Global Arbitration Review

The Guide to Advocacy

Editors
Stephen Jagusch QC, Philippe Pinsolle and Alexander G Leventhal

Fifth Edition

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Publisher's Note

Global Arbitration Review is delighted to publish this new edition of *The Guide to Advocacy*.

For those new to Global Arbitration Review (GAR), we are the online home for international arbitration specialists, telling them all they need to know about everything that matters.

Most know us for our daily news and analysis. But we also provide more in-depth content: including books like this one; regional reviews; conferences with a bit of flair to them; and time-saving workflow tools. Visit us at www.globalarbitrationreview.com to find out more.

As the unofficial 'official journal' of international arbitration, sometimes we spot gaps in the literature. At other times people point them out to us. That was the case with advocacy and international arbitration. We are indebted to editors Philippe Pinsolle and Stephen Jagusch for having spotted the gap and suggesting we cooperate on something.

The Guide to Advocacy is the result.

It aims to provide those newer to international arbitration with the tools to succeed as an advocate, whatever their national origin, and to provide the more experienced with insight into cultural and regional variations. In its short lifetime it has grown beyond either GAR's or the editors' original conception. One of the reasons for its success are the 'arbitrator boxes' – see the Index to Arbitrator's Comments on page ix if you don't know what I mean) – wherein arbitrators, many of whom have been advocates themselves, share their wisdom and war stories, and divulge what advocacy techniques work from their perspective. We have some pretty remarkable names (and are always on the look out for more – so please do share this open invitation to get in touch with anyone who has impressed you).

Alas since the last edition we lost one of those remarkable names with the passing of Stephen Bond (1943–2020). Steve was a former head of the ICC and of White & Case's international arbitration team, and a refreshingly clear-eyed thinker. As with Emmanuel Gaillard in 2021, the world of international arbitration was suddenly much poorer when he went. I would urge those who have not seen the two GAR pieces published in commemoration to look them up.[1] One of the things that comes across strongly is how much Steve loved to teach, in his own fashion. With that in mind we thought it would be

1 https://globalarbitrationreview.com/tributes-stephen-bond; https://globalarbitrationreview.com/stephen-bond-1943-2020.

fitting to preserve his arbitrator boxes for the benefit of future generations. So you will still see his name appearing throughout.

We hope you find the guide useful. If you do, you may be interested in some of the other books in the GAR Guides series, which have the same tone. They cover energy, construction, M&A, and mining disputes and (from later this year) evidence, and investor–state disputes, in the same unique, practical way. We also have a guide to assessing damages, and a citation manual (*Universal Citation in International Arbitration - UCIA*). You will find all of them in e-form on our site, with hard copies available to buy if you aren't already a subscriber.

My thanks to our editors Stephen Jagusch QC, Philippe Pinsolle and Alexander G Leventhal for their vision and editorial oversight, to our exceptional contributors for the energy they have put into bringing it to life, and to my colleagues in our production team for achieving such a polished work. And also to practitioners Neville Byford, Stephen Fietta and Sean Upson ('The Role of the Expert in Advocacy') and Flore Poloni and Kabir Duggal ('Tips for Second Chairing an Oral Argument') for giving us extra material to enrich those chapters.

David Samuels
Publisher, GAR
August 2021

Index to Arbitrators' Comments

John M Townsend

Georg von Segesser

Introduction

Stephen Jagusch QC, Philippe Pinsolle and Alexander G Leventhal[1]

This fifth edition of Global Arbitration Review's *The Guide to Advocacy* builds on the success of its four prior editions. Each edition offers the opportunity to explore new aspects of the advocate's role in international arbitration – from the artistry of oral and written advocacy to the expertise of regional or sector-specific arbitration to the guile of a master strategist. With this fifth edition, we are pleased to offer our esteemed readers new chapters on cultural considerations in the Arab world by Ziad Mahayni and Mohamed Mahayni and in Spanish-speaking Latin America by Paola Aldrete, Ana Sofía Mosqueda and Cecilia Azar of Galicia Abogados. In addition, we are pleased to present chapters on the role of the expert in arbitration by Luke Steadman and tips for second-chairing an oral argument by Tunde Oyewole, and finally a chapter on advocacy in virtual hearings by Kap-You (Kevin) Kim, John P Bang and Mino Han.

And yet, this fifth edition marks a pronounced departure from the prior editions of *The Guide to Advocacy* because it is the first edition of this publication in the post-covid era. Since the fourth edition was released, arbitration practitioners have been forced to explore new ways of pursuing the administration of justice. This has led practitioners to adopt tools of technology that have been available for some time, but ill exploited for a multitude of reasons. While this does not mean that old methods will become obsolete, advocates young and old must make do with the changes that covid disruption has wrought. Remote hearings, paperless filings and virtual bundles are now a common feature of any arbitration and here to stay for good.

And this is not without impact on the advocate's job. In the past year, arbitration advocates have been forced to learn how to harness the 'new' technology to persuade tribunals effectively and adapt their skill set to new media. Our Guide responds to the changing

1 Stephen Jagusch QC and Philippe Pinsolle are partners and Alexander G Leventhal is a senior associate at Quinn Emanuel Urquhart & Sullivan LLP.

face of the art of advocacy. To accompany the chapter on remote hearings by Messrs Kim, Bang and Han, we have asked all of our authors – returning and new – to update their contributions with content on post-covid advocacy. This new content, no doubt, will set the standard for advocacy in the post-covid era.

Advocacy in arbitration covers a limitless array of concepts, skills and viewpoints. It is, no doubt, the art of persuasion: the capacity to transcend legal, cultural, contextual, linguistic and technological barriers to secure a favourable outcome for one's client. It is the arrows in the advocate's quiver that allow him or her to marshal evidence and present it in such a way that it guides the arbitrators' decision-making – the power of trenchant and tactful prose, a compelling opening presentation, the artfulness of a line of questioning in cross-examination, the ability to transcend distance and physical barriers to draw the decision-maker into one's argument. But advocacy in arbitration is also the art of strategy: the ability to craft a case theory from a boundless set of facts and an exotic applicable law, the adroitness to tailor the arbitral process to suit one's strategy. *The Guide to Advocacy* seeks to pull together the diverse strands of arbitral advocacy in one compendium and offer the reader the views of some of the most renowned practitioners in the field.

As you pore over the pages of this Guide, leading arbitration practitioners will invite you into their break-out room and offer you their thoughts on advocacy through each step of the arbitral process. They will share with you their meditations on how to forge a robust case strategy, execute eloquent written advocacy, conduct effective direct and cross-examination, act as an indispensable resource for the first chair in a hearing, deliver persuasive opening and closing presentations, and much more.

1

Case Strategy and Preparation for Effective Advocacy

Colin Ong QC[1]

General introduction

One cannot underscore enough the importance of effective advocacy on the prospects of success of any international arbitration matter. However, before one can even start preparing for written or oral advocacy, one needs a proper road map and strategy setting out how one would like to deal with the case. Experienced and successful lead counsel will all agree that, in the conduct of international arbitration, it is difficult to overstate the importance of spending time thinking about and preparing a good case strategy at the outset. It is important to note that, while case strategy, investigations and case preparation activities are not advocacy, they do have a very close interaction with advocacy and a direct impact on what advocacy options are open to counsel. As such, one can say that, without proper case strategy and efficient case preparation, counsel is unlikely to get to the stage where he or she can effectively carry out oral and written advocacy.

Counsel with a well-thought-out case strategy will be in a better position to avoid and evade any traps or pitfalls on the journey to the final hearing. The case strategy is the road map and acts as a counsel's secret means of guiding his or her team towards a successful preparation for good written and oral advocacy. Without a proper case strategy, there is no road map for the legal team to know where they have to go, and counsel is likely to get distracted along the way before he or she realises that his or her team and client will become the losers in the arbitration. A good case strategy and proper preparation to lay down the groundwork for effective oral and written advocacy is, therefore, absolutely essential to the proper handling of an arbitration from the time of the notice of arbitration right through to the end of the final hearing.

1 Colin Ong QC is senior partner at Dr Colin Ong Legal Services (Brunei), counsel at Eldan Law LLP (Singapore) and Queen's Counsel at 36 Stone (London).

The golden rule – know your tribunal

The golden rule of advocacy should be: help your tribunal. And in order to achieve this, first and foremost, an advocate should know its arbitrators and try to understand how they will approach the case.

Although most arbitrators share similar ways of approaching the procedure, different cultural backgrounds and distinct methodologies may affect the outcome. But, at the end of the day, any arbitrator will look for a narrative and an analytical framework that makes sense of the facts, is consistent with the legal rules applying to the substance, and does not offend a sense of fairness. It is therefore vital for an advocate to place himself or herself in the arbitrators' shoes, and try to think as they likely will.

Don't fall in love with your case

I remember, in my first years at the Bar, an old colleague telling me what he saw as the three fundamental rules of a trial lawyer: don't believe what your opponent says, don't believe what your client says, and above all, don't believe what you say. There is, of course, a little irony in this, but a good advocate should never fall too much in love with his or her case. A good dose of scepticism and self-criticism may sometimes improve your advocacy.

Be the first to be clear

The second way of helping your tribunal is to keep your arguments as simple and focused as possible. Many complex cases boil down to three or four decisive questions. The party who first manages to convey its arguments on those key issues in a clear and structured way will take a considerable lead in the arbitration. It is as a consequence important not to weaken a party's core arguments with the many peripheral questions that will inevitably arise, and to which the arbitrators will pay little, if any, attention.

Don't underestimate the importance of the hearing

A good advocate should also be mindful that an arbitrator's learning curve is very different from that of a counsel. There are key phases in the procedure, such as the evidentiary hearing, at which the arbitrators' views on the case will start crystallising, and it is important that by then an advocate has been able to convey a structured and coherent vision of the case that, ideally, a tribunal could adopt almost in its entirety to make its award. Serge Lazareff once said that he used to write his awards on the documents, but that he made his decision at the hearing, and there is some truth in that. Advocates should bear that in mind when deciding whether they should request closing arguments, post-hearing briefs, or both. Duplications of arguments, rhetoric and aggressive language, from that perspective, can only hurt a party's case. A wise advocate will always be able to explain the most complex concepts in the simplest terms, and will at all times be courteous, pedagogical and mindful of the necessity not to waste the tribunal's and the opponent's time.

– Alexis Mourre, Independent arbitrator

While advocacy itself is an elusive art that is usually inborn for lawyers, there are ways to improve one's advocacy techniques over time. The art of strategy is even more complex, as it embodies a number of other skill sets, including the need for a mastery of the applicable law in the specific fields of law that surround the dispute. It requires deep analytical and logical reasoning, a mastery of the arbitration rules of procedure and a good case presentation methodology. It will also include the need to have full understanding of the applicable law and how the arbitrators and opposing counsel are likely to operate. The background training and experiences of a lawyer are very likely to influence his or her individual perception as to how advocacy should be conducted. The lawyer's perception as to the proper sources of law and how he or she should present a client's evidence and the legal reasoning will also generally determine the style of advocacy that he or she will deploy in the arbitration process arguments.

Common lawyers who are trained to rely upon doctrine of *stare decisis* and case precedent will have very different views and techniques of legal reasoning and presentation from their civil law counterparts, who will often be better skilled in the technique of jurisprudential reasoning, the pairing of statutory material and academic jurisprudence. They will also be used to the system of *iura novit curia*, which allows parties to a legal dispute to assume that the court or arbitral tribunal is familiar with the law that is applicable to their case. Lawyers who are trained in the common law system generally are taught to put a lot of emphasis in the oral presentation of their case submissions; base their legal reasoning on precedence, cross-examination and re-examination of witnesses; and excel at putting their factual and legal case orally to the arbitrators. Conversely, lawyers trained in the civil law system accord far greater deference to reliance on documentary evidence and upon the expected role of the arbitrator to put questions to the witnesses. This means that civil law advocates tend to have a lot more experience in perfecting their written advocacy. They will generally have had a lot of experience with cases that require them to put together well-thought-out written briefs that tell the story to the tribunal. It also means that they are less likely to have built up tens of thousands of hours of oral advocacy experience in developing the techniques of cross-examination and oral submissions that are second nature to common law lawyers.

Because of the confluence of civil and common law in international arbitration, the art of strategy and preparation for effective advocacy is likely to be the most difficult and sophisticated stage for counsel. It requires the widest range of skill sets and will often require a lot of experience and practice in appearing before both civil and common law tribunals and against opposing counsel from both systems of law.

When should the preparation of a case strategy begin?

The preparation and development of a case strategy should begin after one has learned the initial facts of a case, seen the key documents, conducted initial interviews with potential witnesses of fact, and conducted informal investigations on the factual and legal bases of the case. Counsel should formulate their overall case strategy very carefully at the outset, as this will eventually lead to favourable conditions for them to apply their advocacy skills. The case strategy will be the bedrock on which successful conditions for advocacy can be developed. A good overview case strategy will also allow counsel to carry out a proper

investigation and preparation of facts and legal principles necessary for the case memorials. A good case strategy will also enable counsel to initiate a favourable case management protocol with the tribunal and, if all goes well, it should lead to favourable conditions for counsel to apply their oral and written advocacy skills.

A well-thought-out case strategy at the outset will provide the necessary guidance for all essential actions that will need to be dealt with in arbitration. These include collating initial documentary evidence; investigating the facts and legal issues involved; selecting and interviewing the best witnesses to assist in building the case; preparing solid written advocacy essentials such as memorials; producing an effective opening submission; determining which exhibits are to be relied upon for the purposes of preparing one's witnesses and cross-examining the opposition; carrying out oral submissions at the hearing; and preparing solid post-hearing written submissions.

While one should develop a good initial case strategy, it will sometimes become apparent that the presentation of additional facts through oral and documentary evidence requires the development of the case strategy. The case theory of the arbitration may have to be revised and may be in a slower state of evolution and require to be updated, as more relevant and material information becomes available to counsel. While one can make adjustments to one's case strategy and allow some flexibility, one must not have any form of strategy that is purely reactive in nature or is being developed as the arbitration proceeds. Such a reactive case strategy will be a sure way to place the legal team and its client at a strategic disadvantage. Anything short of a consistent and clear strategy towards certain key goals will undermine one's overall chances of winning the arbitration. Shortly after the initial first meeting with a client, counsel needs to be able to advise his or her client as to how to he or she proposes to deal with the dispute.

Good investigative skills assist in the preparation of the case

The planning of the case strategy goes hand in hand with the need to prepare the case as it unfolds, from the time counsel is first instructed to the time that memorials are filed, and long after. Counsel need to have good investigative skills and know how to look for evidence, collate oral and written evidence, and select and interview witnesses, in addition to conducting legal research on the case. Counsel need to know how to investigate any factual allegations made by the opposing party. Counsel need to try to find out the legal basis of the opposing party and how to manoeuvre their case so as to derail their opponent's own case strategy. It is important to know what type of expert witnesses may need to be instructed.

When should one begin investigation and case preparation?

The case preparation needs to begin at almost the same time as the first investigation into the key issues surrounding the dispute. Unless and until counsel has a clear feel of the issues at stake and the historical facts that may support the case theory, it will be extremely difficult, or even impossible, to develop any kind of meaningful case strategy that can withstand the pressures of the arbitration process.

Counsel will often be given a lot of documentation and told a lot of background information by their clients. They need to make quick decisions to separate and sort out the relevant material and important issues at the outset. It will otherwise be extremely difficult for counsel to make any crucial decisions as to the path to be taken and the interlocutory

procedures that they will need to apply in the course of the arbitration. At these initial stages, there is often a struggle between solicitors and in-house lawyers on the one hand, and counsel on the other, as to the necessity of the expenditure on investigation. In cases involving larger claims, it is easier for counsel to persuade solicitors and in-house lawyers to conduct an early investigation into the facts of the case. While early investigations will often add additional costs early on, experienced counsel will agree that, on average, one finds that this early expenditure on investigation can lead to a significant reduction in legal and expert fees later on in the arbitral process. Such a step also tends to lead to a more manageable and advantageous arbitration procedure, which will then allow counsel to perform oral and written advocacy at the best possible levels and hopefully lead to a successful award in favour of the client. An early investigative process will almost always facilitate counsel's decision as to how his or her written submissions should be structured.

An early investigative process will also generally allow counsel the benefit of the critical facts at hand. When acting for a claimant, knowledge of these facts will allow counsel to assist his or her client to draft and send out pre-arbitration letters giving notice to the opponent setting out the relevant facts and legal principles in his or her favour for the purposes of an advantageous costs award at the end of the hearing. When acting for a client who is a respondent, counsel will also need to get all the relevant facts out and interview witnesses as soon as possible before the party files any answer to any notice of arbitration. It is essential that counsel are able, within the procedural time frame, to set out a convincing answer, defence and any counterclaim as fully as possible to provide a convincing introduction to the tribunal. For case strategy to work to its full advantage, it is essential for counsel to be able to set out and frame a case in the way in which he or she wants the tribunal to understand and accept it. A better understanding of the case and a good interaction between counsel and a tribunal often leads to a higher likelihood that the tribunal may be more willing to accept the procedures that counsel is likely to propose along the way.

Key factors to consider for the proper preparation of a case strategy

When one is first developing a case strategy, it is essential to fully understand the factual theory of one's own planned case and the development of the legal theories in support of it. However, it is equally essential to understand and anticipate the factual evidence that supports the case of the opposing party and anticipate the possible legal theories that the opponent will be likely to deploy to support its own case. To a more limited extent, it will also be important to try to understand where the opposing law firm is incorporated or established, as law firms and counsel from different jurisdictions are subject to different bar and law society ethical rules. Such rules can significantly affect how different counsel may prepare their case strategy for oral and written advocacy. A later section of this chapter deals with this aspect of case strategy.

The initial stage of preparing case strategy in arbitration is for lead counsel to take a step back to have an overview of the underlying structure of the commercial relationship between the parties. While disputes can take place between parties in any business, it is not always immediately obvious to third parties, including lawyers, what the parties are actually disputing. In the majority of cases, the crux of the dispute tends to be about whether or not a party is in breach of contract or failing to perform certain obligations under the contract. However, it is important for counsel to ask his or her instructing party whether there may

The arbitration clause – stick or twist?

One of the first questions to be asked is whether the parties to the arbitration really should stick with the arbitration provision on which they had agreed when entering into their contract. The contract in issue in a $2.5 billion case in which I sat as a co-arbitrator had provided for ICC arbitration, with the ICC Court to appoint all three arbitrators. When the dispute arose, however, both sides, a Fortune 50 US company with various joint ventures with the respondent state, decided to scrap the arbitration clause in their contract. Instead, they agreed that first they would choose together a tribunal president, then, with both sides having knowledge of that choice, the parties would proceed to appoint their party-appointed arbitrators simultaneously, but without knowledge of the other party's appointee. Not surprisingly, both co-arbitrators knew the tribunal president well. In the end there was a unanimous award for the claimant for the requested $2.5 million, including interest. The parties soon agreed to immediate payment of the award, minus the substantial interest, and their other joint ventures continued.

– Charles N Brower, Twenty Essex Chambers

be other submerged disputes, including a dispute about how a business is to be run or even direct or indirect control of the business itself. Counsel needs to know if his or her client is still doing business with the opponent on other matters and if the client would like to maintain an amicable relationship after the arbitration has taken place. Counsel needs to know if there is any particular interest for the parties to continue doing business on other businesses that may not form part of the matters in dispute in the arbitration. Counsel needs to know if the parties have reached a stalemate position in which all goodwill has already broken down and the parties will remain irreconcilable. This is an important part of how the case strategy is to be developed, as counsel needs to advise his or her client on possible hostile legal steps and any interlocutory actions that the parties may seek to employ against each other.

Parties that have an ongoing relationship in other matters or a long-term business relationship that is expected to continue into the future tend to want to manage hostilities and conduct the arbitration in a more restrained and less aggressive manner. Counsel should always bear in mind that there is no single best way to conduct the practice arbitration. Unlike court litigation, which is centred heavily on strict rules of court procedure, arbitration is flexible and offers a lot of room for counsel to tailor-make the dispute resolution process to deal with the core issues of the dispute.

What other elements should form part of a good case strategy?

Each legal team that handles a case has one main goal: to win the case. It needs to be able to persuade the arbitral tribunal that the merits of the case are in its client's favour. Counsel will only be able to do this with a good case strategy that showcases his or her own merits and strengths while undermining the case of his or her opponent. Counsel also needs to make a decision as to the client's desired end result. In the event that the client has other existing relationships with the opponent and wishes to continue to do business regardless

of the outcome of the arbitration, counsel needs to be able to navigate the arbitration proceedings in such a professional way that the disputing parties will not be pushed beyond the point of no possible reconciliation after the arbitration. Conversely, if the dispute is between joint venture partners who absolutely cannot work together any more, counsel will need to decide at the outset whether a successful award will actually settle the situation or whether it will remain a paper victory only and leave the parties still disputing within the business or company.

At the outset of being instructed by solicitors or by in-house counsel, before one can shape the case strategy and decide on the style of case preparation, one needs to look at the choice of law, choice of language and seat of the arbitration. These three practical legal factors will decide which arbitrators are to be appointed and define how the case is likely to be run. Counsel will need to know how the majority of the tribunal is likely to allow the arbitral proceedings to be run and will need to anticipate what recourse one could get from the tribunal under the law of the seat of the arbitration.

Counsel will need to be able to anticipate whether or not the opponent will be likely to approach the case head on or whether it is likely to seek to take out additional interlocutory applications as part of his or her strategy in building the case.

Counsel will need to decide from the outset whether or not to make an application to bifurcate or even trifurcate the arbitral proceedings. One should already be preparing the list of issues involved in the case and continue to work on defining the issues as more evidence comes to light.

Counsel will need to be able to anticipate whether he or she has adequate documents at hand, and whether he or she or his or her opponent is likely to be seeking interim relief from the tribunal. Counsel needs to anticipate the likelihood of his or her opponent or even himself or herself making applications to the tribunal on jurisdictional challenges or other applications that may be critically important for one party but extremely disruptive to an opponent. These may include the likelihood of challenges being made against arbitrators personally or against the jurisdiction of the tribunal; the likelihood of any applications for security of costs; anti-suit injunctions; preservation orders; emergency arbitration proceedings; applications for onerous US-style document disclosure productions; and other lesser-used strategies, such as one side obtaining assistance from the authorities of the seat of arbitration. In the event that one side has a strong relationship with the authorities in any country that has a questionable reputation with its police and security forces or immigration authorities, one can also expect all sorts of problems being made for one's witnesses, legal team and expert witness team.

Important points should be raised with the opposition early on for consideration of costs

In the earliest stages of any arbitration, a key factor of any decision-making process in case strategy must be the financial status of the client. Counsel needs to know the case that the client needs to prove and the avenues that remain available to the client. Counsel needs to work very closely with the client at the outset of being instructed and ask for the client to set out his or her key priorities and desires. Counsel will need to be able to engage the client and explain any limitations, such as costs and loss of time. Counsel needs to know if the client is prepared to settle and, if so, on what commercial and financial terms.

The issue of costs is often overlooked at the beginning of an arbitration. Even if one is acting for a party with very deep pockets, it is important for counsel to emphasise to his or her instructing solicitors and client that the costs estimates for any arbitration are simply estimates and not an absolute limit. Clients ought to be informed at the outset and reminded throughout the arbitration process that they will need to keep enough funds to see the arbitration to an end. As part of case strategy, it is important to try to anticipate whether or not opposing counsel is likely to try to deliberately engage in guerrilla tactics as part of their strategy to wear down the opponent in terms of excessive expenditure of fees, costs and time. Most, but not all, guerrilla tactics are carried out to either force a settlement agreement or derail the arbitration.

Possible guerrilla tactics that counsel needs to factor in for costs

As part of case strategy and case preparation, it is important for lead counsel to consider whether he or she fully understands the rules of the game. Matters of procedure in international arbitration are not set out in any common statute, rule or code. The UNCITRAL Model Law has been adopted in whole or in part in many countries and has gone a long way towards providing guidance on the fundamental principles of the arbitral process and what it is intended to achieve. However, the final procedures that are adopted in any arbitration differ from one arbitration to another depending on the nature of the dispute, the applicable procedural law (often the law of the seat), any institutional rules adopted, the background of the arbitrators, and the counsel themselves.

There have been many discussions about the subject of 'guerrilla tactics' in international arbitration. It is important to note that guerrilla tactics may not always amount to any violation of laws or procedural rules of arbitration, although there are a few that are readily and universally considered unethical.[2] However, it is also important to remember that different counsel from different jurisdictions and countries have their own set of bar rules, law society rules and court ethical guidelines to follow. There are constant heavy intellectual debates as to whether there is a need for regulation of counsel conduct in international arbitration and, if so, whose standards should be applicable.[3] One can see that powerful arbitration bodies are at loggerheads with each other, not just over some of the provisions of the 2013 International Bar Association Guidelines on Party Representation in International Arbitration, but even from the approach adopted for dealing with these differences in ethics of different legal professional bodies in different jurisdictions. Counsel needs to be able to anticipate the possible arsenal of weapons that his or her opponent will employ and know from the outset which of these are guerrilla tactics. However, it is hard to categorise some borderline tactics as guerrilla tactics.

Most professional ethical rules have been developed purely with national court litigation in mind. Counsel and law firms are regulated by their local bar rules or local law

2 Clear-cut examples include witness intimidation and the illegal theft of confidential or secured information from the opponent.

3 For example, the 2013 International Bar Association Guidelines on Party Representation in International Arbitration, the general guidelines for parties' legal representatives within the London Court of International Arbitration Rules 2014, and the 2014 Swiss Arbitration Association's proposal for a Global Arbitration Ethics Council.

The art of persuasion is simplicity

The art of persuasion is simplicity and relying on the relevant issues. Perfect command of the language of the arbitration may not always assist the tribunal. Rather, the tribunal will need to be guided by a road map through the issues and evidence rather than be presented with hyperbole and exaggeration.

– Julian Lew QC, Twenty Essex Chambers

Be in control and keep it simple

Advocacy is like boxing. If you control the ring, you are likely to win the prize fight. But be subtle. No histrionics. No overstating your case. You start off with a clean piece of paper and it is for you as the advocate to paint the picture you want the tribunal to accept and adopt. So keep it simple. Don't mix up bad points with good points, or you risk the good points going the same way as the bad ones.

– Ian Hunter QC, Essex Court Chambers

society rules. However, as there is no necessity for counsel to be lawyers, let alone registered practising lawyers, they will not be subjected at all to any local bar ethical rules. It is incumbent on counsel to consider as part of his or her case strategy and case preparation the possibility of going against a law firm domiciled in a country with very different standards of lawyers' ethics. In this event, counsel needs to be aware of the possibility of opposing counsel or a law firm from another jurisdiction being allowed to prepare witnesses or being able to initiate actions that are considered to be ethically wrong or even reprehensible in the other jurisdiction. It would not be correct to insist that a non-lawyer counsel from Arcadia is to be subject to the ethical standards of a lawyer or a law firm from Utopia. The lawyer or law firm from Utopia may not be allowed to prepare or coach his or her witnesses but the non-lawyer advocate from Arcadia may be entitled to prepare and coach his or her witnesses in mock arbitration hearings.

It is important for counsel to be able to anticipate the possibility of guerrilla tactics, which may take the form of continuous and systematic arbitrator challenges or recurring requests for extensions of time. There may also be a strategy of submitting an excessive number of documents from the opponent to obstruct the tribunal in its attempt to carry out its work efficiently. Ultimately, the intended objective of a party that decides to engage in guerrilla tactics is to obstruct, delay, sabotage and derail the arbitral proceedings. Guerrilla tactics may form part of the case strategy of counsel from jurisdictions that have comparatively minimal ethical regulations over local law firms.

Factors to be considered in arbitrations seated in unfamiliar jurisdictions

Counsel should be able to realise his or her own strengths and limitations at the stage of case strategy and case preparation. Where counsel is dealing with an arbitration seated in an unfamiliar place and governed by law with which he or she is not familiar, an important strategic decision needs to be made at the outset. Counsel will need to consider and decide

whether he or she should be presenting the governing law issues by way of written memorials or through a legal expert witness report on the issues of law that apply to the dispute.

Such a decision also depends in part on the tribunal that has been, or is about to be, appointed. Counsel needs to decide whether he or she is likely to have an upper hand against the opposing counsel in the event that neither side decides to retain any legal expert. Counsel will also need to consider whether his or her party-appointed arbitrator and the chairperson are likely to be more familiar and comfortable at applying the principles of the governing law and the law of the seat than the other arbitrator. In the event that the answer is affirmative in both situations, counsel who is very familiar with the governing law will generally decide against the retention of any legal expert witness, as counsel will be better off bringing to life the legal issues at stake at the final hearing. Such counsel will also be more flexible and better able to fine-tune his or her case strategy after the disclosure and exchange of witness statement stages of the arbitration. Conversely, counsel who is not familiar with the governing law should consider appointing either a legal expert witness to deal with the issues of governing law or to consider finding an able local co-counsel who is familiar with those issues of law. A local counsel is also likely to have better access to potential witnesses and have the necessary language and cultural abilities, and this would allow the overall team to develop the legal theory based on factual evidence that local counsel may be better suited to gather.

In the event that counsel or the legal team decides to recommend the appointment of foreign counsel to deal with aspects of the governing law, then there are other strategic decisions that will need to be dealt with. When collaborating with foreign counsel in the capacity of co-counsel, lead counsel will need to work out the exact scope of responsibilities. Lead counsel also needs to work out the most fruitful manner of demarcation of the work and responsibilities between both law firms.

In the event that lead counsel decides to engage a legal expert witness to provide legal opinions as opposed to engaging co-counsel, it is critical that the engagement begins immediately or as soon as possible. This is to allow reasonable time to be given to the legal expert witness to fully understand the facts and issues at stake so as to be able to have meaningful discussions with counsel and solicitors. Counsel will also need to fully understand the perspective of the legal expert witness if he or she is to be able to properly develop the case strategy and procedures that he or she plans to deploy in the course of the arbitration.

Institutional transparency in confirming challenged nominated arbitrators

Even if counsel is familiar with the courts of the seat of an arbitration, it is also important for him or her to understand that not all arbitration centres are equally robust or transparent when it comes to dealing with challenges against the nomination of arbitrators, whether meritorious or not. Arbitration institutions have differing degrees of robustness when it comes to dealing with spurious challenges and confirming nominated arbitrators. At the highest end of the scale is the International Chamber of Commerce (ICC) arbitration system, which is the most transparent in this respect.

In a 2018 matter, the nominated presiding arbitrator, who was nominated by the co-arbitrators, was challenged by one of the parties who objected to his appointment solely

on the ground that he was 76 years old at the time of nomination.[4] It was alleged that it was not feasible to procure insurance to guard against human risk or 'proceedings rehearing' risk. In essence, the objecting party alleged there was a risk that, during the course of the arbitration, the 76-year-old arbitrator might suffer from health issues or otherwise become unable to continue in his role as president, with potentially serious consequences for the parties. The ICC Court rejected the challenge and decided to confirm the nominated presiding arbitrator. Significantly, the ICC provided its detailed grounds of reasoning, including a statement that there was also no indication that the prospective president's health should be a source of concern as precarious health conditions may be a cause for concern irrespective of age.[5]

One can then contrast the ICC Court's approach to that of the Singapore International Arbitration Centre (SIAC) Court in a similar situation in which the prospective presiding arbitrator, who had been nominated by the co-arbitrators, was challenged by counsel for one of the parties. The sole objection made against confirmation of the prospective presiding arbitrator was on the grounds that counsel had worked closely in other cases with a single identified lawyer from the same law firm as the prospective presiding arbitrator.[6] The co-arbitrators rejected the challenge on the grounds that none of the lawyers from the law firm of the nominated presiding arbitrator was participating in the arbitration. In short, there was no breach of the 2014 International Bar Association Guidelines on Conflicts of Interest. Nevertheless, the SIAC Court decided to accept the challenge and did not confirm the nominated presiding arbitrator. Notably, this decision was made without providing any reasoning whatsoever; the SIAC system does not require reasoning in this regard.

It is likely that the requirement of transparency by the ICC Court and the need for the ICC Court to provide reasoning for any decision on the confirmation or not of prospective arbitrators will limit the likelihood and number of unmeritorious challenges in ICC matters. Similarly, when it comes down to the challenge of arbitrators during the course of an arbitration, it is important for counsel to understand whether particular rules of arbitral appointing bodies may present any opportunity for making or resisting tactical attacks on arbitrators to slow down the arbitration process. As an example, as a matter of SIAC policy, the identities of SIAC Court members who deal with arbitrator challenges are not disclosed. Any decision of the SIAC Court under the SIAC Rules is said to be made on a collective basis and represents the SIAC Court's final views on the matter placed before it. However, a refusal to disclose the identities of SIAC Court members involved in any decision may itself lead to further challenges before the Singapore courts. It is against the principle of natural justice and fairness to both the arbitrator and parties not to know the identities of an arbitration centre's court members involved in making a decision on a challenge. A subsequent challenge or action against the SIAC or such other arbitration centre would itself result in more delay and can be considered a bonus for a party that wishes to delay the outcome of arbitration proceedings. A further consequence of any refusal by any arbitral institution to disclose the identities of its court members involved in making a decision might also be considered as not forming part of the procedure as agreed between

4 ICC Case No. 23288/AYZ of 2018.

5 https://globalarbitrationreview.com/digital_assets/ce14266f-c43d-43a5-adc8-a8397e1320ab/20181012123456.pdf.

6 SIAC Case No. 171 of 2018.

the parties. It is therefore very important for counsel to fully understand the robustness and transparency of both the arbitration centres and the national courts of the seat of the arbitration in dealing with both meritorious and unmeritorious challenges. It is equally important for lead counsel to fully understand the extent of the transparency of the arbitral centres in dealing with challenges. A failure to understand this issue of transparency in the confirmation of arbitrators risks leading the parties to protracted and thus more costly proceedings.

Burden of proof considerations

It is always very important for lead counsel to decide at the outset who has to discharge the burden of proof and the standard of proof that is to be applied. It is important to consider this issue at the same time as compiling the list of issues that form part of the case. Counsel will then need to move on and decide how the issues are to be proved. At the initial stage, counsel will not have the full facts of the case at hand as he or she is still to look through the documentary evidence. As such, at the earliest stage, it is important for counsel to rely on the potential witnesses to provide an outline for the dispute.

Counsel should not lose sight of the fact that the client's case will need to be proved by the factual and expert witnesses and not by counsel. One will need to decide the long-term path as quickly as possible and come to initial conclusions as to whether the potential witnesses are relevant and credible enough to assist counsel in pushing available documentary evidence so as to discharge the burden and standard of proof.

Once counsel knows what he or she will be able to say to the tribunal, he or she will also know what evidence will need to be sought from the factual witnesses. It is helpful to elicit from each witness what one would like to submit to the tribunal at the hearing and post-hearing brief stages. One of the most important benefits of careful case preparation, including proper selection of witnesses and a focused preparation of evidence, is the avoidance of many hours of aimless examination and cross-examination.

Choosing and setting up the appropriate tribunal

It is often said that an arbitration is only as good as the arbitral tribunal. As such, it is very important for a party to carefully choose who are to be the ultimate decision makers of fact and law. While the ability to select one's tribunal is often touted as one of the advantages of the arbitration process, it also means that lead counsel will have to be very careful about deciding which arbitrator to appoint. This decision will have several important strategic implications on the arbitration itself. Much literature has been written about this selection process and it is a subject in itself. In short, one aims to appoint an impartial, fair and patient lawyer who is suitable for the arbitration in terms of technical expertise in the subject matter and whether the arbitration is governed under civil or common law. In terms of case strategy and case preparation, there are other important considerations as to whether one wants to have a tribunal that is ultra-efficient or one that is slow and careful.

Counsel acting for the claimant tend to want a very efficient tribunal that is able to deal with all interlocutory decisions, move to a final hearing and come out with a final award as soon as possible. Conversely, counsel acting for a respondent who may be caught unprepared by the arbitration tend to want to slow down the arbitration process. As part of their case strategy, they will probably insist on appointing a sole arbitrator who is a highly

Never forget the goal

Never forget who the decision maker is. In most arbitrations the tribunal is composed of three qualified and experienced lawyers (i.e., colleagues). Your job as counsel is to convince them, not the client, the opposing party or its counsel or anyone else, but the arbitrators. Everything that you do as counsel must be geared towards this goal.

– Kaj Hobér, 3 Verulam Buildings

respected arbitrator with a busy caseload. Counsel for the respondent may also want to appoint an arbitrator who has multiple appointments at hand, is not very adept with technology and word processing, and is not very keen on travelling by air.

Counsel acting for a claimant who is faced with a three-arbitrator tribunal can also employ case strategy on improving the speed of the interlocutory process. Often, counsel will suggest that the three members of the tribunal may want to empower the presiding arbitrator to make procedural orders without having to consult the other arbitrators. Counsel for a respondent who prefers to slow down the hearing will be likely to insist on invoking his or her right to have all party-appointed arbitrators to be given an equal opportunity to make all decisions, including procedural decisions.

As a matter of case strategy, it is essential for counsel to understand the prospective arbitrator's background to see if that person will fit the arbitration at hand. While one will always seek to appoint the most reputable and highest-ranked arbitrator possible, it is equally important to find out if the arbitrator has any special technical expertise to deal with the list of issues in the arbitration. The arbitrator's cultural perspective is also important. He or she will generally be experienced in the field of the arbitration, and it should be considered whether it is required that the arbitrator needs also to have specialist financial or technical expertise. It is also taken that an arbitrator will need to be able to understand the commercial issues underlying the dispute. Experienced counsel will be certain to appoint a good arbitrator who will not risk losing his or her credibility by appearing to be unfair or take over the role of a party's advocate. It is taken that experienced counsel will appoint an arbitrator who will ensure that counsel will be given a fair opportunity to present the case.

However, what is often forgotten is the background culture of the arbitrator. It is critical to understand whether the arbitrator is a lawyer from the civil or common law tradition and who is to be the appointing authority in the event of a default situation in which it is not possible to agree the sole arbitrator or the presiding arbitrator.

Leaving aside the ICC and leading arbitration institutions such as the Hong Kong International Arbitration Centre, many arbitration institutions have a track record of appointing a great majority of arbitrators from either a civil law or a common law background. This does mean that counsel will need to factor into his or her case strategy what is to be the likely background of the arbitrator who will be appointed by the appointing centre should there be a default situation. Counsel will need to understand how the arbitral institution will be likely to act in the event of a default situation, and whether it is likely to appoint an arbitrator who will be familiar with and uphold the principles of the governing law of the contract that has been agreed by the parties. It is important to go through statistics of the arbitral institution and then decide whether one needs an arbitrator who truly

understands the governing law or not. As an example, if one has an arbitration seated in a common law jurisdiction that is governed by civil law, such as Indonesia, and counsel believes that he or she has a weak case under Indonesian law but a good case under English law, then counsel is likely to appoint a very senior English or common law arbitrator but retains the right to accept or reject the appointment of the presiding arbitrator. The opposing side may appoint an Indonesian law expert and may then try to ask for agreement of an arbitrator who understands Indonesian law or civil law.

As part of counsel's case strategy of not allowing his or her own party-appointed arbitrator to appoint the chairperson, the appointment process will fall to the appointing authority. If it is an authority such as SIAC, it will be much more likely for the authority to appoint an English or non-civil law arbitrator. This will increase the likelihood of the two common law arbitrators being on the same wavelength regarding common law principles. Such a case strategy will then reduce the importance of the application of the governing law and increase the focus on counsel's advocacy skills. Similarly, where an arbitration is seated in a civil law jurisdiction such as Indonesia but is subject to common law (such as England), the same tactical consideration may come into play when black letter law does not favour a party.

It is also important to know how the majority of the arbitral tribunal is likely to approach the procedural choices that are to be made at the early stages of the arbitration. Again, experienced counsel who wants to downplay the application of governing law aspects is likely to appoint a well-known arbitrator who is in great demand but is one who comes from a system of law that is diametrically opposite to the governing law. Such a strategy then ensures that the arbitrator is unlikely to be able to devote more than the normal time and effort required to understand the issues and to apply local governing laws in the arbitration efficiently. There is no right of appeal in international arbitration and no right to set aside an arbitral award simply because the tribunal got the law wrong. If one is acting for the claimant, it is extremely important to ensure that the presiding arbitrator is someone who is not only a specialist in the governing law, but also has excellent case management skills.

Bifurcation and preliminary issue determinations

As part of case strategy and case preparation, counsel will need to think critically about whether there is any need to make an application for bifurcation. Some arbitral tribunals may, in complex cases, allow applications to bifurcate the proceedings, and allow the parties to deal with issues of damages only after the tribunal has rendered its ruling on liability.[7] The party with the stronger case will be likely to seek bifurcation on the grounds that such a procedure can contribute to the early resolution of the dispute. A party that makes an application for bifurcation will generally premise its application on the grounds that the process will allow the parties and the tribunal to focus on fundamental issues at an early stage to make case management more effective and also to purportedly save costs. Whether

7 See Colin Ong, 'The Bifurcation of Jurisdiction from Merits, and Merits from Damages', *The Investment Treaty Arbitration Review* (2nd Ed., 2017).

this may be the actual situation will rest on the shoulders of counsel, who will need to persuade the tribunal through oral and written advocacy.

Such case strategy considerations are equally important to respondents in cases where a significant part of the claims may end up being dismissed for lack of jurisdiction. Bifurcation can be a helpful procedure for claimants if an early partial award on liability will be able to lay down a platform for without-prejudice settlement discussions before any expensive damages phase takes place. Counsel acting for respondents tend to apply for bifurcation of jurisdiction from merits, and even trifurcation at times when they also seek to split the liability and quantum phases.

Preliminary issue determination is another weapon used by counsel who wish to frame a case according to their case strategy and cut down the number of issues to be decided at the final hearing. However, as with bifurcations, applications for preliminary issue determination is a procedure that is not always accepted by arbitral tribunals and is also generally opposed by the opponent. As with bifurcation, an applicant for a preliminary determination will usually couch his or her application in a way that suggests certain threshold preliminary issues are able to resolve key issues of the arbitration or to significantly cut costs by limiting the amount of evidence that needs to be produced and sifted through by the tribunal. Some commonly seen themes include preliminary applications as to whether the remedies sought by a party are recoverable in law and whether or not there is indeed a proper defence of *force majeure*. Expert knowledge of the different evidentiary rules is also important. For example, the revisions to Article 8.5 of the recently revised 2020 IBA Rules provides that 'the Arbitral Tribunal may nevertheless permit further oral direct testimony', even where the witness or expert has presented written testimony. This amendment allows the party that has submitted a witness statement or expert report to call that witness to provide direct evidence in chief, even after the opposing party has waived its right to cross-examine the witness during the final evidentiary hearing. Counsel will need to factor in this change as part of its overall case strategy since a party that may seek to avoid seeing a witness or expert presenting oral evidence at the final hearing may now no longer be able to achieve its wish.

Selection of witnesses

Factual witnesses

The selection of witnesses is an important consideration that can affect case strategy. Counsel will need to decide at an early stage which factual witnesses will be ideal for the arbitration. At times, counsel may decide that the witness that is closest to the background facts may not be as ideal as one who may not have been involved in all the historical facts. Counsel may decide that the more knowledgeable witness is easily shaken when challenged and may start giving inconsistent or even false answers. Counsel may well decide to rely more on contemporaneous documents and minimal factual witnesses if his or her documentary case is very strong. Conversely, when faced with a case in which contemporaneous documents are not in his or her favour, counsel may decide to use factual witnesses who are both robust and clever enough to fill in the blanks where there are gaps between contemporaneous documents. It is always poor case strategy to encourage any witness to give evidence on issues with which they are insufficiently familiar. After identifying the most credible person to be a factual witness, it is important that lead counsel ensures that

the factual witness is able to recount his or her narrative of events in a simple and straightforward manner.

It is important that lead counsel is able to help the factual witness go through contemporaneous documents that would then form exhibits to assist the witness to narrate his or her account of events in his or her own words. As a matter of careful strategy, a seamless incorporation of such exhibits with the witness's narration of events will greatly assist both counsel and witness at the hearing stage.

Lead counsel should always avoid incorporating legal arguments into witness statements but counsel needs to be able to know how to arrange the narration of the witness in such a way as to fit the key points of the case into the key legal principles that counsel is trying to rely upon. Just before the final hearing, counsel will then be able to put together opening written submissions that would allow the tribunal to easily understand the key legal principles that bolster the case and show how the facts provide a clear map and fit hand in hand with those key legal principles.

Expert witnesses

It is important for counsel to identify the right expert witness who will be able to help strengthen his or her case and someone who is able to prove the case theory of counsel. A good expert must be able to provide honest opinions and reasoned options that allow the advocate to properly assess and prepare the case theory properly. On the other hand, it is important for lead counsel to maintain absolute control in not allowing the expert witness to run the case. A good advocate will need to know how to strike a balance between the two positions. It is important that the expert witness does not appear to be too interested in supporting the client and does not take an unbelievable or illogical position that proves too difficult to properly defend. Lead counsel needs to ensure that his or her own credibility as well as that of the expert is always maintained to the highest standards. This overriding quality is critical to the effectiveness of counsel in both oral and written advocacy. The ultimate aim is to have the expert witness persuade and convince the tribunal to accept that the expert's analysis and interpretation are correct.

Experienced lead counsel will have experienced many situations in which there is almost an equilibrium between facts and legal theory, and they will know that if these cases involve a certain number of technical issues, the credibility of the experts and the version of expert evidence that is accepted by the tribunal have a critical effect on the decision in the case.

Non-legal issues that may affect case strategy

Counsel needs to keep an eye on non-legal issues that may affect the longer-term interests of his or her client. Such issues will often have nothing at all to do with the skills of an advocate or the knowledge possessed by the lawyer. The issues often fall far from the gaze of the average court litigator or arbitration counsel. They involve considerations such as a good in-depth knowledge of the nature of the client's business and of the relevant market. In practical terms, this requires not only sophisticated legal knowledge but a broad grasp of context: the nature of the client's business, the market and the client's relationship with the other parties to the dispute.

Experienced advocates often prefer to adopt the 'chess clock' or 'time guillotine' approach, whereby each side has a fixed number of hours in which to present its case (including examination in chief, cross-examination of opposing witnesses, oral opening and closing submissions). This method will often favour the more experienced advocate who is used to working under time pressure and tends to work to the advantage of civil law practitioners, as he or she is likely to have already set out his or her written advocacy in a clear manner, and the limited time, chess clock method will generally force both sides to focus sharply on the key aspects of the case. There is not enough time for verbose oral submissions, and a shorter time frame usually forces counsel to consider only the key points that really need to be made to persuade the tribunal to adopt its preferred case theory. This limits repetitive oral submission and forces parties not to spend too much precious time on non-core issues.

Lead counsel who may need to cross-examine many witnesses and may need to focus on building a case tend not to be too keen on adopting such a methodology.

Conclusion

The best advocate must at the outset consider the eventual endgame that he or she hopes to be able to play out. Unless the groundwork has been laid out properly, the advocate cannot use his or her superior advocacy skills to the best effect. However, counsel also has to consider whether his or her strategy can provide the outcome that the client desires. In the event that counsel feels that the best case strategy will not be enough to protect his or her client, or feels the tribunal will not be able to issue a final award in time to accord the much-needed relief to his or her client, then counsel needs to inform the client as soon as he or she comes to any such conclusion.

Arbitration counsel needs to have a large and varied skill set that transcends the knowledge of law or good advocacy. He or she needs to appreciate, from the very outset of the case, just how important the overall case strategy needs to be. Counsel must be proactive, not just reactive, and has to be focused from the start on the outcome that the client wishes to achieve. A wide variety of factors, some of which have been outlined in this chapter, will contribute to the success of that strategy and to the final outcome of the arbitration. Each case will require its own strategy, even though there are many factors in common. Importantly too, strategic concepts in international arbitration differ greatly from those to be applied in domestic litigation because of the truly international and potentially diverse nature and approach of the parties, their counsel and the arbitral tribunals. The successful counsel in international arbitration picks up on all these varying factors and applies them to the best advantage of his or her client.

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Written Advocacy

Thomas K Sprange QC[1]

Written advocacy is an essential ingredient of the arbitration process. While somewhat underrated as compared with its more illustrious counterpart – oral advocacy – it is no exaggeration to say that without excellent written advocacy, the prospects of success are severely diminished, perhaps disastrously so. Even the most skilled and effective oral advocates struggle to exert their skill set when the foundations of their case – the written advocacy – are substandard. Put simply, oral advocacy heroics will rarely overcome a failure to coherently articulate the thrust of a case in writing prior to hearing. Allowing an adversary to quietly persuade a tribunal of the strengths of its case and the weakness of yours in the months leading up to hearing leaves your client several points behind before the contest has started. This reality is even more apparent in high-value cases of considerable controversy and complexity, where the chance to effectively play catch-up and dislodge preconceptions inevitably formed by a well-read tribunal is limited indeed. The global pandemic that has led to most hearings taking place virtually has in certain respects heightened the importance of written advocacy. For example, many take the view that it is more challenging to turn around embedded views virtually, where a range of advocacy skills are less capable of deployment, than in person. Written advocacy therefore represents a unique opportunity to start winning the persuasion battle and optimise the prospect of ultimate success. It is also an important step in the life of your case. Not only does the written phase require you to focus and test your case theory in a more rigorous way than you may have to date, it also serves as a litmus test for your case: if you cannot make it sound compelling in the written word, something is wrong!

The purpose of this chapter is to provide guidance as to excellence in written advocacy. As a starting point, there are generally considered to be two core features of any good piece of written advocacy. First, the piece must advance the overall case theory pursued

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The most convincing narrative will control the frame

It is vital to take the first opportunity to present the tribunal with an intelligible, coherent narrative. Either the story that you present, or the one that your opponent presents, will register with the tribunal as the most convincing way to make sense of the events described. Such a narrative must be clear, must appear fair, must take reasonable account of the facts (especially the difficult facts) and must be consistent with the documentary evidence. Arbitrators will absorb this type of information most readily if it is presented in chronological order, so the narrator departs from the chronology at his or her peril. But the narrator who presents the tribunal with the most convincing narrative will control the frame through which the tribunal sees the case.

– John M Townsend, Hughes Hubbard & Reed LLP

by the party you represent. Fail to do this and the piece becomes redundant. Second, the piece must display all the hallmarks of good written advocacy practice and avoid the numerous pitfalls that appear to trap many drafters, even experienced ones. An otherwise great pleading can be undone by the presence of even a small slip in standards. The audience tends to be seasoned, discerning and unforgiving. If, at the time of submission of a pleading, you have furthered your client's case theory and have done so in an attractive way, the primary goal of written advocacy will have been achieved.

With this in mind, this chapter focuses first on these two core components, followed by specific consideration of the various forms of written advocacy deployed in a typical arbitration, ranging from the request for arbitration to the final post-hearing submissions, as well as bespoke submissions outside the typical procedure.

Before embarking on the analysis, one important predicate: this chapter is not about style of writing. Everyone has their own approach and way of articulating their thoughts. It is highly unlikely that yours will change in a material way. Moreover, the audience you are hoping to appeal to will not necessarily like yours or have a similar style themselves.

How less can be much, much more

Why, oh why, do lawyers think they have to write everything as though it were an indenture? By the time the arbitrators are well into the case, they actually know the names of the parties and now have to be forced to read – once again – 'Reliable Contractors Consolidated Ltd, incorporated under the laws of the Republic of Sunny Isle, having its principal offices c/o Mason Dixon Esq., 123 Broad Street, Sleepytown, Sunny Isle, tel. ---, fax. --- (hereinafter referred to as Claimant or Reliable)'. Of course, their eyes will glaze over this dross, and once they get used to the idea of skipping, sometimes to preserve their sanity, who knows where they will stop? Why do qualifications have to be repeated at every turn? If you have not been exposed to what are known as skeleton arguments, try to get a hold of one prepared by barristers who manage to earn their keep in London and learn how less can be much, much more.

– Jan Paulsson, Three Crowns LLP

Wherever possible, simplify

As advocate, your role is to persuade the tribunal of the merits of your case; to ensure the tribunal sees the case through your eyes and not those of your opponent. Tell your story chronologically and clearly, and make it interesting. Refer to documents and key events with a title or shorthand description that creates perceptions that support your narrative; frame the issues in a way that ensures the dispute takes place in your ballpark and not that of your opponents. It is likely that in all subsequent submissions, your opponent will feel constrained to follow your terminology and you will have succeeded in framing the dispute in a way that benefits your case theory.

The use of pejorative language is rarely effective – it should only be used if you are confident that the evidence justifies such use of language, and even then, it should be used sparingly. Repeated hyberbole is tiresome; at best it will detract from the merits of your submissions and at worst it may engender sympathy for the opposing party.

Wherever possible, simplify rather than complicate. An incoherent, rambling submission will irritate the tribunal and intimates that counsel is endeavouring to mask the weakness of the argument being made. Address difficult issues up front and don't shy away from making concessions if necessary. Your opponent will seize on any failure by you to address an issue and portray it as evidence of the weakness of your case. The tribunal will likewise not overlook points, and will have more confidence in you and be more inclined to take your other submissions seriously if you do not try to defend the indefensible.

A tribunal is typically curious as to the background surrounding the dispute, so it is sensible to explain the context in which the claim has arisen. I recall a case in which the sole arbitrator commented that the claimant had made a windfall profit, and it was immediately clear from that comment that the arbitrator was not inclined to award any further damages to the claimant. The reality was that there was no such windfall profit, but in failing to fully explain the claim in the context of the prevailing market conditions, the claimant lost the arbitration.

Unless you are confident you have all the oral and documentary evidence and know precisely how the case will develop, give yourself room when drafting your initial submissions to manoeuvre as the case develops.

A chronological timeline can be invaluable in complex cases.

– Juliet Blanch, Arbitration Chambers

Indeed, one may observe that many experienced drafters privately regard their pleadings to be works of art unmatched by their contemporaries, but at the same time there is no universally accepted 'correct' style. None of this ultimately matters provided that, whatever your style, you abide by the two core principles of advancing the case theory and doing so by practising good written advocacy habits (and thus avoiding bad ones).

Developing the case theory

If there is one pivotal moment in a case, it has to be the moment that the legal team forms its firm view as to what its case really is and how it is to be presented in an effective and

The contract is the law of the parties

It is surprising how frequently counsel for the parties fail to point out at their earliest opportunity, and emphasise in person to the tribunal, the contract language that they rely on to define their client's role in the transaction and support its position in the dispute.

Good advocacy compels that counsel make known to the tribunal, whether at preliminary hearing, initial hearing or any other time it has the opportunity to address the tribunal, what its position is as to the language of the contract and its meaning and role in defining the rights and obligation of the parties. The legal maxim 'the contract is the law of the parties' is equally applicable to civil and common law proceedings and simply means that parties are obliged to do what they have agreed to do. The parties have essentially created the law as between themselves.

Moreover, the arbitrators, whose role in commercial arbitration is defined in an agreement to arbitrate contained in the very same document will be receptive to being informed at the very outset of the proceeding of the contract language – the law of the parties – supporting each party's case.

No doubt in an important and heavily contested case, there will be numerous disputes about what the contract language really means and how that comports with what actually happened. But where to start is what the contract says and the responsible advocate will get this information, and the party's interpretation of those obligations, to the tribunal early on so that the tribunal will appreciate the advocate's subsequent development of how the actions actually taken by the parties complied with, or did not comply with, their obligation under the contract.

– William Laurence Craig, Independent arbitrator

compelling way. Needless to say, this seminal juncture should take place at the beginning of the proceedings, not mid-stream, and certainly not on the eve of the hearing.

The first step in developing a case theory can be achieved in a remarkably simple way: imagine the chair of the tribunal presiding is present and asks the following questions: What are the key issues arising in this case? What is your summary position with respect to them? Why in summary are you right about each of them? Only when you can formulate a coherent (but short) response to these three questions can you begin to develop a case theory. The approach works whether you are claimant or respondent; whether the case involves a treaty, a contract or otherwise; whether it is simple or complicated, high-value or not; and whatever the governing law.

Identifying the key issues should be an exercise in minimalism. The aim is to narrow down to the basics, not create a list resembling a complex algebra exercise. What you want is a structure for the purpose of building a case theory. There will doubtlessly be more nuanced sub-issues, but those can be developed over time. The focus must be on the threshold issues on which the case will rise or fall. The parties, the general factual background and the surrounding legal regime can wait; what matters at this point is setting out the substantive points on which you must prevail to win. As a claimant you will, in very basic terms, typically be establishing some form of contractual or treaty-based right or obligation, a breach of that and loss stemming from it, and a jurisdiction for the tribunal

General rules for written advocacy

- Disputes presented in international arbitration, whether of a commercial or investment nature, are usually complex. Unless you have a poor case and your goal is to distract or confuse the tribunal, do not make the situation more complex. Know your case before you present a written submission and know precisely what you intend to achieve with that submission.
- Persuasion is the key. So, know your tribunal and understand the legal background and language abilities of its members. This may affect your approach in both written and oral advocacy.
- The key is to establish the confidence of your tribunal. That requires reasonable and reliable written submissions. Do not overstate your case or defence. Take a reasonable, realistic approach.
- Do not use, or overuse, vehement or hyperbolic language – it rapidly becomes tiring and annoying.
- Unless you are completely right on every point (which is rare), be prepared to concede indefensible or poor points. There is little benefit in losing these at the cost of distracting and tiring the tribunal and eroding its confidence in your judgement as an advocate in your case.
- It is critical to know your case as well as possible from the outset. This will permit you to write clear, focused submissions that follow the same, coherent approach in all written pleadings and submissions from start to finish. This will make your pleadings easier to follow and inspire confidence in them. Good written communication skills are persuasive.
- Do not overestimate your language abilities. Make sure that your written and oral pleadings master the language of the arbitration. Poor or mistaken usage can be confusing or distracting and, at times, even damaging to your case. While this is particularly so with respect to oral advocacy, it is also important for written pleadings and submissions.
- Do not overlook quantum, interest and costs. These are (surprisingly) often given less thorough attention than issues of liability. However, they are important issues with which the tribunal is likely to require assistance. Clear and logical submissions on these issues are particularly important.

– Henri Alvarez QC, Vancouver Arbitration Chambers

to have a basis for adjudicating those issues. A respondent will naturally have opposite aims and a somewhat easier task in that, leaving aside counterclaims and some forms of jurisdictional challenges, they will be responsive to the claimant's case. Either way, the ultimate goal is, at the end of the analysis, to possess a concise list of key issues (legal and factual) whose determination you confidently believe will resolve the case. There is a further goal in mind: you ideally want the issues to be framed in a manner that tactically suits your case. That will vary from case to case, but typically there will be points that you are strong on or that, if decided in your favour, are pivotal for the balance of the issues. These should feature prominently, while those that are problematic should be insulated as far as possible (e.g., by couching them as sub-issues, or putting them into a context that makes clear that they are not decisive to the outcome of the dispute).

I had over-egged the pudding

In the very first case I handled as counsel after leaving the ICC, it became necessary to challenge the sole arbitrator. The case involved the application of Taiwanese insurance law, in connection with a construction project, for a Japanese client that was the respondent. This was the first arbitration for the arbitrator. He accorded us two days to file our first memorial when the claimant had had months to prepare its own. After complaints, we were finally accorded two weeks, which was still impossible. In my enthusiasm, three large ring binders for the challenge were submitted to the ICC, setting out every idiocy the arbitrator had committed. The challenge was rejected. As the English say, I had over-egged the pudding. It would not have been possible for the ICC Court members to read all that had been submitted. The main focus had been lost in the paper blizzard. Lesson learned. Arbitrators are not only human, they are busy humans. Keep the submissions as lean as possible, so that they may actually be read. Keep a sharp focus on what is essential. Don't always pursue every possible avenue of attack. It seems to have worked: I have never lost a final award.

– Stephen Bond

Having identified what the issues really are – factual and legal – you may begin the task of formulating your position on each of them. It is imperative that careful and introspective thought is given to these threshold issues, including where your client is weak, where it is strong, the counterarguments that are likely to come your way and what will be needed to address each of them, either by way of fact gathering or development of legal argument. It is difficult to replicate the cold, harsh light of robust questioning by a tribunal as to your case, but if there is any time at which you should dig into all your reserves of discipline and do so, it is at this moment. For example, it is worth taking a critical aspect of one of the key issues, whether it be a contractual provision, an article of a treaty, a piece of written evidence or an authority, and to stress-test it with all the points the other side would use against it. All too often, when developing a case theory, the focus is on finding something that works or passes the credibility test. Not enough time is spent on seeing how robust the position is, whether it will survive interrogation by skilled adversaries and a ruthless tribunal, and how it might be improved as a result. Time and effort spent in this way will reap significant rewards when it comes to drafting submissions, for the obvious reason that you will have a much more precise, well-ordered structure of what your case is on the essential points and a clear sense of where you most need to persuade. Moreover, you are giving yourself a better chance of giving the tribunal a clear and logical road map to finding in your favour. After all, your written advocacy will be a significant part of the tribunal's review and reference during deliberations. Finally, this is an important juncture for you and your client to undertake an honest assessment of your case. If presenting it in the written form has been particularly challenging, or the final product, despite best efforts, is underwhelming, then proceeding to final hearing may no longer be the preferred option.

Good written advocacy habits

If the case theory is the foundation of a submission, then good advocacy habits represent the glossy external structures that can turn it into the powerfully persuasive piece required. Fail to exercise good advocacy habits and all the good work to develop the case theory risks being lost or severely undermined. There are countless examples in everyday practice, ranging from exaggerated or screechy language, incoherent or poor structure, the overuse of adjectives and dramatic prose, silly typographical errors, spending many pages on a topic when one page would be sufficient, over-quoting source documents to failing to provide the reader with a sufficient road map to the main body of the submission.

Good advocacy habits, therefore, fall broadly into two categories: first, the notions of credibility and reliability; second, the practical issues relating to structure and layout. Given that the first is the most important and the second more straightforward, the primary focus of the discussion is on credibility and reliability.

In considering the two categories, it is important to note, as flagged at the outset, that this is not about style of writing. While certain aspects of each of the categories come close to touching on matters that may be regarded as style-related, they remain rules of thumb and should not impede writing styles in practice.

Credibility and reliability

Your job as an advocate, ultimately, is to persuade an intelligent and experienced human being, or three of them, that you are right and someone else, of equally persuasive skill, is wrong. There is very little prospect of persuading anyone of anything if they do not regard

A submission must be a submission, not an encyclopedia

I find that a lot of submissions are unsatisfactory. They are much too long, not well structured, not presented in a logical order, too repetitive, with a lot of unnecessary factual information or legal developments. In other words, they are confusing. The parties should first determine what are the issues to be decided and structure their submissions accordingly, in a logical order. For each section and subsection, they should devote one paragraph to the presentation of their position (and the other party's position if it is a reply or rejoinder), and explain how they will argue it in a sequential order: a, b, c, d. And so on. They should also remember that a submission must remain a submission and should not become an encyclopedia. In other words, parties should avoid any unnecessary factual elements and legal developments or case law. They make the issues unnecessarily complex and often generate confusion. Parties should try to be as brief and focused as possible. They should avoid repetition, in particular in the reply and rejoinder. In most cases, a good memorial should not exceed 100 to 150 pages. The longer, the weaker; the shorter, the better. If the tribunal has two submissions in front of it, the one that is better structured and more pleasant to read will carry a greater weight.

I am also much in favour of skeleton arguments. They force the parties to go to the essence of their case, and to present it in a logical order and in a concise way. They are very helpful for the arbitral tribunal.

– Bernard Hanotiau, Hanotiau & van den Berg

Persuasion starts with a powerful beginning

In both written and oral advocacy, you should lead with your conclusion, starting with the most important point. In writing dispassionate memos, it is more common to use a 'build-up' method, carefully constructing an argument step by step until you can introduce the end point as unassailable. This is like building a house, where one lays the foundation before adding the upper floors and, finally, the roof. However, in advocacy, it is more effective to begin with the conclusion and a short explanation of why that outcome is warranted. Only then do we turn to a careful, detailed construction of the argument and, at the end, we explain again the preferred outcome, reiterating our themes. If we built houses that way, they would collapse, of course. But in advocacy, the premium is on persuasion, and persuasion starts with a powerful beginning. The constraints of attention and time often interfere with the build-up method, and there is nothing worse than having a powerful conclusion that you never effectively get to deliver.

– Jean Kalicki, Arbitration Chambers

you as credible and reliable. Your words, no matter how golden, will carry little weight if the audience does not have the basic faith and confidence that what you say is credible and reliable. No amount of intelligence, flamboyance, gravitas or authority will overcome the basic requirement that the tribunal must trust you.

Two essential written advocacy habits to adopt to ensure that you are perceived to be credible and reliable relate to the manner in which you present the facts and how you deal with bad or weak points in your case.

Deeply respect the facts of the case for what they are; do not try to mould or bend them to suit your arguments. It is fortunately rare for lawyers to deliberately misrepresent the facts. However, it is quite common for the facts to be distorted, either by extenuation or omission, all in the name of advancing a particular case. All this does is undermine the credibility of the point that is ultimately made and start to raise doubts in the tribunal's mind as to credibility and reliability. You must, of course, strongly and artfully present your client's case, but this should be achieved by force of argument, not spinning of fact. The distinction is often a subtle one, but it is critical. The right habit to adopt is to present a particular factual situation in a neutral fashion and then make submissions regarding the conclusions to be drawn, and why it supports your case and hurts your adversary's case. The wrong habit to adopt is to mix the presentation of facts and submissions relating to the conclusions arising, or to try to nuance or massage the facts to suit your case. Your audience is sophisticated and experienced, so they will quickly see through this and grow wary as to the substance of your entire submission.

Where there is a disputed point of fact, as often is the case, the aim is to focus on the plausibility of your client's version rather than dictate to the tribunal the factual position that they should find. This reasoning as to plausibility is where you really get to show your skill and where your client needs you the most. Good and bad written advocacy in this sense is best demonstrated by way of an example. Imagine a factual dispute as to whether a party terminating a joint venture contract, the respondent, acted in good faith or not in sending a termination notice. The claimant could address its pleadings in either of the following ways:

- Option A – The tribunal must find that the respondent acted in bad faith and egregiously so. All the evidence shows that the respondent did not care about the claimant's rights, the contractual obligations or the damage that would cause. All the respondent was focused on was financial gain and what suited it best. In short, the respondent never intended to act in good faith. The respondent is presenting a false case that is unreal and should be rejected. The tribunal is obliged to conclude as such.
- Option B – If the respondent was acting in good faith, the tribunal would expect to see an internal consideration of the financial data, contemporaneous evidence of management discussions as to weighing up the options available to the joint venture, pre-emptive discussions with the claimant regarding potential termination and an opportunity for the claimant to remedy any concerns. Conversely, the tribunal would not expect to see the respondent surreptitiously dealing with a potential new joint venture partner well before termination nor concealing critical data from the claimant regarding the commercial operations of the joint venture. Taken together, this evidence supports the claimant's contention that the respondent did not act in good faith.

Option A on its face may be more attractive, particularly to an emotional or vengeful client, as it is robust, aggressive and clear as to what is required. However, to a tribunal, Option B is more helpful. Rather than being told what to do, the tribunal is given solid reasoning as to why, faced with differing views, it should accept the claimant's version. Moreover, brash statements about what a tribunal 'must' do ring hollow if a tribunal thinks that the position is not so clear or, worse still, is against you. Having been so dogmatic, your credibility will have taken a substantial hit and there is a real risk that a pattern will emerge in the mind of the tribunal.

The position is usually more straightforward when it comes to the law in that while its application and interpretation are often contentious, the existence and content of sources

An otherwise able counsel became 'The Boy Who Cried Wolf'

Written submissions are most effective if they are clear, brief and unadorned with rhetoric. An otherwise able counsel became 'The Boy Who Cried Wolf' as a result of his repetitive use of purple prose. His written submissions were replete with phrases such as: 'claimant's case is fundamentally and unequivocally falsified by the factual material'; 'the serially unreliable and fundamentally misleading presentation of the facts'; 'claimant's dramatic change in its case'; 'most strikingly, the claimant did not'; 'claimant's position is utterly hopeless . . . the inference is irresistible'.

After several of his overstated contentions had proved false, his similar submissions faced an uphill battle.

The same counsel did his client no favour by filing a skeleton argument of 475 pages, supplemented by two appendices, and a 349-page, detailed narrative of the facts (which, needless to say, repeated many of the arguments contained in the skeleton).

By all means use every adjective and adverb that comes to mind in the first draft of your pleadings, but be sure to edit them out in your second.

– J William Rowley QC, Twenty Essex Chambers

A request for arbitration should tell a compelling story

A request for arbitration is not merely a formality. It is the tribunal's introduction to the claims, and, typically, the only exposure the arbitrators will have to the case for many months at the beginning of proceedings. First impressions are critical. Thus, a request for arbitration should tell a compelling story explaining what happened and why the claimant should prevail. If the request succeeds in telling a convincing story, the claimant will be well positioned to build on that narrative in future submissions.

– Stanimir A Alexandrov, Stanimir A Alexandrov PLLC

of law are more obvious. Your job in the context of written advocacy is usually about applying principles to facts, distinguishing from past cases and developing theories where the law is patchy. Nevertheless, the notions of credibility and reliability apply equally to what you present in writing on the law. Again, it is rare for the position to be deliberately wrong. What does happen is the contortion of legal theories and commentary to suit a particular case. This is a dangerous pathway. There are two features of most tribunals: the constituent parts have been chosen for their experience and expertise as lawyers; and their reputations and longevity depend largely on them getting it right. It follows that tribunals will therefore be quick to spot mischief, or worse, when it comes to the law. Accuracy is therefore all-important when it comes to stating the relevant legal principles. It is also wise to take the more low-key rather than over-exuberant line when dealing with aspects of the legal theory that appear to support your case. If the theory in question is really as strong as you think, then it will speak for itself; if it is not, then the last thing you want to do is oversell the strength of something that may be a little weaker than expected.

In sum, maintain your credibility and reliability by being accurate, fair and low-key with the facts and the law. Never let enthusiasm, emotion, client pressure or other factors take you off this course. There is plenty of scope for impressive persuasive writing in introductions, key sections linking the facts and the law, your reasoning on specific issues, and the specific and general conclusions.

None of us is immune from having a case that involves bad or weak points; they are an occupational hazard that cannot be avoided. However, the manner in which bad points are dealt with in written submissions is all-important and can have a material effect on credibility and reliability. Handled with care, the impact may well be minimised. Charge ahead without caution or appreciation for the weakness of a particular point and you risk harming your standing in the tribunal's eyes, including tainting the balance of your case.

The first step as regards bad points is trying to find a way to jettison them without harming your case theory (which should aim to be free of bad points from the outset, as has already been discussed). There is nothing to be achieved by maintaining a bad point that ultimately does not matter to your case. Instead, you run the real risk of tainting your entire case. Resist the temptation to retain a bad point, just in case you may need it, or because the client likes it and does not want to appear to be surrendering in any way. If a point feels weak at the drafting stage, imagine how it will look when it has been assaulted by your adversary and considered in detail by a tribunal.

Rather than filing it, send it to the respondent

Long or short, full of exhibits or few, the answers necessarily depend on the case. However, one possible tactic for a claimant is to prepare a persuasive request for arbitration (whatever it takes in the circumstances) and then, rather than filing it, send it to the eventual respondent advising that the request will be filed within a fixed number of days unless a settlement satisfactory to the claimant is reached. This tactic is not appropriate in every case, and certainly does not work most of the time, but when it does, immense amounts of time and money are saved; and when it does not, nothing is lost.

– Stephen Bond

If you have no choice but to retain a bad point, your aim should be to safeguard the balance of your submission from this point and to maintain your own credibility with the tribunal. This can be achieved in various ways. First, deploy the point strategically in your submission, ideally after the main points that you are strong on and if possible as an alternative or ancillary point. Second, couch your submissions on the bad point in a matter-of-fact, understated way, implicitly acknowledging its challenges while also noting that it has some virtues. You will gain credibility with the tribunal by your candour and perhaps engage them to an extent not otherwise contemplated. Third, do not try to enhance bad points with rhetoric, adjectives or overly bold statements, none of which makes a bad point a good one and all of which will serve only to harm your credibility. Fourth, where possible try to build in some flexibility so that you can react to the tribunal's take on the point in question at the oral hearing. For preference, you want to be able to either firm up on the point if the tribunal reacts more positively than expected, or take a more subdued approach if the response is very negative.

Structure and presentation

When considering how to structure and present your submission, it is worth stepping back and considering again what you are trying to achieve: engage the tribunal, make them understand your case, allow them to appreciate the complexities and overcome them, get them into the mindset of rejecting the other party's arguments and accepting yours, all without boring them or losing their interest. With those goals in mind, the way in which you structure and present your submission is very important. It must be attractive, interesting, and easy to navigate and read.

This can be achieved by following some basic and important actions which, while obvious, are often neglected. They include the following:

- Be precise and concise.
- Never lose focus of the case theory and the aim of persuading your tribunal to adopt it. If something in your submission does not really advance your case theory, ask yourself whether it is required.
- Give a succinct but comprehensive introduction that gives the reader a clear sense of what they are about to read in detail and what the ultimate conclusion will be. The tribunal should not embark on the substance of a submission without having

Don't forget motive

It is very helpful if the statement of claim explains not only the wrongful conduct by the respondent but also why the respondent acted as it did. Years ago, I was involved in an investor-state dispute in which the claimant proved a litany of problematic acts by the other side but failed to explain the motivation behind the respondent's allegedly wrongful conduct. When it was time for questions from the tribunal at the end of the hearing, one of the arbitrators stated: 'I only have one question: Why would the government want to do that?' At that moment, I knew that the claimant investor had lost the case. Although 'motive' was not an element of the claim, an understanding of the respondent's motivation was important for this arbitrator to embrace the claimant's case.

– Stanimir A Alexandrov, Stanimir A Alexandrov PLLC

understood the fundamentals of your case theory, what the key issues are and what topics are to be covered in detail.

- Use well-defined sections and subsections that follow a logical pathway and broadly follow your case theory. Tribunals will often want to navigate around a submission or focus on particular aspects at different times. It is essential that they are able to work through a submission by reference to specific and well-defined sections. Particular care should be given to the content of headings and subheadings. It is a common slip for a drafter to give little thought to a heading and whether it accurately reflects what follows. For anything over around 25 pages, an index or table of contents is a good idea.
- Do not be afraid to use appendices, tables, schedules, chronologies and diagrams to support the written submissions. While words are a powerful tool, these forms of presentation can be a compelling adjunct in that they provide a more visual presentation of the point or issue in question and enhance the tribunal's understanding. They can also have the advantage of cutting down the volume of the submission itself, leaving the tribunal with a more digestible document to consider. A good example of this is when dealing with a detailed factual background, where the blow-by-blow detail may be important. A pithy summary of the facts supported by a schedule-form chronology that references the contemporaneous documents allows the tribunal to get a clear sense of what happened from the submission but then access the detail in the schedule. This avoids pages and pages of a written chronology that a tribunal may well find turgid, but at the same time ensures that the detail is available when needed.
- Eradicate all typographical errors.
- Count the number of adjectives that you have used throughout. Ask yourself honestly whether those you have deployed are really required and whether the sentences and underlying points are well made without them.

Drafting considerations for specific submissions

The approach to submissions varies from arbitration to arbitration, depending on various factors, including the applicable rules, the arbitrators, the practice of the legal representatives, the procedural law and the nature of the underlying claims. Nevertheless, there tends

to be a pattern along the lines of following the initial phase of request and answer, statements of case or memorials, exchanged sequentially, pre-hearing submissions or skeletons and post-hearing submissions.

The methodology to adopt with respect to each phase will be driven by a number of influences unique to the particular case. For example, time pressures, tactical questions and the existence of parallel proceedings may all require a different approach. However, there are some basic considerations that, unless there are specific circumstances, ought to be present in each phase. These are explored next.

Request or notice of arbitration and answer

These submissions represent each party's first step in the arbitration. For that reason they are an all-important first impression. Leaving aside the requirements of institutional rules as to the contents, the fundamental considerations are as follows:

- Include sufficient information to make your case clear to the tribunal and opposing party at a high level. You do not want there to be any misapprehension as to what your case is.
- Avoid taking too firm a position on aspects of the factual case that are likely to be contentious and evolve with the case, including document production. Also avoid unnecessary detail of your persuasive arguments; they should be saved for later. Your job at this early stage is to inform, rather than convince.
- Ensure that, as claimant, you incorporate all potential causes of action and related prayers for relief. You do not have to precisely particularise them, but getting cause of action and relief muddled is not a good start.
- As respondent, it is essential to include any jurisdictional challenges or silver bullet defences in your answer, such as statute of limitations. While you may not be precluded from pursuing them at a later point, an inauspicious start on key points is harmful.
- If there are out-of-the-ordinary procedural issues, such as potential requests for interim relief, bifurcation or security, it is best to flag them at this early stage.

In sum, these documents are all about informing the tribunal in broad terms of the shape of your case. You want to provide enough detail so that you may obtain from the tribunal the

In post-hearing submissions, cover what the tribunal really wants to know

By the end of the hearing, both parties have argued their cases in written submissions and in oral argument. Witnesses have told their stories and experts have opined on the case and both have been cross-examined. The tribunal has read, listened and presumably asked questions about all of this. Post-hearing submissions would be unhelpful if they regurgitated everything that has already happened. If there are post-hearing submissions, it is useful to focus at that point on what the tribunal has indicated that it would like to hear about – not on rearguing the entire case. Often the tribunal will offer specific questions to be addressed in post-hearing submissions, but even if it does not, it is likely that the arbitrators' behaviour at the hearing will have revealed the issues in which the tribunal was most interested. Effective post-hearing submissions specifically address those questions or areas of debate.

– Stanimir A Alexandrov, Stanimir A Alexandrov PLLC

procedure, including document production, that suits your case. You need to be thorough in terms of the fundamentals (e.g., key facts, cause of action, relief) and must ensure that the institutional and arbitration agreement requirements are met (e.g., specific requirements met, filing fee, nomination of party-appointed arbitrator). At the same time, you should not overcommit, given that the case will inevitably evolve and there are future opportunities to be dispositive.

Statements of claim or memorial and defence or counter-memorial

The precise form of the statement of case or memorials will to some extent be driven by institutional rules, the nationality of the tribunal members and the typical practice of the lawyers engaged by the parties. Regardless of this, there should be one consistent feature of any form of statement of case or memorial: it must articulate in detail your case theory. This is the main event of submissions and must be treated as such. There is no place for fudging, superficiality or holding back. If the tribunal is not convinced, or at least intrigued, by your case after reading your statement of case or memorial, then you probably face an insurmountable challenge ahead. The following pointers are essential to achieving the aim of an outstanding statement of case or memorial:

- Your case theory should be at the forefront of your mind throughout the drafting process. This submission is the detailed road map to why you are right and should win. Never lose sight of that.

Find a short sentence that frames your case simply

As the son of an advertising genius whose face once appeared on the cover of *Time* magazine, I learned at the family breakfast and dinner tables the significance of formulating a slogan, a sentence, a few words designed to capture favourably the attention of an audience. The greatest challenge to an advocate is to find just that short sentence that frames your case simply, accurately and in terms that inherently enlist a sympathetic reaction to your case from the arbitral tribunal. I recall two examples from the same case, in which I represented a state that decades earlier had expropriated from three American plutocrats a biodiversity-rich, very extensive dry tropical forest property in order to conserve it, but on which the owners had planned to build a number of hotels with accompanying golf courses and other amusements, and on that basis sought correspondingly outrageous damages. The only issue was the amount of compensation. In the course of the proceedings, we had managed to have the property listed with UNESCO as a World Heritage site. Thus, our mantra in the written submissions was: 'The Claimants seek to "Disneyfy" a World Heritage Site.' I opened the hearing with the display of a British Museum poster of the Rosetta Stone. After a puzzled pause on the part of the tribunal, and opposing counsel, I explained: 'The property to be valued in this arbitration is the Rosetta Stone of biodiversity in this world.' In other words: 'Please don't award the claimants too much!' The tribunal granted compensation, including compounded interest, that was barely one-third of what the claimants had sought. A good result!

– Charles N Brower, Twenty Essex Chambers

- This is not a submission to be rushed. Plan carefully, including input from fact witnesses, experts and client representatives. You need to ensure that all stakeholders in the process have time to contribute meaningfully to the content, ensure its accuracy and improve its potency.
- Do not start to draft until you have a strong grip on all the key facts and propositions of law that you need to articulate to express your case theory. This means time with witnesses and extensive legal research before you actually put pen to paper. Remember that the tribunal will regard this submission to be the fount of all aspects of your case. If something is lacking, or is based on an ill-founded factual investigation or a misguided legal theory, it will hurt you immeasurably for the balance of the arbitration.
- This submission will probably be the most dense of the submissions that you file. It therefore needs to be well structured, organised in logical sections with a good index and cross-referencing. Aim to make the document attractive to read, both in stand-alone pieces but also as one continuous document. Tribunals tend to read things in one go to begin with and then refer back to specifics at a later point in time to refresh their memory or to focus on a particular point. Make both experiences easy for the tribunal.
- Use contemporaneous documents wisely. Your words will ideally be persuasive, but they will gather weight if they are supported by written evidence. If you present a series of contentions as to who, what, when and why, then providing references to the written record throughout is critical. The more pivotal the fact, the more interested the tribunal will be in terms of the supporting evidence. Conversely, bold statements without any support will raise suspicions and leave you exposed.
- Resist the temptation of polemics. No matter how strongly you or your client feel about the case, no matter how hard fought it is, it is rare for colourful language to persuade where legal logic and factual support have failed. The more unnecessarily colourful you are, the more it appears that your case may be lacking in substance. If your case is so good that adjectives will not hurt it, why do you need them?
- Do not get lost in the detail. Granted that this submission will probably be your longest and you should not be shy about adopting a comprehensive approach; however, you must not lose sight of your goal, which is to establish your case theory in a succinct and simple way. Reflect on the final draft with this in mind.

In sum, these submissions are the cornerstone of your case (whether as claimant or defendant). They require the biggest investment of time and effort. Considerable skill is required to strike the balance between thoroughness (to ensure that you have covered every important point in sufficient detail) and simplicity (to ensure that your case theory stands out). In addition to skill, a large dose of planning and logistics is required to ensure that the fact investigation and the legal research is focused on the key issues and leaves no stone unturned. Finally, this the most collaborative of the submissions that will be filed. Witnesses, clients, experts and the advocacy team all need to take ownership of these submissions and ensure that their voice is heard and that their views are either incorporated or, if not, addressed satisfactorily.

Statements of reply or reply memorial and rejoinder or rejoinder memorial

There are fewer hard-and-fast rules when it comes to reply and rejoinder submissions. Much will depend on the nature of the case and the issues that arise between the parties as to the shape of these submissions. Moreover, many of the disciplines described throughout apply equally here. There is one overarching principle, however, that should always be adopted: focused brevity. Deal with what matters and do not engage with the immaterial.

Nothing is more disheartening for a tribunal than the unnecessary repetition that often finds its way into the reply and rejoinder round. Resist the temptation to take a basic tit-for-tat approach by merely responding in kind to what has been said against you in the submission you are responding to. Instead, distil down to what it is that is being said against you that really matters and focus on that: avoid dealing with things that are either common ground or of irrelevant controversy. Once you have established your target issues, address them with focus and as much efficiency as you can muster. Telling a tribunal in as few pages as possible what your adversary's case is and why it is flawed takes much longer to compile than the step-by-step denial and counterargument, but is far more compelling.

There are similarities between the reply and rejoinder round and re-examination of your witness during the oral hearings. Less is more. Do not deploy words unless they advance an important piece of the case. Have faith in what you have already deployed. Be bold and confident enough to take a surgical approach. Impress the tribunal with your conviction in your case by your brevity. Perhaps most importantly, avoid the common mistake of trying to take on every aspect of your adversary's submission that you do not agree with or regard as inaccurate in some way. It takes courage and judgement not to engage in the detail of a point that is wrong but otherwise not material to the dispute.

Pre-hearing submissions or skeleton arguments

There is one mission when it comes to pre-hearing submissions: present the decision tree that entails your case theory in outline form. Achieve this and you will ensure that the well-read tribunal is able to engage immediately with the crux issues. You will also ensure that the rare poorly read tribunal or tribunal member at least has a cursory understanding of what your case is about. In these days of virtual hearings and greater challenges in navigating documents, a precise reading list of key exhibits and legal authorities is even more important. The more specific you are in your guidance through these materials, the easier it will be to manage your oral submissions and ensure that time is not lost in finding documents electronically.

The shorter the better. If a tribunal has to struggle through too much detail at this stage to understand your case, you will make the oral stage more difficult and challenging. Do not feel that this is the time to respond to all the points your adversary has made to date. This is about your case theory.

As a postscript, if your case has evolved or a new element has been introduced, do not try to conceal it or present it as a nuanced part of the old case. That will cost you in the credibility stakes. Instead, be candid and open, and offer the necessary procedural concessions to your adversary to deal with it.

Post-hearing submissions

The submissions that follow the oral hearings are perhaps the most amorphous of all, given that so much depends on how your case has fared during the oral process, whether the tribunal wishes to receive full closings on all issues or only on specific points, and whether they are to be accompanied by oral closing submissions at a later stage. Nevertheless, there are some general points that are likely to apply to most situations:

- Revisit your case theory with a realistic eye and adjust it to match the reality of the oral process. There is no point continuing to push that which is no longer tenable. At the same time, there may well be aspects of your case that are now all but established. If so, it is time to exploit them.
- Avoid regurgitating your previous submissions. The world is likely to have changed in a material way since the oral hearings.
- The mantra of credibility and reliability applies with considerable force at this stage. The tribunal is in award-writing mode. If the tribunal has faith in the accuracy and fairness of what you are saying, it may well be adopted wholesale. The opposite will be true if you over-exaggerate the evidence, selectively quote transcripts or overstretch legal theories.
- Just because relief is the last aspect of the case that you will address, do not neglect it. This operative part of your case is the aspect that clients are most interested in. Make sure you have given what you want by way of relief to the tribunal in an easy-to-follow manner, well linked with the legal and factual basis for it.
- Ignoring big problems in your case will not make them go away at this point. You must address the difficulties that you face and provide the best available solution. Avoiding them or dismissing them in a glib fashion leaves the tribunal wondering, and often irritated, that they are being left to their own devices on something of substance.
- Put yourself in the tribunal's shoes as you reflect on the final draft and ask yourself these two searching questions: Is this helpful for the tribunal's task of writing the award? And have I given the tribunal all it needs to walk step by step through the decision tree and to adopt my case theory? Unless you can answer both questions firmly in the positive, keep drafting.

Bespoke submissions

Often in the course of significant proceedings, you will be called upon to file submissions relating to a host of procedural and sometimes substantive points that arise ad hoc and outside the usual procedural timetable. These can relate to the timetable, document production, admissibility of evidence, amendments to pleadings, interim relief or specific points of

A final thought on written advocacy

Have you wondered why the written pleadings of advocates whose clients are almost always respondents tend to have certain common characteristics? Don't think for a second they don't know what they are doing. But when you are representing a claimant, is your goal not to lose?

– Jan Paulsson, Three Crowns LLP

law or fact. Submissions of this nature can be challenging as they often have to be short but at the same time delve into the detail of the underlying case. Here are some points to keep in mind when tackling these types of submissions:

- Clearly set out in the introduction what the specific issue is and what your position, answer or bottom line is.
- Provide a reading or reference list of background documents, such as other pleadings, evidence or documents so the tribunal knows what they need as context.
- Brevity and succinctness are essential. You are writing to get a specific and discrete point resolved in your favour. The tribunal will either be persuaded quickly or not at all.

As with reply submissions, do not fall into the trap of trying to respond to every point of contention. Exercise skill in identifying the clutch issues that the tribunal really needs to decide the case in your favour: leave the verbiage to its own fate. Do not expend precious words or tribunal attention on unnecessary debate.

- With procedural points, help the tribunal by giving them the precise relief, order or direction that you seek, as well as the reasons for it. This is often overlooked and can undermine your position if it is omitted.
- Avoid being overdramatic at all costs. There is a good chance that the tribunal will rule against you on procedural points and, if the reality of compliance with a consequent procedural order is not as disastrous as you have presented, your credibility may suffer.

3

The Initial Hearing

Grant Hanessian[1]

Virtually all the major international arbitration rules provide arbitral tribunals with enormous discretion to conduct proceedings, subject only to the obligation to treat the parties fairly and impartially and to provide a reasonable opportunity for the parties to present their respective cases.

Hence the importance of the initial hearing. If one may speak of the 'art' of international arbitration,[2] the initial hearing presents the tribunal and parties with a blank canvas and a full palette of procedural possibilities. At the initial hearing, the parties provide their views as to how the case should proceed, choices are made, and the case begins to assume its particular character. However labelled under the various rules – 'case management conference', 'preparatory conference', 'preliminary meeting' or 'pre-hearing conference' – the initial hearing, which typically takes place shortly after the appointment of the tribunal, and the procedural order that usually follows shortly thereafter, not only results in a comprehensive plan for the proceedings but also may significantly define the issues to be decided.

The careful advocate therefore approaches the initial hearing with considerable care and preparation, and a clear idea of how he or she wishes to see the case resolved.

The initial hearing and first procedural order typically address such issues as:

- method and timing of determining the place, language and applicable law of the arbitration, if these have not previously been agreed;
- requests for interim measures, bifurcation or confidentiality;
- extent and timing of exchange of documents and method for resolving disputes regarding document exchange;
- number and form of written and evidentiary submissions and witness statements;

1 Grant Hanessian is an independent arbitrator in New York.

2 See, e.g., Pieter Sanders, *The Art of Arbitration: Essays on International Arbitration*, Liber Amicorum (Springer, 1982); Doak Bishop and Edward G Kehoe eds., *The Art of Advocacy in International Arbitration* (2d ed., Juris, 2010).

'An initial hearing is generally worth the investment'

While there are, of course, cost and availability considerations, an initial hearing is generally well worth the investment, particularly if the parties are from different cultures or if counsel have significantly different levels of experience in international arbitration.

Whether or not there is an initial hearing, parties should make every effort to reach agreement between themselves as to procedure and timetable. If agreement cannot be reached, a tribunal is not oblivious to which party has been obstructive.

– Juliet Blanch, Arbitration Chambers

- requirements for appearance and examination of witnesses at hearings;
- cybersecurity concerns; and
- number and venue of hearings.

The increasing focus in recent years on controlling the time and cost of arbitration proceedings has placed additional emphasis on the initial hearing – decisions made (or not made) at the initial hearing will often determine the length, cost and efficiency of the arbitration.[3] Parties should not anticipate that these decisions can be easily revisited; tribunals are well aware that failure to follow agreed procedures may constitute grounds for non-recognition of the tribunal's award under the New York Convention.[4]

This chapter first provides thoughts on how counsel might best approach the initial hearing and then discusses particular issues that often arise at the hearing.

Approach to the initial hearing

Preparation

Preparation for the initial hearing should begin when counsel starts preliminary discussions with the client and drafting the initial pleading. Counsel should consider the strengths and weaknesses of the client's legal position, evidence and important witnesses, and develop a preferred road map for the entire proceeding well in advance. Does the client wish to expedite or delay resolution of the case? If the former, are some issues important to final resolution subject to summary determination at an early stage? Is it desirable that the tribunal make certain decisions (for example, regarding applicable law, jurisdiction, interim relief, security for costs) prior to full evidentiary submissions? Is it in the client's interest that there be extensive or minimal exchange of documents? When should this exchange take place? Should the claimant make the first evidentiary submission, or are simultaneous submissions preferable? How many witnesses? Experts (and, if so, on what topics)? How many hearing days? Should the hearings be virtual or in person or a hybrid?

3 See Christopher Newmark, 'Controlling Time and Costs in Arbitration', *The Leading Arbitrators' Guide to International Arbitration*, L Newman and R Hill eds. (3d ed., Juris, 2015), pp. 81 to 96.

4 Article V(1)(d) of the New York Convention provides that an award may be refused recognition, if the 'procedure was not in accordance with the agreement of the parties'.

A good initial hearing always pays dividends

During the past 20 years or so, the appetite for an early, first meeting in person between the tribunal and the parties appears to have diminished. The difficulty of finding an early date that works for counsel, representatives and members of the tribunal, and the cost, are often cited.

But if the parties, their counsel and members of the tribunal come from different cultures, counsel and the tribunal have not previously worked together, and agreement on timetables and procedures is not apparent, holding a meeting in person will almost always pay big dividends.

Not only is it easier to forge agreement or establish a timetable and procedures when all are present, and have been heard, but an early first meeting allows the tribunal to take the measure of counsel (and vice versa) and to establish control. And if the occasion is used properly to discuss all the normal matters that are covered in a well thought out Procedural Order No. 1, the resulting order and directions will go a long way to ensuring that neither the parties nor the tribunal face any surprises as the arbitration develops. One of the most important ingredients of a good arbitration is that all participants understand what is expected of them at each stage of the proceeding.

– J William Rowley QC, Twenty Essex Chambers

Reaching agreement with the opposing party prior to the initial hearing

Often, the tribunal or arbitral institution will invite counsel to consider a list of issues to be discussed at the hearing. Many institutions have guidelines or policies regarding the initial hearing.[5] In cases under the arbitration rules of the International Chamber of Commerce (ICC), the 'case management conference' typically includes discussion of the ICC's Terms of Reference and a separate 'procedural timetable'.[6] One of the most comprehensive lists of issues to be discussed at an initial hearing is one of the first to have been published: the United Nations Commission on International Trade Law Notes on Organizing Arbitral Proceedings (the UNCITRAL Notes), issued in 1996.[7] The UNCITRAL Notes remain a useful checklist for an initial hearing agenda. Some arbitrators find it useful to distribute to the parties a form Procedural Order No. 1 prior to the hearing as a basis for party discussion.

5 See, e.g., Rules of Arbitration of the International Chamber of Commerce Rules, effective as of 1 January 2021 [ICC Rules], Appendix IV, 'Case Management Techniques'. See also International Centre for Dispute Resolution Rules, effective as of 1 March 2021 [ICDR Rules], Art. 22(2); China International Trade Economic and Trade Arbitration Commission Rules, as revised 4 November 2014, effective as of 1 January 2015 [CIETAC Rules], Art. 35(5); Singapore International Arbitration Centre Arbitration Rules effective as of 1 August 2016 [SIAC Rules], Art. 19(3).

6 ICC Rules, Arts. 22(2), 23 and 24. The Terms of Reference, drafted by the tribunal on the basis of submissions of the parties, set forth the scope of the proceedings, contentions of the parties and issues for decision. Terms of Reference are to be signed by the arbitrators and counsel; if any party refuses to participate in drawing up the terms or refuses to sign, the document must be approved by the ICC Court. See also CIETAC Rules, Art. 35(5). Unusually, Terms of Reference may also be required under local arbitration law.

7 'Report of the United Nations Commission on International Trade Law on the work of its twenty-ninth session', Official Records of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17) (reproduced in UNCITRAL Yearbook, Volume XXVII: 1996, Part One), paras. 11 to 54.

Be reasonable!

The initial hearing is when the parties and the tribunal first meet each other, and it is advisable for the parties to reach agreement on as many procedural issues as possible in advance of that. It does not create a favourable first impression about the reasonableness of the parties or counsel if the tribunal must devote significant time to resolving ministerial procedural issues on which reasonable parties ought to be able to agree.

– Stanimir A Alexandrov, Stanimir A Alexandrov PLLC

Tribunals and institutions typically encourage parties to attempt to agree on procedural matters prior to the initial hearing. The parties may be asked to advise the tribunal as to the points on which they agree and disagree. Arbitrators generally prefer to defer to the parties regarding procedural matters, not only for reasons of 'party autonomy' but also because most arbitrators believe the parties are best positioned at this early stage to know how the matter should proceed. Indeed, the tribunal may know very little about the case – depending on the applicable rules and the parties' initial tactical choices, the pleadings may be very summary, accompanied by little or no evidence.

Even if not requested to do so prior to the initial hearing, counsel should nevertheless consider issues that are likely to arise and whether it is advantageous to reach out to opposing counsel to seek agreement on certain matters.

Of course, the parties may have very different ideas about the conduct of a particular arbitration. Counsel from different jurisdictions, particularly if the counsel teams have more experience before national courts than international arbitral tribunals, may have opposing views regarding exchange of documents, examination of witnesses and other matters. If the parties are not agreed regarding issues of particular importance, counsel may wish to consider making short written submissions to the tribunal regarding the disputed matters prior to the initial hearing, or even requesting a pre-hearing schedule for such submissions, to ensure that the tribunal has the parties' positions in advance of the hearing. Limited briefing of disputed issues after the initial hearing and prior to issuance of the first procedural order is also common.

Finally, even when the parties have agreed on certain matters, the arbitrators may encourage the parties to reconsider their agreement on procedures that result in extensive delays in resolving the case, are disproportionate to the amount in dispute or complexity of the case, or reflect parochial litigation practices that may be inappropriate in an international arbitration.

Logistical matters

There are obvious benefits to a face-to-face initial hearing for the tribunal and counsel. However, if the arbitrators and counsel reside in different parts of the world and physical hearings are not practical, it is common to hold initial hearings by telephone or videoconference.

The case will be run the way the chair wants

The most important thing to know going into a preliminary hearing is how your arbitrator, or the chair of a three-arbitrator tribunal, likes to conduct proceedings. The principle of *cujus regio ejus religio* (the religion of the prince is the religion of the state), first formulated in the Peace of Augsburg, applies with full force to arbitrations. The case will be run the way the chair wants to run it, and the wise advocate adapts to the chair's preferences.

– John M Townsend, Hughes Hubbard & Reed LLP

In some cases, it may be useful also to have party representatives at the initial hearing.[8] As an advocate, I generally preferred to have the client present, as I believed that this facilitated the client's understanding of the process and helped emphasise the client's interests, particularly if there was some urgency in resolving all or part of the case.

The presence of the parties may encourage counsel to show more flexibility, particularly as to scheduling hearings and submissions.

Issues to be determined

Issues typically addressed at the initial hearing are discussed next. As has been stated, some arbitral institutions have guidelines or policies regarding the issues that should be addressed, which should be consulted, if applicable.

Place of arbitration

The place of arbitration – or legal situs – can be of critical importance. The location usually determines the applicable procedural arbitration law – which governs the enforceability of the arbitration agreement and the arbitrability of claims – as well as the national courts that will be available to support (or, in less fortunate circumstances, frustrate) the arbitration and serve as primary jurisdiction for enforcement under the New York Convention.

Typically, the place of arbitration will be resolved prior to the initial hearing either in the arbitration agreement or, in some cases, by the arbitral institution.[9] In the event the place of arbitration has not been determined, this issue should be addressed at the initial hearing and a procedure established for promptly resolving the issue.

The possibility of hearings or other meetings outside the place of arbitration may also be discussed. Arbitration rules typically provide that the tribunal can hold hearings in a location other than the place of arbitration.[10]

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8 See, e.g., ICC Rules, Art. 24(4) ('The arbitral tribunal may request . . . the attendance at any case management conference of the parties in person or through an internal representative').

9 Rules providing that the institution, not the tribunal, determines the place of arbitration in the absence of party agreement include ICC Rules, Art. 18(1), CIETAC Rules, Art. 7(2) and the Arbitration Institute of the Stockholm Chamber of Commerce Rules, effective as of 1 January 2017 [SCC Rules], Art. 25(1).

10 See, e.g., Hong Kong International Arbitration Center Rules, effective as of 1 November 2018 [HKIAC Rules], Art. 14(2); ICC Rules, Art. 18(2); ICDR Rules, Art. 19(2); London Court of International Arbitration Rules, effective as of 1 October 2020 [LCIA Rules], Art. 16.3; SCC Rules, Art. 25(2); SIAC Rules, Art. 21(2); The United Nations Commission on International Trade Rules, as revised in 2010 [UNCITRAL Rules], Art. 18(2).

Arbitration rules, procedural and substantive law

Usually, the parties will have agreed on particular arbitration rules in their arbitration agreement or by subsequent agreement prior to the initial hearing. However, in the rare case in which the parties have not agreed on rules, the subject must be addressed at the initial hearing. Since the tribunal is already in place, the parties typically will not be in a position to use institutionally administered rules and must choose between existing ad hoc rules (e.g., the UNCITRAL Rules) or tailoring a set of procedures to the particular case. Obviously, reaching agreement at the outset of a dispute regarding bespoke rules requires considerable cooperation between the parties, which may be difficult to achieve in a contentious dispute. Crafting bespoke rules is not for inexperienced arbitration counsel or the faint of heart: 'pathologies' often lurk in such efforts, and result in delays, additional costs and may endanger enforcement of the award. Counsel and tribunal drafting their own rules must be, or become, familiar with any mandatory procedural rules under the national law of the place of arbitration.

Disputes regarding applicable procedural and substantive law should be identified at the initial hearing and a process determined to decide these matters. Depending on the importance and complexity of the issues – which can be quite complex[11] – it may be appropriate for the tribunal to resolve the governing law as a threshold issue.

Language of proceedings

The language of the proceedings can have a significant effect on the conduct and cost of an international arbitration. If the parties cannot agree on the language, most rules provide that it will be determined by the tribunal.[12]

In the event, as would be hoped, that the parties have agreed (in their arbitration agreement or subsequently) on the language of the arbitration, a number of questions still arise that should be considered at the initial hearing. Generally, translation of documents originally in languages other than that of the arbitration is not required at the time of the initial exchange between the parties but only if and when a document is submitted as evidence – and then only in relevant part. Consideration should be given as to whether there will be oral presentations or testimony in a language other than that of arbitration. If the arbitrators and counsel are unable to work in the other language, and interpretation is required, it must be decided whether there will be simultaneous or consecutive interpretation. Simultaneous interpretation is much preferred but more expensive. If presentations or testimony are permitted in a language other than that of the arbitration without interpretation, and there is to be transcription of proceedings, it must be decided how the transcript will reflect statements made in languages other than that of the arbitration. The initial procedural order may also reflect how corrections in the transcripts are to be made and translators and interpreters are to be retained and paid.

11 See, e.g., Nigel Blackaby and Constantine Partasides, *Redfern & Hunter on International Arbitration* (6th ed., Oxford University Press, 2015), Chapter 3.

12 See, e.g., CIETAC Rules, Art. 81(1); HKIAC Rules, Art. 15(1); ICC Rules, Art. 20; ICDR Rules, Art. 20; LCIA Rules, Art. 17(4); SIAC Rules Art. 22(1); SCC Rules, Art. 26(1); UNCITRAL Rules, Art. 19(1).

Always be advocating

The effective advocate should think of every contact with the tribunal and opposing counsel as a moment of advocacy. That does not mean that the advocate is argumentative, or seeks to argue points not called for at the time. It does mean that from the very beginning of the case, the advocate should be looking to demonstrate an intention to cooperate and engage. For an advocate, credibility is all, and that credibility should extend to earning the tribunal's confidence that the advocate intends to be constructive in organising the case and prepared to be reasonable in working out disputes. The credibility earned by effective advocacy on the procedural aspects of the case will pay dividends on the merits.

– Donald Francis Donovan, Debevoise & Plimpton LLP

Determining points at issue

Many tribunals begin the initial hearing by giving counsel an opportunity to set out the factual context of the dispute, summarise their respective claims and defences, and highlight the main issues in the case. Although these presentations are often relatively short and informal, they are often the first opportunity for counsel to orally address the tribunal. Counsel should prepare this presentation with some care as it is important to have a consistent narrative throughout the proceedings. Particularly in a smaller case, counsel may not have another opportunity to speak to the tribunal regarding the merits of the dispute until the evidentiary hearings.

Some tribunals will wish to have more detailed information about the claims at the initial hearing and, in some cases, additional information may be required under applicable rules. For example, the ICC Rules require that counsel provide the tribunal with information for the terms of reference at, or soon after, the initial conference, including 'a summary of the parties' respective claims and of the relief sought by each party, together with the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of any other claims [and] unless the arbitral tribunal considers it inappropriate, a list of issues to be determined'.[13]

Tribunals may also want to know whether the parties intend to amend their initial pleadings. Some tribunals may ask the parties to consider whether they wish to prepare a stipulation of uncontested facts prior to the initial hearing.

Preliminary or interim measures

In international arbitration – as in all disputes – it is sometimes critical for a party to obtain relief prior to the final disposition of the case. Such relief – in international arbitration variously termed 'interim measures of protection', 'conservatory measures', or 'provisional', 'preliminary' or 'temporary' relief – may be necessary to preserve the status quo (e.g., by ordering continued performance of a contract during the arbitral proceedings), or to facilitate conduct of arbitral proceedings (e.g., by ordering the preservation of evidence or

13 ICC Rules, Art. 23(1), paras. (c) and (d).

The best advocacy is a collaboration

In the art of persuasion, the adage 'brevity is the soul of wit' rings true. Too often, the persuasive value of a case is diminished by diligent advocates who, in seeking to advance their client's interests to the fullest, obfuscate the key elements of a claim with arguments and evidence on peripheral facts and issues. Advocates must avoid ornamenting pleadings with irrelevant facts, or unnecessary detail, propensities that distract from the real issues in dispute.

The best advocacy is achieved with collaboration between arbitrators and counsel. Arbitrators should engage with parties at an early stage of the proceedings to identify the issues that remain genuinely in dispute, and encourage the focusing of submissions and evidence (whether lay witness, expert or documentary) on only those issues. It is ultimately in the interests of all parties to exercise brevity in arbitration. Succinctness in pleadings will allow the tribunal to reach the crux of the matter in an economic and expeditious manner. If the parties positively engage with these case management practices, counsel will be able to tailor the presentation of their client's case to the key issues, and thus present their case most persuasively.

– Doug Jones AO, Sydney Arbitration Chambers

inspection of goods, property or documents). Under most arbitration rules and national arbitration laws, arbitral tribunals may issue preliminary, interim or provisional measures.

In the event a party contemplates an application for such measures, and the subject has not been previously brought to the attention of the tribunal, it may be useful to alert the tribunal of a potential request at the initial hearing, so the arbitrators can consider whether to establish a schedule for the application. Since imminent harm is generally a criteria for interim relief,[14] if a party believes at the time of the initial hearing that it will make such a request, it is usually best to inform the tribunal, so as not to unnecessarily surprise (and inconvenience) the tribunal and opposing party and raise issues as to when the moving party first knew of the circumstances giving rise to the request.

Written and evidentiary submissions; communications between parties and arbitrators

The procedural order following the initial hearing usually provides a schedule for the case through the end of merits hearings. Given the need to coordinate schedules of arbitrators, counsel, experts and witnesses it is normally advantageous to schedule merits hearings at the initial hearing if at all possible. Establishing dates for merits hearings in the initial procedural order allows the tribunal and counsel to work backwards in scheduling evidentiary submissions, document exchange and other key events, typically providing sufficient time in the schedule so that the merits hearings are not delayed if milestone dates slip, as sometimes occurs.

Regarding written submissions, the tribunal and parties must decide whether these should be consecutive or simultaneous, and the timing of document exchange. Some

14 See Grant Hanessian, 'Legal Standards Applicable to Deciding Applications for Interim Relief', *Defining Issues in International Arbitration* (J C Betancourt, ed., Oxford University Press, 2016), p. 158.

Set backup hearing dates at the same time as the rest of the calendar

It is always advisable for parties to agree on a procedural calendar, including potential dates for a hearing, and then confirm those dates with the tribunal. When considering hearing dates, however, it is also advisable for the parties, with the tribunal, to set backup hearing dates at the same time that they set the rest of the calendar for the case. With the number of counsel and arbitrators involved in a hearing, it is not unusual for something to come up during the course of the case that might justify changing previously agreed filing dates, etc. If the parties have identified backup hearing dates with the tribunal at the start, they are less likely to have to go through the difficulties of rescheduling at the last minute, which may lead to split or significantly delayed hearings.

– Stanimir A Alexandrov, Stanimir A Alexandrov PLLC

arbitrators may request submission of relatively short written skeleton arguments shortly before the hearings.

Other matters to be considered include consequences of late submission of evidence; whether the parties will submit jointly a single set of documentary evidence (or bundle) prior to the hearing; presumptions and timing of objections regarding the origin and receipt of documents; page limits on written submissions; and such matters as paper and font size, whether written submissions are to include hyperlinks to fact and legal exhibits, and protocols as to how the parties are to communicate with each other and the tribunal, and particularly whether the tribunal and opposing counsel require electronic or hard copies (or both) of submissions and evidence.

Any on-site inspection contemplated should also be discussed at the initial hearing, as should arrangements regarding the presentation of physical evidence.

Document exchange

Although parties and counsel from civil law and common law jurisdictions may have differing views regarding exchange of documents (and there may be significant differences between experienced international arbitration counsel and counsel more familiar with domestic litigation), there is a general consensus that the International Bar Association's Rules on the Taking of Evidence in International Commercial Arbitration (the IBA Rules) provide appropriate guidance in most cases.[15] Although it may seem counterintuitive to lawyers trained in common law jurisdictions, significant efficiencies may sometimes be achieved if the parties wait until after the first round of evidentiary submissions to engage in document exchange. The initial evidentiary submissions may significantly focus the issues in dispute and narrow the scope of subsequent document requests.

Any issues concerning privilege, exchange of electronic information and cybersecurity should be given close attention at the initial hearing, as disputes in these areas can lead to

15 See, e.g., ICDR Rule 24 (essentially adopting the IBA Rules standards for document exchange).

Respect the IBA evidence rules

Requests for production of documents tend in a number of cases to be abusive. For a few years after the IBA Rules of Evidence were issued, counsel used to comply in most cases with the parameters specified in the Rules (requests for precise documents or categories of documents, relevance and materiality, documents in the possession of the other party). Nowadays, Redfern schedules sometimes extend over several hundred pages, and many requests tend to be fishing expeditions and no longer comply with the IBA Rules. They generate a lot of unnecessary work for the arbitral tribunal since in the end they will generally be rejected. Parties should also realise that any procedural abuse may be sanctioned by the arbitral tribunal in the final allocation of costs.

Equality does not mean deadlines should be identical

There is no longer any arbitral procedure in which the parties do not file one or several requests for extensions of time. It is therefore essential that in the procedural calendar they agree on deadlines that are reasonable and comfortable, and that they will be able to strictly respect. The parties should also be reminded that the principle of equality does not mean that the deadlines for each party be identical. It only implies that they both have equal opportunity to adequately present their case.

Requests for extensions of time should remain exceptional, duly justified, and made well in advance of the deadline and not the day before. They are not problematic if they are limited to a few days. On the other hand, they generate problems if they imply a postponement of the hearing dates. At a time when institutions put a lot of pressure on arbitrators to strictly comply with short deadlines, the parties should do the same and therefore avoid requesting extensions that have the effect of disrupting the tribunal's own organisation.

– Bernard Hanotiau, Hanotiau & van den Berg

very significant costs and delay. A number of sources are available to counsel and arbitrators to explain the issues that arise in the context of exchange of electronic information.[16]

Some method of resolving disputes regarding document exchange should be discussed at the initial hearing and included in the procedural order. Use of the 'Redfern schedule', by which parties itemise in a table disputed document requests, is now common,[17] although one may wonder how often use of such schedules – the author has seen these run to hundreds of pages in large cases – achieves the intended efficiencies.

16 See, e.g., ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration (2019), available at https://cdn.arbitration-icca.org/s3fs-public/document/media_document/icca-nyc_bar-cpr_cybersecurity_protocol_for_international_arbitration_-_print_version.pdf.

17 See Nigel Blackaby and Constantine Partasides, *Redfern and Hunter on International Arbitration* (6th ed., Oxford University Press, 2015), Chapter 6.

Confidentiality

Most international arbitration rules do not require the parties to maintain the confidentiality of proceedings or information exchanged in the course of the arbitration. In the event the parties desire confidentiality – of the proceedings generally or of particular information or documents (e.g., on grounds of trade secrets) – the subject should be addressed at the initial hearing and in the following procedural order or a separate confidentiality agreement.

Merits hearings

One or more parties may argue at the initial hearing that the case, or a significant part of the case, can be resolved by a partial award on the basis of legal submissions and documents, without the need for an evidentiary hearing – or after limited evidentiary hearings on a dispositive matter such as jurisdiction or statute of limitations. Even if such initial proceedings are scheduled, it is often advisable to schedule final evidentiary hearings, so that the dates are reserved and available if necessary.

In addition to scheduling dates for merits hearings, arrangements must be made regarding the location of the hearing and related logistical matters, whether there should be a limit on the aggregate amount of time each party will have for oral submissions and questioning witnesses; the order in which the parties will present their arguments and evidence; arrangements for a record of the hearings; use of demonstrative evidence at hearings; and whether the parties wish to reserve time for closing arguments. It is often advisable to schedule a pre-hearing conference several weeks before the merits hearing to resolve any outstanding issues and confirm that the reserved hearing dates remain necessary (or sufficient).

Witnesses

Counsel sometimes have different approaches to witnesses, and in such cases it is useful for the procedural order following the initial hearing to have clear rules on the presentation of witness evidence.

Use of witness statements in place of direct examination is now common in larger international arbitration. Typically, witness statements will be submitted with the first substantive pleading (the statement of claim or first memorial). The procedural order should provide the date – sufficiently in advance of the hearings – by which the parties will state which of the adverse party's witnesses it intends to cross-examine. In the event that witness statements are not required, particularly in a smaller case, a date should be established for notification of the identity of any witnesses a party intends to present.

Other matters to consider include establishing dates by which the parties will state the order in which they will call their witnesses and designate party representatives for the hearings; length of direct examination (often a short warm-up direct examination is permitted); scope of cross-examination and re-direct examination; whether oral testimony will be given under oath or affirmation and, if so, in what form an oath or affirmation should be made; and whether witnesses may be in the hearing room prior to their testimony.

Some general rules on how to make a better first impression

The initial hearing offers an important opportunity to make a good first impression. Here are some tips.

- Well-prepared counsel who take a reasonable, organised approach help to establish themselves as reasonable and reliable. This requires having a good understanding of one's case so as to establish a timetable and procedure suited to it. This can be of significant importance for the outcome of a party's case.
- In approaching the initial hearing, it is important to know your tribunal and its legal background and general approach to arbitral procedure. This will often be of assistance in advocating for specific procedural steps or rules that will be helpful to the presentation of your case. Consider issues such as interim measures, document production and privilege and confidentiality in advance of the meeting and whether and how to best provide for them.
- Generally, it will be helpful to have discussed and, where possible, agreed the general procedure with counsel for the other side before the initial hearing. This will permit a more orderly initial hearing and allow counsel to focus on the areas where there are differences between the sides. A well-prepared, reasonable approach in respect to these items in dispute may yield significant benefits.

– Henri Alvarez QC, Vancouver Arbitration Chambers

Experts

If the parties intend to appoint expert witnesses, as is common, expert reports are often scheduled to accompany the other evidentiary submissions. Counsel may find it useful to enquire at the initial hearing whether the arbitrators wish to have the experts meet prior to the merits hearings to identify areas of agreement and disagreement or to have expert witness conferencing at the merits hearings. Witness conferencing, in particular, may affect the parties' choice of experts.

If the tribunal, or one of the parties, expresses an interest at the initial hearing in tribunal appointment of an expert, it may be appropriate for a party opposing tribunal appointment to ask the tribunal to postpone any decision until after the initial evidentiary submissions (including any reports by party-appointed experts). If the tribunal does appoint an expert, the procedural order should include a schedule for drafting the expert's terms of reference, submission of the expert report and party comments on the expert's report well before the merits hearing.

Post-hearing matters and form of award

The initial hearing and first procedural order may not address post-hearing submissions, leaving the issue for determination at the end of the hearings. Extensive post-hearing briefs can add substantially to the cost of the case. If the parties wish to discourage post-hearing briefing, or limit the parties' post-hearing submissions to areas of particular tribunal interest, it may be useful to raise this subject at the initial hearing. Issues regarding the form or registration of the award under the applicable national arbitration law or the arbitral rules should also be resolved.

Settlement negotiations and mediation

Some tribunals will ask during the initial hearing if the parties have engaged in settlement discussions or discussed the possibility of mediation. Some arbitration rules require the institution to inform the parties of the institution's mediation capabilities at an early stage.[18]

Security for costs

If a respondent is concerned that the claimant, if unsuccessful, will be unable to pay the costs of arbitration, the respondent may wish to consider whether it has an interest in making an application for security for costs. The parties and tribunal can consider at that time whether additional information from the claimant is necessary for such an application and, if so, when it should be provided.

Administrative services and use of tribunal secretary

In ad hoc arbitrations, it may be useful to discuss at the initial hearing, and establish in the first procedural order, communications protocols for administrative matters such as tribunal compensation and the amount and management of cost deposits. Often, ad hoc tribunals will seek agreement of the parties to use an arbitral institution for these services.

Also, the initial hearing is a good opportunity for the tribunal to inform the parties if it wishes to use a tribunal secretary. If the tribunal is proceeding under the rules of an arbitral institution, or if an institution is providing administrative services in an ad hoc case, it may be useful for the parties to advise the arbitral institution, rather than the tribunal, of any concerns the parties may have regarding the use of a tribunal secretary (e.g., secretarial duties or compensation), to permit counsel to provide views on these issues without attribution.

Other matters

Tribunal deliberations

Seeking to improve the quality of tribunal preparation and decision-making, some have proposed that the tribunal and parties include in the initial procedural order dates for the tribunal to meet immediately prior to and following the merits hearings.[19] The rationale for these initiatives is certainly sound, but it can be awkward for counsel to suggest that dates for tribunal deliberations should be included in the first scheduling order. Again, it may be possible for the parties to communicate such a request to the institution, rather than directly to the arbitrators.

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18 See, e.g., ICDR Rules, Arts. 4 and 6.

19 Lucy Reed has advocated the 'Reed Retreat', in which the arbitrators meet immediately prior to the merits hearings to discuss the parties' submissions and consider issues on which they would like the parties to focus during the hearings. Lucy Reed, The Kaplan Lecture 2012 – 'Arbitral Decision-making: Art, Science or Sport?' (2012), available at www.arbitration-icca.org/media/4/42869508553463/media113581569903770reed_tribunal_decision-making.pdf. Current International Bar Association president David Rivkin has advocated that tribunals agree to deliberate immediately after merits hearings, when they have the best recollection of the evidence and arguments. Douglas Thomson, 'Rivkin's "clarion call" for arbitration', *Global Arbitration Review* (27 October 2015), available at http://globalarbitrationreview.com/article/1034956/rivkin%E2%80%99s-%E2%80%9Cclarion-call%E2%80%9D-for-arbitration.

Remember: creativity requires full understanding

Initial procedural hearings too often are a wasted opportunity. Procedures are set for the entire case and rarely revised later. An effective advocate should take advantage of this opportunity. To do so, the arbitrators should have as much information as possible about the case. If the initial pleadings are limited, then consider preparing a more complete summary of the case before the initial hearing. Or ask the arbitrators to request both parties to make submissions at the procedural hearing about their view of the case. This will enable the arbitrators and counsel to have a more informed discussion of the appropriate procedures for the case – and to have the confidence to be more creative in setting those procedures.

In one case on which I served as chair of the tribunal, it was clear that joint venture partners could not work together. I asked the parties to put aside the 18-month timetable they had proposed, and instead to meet immediately to discuss the four or five issues that needed a prompt resolution. An hour later, they came back to the meeting room with such a list. We were able to formulate a hearing around those issues in only a few months. Once the arbitrators decided those issues, the case promptly settled.

– David W Rivkin, Debevoise & Plimpton LLP

Conduct of counsel: reference to IBA Guidelines on Representation of Parties

Application of national ethical codes is uncertain in many international arbitrations, particularly when the arbitration is sited in a jurisdiction in which counsel are not licensed. The IBA's Guidelines on Party Representation in International Arbitration, issued in 2013, are intended to create a level playing field in which parties and counsel may have different ethical norms that may affect the integrity and fairness of the proceedings. The IBA Guidelines address such matters as identification of party representatives, counsel conflict of interest, document retention and production, and counsel communications with the tribunal, experts and witnesses. They also provide means for tribunals to provide sanctions for counsel misconduct. Since the IBA Guidelines apply only if agreed by the parties, it may be useful for the tribunal and parties to agree at the initial hearing that the Guidelines, or some portions of them, will serve as a source of guidance, as is now customary with respect to the IBA Rules on the Taking of Evidence.

Conclusion

As the discussion in this chapter makes clear, the topics that may be addressed and resolved at the initial hearing are as many and varied as the procedural possibilities of international arbitration itself. The initial hearing is the first, and most critical, occasion for the tribunal and parties to shape procedures appropriate to the nature and complexity of the particular case – to organise proceedings in a cost-effective manner and to anticipate and avoid disruptive procedural battles later in the case. The initial hearing is also counsel's only opportunity to make a good first impression on the tribunal. For all these reasons, it is important that counsel use the initial hearing to best advantage – which can only occur if counsel approaches the event with a thorough understanding of how the entire case should proceed.

4

Opening Submissions

Franz T Schwarz[1]

This chapter provides an overview of topics and techniques to consider in the preparation and delivery of opening submissions in international arbitration. It covers both rhetorical approaches and pitfalls; examines the content and structure of presentations, including how to address weaknesses in one's case; and closes with thoughts on specialised presentations on technical matters or on quantum. This year's edition is updated with the experience gained, by necessity, through the covid-19 pandemic and the resulting proliferation of online hearings. As challenging as this time was, and remains, it has also been a period that permitted arbitration to showcase one of its premier attributes – flexibility. And counsel had to adapt to this changing world of video calls and hearings. Some of these changes will no doubt be here to stay. As always, the thoughts expressed in this chapter are not immutable rules but are suggestions of what you might consider as you prepare for your next opening submission. Good advocacy is inherently subjective, and what works well for one counsel will not work for another. Each advocate needs to find their own authentic voice.

Preparation

Whether it is an axiom or a cliché does not matter: preparation is everything. This is particularly true for the opening presentation, which is almost entirely in your own hands. You decide what to present and how to present it. Indeed, meticulous preparation will also allow you to respond convincingly to questions from the tribunal or a rebuttal from your opposition.

Preparation will also increase your confidence as an advocate, which is important because measured confidence translates into credibility and persuasion. This is as true for novices as it is for veterans of the trade: too many 'experienced' counsel become lazy over

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Opening submissions – some tips

Be timely. If you are filing a pre-hearing brief, don't file it the evening before the hearing starts – what you might gain in perfecting your submissions will be lost because the tribunal will have had no time to properly read and digest it.

Focus on the key issues. Don't use pejorative language in an attempt to win the sympathy vote – it is too late, you should have framed the case by this stage. The tribunal is now focused on the key legal issues.

Don't read your opening submissions. You should aim to create eye contact with each member of the tribunal – you are seeking to develop a rapport with the tribunal. Don't keep all your folders on the desk top between you and the tribunal – it creates a barrier between you and the tribunal and makes it harder for you to read the tribunal.

It's okay to summarise. Most tribunals will have spent considerable time preparing for a hearing and will have read all the submissions and key documents. If that is the case, it's sufficient to summarise succinctly the factual background and legal arguments. Listen to the questions from the tribunal and be flexible – be ready to change your proposed order of submissions. You should engage in an interactive discussion, not a soliloquy.

Be disciplined in deciding which documents should be included in the hearing bundles and particularly what should be included in a core bundle. Work with your counterparty to ensure there is no duplication and have an agreed index.

– Juliet Blanch, Arbitration Chambers

time, thinking they can 'wing it' – it usually shows. Experience can take you far, but preparation will take you further.

Preparation has only become more important in the era of online hearings. Time is at a premium and hearing days, which have to accommodate different time zones, are often shorter. Attention spans are also shorter on-screen than in person. This requires counsel to be even more economical with their time and succinct with their arguments. But shorter presentations require more, rather than less, preparation, cutting away the unnecessary, duplicative and ineffective elements.

Some of the most experienced advocates still prepare by drafting a full, verbatim text of their opening submission. As they prepare for the hearing, and as they rehearse and work on the text, their need to rely on the manuscript is continuously reduced. A PowerPoint presentation, prepared to accompany the opening submission, can also serve as a useful guide to ensure that no important point is inadvertently left out. PowerPoint presentations, or similar visual aids, are now ubiquitous and particularly suited to the shared screen that is the modern hearing room.

Do not be shy about rehearsing the opening out loud, including in front of your colleagues. You will find that some sentence or turn of phrase, which looked beautiful on paper, works less well when spoken. Indeed, although you should write down your opening submission, it should be written as one speaks: with short, concise sentences that are easy to follow.

Hearing etiquette

A sure sign of inexperienced presiding arbitrators is that they tolerate lawyers who repeatedly address each other in hearings. Everything that is said in a hearing by advocates should be addressed to the tribunal, or with the tribunal's permission ('You may now question the witness'). Anyone who doesn't know why should stay in the back row.

This is yet another matter that should not have to be established in advance, but unfortunately sometimes does.

– Jan Paulsson, Three Crowns LLP

Rhetorical approaches

Credibility

Credibility is your currency. It should determine the content and tone of your presentation: it is a matter of both substance and form. You should never mislead the tribunal; be truthful to the facts and accurate on the law. When arguing a difficult point, there is a great difference between asking the tribunal, on the basis of the particular facts, to go further than established case law may suggest, and misrepresenting what the case law says. Be precise.

Credibility is also a function of form. It is expressed through your posture, your demeanour, your tone and even your personality. Be authentic and sincere. Someone bestowed with charisma and charm can use these gifts to great effect because they come naturally and so appear sincere. A shy person – say, an introverted and somewhat dry, but highly cerebral intellectual – can be an equally effective advocate for the same reason: they appear at home in their style. A good advocate is authentic and, by extension, credible.

Knowing your tribunal

If credibility is your currency, the tribunal is where you spend it. Knowing your tribunal will help you spend it effectively.

Speak to your target arbitrator as if one to one

Advocacy, good advocacy, is, for me, the *raison d'être* of arbitration. When I am treated to excellent advocacy (alas, not often enough), I recall my days as a busy advocate in Canada. There was nothing more challenging for me than standing before a judge, or a panel of three or even nine judges or arbitrators, and knowing that I had to convince one of those swing adjudicators whom I suspected was not sympathetic to my client. And then, having spoken mainly to my targeted judge or arbitrator as if this was a one-to-one conversation, seeing in the adjudicator's eyes or facial expression that he or she was now going to find in favour of my client. What satisfaction! What a feeling of accomplishment! I am not boasting that it always worked, but it often did.

– Yves Fortier QC, Twenty Essex Chambers and Cabinet Yves Fortier

Speak slowly

Remember always, in oral advocacy, to speak more slowly than you would in ordinary conversation. This is not just a courtesy to the court reporter and to the arbitrators struggling to take notes; it is also the best way to command attention and to persuade.

As Mark Kantor used to say to our Georgetown Law School students, the 'beat' of advocacy is not rock and roll, it is the waltz. If you speak too fast, you lose the ability to employ cadence and volume to create emphasis.

– Jean Kalicki, Arbitration Chambers

You will have made great efforts getting to know your tribunal when it was constituted. Appointing an arbitrator is the most important decision a party makes. Now, with the hearing on the merits approaching, you will already have seen the tribunal in action, as it will have decided issues of procedure, document production and possibly jurisdiction. You will therefore have a sense of their particular style and perhaps the dynamic between its members: is the presiding arbitrator leading with a firm hand, or is he or she inclusive? Has the tribunal decided procedural disputes by compromising between the parties' positions, or taken decisions that are more black or white in nature? Has the tribunal in its decisions been guided by the parties' positions or has it displayed a strong independent streak? All this will guide your opening submission.

You will also consider the individual members and their background. Do you find yourself before (one or more) common law arbitrators in a case substantively governed by a civil law system? The opening presentation will be your chance to engage these arbitrators

Avoid bombast

The tone of an opening statement sets the stage for the arguments throughout the entire hearing. It is best to be respectful, not just of the tribunal (which should be a given), but also of the opposing party and their arguments. Shrill protestations, accusatory rants and overheated rhetoric will not impress a tribunal. It is best to make one's case using facts, logic and accurate application of the law.

Stringing together strong adverbs and adjectives – 'grossly', 'outrageous', 'shocking', etc. – typically obscures, rather than strengthens, arguments.

– Stanimir A Alexandrov, Stanimir A Alexandrov PLLC

Don't exaggerate the facts or the law. A knowledgeable tribunal will be unimpressed by bombast and overstatement, and your opponents may use your overstatements to undercut the effectiveness of your core points. Exaggerating or overstating a point puts the advocate out at the far end of a thin ledge, with little support underneath and a long fall to the bottom of the cliff if that support is chipped away by a critical arbitrator or a diligent opponent. The adverse consequences of exaggeration often seriously outweigh the rhetorical benefits.

– Jean Kalicki, Arbitration Chambers

A short, well-constructed, written skeleton presents a magnificent opportunity

In most cases of significance, a tribunal will have had the advantage of two rounds of pleadings and multiple witness statements and expert reports. Good tribunals will always have read into the case before the hearing. So why do we need skeletons, and why are counsel inclined to extensive openings? The answer is that they can't be sure that the arbitrators have done their job. But experienced counsel who know their tribunal will understand that time can easily be wasted by lengthy oral openings.

Even when a tribunal can be expected to have read the pleadings and the testamentary statements, a short, well-constructed, written skeleton, delivered a week before the hearing (don't give it to the tribunal the weekend before – this is too late, and if a tribunal is travelling, it may not even be received before the arbitrator turns up at the hearing) is a magnificent chance to provide the tribunal with the distilled essence of your case and your answers to your opponent's.

If it is essential that the tribunal be shown important exhibits, they should be quoted, if they are short. But whatever you do, given today's technology, be sure to provide your decision makers with an electronic version of your skeleton (or opening), which is hyperlinked to every important factual exhibit and legal authority – for ease of reference, highlight in yellow the relevant parts of those exhibits.

A good skeleton or opening should be a reliable road map for the tribunal's drafting of an award in your client's favour.

– J William Rowley QC, Twenty Essex Chambers

more directly and personally than in your written submissions and explore any differences in approach that you wish to highlight. What about the tribunal members' expectations of style: are they, as a result of their background or practice, more familiar with the presentations prevalent in a particular court system, or are they internationalists accustomed to any manner of presentational style? This, too, will influence your presentation: depending on the circumstances, there may be value in familiarity or in rattling them with the unexpected.

And, of course, you will consider their likely approach on the merits. Are they very commercially minded, or inclined to follow the black letter of the law? Are they driven by a persuasive narrative, or likely to view a case within the formal parameters of the applicable law? Being familiar with the members of the tribunal and their proclivities will allow you to strike the right balance between law and equity, and between flourish and analysis.

Tone

As form follows function, the tone follows the purpose of your presentation. The overarching purpose of your oral submission, of course, is to be persuasive. As a general rule, therefore, your tone should be serious, focused and measured, so as to carry your argument with maximum credibility.

There are exceptions to this rule. If the subject matter so demands, it can be right to show emotion. A fraud perpetrated on your client may, when you recount the facts, allow for a measure of anger: for emphasis, not for show. Again, this will be a matter of personal style

Consider the road map to be your 'elevator speech'

Road maps can be extremely effective in oral submissions, but often they are not used to best advantage. Simply listing the sequence of topics you intend to cover may help your arbitrators organise their notes, but it does little to sell your case. The most powerful road maps also set forth for each topic the important 'take away' point – the conclusion you wish the arbitrators to reach and the key reasoning underlying each conclusion. This can be done in a sentence or two per point. Consider the road map to be your 'elevator speech': if you had to summarise your case in the time it takes to rise from the lobby to the penthouse, how would you boil it down to its essence? Try to give the tribunal a concise summary of what you wish it to remember about your case, and the building blocks you think it needs to write the award you wish to receive. Then, having introduced the key elements, make sure to return to each as you address it in more depth – and revert to them in your conclusion, to help fix the critical steps even more securely in the arbitrators' minds.

– Jean Kalicki, Arbitration Chambers

and how you can express yourself authentically. It will also depend on the tribunal's disposition whether an injection of emotion is effective. It certainly can be a powerful rhetorical tool to place a marker on an important aspect of the facts – but you must stay in control at all times and you must not overuse it, lest you appear overexcited and hence less credible.

What about humour? It should be used sparingly, if at all. This does not mean that you have to be overly serious either: be pleasant and by all means likeable. But seeking to persuade another is no laughing matter, and one joke too many may seriously undermine your credibility. Some advocates (in particular in arbitration circles, with no shortage of big egos) view their sharp tongue and quick wit as an expression of their superior intellect and fast thinking. I have always wondered whether this is a good strategy in the long run. But here, too, there are obvious exceptions. Not showing any sign of good humour when the situation, or social convention, clearly demands it may alienate you from the tribunal. These situations call for your best judgement.

All of this is made more difficult in a remote hearing, where you are speaking into a camera and a microphone. These devices provide a remote projection of yourself, and much tonality may get lost. Be mindful that you may come across differently on camera, and nuances in your expression maybe distorted. Record your opening session and watch yourself: as painful as this may be, it will allow you to experience your opening presentation as others will see it.

Pacing

It would be pretentious to say that only inexperienced lawyers try to pack too much information into the time they are given. Everyone struggles with this: in a twisted variation of Parkinson's Law, the desired information expands to exceed the available time. The easiest, but least effective, way to deal with a shortage of time is to increase the pace of your speech.

You cannot over-prepare

As in every human encounter, the first impression in an arbitral hearing is a defining moment. You cannot over-prepare for the initial hearing with members of your tribunal, your judges.

You will have mastered the factual matrix of the dispute as well as all legal issues that will need to be resolved. You are calm, you are poised, you know the file inside out and it shows in your demeanour; you project confidence and assurance. Invite questions; you know you can answer any question put to you.

You look at the arbitrators. You speak to each of them in turn, preferably without reading, which, of course, prevents you from making eye contact with your judges. And remember, members of the tribunal will have read your written submissions. Be thorough but be succinct. If you refer to opposing counsel, be polite and respectful.

And finally, even if you have been allocated, say, two hours for your opening statement, do not feel obliged to use the two hours. If you can complete your opening in one-and-a-half hours, then do so. Your judges will welcome and appreciate your confidence. The first impression must be a positive, lasting impression.

– Yves Fortier QC, Twenty Essex Chambers and Cabinet Yves Fortier

Consider how human attention tends to drift during any frontal lecture. Consider then how speaking quickly makes it even less possible, let alone desirable, for the audience to follow with interest. You can re-read a written sentence, unwieldy as it may be, to extract some meaning, but you cannot rewind the spoken word on the spot. True, there may well be a written transcript, and while this can be revisited by the tribunal at a later stage, your opening statement needs to take immediate effect, to open the tribunal's mind for the evidence to follow. Add to all this the particulars of the tribunal: their age, perhaps, or the fact that English is not their native language. Keep your language simple and your pace measured. Your pace should also be varied, though. Monotony loses attention; variation attracts it. Once again, this is even more important in a remote hearing.

Do not forget the rhetorical effect of the pause.

A pause, well placed, serves as a reminder, a bookmark. It interrupts the flow; contrasts the monotony of legal language; and gives the audience the opportunity to catch their breath and think. In fact, it forces the audience to catch their breath and think about what you just said at a moment of your choosing. This makes the pause a powerful instrument of emphasis.

Understatement and overstatement

If you follow the overarching goal of presenting a credible and persuasive argument, you will rarely understate or overstate your case. You will minimise weaknesses, but not deliberately misrepresent their import. You will project confidence in your case, without overstating the merits of your evidence or your authorities. Yet understatement and overstatement can be legitimate rhetorical figures. By postulating extremes, you may be able to show the fallacy of an argument.

Present your argument not as an 'argument'

Always choose confident, direct language to present your points, not passive or hesitant language. For example, saying that 'our submission is' or 'we contend' simply reminds the tribunal that there is a counterargument, and you are just an advocate presenting a position; it does not add anything to the persuasiveness of your presentation. So instead of 'We believe X' – which suggests equal room for an opposing belief or argument – simply state 'X' as an assertion, and then explain the basis for the assertion. Present your argument not as an 'argument', but as the logical and necessary conclusion from the evidence and legal authorities you invoke.

– Jean Kalicki, Arbitration Chambers

Analogies

A picture is worth a thousand words, or so the saying goes. Comparisons, analogies and metaphors can be effective tools in your arsenal because they create images in your audience's mind. Many of these images are effective also because they are part of the cultural fabric of your audience: 'pulling yourself up by your bootstraps'; 'having your cake and eating it too'; 'heads, I win; tails, you lose'.

The use of analogies, figures of speech and the like is not without risk, however. Some of those images are peculiar to one language or culture and may have no, or a different, meaning elsewhere. The danger of analogies is also that there is always a better one: if the analogy is slightly off the mark, it can be used against you or turned around.

Organisation

On the most basic level, the structure of your presentation will be a function of the merits of the case: after an introduction to set the scene, you will invariably have to deal with the facts, the law, the quantum, the relief you are seeking. From there, you will build your presentation around the strengths in your case; that provides a robust foundation and allows you to put real or perceived weaknesses into a less harmful context.

You will also consider, though, whether to follow the same structure that you used in your written submissions (which has the advantage of familiarity to the tribunal) or whether to try something different and fresh (which may heighten the tribunal's attention and interest).

Importantly, you will organise your presentation in the manner that best befits your case. Representing the claimant, and thus going first, you naturally have great freedom in this regard. But you should exercise considerable freedom as the respondent's representative as well. Sometimes, it makes sense for a respondent to follow the same structure as the claimant: rebutting, step by step, what has been said. But often, the claimant's structure is not helpful to your case, as it emphasises different strengths and belittles precisely those aspects of the case that you will wish to explore. Mirroring the claimant's organisation and approach means accepting how the case is framed. Instead, reorganise the argument to highlight the strengths in your case and to attack with maximum effect the opposition's weaknesses.

Address weaknesses before you reach the hearing

Every case has its weaknesses; if the matter were open and shut on one side, it would be unlikely to proceed to dispute settlement. It is always much better if counsel addresses those weaknesses up front rather than trying to gloss over them. From my experience, it is particularly harmful to a party when the weaknesses in its case are aired for the first time at the hearing. In such cases, the tribunal may begin to doubt that party's credibility. Thus, it is advisable to address one's case weaknesses directly in the written submissions, and then to follow up on them in opening and closing arguments as well.

– Stanimir A Alexandrov, Stanimir A Alexandrov PLLC

In longer opening submissions, and in remote hearings, consider using different speakers on your team to address, for example, facts, law and quantum separately. This can have several advantages. First, it provides the tribunal with a welcome change in tone and style. Listening to the same person for two hours is a challenge for any audience; listening to three speakers over the same period helps the audience to stay focused. Second, you can choose speakers who have mastered the particular subject matter they are asked to address and so lend extra credibility to your presentation. Legal submissions and presentations on quantum are particularly well suited for handling by someone with specific expertise.

Timing and logistics

There is never enough time, as far as counsel is concerned. The tribunal often has a different view. It will say that it has read all the submissions, lengthy as they were, so that long opening submissions are not needed. But is that true? Even having prepared well for the hearing, arbitrators may benefit significantly from a well-structured opening presentation that focuses on the decisive points, readjusts the emphasis and prepares the tribunal for the evidence to follow.

As counsel, I typically resist any effort to unduly restrict the time for the opening. How much time is needed depends, of course, on the case and its complexities, but I think it is important that parties get the time they say they need. It is their day in court, after all.

It is helpful also to think about the staffing for the hearing. Of course, there is the main advocate, or the main advocates if multiple subject matters or topics are divided, but there should also be a properly assigned and rehearsed choreography of supporting cast to hand out written materials or demonstratives, or to operate a PowerPoint presentation.

Content

What to cover?

A good starting point in thinking about the content of your presentation will usually include the following: (1) an introduction that sets the stage, provides some overarching themes and exposes the main strengths of your case as well as the opposition's weaknesses; (2) an account of the factual narrative that makes best use of the evidence, particularly in fact and document-heavy cases; (3) an exposition of the law as applied to the facts of the

Time limits and oral openings

Typically, the parties will have filed written opening submissions and there will be a time limit for oral openings. Here are some suggestions to help you open well.

- You should assume the tribunal has read the written submissions, so do not waste time repeating what is already clearly explained in writing. The tribunal will not know your response to your opponent's written opening, so use the opportunity to explain the flaws in its case.
- If you are up against a tight chess clock, time your oral opening to make sure you do not overrun. Overruns often happen, particularly when the opening is split between two speakers.
- Make sure your written opening confirms the precise relief you seek from the tribunal.
- If you use a PowerPoint or similar presentation, always provide a hard copy so the tribunal can make notes on it.

– Andrew Foyle, One Essex Court

case; (4) a rebuttal of arguments already raised by the other side or anticipated to be raised at the hearing; (5) an examination of the quantum; and (6) a conclusion.

The opening submission serves to set the stage for the evidentiary hearing, and so should, in general, revolve around the existing evidence: providing context for what the tribunal will hear from the witnesses and the experts. How much detail is too much detail? That is a judgement call. A detailed exposition of a factual aspect of the case can be powerful, as long as it is relevant and not tedious.

What to emphasise?

You will typically build your presentation around the strengths in your case; these provide the fortified hilltop from which to venture into more uncertain territory. Do not cede the hilltop and get lost in a battle that your opponent wants to fight on ground more favourable to him or her: always return to the strengths in your case. As a result, emphasise the strong supporting evidence, the testimony, the documents, the concessions from the other side's written submissions. This is the easy part, however. It is much more difficult, and at least equally important, to effectively deal with the weaknesses in your case.

Dealing with case weaknesses

As you prepare for the hearing, there are three questions you need to ask in regard to weaknesses in your case: whether to address them yourself, and if so, when and how.

It typically makes no sense to try to hide the weak spots in one's case. Can you safely assume that no one on the other side or the tribunal has identified the weaknesses in your case? This is a high-risk assumption, akin to refusing to go to the doctor if you are ill. The illness is not going to go away by being ignored. It is far better to find a way to address the weaknesses in your case on your own terms.

You can postpone answering a tribunal's question – but not indefinitely

Counsel may feel like he or she is just getting into the flow of a good opening argument when an arbitrator interrupts to ask a question. As jarring as it may be, it is best to focus on those questions and specifically respond to each one because they are an indication of the tribunal's own focus in its analysis of the case. Ideally, counsel will respond to the arbitrators' questions as they are posed. But if counsel prefers to continue with the opening statement uninterrupted, he or she should acknowledge the questions, request time to continue the opening statement, and indicate that he or she will answer the questions later in the statement (or at some other point during the hearing). If counsel chooses to postpone answering the tribunal's questions, however, he or she should make sure that he or she (or a colleague) does eventually address the arbitrators' questions at some point during the hearing, and when doing so, ideally signal expressly that he or she is now answering the question posed earlier. The arbitrator will not forget that he or she asked the question, and will be waiting for the answer.

– Stanimir A Alexandrov, Stanimir A Alexandrov PLLC

At the bare minimum, have an answer ready. It would only magnify any real or perceived weakness in your case if the tribunal asked you about it, whether prompted by the other side or of its own volition, and you failed to give a clear or concise answer.

The more difficult question is when to address a weakness. This is particularly so if you are representing the claimant. You are going first; you are acting not reacting – but you don't know if and how the respondent will address the weakness in its own opening statement. If the weakness relates to an important issue, there are significant advantages in addressing it first. It is a golden rule of war as much as advocacy that the party that defines the battlefield has made a huge step towards victory. By working the weakness into your submission, you frame the discussion: you provide context and explanation instead of allowing the other side to present the weakness in the most unfavourable and unbalanced manner.

What if there is no answer to your weakness? Try harder. There is always an answer – at least there ought to be if you have made it this far in the arbitration. The world is not black or white, and any strength or weakness has shades and nuances that you can exploit to soften the blow. In fact, the answer may be acknowledging the weakness, and explaining why, nonetheless, this weakness does not affect the ultimate outcome of the case, or, better still, is actually a factor in your favour. Acknowledging weak points, if it can be done without harming the very basis for your case, can be a powerful tool: by showing that you are not wasting the tribunal's time by arguing, against common sense, a host of weak points, you cement your standing as a reasonable and, importantly, credible advocate.

Anticipating opposition arguments in the opening submission

You not only need to address weaknesses in your own case, you also need to anticipate the other side's arguments. This is somewhat different for a claimant (who goes first) than it is for a respondent (whose opening submission is by definition more responsive).

As a claimant, you will distinguish between at least two categories of opposition arguments: (1) those that the other side have already made and are likely to repeat in their

Every question is a window into the arbitrator's thinking

Welcome tribunal questions. You may find yourself baffled as to why an arbitrator would ask a particular question and you will almost certainly be irritated that he or she chose to ask it at precisely the moment that you were about to make an entirely different point. But welcome the question. If you are lucky enough to have an able second chair, trust him or her to remember the point you were about to make, and pivot as smoothly as you can to the arbitrator's unaccountable interest in what colour the machinery was painted. Every question is a window into what the arbitrator is thinking, and a clue to whether he or she is receiving on the same frequency as you are broadcasting. A really skilful advocate will find a way to work from the answer to the arbitrator's question to the point that he or she intended to make in the first place, but it is better to suffer an awkward transition than to brush away an irritating question because you would rather deal with something else. Arbitrators very quickly conclude that advocates who squarely address the questions on their minds are the ones worth listening to.

– John M Townsend, Hughes Hubbard & Reed LLP

opening submissions; and (2) new arguments that the opponent is either likely to raise for the first time, or that it seems to have overlooked so far but may still raise. The analysis of whether and how to anticipate these arguments in your own opening submission is similar to our discussion of weaknesses.

Arguments that you are fairly certain the other side will raise, if they are of any import to the case, should be anticipated and addressed. This will allow you to put them into their proper context and define the framework in which they are discussed. It also gives you the opportunity to display confidence: you are not shying away from engaging with the other side's arguments directly and decisively.

Much more difficult is the decision about whether to anticipate and address arguments that the other side has not really made, but that you think could expose a weakness in your case. Can you be certain that the opponent has overlooked the point, or have they held it back so as to move in for the kill at the hearing? There may be an indication in the pre-hearing correspondence that things are starting to move in a new direction. In this case, it may be wise to address this in your own opening. Otherwise, it will seem counter-intuitive in many cases to raise an unhelpful argument that the opposing side has not even made. However, this does not mean that the issue can simply be ignored: the other side may still jump on it, or the tribunal may raise it of its own volition. As a result, you need to be prepared in two important ways. First, you need to have a response if it comes up after all. Second, and this is sometimes overlooked, you need to articulate all your existing arguments, and your presentation as a whole, in a way that is consistent with your potential response on the new point. In other words, you need to think through how this argument, if it were raised, affects your case – and then present your case accordingly so that, when it comes up, it 'fits' into your overall presentation.

Your job is both easier and more difficult if you represent the respondent. It is easier because you do not have to make a decision in advance of whether to address every single argument; it is more difficult because you will have to make that decision on the spot, immediately after the claimant has presented its opening submission.

This is best dealt with through detailed preparation. Like the claimant, you will start by preparing your opening through the lens of presenting your case in the best possible way. In fact, it will be important not to become too distracted by what the claimant is going to do. Your job is not simply to respond to what the claimant will say but to set out a case that is entirely your own: a different narrative of what happened and issues that the claimant has conveniently left out. It is not enough to say that the claimant is wrong; you also need to persuade the tribunal that your client is right. This will often require a different structure. Assume the claimant has a strong case on the facts, but faces serious issues on the legal issues, such as the statute of limitations and liability restrictions. The claimant has done a wonderful job of laying out the facts of the case, but has struggled with the statute of limitation. Do you want to play the claimant's game or invite the tribunal to join you on a different playing field?

Having established the best way to present your case, you will then start to think how the claimant's arguments fit into your narrative and at what point to address them. You will prepare a response to every argument, but you will not necessarily advance all these responses at the hearing. Instead, you will react to what the claimant has done in its opening. Having prepared for every eventuality, you now have room to manoeuvre. The claimant makes exactly the argument you anticipated? You are prepared and will respond. The claimant places more emphasis than in the written submissions on a particular argument? You are prepared and will respond. The claimant places less emphasis on a particular argument than in the written submissions? You are prepared and can respond in multiple ways: you can compliment the claimant on having effectively dropped what was an unavailing argument in the first place, and then shorten your substantive response as well; or you can hit back all the harder and spend extra time with this point. Within the framework you have prepared in advance, you now have flexibility.

Having said that, the worst opening presentations of a party are those that do not engage with the other side's case. Of course, it is important to impose your own view and narrative on the case, but if, as respondent, you do so without addressing the opposing view, it may soon start to look like you have no answer. A good tribunal will pay attention to what is said, but will also take notice of what is omitted.

Responding to the opposition's opening submission

In some cases, although this seems to happen less and less, the parties are given the opportunity to make rebuttal statements in a second round of opening submissions. These are often severely restricted in terms of available time. Here, you will be short and to the point, and address the major points you need to rebut one by one. Many counsel waste the opportunity of an oral rebuttal by addressing points that are not material to the outcome of the case. Choose carefully, based on the notes you will have taken during the other side's presentation. If needed, ask for a short recess to prepare your rebuttal.

Dealing with tribunal questions

Questions asked by the tribunal are of particular importance, as they can offer a view into the tribunal's thinking. It is vital to view these questions as opportunities to emphasise a point or correct a misconception on the tribunal's part – they may be the last and only chance to do so.

A demonstration minus instructions equals a distraction

Demonstrative exhibits can help simplify abstract concepts or distil voluminous information, but they must be used judiciously to be effective. Also, make sure to explain the exhibit and its relevance; displaying an exhibit without discussing how it should be read or interpreted will be a distraction at best and cause confusion at worst. The tribunal may end up studying the exhibit instead of listening to your remarks, rather than reviewing it along with and in support of your remarks. Think about how to present the information most clearly and succinctly. This may include orally walking the tribunal through the demonstration: 'As you can see in the handout, your analysis should consist of three simple steps.' Alternatively it could mean telling the tribunal to set it aside for now and listen to your remarks: 'For the tribunal's assistance later, we have prepared a short chronology and a decision tree. But in the interest of time, I don't propose to discuss this now; you can set it aside until you consider it useful to study.' The main lesson is to make sure the tribunal understands how and when you wish it to use the exhibit, so the document furthers the objectives of your oral advocacy rather than hampering it.

– Jean Kalicki, Arbitration Chambers

Tribunal questions carry the highest potential to be surprising. You will have carefully studied the opposition's papers and so should be able to anticipate their position at the hearing. Not so with the tribunal: the hearing may well be the first time you are engaging the merits with the tribunal. You don't know with any certainty what is on their minds, and their minds may be wandering into uncharted territory. Something that appears minor to you, or indeed to both parties, may have particular significance in the tribunal's view.

This is where all the hard work and effort spent on your preparation will pay off. Knowing the file will enable you to nimbly navigate the record and react to unforeseen questions from the panel. Without preparation, you will struggle. Even with the best preparation, however, you may encounter a question to which you have no obvious answer. It is dangerous to improvise in this situation, as too much may depend on a correct and persuasive response. It may, therefore, be better to ask for leave to address this question subsequently. Indeed, questions from the tribunal deserve particular attention when you prepare your post-hearing submissions.

Be not afraid to disagree. This is not to encourage you to be argumentative, let alone disrespectful. But if an arbitrator asks you a question that is based on a flawed premise, whether factual or legal, you must correct it. If an arbitrator pounds on a weakness, you must put this point into a more helpful context. Even if you do not persuade the arbitrator who asked the question, you may still be able to reach the two other members of the tribunal.

Particular subject matters

Some subject matters come less naturally to lawyers and present special challenges. As discussed above, these subjects present an opportunity to involve another speaker in the presentation who has particular expertise and experience with this aspect of the case. In any event, much can be done through proper preparation.

PowerPoint can divide the arbitrator's attention

Never put the words of your argument into PowerPoint. Slides can provide an effective and persuasive means of conveying the sort of information that can be captured in a photograph, or a map, or a graph, or a diagram. They can be the most efficient way to draw a tribunal's attention to the precise words of an important document. They are essential in helping a tribunal to make sense of numbers. But the advocate who attempts to argue with the words he is saying displayed beside him may as well have put a bag over his head. He has, the moment the slide goes up, surrendered the control he would otherwise exercise over the tribunal's attention, which is thereafter split between him and his slides. Worse, because most tribunals ask for copies of the slides so that they can take notes on them during the argument, the tribunal's attention is divided between what the advocate is saying and what he or she plans to say next, because arbitrators, and especially bored arbitrators, cannot be restrained from reading ahead.

– John M Townsend, Hughes Hubbard & Reed LLP

Legal submissions

In national court proceedings, presenting on the law is a lawyer's central prerogative. This becomes more difficult in international arbitration where the lead advocates, and often the arbitrators, are not trained in the applicable substantive law and so have to apply a law other than their own.

From counsel's perspective, this is a particularly good opportunity to closely involve a local lawyer or expert, certainly in the preparation of the opening submission but perhaps also in its presentation. You want to be able to speak with confidence, and you will need some assistance to do so. If you involve a local expert or counsel, his or her intervention will also have to be meticulously prepared, including when the local lawyer's first language is not the language of the proceedings. It is also conceivable to conduct the legal presentation as a tag-team, with the (foreign) lead counsel making the big thematic points and the local lawyer filling in the important details.

As always, it is important to consider the tribunal's perspective in this regard, in particular if one or more tribunal members are (also) not qualified in the applicable law. You need to relate the legal submissions to them in a way that is easily accessible. Imagine, for example, that you are presenting a legal argument under a civil law system to a common law tribunal. You need to understand whether the civil law concept on which you are relying has a corresponding feature in common law, or whether there is a real difference in concept or outcome. Depending on the situation, you may then say that what you are proposing is not so different from what the arbitrators know from their own system, or, if there is a difference, explain this difference in terms that make the argument compelling.

In any case, your legal argument ought to be simple and clear: it should both explain the rule (normative theory) and why its application in this case makes sense (persuasive theory). Particularly when operating in foreign legal systems, arbitrators will hesitate to apply a legal rule in a way that creates unfair or inappropriate outcomes. This is not necessarily a matter of applying equities rather than the law as it stands, because most legal systems have a way

to avoid unfair outcomes in the first place. As a result, it is rarely persuasive to rely on a (formal) rule without recognising its rationale and applying it to the case at hand.

Technical submissions

It is one of the privileges of international arbitration that it offers you the opportunity to engage with many different industries and businesses around the world. You need to maintain the willingness to learn something new if you are called on to present technical matters. For some lawyers, including those with a background in science, this comes easily; the rest of us just have to work harder – you cannot explain what you do not understand yourself.

This is even harder for the arbitrators. In your preparations, you will have had the opportunity to consult an expert or your client and ask any question you like to gain a thorough understanding of the issues. The arbitrators' preparation, on the other hand, will have been limited to the written submissions and reports. It is therefore even more important than normal to keep it simple and accessible. Set out the basics and then take the tribunal step by step through the technical issues until you have set out the decisive points. In technical matters, it may be a good idea to use examples that illustrate what you are talking about.

PowerPoint presentations, visual aids and demonstratives

Illustrations can be powerful tools for helping you to make an impression. They can be used during the opening submissions, as part of a PowerPoint presentation, or (in a physical hearing) as stand-alone posters; and they can resurface during the hearing, for example in the examination of witnesses.

With today's technical possibilities, examples can be much more than an illustration in PowerPoint. From animated movies that show chemical processes unfold to physical objects, such as models and equipment, the possibilities are as endless as your imagination

Cartoons, films and non-traditional sources are okay

In the right case, look for opportunities to illustrate your points by references outside the standard legal sources. In one case, the other party contended that the transactions we were trying to enforce were illegal even though its lawyers and bankers had been fully involved in putting them together. To emphasise the hypocrisy, and to take advantage of the professional credibility of those lawyers and bankers, we played a clip from the classic movie *Casablanca*. You may recall the scene in which, after a rousing rendition of *La Marseillaise* led by the resistance leader Victor Laszlo, the local French administrator, Captain Renault, announces the closure of Rick's Café Américain on instructions from the German officers present. When Rick, played by Humphrey Bogart, objects, Captain Renault states: 'I'm shocked, shocked to find that gambling is going on in here!' The croupier then emerges from the back room and hands Captain Renault a wad of cash – 'Your winnings, sir.' We waited until the last moment to decide whether to play the clip, but when our adversaries used a *New Yorker* cartoon in their opening, we jumped. We orally set the scene in the movie and then played the clip. It punctuated our point in Hollywood-dramatic, if untraditional, fashion. We had a complete win.

– Donald Francis Donovan, Debevoise & Plimpton LLP

Take the rocket science out of quantum

Quantum submissions are often extremely frustrating for the arbitral tribunal. The parties devote hundreds of pages to factual and legal arguments and, once they come to quantum, their presentation is often limited to a few pages. They limit themselves to a reference to the expert reports which, in many cases, are too technical and not easily understandable without further explanations by counsel. As they do for their other arguments, the parties should argue their quantum claims in a detailed and easily understandable manner, step by step, making it easy for the arbitral tribunal to understand the logic of their reasoning from A to Z.

– Bernard Hanotiau, Hanotiau & van den Berg

and your budget will allow. The overarching objective, of course, is to make difficult aspects of the case easier for the tribunal to grasp. This is particularly important in remote hearings; PowerPoint and other presentation software are naturally suited to the shared screens of a remote hearing, and having visually engaging presentations is an effective way of keeping the tribunal's attention. Consider, for example, screen-sharing a quantum model and manipulating it as part of the opening by changing the assumed input – the numbers literally come to life.

Even a good, old-fashioned PowerPoint presentation allows you to summarise your important messages as bullet points; they provide structure to your presentation (and can be an aide-memoire to guide you); they can contain quotations from important documents or case law (which you then don't have to read into the record in their entirety); and they can contain illustrations and graphs to illustrate your presentation.

Many arbitrators, perhaps overwhelmed by too much material to appreciate another 300-page document, will argue that the presentation should not be too long and should cover only what you are actually presenting at the hearing. One should accept a degree of flexibility, however. You may be spending more time than anticipated on certain issues (including because you have to respond to questions from the panel) and so are unable to cover all your slides. Indeed, you should be allowed to prepare some slides specifically for

Overcomplicating is never of help

The prime objective of oral advocacy should be to provide the tribunal with the information it needs to determine the substantive issues for determination in the arbitration. This may include the background to the dispute, the key issues on which the parties disagree and why, guiding the arbitrators through the relevant documents and evidence that support each party's case, and why the remedies sought are relevant and appropriate in the circumstances of the case.

Overcomplicating the dispute or focusing on the personal angst between the parties is never of help to a tribunal. Excessive use of adjectives, adverbs and general exaggeration of the adverse parties' alleged performance, actions and arguments will not assist the merits of the case.

– Julian Lew QC, Twenty Essex Chambers

the contingency that the tribunal has questions on these points, which they may not. It is important, however, to restrict the content of each individual slide. Too much information that the audience cannot easily follow in addition to listening to you is overwhelming and counterproductive. It is also advisable to hand out (or email) a hard copy of your presentation before you commence the opening. This encourages the tribunal to take notes on your PowerPoint presentation while you are presenting, and return to it in deliberations.

Quantum submissions

These considerations hold true for submissions on quantum as well. Perhaps even more so; many lawyers – counsel and arbitrators alike – have a tendency to delegate issues of damage quantification to the experts. For counsel, this is unacceptable. Having ultimate responsibility for the case and its presentation, you cannot leave such an important aspect of the case to an external expert. What good is it to win on the merits if you fail to recover the appropriate amount of damages for your client? As a result, you have to be fully engaged on the issue of quantum, and with your quantum expert, both on substance and presentation.

Here, too, simplicity is key. Most damages calculations proceed according to a 'model' developed for the particular case. You need to break down that model into its constituent parts; explain how these parts relate to each other and which parts have a significant impact on the overall outcome; and, on the basis of the individual parts, address any differences in opinion between your model and the opposition's approach. In other words, you have to provide the tribunal with the tools to make adjustments to your calculation without disregarding the entire model altogether. This is also a good opportunity to use examples and illustrations.

5

Direct and Re-Direct Examination

Anne Véronique Schlaepfer and Vanessa Alarcón Duvanel[1]

Direct examination

Formerly, a chapter discussing direct examination in international arbitration would have been seen as devoid of any interest, since direct examination is in most cases substituted by witness statements, the witnesses appearing at the hearing for the purpose of cross-examination and to answer questions asked by the arbitral tribunal. (Re-direct examination remains available, of course, but although its difficulty is often underestimated, it is hardly a controversial exercise.) Nowadays, direct examination is of renewed interest, as a result of various publications advocating the practice of oral direct examination at the hearing in place of witness statements, which are sometimes considered as pure-lawyer products and therefore useless to decide a dispute.

For the purposes of this chapter, we first review some of the main advantages and disadvantages of oral direct examination and witness statements. We then turn to the preparation and performance of oral direct examination and briefly address the preparation of witness statements since these also constitute, in the broad sense, examination in chief.

Advantages and disadvantages of oral direct examination and witness statements

One of the main advantages of international arbitration is that parties and arbitral tribunals are free to define the procedure as they deem fit for the case at issue.

Among other things, this means that parties and arbitral tribunals may organise their hearing as they see fit. In particular, they may decide whether witnesses will be heard and, if so, if direct examination will be conducted orally at the hearing or will be replaced by witness statements submitted in advance (with oral direct examination excluded or significantly limited).

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Ideally, witnesses should testify in the language of the arbitration

To the extent possible, witnesses should testify in the language of the arbitration. If they are not fully conversant in that language, they should be assisted by a translator who will help them whenever necessary. Systematic translation (in particular consecutive translation) should be avoided as much as possible. You lose a lot in terms of content and understanding of the witness's message. Counsel sometimes think that, for strategic reasons, it is better to have the witness testify in his or her native language. I firmly believe that this is wrong, as long as, of course, the witness is able to speak reasonably well the language of the arbitration.

– Bernard Hanotiau, Hanotiau & van den Berg

Excessive freedom being often a source of anguish for human nature, practitioners have developed over the years the practice of submitting witness statements.[2] These documents are meant to replace oral direct examination at the hearing. The witnesses are summoned to appear at the hearing only to be cross-examined by counsel representing the opposing party and to be asked questions by the arbitral tribunal. Counsel for the party that submitted the witness statements retains the option of asking questions in re-direct examination. This trend is reflected in the IBA Rules on the Taking of Evidence in International Arbitration:

> *The Parties may agree or the Arbitral Tribunal may order that the Witness Statement or Expert Report shall serve as that witness's direct testimony.*[3]

This practice is currently being challenged by practitioners who support direct examination at the hearing as a more appropriate means for arbitral tribunals to determine the value and weight of the testimony given by the witness. Direct examination would allow arbitral tribunals to better understand the case at issue and would render the hearing more lively and interesting. Moreover, arbitral tribunals would remember more easily the story told in the witness's own words than the content of often lengthy, and boring, witness statements written by lawyers.[4] They would also be in a position to direct the witness to the issues that matter and avoid the irrelevant testimony often contained in witness statements.[5] In short, the suggestion would be to abolish witness statements altogether and to replace them with direct examination.[6]

2 Doak Bishop, 'Towards a Harmonized Approach to Advocacy in International Arbitration' in *The Art of Advocacy in International Arbitration* (Doak Bishop, Edward G Kehoe, eds.), p. 480.

3 International Bar Association [IBA], Rules on the Taking of Evidence in International Arbitration (2010), Article 8, Paragraph 4; see Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration, p. 24 (available at www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx).

4 GAR Live Stockholm, 15 April 2016, 'Should witness statements be abolished?': Christer Danielsson, alongside John Fellas, arguing the motion for the abolition of the current automatic use of witness statements (see http://globalarbitrationreview.com/news/article/35232/should-witness-statements-be-abolished).

5 ibid., arguments put by John Fellas.

6 ibid.

By contrast, supporters of witness statements advocate their efficiency in significantly reducing the duration of the hearing and in providing clear explanations, formulated in a language that arbitrators understand.

Without entering into a lengthy discussion of the pros and cons of witness statements versus direct examination at the hearing, we consider it useful to highlight the following:

- Direct examination instead of witness statements may appear adequate in given cases, but it is unlikely to become the norm. Direct examination would more than double the duration of hearings (one would need to take into account the duration of the direct examination itself and the necessary time to adapt the cross-examination and the questions from the arbitral tribunal to the content of the explanations given in direct examination). Given the concerns expressed nowadays by parties as to the duration and costs of international arbitration, the future of direct examination at hearings does not look particularly bright.
- The fact that arbitral tribunals would hear the explanations directly from witnesses in their own words (instead of reading a statement) is no guarantee that the explanations will be any clearer, more focused and relevant; and more lively. Counsel and witnesses who are confused when writing will probably not perform any better orally. This becomes even worse if they are not well prepared for the hearing. Moreover, the idea that arbitrators would be able to direct the witness to the relevant issues and be more efficient may prove theoretical, particularly in complex cases. Witness statements help arbitral tribunals determine in advance which aspects of the dispute are known to the witnesses, their field of expertise, etc. This preparatory work, which allows arbitral tribunals to identify in advance relevant questions, is not possible (or at least is made more complex) without witness statements.
- Not all witnesses are fluent in the language of the arbitration and interpretation is often unprecise, especially when the testimony relates to complex technical issues. The advantage of hearing a witness's own words is seriously reduced if the witness has difficulty finding the right words or needs an interpreter.
- As to the criticism that witness statements are merely documents drafted by lawyers and therefore of no evidentiary value, in most cases this is incorrect. Even if counsel is involved in the drafting of a witness statement, the ideas and the knowledge are (or should be) those of the witness. Often, the latter's personality transpires through the text of the witness statement. In short, witnesses are not puppets and witness statements should reflect what they have to say about the case at issue. Otherwise, the risk is significant that their oral testimony during cross-examination will differ from their witness statement, even if the cross-examiner is not particularly talented. A witness statement that does not reflect the witness's ideas and understanding of the case is a recipe for failure. If done seriously, preparation of witness statements is actually part of the hearing preparation.[7]
- There is nonetheless another reason that would militate in favour of some direct examination. Arbitral tribunals often test witnesses' credibility and the reliability of the explanations contained in their witness statement during cross-examination and by their own questions at the hearing. If a witness is not called to be cross-examined, there is a

7 ibid.

The value of direct examination

In my experience, it is usually a good idea to conduct a direct examination. The tribunal can benefit from hearing the witness make his or her main points in his or her own words.

A brief direct examination is usually sufficient to remind the tribunal of the witness's main points and to allow the tribunal to begin to assess his or her credibility.

– Stanimir A Alexandrov, Stanimir A Alexandrov PLLC

A missed opportunity

Written witness statements may save time and money, but to the extent they fully supplant oral direct testimony, they come at a price. As much as a witness may have been rehearsed in anticipation of oral direct testimony, he or she nevertheless speaks directly to the tribunal and creates an immediate impression of veracity and persuasiveness – or not. All that is lost in a written witness statement whose authorship might well be counsel's, not the witness's. Yes, even with written witness statements, witnesses perform orally on re-direct, but that may come a bit late.

As arbitrator, I frequently invite counsel to supplement their witness statements with brief direct questioning of up to 20 minutes so as to allow the witness to engage in at least a modicum of self-presentation and to underscore a few key testimonial points. To my surprise, counsel decline that invitation more often than not, giving the witness an opportunity to do nothing more than make one or more corrections or amendments to the witness statement.

This is a missed opportunity. I urge tribunals to issue such invitations and urge counsel to avail themselves of it.

– George A Bermann, Columbia University School of Law

risk that the written testimony will be forgotten, especially if several other witnesses are heard during the hearing. It may therefore be a strategic decision not to call a witness for cross-examination. Moreover, it may also be interesting to hear a witness speak 'freely' about specific issues before being cross-examined.[8] This is why some arbitral tribunals allow limited direct examination before cross-examination, even if a witness statement has been submitted.

Determining whether to examine a witness or file a witness statement

Whether the testimony is made orally at the hearing or by means of a witness statement filed in advance, there are some key issues counsel needs to consider when selecting witnesses.

First, it is important to determine who knows what. It is not particularly wise to have an individual testify on a given subject when it is obvious that somebody else would be better placed to do so. Presenting a witness is a strategic decision. Counsel needs to identify the added value that the testimony will bring to the case, as well as the risks involved.

8 See Marinn Carlson, 'The Examination and Cross-Examination of Witnesses' in *Arbitration Advocacy in Changing Times* (A J van den Berg, ed.), ICCA Congress Series, 2010 (Kluwer Law International, 2011), p. 204.

Second, it is necessary to check a witness's recollection of the facts and understanding of the (for instance, technical) relevant issues. Counsel needs to listen to what the witness has to say about a given topic. Verifying that the witness's memories match the documentary evidence is of key importance. Without any hint of bad faith, one's recollection of facts or impressions might significantly differ from the record. If that is the case, this needs to be identified early on, before the decision is made to file the witness statement or to carry out a direct examination of the witness.

Third, even if a witness statement is filed, counsel needs to check whether the witness is able to orally address the issues at stake. (Even if there is no direct examination, the witness may have to do so during cross-examination or in response to questions put by the arbitral tribunal.)[9] Is the witness convincing? Is the witness able to make a clear statement using words that arbitrators understand and to answer a question without volunteering information that is either not requested or, worse, damaging? Has the witness mastered the language of the arbitration?

These points need to be assessed before the decision is made to select a witness.

The purpose of direct examination and witness statements

The purpose of direct examination and witness statements is to convince the arbitral tribunal that the position of the party presenting the witness is correct. Hence, the testimony (be it oral or in writing) must be clear, coherent and consistent with other means of evidence on record.

As indicated above, even when witness statements are filed, the procedural rules may provide that a short direct examination of the witness may take place. In most cases, the duration is limited; it is often no longer than 30 to 45 minutes. In such cases, it is for counsel to determine whether to perform any direct examination and, if so, on what issues.

The 10-Minute Rule

All too often, counsel will agree that written witness statements 'shall stand as witness's evidence in chief'.

Of course this saves time. But spending 10 minutes with your own fact witnesses, taking them through the highlights of their testimony by direct examination will allow them to settle into an unfamiliar setting; remind (one hopes not introduce) the tribunal of the highlights of their testimony; and create (one hopes) a favourable impression.

In the case of experts, wise counsel will seek a provision in Procedural Order No. 1 to allow an expert 15 to 20 minutes to provide an oral overview of how he or she approached his or her report; to highlight the important conclusions reached; and to indicate important reasons why there is disagreement between experts of the same persuasion. The effect is to remind the tribunal of the essentials of the expert's report.

– J William Rowley QC, Twenty Essex Chambers

9 R Harbest, 'Direct Examination' in *A Counsel's Guide to Examining and Preparing Witnesses in International Arbitration* (Kluwer Law International, 2015), p. 49.

Address embarrassing facts in direct examination

With the generalised use of witness statements, the importance of direct examination is often underestimated. It is a serious mistake. When discussing with the arbitrators the presentation of evidence at the hearing, counsel should always insist on a short direct examination of at least 15 minutes. As a warming-up exercise, direct examination is indispensable. Lawyers with an experience of being cross-examined limited to mock cases have no idea of the stress of the person giving evidence for the first time. The bull entering the fighting arena knows the feeling. Answering some questions from a known and friendly face before being put on the grill is always comforting. Second, when counsel is aware of facts that may be embarrassing for the witness, there may be an advantage in addressing them first in direct examination, so as to obtain explanations that the witness might be not able to give spontaneously in cross-examination. In any case, the cross-examiner will lose any effect of surprise that could have impressed the arbitrators and his or her task will be more difficult. It is particularly useful in matters of credibility.

I will never forget a construction case in which an engineer of the constructor had not indicated in his witness statement that he had divorced the daughter of the CEO of the owner seven years before starting his work for the constructing firm. In direct examination, counsel asked the witness: 'Do you know Mr Smith, the CEO of the owner?' The witness answered 'Yes, he was my father-in-law for five years.' Laughter in the hearing room. Then counsel asked: 'Was he a nice father-in-law?' Answer: 'Very nice indeed, I like him very much.' Next question: 'Why did you not mention that fact in your witness statement?' Answer: 'Because it has nothing to do with this case.' This was a good job. How could counsel for the other side then have raised the issue in cross-examination to suggest that his unfortunate marriage had left a grudge against his client in the witness' mind?

This is an exceptional example, but the tactical approach may be reproduced in more ordinary situations: an embarrassing letter that is on the record and has not been mentioned so far, the existence of a meeting that the witness participated in and where decisions were taken that do not help your client, and so on. Yet, besides the issues of credibility or impeachment of the witness, which can be raised freely in cross-examination, a caveat is necessary depending on whether or not the scope of cross-examination has been limited by the arbitrators to the content of the witness statement. If not, do not hesitate: attack before being attacked. If it has been limited to the content of the witness statement, be prudent. You must assess whether the embarrassing fact can be linked with issues that the witness statement deals with. If not, refrain. Otherwise, you could open a window through which the cross-examiner could touch issues he or she is not authorised to entertain at the hearing.

–Yves Derains, Derains & Gharavi

In some cases, procedural rules provide that direct examination must be limited to correcting errors contained in the witness statements or to addressing issues that could not have been addressed at an earlier stage. This may be the case, for instance, if new facts have arisen since the last filing of witness statements, or if some issues have been addressed for the first time in the opposing party's last submission, without the witness being given the opportunity to comment on them in writing.

Quantum experts tend to be too long, too technical

Determining the quantum of a claim is a very complex exercise for the arbitral tribunal. It needs therefore to be assisted by the quantum experts and counsel as much as possible. The parties sometimes feel frustrated by the reasoning of the tribunal on quantum in the award. In the first place, they should blame their counsel and experts. Quantum experts tend to be too wordy, too technical and unable to clearly express their reasoning in terms that are easily understood by laymen, and this, even in the so-called didactic presentations before their cross-examination.

Counsel, on the other hand, tend not to include enough developments in their submissions, such as post-hearing submissions, on a clear, step-by-step presentation of their quantum claims. Substantial efforts should be made on both sides.

Tribunals should also request that quantum reports presented by the respondent should not be limited – as they often are – to a criticism of claimant's quantum report but should always provide alternative calculations.

As for language, what I have said concerning translation of witness evidence is even more important in relation to expert evidence. Having a technical or quantum expert testify in a language other than the language of the arbitration is a big mistake, if not suicidal.

– Bernard Hanotiau, Hanotiau & van den Berg

The scope of direct examination may also be a little broader and allow witnesses to address a few the key issues in their statements.

As long as direct examination is limited to correcting errors in a statement, it is not a very risky exercise. In fact, correction of errors is important and the witness should always be up front about them. In addition, correction may defuse the harmful effect of a line of questions on cross-examination designed to highlight the contradiction.[10]

When it comes to addressing new points or to developing aspects addressed in writing in the witness statement, the difficulties linked to the conduct of direct examination should not be underestimated. Very often, one hears that direct examination is a good warm-up before cross-examination and a good opportunity to score points when the witness is still relaxed.

In reality, most witnesses are not relaxed at the beginning of their examination. Even if the question is put by the counsel they know, with whom they have been preparing for the hearing, it may not be that easy for witnesses to express themselves clearly at that specific moment. Hence, it is important to define before the hearing whether it is opportune to have any direct examination and, if so, to determine with the witness what questions will be asked and in which terms.

Moreover, arbitral tribunals do not appreciate direct examination that is a mere repetition of what is in the witness statement or that gives rise to unclear answers. In such cases,

10 See Nigel Blackaby, 'Direct and Re-Direct Examination of Witnesses' in *The Art of Advocacy in International Arbitration*, (Doak Bishop, Edward G Kehoe, eds.) (Juris, 2010), Chapter 15, p. 392.

How to prepare a witness statement – properly

The most careful written work that an advocate in international arbitration must handle is not the memorials, but rather the fact-witness statements, and, depending upon the expert witnesses' experience, perhaps also their reports.

Much damage has been done to fact witnesses on cross-examination by counsel's lack of care in the preparation of their written statements. The most disastrous such experience I have known as arbitrator was when a less-developed country respondent government chose to staff the case entirely with its own in-house lawyers. A key government witness on cross-examination was repeatedly questioned about each paragraph in his written statement, which was exceedingly strongly worded. At each paragraph, he was asked, 'Did you really mean to say that?', and each time he responded along the lines of, 'Well, I would have preferred to say it less sharply.' When finally asked, 'If you didn't agree with the language of your statement, why did you sign it, saying it was truthful?', the witness turned, pointed to one of the government's in-house counsel and exclaimed, 'Because when he called me to come to his office to sign my statement, he said I had to sign it as is because it had already gone to the other party!'

Follow these rules:

A Have the witness write out his or her own statement first, in the witness's native language (unless truly fluent in the procedural language(s) of the arbitration) after discussing its expected contents.

B Review it with the witness to ensure that it does what it is intended to do. Any revisions should be fully approved by the witness so that the statement truly represents his or her testimony. Only then can it be signed.

C Then have any necessary translations done and certified.

The ultimate goal is for the witness to be able to say that he or she wrote that witness statement himself or herself, that counsel then reviewed it with the witness, that any modifications were made with the full agreement of the witness, and thus that it was not 'written by the lawyers' and stands as the witness's own statement. Period!

– Charles N Brower, Twenty Essex Chambers

no points will be scored and the arbitral tribunal will mainly be waiting for the real exercise, namely the cross-examination.

Incidentally, if witness statements are sometimes considered an additional submission made by lawyers, direct examination may create the same impression if the witness merely repeats words learned by heart during hearing preparation.

To sum up, if witness statements have been filed, direct examination must take place only when it is useful, for instance to correct an error, explain a document that is unclear, or complete the testimony, or when specific issues have arisen after the submission of the witness statements. A clear explanation given in direct examination may be powerful and prevent the same issue being addressed in cross-examination if the cross-examiner gets the impression that the point is settled and that nothing will be achieved by addressing it again.

Open or leading questions?
It is critical to know the backgrounds of your arbitrators

Whether to ask leading questions if given an opportunity to conduct a direct examination is one of those questions where it is critical to know the backgrounds of your arbitrators. Common law lawyers are likely to view putting leading questions to a witness on direct examination as inherently unfair and improper. Even if they allow you to do it, they will discount the testimony, because they will consider it essentially to have been fed to the witness by the lawyer. Civil law lawyers are less likely to care, because they generally give less weight to witness testimony.

– John M Townsend, Hughes Hubbard & Reed LLP

Performing direct examination

As has been indicated, in most cases, namely when witness statements have been filed, direct examination introduces the witnesses and, sometimes, shows that they have mastered the issues addressed in their statement. This may help form the arbitral tribunal's opinion on the case.

Direct examination is the opportunity to bring the case to life with witnesses who are using their own words and expressions to bring a human face to the story.[11] Studies of the psychology of decision-making have shown that first impressions will stay in the arbitrators' mind and colour their reception of information heard later during cross-examination.[12] To achieve this, direct examination must be dynamic, structured and meaningful. Counsel must showcase the witness and ask simple open questions. Put in simple terms, in direct examination, the witness must do the talking, not counsel, who should nonetheless maintain control over the substance of the testimony.

Clear, short, factual and direct questions help to control the witness. In particular, they prevent an overconfident witness from embarking on a long narrative answer covering many facts, which generally leads to more confusion than clarification for the arbitrators. The persuasive value of a testimony is diminished if the witness cannot remember the question at the end of a convoluted answer.

Contrary to what some practitioners believe, there is no rule that prohibits the use of leading questions in direct examination in international arbitration. However, leading questions are tantamount to oral argument by counsel. The arbitral tribunal may therefore assess

11 See M A Cymrot and P M Levine, 'Going First Makes a Difference: Decision-Making Dynamics in Arbitration', *TDM*, Volume 12, Issue 6, November 2015, pp. 1 and 2; Marinn Carlson, 'The Examination and Cross-Examination of Witnesses' in *Arbitration Advocacy in Changing Times* (A J van den Berg, ed.), ICCA Congress Series, 2010 (Kluwer Law International, 2011), p. 203.

12 See R Waites/J Lawrence, 'Psychological Dynamics in International Arbitration Advocacy' in *The Art of Advocacy in International Arbitration*, pp. 109 and 110; see also R Harbest, 'Direct Examination' in *A Counsel's Guide to Examining and Preparing Witnesses in International Arbitration* (Kluwer Law International, 2015), pp. 36 to 38 and 52 to 62, which discuss the psychology of decision-making, including the cognitive biases and confirmation bias of the human being, the principle of anchoring and its application to arbitrators. See also M A Cymrot and P M Levine, 'Going First Makes a Difference: Decision-Making Dynamics in Arbitration', *TDM*, Volume 12, Issue 6, November 2015, pp. 4 to 7.

the quality of counsel's presentation, not the evidentiary value of the witness's testimony. As a result, leading questions defeat the purpose of direct examination.

Counsel's preparation for direct examination

In direct examination, lawyers must know the answers to their questions, which requires a good level of preparation.

Direct examination is the only witness examination that can be fully prepared in advance. Structure, knowledge and fluency are critical to efficient direct examination. Conversely, a lack of preparation may lead to a disorganised examination and more confusion for the arbitrators. Counsel's preparation also impinges on the witness's credibility and the persuasiveness of the testimony. To be adequately prepared, counsel should do the following:

- Identify the objective of the direct examination.
- Establish the key points that must be proven through the witness.
- Be clear about what the arbitrator should believe after hearing the witness.
- Identify which issues are worth addressing in direct examination.
- Study the documentary evidence and allegations contained in the submissions filed by the opposing party that relate to the witness's testimony.
- Identify some key documents that may be commented on by the witness in direct examination.
- Structure the direct examination in a clear and convincing manner. Strong points should be at the beginning or the end of the direct examination, as arbitrators tend to remember best what they heard first and last.[13]
- Keep the questions short and simple (one proposition per question). Questions in direct examination should be open-ended, to give witnesses the opportunity to express themselves. Witnesses, who are not led by the question, must be able to understand what is expected from them.
- Practise before entering the hearing room. For instance, conducting a mock examination may be useful. It is a good opportunity for counsel to adjust questions if they appear unclear and for the witness to make sure that he or she is able to convey the message clearly.
- Direct examination should be well rehearsed. Nonetheless, counsel needs to listen carefully to the witness to be able to react if a follow-up question is needed or if it appears that the witness is not performing under pressure as expected (which may imply that direct examination should be stopped).

In the event that no witness statements have been filed, the order of appearance of the witnesses is another important aspect of direct examination. When witness statements have been filed it is for the cross-examiner to define the order (taking into account contingencies such as the witness's availability).

13 R Harbest, 'Direct Examination' in *A Counsel's Guide to Examining and Preparing Witnesses in International Arbitration* (Kluwer Law International, 2015), pp. 52 to 59.

Witness preparation for the hearing

It is now generally admitted that lawyers in all jurisdictions may prepare witnesses. For instance, the IBA Guidelines on Party Representation in International Arbitration provide that a 'Party Representative may . . . meet or interact with Witnesses and Experts in order to discuss and prepare their prospective testimony'.[14]

In fact, in international arbitration witness preparation is not only permitted but considered a duty of the lawyer.[15]

Testifying in an international arbitration is not something many people look forward to. In fact most potential witnesses are intimidated and stressed at the idea of being asked questions by lawyers and arbitrators. Pre-hearing preparation is therefore essential and should cover both the content of the examination and the witness's familiarisation with the arbitration process.[16]

If it is improper to tell witnesses what to say, counsel can assist them in preparing how to communicate persuasively what they know about the case.[17]

First, it is important for the witness to review the witness statement and the documents relevant for the testimony. When these documents are too numerous, it is more realistic to ask the witness to focus on the key ones.

Second, counsel needs to meet the witness, explain how the hearing will be organised and discuss, of course, the content of the oral testimony. If counsel intends to refer to exhibits during direct examination, it is good to inform the witness in advance.

Third, counsel needs to evaluate how the witness performs orally. In fact, this should have been done before filing the witness statement. Even if no direct examination takes place, the witness is likely to face cross-examination. It is of the utmost importance to check before filing a witness statement whether the witness is able to answer the questions, to speak clearly, to be convincing, etc. In any case, a rehearsal before the hearing is very useful and may help correct some aspects, for instance if a witness has a tendency to interrupt the person asking the questions or not to listen to questions.

Re-direct examination

Re-direct examination (also called re-examination) is a process available after cross-examination to rehabilitate the witness (if appropriate), correct mistakes, clarify

14 See IBA Guidelines on Party Representation in International Arbitration (2013), Guideline 24, available at www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx. See also Article 4(3) of the IBA Rules on the Taking of Evidence in International Arbitration (2010), available at previous link; Article 20(5) of the Rules of Arbitration of the London Court of International Arbitration (2014), available at www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx#Preamble.

15 R Harbest, 'Preparing the Witness' in *A Counsel's Guide to Examining and Preparing Witnesses in International Arbitration* (Kluwer Law International, 2015) p. 178.

16 ibid., pp. 175 to 176.

17 The number of preparatory stages of the preparation of witnesses for oral testimony as a whole varies among the commentators: see N Blackaby, 'Witness Preparation – A Key to Effective Advocacy in International Arbitration' in *Arbitration Advocacy in Changing Times* (A J van den Berg, ed.), ICCA Congress Series, 2010 (Kluwer Law International, 2011) p. 126, referring to three stages; D Roney, 'Effective Witness Preparation for International Commercial Arbitration: a Practical Guide for Counsel' in *Journal of International Arbitration*, Volume 20 (2003), No. 3, p. 430, listing six stages.

Using re-direct to correct a client's mistake

I was counsel in a court case in Singapore many years ago. My client gave his evidence-in-chief and, in the course of cross-examination, fixed the date of the critical meeting. According to my instructions and the materials available to me, it was clear that my client had made an error. When it was time for me to re-examine, I had a dilemma of how to persuade my client to correct his mistake as to the date without asking him a leading question. In the Singapore courts, following common law principles, it is not permitted to ask leading questions in re-examination, and this rule is reflected to some extent in Article 8(2) of the IBA Rules of Evidence 2010, which disallows 'unreasonably leading' questions. However, our Evidence Act reflecting common law principles does allow a witness to be shown a document for the purposes of refreshing his or her memory. I then decided to find a page from the calendar for that month and had it placed before my client. There were certain milestone events in his chronology that were new and would fix a chronological sequence of events in his mind. I then asked him a series of questions, as follows.

Q Look at the calendar for May 1995. You have given evidence in cross-examination that on 16 May 1995, event (A) occurred.

A Yes.

Q You have also given evidence in cross-examination that on 22 May 1995, event (B) occurred.

A Yes.

Q Look at the calendar. On what day of the week was 16 May?

A Tuesday.

Q What day of the week was 22 May when you said that event (B) occurred?

A Monday.

Q Do you remember whether event (B) occurred before or after the weekend of 13–14 May?

A I remember that it was before the weekend.

Q In your cross-examination, you said that event (B) occurred on May 22, which is after the weekend.

A Yes.

Q In the light of what you have seen on the calendar and the evidence you have just given, what do you say was the date on which event (B) happened?

A I now realise that I made a mistake in my cross-examination. The correct date should have been 18 May, before the weekend.

– Michael Hwang SC, Michael Hwang Chambers LLC

obscurities and uncertainties, refute misleading inferences from cross-examination, and address new issues raised in cross-examination.

Determining whether to re-direct a witness

If re-direct examination is not the most enticing part of witness examination, it is certainly the most difficult. Determining whether to ask questions in re-direct examination requires

To re-direct or not to re-direct?
'It's best to be very cautious'

Whether to re-direct a witness is a very difficult decision for counsel. If a witness's credibility has been attacked in cross-examination, counsel may feel obliged to attempt to restore that witness's credibility through re-direct examination. However, if a witness is panicked and upset after being cross-examined, re-direct questions from counsel may serve only to worsen the witness's flustered state and further harm his or her credibility. Even if the witness has testified well and counsel merely wants to expand upon an area of testimony for the tribunal, re-direct questions may backfire. Depending on a witness's state of mind, he or she may not recognise the intentions of counsel and the witness may assume that he or she has done something wrong and backtrack on his or her testimony. I have seen that happen quite a few times. Thus, it is best to be very cautious when deciding whether to conduct a re-direct examination of a witness.

– Stanimir A Alexandrov, Stanimir A Alexandrov PLLC

Re-direct is a difficult skill

Eliciting from a witness a favourable answer by means of an open-ended and non-leading question in re-direct is a difficult skill to acquire as the opportunities for practice are limited, given the existence of witness statements and the consequent absence of direct testimony in most cases. There are a few tricks that can be employed, such as drawing a witness's attention to a document or providing alternatives from which the witness can choose. Re-direct should only be employed where counsel is reasonably confident of a clarifying or favourable answer, as the danger is that it can just reinforce a bad answer given in cross-examination. Questions should be limited, arise out of the cross-examination only and be selected with care, or the process can backfire.

– Hilary Heilbron QC, Brick Court Chambers

Only re-direct when critical

Only re-direct if the point is critical, otherwise avoid the temptation. Witnesses become stressed trying to work out what point they have missed or answered incorrectly and, in trying to rectify the situation, all too often the witness just digs an even deeper hole.

– Juliet Blanch, Arbitration Chambers

advocacy experience and good knowledge of the case and of the witness. Preparing these questions in the limited time available for that purpose is far from easy.

Re-direct examination takes place after cross-examination, which may last for hours or days and is exhausting for the witness (sometimes even for the other participants, notably the arbitral tribunal). If the witness did not perform well during cross-examination, his or her level of self-confidence may be significantly diminished. These factors must be taken into account before deciding whether to ask questions in re-direct examination.

Re-direct examination is essentially a 'repair job'. It constitutes an opportunity for the witnesses to correct the wrong impression they may have created during cross-examination or, more bluntly, to correct any wrong information they may have given (witnesses may make mistakes during cross-examination).

To assess whether this repair job will work, it is important to determine why it is needed. Various situations may be contemplated.

First, in cases where the cross-examiner deliberately directed the witness to a section of a document without taking into account its whole content, potentially affecting the tribunal's understanding of the document and the answer given by the witness, it may be useful to return to the point and to ask the witness to refer to the document as a whole. The purpose here is not so much to allow the witness to complete the answer (although this is, of course, important), but rather to ensure the arbitral tribunal is aware of the full content of the document. Even if arbitral tribunals regularly repeat that they know the documents on record, in cases where numerous exhibits have been produced, it may be wise to ascertain whether the key ones have been well understood by the arbitrators. Re-direct examination in such cases is relatively easy: if correctly directed to the relevant sections of the document, the witness should be able to answer fully, especially if, during cross-examination, it was apparent the witness wished to be given the opportunity to do so.

Second, if the cross-examiner's question was not clear and it is obvious that the witness did not understand it properly, it may be worthwhile to address again the issue in re-direct examination, provided that the question is put more clearly.

Third, if the cross-examiner has asked a question based on documentary evidence on record but not addressed in the witness statement and, for whatever reason, the witness did not give a complete or convincing answer, the decision whether to come back on the same issue in re-direct examination is more difficult. It will heavily depend on why the answer given seemed unclear or incomplete. If the witness was merely not given the opportunity to develop an answer or if there are other documents on record supporting the answer counsel would wish the witness to give, it may be worth trying to improve the unconvincing impression created by the witness's first answer. If, on the other hand, the unsatisfactory answer is a result of the witness being uncomfortable with the issue at stake, it is better not to reopen it.

Fourth, the most complex situation is where the witness gave an explanation that is either inaccurate, or inconsistent with documentary evidence or with the content of his or her witness statement (or the statement of another witness). The risk is quite significant that the witness will repeat what he or she has already said and further damage the case by confirming, or possibly elaborating on, the first 'bad' answer. As a result, it is often better not to reopen the issue in re-direct examination, especially if counsel knows that the point made in cross-examination concerns a weak aspect of the case or of the witness's testimony.

The foregoing shows not only that counsel needs to be attentive during cross-examination to be able to identify the points that may be worth addressing in re-direct examination and understand any tacit message that the witness may express through body language. It also highlights the importance of witness preparation, which allows counsel to determine the witness's strengths and weaknesses and decide whether re-direct examination on a given point is appropriate.

If counsel decides that re-direct examination is opportune, the following needs to be taken into consideration:

- Again, re-direct examination takes place at a point in time when the witness is already tired and may not be at their sharpest. Long re-direct examination is therefore risky. Moreover, a long re-direct examination often suggests that cross-examination was effective.[18] For these reasons, in most cases, it is better to limit re-direct examination to a few questions.
- Re-direct examination must be within the scope of cross-examination. To clarify for the listeners (and the transcript) that the question concerns a point addressed during cross-examination, it may be helpful to refer to the specific question or document shown during cross-examination. Incidentally, this also helps the witness understand what counsel is aiming at.
- If questions in direct examination must be simple and as short as possible, this is even more important for re-direct examination. The tired witness must be able to understand the question. This is why it is good, when possible, to show the witness a document relating to or illustrating the question.
- The questions must be open to allow witnesses to rebuild their credibility (if needed).[19] As in direct examination, leading questions do not allow the arbitrators to evaluate the answer of the witness. The arbitral tribunal only gets the following negative message: counsel is aware that a point had been made in cross-examination, which needs to be corrected by counsel, who lost confidence in the witness's ability to do so.

Conclusion

If direct and re-direct examination seem less attractive and challenging than cross-examination (young practitioners dream about conducting their first cross-examination, not their first direct or re-direct), these exercises do have strategic importance and form part of the advocacy skills that counsel in international arbitration should have.

Moreover, witness statements should be viewed as part of, or as a means to conduct, direct examination, even if they are in writing. To a large extent, the same concerns should govern the preparation of witness statements and direct examination.

18 See Nigel Blackaby, 'Direct and Re-Direct Examination of Witnesses' in *The Art of Advocacy in International Arbitration* (Doak Bishop, Edward G Kehoe, eds.) Chapter 15, p. 400.

19 ibid.

6

Cross-Examination of Fact Witnesses: The Civil Law Perspective

Philippe Pinsolle[1]

As a right to cross-examine a witness or expert generally does not exist in the civilian tradition of civil procedure (although some right may exist in criminal procedure),[2] an advocate trained in civil law is likely to be unfamiliar with the concept of cross-examination. This, one may conclude, would cede an important advantage in international arbitration to trained advocates trained in common law. Not true. Cross-examination can be learned through experience and observation, and civil law-trained lawyers, just like common law-trained lawyers, can be quite effective at this exercise if they learn properly by watching others. Cross-examiners are found equally among the ranks of lawyers trained in both the civil law and the common law traditions.

This chapter seeks to explain how a civil law-trained practitioner may approach the techniques of cross-examination. It is based on real situations observed in real arbitrations and – it is hoped – provides practical advice to those civil law practitioners wishing to engage in cross-examination and will help common law arbitrators to understand certain idiosyncrasies of cross-examination conducted by civil law lawyers.

It has been said that the components of a successful cross-examination are to (1) understand its purpose, (2) prepare thoroughly, (3) select the right witnesses to cross-examine, and (4) execute well.[3] While this chapter is not divided quite along those lines, these four points, which reflect common sense, underlie the themes addressed.

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1 Philippe Pinsolle is the head of international arbitration for continental Europe at Quinn Emanuel Urquhart & Sullivan LLP.

2 John Henry Merryman and Rogelio Perez-Perdomo, *The Civil Law Tradition* (Stanford University Press, 2007) 3rd ed., p. 116 ('Cross-examination, in particular, seems foreign to the civil law proceeding.'); see also Hans van Houtte, 'Counsel-Witness Relations and Professional Misconduct in Civil Law Systems', *Arbitration International* (Kluwer, 2003), Volume 19, Issue 4, p. 457.

3 Edward G Kehoe, 'Cross-Examination and Re-Cross in International Arbitration' in *The Art of Advocacy in International Arbitration*, Doak Bishop and Edward G Kehoe (eds.) (Juris, 2010), pp. 405 and 406.

Fact witnesses – what *not* to ask

Cross-examination of factual witnesses should be focused on the key points in dispute and factual evidence within the knowledge of the witness. Common pitfalls include:

1 attempting to cross-examine on every single point in the case rather than confining the questions to the main disputed issues. Notify the tribunal in advance that is what you are doing, so no point can be taken that a subsidiary issue was not put to a witness;
2 asking a witness what he or she thinks another person meant when writing a letter or a document. This is no more than conjecture and not evidence;
3 asking a witness to construe words in a contract – that is for the tribunal; and
4 asking hypothetical questions that are *ex hypothesi* not evidence.

– Hilary Heilbron QC, Brick Court Chambers

Determining whether to cross-examine a witness

An advocate must first decide whether a witness should be cross-examined at all and, if so, on which topics. A key factor in making this decision is whether the applicable procedural rules, often found in Procedural Order No. 1, provide that the failure to cross-examine implies acceptance of the witness statement's content, or the opposite. In the former case, it will be difficult to avoid cross-examination. In the latter, the question is more delicate, bearing in mind that to not cross-examine any witnesses at all or not cross-examine a key witness or expert is probably a bad idea. That said, there are cases where one party chooses, for tactical reasons, to multiply the number of witnesses or experts on the same topic. In such cases, it may be judicious to choose to cross-examine only some of them.

Given that international arbitration often operates on a chess-clock system,[4] choices probably need to be made as to which witnesses are worth cross-examining.

There are five types of factors that an advocate should consider when selecting which witnesses to cross-examine.

Hard consequences

There are certain technical consequences that flow from the decision not to cross-examine a witness. These consequences can be referred to as 'hard' consequences and must be taken into account when making the decision to cross-examine or not. Depending on what Procedural Order No. 1 (or its equivalent) provides, the content of the witness statement may or may not be admitted automatically, the arbitral tribunal retaining the discretion to weigh the probative value of the testimony. If the rule is unclear, it is worth seeking clarification with the tribunal prior to taking the decision to cross-examine, or not.

4 David W Rivkin, 'Strategic Considerations in Developing an International Arbitration Case' in *The Art of Advocacy in International Arbitration*, Doak Bishop and Edward G Kehoe (eds.) (Juris, 2010), p. 163.

Make sure the tribunal knows where you are heading

In conducting cross-examination, it is good practice to let the tribunal know from the outset what the main goal for each line of questions is and how these questions aim to support your broader case. A road map of the cross-examination themes would also be helpful for arbitrators. It is not unusual that tribunals will ask counsel in the course of their cross-examination to explain where they are going with a particular line of questions and how many more questions they have. Counsel tend to give a road map of their opening and closing statements but not of their cross-examination, which can be puzzling. It is unhelpful for tribunals to sit through hours of cross-examination, the broader aim of which may not always be obvious. Relatedly, counsel should be mindful that some civil law arbitrators who are not familiar with common law practices may not necessarily fully appreciate, or indeed understand, how cross-examination works. By letting arbitrators know of the main aim and structure of their questions, counsel can keep arbitrators engaged throughout the cross-examination.

– Stavros Brekoulakis, 3 Verulam Buildings

Soft consequences

An equally important consideration relates to the background and personalities of the arbitrators.[5] Here, it must be borne in mind that, given his or her training and experience, more senior common law arbitrators may be more likely to draw an adverse conclusion from the decision not to cross-examine a witness than a civil law arbitrator may be. However, this does not mean that civil law arbitrators give less weight to cross-examination. Most will have extensive experience in international arbitration and, therefore, will be very familiar with the procedure.[6] For example, as arbitrator, I consider cross-examination to be a very important component of the process of evaluating witness or expert evidence.

Know your medium (remote or in-person)

Once the decision is made to cross-examine a witness, an advocate must always keep in mind the medium: remote or in-person? The answer to this question will have an impact on the way the advocate approaches the cross-examination. Prior to the widespread use of remote hearings during the covid-19 crisis, cross-examinations were almost always conducted in person in international arbitration, with the cross-examiner seated to the side of the witness and the witness facing the tribunal. While arbitration advocates may take this configuration for granted, it has practical consequences on the way an arbitrator approaches the cross-examination. For an in-court cross-examination, for example, an advocate may

5 Rachael D Kent, 'An introduction to cross-examining witnesses in international arbitration', *TDM 2006*, Volume 3, Issue 2, p. 1.

6 David W Rivkin, 'Strategic Considerations in Developing an International Arbitration Case' in *The Art of Advocacy in International Arbitration*, Doak Bishop and Edward G Kehoe (eds.) (Juris, 2010), p. 153 ('The tribunal's background and professional experience can influence their views on both procedural and substantive issues, and so they should also inform many of the choices to be made by the advocate throughout the course of the arbitration.').

Avoid harassing or needlessly embarrassing a witness

Tribunals appreciate counsel who maintain a respectful, moderate tone throughout their cross-examinations. Harassing or needlessly embarrassing a witness will not sit well with the tribunal. In fact, an overly aggressive approach may lead the tribunal to sympathise with the witness – an outcome that is best avoided. I was involved once in a hearing where a witness broke down in tears in response to unnecessarily hostile questioning. Even though the questioning exposed a falsehood in his witness statement, some members of the tribunal did not focus on that falsehood because they were distracted by the unpleasantness experienced by the witness.

– Stanimir A Alexandrov, Stanimir A Alexandrov PLLC

not be seated and the witness may not be facing the decision maker – which may force the advocate to be more conscious of his or her body language (and movements), in particular in drawing the decision maker's attention to the witness at the right times. Where the cross-examination is remote, the advocate should ensure that sufficient protocols are in place to ensure that the witness is properly displayed on the screen with sufficient internet connection (and, of course, does not have access to any materials). This is critical because an effective cross-examination can easily be jeopardised by a bad internet connection or a witness that is not properly displayed on the screen. In addition, the remote nature of the cross-examination can have an effect on the rhythm of the cross-examination. For example, the timetable for the remote hearing may call for more frequent pauses (a product of the reality that it may be more difficult in a remote hearing to retain the tribunal's attention). The advocate should take these realities into consideration when mapping out the content of the cross-examination to ensure that the tribunal is able to follow the key moments of the cross-examination. Finally, the technical particularities of a remote hearing will have an effect on style. For example, the remote medium will also require an advocate to be more judicious in his or her interruptions. Because the video feed may be slightly delayed, an interruption may not have the same effect that it would in person and could lead to the advocate and the witness talking over each other.

Time available

An advocate should further consider the number of witnesses testifying on behalf of the opposing party and the time available to cross-examine them. Regardless of how time is allocated between the parties, it is not unlimited during a hearing. As always, the advocate should focus only on what is most important. Alternatively, the advocate may seek not to cross-examine a witness in the hope that the arbitral tribunal will not unduly focus on their witness statement if it does not hear them at the hearing.

Overlapping witnesses

When multiple witnesses testify on the same topic, an advocate may be tempted to cross-examine only the 'weakest' witness. This may well work, if the weakest witness can be identified. However, if time allows, another possibility is to cross-examine them all. This is

because the tribunal's decision on that topic is likely to be driven by the lowest common denominator. A key rule is to never return to a topic that has been successfully explored with a previous witness. When two witness statements overlap and a satisfactory answer has been obtained on a given topic when cross-examining the first witness, it is generally not a good idea to broach this topic again with the second witness. At best, the second witness will merely confirm the answer of the first witness. At worst, the second witness will give a different answer, thus confusing the record on a point that had initially been scored.

Preparation

First, as has been noted by others, the single most important components of preparation are rigour and thoroughness. The famous golf professional Gary Player is reported to have said: 'The harder I practise, the luckier I get.' The same applies to preparation for cross-examination: there is simply no substitute for hard work. Knowing the file perfectly will enable the cross-examiner to navigate between topics.

Second, and this is directly linked to the previous remark, an advocate should keep in mind that cross-examination is not, and cannot be, a linear exercise. The facts and the arguments do not proceed linearly, and the advocate should therefore be prepared to think laterally[7] or, more exactly, according to a matrix system. One question on a given topic may lead to another interesting topic, and a good cross-examiner has the ability to open a parenthesis, explore this second topic, and then come back to the initial topic. For this reason, I find it much more effective to prepare topics instead of questions. An advocate will only be able to ask clear and cogent questions if he or she has a clear and cogent understanding of the topics and the facts. An effective way of doing so is by visualising the case through a matrix with the arguments and facts for each topic.

Third, a civil law-trained practitioner should make sure to practise formulating questions. On cross-examination, questions should, in principle, be closed, leaving as little leeway as possible to the witness.[8] At the same time, the question should lay the groundwork for a future question, which the advocate should always attempt to anticipate. It is particularly important for the civil law-trained advocate to practise this technique, as he

7 See also Edward G Kehoe, 'Cross-Examination and Re-Cross in International Arbitration' in *The Art of Advocacy in International Arbitration*, Doak Bishop and Edward G Kehoe (eds.) (Juris, 2010), p. 410.

8 Anthony Sinclair, 'Differences in the Approach to Witness Evidence Between the Civil and Common Law Traditions' in *The Art of Advocacy in International Arbitration*, Doak Bishop and Edward G Kehoe (eds.) (Juris, 2010), p. 42 ('Cross-examination is typically conducted by means of tightly controlled and "leading" questions, which suggest the answer within their own terms. This is the norm in most arbitrations . . . Leading questions in cross-examination are not considered a problem for two main reasons; first, because the tribunal determines the weight to be accorded to any witness evidence, and second, because the opposing party's witnesses are relatively unlikely simply to agree with propositions put to them by the other side's lawyer on cross-examination.'); Michael Hwang, 'Ten Questions Not to Ask in Cross-Examination in International Arbitration' in *The Art of Advocacy in International Arbitration*, Doak Bishop and Edward G Kehoe (eds.) (Juris, 2010), p. 431.

How to deal with clear untruths

Whether the arbitration is held under common law or civil law rules, it is depressing, but no longer surprising, to see how often the witness statements of fact witnesses contain deliberate untruths, as do their responses to cross-examination questions. (It is even more depressing that some supposedly reputable lawyers have had a hand in these witness statements.)

One objective of cross-examination of fact witnesses is, of course, to reveal at least some of these untruths. This is generally accomplished by putting before the witness documentation or other witness statements from the same side that contradict the testimony. A laundry list of lies is not necessary, as revealing just a few key untruths will generally lead arbitrators, especially common law arbitrators, to discredit other contentious points made by that witness.

However, a second objective of cross-examination that is often ignored is using an opposing witness to lend support to points in your own side's favour. Even the most carefully crafted witness statement can yield valuable support to facts that buttress the position of the other side, and self-incrimination is extremely difficult to counter.

Civil law arbitrators and cross-examination – a conundrum

There are two important differences between cross-examinations before common law and civil law arbitrators. First, in general, civil law arbitrators are more inclined to consider it normal that witnesses with an interest in the matter at hand will not necessarily tell the truth, and these arbitrators may be less influenced by a cross-examination that reveals such untruths than a common law arbitrator would be.

A corollary of this first point is that civil law arbitrators tend to give great credence to documentary evidence and to favour such evidence over contradictory oral testimony. At the same time, civil law arbitrators can be more reticent than common law arbitrators to permit a document production exercise that would result in the disclosure of relevant documents. This is a circle that must be squared to the greatest extent possible.

The second difference between civil law and common law arbitrators is that the civil law arbitrator tends to be more protective of the serenity of proceedings and of the dignity of a witness on the stand. A harsh tone, raised voice, or insulting comments by the cross-examiner may lead the civil law arbitrator to become protective of a witness, which is quite the opposite of what cross is intended to accomplish.

In sum, because cross-examination is an art, not a science, the lawyer/artist questioner had best be ultra-sensitive to colours, style, brush stroke and even the frame of the painting that they hope the arbitrator will admire.

– Stephen Bond

Pick up on the tribunal's signals

The key consideration when dealing with witnesses is credibility. As counsel, it can be extremely frustrating to feel that the tribunal is not 'getting' your witness, or not appreciating how your brilliant cross-examination of a witness undermines his or her evidence. And for a tribunal, it can be frustrating and even painful to watch a witness taken through endless evidence that the tribunal sees as pointless.

Often the full scope of the failure to engage the tribunal will only be apparent when the award is issued, and it's too late to do anything about it then. Obviously, it is the duty of an advocate to try to engage the tribunal with all parts of the evidence that are relevant. At the same time, counsel can and should help themselves by being more alert to subtle (and not-so-subtle) signals from the tribunal that it is time to move on. Good counsel should be able, and would do well, to be more focused on picking up signals as to which direction the tribunal is heading earlier on, when there is still time to do something about it.

– Jackie van Haersolte-van Hof, London Court of International Arbitration

or she will probably not be as familiar with it as the common law-trained advocate.[9] That said, the exercise is not mechanical, and it is simply wrong, for example, to say that you should ask questions only if you know the answer to them. A seasoned cross-examiner can go fishing with a lot of success.

Fourth, an advocate should remember that his or her preparatory materials should include much more than the witness's witness statement. If the witness is an expert, be aware of that expert's works.[10] If the witness is a fact witness, be prepared to engage the witness on a broader factual matrix than the scope of the witness statement (or statements), and be familiar with documents on record that concern this witness, even though no questions may be asked on point.

Finally, an advocate should clearly identify in advance the points that he or she needs to score in the cross-examination, and never lose sight of these points. Only once this strategy has been clearly defined can the advocate make a realistic judgement about whether a point has been scored (or cannot realistically be scored) and move to the next.

9 Nigel Blackaby, 'Witness Preparation – A Key to Effective Advocacy in International Arbitration' in *Arbitration Advocacy in Changing Times*: ICCA Congress Series No. 15, (Kluwer: 2011), p. 131; Anthony Sinclair, 'Differences in the Approach to Witness Evidence' in *The Art of Advocacy in International Arbitration*, Doak Bishop and Edward G Kehoe (eds.) (Juris, 2010), pp. 42 and 43 ('In one recent arbitration, a German arbitrator admonished the English cross-examiner for asking leading questions, and instructed him only to ask questions commencing Who, What, Where, When, How and Why. This is of course diametrically at odds with normal practice and the advice repeated throughout the leading advocacy manuals for common law practitioners, which insist that "every question on cross-examination should be leading".').

10 Guido Santiago Tawil, 'Attacking the Credibility of Witnesses and Experts' in *The Art of Advocacy in International Arbitration*, Doak Bishop and Edward G Kehoe (eds.) (Juris, 2010), pp. 461 and 462.

On objections
'The wise advocate keeps objections to the minimum'

Why do some advocates in arbitration insist on recording objections 'for the record'? There is no appeal on the merits in arbitration, and arbitrators' findings of fact are definitive. There is therefore no point in this habit; it can only annoy the tribunal. Some advocates who have inadequate trial experience make astonishingly foolish objections, such as complaining that a cross-examiner has asked a 'leading question'. Cross-examination is all about leading questions such as: 'Everything you wrote in this latter is untrue, isn't that so?'

The wise advocate keeps objections to a minimum, perhaps ever so slightly rolling his eyes to show the tribunal that his opponent is wasting time by asking questions of his own witness that suggest the answer – 'You took that precaution because you had learned that this person could not be trusted, is that right?' – or asking improper questions of an adverse witness – but there will be no objection because the tribunal is wise and will give little weight to the product of poor questioning, so there is no need to use precious time by objecting. None of this means that proper objections should be suppressed when they make a difference, such as lack of foundation ('She has never seen that document.'), privilege ('This calls for revealing confidential legal advice.') and harassment ('He has answered that question twice already.').

– Jan Paulsson, Three Crowns LLP

Approach and style

Each advocate has his or her own approach to, and style in, cross-examination, and none is necessarily better than another. There are enormous differences even among common law-trained practitioners – for example, between the styles of US-trained and British-trained lawyers.[11] The question really comes down to how an advocate wishes to be perceived. However, there are a few key parameters within which advocates must operate if they are to perform an effective cross-examination.

First, advocates must ensure they control the witness at all times. A cross-examination is by design an uneven exercise, and the cross-examiner has the advantage. This is because the advocate is the only one entitled to formulate the questions and the witness is more or less blind as to where the advocate is heading with the next question. The advocate must make sure never to give up this advantage. Too often arbitrators see advocates not being able to control their witness and this produces a disastrous impression.

Second, it is essential that the tribunal can follow the advocate's line of questioning. An advocate should never forget that the ultimate audience is the tribunal, and the advocate's behaviour and framing of questions should be directed at persuading the tribunal. At the very least, the advocate should make sure that the tribunal does not get lost along the way. In this respect, I consider a relaxed style, with perhaps a little touch of humour, to be the most effective. In my experience, it is counterproductive in international arbitration to be too aggressive. If an advocate is too harsh with a witness, a tribunal may be inclined to try

11 See, for example, Anthony Sinclair, 'Differences in the Approach to Witness Evidence' in *The Art of Advocacy in International Arbitration*, Doak Bishop and Edward G Kehoe (eds.) (Juris, 2010), p. 30.

to rescue that witness.[12] Additionally, it may be useful to put a question in context for the tribunal's benefit (either by making reference to the chronology or to the corresponding issue to be decided, or both).

Third, an advocate should recognise that his or her task is to elicit the aspects of the testimony that have been prepared and contrast those aspects with the parts that have not been prepared. Significant resources are poured into international arbitration cases and a tribunal is likely to assume that a witness has been prepared.[13] Quite often, the clarity and style of an answer will differ depending on whether the answer has been prepared, or not, and the tribunal will pick up on this.

Making use of witness statements

A witness statement is the written testimony of the witness and usually forms the basis of a cross-examination. Therefore, the first issue to check, again in Procedural Order No. 1 or its equivalent, is whether the cross-examination is restricted to the content of that statement. This will help the advocate frame the approach to the questioning. If the rule is unclear, an option is to seek clarification, but another tactic is to say nothing, and wait to see whether the opposite side raises an objection.

An advocate must in any event decide how to use the witness statement. As already mentioned in the section on Preparation, I do not consider a cross-examination to be a linear exercise, and am accordingly not inclined to go through a witness statement from beginning to end. As also mentioned above, an advocate should form a clear idea of which points need to be scored from a particular witness. The clearer the objective of the cross-examination, the easier it will be for an advocate to choose which topics to focus on, from what can be quite a lengthy witness statement.

Finally, an advocate should keep in mind that witness statements are usually drafted by lawyers, and the language, while not necessarily false, will have been carefully considered. A witness will usually be more straightforward in a hearing, and the lawyer's spin in drafting the statement may be exposed. An advocate should therefore elicit the lawyer's phrasing and, to the extent that an answer in cross-examination differs from the witness statement, an advocate should be prepared to point that out immediately.

Handling and presenting documents

There are two purposes to handling and presenting documents in cross-examination.

The stated purpose is to confront a witness with a document to verify the accuracy of that witness's testimony.

The collateral purpose, which an advocate should always keep in mind, is to present the tribunal with a series of documents in chronological order with the witness's commentary. The effect of doing so will be to establish in the tribunal's minds a certain impression about the sequence of the relevant facts, the credibility of the witness, the documentary record

12 Marinn Carlson, 'The examination and cross-examination of witnesses' in *Arbitration Advocacy in Changing Times*: ICCA Congress Series No. 15, (Kluwer: 2011), p. 205; Rachael D Kent, 'An introduction to cross-examining witnesses in international arbitration', *TDM 2006*, Volume 3, Issue 2, p. 2.

13 Anne-Véronique Schlaepfer, 'Witness statements' in *Arbitration and Oral Evidence*, L Levy and V V Veeder eds. (ICC Publishing, 2005), p. 68.

and the questions that the tribunal must decide. Perhaps more importantly, this exercise will force the tribunal to read the most important documents both in context and in chronological order.

The impression that an advocate wishes to create in the tribunal's mind should be well thought out in advance, because it will influence what kind of questions he or she will ask, and it forms part of the preparation process described above. If the advocate is well versed and clear on the objectives of the cross-examination, the documents, the facts, the issues and the submissions, including the witness statements, then he or she will be able to ask the types of questions that will create the desired impression in the tribunal's mind. Some of those questions will be directed at the witness's opinion about documents, and others will concern background and context. Those questions only become clear to advocates once they clearly understand the objective.

Equally important is the handling of documents. I consider it a good habit to always give a copy of a document to a witness (both in the original language and a translation, if necessary), to avoid a future objection. I find it most helpful to collect these documents in a witness bundle that can be organised by topic and chronologically. A witness bundle makes it as easy as possible for the tribunal to follow the documentary record and can be a useful tool in deliberations.

Making and dealing with objections

Objections are another specific feature of cross-examination with which civil law lawyers may not be familiar. The first point to keep in mind when making objections is that they are a tactical tool, and can be used to disrupt the opposing counsel's cross-examination. However, an advocate should be sure to make only technically justified objections. Doing otherwise will jeopardise the credibility of the advocate, who may lose the sympathy of the tribunal.

There are at least two instances in which an objection is appropriate. First, an objection can be used defensively when a witness is caught in a difficult position. Second, an objection may be used offensively when the tribunal is becoming irritated with a cross-examiner's line of questioning. In the latter case, a good advocate will detect when the tribunal is likely to intervene and will refrain from making the objection. It is always preferable that the tribunal intervene in a spontaneous fashion. Regardless of the intended function of the objection, the use of objections should be scarce, as too many objections will produce an opposite effect to that sought.[14]

Finally, there is the question of how to make an objection. My personal preference is not to interrupt the lawyer asking the questions, as it may be perceived as aggressive and could even lead to a shouting match between counsel. Rather, I prefer to wait until the lawyer has finished asking the question and then to make the objection directly to the tribunal.

Advocates should also expect to receive objections to their questions. While a seasoned lawyer may have more flexibility in asking questions, as long as that flexibility is not abused, junior lawyers will be held to very strict standards. Nonetheless, junior advocates should

14 Rachael D Kent, 'An introduction to cross-examining witnesses in international arbitration', *TDM 2006*, Volume 3, Issue 2, p. 8.

not become too rattled by objections. Rather, they should always keep in mind that the game of making objections is a tactical one.

To avoid being flustered by an objection, the advocate should understand that there are options. First, if the objection is technically justified, the advocate should quickly concede the point and move on. Second, if the objection is not justified, the advocate has further options: he or she can either ignore it or raise it with the tribunal (not the other side) by enquiring whether there was a problem with the question or whether the tribunal wishes the question to be reformulated.[15]

Difficult witnesses

A difficult witness can come in different forms. There are witnesses from whom there are not many points to score, either because there is not much to ask or because they are very well prepared. An advocate may find himself or herself unable to score many points with the opposing side's key witness. In this case, an advocate should simply do his or her best and stick to easy points. A good cross-examiner will realise quickly whether a particular witness is likely to lead to useless testimony but will nonetheless test that witness sufficiently prior to making the decision to give up. This is because witnesses who have been well prepared may nonetheless lower their guard after some time in cross-examination. That point must be tested prior to deciding to stop the exercise.

Another type of difficult witness is the combative witness, who will seek to give long, monologue-like answers, or aggressive answers. An advocate should not fear to politely and courteously admonish the witness.[16] For example, in response to an evasive answer, an advocate might say: 'The question was whether or not you received the letter on 5 April, and I still expect an answer.' An effective way to deal with a long-winded answer is to ask the witness whether he or she still remembers the question.

It is the advocate's responsibility to control the situation. However, in the event that the advocate cannot control the witness, the last resort is for the advocate to appeal politely to the tribunal for an intervention.

15 ibid.

16 ibid., at p. 6.

7

Cross-Examination of Fact Witnesses: The Common Law Perspective

Stephen Jagusch QC[1]

Introduction

It is with considerable hesitation that I commit my thoughts on cross-examination to print. First, because those thoughts are not nearly as settled or ordered as one might expect, given my occupation. Second, I tend not to prepare for or conduct cross-examinations pursuant to any particular framework or with overly stringent objectives. The reason for this is that counsel frequently benefit from being able to adapt the cross-examination – its direction, tone and speed – in response to a variety of factors that cannot be known with certainty beforehand. These factors include the opponent's opening presentation, late-produced documents, interventions from the arbitrators and prior witness testimony – to say nothing of the witness's appearance, demeanour and confidence, or simply the 'mood in the room'. Hence, from my perspective, the most important aspect of any cross-examination is to be sufficiently prepared to put the questions not only in the manner planned, but also in the manner not planned. This may well be another way of saying that counsel must be prepared to take the cross-examination in many different directions. However you look at it, detailed notes of subjects and questions, each with paths that lead from 'yes' or 'no' answers, may well seem like solid preparation, but in the real world it can be the worst preparation, as it may leave the advocate less able to respond to developments as they occur. And believe me, they occur.

This is not to say that counsel should not determine in advance their primary objective. That is necessary, though it is only the first step. The primary objective usually taught to advocates trained in the common law is to undermine a witness's credibility. However, we know from practice that in some cases the witness is able to give useful testimony; hence

1 Stephen Jagusch QC is a partner at Quinn Emanuel Urquhart & Sullivan LLP. The author would like to thank Quinn Emanuel associate Nabil Khabirpour and former Quinn Emanuel of counsel Timothy L Foden for their assistance in preparing this chapter.

Cross-examination is about command

There are many types of cross-examination, and few follow the stereotypical form epitomised by the old US television series *Perry Mason*, in which the principal witness inevitably broke down with a stunning admission after a clever cross by the wily Mr Mason. Much more often, the effective cross-examiner makes his or her points more subtly, so that the import of the testimony becomes clear only as the cross concludes. Sometimes, the cross can be friendly, because the examiner knows that there is a story the witness will want, or be willing, to tell. Sometimes the examiner will need to proceed by intellectual force, making a hostile witness tell the examiner's story by marshalling documents, other testimony and indisputable facts that allow no other credible version. Sometimes the cross is simply about credibility. But always, a cross-examination is about command – no matter in what direction the witness heads, the examiner must control the narrative. That's why to a trial lawyer, there is nothing more beautiful than the look of a transcript of a cross-examination in the classic form – a series of leading questions and brief, primarily yes-or-no answers.

– Donald Francis Donovan, Debevoise & Plimpton LLP

on occasions counsel may benefit by underscoring, not undermining, the witness's credibility. And there may be situations in which counsel will seek to achieve both: where some evidence is harmful, and other evidence is useful. This requires a delicate touch. In some cases, counsel will seek to elicit evidence that has been overlooked – perhaps intentionally – in a witness statement. In others, counsel may wish to highlight that the witness indeed knows nothing beyond what is in the witness statement. Counsel may also use witnesses under cross-examination to highlight the opponent's 'empty chairs', disclosure failings and inconsistencies with fellow witnesses (or experts who have relied on witness testimony). There is, in other words, a broad array of acceptable objectives for the advocate. And these may change during the course of a cross-examination, but each should be carefully identified and evaluated while preparing for the hearing.

There is one thing that may be said with great confidence, however: counsel must never assume that the testimony of every witness put forward by their opponents is (or will remain, even if not cross-examined) harmful to their case. Cross-examination provides a platform for counsel not only to attempt to neutralise harmful evidence, but also to elicit helpful evidence. Success in either depends on a multitude of factors often unknown to the advocate, and in most cases beyond his or her control. It is foolish for counsel to embark on any cross-examination with fixed expectations as to the path it will follow, the evidence it will elicit or its persuasiveness for the arbitrators.

Of course this is not how cross-examination is usually portrayed by Hollywood, namely as a great spectacle, a duel, all-consuming theatre involving angry questions, heated objections, either sustained or overruled, and game-changing witness meltdowns and sobbing confessions. It can be so – I have witnessed it – but it is very rare indeed.

The far more reliable image is one of a gathering of interested people trying to ascertain (or hide) the truth to support (or undermine) the theory or presentation of the parties' cases that their counsel consider most likely to persuade the arbitrators. Hence – and this is key to appreciating the nuanced nature of a good cross-examination – it is important

Are you sure the rules of the game are clear?

Perhaps foremost among the things that should be settled well before the hearing is whether questions should be limited to subjects dealt with in witness statements. This is often neglected, because lawyers believe they know the answer when they do not. American lawyers often assume that since witness statements have the function of replacing direct testimony, cross-examination is limited to the scope of the witness statements; English lawyers tend to assume that 'once you give me a witness, he is mine' – with the result that anything within the witnesses knowledge and relevant to the case is fair game. There are things to be said in favour of either rule, but it must be clear.

– Jan Paulsson, Three Crowns LLP

to understand that the advocate faces myriad considerations and moving parts that often act unpredictably, but in ways that affect how a cross-examination may be perceived by the arbitrators. These include such disparate and seemingly unrelated facts as the length of the hearing, the time of day, the light and comfort of the room, the general interest of the subject matter, the stance, tone and eloquence of those speaking, and the age, gender, background, physical and mental stamina, and wellbeing of each of the arbitrators.

Given these disparate factors, it is no surprise that each hearing creates its own social microcosm: its diverse participants interacting with each other in all types of verbal and non-verbal ways, often subconsciously, forming assessments and views as to the likeability, the relevance and the credibility of each other. In no two hearings will these variables be the same and in the course of a hearing these shifting factors can produce noticeable changes in the arbitrators' perceptions of the more persuasive counsel or case theory.

In this respect, I offer the analogy of the artist presented with a canvas, but one that is far from blank. It will have been both cut and coloured by the preceding written and oral stages, by counsel's perception of the arbitrators' perception of the evidence and the merits, and how the witnesses present in person. This canvas could contain some or no borders, some or no landscape or other features, and some fixed and some dimmable or even erasable impressions. Yet the artist possesses only his or her wit and a very limited palette of evidence and arguments from which to attempt to create on the canvas an image more closely resembling his or her theory of the case.

Cross-examination is no science, no series of formulae or fixed propositions, no set of blocks that can be assembled to create only a finite number of forms. It is something far more abstract, more subtle, more artistic.

Given this almighty challenge, one might consider that only a few would be so ambitious, if not outright presumptuous, to write for the benefit of others how to conduct a cross-examination. As it happens, however, a great deal has been written about it. Most of the authors are common law trial attorneys or professors of the courtroom and they write from their perspectives as advocates operating within highly restrictive environments, where principles and practices have evolved over centuries into hard-and-fast rules setting out what advocates can and cannot do, which explains the myriad objections available to opposing advocates and the endless stories of shamefaced counsel following cross-examinations that have spectacularly failed. This is the culture that developed over

the centuries in common law courtrooms around the world,[2] but international arbitration is not practised in those courtrooms; nor (usually) is it practised by those advocates. Indeed, practitioners from both civil and common law systems with no experience in the practice of international arbitration do themselves and their clients no favours by assuming that the rules and practices of their home courtrooms will apply before international arbitrators.

For this chapter – cross-examination from the perspective of the common law – I begin with an early presentation made by an American courtroom procedure guru, Professor Irving Younger, in which he formulates his 10 Commandments of Cross-examination.[3] I remember well the day that my own professor played to my class the then decades-old video of Younger presenting the 10 Commandments. To be sure, it is one of many collections of rules or 'dos and don'ts' published over the years by prominent specialists in common law courtroom procedure, but it has become the one I reflect on most, not only because it was the first that I studied, but also because I have on many occasions found myself challenging the appropriateness of strict adherence to the 10 Commandments in the context of contemporary international arbitration.

While cross-examination (and hence the 10 Commandments) had its origins in the common law, international arbitration has moved on considerably. For example, counsel are now better prepared for cross-examining witnesses by the now standard practice of producing relatively comprehensive written witness statements in advance of the evidentiary hearing. Such statements normally stand as the witness's evidence in chief. Moreover, no longer are counsel expected to challenge each witness on everything unhelpful recorded in their witness statements.[4] Nor do counsel have the luxury of taking their time with witnesses, as tends to be the practice in common law courtrooms. These days arbitrators expect of counsel, even in factually complex evidentiary hearings, to present cases promptly, often giving very limited time to present submissions and question the witnesses. This requires counsel to consider whether to cross-examine witnesses at all and, when they decide to do so, how to target the best points in the shortest possible time. It requires counsel to jettison less important points, which can only be sensibly achieved if they have a thorough grasp of all the issues and evidence in the case.

As international arbitration has developed its own standard procedures – many of them compromises between differing legal cultures – some of the 10 Commandments have become less imperative, if not potentially harmful. In the sections that follow, I set out some thoughts on key issues facing cross-examining counsel and along the way make passing references to the 10 Commandments to help gauge to what extent cross-examination in contemporary international arbitration has moved on from its very strict common law roots.

2 Not in civil law jurisdictions, where witness testimony is rare but even when used it is treated with utmost caution and not subject to cross-examination by opposing counsel.

3 Available at, e.g., https://www.nebarfnd.org/sites/default/files/2019-04/10commandments.pdf.

4 The rule that the advocate is not deemed to have accepted that which he or she does not challenge is now firmly entrenched in international arbitration. That said, out of an abundance of caution it is prudent to ensure that this understanding is recorded formally by the tribunal in one of its early procedural orders or directions if not in terms of reference or such other document that may come to record the applicable rules or procedures.

The lesson from the two most effective cross-examinations I've seen

There is no right way of doing an effective cross-examination – what will work depends on many different factors, but it is crucial not to underestimate the time you will need to prepare your cross-examination. The two most effective cross-examinations I have seen were diametrically opposed in style: in one, the advocate fired a succession of questions at the witness with hardly a pause for breath; in the other, the advocate was deferential, disarming the rather arrogant chief witness and taking frequent pauses between questions to allow the tribunal to reflect on the devastating testimony that had just been given. When preparing for a hearing always give yourself double the time you think you will need to prepare your cross-examination.

– Juliet Blanch, Arbitration Chambers

Before going any further, let's recount the 10 Commandments. Younger commanded the advocate to:

1 Be Brief
2 Use Plain Language
3 Ask Only Leading Questions
4 Prepare
5 Listen
6 Avoid Argument
7 Avoid Repetition
8 Avoid Witness Explanation
9 Limit Questioning
10 Save For Summation.[5]

A striking theme here, as with countless similar instructions in the common law world, is not dissimilar to a commonly accepted summation of the Hippocratic Oath: do no harm. It is every bit as much what is not done that can lead to counsel's demise, as what is done. The same meaning, put in more contemporary observation, is that 'there are more suicides than homicides in cross-examination'.[6]

And so, I move to a select few issues that confront cross-examining counsel that are addressed also by my co-editor, Philippe Pinsolle, from a civil law perspective (see Chapter 6).

Determining whether to cross-examine a witness

Although any party submitting a witness statement must be prepared for that witness to be questioned at an evidentiary hearing, no rule requires opposing counsel to cross-examine a

5 While Younger acknowledged that the Commandments were overlapping and that there were only 10 inasmuch as was necessary to arrive at a solidly round figure and, one suspects, to derive biblical resonance. For example, in addition to the 10 Commandments, Younger believed that cross-examination should be limited to just three points, but he did not make this a Commandment.

6 AAA *Handbook On International Arbitration Practice* (Juris, 2010), at 225.

Quit while you're ahead

In a commercial case in court, I had to cross-examine an important witness, who was a young and inexperienced executive with only secondary education. I commenced my cross-examination at the beginning of the afternoon session, and because of his nervousness appearing in court and his lack of higher education, he was an easy target for cross-examination, making a number of admissions and confessions, which were favourable to my client. At the end of the afternoon session, I felt that I had made a sufficient impact to make his witness statement much less credible, but asked the court to let me ponder overnight whether to ask any further questions the following morning. The next morning, I decided to cross-examine for a while to underline the admissions and concessions he had made on the previous afternoon. However, by this time, the witness had suddenly become smarter and more confident and (presumably) more used to dealing with my questions. He then promptly explained his admissions and concession of the previous day and reaffirmed the truth of his witness statement, and explained his new evidence that day by saying that he had not understood my questions properly when he had answered them the previous day. Of course, his credibility would had been suspect in any event, but I had effectively made no headway with any of my new questions on the matter, so in the closing submissions I had to deal with his evidence on the first day and contrasted that with his evidence on the second day, and then make submissions on his reasons for his change in testimony. The moral of the story: control the length of your cross-examination and quit when you see the witness starting to give better answers to your questions.

– Michael Hwang SC, Michael Hwang Chambers LLC

witness. A knowledgeable, articulate witness with a good memory of facts that are harmful to the case may well use the time when being questioned merely to reinforce the harmful evidence contained in their witness statement. The decision whether to give the witness that opportunity is important. It is a matter of judgement, which in most cases cannot be exercised without detailed knowledge of the evidence and issues in the case, and the witness's written testimony; an understanding of the experience, demeanour and character of the witness; and client instructions. Factors to consider include the importance of the subjects covered by the witness and the extent to which the written testimony contains harmful evidence. Also, what has the witness not said, or what issues have they not addressed, about which they have personal knowledge? Are there unexplained gaps in the story as told by the witness? Counsel should also consider areas into which it is possible that the witness, or opposing counsel, would rather the witness did not stray.

Even if a witness believes that he or she is telling the truth, it does not follow that the testimony is credible. Much depends on the reliability of the witness and counsel may need to devote some time to testing this. Credibility and reliability, in turn, are best tested under various angles of cross-examination,[7] whether dealing with specific points or the witness's disposition as a whole. Sometimes counsel will question the witness about inconsistencies internal to the witness's written testimony; sometimes by reference to the testimony of

7 M A Cymrot, 'Cross-Examination in International Arbitration', Feb/Apr 2007, *Dispute Resolution Journal*, at 55.

Above all, engage

The greatest joy of advocacy is the opportunity to directly engage with the opposing advocate and the tribunal. It follows that an advocate should welcome questions from the tribunal and straightforwardly respond to them. Likewise, the advocate should squarely take on each important point made by the adversary. To be persuasive is to be concrete and specific, and the best way to be concrete and specific is to engage fully and directly with what the adversary says and what the tribunal wants to know.

– Donald Francis Donovan, Debevoise & Plimpton LLP

others; sometimes by reference to the contemporaneous documentary record. Sometimes counsel will resort to opposing counsel's oral or written submissions. Each approach is legitimate and, if each is pursued, it may become time-consuming. And so we see that the first of the 10 Commandments – be brief – comes under pressure.

Of course, cross-examination is not all about destroying the witness's credibility, although it might seem appealing to do so. Sometimes counsel will want the witness to be believed, having elicited testimony that undermines the opponent's case. As mentioned earlier, on other occasions counsel will have two seemingly contradictory objectives: on the one hand, to undermine the witness's credibility, on the other to underscore evidence that is useful to the case. This requires careful management.

Success in one of counsel's objectives may harm the other. It all goes into the mix when deciding whether or not to cross-examine a witness, and, if so, on which subjects.

Preparation

Benjamin Franklin famously remarked that by failing to prepare, one prepares to fail. This could not be more true for cross-examination. Basic preparation includes the making of outlines, keeping citations and documents at the ready, being cognisant of the procedural rules and the tribunal's preferences, preparing issues or topics of cross-examination and understanding how they either reinforce counsel's case theory or undermine that of the opposition. These are all important yet, all too often, one sees counsel conduct a cross-examination with too much reliance on prepared subjects and questions: this can lead to missed opportunities. Blind adherence to a prepared script will often lead counsel away from the unexpectedly useful evidence that witnesses sometimes volunteer under questioning.

While Younger rightly instructs us to listen, he also instructs us not to ask any questions to which we do not know the answer. I do not agree with this, for reasons I elaborate on later. If counsel becomes too focused on the next prepared question, too immersed in his or her outline, valuable opportunities to elicit useful testimony may be overlooked. Witnesses frequently make throwaway remarks, sometimes merely to fill the time while counsel considers the next question, and these remarks, if explored, can elicit useful testimony. This undermines the eighth Commandment, which directs counsel never to let the witness explain. Yet sometimes the explanation sought will be irrelevant because the point has been made by the question. And sometimes the answer, whatever it is, can lead counsel to pursue a new line of attack. Moreover, if in counsel's judgement the witness has

become confused, is behaving defensively or is simply incoherent, the best course can be to let the witness continue speaking, which is often best achieved by asking open questions. If counsel is completely confident that the witness cannot explain, there is little harm, beyond the use of time, in the witness being asked to do so. And the confused witness may give up yet more useful testimony, to say nothing of turning the arbitrators against the opposition's case.

Approach and style

The conventional wisdom in matters concerning approach and style is to 'find your own' and then carry it through the trial or hearing. Of course, no two advocates are alike and must therefore find a style that works for them. Yet – without wishing to understate the importance of personality – of far greater importance is the advocate's ability to adapt manner, style, tone, rhythm, presentation and questioning to context. A singular approach and style does not suit every occasion, or changing circumstances. For example, bullying or being heavy-handed with a witness rarely plays well with arbitrators. It is especially important to consider this when dealing with vulnerable witnesses. On the other hand, arrogant witnesses who refuse to answer questions require stern handling (and witness demeanour can change from one session to another).

Subject matter should also influence approach and style. For example, arbitrators will only rarely follow detailed questioning about figures and formulae arising from dense or multiple spreadsheets or accounts, especially if conducted towards the end of a long day. Often it is better to leave complex numerical analysis to experts, or at least to when the arbitrators are fresh. The use of questions to merely highlight the documentary record is another area where counsel should be flexible. Some arbitrators appreciate the use of the witness to highlight key documents from the record, a process they regard as valuable and informative, especially if the documents have not yet been referred to in opening submissions. On the other hand, some arbitrators regard taking witnesses to documents without highly material questions as a waste of time.

In other words, as very little in this area is enshrined in fixed rules, much of counsel's approach should be responsive to the preferences of the arbitrators.[8] Arbitrator preferences can be vastly different from one case to the next, but their broad powers to shape the proceedings and the manner in which cross-examination is conducted is undisputed.[9]

Younger's elaboration of his fourth Commandment is that counsel should not ask a question to which he or she does not already know the answer. While it is true that through the use of leading questions, counsel is able to direct and control oral testimony, the fourth Commandment, if disapplied with wisdom, can be to counsel's great advantage. The skill here is to select the right issue on which to ask a question to which the answer is not known. One such situation is when there is no real likelihood of the answer being harmful. For instance, if counsel has cause to ask whether a witness is still stealing money

8 ibid.

9 IBA Rules on the Taking of Evidence in International Arbitration (2010), Article 8: 'The Arbitral Tribunal shall at all times have complete control over the Evidentiary Hearing. The Arbitral Tribunal may limit or exclude any question to, answer by or appearance of a witness if it considers such question, answer, or appearance to be irrelevant, immaterial, burdensome, duplicative, or covered by a reason for objection.'

When a witness refuses to answer

It is perfectly acceptable to seek the assistance of the tribunal if a witness refuses to answer the question asked or persists in lengthy monologues. This is particularly the case when the witness is giving evidence through a translator, making it harder for the advocate to interrupt the testimony.

– Juliet Blanch, Arbitration Chambers

from his or her employer, counsel may not know the answer, but it does not matter: either the witness is still stealing money, or used to steal money, or singly denies it as might be expected – all answers assist and, at least, no answer is unhelpful. Another example might be to ask a director if he or she discussed a letter with the board of directors. A 'no' may support a case for the witness acting without authority. A 'yes' might help to implicate other directors and the company itself. Everything will, of course, depend on the circumstances, but the principle holds that some questions may elicit answers that either do not matter or provide an opportunity for the witness to further contradict themselves, or disclose new information that cross-examining counsel may find useful. As with all advocacy, flexibility and the ability to seize opportunities are key.

And in addition to procuring evidence that is helpful to counsel's case, an advocate must also keep in mind the visual and presentational aspect of cross-examination. In this regard, it can prove helpful to bear some basic principles of psychology in mind. One that I find most relevant is Tversky and Kahneman's 'peak-end rule',[10] which suggests that an experience is not evaluated by the whole experience but rather by representative 'snapshots' based on the 'representativeness heuristic'.[11] Tversky and Kahneman suggest that these representative snapshots are, in fact, the average of the most intensively felt parts and the feeling at the conclusion of the entire experience. On this view, a selection of powerful moments and a strong ending is likely to be more effective than an equal-weighted line of enquiry. In this respect, it is important to remember that much of the assessment of credibility carried out by the arbitrators is based on impression. Early and late impressions tend to be the most lasting. It is important therefore to begin and end a cross-examination with the material most likely to grab the arbitrators' attention.

Whatever approach counsel deems right for the given circumstances, it is always the case that politeness, measured confidence, an agreeable pace, eloquence and clarity will do much to enhance the effect of any cross-examination. Advocates praised as 'ferocious' cross-examiners do not always serve their clients well. There are likely to be very few, if any, circumstances in which cross-examining counsel should become (or show that they have become) 'cross' with a witness. On the contrary, the effectiveness of questioning may well be reduced if the arbitrators believe the witness is receiving impolite treatment.

10 *Journal of Personality and Social Psychology*, Volume 65,Issue 1, at 45 to 55.

11 D Kahneman, A Tversky, 'Subjective probability: A judgment of representativeness'. (1972), *Cognitive Psychology*, Volume 3, issue 3, at 430 to 454.

Sometimes, the best option is to get under the witness's skin

You can win (or lose) a case with the successful cross-examination of an important witness. You need to be a very good advocate to win a case by relying mainly on the cross-examination of your opponent's star witness. Lawyers of my generation often tried to get under the witness's skin to make him or her lose concentration. Let me explain with a war story.

Many years ago, I was cross-examining my opponent's vice president, finance – their star witness. He had been appointed very recently to this lofty position; previously, he had been controller of the company. He was, understandably, very pleased with and proud of his promotion. Shortly after I had commenced my cross, I intentionally referred to him as 'Mr Controller'. Of course, he corrected me. I apologised, but five or 10 minutes later, I sinned again and called him 'Mr Controller'. He corrected me again. This went on for a good half-hour. Each time he corrected me, the witness was getting more and more upset. Eventually, he lost his concentration and I was able to score many goals in my opponent's net! My cross of that 'star' witness proved to be quite successful.

– Yves Fortier QC, Twenty Essex Chambers and Cabinet Yves Fortier

Younger's ninth Commandment, to limit questioning, is another that does not tell the full story in contemporary international arbitration. It is certainly true that a common pitfall to avoid is asking too many questions: this danger looms largest when the advocate has made a strong point that he or she is determined to exploit. The key points here are not to flog a dead horse and not to gild the lily. Once useful evidence has been elicited, counsel should consider carefully if the time has come to quit while they are ahead. 'The interminable advocate, in short, is rarely the victorious advocate.'[12] None of this is to say that questions must stop altogether as soon as the witness proffers something useful. As I have said, unexpected answers or new ideas may need to be subjected to further questions, and this is where counsel need to be quick on their feet, but also to remain calm and exercise sound judgement.

Handling and presenting documents

The contemporaneous documentary record is essential to any cross-examination and should provide the starting point from which counsel select subjects for questioning. Secondary sources include other testimony (from statements or the transcript) and written and transcribed submissions. There is limited use in simply putting your case to a witness who, if well prepared, will deny it; which is why these source materials are essential. Documents, whether used as swords or shields, are generally the most effective way to elicit the sought-after evidence, or contradict other evidence that is unhelpful.

Given the importance of documents, counsel must deploy them at the right moment. How one achieves this is a matter of judgement, but the two most effective times are usually when introducing a subject, to help keep the witness on track, or after subject-matter

12 I Younger, 'A Letter in Which Cicero Lays Down the Ten Commandments of Cross-Examination', 3 *Litigation*, No. 2 (Winter 1977), pp. 18 to 20, 49.

Only allege bad faith when you have the ammunition

Arbitrators are rarely impressed by gratuitous attacks on the good faith of the opposing party, or by rhetorical grenade-launching between counsel. An argument about character or bias may seem appealing because it allows you to come out swinging. But bad faith should only be raised in arbitration proceedings in extreme circumstances and, most importantly, when there is persuasive evidence to support the charge. If the facts in the end do not support such a strong allegation, the counsel launching the attack loses credibility.

– Jean Kalicki, Arbitration Chambers

questions have been put, to discredit by contradiction. On any view, however, it is essential that counsel completely master the documentary record. Only then will counsel know when and how to deploy documents to maximum effect.

Making and dealing with objections

In common law courtrooms, the making and responding to objections has become an art form unto itself. Objections are mostly made as to the form or foundation of questions, as derived from strict common law rules concerning the admissibility of evidence. However, in contemporary international arbitration, less attention is paid to form and more attention is paid to substance. This is because arbitrators are considered perfectly capable of assessing the probative value – or weight – that should be attributed to answers given to questions under different circumstances. The result is that arbitrators tend to frown upon technical objections or objections that appear mainly strategic, perhaps to protect a witness or derail cross-examining counsel. It is better to limit objections to an opponent's questions unless there is an obvious and proper basis for doing so, such as when the question is unintelligible, compounded or ambiguous, or put on an incorrect or unproven premise.

How counsel responds to objections will depend largely on whether he or she considers the objection to be justified. If counsel has framed a question poorly, or there is any scope for the question being based on a mischaracterisation of the evidence, then counsel should promptly thank objecting counsel, apologise to the witness and the arbitrators and proceed to put a better question. This helps to establish and retain the confidence of the arbitrators. If, on the other hand, counsel considers an objection to be wholly baseless, he or she should promptly defend the question and permit the arbitrators to rule on the matter.

If counsel's cross-examination is unduly peppered with poor or plainly strategic objections, he or she should seek a direction from the arbitrators that opposing counsel should refrain from further interruption of the flow of questions.

Difficult witnesses

Witnesses can be difficult in numerous respects, the most common being not listening to questions, not answering them and making speeches. Much has been written about asserting control and keeping command of the situation. This is important, but it is often more nuanced than the binary question of who is controlling whom. In most cases, counsel will benefit from making an effort to get to know the witness, through polite introduction

Advice to arbitrators

Some arbitrators who know better interrupt cross-examinations to show that they are better advocates than the advocates. Others innocently interrupt because they find it useful. Both are wrong. Cross-examination should never be interrupted save in response to a valid objection or for a simple clarification, such as 'Was this still in the year 2011?' The reason is that a well-planned cross-examination may be hopelessly disrupted by clumsy distractions. The tribunal should only question the witness once the lawyers are done. But by the time it happens, it is too late to object; who wants to take the risk of lecturing the tribunal? This is the type of thing that should be clarified in advance; best in a pre-hearing conference, before egos get in the way.

– Jan Paulsson, Three Crowns LLP

and non-threatening questions. This may be achieved by introductory questions that help the witness to get comfortable with counsel, to help them to relax. This is often a good idea with lay witnesses. For professionals, sometimes a more direct approach is necessary: they must understand, and quickly, that counsel is in charge. Once counsel have a better sense of their witness, they can tailor their approach. Skilfully moving between leading and more open-ended questions can prove especially helpful.[13] And it is often worth exploring with witnesses whether they have any vested interest in the outcome of the case, as this may affect the weight the arbitrators attribute to the evidence and may help explain any witness intransigence. Certainly, it will not always be possible to elicit from a witness, on the critical issues, the sort of evidence or statements counsel seeks. A useful strategic adage in such circumstances is the principle of *falsus in uno, falsus in omnibus* – false in one thing, false in everything. If the advocate is able to establish that a witness is unreliable in one, albeit less important, area, the shadow of doubt can be leveraged in submissions to challenge the testimony on more salient aspects.[14]

Counsel will at times suspect that a witness is not being entirely truthful but lack the resources with which to pursue the matter. It is not easy to decide, in the midst of questioning, which responses are worth testing. Psychological studies have revealed some helpful pointers to identify deceit or half-truths. Blair, Levine and Shaw[15] have noted the usefulness of so-called tests of expected knowledge. Say, for example, a witness claims to have been closely involved with the construction of a building over a number of years. If that is true, it can also be reasonably expected that a number of other facts must follow; for

13 See R D Kent, 'An Introduction to Cross-Examining Witnesses in International Arbitration', April 2006, *Transnational Dispute Management*, Volume 3, issue 2, fn 6.

14 L W Newman and R D Hill, *The Leading Arbitrators' Guide to International Arbitration* (3rd Ed, Juris, 2014), p. 684.

15 J P Blair, T R Levine, A S Shaw, 'Content in context improves deception detection accuracy', *Human Communication Research*, Volume 36 (2010), issue 3, at 423 to 442 <http://dx.doi.org/10.1111/j.1468-2958.2010.01382.x>, cited in T C Omerod, C J Dando, 'Finding a Needle in a Haystack: Toward a Psychologically Informed Method for Aviation Security Screening', *Journal of Experimental Psychology: General*, Volume 144 (2015), No. 1, 76 to 84.

Do not over-prepare your witness

Do not over-prepare a witness. One witness was so well rehearsed that he was completely implausible; I overheard one of the arbitrators whispering to the arbitrator to his right, 'He's lying.'

– Juliet Blanch, Arbitration Chambers

example, this same person would normally also know how to travel to that site, know other people that worked there and be familiar with accommodation and eateries in the area.[16] The absence of such knowledge, or difficulties in articulating it, casts doubt on the veracity of the initial statement. Another approach, countenanced by Milne and Bull,[17] is to elicit intentionally open and expansive verbal accounts that bind the speaker to a particular set of facts. These can later be used to cross-check responses to more narrow and pointed questions that overlap with the initial account. These are useful tactics that once more conflict with some of the 10 Commandments.

Re-cross examination

Many arbitrators will not permit re-cross, and rightly so if re-direct has been limited to matters arising during the cross-examination. However, it will happen in some cases that a witness will present wholly new and harmful testimony either on re-direct or in response to questions from the arbitrators. If this happens, counsel may re-cross and should insist on doing so if it is obvious that questions can be put to remedy the new, harmful evidence. In serious cases, counsel should consider a break to enable sufficient preparation, or reserve the right to deal with the new evidence by submissions. This will often appeal to the arbitrators who frequently will be pleased to see a cross-examination completed and hence reluctant to see it start up again.

Concluding remarks

Practitioners of international arbitration are not hidebound by complex, mostly outdated and frequently outright baffling rules of procedure that dictate what advocates can and cannot ask of the witness they are questioning. In this sense, international arbitration is more contemporary, more flexible and more mature. The practice of international arbitration recognises that the parties, their counsel, their witnesses and, perhaps most importantly of all, the decision makers – the arbitrators – come from diverse backgrounds and legal cultures, and that one size does not fit all. Sometimes counsel should not attempt to cross-examine a witness at all. Sometimes the list of must-cross subjects is vast. Each case is unique. One case may demand the destruction of a witness's credibility, another may

16 T C Omerod, C J Dando, 'Finding a Needle in a Haystack: Toward a Psychologically Informed Method for Aviation Security Screening', *Journal of Experimental Psychology: General*, Volume 144 (2015), No. 1, at 77.

17 R Milne, R Bull, *Investigative interviewing: Psychology and practice*, Wiley (Chichester, West Sussex) 1999, cited in T C Omerod, C J Dando, 'Finding a Needle in a Haystack: Toward a Psychologically Informed Method for Aviation Security Screening', *Journal of Experimental Psychology: General*, Volume 144 (2015), No. 1, 76 to 84.

require that it be built up, and this is without taking into account the knowledge, experience and confidence of the witnesses, which can within moments of the examination commencing lead to the skilled advocate taking a different approach. It is into this extraordinary array of moving parts and subjective evaluation that the advocate steps forward to conduct the cross-examination.

For all that, though, I do not dare suggest that what I consider to be a good cross-examination is either objectively good or even one that I could produce. As with all art, its beauty lies in the eyes of the beholder. This is plain from the many cases in which I have sat as arbitrator and seen for myself the vastly differing appreciations by different arbitrators of the same cross-examination and, when counsel, the differing perspectives of my own team members of the cross-examinations completed by opposing counsel. This perhaps explains why cross-examination has been referred to as the 'most misunderstood of all elements'[18] of the advocacy process. Younger reminds us that even Cicero referred to cross-examination as 'by far . . . [the] most difficult, the most complex, and the most subtle'[19] of all the things an advocate must do. One reason for the lack of understanding is that we usually measure success against objectives, yet in cross-examination there is, rightly, no requirement that counsel provide advance disclosure of their objectives.

However, the cross-examination process need not be misunderstood any more than any other art. It merely needs to be understood in its context, which entails a deep understanding of the parties' positions on the various issues in the case and a broad understanding of counsel's many potential objectives in asking questions of their opponent's witnesses. I do not accept that it can be measured by any hard and fast rules, be they Younger's immutable 10 Commandments or the scores of other published 'dos and don'ts'. This is not to say that the 10 Commandments are of no relevance. On the contrary, and even by Younger's admission, his commandments, if obeyed, should at a minimum aid the inexperienced cross-examiner in avoiding potentially costly mistakes or own goals. I merely wish counsel to understand also that blind obedience of the 10 Commandments, without deviation, risks missed opportunities and in some cases real harm to a client's case.

18 'Advocacy, Negotiation and Conference Skills 1994-95' (Bar Finals Manuals), Blackstone Press Ltd, Revised edition (26 September 1994), at 253.

19 I Younger, 'A Letter in Which Cicero Lays Down the Ten Commandments of Cross-Examination', Litigation, Volume 3 (Winter 1977), No. 2, at 18.

8

Cross-Examination of Experts

David Roney[1]

The cross-examination of expert witnesses is one of the most challenging aspects of advocacy in international arbitration. When executed effectively, it is possible not only to neutralise the evidence of the opposing party's expert witness, but also advance your own case theory in powerful ways. As with all witness examination, this requires complete mastery of the case file, careful preparation and a disciplined questioning technique.

Expert evidence may be adduced on a wide variety of subject matters, such as defects in the design of software, delay in construction projects, the chemical composition of pharmaceuticals, the valuation of expropriated investments and questions of law. To conduct an effective cross-examination, it is necessary to become immersed in the relevant subject matter in a focused and practical way, usually by working closely with your client and own expert witness. This will enable you to expose the weaknesses in the expert evidence of the opposing party and help the arbitral tribunal understand and resolve the disputed expert issues in favour of your client.

This chapter sets out certain frameworks of analysis and guidelines for cross-examination that can be applied regardless of the subject matter of the expert evidence. These frameworks and guidelines can also be applied whether a particular international arbitration has a more common law or civil law character, although it is always necessary to tailor cross-examination to the specific witness and arbitral tribunal. Before delving into the specifics of preparing and executing the cross-examination of an expert witness, it is useful to begin by considering the role of expert evidence in international arbitration.

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1 David Roney is a partner with Sidley Austin LLP. The author wishes to thank Michelle Chan, Tanya Landon and Dorothee Schramm, all of Sidley Austin LLP, for their valuable assistance in the preparation of this chapter.

Remember who is on the tribunal!

I recall a hard-fought case in which an advocate was vehemently arguing that testimony by a particular individual should be discarded on the basis of his qualifications. The witness in question was a technical surveyor. What the advocate had overlooked was that the arbitrator his party had appointed was also a surveyor!

I looked at my neighbour, perplexed: the advocate had just made his job more difficult simply by failing to keep in mind the very people to whom he was addressing his arguments. Presumably, at the outset of the case, technical expertise had seemed a valuable characteristic for this party, but as the case moved along, other considerations prevailed. Or perhaps it was simply the heat of the moment . . .

– Jackie van Haersolte-van Hof, London Court of International Arbitration

The role of expert evidence in international arbitration

Expert witnesses have become a routine feature of international arbitration. Unlike fact witnesses, expert witnesses do not testify about events in which they were personally involved. Instead, the role of the expert witness is to provide opinion evidence to assist the arbitral tribunal in understanding and deciding specialised issues that go beyond the ordinary experience and knowledge of the layperson.

While there are different practices and procedures for dealing with expert evidence,[2] the most common approach in international arbitration today involves each party appointing one or more expert witnesses to prove its case. There are no formal rules of evidence governing the admissibility and use of such expert evidence in international arbitration. Nonetheless, certain general principles regarding party-appointed experts are now widely accepted.

First and foremost, it is now almost universally accepted that a party-appointed expert must be independent and objective. For example, Article 5(2) of the IBA Rules on the Taking of Evidence in International Arbitration requires that a party-appointed expert must disclose 'his or her present and past relationship (if any) with any of the Parties, their legal advisors and the Arbitral Tribunal' and provide 'a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal'.[3] Certain guidelines and practices go further, particularly those influenced by English court procedures. This is best illustrated by Article 4 of the Chartered Institute of Arbitrators' Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration, which stipulates that '[a]n expert's opinion shall be impartial, objective, unbiased and uninfluenced by the

2 Depending on the legal background of the parties and arbitral tribunal, expert evidence may be adduced through party-appointed expert witnesses or tribunal-appointed witnesses or some combination of the two approaches. This diversity of approaches is recognised by most of the major rules of arbitration: ICC Arbitration Rules, Articles 25(2) and 25(3); LCIA Arbitration Rules, Articles 20 and 21; Swiss Rules of International Arbitration, Articles 25 and 27; Singapore International Arbitration Centre Arbitration Rules, Articles 25 and 26; Hong Kong International Arbitration Centre Administered Arbitration Rules, Articles 22 and 25.

3 The IBA Rules on the Taking of Evidence in International Arbitration 2020 [the IBA Rules], Article 5(2).

Set an expert to catch an expert

The cross-examination of an expert witness is a very delicate exercise. Unless your own expert has provided you with ammunition that will make it possible for you to embarrass the expert, you are often well advised to ask only a few innocuous questions to which you know the answers, or even to ask no questions at all!

How to impugn the credibility of an expert? Ask your own expert to research thoroughly the written and oral musings of your opponent's expert. I recall some years ago (long before the internet or Google) that an expert witness I was cross-examining had opined previously in an obscure scientific magazine the exact opposite of the thesis he was presenting that day to the court. At an appropriate moment, I confronted the witness with his earlier article. He squirmed and tried to explain the different context, etc., but his credibility was damaged and the judge gave no weight to his opinion.

And, by the way, do not forget to ensure that your own expert has disclosed to you all written and oral opinion pieces on the subject matter of his or her expertise!

– Yves Fortier QC, Twenty Essex Chambers and Cabinet Yves Fortier

pressures of the dispute resolution process or by any Party' and that '[a]n expert's duty, in giving evidence in the Arbitration, is to assist the Arbitral Tribunal to decide the issues in respect of which expert evidence is adduced.'[4] Whether or not party-appointed experts are considered to have an overriding duty to the arbitral tribunal, it is clear that such experts must not be partisan advocates or 'hired guns', tailoring their evidence to suit the party who has appointed them.

Second, arbitral tribunals generally accept party-appointed experts as learned and qualified to express opinions within a given field of expertise, subject to cross-examination and specific submissions on the matter. Consequently, there is ordinarily no need for a party to apply for leave to submit party-appointed expert evidence or to prove in any formal way that the expert is qualified or that the testimony is the product of reliable principles and methods. That said, when adducing expert evidence, a party is well advised to demonstrate both that there are important disputed issues requiring expert evidence and that the specific party-appointed expert will be of assistance to the arbitral tribunal in deciding these issues. Questions most often arise in this respect with legal experts – many arbitral tribunals doubt the utility of lengthy expert legal opinions that cover well-trodden areas of the law and are effectively legal submissions in all but name.

Third, in most international arbitrations, each party is free to decide whether or not to cross-examine the opposing party's expert witnesses. Where no request is made to cross-examine an expert witness, Article 5(6) of the IBA Rules provides that none of the parties 'shall be deemed to have agreed to the correctness of the content of the Expert

4 The Chartered Institute of Arbitrators, The Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration (2007), Article 4. See also V V Veeder, 'The Lawyer's Duty to Arbitrate in Good Faith', *Arbitration International*, 18(4) (2002), 431.

If the tribunal loses confidence in the expert's view of even a few issues, it will cause them to question her opinion on other issues

Don't try to rebut every issue on which the expert has opined. Pick the points on which you can most easily undermine the expert's credibility. If the tribunal loses confidence in the expert's view of even a few issues, it will cause them to question his or her opinions on other issues. This is particularly true when the expert's opinion reads more like an advocate's statement than that of a neutral and independent expert. In those circumstances, focus on the expert's most extreme statements.

When the expert's opinion has failed to acknowledge grey areas, on cross-examination the expert must either concede that another position is also reasonable or demonstrate, by refusing to do so, a lack of credibility. In one case, where I took this approach, the expert finally looked at me and said: 'Please stop.'

– David W Rivkin, Debevoise & Plimpton LLP

Report'.[5] If the IBA Rules have not been adopted, it is prudent to verify that this matter is covered by the relevant procedural rules to avoid the risk that the arbitral tribunal may draw adverse inferences from a decision not to cross-examine. Once you have determined that no such adverse inferences will be drawn, it is important to ask yourself whether cross-examining each of the opposing party's expert witnesses will advance your case. For example, if an expert witness is demonstrably partisan and the issues that he or she addresses are not central, it is unlikely that your case will be advanced by giving such a witness a platform to espouse partisan views in front of the arbitral tribunal. Instead, it may be far more effective to address these matters by oral or written submission. Also, if an expert witness does not actually testify at the hearing, the evidence of that expert often fades into the background, and tends not to play a major role in the decision-making processes of the arbitral tribunal.

With these general considerations and principles in mind, the practical steps to be followed when preparing for and conducting the cross-examination of an expert witness will be considered.

Frameworks for analysing expert evidence

Every effective cross-examination of an expert witness begins with a careful analysis of the expert evidence on record, preferably with the assistance of your client and own expert witness. This analysis should be directed to two main objectives: (1) identifying areas for attacking the evidence of the adverse expert witness; and (2) identifying areas for seeking agreement with the adverse expert witness.

Identifying areas for attacking the expert evidence

When preparing for cross-examination, it is useful to think of the expert opinion as a conceptual construct built on several distinct pillars. One of the main objectives of your

5 The IBA Rules, Article 5(6).

You must become an expert too

A good expert is one who can use simple, clear terminology when explaining technical issues to a layman.

Make sure you instruct your expert at the outset and work with your expert in drafting your submissions and your cross-examination.

It can sometimes appear from the overuse of technical language in the submissions and their brevity on expert issues, including quantum, that counsel have not themselves properly understood the points they are making. Remember that your client does not just want to win, your client wants either to maximise recovery or minimise the amount they have to pay. Spend as much time as is necessary with your expert to master the technical issues and then ensure your submissions explain the issues effectively and in sufficient depth. If calculations are included, ensure they are again as detailed as possible so that the tribunal can follow them and understand how to apply the formula used. If the tribunal doesn't understand the technical issues or understand how the quantum is calculated, it can't give you the award you are seeking for your client.

– Juliet Blanch, Arbitration Chambers

cross-examination is to weaken or destroy as many of these pillars as possible, so that the construct collapses.

Is the expert witness independent?

The independence of the expert witness is the first and most fundamental pillar of every expert opinion. If it can be demonstrated through cross-examination that an expert witness is not independent, this will often undermine the entirety of the expert opinion and the arbitral tribunal will place little or no weight upon it. Given the potentially devastating consequences of this line of attack, it is always worthwhile exploring this area in cross-examination, even if only briefly.

Begin broadly by asking whether the expert witness has any past or present relationship with the party who appointed him or her. For example, this issue may arise if an expert witness on accounting issues is also the auditor of the party. Beyond possible violations of professional rules applicable to auditors, this witness likely has a direct financial interest in maintaining the ongoing auditor engagement and also may have been personally involved in certain factual issues in dispute.

The expert witness also should be asked whether he or she has been previously appointed as an expert by the same party or same law firm and, if so, how many times and when the last such appointment occurred. In a recent London-seated arbitration, the adverse expert witness had listed the law firm that had appointed him as a reference in his curriculum vitae. Under cross-examination, the expert revealed that he had been appointed by this law firm more than 10 times during the previous five years. The opposing barrister attempted to downplay the significance of these repeat appointments by joking that he too listed the law firm in question as a reference on his curriculum vitae. The joke fell flat when

Dealing with an evasive professor

I was acting as counsel in a case under the SIAC Rules in which both sides engaged experts in foreign law. I was cross-examining the other side's expert, a distinguished law professor, and found that she was not answering my questions directly. So I asked her politely to please answer my questions 'Yes' or 'No' first, and then give whatever explanation she felt was necessary afterwards. She replied: 'No, I cannot do that. I am a professor of law. I cannot just give a "Yes" or "No" answer. I must first explain the general law, and then I will answer your question.' So as not to waste further time in arguing this approach with her, I then asked her a question which, admittedly, was a little long and complex. She then proceeded to give a long explanation about the general principles of the relevant foreign law, but concluded her answer without a 'yes' or a 'no'. I said: 'Professor, I have accommodated you by letting you give a long explanation of the law, but you haven't answered my question "yes" or "no".' She then looked at me blankly and said: 'And what was your question again?'

– Michael Hwang SC, Michael Hwang Chambers LLC

the barrister was reminded that he had been engaged as an advocate, while the expert was meant to be independent.

This is one area where, contrary to the fundamentals of good cross-examination technique, you will need to ask open questions without knowing what answer will be given. The risks of asking open questions about an expert witness's independence are well worth taking, since the potential downside is minimal and the potential upside is significant.

Is the expert witness qualified?

The expert witness's qualifications are the second pillar of every expert opinion. Specifically, does the expert witness have the requisite qualifications and experience to express an authoritative and reliable opinion on the subject matter? The entirety of the expert opinion or certain specific conclusions can be undercut by demonstrating through cross-examination that the expert witness is not qualified to express the opinions given or is straying beyond his or her field of expertise.

When preparing for cross-examination, it is advisable to investigate what academic and professional credentials are typically obtained by experts in the field, and to determine whether the adverse expert witness possesses such credentials. If not, this can be developed into a powerful line of questioning.

Academic and professional credentials are, however, only part of the picture. Most international arbitrations arise out of complicated real-world problems. As a result, an expert witness's practical experience in a given industry or field is often more relevant for the arbitral tribunal. Even if an expert witness has stellar academic credentials, it may therefore be possible to attack the reliability of his or her evidence by demonstrating a lack of practical experience and insight. Similarly, an expert witness with good general experience in a given field may be open to challenge if he or she has no relevant experience with the specific expert issues in dispute. This type of attack is particularly effective if your own expert possesses both impressive credentials and relevant practical experience.

For example, in a high-stakes arbitration seated in Geneva, the adverse expert witness expressed the view that a technology company would have no difficulty attracting highly skilled foreign workers to a facility in a developing country. Under cross-examination, the expert admitted that he had never visited the country in question and had never attempted to recruit skilled workers for that or any other developing country. He was ultimately compelled to accept that the arbitral tribunal should therefore prefer the evidence of our expert witness, who had first-hand experience of the country, including the difficulties of recruiting skilled foreign workers owing to ongoing civil unrest.

Counsel:	**In your CV attached as Appendix A to your first expert report, you set out a long list of countries that you have visited.**
Expert:	**Yes.**
Counsel:	**[Country X] is not on that list?**
Expert:	**No, it is not.**
Counsel:	**You have never been to [Country X]?**
Expert:	**No, I have never been there.**
Counsel:	**In your CV, you also list in detail your professional experience.**
Expert:	**Yes.**
Counsel:	**You set out your specific responsibilities in each position in some detail.**
Expert:	**Yes, the descriptions are quite detailed.**
Counsel:	**You did not leave out any significant responsibilities in these different positions?**
Expert:	**No, I don't believe so.**
Counsel:	**You do not state anywhere that you have experience in recruiting skilled workers to [County X], do you?**
Expert:	**No, I have never done that.**
Counsel:	**In fact, you do not say anywhere that you have experience in recruiting skilled workers to any developing country, do you?**
Expert:	**No, I have never really been involved in recruiting workers.**
Counsel:	**You understand that [Claimant]'s expert, Ms [Y], lived for almost 15 years in [Country X]?**
Expert:	**That is what she has said.**
Counsel:	**Well, you do not dispute that fact, do you?**
Expert:	**No, I do not.**
Counsel:	**You also understand that, during the period from 2013 to 2015, Ms [Y] attempted to recruit skilled foreign workers to [Country X]?**
Expert:	**Yes, she has said that.**
Counsel:	**Ms [Y] has testified that she had great difficulty recruiting skilled foreign workers because of the ongoing civil unrest at that time in [Country X].**
Expert:	**I understand that.**
Counsel:	**Since Ms [Y] has first-hand experience of attempting to recruit workers to [Country X] during the relevant period, she is in a better position to testify about the difficulty of doing so than you are?**
Expert:	**Yes, I suppose I have to accept that.**

From time to time, expert witnesses with solid qualifications are engaged to address a particular subject matter and then go on to express opinions on matters outside their field of expertise. This often occurs because the instructing party does not wish to incur

On cross-examining legal experts

The answer to the question 'Should you cross-examine legal experts?' may differ for legal experts in technical issues or domestic law versus legal experts in international law.

In my view, counsel should cross-examine experts in technical or domestic law issues in which the arbitrators do not already have independent expertise. Whether to cross-examine experts in international law, however, should be determined case by case. Arbitrators will benefit most from cross-examination of legal experts in areas in which the arbitrators are less knowledgeable themselves.

– Stanimir A Alexandrov, Stanimir A Alexandrov PLLC

A better approach to legal experts

Cross-examination of legal experts is unhelpful and should be avoided. Instead I suggest the following method. Each party drafts a list of the questions they wish to ask the legal experts. These lists are communicated to the arbitral tribunal a few days in advance of the hearing or the experts' examination. The arbitral tribunal selects in those lists the questions that it finds useful to ask the experts and adds any questions that it finds appropriate. The list set up by the arbitral tribunal is not communicated before the examination. The questions are addressed to the experts sitting together at the witness stand. Once the list is exhausted, the parties may ask further questions if they wish. In most cases, counsel will not do so. The main advantage of this procedure is that it is time-efficient and that when legal experts are heard together, they tend to narrow their positions and agree on most issues. I firmly believe that a traditional cross-examination of legal experts does not make sense. It is totally unhelpful.

– Bernard Hanotiau, Hanotiau & van den Berg

additional costs for a second expert. Whatever the reason, it may be possible to demonstrate through cross-examination that the expert witness's qualifications are limited to a given field, for example, the quantification of damages, and certain conclusions in his or her expert report relate to a different field, for example marketing strategies for mobile phones in Asia. A strong argument can be made that the expert witness's opinions on any matters beyond his or her specific field of expertise should be rejected outright.

Notwithstanding the importance of qualifications, this is an area of cross-examination that should be approached cautiously and respectfully. Unless you are confident that the expert witness's overall credibility will be diminished because of serious deficiencies in his or her qualifications, an aggressive attack may backfire and create sympathy for the expert.

Is the expert witness's opinion consistent with previously expressed views?

The third pillar of an expert witness's opinion is consistency. To weaken or destroy this pillar, it is necessary to determine whether the expert witness has previously expressed views on the expert issues in dispute. If so, two alternative lines of attack may be available.

First, if the expert witness has expressed views in publicly available sources that are inconsistent with those advanced in the arbitration, this will provide powerful ammunition for challenging both the substance and objectivity of the expert evidence.

Defusing one expert's report
'I was criticised . . . this has caused me great personal concern'

The case involved the claimant's ability to develop a gas field in Northern Iraq, and to export the gas produced to Turkey and beyond. The respondent filed an 'expert report' from a North American lawyer who had some years of experience advising foreign investors in upstream energy projects in Iraq. His report concluded that the project was doomed because of local legal, constitutional, economic and political reasons. The report had something of the tone of a submission, rather than being a disinterested statement of opinion of an independent expert. The expert's cross-examination by a leading London silk commenced this way:

Q Now, Mr [X], are you qualified as an Iraqi lawyer?
A I am not.

Q Are you a constitutional law specialist?
A I am not.

Q Are you an expert on the interpretations of constitutions?
A I only have worked on petroleum regimes which, in my view, include those features of a constitution that speak to petroleum.

Q I see. Is it correct that you were recently called as an expert witness in the High Court here in England?
A On a matter involving [A] and [B], yes, I was.

Q And you were called as an expert in three areas. Industry practice, oil industry financing, and Kurdish law.
A That is correct.

Q And is it correct that you were severely criticised by the trial judge [. . .]?
A It is correct that I was criticised by the judge in that case.

Q And he expressed, did he not, in his judgment, considerable doubts about your suitability as an expert witness on those two topics that were dealt with?
A He expressed doubt of my suitability as an expert witness on matters of investment banking, corporate finance.

Q I think he said that your expertise in the two fields that you dealt with were markedly inferior – was markedly inferior to the other experts.

. . .

Q I think we can look at the judgment if necessary. But I think when one reads it one sees that he says in the investment banking and the oil industry financing your knowledge, on your own admission, was peripheral?
A That's correct. I look back on this matter and would say that the evidence that I gave which I was asked to give in respect of oil and gas matters in the Kurdistan region evolved to include, as pleadings developed, discussion of matters related to investment banking. And I accept that that is at the periphery of my expertise. I think I have ... I have some experience there, but perhaps not expertise. I was criticised.

. . .

Q It's also correct, isn't it, that he made serious criticisms of the substance of your evidence? The mistakes you had made, the changes that appeared at various stages in the reports, and so on. Is that correct?

A I would say he described two aspects of what I did as misleading. And, again, this has caused me great personal concern that I need to be careful in ensuring that when I speak to issues that are at the periphery of my expertise that I avoid any aspects of, you know – I stay within the boundaries of what is my expertise.

Q [The trial judge] also expressed doubts as to your independence, didn't he?

A He did express those doubts. All I can say is that I was independent of [A]. I had no intention to mislead the court in that matter. And I'm disappointed that the ... with the outcome that suggested that I ... that I had ventured beyond my area of expertise.

Q This is not a question of venturing beyond the area of your expertise. This criticism was based on what he called your tendency to act as an advocate. Do you remember that?

A I do remember those comments.

Q And so he thought you weren't independent because you saw your role to advocate your client's case; is that right?

. . .

Q But I put it to you that you're doing exactly the same thing in this case. Your reports are very substantially advocacy in support of [respondent's] position. Isn't that correct?'

In his closing, the claimant's counsel was hard-pressed to rely on Mr X's report.

– J William Rowley QC, Twenty Essex Chambers

This is most common with academics, since they tend to have a large body of academic publications in their field of expertise. In particular, legal experts will likely have published articles and books on the specific area of law in question and may have testified in the past on such issues in court or arbitral proceedings. Any discrepancy in the legal expert's views may cast doubt on his or her professionalism and objectivity.

It also may be possible to identify inconsistencies in the previously expressed views of professional expert witnesses. For example, investment treaty awards or court judgments may reveal that valuation experts have taken positions on the correct approach to choosing discount rates or assessing country risk that are incompatible with those advanced in the current arbitration.

Similarly, where there have been a number of different legal proceedings in connection with the same dispute, it is sometimes possible to find inconsistencies or helpful admissions in the past reports and testimony of the same expert witness.

Expert witnesses who have been criticised for a lack of consistency or objectivity by courts or other arbitral tribunals in published decisions, whose expert reports were excluded as lacking a credible foundation, or who have been disqualified as an expert in another case, are particularly vulnerable to attack during cross-examination.

Second, an alternative line of attack may be available if it can be shown that the expert witness has preconceived views that prevent him or her from considering the disputed expert issues in an objective and open-minded manner.

On occasion, expert witnesses are actively involved in policy development and may have made statements in the press demonstrating a commitment to a particular agenda. An expert witness may work closely with a competitor or competing technology, and therefore may be unable to view the technology in dispute in a neutral manner. Or perhaps the expert witness was personally involved in the events in dispute and took a particular position that he or she feels compelled to defend in the arbitration. In all of these instances, the expert witness's objectivity may be called into question.

Has the expert witness relied upon proper instructions and sound factual assumptions?

The instructions and factual assumptions relied upon by the expert witness are the fourth pillar of every expert opinion. This is one of the most common and successful areas of attack in cross-examination. It is frequently difficult to establish that an expert witness lacks proper qualifications or has made serious errors within their field of expertise. But in many cases, it is possible to undermine the expert witness's conclusions by showing that they are dictated by instructions designed to generate a particular outcome or are based upon flawed factual assumptions.

Expert reports usually set out the scope of the instructions received, a statement of the facts relied upon, a list of all materials reviewed and the conclusions reached on the different issues in dispute. For each conclusion contained in the report, you should carefully analyse what specific instructions and factual assumptions have been relied upon by the expert witness. Often, it is possible to demonstrate that the instructions have resulted in the expert witness carrying out an analysis that is too broad or too narrow, or directed to matters that are not relevant. For example, when quantifying damages for breach of a distribution agreement, one expert witness was instructed to calculate lost profits based upon a market that encompassed territories not covered by the distribution agreement during the relevant period. In other cases, a close review of the expert report may reveal instances where the expert witness has avoided giving a direct answer to a specific question put by the instructing party. This is usually because the expert witness does not agree with the proposition suggested by the question – a helpful point worth highlighting in cross-examination.

There are several different ways to challenge the factual assumptions underpinning the expert witness's conclusions. One classic approach is to substitute one of the expert witness's assumptions with a counter-assumption that is more reasonable and logically leads to a different conclusion. A fair-minded expert will often accept that, based upon this different assumption, he or she would reach a different conclusion. If an expert witness refuses to do so, this will suggest a lack of objectivity.

In some cases, it may be possible to find authoritative sources in the public domain that independently establish that the expert witness's factual assumptions are unreliable or unrealistic, or that different assumptions would be more appropriate in the circumstances. Sources of this kind might include studies published by international organisations, statistics gathered by regulatory agencies, or standards issued by industry bodies.

Perhaps the most powerful way to challenge an expert witness's factual assumptions is to demonstrate that they are not consistent with the evidence on record. This can be done by taking the expert witness to contemporaneous documents that contradict the factual assumptions relied upon. If it can be shown that the expert witness neglected to read or cite an important document that does not support his or her position, or cherry-picked the evidence relied upon in reaching a specific conclusion, this will undermine not only the substance of the expert witness's opinion but also his or her overall credibility.

Similarly, an expert witness's opinion can be undercut by showing that key factual assumptions are inconsistent with the evidence of the fact witnesses who were personally involved in the events in question. In one recent construction arbitration relating to a large energy project, the owner's expert witness took the position that the contractor had performed certain works that were not required at the time because no project schedule was in place. When the owner's project manager admitted under cross-examination that there was, in fact, a project schedule at the relevant time, this admission was put to the expert witness. Instead of conceding the point, the expert argued that the views of those actually involved in the project were not relevant to his opinion on the need for the contractor's works. This prompted the presiding arbitrator to wryly comment that, while he understood the theory advanced by the expert, the arbitral tribunal was required to decide the case based on the facts.

Counsel:	**In paragraph 416 of your second expert report, you state: 'It is quite simply wrong and nonsensical for [Contractor] to argue that it was necessary to proceed with the out-of-scope works in February 2010 because [Employer] was insisting on compliance with the project schedule at that time.'**
Expert:	**Yes.**
Counsel:	**Your position is that there was no project schedule in place after January 2010?**
Expert:	**Yes. That is my position.**
Counsel:	**On that basis, you go on to say that there was no schedule-driven reason for [Contractor] to proceed with the out-of-scope works in February 2010?**
Expert:	**Correct.**
Counsel:	**Are you familiar with Ms [X] of [Employer]?**
Expert:	**Yes.**
Counsel:	**She was one of the leaders of [Employer]'s technical team for the project?**
Expert:	**That is correct.**
Counsel:	**She worked on the project from the beginning until the end, when the project was cancelled?**
Expert:	**Yes. That is my understanding.**
Counsel:	**You were present in the hearing room on Tuesday when Ms [X] was testifying?**
Expert:	**Yes. I was present.**
Counsel:	**At page 1892, line 13 of the transcript, Ms [X] stated as follows: 'When [Employer]'s Technical Committee considered the additional scopes of work proposed by [Contractor] for February 2010, we compared the proposal against Project Schedule M.'**
Expert:	**Yes.**
Counsel:	**Further down in transcript at page 1895, line 20, Ms [X] testified as follows: 'Project Schedule M was the only schedule in place at that time and all the works had to progress in accordance with the dates set out in Project Schedule M.'**
Expert:	**OK. That is what she said.**

Counsel:	**You accept that, contrary to what you stated in your expert report, there was in fact a project schedule in place after January 2010?**
Expert:	**Well – that is her opinion.**
Counsel:	**Ms [X] was on the ground at that time and actively involved in the project, correct?**
Expert:	**Yes.**
Counsel:	**And you were not.**
Expert:	**No, I wasn't. But my opinion on the validity of the schedule is not necessarily based on looking at what the people on the project think was the schedule. I do not consider an unrealistic schedule to be a valid reason to proceed with works.**
Counsel:	**So you are saying that Ms [X]'s understanding of whether there was a valid and binding project schedule in place in February 2010 is not relevant to your analysis?**
Expert:	**Yes, I suppose that is what I am saying.**
Counsel:	**But you agree that the parties understood there was a valid and binding project schedule in place in February 2010?**
Expert:	**They appeared to be relying on Project Schedule M, yes.**
Counsel:	**Whether or not you sitting here today in 2016 believe that project schedule was reasonable, the fact of the matter is that both parties were working to achieve Project Schedule M back in February 2010.**
Expert:	**My view is that it was not reasonable or realistic for the parties to be working towards Project Schedule M back in February 2010.**
Presiding arbitrator:	**Mr [Expert], I understand your position. But the Tribunal must decide this case based on the facts at that time. The Tribunal will need to consider whether, based on the agreed project schedule in place in February 2010, [Contractor] had an obligation to proceed with the works necessary to achieve that schedule.**
Expert:	**Mr Chairman, yes, I understand the difference in the question.**

Has the expert witness chosen appropriate methodologies and applied them correctly?

The fifth and final pillar of every expert opinion is the correct choice and application of methodologies. Expert witnesses are invariably required to apply a specific methodology, theory or calculation to analyse each disputed expert issue and arrive at a conclusion. This often involves choosing one methodology over another, which may affect the conclusions that are reached. Whatever methodology has been chosen, it is equally important to consider whether the expert witness has applied this methodology correctly.

Through cross-examination, it may be possible to establish that there are several different recognised methodologies in a given field and, for no particular reason, the expert witness has selected the one methodology that favours the appointing party. Alternatively, the expert witness may have chosen to apply different methodologies to similar types of claims in an effort to arrive at particular outcomes.

Another approach is to attack the choice of methodology on the basis that it is not generally accepted in the field or not applicable to the case at hand. To pursue this line of questioning, it is necessary to determine whether the expert witness's choice of methodology is supported by authoritative treatises, guidelines or similar sources. If there are no such sources, you must investigate whether there is any consensus within the relevant community of experts regarding the reliability of the chosen methodology and the appropriateness of applying it in the circumstances. If the majority of experts in the field would ordinarily use a different methodology and arrive at a different conclusion, this will cast serious doubt on the reliability of the expert witness's evidence.

How to examine the tribunal's legal expert

A tribunal presented with irreconcilable expert testimony about the same legal system, or by evidence from only one side because the respondent has chosen not to participate in the proceeding, sometimes calls in its own legal expert.

That presents the lawyers in the case with the need to decide whether to cross-examine the tribunal's expert. If the conclusions reached by the tribunal's expert are consistent with the lawyer's case, or can be reconciled with it, the lawyer would do well to remember that the most effective cross-examination often consists of: 'No questions, Madam President.'

However, a legal expert, even a tribunal-appointed expert, who presents a view of the applicable law that would be fatal to the lawyer's case must be cross-examined.

Unlike an adversary's legal expert, the tribunal's expert cannot be treated as a hostile witness, because the tribunal will resent such treatment of someone it selected. The most effective way to approach the delicate task of cross-examining the tribunal's expert is first to elicit confirmation of all the points on which the expert is in agreement with the lawyer's case – there will always be some. The challenge is then to politely draw the expert's attention (and the tribunal's) to the shortcomings of the expert's reasoning on the points of disagreement or to authorities that contradict that reasoning. However tense such an examination may become, and however hostile the expert may appear, the lawyer must never appear other than perfectly polite.

– John M Townsend, Hughes Hubbard & Reed LLP

Occasionally, the expert witness's approach or methodology involves nothing more than an expression of pure subjective opinion. Since it is difficult to test the accuracy and reliability of such an opinion, cross-examination may simply highlight the unsubstantiated and unverified nature of this expert evidence. In closing submissions, the arbitral tribunal should be reminded to take this into account when deciding what, if any, weight to afford the expert witness's opinion.

One additional way to attack the expert witness's choice of methodology is to compare and contrast it with the methodology adopted by your own expert. If it can be demonstrated that your expert witness's methodology is more accurate, reliable or appropriate for the case based on several objective factors, this will provide strong grounds to argue that the arbitral tribunal should prefer the conclusions that your expert has reached.

Beyond critiquing the choice of methodology, it is necessary to ascertain whether the expert witness has made any errors in applying the methodology. Unless your law firm has an in-house team of accountants, economists or scientists, your own expert witness can usually do this efficiently. Any errors in applying the chosen methodology can then be highlighted to good effect during cross-examination.

Where scientific tests, financial modelling or any other type of complex or time-intensive analyses have been undertaken, it is worth exploring in cross-examination who exactly carried out this work and how closely they were supervised. It is often the case that the expert witness has delegated this type of work to others who may or may not have been appropriately qualified to do the work or adequately supervised. If it can be demonstrated that this was the case or that the expert witness is not sufficiently familiar with the details of

the work performed, the arbitral tribunal may not be comfortable relying upon the conclusions reached by the expert witness on the basis of this work.

Identifying areas for seeking agreement with the expert witness

A second and perhaps even more important objective of your cross-examination is to highlight areas where the adverse expert witness agrees with facts or conclusions that support your case theory.

For example, an expert witness might make a number of statements in favour of the appointing party, but the logical implications of these statements could confirm your position. By carefully positioning each of these statements in cross-examination, the expert witness may be boxed in and compelled to accept the logic of your argument.

Alternatively, important admissions may be obtained by launching a collateral attack on matters that were not addressed in the expert report, but are squarely within the witness's field of expertise. The expert witness is usually not prepared for such lines of questioning, and therefore may more readily accept propositions helpful to your case. In one recent Paris-seated arbitration, an expert witness was called to testify about alleged deficiencies in certain specific tests carried out by an independent inspection agency. While not addressed anywhere in his report, the expert was compelled to make a number of crucial admissions under cross-examination about general industry standards applicable to such agencies. Arbitral tribunals will frequently allow such questions because they help to narrow the issues in dispute.

Guidelines for the cross-examination of expert witnesses

Once the expert evidence on record has been analysed, it is helpful to consider certain practical guidelines for planning and executing the cross-examination of an expert witness. These guidelines focus on: (1) the preparation of a topic outline for cross-examination; and (2) techniques for conducting an effective cross-examination.

Preparing a topic outline for cross-examination

One of the keys to an effective cross-examination is a detailed topic outline. This outline will structure not only your notes, but also your overall strategy for approaching the different lines of questioning to be pursued:

- Each area of cross-examination should be broken down into one or more separate chapters.[6] Each chapter should focus on one specific fact or goal that advances your case theory. You should then map out your questions in a logical progression towards that specific fact or goal. Each chapter should be free-standing, so that it can be moved around within the overall cross-examination to achieve the best effect.
- The different chapters of your cross-examination should then be ranked as strong, moderate or weak. Ideally, it should be possible to identify two or three 'power chapters' that will cleanly emphasise important aspects of your case theory.
- All the chapters should then be sequenced to give structure to the cross-examination. The basic rule of sequencing is to start strong and end strong. This is because the

6 For the chapter method of cross-examination, see L S Pozner and R J Dodd, *Cross-Examination: Science and Techniques* (Charlottesville, NC, The Michie Company, 1993).

On hot-tubbing
'Approach expert conferencing with caution'

Expert conferencing is becoming increasingly popular in international arbitration. For the tribunal, expert conferencing can provide a welcome opportunity to see the experts directly engage each other, which may help to find areas of agreement and thus narrow the issues in dispute. However, counsel should approach expert conferencing with caution. In my experience, the personalities of the experts can have a significant impact during expert conferencing. An expert with a more forceful personality can overshadow a more knowledgeable expert who is more reserved or does not insist on having the last word. Before agreeing to expert conferencing – indeed, perhaps even when engaging an expert at the outset of the case – counsel should carefully evaluate not only the expert's knowledge and presentational skills but also his or her demeanour in person.

– Stanimir A Alexandrov, Stanimir A Alexandrov PLLC

beginning and the end of your cross-examination will have the greatest impact on the arbitral tribunal. Always start with two or three short and strong chapters, so that you gain control over the expert witness. Longer and more complex chapters should be placed in the middle of the cross-examination, where certain risks can safely be taken. Finally, end with a power chapter, so that the arbitral tribunal is left with a positive overall impression of the cross-examination.

Techniques for conducting an effective cross-examination

By carefully analysing the expert evidence and preparing a detailed topic outline, you will develop a clear strategy for your cross-examination. To execute this strategy at the evidentiary hearing, it is essential to apply certain tried and true techniques for conducting an effective cross-examination of an expert witness:[7]

- Many of the challenges of cross-examining expert witnesses are related to the complexity of the subject matter. The more complex the subject matter of the cross-examination, the more important it is to focus on the fundamentals of good questioning technique:
  - Use a 'headline' to identify each new topic to be covered, for example: 'I would now like to focus on the methodology you adopted to quantify the net present value of the investment.'
  - Use only closed questions, unless there is a specific reason for not doing so. A closed question is a declarative statement of fact, not an enquiry, for example, 'You inspected the power plant on two occasions?'
  - Use facts, not conclusions. Do not argue your case with the expert witness, but instead focus each question on a specific fact established by the evidence on record.

7 These cross-examination techniques are drawn from many different sources, including the author's personal experiences and original materials on advocacy, Foundation for International Arbitration Advocacy workshop materials and L S Pozner and R J Dodd, *Cross-Examination: Science and Techniques* (Charlottesville, NC, The Michie Company, 1993).

Technical witness conferencing yielded more insight than cross-examination

Cross-examination of technical witnesses and experts may not always be the most efficient method. Years ago, I was chairing an ICC arbitration where the core of the dispute revolved around intellectual property rights and one of the main issues was which side was entitled to use the developments and improvements of the original invention. The contract concluded at the origin by the parties provided for sharing specific developments of certain segments of the invention. The witnesses who appeared to testify were all former or present technicians of the parties who were involved in the negotiations of the contract at the outset and who over several years were jointly involved in the further development of the invention. When being cross-examined by counsel, they were so well prepared that they virtually repeated what they had written in their witness statements. Realising that this was fruitless, the members of the tribunal successfully proposed witness conferencing with all the technicians. After about half an hour, the witnesses forgot about the instructions they had received from counsel prior to the arbitration and started communicating among themselves in a very open and congenial manner. The arbitrators had the impression that the witnesses were just continuing with the technical exchange they had at the time they closely worked together. With the 'revival' of the cooperative team spirit, a constructive basis was found, which allowed the arbitral tribunal to put questions to the witnesses and receive useful answers for the better understanding of the relevant technical aspects.

– Georg von Segesser, von Segesser Law Offices

  - Ask only one fact per question. Keep each question short and use simple words. Ideally, use the expert's own words to make your point, rather than characterising or paraphrasing. Avoid all adjectives or quibble words. This is essential for control and clarity when covering complex technical subjects.
  - Listen carefully to the answer, and follow up. Do not be fixated on the next question in your notes. Make certain that you obtain the answer you want before moving to the next point.
- At the beginning of the cross-examination or possibly at the beginning of different chapters, it may be necessary to destroy certain 'safe havens' that the expert witness could use to evade damaging lines of questioning. For example, you may need to establish that the expert witness reviewed certain key documents or was aware of particular facts before you will be able to obtain helpful admissions.
- Each point to be made on cross-examination needs to be set up. Usually, the best approach is to develop a point obliquely, rather than confronting the expert witness directly. By carefully marshalling a series of individual facts, you will enable the arbitrators to draw their own inferences and conclusions regarding the expert's evidence. This is always far more convincing than argumentative questioning by counsel.
- Once the cross-examination is under way, do not change the planned sequence of your chapters. Expert witnesses are often adept at deflecting questions by raising side topics or new matters. Do not be distracted by them. You have structured your cross-examination in a certain way for good reason, and it is important to remain confident in your plan of attack.

- It is nonetheless necessary to remain flexible as the cross-examination evolves. Be ready to discard chapters or change strategy as appropriate. If a particular line of questioning becomes bogged down, there is nothing to be gained by arguing endlessly with the expert witness. It is far better to move on to a different short and strong chapter that will allow you to reassert control and refocus the arbitral tribunal's attention on your case theory.
- Finally, always be respectful and polite to the expert witness. You must earn the right to become aggressive by repeatedly demonstrating that the expert is being unfair, unreasonable or untruthful. No matter how difficult the expert, remain professional and in control – this is essential to assess the witness's evidence and the impact of your questioning on the arbitral tribunal.

Additional considerations relating to virtual cross-examination

With the travel and other restrictions adopted in response to the covid-19 pandemic, virtual hearings have now become commonplace in international arbitration. Having settled into this new reality, arbitral tribunals are likely to be more open to conducting hearings, in whole or in part, in a virtual format.

As a consequence, every counsel active in international arbitration must now master the virtual cross-examination. There are a number of key considerations in this respect:

- Preparation is essential to ensure that you are fully comfortable with all aspects of the technology and are able to navigate it seamlessly throughout your virtual cross-examination. It is particularly important to verify that the documentary evidence is well organised (preferably in an electronic bundle) and then practise making use of it in advance of the hearing.
- Before beginning your cross-examination, ensure that the expert witness is alone in the room where he or she is testifying and only has access to a clean set of the case materials (not to any notes or electronic modes of communication).
- Put up your cross-examination notes on the screen directly in front of your video camera so that you can both see your notes and maintain eye contact with your camera.
- Throughout the cross-examination, speak slowly and in very short sentences to avoid speaking over the expert witness, creating confusion and losing control. As you cannot rely on your physical presence and body language for emphasis, focus on modulating your voice to keep the expert focused and the arbitral tribunal engaged.
- If possible, during the virtual cross-examination, put up each document on the screen. Then identify the document and each passage clearly before addressing it. Read in all quotes from the documents. If the documents cannot be put up on the screen, ask the expert witness to expressly confirm that he or she is looking at the relevant document and passage before asking any question about it, to minimise the risk of misunderstandings and to create a clear record on the transcript.
- Establish a confidential means of communicating with your own legal and expert teams so that you can easily and securely obtain real-time input on potential follow-up questions or other observations regarding answers provided by the opposing expert.
- Due to the challenges of maintaining clear communications and navigating documents in a virtual format, plan for your questioning to take longer than usual. Focus on the critical points and generally be less ambitious with the scope of your cross-examination.

Experts can make or break a case

Experts can make or break a case. Once, counsel for the losing party asked me, as its party-appointed arbitrator – well after the award had been rendered and the period for set-aside had passed – what I viewed as the single most important reason for his loss. My answer was simple. Expert testimony in the case was critical not only on damages but also on liability issues, and his expert was self-contradictory, evasive, unfamiliar with the basic literature, not to mention overly defensive. Under such circumstances, superb advocacy by counsel can go only so far.

George A Bermann, Columbia University School of Law

- Be aware that your facial expressions and interactions with your team members are more visible to the arbitral tribunal in a virtual hearing. Monitor your own video image to ensure that you come across as professional at all times.
- The facial expressions and reactions of the expert witness are also magnified, which helps both cross-examining counsel and the arbitral tribunal to assess the expert's testimony. Use this feature of the virtual cross-examination to your advantage.

Additional considerations relating to witness conferencing

In addition to cross-examination, it is now commonplace in international arbitration to hear expert witnesses through witness conferencing.[8] Witness conferencing is the simultaneous questioning of two or more witnesses from the opposing sides of the case. The exact format and procedure for witness conferencing can vary significantly from one arbitrator and case to the next. Often, however, traditional cross-examination is followed by witness conferencing with the opposing expert witnesses on a particular subject matter being heard together.

While a full discussion of witness conferencing is beyond the scope of this chapter, it is important to consider in advance of the hearing whether each point to be covered with the opposing expert witness would be best addressed through cross-examination, witness conferencing or both:

- During cross-examination, you have complete control over the topics that are covered. This is not the case with witness conferencing. Accordingly, any critical points should be addressed, initially at least, through cross-examination. Also, if a clear foundation needs to be established through a series of questions, it is usually best to develop the point first through cross-examination. Witness conferencing often can be a free-for-all, and you will rarely have the opportunity to ask more than two or three questions in sequence without interruption.
- Other points might, however, be made more effectively through witness conferencing. For example, you may be able to put a few key questions to your own expert witness and then immediately use the answers to pin down the opposing expert in a way that would not be possible in cross-examination. This can be particularly useful if the

8 W Peter, 'Witness Conferencing', *Arbitration International,* 18(1) (2002), 47.

arbitral tribunal is having difficulty grasping a complicated technical issue or where the opposing expert is using technical double-speak to confuse the issue.

- In any case, as counsel, your ability to control witness conferencing is limited. Consequently, you should not overestimate what can be achieved through witness conferencing, and instead rely primarily on cross-examination to advance your case theory.

Conclusion

By applying the frameworks of analysis and guidelines for cross-examination outlined in this chapter, any reasonably intelligent lawyer can learn to conduct a competent cross-examination of an expert witness. Cross-examination is not a dark art – it is the product of know-how, hard work and practice.

9

The Role of the Expert in Advocacy

Luke Steadman[1]

The distinction between an advocate and expert witness is considered by the UK courts to be crucial to the just disposal of any hearing.[2] Expert evidence presented to the court, it is said, 'should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation'[3] while the expert witness is there to provide 'independent assistance to the Court by way of objective unbiased opinion in relation to matters within [their] expertise'.[4] An expert witness should not assume the role of an advocate.[5]

Such is the position under English litigation, and experts submitting reports in cases under the English Civil Procedure Rules sign statements confirming this; their understanding of it; and their compliance with it. Many experts will, as a matter of course in arbitration proceedings, include a similar statement to the effect that they are giving objective independent evidence on the matters on which they are instructed, despite such statements not being required by any of the leading institutional rules.[6]

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1 Luke Steadman is a partner at Alvarez & Marsal. The author would like to thank Neville Byford, a partner at Eversheds-Sutherland; Stephen Fietta QC, founder and principal at Fietta LLP; Sean Upson, a partner at Stewarts; and others who have provided their insights on the differences between experts and advocates.

2 *Pickles v. Revenue & Customs* (Whether crediting a directors' loan account which was freely available for the directors/members to draw upon) [2020] UKFTT 195 (TC) (22 April 2020) at 6.

3 *Whitehouse v. Jordan* [1981] 1 WLR 246, at 256.

4 *Polliviitte Ltd v. Commercial Union Assurance Company PLC* [1987] 1 Lloyd's Rep, 379 at 386.

5 CPR PD35 para 2.2.

6 The IBA Rules on the Taking of Expert Evidence in International Arbitration require experts to be independent of the parties but say nothing about the content of their evidence. The Chartered Institute of Arbitrators Protocol on the use of Party-Appointed Experts states that party-appointed experts should be 'impartial, objective, unbiased and uninfluenced' and imposes a duty on experts to 'assist the arbitral tribunal to decide the issues in respect of which expert evidence is adduced'. The ICC, LCIA, UNCITRAL and ICSID Rules (among others) permit expert evidence but impose no requirements on party-appointed experts.

The importance of a competent expert cannot be overstated

The importance of a competent and professional expert cannot be overstated. Experienced experts are expensive, especially in cases requiring complex questions of delay analysis and damage quantification. It is understandable that parties can often be reluctant to make a considerable investment in leading experts; however, it is an investment that is always worth making. I have personal experience of a number of occasions when an otherwise potentially strong case failed because of a flawed expert analysis. Even when a tribunal is otherwise persuaded that a party has a good case, it will not be able to eventually find for that party unless it has detailed and cogent evidence to support the findings when they write up the award. Careful arbitrators tend to be conservative in their decision-making and are looking for a strong and reliable evidentiary basis to reassure them that their decision is the right one.

– Stephen Bond

So, is it right to say experts have no role in the advocacy of a matter in arbitration? After all, our reports comprise argument and evidence that support the opinion reached, so we need to be an advocate for our own opinions and our interpretation of documents. To do otherwise, to eschew advocacy at all, would be simply to dump at the tribunal's collective feet a mass of disorganised material with the instruction to the tribunal to work it out for themselves, which cannot be of much assistance to even the most experienced arbitrators.

For this reason, the answer to the question must be 'yes, but', because, in a different sense to the advocacy advanced by lawyers on both sides, expert evidence needs to be qualified by a focus on the needs of the tribunal rather than of the party instructing an expert. In other words, a 'good' expert is an advocate for his or her own independent view, properly and objectively supported, which may (or may not) align precisely with instructing counsel's case. A good expert report will equip the tribunal with the language to deal with the expert issues before it and ensure that those issues are properly articulated, and their margins or boundaries defined for the tribunal. A poor expert is one whose evidence simply provides what they think their client wants them to say, leaving the tribunal no way to grapple with the issues it needs to decide.

Although it is probably better to refer to an expert as a communicator rather than an advocate, expert opinions do form part of the way a case is advanced, and for this reason, the expert has a role throughout the proceedings. Following the format of previous editions, this chapter aims to identify the expert's role at each stage of the arbitral process and to discuss how to get the best out of the expert in a way that contributes effectively to the advancement of the case, bearing in mind the expert's role as a communicator, not an advocate.

The purpose of expert evidence is twofold: firstly, to educate the tribunal on technical matters that may not be within their own expertise, but for which understanding is required for the tribunal to do its job; and secondly, to put forward a view of those technical matters and evidence consistent with the expert's approach to independence and objectivity and the matters in respect of which he or she is instructed.

Not all matters require the expert to put forward a view. For instance, accounting teams on both sides may agree that certain costs claimed in proceedings were incurred

Experts win cases

Asked, long after the fact, by losing counsel in a case where the weaknesses in his advocacy, if any, lay, I offered two simple words: 'Your expert.' That was the truth.

Expert evidence is of the essence in any dispute in arbitration that has the least technical dimension. In more cases than one might imagine, outcomes turn on evidence of a more or less specialised nature. Most leading international arbitrators are generalists and, albeit to a somewhat lesser extent, so too are most leading international arbitration counsel. Expert witnesses plainly fill this gap. Even in disputes having no particularly specialised character, if monetary relief is forthcoming, so too will be expert evidence on damages.

Because arbitral tribunals gauge carefully the objectivity and reliability of expert witnesses, counsel need to admonish experts that poor expert performance can sabotage what might otherwise be a winning case. Who are the experts to avoid? Those who display excessive partisanship, undue defensiveness (including taking umbrage at challenges to their credentials), inconsistencies with prior statements (including prior writings and testimony) and an unwillingness to make strategic concessions.

– George A Bermann, Columbia University School of Law

or expended, with an agreement being reached by each side's accountants checking and cross-checking a common set of documents. In which case the issue, or the documents, may no longer need to concern the tribunal. Equally, expert evidence may not be required at all if the facts of the case or the contractual matrix are sufficiently clear. However, most matters involve, to a greater or lesser extent, consideration of a counterfactual scenario (and a comparison between that counterfactual and the actual outcome). Hence consideration at an early stage as to whether experts should assist in devising a counterfactual scenario must be considered.

In some cases, expert evidence need only be a translation of technical aspects and no expert opinion will be required. In other words, once the fact evidence has been explained by an expert the conclusions to be drawn may be obvious. Most practising experts draw an important distinction between resultant evidence (the outcome of factual analysis) and expert opinion, a distinction which may be less obvious to non-specialist counsel and tribunal. For instance, following money through a complex web of offshore and company transactions (to use a common example) involves a degree of forensic skill, but the determination of the final destination of funds is one of resultant evidence. Expert opinion in this scenario may result from the consequence of the loss of those funds, not their determined disposition.

What makes good expert evidence is therefore the expert's ability to communicate complex issues clearly, precisely and without compromising on detail or meaning. Understanding and communicating are different skills, and only the latter is useful to the tribunal. In choosing an expert, counsel should consider both expertise and experience: expertise, because someone who is not an expert in their field will generally be a bad choice and will almost invariably come unstuck in cross-examination; experience, because of the unique way in which expertise is challenged in adversarial proceedings. The work of an expert is, in practice, part 'journey' and part 'translation' as, regardless of what is found,

Experts not advocates: style

Flamboyance and expert don't necessarily go well together. Quiet confidence wins the day with the tribunal.

– London-based partner at a US law firm

If the expert cannot convey the point to the tribunal, it's irrelevant.

– Arbitrator

Quiet confidence assists the court most – if they are thumping the table advocating a position, they lose trust. I want a tribunal to think: this person knows what they are talking about, and I trust them because they are here to help us.

– Partner at a UK law firm

however complex or esoteric, it has to be communicated succinctly and clearly in arbitral proceedings for it to be of use to the tribunal. This ability to communicate will allow an expert to contribute to the overall advocacy of a party's case.

Instructions

Instructions are simply the areas for which the expert's opinion is sought. An expert can assist in framing the precise questions to be addressed. Indeed, framing the 'exam questions' is a good way of distilling exactly what issues need to be considered. While it may be unavoidable because of the circumstances of the parties' claims, an issue with instructions arises when they need to address a party's counterfactual case. Consider the difference between the following:

- What was the value of Company X on historic date Y? (Or what is the value of Company X today?)
- What should the value of Company X have been on date Y had Z not happened? (Or what should the value of Company X be today 'but for' Z?)

The first question may require no further input. The expert may seek technical clarification, for instance in the context above as to the relevant 'basis' of value required,[7] but once the question is clarified, the answer will depend on the quality and availability of documents and the exercise of the expert's own skill. The expert may need, either because of the lack of available documents or for other reasons, to make assumptions in arriving at an opinion, but those assumptions are the expert's assumptions, no doubt to be tested in cross-examination.

The second question requires the expert to apply a counterfactual case and the issue may be that there is no agreement between claimant and respondent sides as to precisely

7 For instance, 'market value', 'fair value' or some other basis.

Trust your experts and tribunal!

Recently, I chaired a London-based arbitration where, after first receiving consent from counsel, the tribunal was able to conduct a separate meeting with the quantum experts. The discussion took place prior to the hearing on the merits, but already after the filing of two rounds of expert reports. The findings of the experts on rather complex issues differed considerably and many assumptions and deductions, in particular with regard to the lost profit calculations, could not be reconciled.

Leading up to the meeting with the experts, the tribunal confirmed with counsel the scope of issues to be discussed and distributed a detailed agenda of topics. The tribunal also made clear that any remarks made by its members during the meeting would be without prejudice to its findings on the merits and made solely for the purpose of facilitating the tribunal's understanding of the expert testimony.

The experts were cooperative and forthcoming during the day's discussion. There was an open discourse among the experts and members of the tribunal. The experts were given the opportunity to provide their input and feedback on the various subjects set out by the tribunal. The overall atmosphere was more collegial than one normally encounters in a cross-examination setting.

The assembly proved to be very helpful for all parties involved. In the end, the tribunal was able to better understand the points on which the experts were in agreement, as well as the points where there was a clear difference of opinion. An added benefit of the meeting was the identification of documents that both experts were interested in seeing to further update their findings. Although quite onerous to prepare for, the process allowed the tribunal to head into the hearing on the merits with a clearer understanding of the experts' opinions and consequently the parties' respective cases. Ultimately, as a result of such an exercise, the presentation of the experts and their cross-examination at the hearing will be more focused and useful.

– Georg von Segesser, von Segesser Law Offices

what that counterfactual case is; each side may offer different counterfactual scenarios and, ultimately, the 'correct' counterfactual case is to be decided by the tribunal based on the evidence put before it.

In such situations, the expert needs to be provided with party-side assumptions and to exercise a great deal of care to remain a neutral communicator and not stray into case advocacy.

For instance, it will generally not be a good idea to restrict an expert to using assumptions only in the client's favour: an expert who only deals with one-sided assumptions will appear biased, even if following his or her instructions, and becomes a poor advocate for his or her own position and the case overall. Equally, an expert asked to value a business based on an assumed set of inputs may simply be acting as a calculator, and the resultant 'valuation' merely an exercise in 'garbage-in, garbage-out'.

Conversely, a good expert can advance a case by considering those client-side assumptions as part of the expert report and forming a view as to reasonableness in the circumstances. This is particularly relevant in matters of damages where an instructing party may have strong views as to financial counterfactual. In these circumstances, the expert serves

Experts not advocates: independence

Lawyers are paid to make an argument they may or may not believe in – by contrast, the tribunal wants to hear an expert's honestly held, independent opinion, which, as counsel, you hope will advance your client's case. You wouldn't present the expert if his or her opinion was not supportive.

– Partner at an arbitration 'boutique' firm

Once you instruct an expert, they are a bit like the child you push out the door at 18 to make their own way in life. They are out on their own; you ought not to control them (nor tell them in a meeting what not to concede) – the expert is now on their own. Hopefully, you have sent them in the right direction.

– Partner at a UK law firm

both the tribunal and instructing party by providing context and independent balance to those client-side assumptions, which in turn enhances his or her credibility with the tribunal and advances the client's case. Of course, the situation where the expert disagrees explicitly or impliedly ('I am instructed to assume . . .', a phrase loaded with meaning when it comes to cross-examination) with his or her instructions or client-side assumptions should be avoided.

Finally, an expert should (and should be instructed to) deal with a range of relevant permutations. A damages expert will always proceed from the basis that the respondent is liable, or that the claim succeeds; but there may be different combinations of findings on liability that the expert needs to consider. In my experience, this often happens with dates – date of the breach, alternate dates, dates of valuation – and an expert that only considers the client's proposed valuation date may be exposed where the tribunal prefers the other side's date. Generally, it is good practice for experts to disclose, or at least summarise, their instructions to avoid confusion on this point.

It is not uncommon to see matters bifurcated between 'liability' and 'quantum' phases. Although this may be driven by a preference to avoid dealing with complex maths on a Friday afternoon, bifurcating a matter may allow the tribunal to deal with and resolve the different complex counterfactuals so that the expert evidence on quantum deals only with the situation that the tribunal finds. Where bifurcation is being considered, it may be crucial to instruct an expert before any decision, so that the different implications of those scenarios may be considered.

The report

Prior to preparing a report, the expert and his or her team can work with counsel both in framing the issues of the case encapsulated in instructions and with the complex issue of disclosure to ensure that documents relevant to those instructions are available. Experts can be useful in identifying what documents to request (this is particularly true of technical experts), how to go about specifying them with unambiguous particularity, and in assessing the resulting production for gaps: documents that should exist but have not been produced

or whose existence is denied. While this may seem reasonable from a legal viewpoint, an expert may have a different view.[8]

The report is the expert's first contribution to the advancement of the case and a report that does not advance the case may never be seen again. Here it helps to remember that the report should be directed towards the tribunal, and its function is not to advocate client-side assumptions or the preferred counterfactual scenario, but to put forward the expert's opinions and engage the tribunal so that it sees that they are fair and reasonable, correct in the circumstances and should be preferred to those of the expert on the other side. There are other 'consumers' of the report, including the other side and their expert, but they are not the primary focus.

A report is advocacy in written words, numbers and graphics. While it is generally the case that most arbitral tribunals are composed of lawyers, and increasingly those that sit as arbitrators are financially literate,[9] it may always be better to assume a zero-state of technical knowledge in a report. This does not mean a didactic approach (condensing a three-year MBA finance or accounting course is hardly feasible), but it does mean concepts and terminology should be carefully introduced and precisely described. The expert should not appear to be hiding behind what the tribunal might see as obscure terminology. To give an example of the confusion that may result from terminology, I was once instructed on a case where a sale and purchase agreement provided for a further payment to be made based on the amount of 'profit' made following acquisition but was silent as to the basis or definition of profit. Hence even simple terms can be complex on expert examination, for instance:

(a) Should 'profit' be measured before or after tax (PBT or PAT), 'gross' or 'net' profit, or some other common measure such as operating profit or EBITDA?
(b) Should 'profit' include or exclude changes of accounting policy or procedures between the date of sale of the business and date of measurement for the purposes of the additional payments?
(c) Could 'profit' include non-cash amount earned from a related party transaction where payment was guaranteed by the assignment of a receivable, being the further payment to be made by the acquiring company?[10]
(d) Why do (b) and (c) matter?

In that case, discussion of the meaning of the term 'profit' and its various permutations was crucial; but of more general application, the expert does not want to be in a situation where in the context of profit the tribunal is thinking about PBT, when the expert is referring to PAT.

8 In a High Court matter I was involved in, it came across badly for the other side when they were forced to explain to the judge that the reason that they had not produced 'accounts' and 'budgets' for the 'operating companies' that I had requested as SJE in that case, was because 'financial results' and 'forecasts' were prepared on a 'group' basis so that no such documents as requested, technically, existed.

9 I recall once being told by an arbitrator that he was most looking forward to hearing about my derivation of country risk premium in my CAPM calculation.

10 The effect of which was to increase 'profit' in circumstances where the earn-out payment was based on a multiple of profit. For every 100 added to profit in this way, 500 was added to the earn-out payment, of which 100 was assigned as guarantee for the amount due to the company.

Words are dangerous things: the expert's choice of words can enhance authority and credibility or land him or her in hot water when it comes to cross-examination. For this reason, qualifiers and superlatives are generally best avoided, and the expert is advised to maintain a dispassionate, balanced and neutral tone. Precision in terminology must be adhered to especially where technical terms and terms that also have an everyday meaning that may, or may not, accord with that technical meaning are used, and where those terms may have multiple meanings. The aforementioned discussion of 'profit' is relevant here, but everyday terms such as 'risk' and 'discount' (to use examples from the corresponding chapter in the first edition) betray technical meanings distinct from their everyday usage.

If words are dangerous, numbers and graphics can be more so. There can be considerable benefit in providing visual aids in an expert's report, providing the report takes the time to explain the purpose of the diagram and the conclusions to be drawn from it, neither of which will be obvious to the untrained reader. However, not all complexities can or should be simplified, and there is a danger with oversimplification. Part of the expert's role must be to make the tribunal aware of the true complexity of an issue and to equip the arbitrators to deal with it properly. Oversimplification, particularly the sort of 'circles, and arrows and a paragraph on the back of each one explaining what each one was'[11] approach can raise the issue of impartiality, where necessary issues are hidden behind an inauthentic stated goal of making 'things palatable' for the tribunal.

The opposing expert

Experts disagree. If they didn't, the tribunal's job might be easier. Understanding why they disagree, and the nature and boundary of that disagreement, provides the tribunal with a reference frame from which to approach expert evidence. Under the English Civil Procedure Rules, experts are generally required to prepare a statement for the court of matters agreed and not agreed and reasons for disagreement (generally known by the shorter name of 'joint statement'). Although this is not required in an arbitration context, it is not uncommon to see tribunals engage with the concept of the joint statement.

In some cases that I have been involved in, the tribunal has directed experts to meet early in the case and to seek to agree on a common approach or common basis of the approach. While noble in its aim, this may be difficult to achieve in practice. Early on in the case, matters are simply less understood, and it is only by working through these, and the relevant documents, that the experts will start to see the areas where disagreement might arise – which makes putting a joint statement later in the process more appropriate.

Whenever prepared, the joint statement is all about communication. Here the experts are not advocating their respective positions but reconciling the differences between them to establish the key issues that the tribunal will need to decide. For instance, the experts may disagree whether a discount rate is 6 per cent or 9 per cent but agree that the answer lies within that range and the particular factors that, when properly considered, lead to an answer between those values. This avoids the tribunal having to deal with superfluous, immaterial or irrelevant material and focuses attention on the actual issues to decide, often lost in the detail of an individual expert's report.

11 Guthrie, Arlo, 'Alice's Restaurant Massacree' (Warner Bros. 1967).

Experts not advocates: hearings

The lawyers always want to get the expert into an argument – but get them away from their area of expertise. No lawyer will want to take on accountant on figures – if they do, they lose.

– Arbitrator

Beware of the 'overstretch' – you get experts who are inclined to opine on anything; perhaps they like the sound of their own voice. It comes out quickly in cross-examination that they don't know a thing about the issue, which casts doubt on their credibility as an expert – and contaminates other parts of their work.

– Partner at an arbitration 'boutique' firm

The skills needed in a hearing are very, very difficult. Appointing an expert for the first time is a bit like skydiving; you'll never know how good they are going to be until they have done it once, and the first time can be a disaster.

– London-based partner at a US law firm

The hearing

It is becoming increasingly common for experts to be asked to make opening statements to the tribunal. This is not an opportunity for advocacy; indeed appearing to argue the case in an opening statement may set a tone of partisanship or bias that will not sit well with the tribunal members. Therefore, it is important that the opening statement is not 'new' evidence but a helpful distillation of those points that are of most relevance to the issues at the forefront of the tribunal's collective mind.

It can be instructive for the expert to sit in on, or at least read the transcript of, the opening day of a hearing where the parties' respective cases are introduced. The questions asked by the tribunal will indicate the issues vexing its members and, to the extent those touch on issues falling with the expert evidence, focusing on those questions – and providing answers from paragraphs in the expert's report – may be a good use of an opening statement.

Does anyone look forward to being cross-examined? I doubt it, but it's natural to feel stress when someone questions what we perceive and represent to be the case. Cross-examination's goal may not be to argue with the expert on his or her area of expertise, but it will aim to put an expert under pressure, create fluster and reduce credibility. An expert does not have to be defeated on all points in a report to lose credibility, so cross-examination will be targeted. In my experience, cross-examining counsel seldom ask about the good bits of my report.

From an expert's perspective, the goal in cross-examination is to show that our approach, review of the evidence and expert opinion remains balanced, fair, impartial and correct. Responses to cross-examination should not be advocacy – we are not there to argue the client's case – but need to clearly distinguish one scenario (usually the one in our expert

reports) from another, typically the one being put in cross-examination. An expert should be measured, serious, convey gravitas, appear calm and not give in to anger or frustration to demonstrate that he or she is there to assist the tribunal. Witnesses are often asked to give simple 'yes' or 'no' answers, but the 'yes, but. . .' answer is a common refrain in expert cross-examination; neither defensive, nor one to be avoided, since answering in this way better equips the tribunal to address the issues. Extending the earlier example, if counsel asks, 'given X, would not the discount rate be Y?', an answer that, 'yes, but X implies Z, which is not observed in this case, so Y will not be correct in this case' provides better information.

Experts must always assume that cross-examining counsel will be well prepared, immersed in the detail of the case and know the complexity of the expert issue; he or she will be well assisted and prepared by the opposing expert, and the supporting team. In the hearing, he or she will have access to that resource via the tried and tested 'yellow sticky' note.

Concurrent evidence is a relatively recent phenomenon, and there are many differing views as to its efficacy, which cannot be dealt with in this chapter. There is agreement that concurrent evidence is not simply experts arguing with each other, as it is difficult to see how a tribunal is assisted by a philosophical debate that it may not be equipped to follow, nor is concurrent evidence about the experts' skills in advocacy and oratory. Done well, 'hot tubbing' allows the tribunal to probe at the heart of the issues of disagreement between experts and, as such, serves much the same role as the joint statement of matters agreed and not agreed.

Conclusion

In previous editions, this chapter has stressed the tension inherent in the role of an expert witness, where a need to be objective, independent and dutybound to the tribunal potentially conflicts with the expert's desire to help the client's case and the professional obligation to that client. That point must be made again: an expert's role remains, first and foremost, to reach professional opinions on the matters for which he or she is qualified, and a good expert will manage that tension – adding value to the advancement of the case by explaining his or her opinions in a way that is clearly understandable to the tribunal and is consistent with the client's case. Indeed, it is that ability to communicate that instructing counsel often seek. After all, a good point badly made or not understood, is, at best, of no use and, at worst, harms the expert's credibility.

Experts are not hired guns. We do not advocate for our client's case, and our evidence is undermined if it is shown to be incomplete or one-sided, or avoids tackling interpretations that are unfavourable to our client. Counsel will have selected an expert, not just for his or her expertise and experience, but also because (it is hoped) that expert opinions will support, explain, bolster or at least assist the client's case. The expert's role then becomes, principally, one of communicator, and the expert's contribution to advocacy is to advocate genuinely held and professional opinions in support of the client's case, but distinct from counsel's advocacy for the client.

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Closing Arguments

Hilary Heilbron QC and Klaus Reichert SC[1]

Closing arguments or submissions are the culmination of the advocate's role in the arbitral process, and they are often key to the end result. They are the ultimate reference point for an arbitral tribunal wanting to write its award. They bring together the strands in the case and, more particularly, the documentary and oral evidence. They contrast with opening submissions, which can only be introductory. Closing submissions, on the other hand, are produced at a time when the tribunal will have heard the full story from both sides. More particularly, they provide the last chance to persuade a tribunal of a party's cause. It is often said that the written submissions should be a road map for the award. However, that should not be viewed as an invitation to rewrite or replead a case. Rather, closing arguments represent an advocate's key moment to focus on what is important and to persuade a tribunal why their side wins or, more particularly, why the relief sought should be granted or refused, as the case may be. This chapter gives some guidance on how to proceed.

Persuasion, not prolixity, is the key. Time may be curtailed and, thus, distracted discourse on irrelevant points can mask the more important issues. This could, at best, waste time or, at worst, throw the tribunal off the course the advocate wants them to follow. A particular challenge in closing arguments, whether made in writing or orally, is to consider the purpose of the submissions made, to ask oneself why a particular point is being made and whether it is necessary: is it, for example, to correct an erroneous impression made by the other side, or to clarify certain misconceptions in the factual evidence or legal argument? Most critically, will the submission assist the tribunal in its deliberations? They also have to be attuned to what the tribunal is likely to consider important. A subjective view of one's own case and what are perceived to be the key points, without a frank and honest analysis of the opponent's case, may not necessarily be that which assists or persuades a tribunal.

1 Hilary Heilbron QC and Klaus Reichert SC are barristers at Brick Court Chambers.

Closing argument should do just that – close down

Opening argument should provide an overview of the case, identify the points truly at issue as the hearing commences and provide the advocate's position on those points, without necessarily previewing all the points the advocate hopes to bring out during the hearing. Closing argument should tell the tribunal what actually happened at the hearing, take account of the full record as the evidence closes, and explain why the position laid out on opening was confirmed and vindicated. There can be no question that cases will develop during a hearing, sometimes substantially so. But the opening and closing should remain symmetrical – the closing will layer the narrative with the points made and the evidence elicited during the hearing, but it should order the universe in the same way as did the opening, and hopefully the pleadings from the very beginning. Closing argument should do just that – close down, from the advocate's perspective, all open points.

– Donald Francis Donovan, Debevoise & Plimpton LLP

Mistakes at this stage can be costly, as the record will close fairly shortly thereafter and the opportunity to undo damage will simply not be available.

Closing submissions versus post-hearing briefs

There is no hard and fast rule as to how closing arguments are to be given. There are many variants, but the main alternatives are:

- exclusively oral submissions, either directly at the end of the witness testimony or some time thereafter;
- exclusively written submissions or post-hearing briefs, usually delivered a short time after the end of the oral hearing; or
- a combination of both, with the written submissions coming before or after the oral submissions.

Ultimately, the primary consideration is what method will most assist the tribunal. Counsel should also bear in mind that, by the end of the evidential hearing, the tribunal will be very familiar with the nuances of the case. This in turn enables it to have a much greater degree of control over what is the most appropriate course to adopt in relation to closing arguments. Depending on the legal culture of its members, and that of the parties and their counsel, tribunals in international cases are usually guarded in the run-up to a hearing about becoming too prescriptive as to what form the parties' arguments might take, whereas at the conclusion of the main hearing, a tribunal is in a much better position to make an informed decision as to what it really wishes to hear.

First, a cautionary note: the increasing tendency to provide ever longer written submissions taking every point, in which the good points inevitably get submerged with the bad, is often counterproductive. It is worth remembering the old adage: 'I would have written a shorter letter, but I did not have the time.' (Seemingly a slightly roughly hewn translation from Blaise Pascal's original and leisurely, '*Je n'ai fait celle-ci plus longue que parce que je n'ai pas eu le loisir de la faire plus courte*.')

Frame the case in the manner that will provide a decision-making road map

An effective closing argument – whether made orally or in writing – does much more than summarise the evidence presented. The advocate should use the closing to frame the case in the manner that will provide a decision-making road map for the tribunal; and to indicate not only why one's client wins on a certain issue, but the consequences of that decision for other issues.

If arbitrators can understand that, because of one decision, certain other issues no longer need to be decided, it makes their internal deliberations and the ultimate award-writing much easier. A decision tree can be very effective in this regard.

It is most satisfying when arbitrators adopt the analytical method that one has provided in the closing arguments.

– David W Rivkin, Debevoise & Plimpton LLP

The tribunal will be deeply aware of its need for a road map

The key to closing argument (not unlike opening argument or, for that matter, post-hearing briefing) is a clear road map not only of the case but of counsel's case in particular. A possibly very long and potentially quite disjointed set of hearings may have just taken place, without any single compelling framework of analysis having taken hold. Countless bits of evidence and argument will have surfaced, but they might not have readily arranged themselves in any particular analytical order.

The reality is that by the time of closing arguments, the tribunal will itself be deeply aware of its need for a coherent and apt road map. It may not yet know its likely position on myriad issues in the case, but that will not lessen the urgency of a road map coming into focus. One of the ways in which counsel can best serve his or her client at this juncture is to provide a road map that is not only compelling in itself but also distinctly advantageous to the client's interests. No single assertion uttered in closing argument will be of much use if it does not align itself with that road map and move the tribunal inexorably in the right direction.

– George A Bermann, Columbia University School of Law

It is therefore good practice (perhaps essential) to discuss with the tribunal at the end of the hearing what method of closing submissions the tribunal considers will assist it. Sometimes the tribunal will highlight issues or questions that are troubling its members and on which further submissions would help. In other cases a tribunal may pose specific questions (see below). Tribunals may set page limits on written submissions or make other directions, such as that there be a finalised list of issues and that the parties address the issues in the same order in each of their submissions. A tribunal will also discuss whether and when oral submissions would be useful.

Generally as to written submissions

In complex cases where there is no one core or decisive issue, written submissions or post-hearing briefs (which are the same product but with a different nomenclature) are

Submissions or briefs?

When it comes to closing submissions versus post-hearing briefs, it should be 'one or the other', depending upon the complexity of the case. In simple cases, closing submissions are to be preferred. On the other hand, if the issues are complex and many witnesses and experts have been heard, post-hearing briefs may be appropriate. They should be limited in terms of number of pages and focus on the evidence that has been presented during the hearing. The tribunal should also indicate to the parties on what issues they should concentrate and those that do not need further development. Finally, they should also be filed within a relatively short period of time. With time passing, memories fade and the momentum of the hearing tends to be lost.

– Bernard Hanotiau, Hanotiau & van den Berg

usually essential. Their disadvantage is that there is always a hiatus, sometimes quite long, between the hearing, when everything is fresh in the tribunal's mind, and the delivery of the written submissions. The timing of post-hearing briefs is, invariably, in the hands of counsel and, therefore, they should be mindful of not inadvertently diluting the tribunal's appreciation of the case with a long hiatus. However, written submissions or post-hearing briefs in a complex case should bring together in one place all the information that a tribunal needs to write its award, including, in particular, guidance as to which documents and evidence the tribunal should give special attention. Generally, the more complex the case, the more likely it is that written submissions will be of greater assistance to the tribunal.

Oral closing arguments – a rarity

I regret very much that oral closing arguments are rare in international arbitration today. They were very common in the national courts of Canada when I was practising as an advocate many years ago.

Oral closing arguments afford a lawyer the opportunity of having an interactive relationship with his adjudicators. You soon find out the issues that are troubling the judge and you can deal with them, then and there.

There is little advocacy, as I understand the word, required in the preparation of written post-hearing briefs! One hybrid method for closing arguments which I favour directs written submissions followed by an oral hearing when members of the tribunal put questions to counsel arising from the written briefs.

But I miss the days of the oral closing arguments where, as an advocate, you could review the factual matrix of the case as well as the legal issues and engage in a constructive dialogue with the judge. Some 30 years ago, after a nine-month trial in an antitrust case, my oral closing arguments lasted four days. The president of my client company said to me afterwards: 'Yves, you know more about my company than I do.' 'Yes,' I replied, 'but Bill, in one week, I will have forgotten it all.'

– Yves Fortier QC, Twenty Essex Chambers and Cabinet Yves Fortier

If allocated two hours for your closing, plan it for an hour and 45 minutes

Be mindful of time limits. You want the decisions about what to cover and what not to cover to be your decisions, not to have them made for you because you ran out of time. If the tribunal allocates two hours for your closing argument, plan it for an hour and 45 minutes. I once argued an important case in which the tribunal allowed each side three hours for closing argument. My co-counsel and I divided the argument and finished 15 minutes before our time was up, to the tribunal's pleased surprise. Our opponent (which chose both to divide its argument among multiple lawyers and to put every word of it on slides) still had 60 of several hundred slides remaining after three hours and 15 minutes, when the tribunal abruptly told them they were out of time and ended the session.

– John M Townsend, Hughes Hubbard & Reed LLP

Generally as to oral submissions

Exclusively oral submissions are, in current practice, relatively rare in international arbitration, save where the case is fairly short and the issues not too many or too complex. Oral submissions have many advantages. They distil and analyse the evidence at a time when it is fresh in the minds of the tribunal and thus avoid any preliminary views becoming subtly entrenched or, indeed, dissipated, owing to the passage of time, in the minds of the members of the tribunal while waiting for written submissions.

The disadvantage is that it may involve some burning of the midnight oil for counsel in the short time between the conclusion of the evidence and closing argument. In countries where oral advocacy is the tradition, this is not uncommon. Particularly if submissions are to be given exclusively orally, it is good practice to accompany them with a short written skeleton or index to the arguments being made, with the relevant transcript references, as well as cross-references to the relevant paragraphs in the opening submissions, so that the tribunal can look back to them when writing its award.

Generally as to both written and oral submissions

A combination of oral and written submissions does seem to be becoming more common, and that trend has continued since the last edition of this chapter was written. Oral submissions before written submissions are of limited use. They are far more useful when the tribunal has had the opportunity to digest the written submissions and can then give directions as to the particular issues on which it requires further oral submissions. However, some tribunals are reluctant to do this in case they are seen to give some indication as to how their minds are working. Nonetheless, the prevalent practice does indicate that tribunals, following receipt of the written submissions, give in advance a steer on what they would like to hear during the forthcoming oral submissions. Often this is carefully phrased with 'the parties should not make assumptions as to the questions being asked' or 'assuming, without finding, that . . . , then please tell us . . .'.

One of the practical problems with oral submissions after the written submissions is finding a date for them to take place, and it is always desirable to put in a provisional time for them when fixing the time for the hearing. Parties, and tribunals, should not overlook

Aim for Caesar, not Cicero

You should strive for a certain degree of rhetorical excellence. At the same time, you must keep in mind what the Romans said about two famous orators in ancient Rome. When Cicero spoke, the comment was: 'By Jove, that was a beautiful speech.' But when Caesar spoke, the Romans said: 'Let us march.' Put differently: your closing argument must seek to induce the desired action: an award in favour of your client.

– Kaj Hobér, 3 Verulam Buildings

the fact that merely because a date is tentatively set for post-hearing oral submissions, it does not inevitably mean that it will be used.

Generally as to which method to use

Save where parties can agree that a particular post-hearing process will be used, the tribunal tends to be in the driving seat when deciding on closing arguments. Counsel should be alert to this fact. The tribunal's knowledge of the case will have accelerated dramatically during a hearing and it is a matter of practical reality (and actual experience, rather than abstract theory) that a lively exchange of views between counsel, or between counsel and the tribunal, on matters of evidence and law focuses minds in a way that no words on a page can ever achieve.

Moreover, a tribunal will be concerned to adopt a post-hearing process that is proportionate in terms of time and cost to the case before it. Every moment spent by a tribunal and, more particularly, huge teams of counsel in an international arbitration incurs very substantial costs, most of which are usually paid for by the losing side. The drumbeat of concern about time and costs, regardless of who may be at fault and whether the concern is based on perception or reality, is such that no tribunal can ignore it. In any event, a tribunal made up of experienced and busy arbitrators, many of whom will have acted regularly as counsel, will not want to encourage wasteful writing or invite wasteful reading upon themselves.

Perhaps the most succinct way of answering the question as to which method to use is for counsel to place themselves in the minds of the tribunal and ask: 'What will help us most to resolve the issues in this arbitration?'

What to cover and what not to cover

Written submissions

Written advocacy is no different from oral advocacy – its aim is to persuade the tribunal of the advocate's client's cause. Written submissions should not be just a narrative: they are advocacy in written form and that is an important distinction. They should be written with the mind of an advocate, not that of a novel author. They should recognise, as previously stated, that unlike at the time of the opening submissions, by the time of closing submissions, the tribunal will be thoroughly familiar with the case and the evidence.

It is a time to take stock: to jettison bad points and concentrate on good ones. Closing submissions should not lose the attention of the tribunal and good presentation is very

There is no substitute for closing arguments

Nowadays, counsel often ask for longer than needed openings, and plan to use the balance (of the hearing week) on cross-examinations. The possibility of doing an oral closing is just that, if time allows, with the offer of post-hearing briefs increasingly being seen as a good alternative.

But they are not. There is also no substitute for closing arguments. This is because there is no better way for counsel to engage with the tribunal on open issues. Closings provide the ideal forum to answer the arbitrator's questions and to tie a party's case to the evidence as it developed over the hearing. Good counsel will sacrifice set-piece openings and unnecessary cross-examination to maximise the benefit of dealing with the tribunal's question during closing submissions.

As a rule of thumb, for a one-week hearing, try always to reserve the Friday (all or half of it) for oral closings. Prepare and hand out a written, point-form slide deck, in which all essential points are summarised. In an electronic version of the deck, include hyperlinks to relevant transcript passages, exhibits, witness statements, expert reports and authorities. And at the beginning of the week, ask the tribunal to identify particular points or questions it would like to see dealt with in closings later in the week. Finally, time the length of your closing in the knowledge that the tribunal is bound to ask questions and to test you. If your time allotment is three hours, make sure that it takes you no more than two hours to cover your deck. This will leave you the extra hour that you will need to respond to and engage with the tribunal.

Post-hearing briefs are rarely a good alternative. Almost every tribunal will have its initial deliberation immediately after the oral hearing (often they will have exchanged preliminary views in the process of identifying questions they wish counsel to deal with). And the best chairman will have reserved time to tackle the award immediately after the hearing. This means that the award will largely be written by the time post-hearing briefs arrive. And the reality is that they seldom sway a tribunal from the initial views it has reached at the close of the hearing.

– J William Rowley QC, Twenty Essex Chambers

important. A list of agreed issues is often a useful blueprint for the presentation of written submissions and tribunals will sometimes give directions to this end or order the issues to be dealt with in the same order, or both, so that the arguments of both sides on a particular point can be easily compared.

Presentation

The following are some considerations to bear in mind. Some may seem to be insignificant, but a tribunal reading long written submissions from two or even three parties needs to be able to distil the key points.

- Good advocacy is to make the point briefly and emphatically. Written submissions often run into hundreds of pages and the good points get lost among repetition and irrelevancy. It is, as ever, the quality not the quantity that counts, and often shorter submissions that are well reasoned are more effective.
- If a point is to be made, it should be made at the beginning of the paragraph, preferably with the supporting reasons thereafter, either in short bullet points or by way of narrative. Long paragraphs of half a page in which a sentence in the middle makes a

Counsel who tells the tribunal that she is about to answer their questions is far more likely to have the tribunal's attention when she begins

A successful closing argument must capture the tribunal's attention, and the most certain way to do that is to answer their questions. Few things are as irritating to an arbitrator as the feeling that counsel are not responding to the questions and concerns expressed by the tribunal. Just as in ordinary conversation one can hold the attention of an interlocutor better by talking about what she wants to talk about than what one may wish to talk about oneself, so in closing one can grab the tribunal's attention by addressing the issues that the tribunal has expressed interest in. This does not mean that counsel cannot reorganise those questions into an order that fits the flow of the argument that counsel wants to make, or that counsel cannot interweave additional (and perhaps more important) points into the argument. But counsel who tells the tribunal that she is about to answer their questions is far more likely to have the tribunal's attention when she begins. And if she actually answers those questions in the course of her argument, she will hold it until she finishes.

– John M Townsend, Hughes Hubbard & Reed LLP

point risks the point being overlooked. For example, an advocate might say that the respondent is in breach of a certain clause of the contract for the following three reasons, setting out each separately. The tribunal can then assess each reason in turn. Strategic use of subheadings is also useful.

- Counsel often use footnotes to make points. The typescript is small, so if the point is important enough to make it into the document, it should be made in the body of the text. Footnotes are for references.
- Transcript evidence. There are two points on this:
  - First, if a party wishes to rely on a passage in the transcript, it is important not just to extract a passage in one's favour which is, when read in context, misleading. It detracts from the overall reliance on the presentation, yet happens all too frequently. Tribunals will look at the full passage themselves, or otherwise this is picked up by the opposing side. Slanted presentation, or selectively extracted parts, of transcript evidence can seriously dent a counsel's credibility with the tribunal and undermine the overall reliability of his or her arguments.
  - Second, a judgement needs to be made as to whether to refer to more extracts of the evidence in the body of the written submissions, just give references or include an appendix in which the references are set out.
- The opening submissions. It is usually not desirable to repeat what has been written in the opening submissions but it is useful to cross-refer to particular passages on which reliance is placed, as some of the opening submissions may have been overtaken.
- It is useful to make clear somewhere whether any points have been abandoned and which are new arguments, subject to issues on whether the point was or was not pleaded and did or did not need to be pleaded. Considerable caution needs to be taken with new arguments, as trying to run a new case, even by stealth, will quickly land counsel in difficulty, and may well provoke furious objections from the opponent, with good reason.

Closing arguments must answer the tribunal's questions

Closing arguments do not necessarily have to be structured around the tribunal's questions, but the closing arguments certainly must answer the tribunal's questions. Moreover, counsel should not simply assume that every member of the tribunal will realise that a brief discussion of an issue is meant to be responsive to a specific question from the tribunal. I therefore believe that counsel should explicitly tell the tribunal when they are answering the tribunal's questions, even identifying the arbitrator who posed the question (if known).

– Stanimir A Alexandrov, Stanimir A Alexandrov PLLC

Emphasising evidence on liability

The analysis and reference to the evidence is the main difference between a written opening and a closing submission. By the time of the latter, flesh has been put on the bones of the documents by the oral evidence and the tribunal has been introduced to documents whose full importance may not have previously been appreciated. Drawing together the strands of the documentary record, the witness statements and the oral testimony is the task of the author of the written submission. Making assessments of the individual witnesses may be useful in some cases. This is one of the key purposes of a written submission, as it provides the first opportunity to do this. Comparisons may be made with the written contemporaneous record and what the witness said in oral evidence.

Given the time constraints associated with hearings, the practice in international arbitration is not to put every single point that is challenged to a particular witness, often by prior agreement between the parties or the tribunal. This can leave open arguments at a later stage, particularly in closing submissions, that a particular contested piece of evidence or argument was not put to counsel's witness and hence the witness's statement must be accepted as accurate. Such arguments garner little sympathy with most tribunals, unless the point allegedly omitted is a key one.

It follows that counsel should be extremely cautious in calling a witness a liar in writing, but not giving him or her an opportunity at the time of their testimony to correct the position, as tribunals may take a dim view (forensically speaking) of such allegations. This is an area of international arbitration practice that can expose cultural differences in cross-examination. Some cultures, even within the common law world, shy away from directly impugning witnesses because counsel is concerned not to have an answer they do not like on the transcript. Other cultures have no such compunction.

However, it is also the time to distil the documentary record and to jettison those documents that have no bearing on the case other than to increase the number of files lining the hearing room shelves. By the time of the closing submissions, the key documents will have taken on additional practical importance, as most, if not all, of the relevant ones will have been put to the witnesses, or discussed in oral argument. Finding an attractive and manageable way of presenting the documentary evidence that tribunals can access easily is always a particular challenge in written closing submissions.

Above all else, it must be emphasised that the written submissions do not provide an opportunity to present new evidence, whether oral or written. The time and place for

The closing shouldn't be a repeat

The closing should not be a repeat of the opening. In closing, a good advocate will explain to the tribunal how the evidence they have heard supports each aspect of the case as set out in the opening. Focus on addressing the issues the tribunal have raised during the hearing. If you are filing a written closing, do not regurgitate word-for-word lengthy passages from your earlier submissions. Don't selectively quote from the oral testimony or use it out of context. Either your opponent or a member of the tribunal will notice and it will serve only to undermine your case.

An oral closing is to be preferred as you can engage with the tribunal and it will take place while each member of the tribunal's memory is fresh and before the first deliberations take place. If you are filing a written post-hearing brief, file it as soon after the close of the hearing as is possible.

– Juliet Blanch, Arbitration Chambers

evidence is according to the procedural calendar leading up to the hearing and, insofar as is permitted in any individual case, during the hearing itself. A party stands or falls on the evidential record. If a party has not been attentive to its evidential burden during the arbitration, closing argument is not the occasion to cure such lacunae. Conversely, it is the precise opportunity for the other side to point out any lacunae in proof.

Expert evidence

The closing submissions will be the last opportunity to analyse the expert evidence and to point to areas of agreement and disagreement, particularly in relation to the experts' oral testimony. A simplification of difficult points is always of assistance to a tribunal. As with the evidential point described just above, the closing argument is not the time for an expert to run a new theory that perhaps he or she might have thought of (or thought better of) earlier in the process. In short, by the time of the closing submissions, parties stand or fall on the expert evidence already placed before the tribunal.

Similarly, caution must also be observed in seeking to impugn the integrity or expertise of an expert after his or her testimony. Many arbitrators might well view doing this in the closing submissions as rather unfair (though again, one needs to be attuned to the legal culture of those involved) and something that should have been done when the expert had an opportunity to respond.

Quantum

Quantum is too often seen as the poor relation as regards time spent on argument, but in fact it is critical to the result in most cases. Success on liability is but a pyrrhic victory in cases where there are substantial issues on quantum. An analysis of the expert evidence, as tested in the hearing, in that respect is essential. Unrealistic claims are not persuasive and undermine the credibility of the sums claimed. Suggesting realistic figures can be helpful. This is one of the areas where tables or graphs may be of assistance. However, again, caution must be exercised at the closing argument stage so as not to stray into making a new case or advancing a new theory.

The advantages of an oral closing

Closing oral arguments can be very useful for the arbitral tribunal if the counsel are able, in the limited amount of time allocated, to summarise the key arguments relating to the position of the party that they represent.

To increase their efficiency and usefulness, it is advisable to submit to the arbitral tribunal a skeleton of such arguments (so that the members of the arbitral tribunal can better understand the way they are structured) containing cross-references to the exhibit numbers of the relevant key factual or legal exhibits.

Since not all counsel may have the necessary oral advocacy skills, some of them may prefer to file post-hearing briefs. In a very limited number of cases, such as in large construction arbitration cases, it may be helpful to have closing arguments in addition to post-hearing briefs and (possibly) rebuttal post-hearing briefs.

However, for certain arbitration cases, closing oral arguments might be preferred to post-hearing briefs.

It is advisable for a court reporter to record the closing oral arguments so that the members of the arbitral tribunal can focus their attention on following those arguments without having to take notes. Moreover, when deliberating, the arbitral tribunal will be able to refer to the transcript.

Another advantage of the closing oral argument is to prevent the filing of endless written submissions, although a similar objective can be reached if the arbitral tribunal limits the number of pages of the post-hearing briefs.

When there are too many issues to be addressed or when matters are extremely technical, it may be preferable to replace closing oral argument with post-hearing briefs.

A key advantage of closing oral arguments over post-hearing briefs is to allow a discussion with the arbitral tribunal, whose members can raise any remaining questions to seek further clarification before retiring for their deliberation.

Last but not least, closing oral arguments are far less costly than post-hearing briefs and contribute to the efficient conduct of the proceedings, since by experience counsel request less time to prepare closing arguments than to prepare post-hearing briefs.

Some practitioners consider that closing oral arguments and post-hearing briefs are not necessary and are a waste of time and money. Based on my experience, and in particular my practice as arbitrator, I strongly disagree and have almost always found them helpful for the understanding of the case and for drawing the arbitral tribunal's attention to the key elements that emerged from the final hearing and to their relevance for the parties' respective positions, as well as for the decisions to be made by the arbitral tribunal.

– Pierre-Yves Gunter, Bär & Karrer

Interest is a topic that generally only arises for thorough examination at a late stage in an arbitration and may well have significant monetary consequences. While a discourse on the subject of interest is beyond the scope of this chapter, counsel must bear it in mind in discussions with the tribunal as to how and when it is to be argued in detail, and which tools (such as an Excel spreadsheet with the necessary formulae built in) would make for efficiency in calculation.

A tribunal will generally be more impressed with a party that has sufficient self-confidence to concede a quantum point if the evidence has not materialised. Depending on how the claims for relief have been structured (and by the time the closing arguments are made, trying to change these may be all but impossible), a bad quantum point pursued or contested to the bitter end may actually imperil other, better, aspects of the claims made or challenged.

The law

Often, and regrettably, the law takes a practical backseat until the closing submissions, notwithstanding earlier directions to have all legal argument fully articulated in the opening memorials. The closing submissions, insofar as arguments on the law are concerned, must be highly specific, and within the boundaries of the theories already advanced.

Counsel should be discriminatory in the legal materials put into the written submissions, as a plethora of citations (where effectively the same thing is said over and over again) may well lead to the importance of the point being lost. While legal cultures do vary, with some common law systems having the potential for a citation to innumerable cases on every line of a written submission, counsel should always ask: 'Why are we putting this before the tribunal and what essential forensic utility does it have?' Also, apart from the cost of having a tribunal read large amounts of legal authorities, consistency in legal literature and case law may not always be perfect, and the more a tribunal has to read, the more one might have the key message diluted by divergent opinions, even if on minor matters. Attempts to agree principles of law are to be encouraged and one solution offered for consideration is to have parties exchange submissions on law only (i.e., just the principles) in advance of the analysis of the case at hand in the fuller closing submissions. Tribunals rarely appreciate hair-splitting on legal principles and can readily spot distinctions without differences.

Reply closing submissions

In complex cases, parties often ask for the opportunity to produce reply closing written submissions. These can often be useful and can answer a bad point made by the other side by referring to additional evidence or law. However, they do add to the overall delay. One common mistake made by counsel is to repeat the arguments made in the initial written closing submission in response to points made by the other side. This is a bad practice. The reply closing submissions should merely deal with specific points that need to be addressed. It is assumed that the earlier arguments will remain extant.

Costs

One matter that needs to be discussed with a tribunal is when submissions on costs should be made. Some tribunals require or suggest that these be provided in advance of the award: other tribunals issue a partial final award and then hear submissions on costs. Argument on and disposition by award of costs is beyond the scope of this chapter. It is simply noted at this point as an important aspect of the post-hearing stage of an arbitration.

Oral submissions

The art of making any oral submissions, including closing submissions, is likewise the art of persuasion. This calls for good advocacy of a different sort from written advocacy, such as speaking slowly and clearly, presenting points in a systematic way, being able to parry questions from the tribunal and not just reading from a text without even looking at the members of the tribunal. Interaction with the tribunal at this stage is very important and a ready knowledge of the case plus references is essential.

The scope of the submissions may be circumscribed by guidance from the tribunal and whether or not there are to be independent, detailed written submissions before or after any oral submissions. There is also likely to be a time constraint, sometimes as short as a couple of hours for each side. Thus, focusing on the good points in the case and grappling with important difficult issues is critical. The less important points can be dealt with by cross-referencing to other material or submissions (such as a note or skeleton argument handed to the tribunal at the same time).

It is important not to lose the tribunal's interest by spending endless time on points that will not ultimately determine the case. Counsel should at all times bear in mind that the tribunal's ultimate task is to decide whether to grant or withhold the prayers for relief, and focusing attention on what is needed in that regard is most effective.

A tribunal will most likely feel much less constrained during oral closings and engage, actively, with counsel in testing the case and the arguments presented. Counsel needs to be sufficiently adroit with preparation so as to field questions of whatever nature that might come their way. Indeed, one particularly useful exercise is to compile a list of all possible hostile questions that may be asked against one's own case in light of the hearing and to work out answers to each in order to disperse any potential damage. In that way, anything a tribunal might ask during oral submissions can be readily dealt with.

Finally, counsel should not be surprised if the tribunal asks questions that seek to have a party nail its colours to the mast on a particular point. While a party may well wish to run a number of alternative arguments throughout the lifetime of an arbitration to keep its options open, a tribunal may well take the opportunity during oral closing submissions to put such a party to its election. Evasiveness at such moments can highlight the weaknesses in a case, as can a rushed answer.

Closings structured around tribunal questions

As already noted, tribunals regularly pose questions to parties in advance of the filing of written submissions, or before oral closing argument. Counsel can derive particular assistance from such questions, particularly if they are focused on what is uppermost in the minds of the tribunal members.

Parties should not get too carried away by the tribunal's questions, as they are normally carefully circumscribed with disclaimers. Also, they usually do not limit whatever a party wishes to put before a tribunal by way of closing argument. Ultimately, it is for counsel to make their own forensic decisions as to what they consider to be useful and of assistance.

Applying the law to the facts

The salient points on legal argument and closing submissions have already been discussed above.

Presentations

If a party wishes to use presentation tools for the purposes of persuasion when making closing arguments, a number of points should always be borne in mind.

- Make sure that there is complete clarity in advance of the appointed day of argument as to whether demonstration tools are to be used, and when they are to be furnished to the other party and the tribunal.
- Under no circumstances can demonstrations present new evidence or case theories. Only matters from the existing record should be used.
- Be particularly careful with PowerPoint slides and how one's case is expressed; an apparently succinct number of words suitable for a slide presentation may unduly skew a case. If a point is complex, then trying to fit it onto a slide is probably unwise.
- Particularly where PowerPoint slides are concerned, a tribunal's attention is being split three ways, namely, the hard copy in their hands, the screen and the advocate.

There are differing views as to the benefits of slide presentations in oral closings, even with copies in writing as opposed to using skeleton arguments. Some tribunals find them useful: others do not and prefer something that can be slotted into their files. It is as well to clarify with the tribunal in advance what their preferences are. Finally, differing legal cultures and practices can ascribe different meanings even to the same word (e.g., demonstratives) and it is critical to make sure that everyone is on the same page linguistically, lest there be time lost in needless rows about distinctions without apparent differences. Arguments about picayune points at a late stage in an arbitration have the potential to annoy tribunals, just at the moment when one wants to avoid any annoyance.

Virtual hearings

Virtual hearings have had an impact on every aspect of advocacy in international arbitration and closing arguments are no exception. The points made above apply with even more force when members of the tribunal are at the end of a camera and are probably not in the same room as each other.

While the impact of virtual hearings is mostly on oral closings, consideration must be given as to whether, and if so how, written closings or skeleton arguments should be tailored to minimise any deficiencies or difficulties arising because of oral closings being virtual.

As for oral closings, advocates should address, in advance of making their submissions, such matters as how best to refer to documents, how to keep the arguments focused and how to make sure that the advocate is looking into the camera rather than looking down at their notes. As with any form of oral advocacy, it is important to engage with the tribunal and look them in the eye. Just reading from a script adds nothing as the tribunal might as well read the document for themselves.

Conclusion

A well-argued and persuasively presented closing submission, written or oral, can have a huge impact on the result of a case. It can force tribunals to review anew the evidence and the law, and to reconsider provisional views that they may have formed. It can guide tribunals to critical pieces of the evidentiary record and contrast evidence of witnesses and documents to prove individual points. It can distil tricky legal issues in a compelling and persuasive way. Consequently, it can provide the ultimate reference point to the writing of the award, and its presentation and content is therefore critical. Above all, though, it is the moment for the lead advocate, in particular, to decide what is the best case from the existing record, to make it well and to make it succinctly. This is the apogee of the art of the advocate.

11

Tips for Second-Chairing an Oral Argument

Tunde Oyewole[1]

Introduction

It's true what they say: advocacy is an art. But it is also a science. After years of trial and error, international arbitration practitioners (and, of course, litigators of all stripes) have established reliable processes, techniques and specific steps to follow that increase the likelihood of achieving the desired results in oral argument. Having a clear idea of those processes, techniques and *specific steps* – and mastering them – is the key to success.

This applies of course to the specific function of the second-chair advocate: the attorney tasked with the primary function of assisting a first-chair advocate who is pleading the case and cross-examining the witnesses. Advocacy is a team sport. But the role of the second chair remains distinct. The second chair must not only know the case inside out, but adapt to the first chair's approach to presenting the case.

While this chapter does not pretend to be exhaustive, it does set out a summary of some of the techniques and processes that consistently prepare the second-chair advocate for success. These are presented below, loosely following the order of operations that take the second chair from the first day of hearing preparations up to the hearing itself.

Start early

The hearing should be a logical consequence of everything that came before it. Assessment and anticipation begin on day one of hearing prep.

Let us be clear about what we mean by 'day one of hearing prep'. For many, day one means the first day after the submission of the final pleading. This is a dangerously limited definition. Day one occurs much earlier, when the brainstorming begins about the key documents and ideas that hold a case together.

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In other words, 'day one of hearing prep' can occur as early as your case theory begins to solidify. At that point, you can already begin establishing the key themes that will need to be reinforced in oral argument.

As oral argument approaches, much of the exercise will become a matter of translating the pleadings into oral form. But the process begins before that, as soon as the key themes begin to emerge. Indeed, many themes will work better orally and in some instances be reserved for the hearing to be given their full expression. Therefore, the second chair must take a primary role alongside the first-chair advocate in performing this translation from the written to the oral. It is an ongoing process of refinement, which is just one more reason to start early.

Know your first chair

Every lawyer has their strengths and weaknesses, their tendencies and idiosyncrasies. For the sake of convenience, let's refer to this as a lawyer's 'style'.

To be an effective second chair, it is important to know the first-chair advocate's style. For example, does the first chair tend to prefer a synthetic approach in which everything is boiled down to the essentials? Or, rather, is the first chair extremely detail-oriented, preferring to think of things element by element to build up to the desired conclusion? These are of course exaggerations, and most lawyers fall somewhere in the middle of the spectrum. It is precisely the job of the second-chair advocate to determine *where* on the spectrum the first-chair advocate sits.

Once this is determined with reasonable certainty, the second chair should then make it his or her job to adapt to the style of the first chair. If they prefer a conceptual approach, be ready to work with that and to feed it.

This guideline also extends to the less exciting elements of the discipline. Even though formatting and printing of materials for the hearing may be handled by juniors and paralegals, the second-chair advocate should ensure that the final product is consistent with the first chair's expectations and preferred working methods.

Become a good sparring partner

At the same time, and somewhat paradoxically, the second-chair advocate should make it a habit to challenge the first chair. It is often said that working as second chair is like being a second in a duel. This is not entirely accurate. Good second chairs do not merely dutifully check the weaponry to make sure all is in order. Rather, good second chairs are active participants throughout the process. They push the first-chair advocate to consider various angles and to improve their approach to arguing the case.

As mentioned above, various tendencies and idiosyncrasies form a core aspect of every lawyer's style. Some characteristics are better than others. The second-chair advocate should therefore have the courage and wherewithal to work against the first-chair's tendencies when they do not best serve the case. For example, a detail-oriented first chair can often benefit from being pushed to take a step back and see a topic from the '50,000-foot view'. Even if the first-chair advocate ultimately decides to stick with his or her habitual approach, a meaningful discussion of the subject from the second-chair's perspective is excellent preparation for the moment when the tricky question comes from the tribunal (or the wily response from the witness being cross-examined).

The right number of mock arbitrators

The lazy mind might assume that a mock arbitration (to make it realistic) should mimic the actual proceeding, and therefore be handled by three arbitrators. This is questionable. Since there are no unilaterally appointed mock arbitrators (and since each mock arbitrator should try to toughen the team by being fairly hostile), the ideal number may well be two – and a sole individual perfectly adequate. When there are three mock arbitrators, one or more of them may be tempted to underprepare in reliance on the others.

– Jan Paulsson, Three Crowns LLP

This of course requires confidence, but that should follow as a matter of course: if you have been chosen to work as second-chair advocate, rest assured that you arrived there for a reason. You have shown that you can be relied on. It is therefore only natural that you not only take orders but also take equal ownership of the case, with a view to having boiled it down to its essentials by the time hearing day arrives.

The collaborative drafting of cross-outlines provides a particularly rich opportunity for the first and second chairs to spar – as well as to synchronise (see the preceding subsection). It condenses a number of the key elements to any merits hearing: mastering the documents and the story, anticipating the other side's responses on key issues and translating the written phase of the procedure into the oral. It also gives the second chair the opportunity to advise the first chair of potential dangers lurking in certain lines of questioning. This keeps the first chair from being lulled into a false sense of security, which is always a danger when one is left to work in a vacuum without honest feedback.

In many instances it will be helpful for the first and second chairs to rehearse the key lines of questioning together – with one playing the part of the lead advocate and the other playing the witness – to test what works off the page and seek ways to further refine the approach. Similarly, short of arranging a full-on mock hearing, the second chair can periodically fall into character and play the role of the tribunal, posing difficult questions and challenging hypotheticals. Used thoughtfully, these exercises are bound to reveal points that can be put even more forcefully. It also ensures that the second chair dutifully assumes the role of a resilient sparring partner.

Master the file

It is essential that the second-chair advocate acquire complete mastery of the file, and in particular the elements that will be crucial to the first chair's oral submissions and cross-examination.

Short of memorising every document on the record, the second chair should identify the key documents of the case and form a complete view. This is one situation where cheat-sheets are permitted. The second-chair advocate should make liberal use of tables that synthesise and summarise key areas of interest. The good news is that much of the initial legwork can be delegated to junior members of the team. When done correctly, these materials may even serve as a basis for demonstratives to be used at the hearing, further justifying the effort to create them.

You are the key to smoothness and efficiency

From the perspective of a tribunal, the role of the second chair is indeed quite important. Also important is the role of the third chair and the role of those who may not even have chairs (because they are busy with other tasks, such as preparing binders and USB sticks with documents). It is very helpful to a tribunal if counsel's team can provide references to documents immediately upon an arbitrator's request; if USB sticks with the record of the case can be provided, where the record is well organised, and the documents are easily accessible; and if key documents can quickly be shown on the screen, including at the tribunal's request. It is often the second chair who is in charge of managing those activities and they are essential for the smooth and efficient conduct of the hearing.

– Stanimir A Alexandrov, Stanimir A Alexandrov PLLC

The second-chair advocate will therefore arrive at the hearing prepared both to follow the script and to improvise when necessary. Even with the best anticipation, unforeseen opportunities will present themselves in the heat of battle, and knowing the file is the best way to maximise such opportunities.

The second-chair advocate must not neglect the procedural elements of the file. First and foremost, the procedural order or orders governing hearings, but also the procedural history that could have an impact on the presentation of the case. For example, the parties' procedural exchanges during the document production phase (Redfern schedules included) have a tendency to take on a new life at the hearing, and the second chair can help the first to seize on opportunities as they present themselves only by having a thorough command of those elements.

Excel at 'stage management'

In theatrical productions, the stage manager assures that everything runs as smoothly as possible when the curtain rises. As one author puts it, good stage managers organise:

> *diverse situations while making certain that they do not lose sight of their original objective. . . . [T]hey must be able to delegate effectively, ensuring that those given a task completely understand both the objective and the process by which they are to achieve it. To motivate others they also need self-confidence and to know that they are fully aware of the work of all concerned in the production.*[2]

This happens to capture another aspect of the second chair's role. In the service of supporting the first-chair advocate, the second chair coordinates the supporting team to ensure the seamless running of the hearing. This enables the first-chair advocate to focus on the essential task of arguing the case (the 'original objective').

The second chair who overlooks the importance of the hearing room set-up does so at some risk. Even though others may be doing the heavy lifting (quite literally in

2 Daniel Bond, *Stage Management: A Gentle Art* (Routledge, 2004), p. 10.

A practitioner's perspective: Keep calm and carry on

I was involved in a high-profile arbitration for which the opposing party had put forward a highly regarded professor, from an Ivy League university, as an expert witness. I was second chair to a partner who was both a woman and from the Middle East. While we were preparing for the cross-examination the week before, the partner suggested that I look at publicly available records to see if the professor had been cross-examined before. In the course of this research, we came across a transcript in which he had testified before a federal judge and the judge had criticised his testimony.

Tip 1: There is no substitute for preparation, but it also helps to think on your feet and outside the box.

During cross-examination of the expert, the professor was questioned on his prior testimony. Clearly taken aback, he became extremely belligerent and started attacking the partner personally in a very rude and unprofessional manner. The partner kept calm and did not react adversely but continued pressing on the questions. This was extremely shocking to me and my inclination was to go to the tribunal to complain about these thinly veiled attacks on her gender and race. But the partner instead continued asking the questions and the professor continued with his antics. The consequence was that when the cross-examination resumed after a short break, the arbitral tribunal made the expert apologise to the partner.

Tip 2: Pick your battles carefully and realise that silence is not always weakness. The tribunal can see what is happening.

At the closing argument, the partner again focused on the case without focusing on the expert's behaviour. The focus was on the issues, which were presented persuasively. The outcome was great – not only did we prevail in the arbitration but we were also awarded costs.

Tip 3: Focus on the story and the issues that are important for the tribunal; do not let every event become a battle.

– Kabir Duggal, Arnold & Porter

some instances), the second-chair advocate should orchestrate the process to ensure that everything is in the right place. Reconnaissance missions to the hearing room are to be encouraged.

Mundane as it may sound, the second-chair advocate should ensure that everything is already in its proper place when he or she takes the stage with the first chair. For example, exhibit bundles must be easily accessible, key materials should be even closer by and the lines of sight between counsel, tribunal and witnesses must be unobstructed.

The second-chair advocate should be seated next to the first chair. This may ruffle feathers when team members have to switch seats to accommodate a less senior second-chair advocate, but egos should readily cede to the interests of the case. We also recommend that the first and second chairs have their own separate copies of the essential materials (at least

Sharing the advocacy with juniors shows confidence in your case

Sharing part of the advocacy with less senior counsel can be effective and send the right messages.

It is understandable why the most prominent, well-known and senior partners typically want to act as the leading counsel in an arbitration, even if they are not always on top of the evidentiary record. Their experience and sense of authority can lend weight to the party's case, especially when the members of the tribunal are familiar with them. However, it can also be effective, and indeed refreshing for the tribunal, if senior counsel allows less senior counsel, who is usually extremely familiar with the file, to do part of the oral pleadings and cross-examination. By sharing part of the oral pleadings with less senior counsel, senior counsel can send a message of confidence in their team and by extension to their case.

– Stavros Brekoulakis, 3 Verulam Buildings

the opening slides/script and the cross-outline/cross-bundle, if not the exhibits) to avoid confusion. The goal is to have two tidy, contiguous workstations.

Much of the same advice applies *mutatis mutandis* to remote 'virtual' hearings, which have become increasingly common. Given the acclimation of the profession (expectations, familiarity, adaptation, etc.), they are probably here to stay, regardless of whether the conditions at the time of writing of this chapter pass as quickly as we all hope. In addition to the pointers above for live hearings, the second chair should take into account the additional challenges that result from being increasingly reliant on technology.

Just as the second-chair advocate must be mindful of sightlines in the hearing room, they must be attentive to camera angles as well as microphone quality and room acoustics when preparing a virtual hearing. The *feng shui* of proper screen placement (viz., the arrangement of various screens relaying the images of the other hearing participants, the transcript, the documents being projected, and so on) is another topic, arguably worthy of an article in itself.

Whether the hearing is in person or virtual, the second-chair advocate should ensure that everything will be in place at the appropriate time by providing intermediate deadlines for the team in charge of preparation. Work backwards from the hearing, and ensure that there is sufficient time to complete each step (with cushion – since as we all know emergencies will happen). And remember – as Atul Gawande warns – no human, no matter how intelligent, is above a checklist to keep track of it all.[3]

3 See Atul Gawande, *The Checklist Manifesto*, p. 17: 'We have accumulated stupendous know-how. We have put it in the hands of some of the most highly trained, highly skilled, and hardworking people in our society. .. . Nonetheless, that know-how is often unmanageable. . . . And the reason is increasingly evident: the volume and complexity of what we know has exceeded our individual ability to deliver its benefits correctly, safely, or reliably.. . . . That means we need a different strategy for overcoming failure, one that builds on experience and takes advantage of the knowledge people have but somehow also makes up for our inevitable human inadequacies. And there is such a strategy – though it will seem almost ridiculous in its simplicity . . . It is a checklist.'

A practitioner's perspective: Prepare as if you are the first chair

Having a proactive attitude will take you a long way towards being a brilliant second chair. In the case of preparation of an oral argument, this means that rather than wait for guidance, step in the shoes of the first chair and structure the work in a strategic way. Consider asking yourself the following questions: What are the most important arguments? What is it you want to be certain that the tribunal takes away from the hearing? What are the risks to be avoided? What points should be made in cross-examination?

You need to have a very clear vision of the hearing schedule and know what you want to achieve in each part. Sometimes, this includes minimising risks.

Have a thorough knowledge of the case and the documents

No one will know the case better than you on the day so make sure you have read through all the material and anticipate the moves of the opposing party.

Have all the work that can be ready ahead of time prepared well before the week preceding the hearing as you will need the time preceding the hearing for adjustments, briefing of the first chair and client meetings.

Act like the bodyguard of the first chair

The most important role for the second chair role is to protect the first chair so that he or she can focus on and answer all questions coming from the team, experts, witnesses and the client. Anticipate what those questions might be.

Also anticipate any potential adjustments to the strategy of the other side. This will come in handy during the hearing to be adequately responsive. Your ability to find the appropriate answers when potentially new issues are raised will demonstrate that you have a thorough knowledge of the case. You should also anticipate the corresponding useful documents. If you anticipate that a specific authority might be cited, have it handy for the first chair.

Dare to lead

With the first chair busy with preparing his or her advocacy, you will have to step into shoes that could feel enormous on the day: resolving conflict within the team, management of the client and selecting priorities. This may include collaboration with more senior team members from other practices in your firm. Remember that you are the person who is best suited to appreciate these priorities. Do not pass any question or observation note from other team members or the client to the first chair: you have to select what is relevant.

Being a second chair – although it may seem less attractive than being the first chair – is also your time to shine and prove that you are taking the steps towards taking on the next role.

Enjoy it

Last, but not least, always remember to enjoy this part of the work, as your time in this role will pass by so fast.

– Flore Poloni, August Debouzy

On match day

It would be a shame for a second-chair advocate to employ some combination of the tips outlined above and be thwarted by circumstances when the hearing finally begins. With that in mind, we provide a few considerations specific to the hearing room once things are under way, to ensure that the second-chair advocate realises the fruits of all the hard work put into preparation.

Be a master of time

The second chair should be a master of time at the hearing. This subdivides into two main tasks: (1) keeping track of the order of play (i.e., the hearing timetable) to ensure that everything is in place at the right moment; and (2) keeping track of the time allotted to the first-chair advocate for whatever phase of the hearing the second chair is providing assistance.

Even if a junior or paralegal (or an iPad for that matter) is designated as the official time-keeper, the second chair is best placed to assess and advise as to whether the opening or cross-examination is proceeding on schedule to be completed in the time allotted. Tough calls may have to be made to exclude precious but less important points ('kill your darlings', as Hemingway said) to ensure that the first chair has sufficient time to address the key facts, propositions and documents. The second chair has a duty to assist in making those decisions.

Even when things are going smoothly, it is advisable to periodically signal to the first chair in pre-determined intervals how much time is remaining. For example, rather than waiting until the 'two-minute warning' to incite panic, the second chair can gently signal to the first-chair advocate how much time is remaining: thirty minutes to go, then fifteen minutes, then five minutes, and then two. Again, this method helps to ensure that the best work done in preparation doesn't get cut simply because of a time management issue.

You're on

The second-chair advocate must always remember that they are always 'on'. They may not be talking and may not be the primary object of focus, but they are nevertheless performing. The second-chair advocate should therefore remain reserved at all times and avoid the temptation to have a private moment. The term poker face comes to mind. Indeed, you can often tell a seasoned second-chair advocate from a newbie on the basis of how much their expressions reveal. Newbies tend to show their responses, whereas seasoned second-chair advocates respond to difficult moments and good moments with equal aplomb.

Furthermore, the moment will likely arise for the second-chair advocate to intervene and take the floor, even if only briefly. Whether by directing a struggling witness to a page number or even assisting the tribunal with a document reference or date, the second-chair advocate should be prepared to judiciously seize opportunities to speak up when helpful.

Curate with care

Much like a curator selecting works for an exhibition, the second-chair advocate has the job of fielding input from other team members (clients included) while the first chair speaks. The second chair must first review the incoming input and decide whether it has a likelihood of being useful to the first-chair advocate in light of the topics at issue (and in

consideration of the time remaining to address them). For those elements that make it past this selection process, the second-chair advocate must decide on the best way to package and present the information. In some instances, passing on a Post-it may suffice. In other instances, it may be more practical to synthesise the information or enhance it with points that the second chair deems relevant. The task requires a sufficiently confident command of the case to know the difference between something useful and something merely relevant, and to make the calls quickly.

Time is limited – not only to make points, but to convey the message to the first-chair advocate in a meaningful way. Therefore, the second-chair advocate is urged to select, package and present wisely and effectively.

Anticipate

The hearing is the moment when science meets art. All of the methodical preparation becomes something more, unexpected even, in the heat of battle. It is improvisation and inspiration. A random word evokes a thought. The 'script' might not mention it, but there may be an opening to explore a topic, and only thorough preparation allows for the moment to be seized with confidence, and in security.

The second chair must constantly look out for such opportunities. This requires keeping an ear out for everything of potential relevance that may occur throughout the hearing, regardless of whether the first-chair advocate is speaking. It is not enough to be on call for the first chair. Rather, the second-chair advocate must actively absorb everything that may serve as new material for the first-chair advocate to address. We have all witnessed that moment when opposing counsel introduces a novel angle or nuance, and the second chair should not merely rely on the first chair to pick up on it, but should take ownership. Even if the first-chair advocate has picked up on it, the well-prepared second chair will be in a position to offer an informed view and at a bare minimum help solidify the approach.

Once the information is processed, the second chair must then choose the moment for conveying his or her input. Often, a break will come at just the right moment and allow for a quick huddle. At other times, the second-chair advocate will have to do it on the spot, such as when the tribunal asks an unexpected thorny question. While an off-mic three-minute discussion between first and second chair might push the limit, there are more subtle approaches. For example, a Post-it with bullet points outlining key elements of a response or even a subtle finger to a key passage in an important document laid out next to the first chair can be of much assistance.

Conclusion

As mentioned in the introduction, the above tips are of course not exhaustive. Furthermore, many of the tips will need to be tailored to the specifics of a case (or the particularities of the relationship between the advocates). But regardless of which techniques one ultimately chooses to employ or forgo, the second chair must commit to being methodical in preparation and flexible in execution. Assuming that the second chair has been thorough and systematic at all stages of the process, the only thing that remains to do is to trust in that process and make the magic happen on game day.

12

Advocacy in Virtual Hearings

Kap-You (Kevin) Kim, John P Bang and Mino Han[1]

Virtual hearings took the arbitration world by storm in 2020 and continued to thrive in 2021. At first, from around March 2020 when travel restrictions were imposed all over the world, the arbitration community faced the question of how to proceed with upcoming hearings: would it be better to reschedule the in-person hearing, or go forward with a virtual one? As the pandemic dragged on, the question answered itself. Virtual hearings, and with that virtual advocacy, became the new normal. Admittedly, participating in hearings remotely featured before – however, rarely, if at all, had counsel teams on both sides and the tribunal sat in entirely different places and conducted the hearing through virtual platforms. This prompted the international arbitration community to develop a new style of advocacy.

In light of these recent developments, this chapter will explore the fundamentals of advocacy in virtual hearings and provide suggestions on how to effectively communicate and engage with the tribunal in a virtual setting.

Differences between virtual and in-person hearings

Before analysing the distinct characteristics of virtual advocacy, the key differences between an in-person hearing and a virtual hearing are worthy of mention.

First, and most obviously, the point of departure is whether the participants of a hearing are physically present at the hearing. In an in-person hearing, the tribunal, party representatives, witnesses, experts and counsel normally all meet and gather in a single room for the hearing. In contrast, in a virtual hearing, while still brought together via video and audio technology, the tribunal, party representatives and counsel are usually attending from several different locations. On certain occasions, the legal team for a party may even be split and

1 Kap-You (Kevin) Kim, John P Bang and Mino Han are partners at Peter & Kim. The authors wish to thank Célia Guignet and Sameer Thakur, associates at the firm, for their contributions.

dial in from various places across the globe. This will likely have an impact on hearing dynamics and the style of effective advocacy, which is amplified because the angle at which the tribunal sees (and perceives) counsel differs between an in-person and a virtual hearing.

Second, an important difference between an in-person hearing and a virtual hearing is the tribunal's average attention span. In an in-person hearing, the tribunal will normally pay a higher level of attention to counsel's or parties' oral statements, given that the tribunal has several helpful visual and aural distractions, making listening to the speaker more stimulating. In a virtual hearing, however, a tribunal is more likely to fall into online fatigue after a short period. Again, this will have a significant impact on the style of effective advocacy.

With these differences in mind, this chapter will address some general points on advocacy for virtual hearings (focusing on how to catch a tribunal's attention in a virtual hearing), followed by more specific tips and remarks on (1) oral openings and closings, and (2) cross-examination of witnesses and experts. While it is important to keep these tips in mind, it is equally important to remember that the fundamentals of good advocacy remain similar to those of in-person hearings. With virtual hearings, lawyers should adapt to a new format to ensure that the differences between virtual hearings and in-person hearings do not reduce the impact of their advocacy, and also to present their case even more convincingly by using tools particular to virtual hearings.

Catching the tribunal's attention

Be mindful of visual connection

In an arbitral hearing, catching the tribunal's attention is one of the most important elements for persuasion. But when a hearing is conducted virtually, counsel will just appear as one small square among a dozen others, unless the video layout is configured to expand the speaker's screen. At the beginning of a presentation, the tribunal will probably pay a great deal of attention to compensate for the lack of direct visual contact. However, as the hearing progresses, the tribunal may quickly lose focus. To mitigate this, counsel should adopt a style of advocacy that allows the tribunal to take a balanced view between the speaker and the rest of the participants on the screen. The following tips are suggested.

First, the camera used by the speaker should focus on the speaker only. Having multiple people appearing in one small window while the lead advocate is presenting is not recommended. Counsel should bear in mind that on a screen they will inevitably appear much smaller than they would if sitting directly in front of the tribunal.

Second, making eye contact with the tribunal is crucial. For that, the speaker should look into the camera when talking. This has the effect of pulling the tribunal's attention to the speaker rather than to somewhere else. Keeping eye contact even through a camera allows counsel to control the tribunal's attention and interact with it more closely. In that regard, a virtual hearing even has some upsides compared to an in-person hearing because one can make use of a teleprompter – which enables the speaker to take note of the script but maintain eye contact with the tribunal. That would not be possible in an in-person setting using a hard-copy script.

Third, the speaker should avoid making too many movements as this will only distract the tribunal from the advocacy. Subtle facial expressions and body language can have a meaningful psychological impact on the observer, even when relayed through a screen.

Fourth, the importance of a speaker's background is not to be underestimated. Avoid using an artificial background as that may be distracting; an actual background better enables the tribunal to focus on the speaker. In fact, some tribunals specifically prohibit the use of artificial backgrounds to ensure the integrity of the hearing. Real backgrounds can also present issues, however. In lockdown, tribunal members suddenly had a front-row view of the speakers' personal lives and homes. If an actual background is being used, especially out of an office setting, it should be a neatly kept one so as not to distract.

Be mindful of audio connection

The audio or vocal connection is as important as the visual connection. It is pointless for counsel to be seen on screen if they are not properly heard by the tribunal.

With regard to oral advocacy, the usual principles of delivery apply, only with a greater emphasis on these points in virtual hearings: counsel should articulate themselves with clarity and pace themself appropriately. One should remember that, depending on the hearing technology and internet connections, a person's voice might slightly lag behind the image (or the other way round). This should be considered when attempting effects of style. For example, a pause intended to be impactful in an in-person hearing might only be understood as the technology failing in a virtual hearing, and the speaker would lose momentum.

Counsel should always avoid talking over others (opposite counsel, witnesses, experts and particularly the tribunal), even more so in a virtual hearing. Talking over someone is likely to confuse and may irritate the tribunal. Further disruption will be caused if this requires transcription and interpretation services to be redone. Also, unlike in an in-person hearing, second chair whispering to lead counsel during the hearing may be captured by the microphone, which could come across as disruptive noise. Therefore, counsel should make full use of the mute function.

Setting up in front of a screen to maximise effective advocacy

To maximise the quality of visual and vocal connections, a good technical set-up is essential. Also, seamless control of the documents is necessary so as not to disrupt the advocacy. Among various technical issues, the following should be checked and set up before a virtual hearing.

- *Virtual platform connections*: A legal team should have multiple connections to the virtual platform, one for each speaker if possible. A witness should have a separate connection too. This ensures that there are no disruptions and downtime when changing speakers within a legal team and also prevents an entire legal team falling out of the hearing if the connection is lost.
- *Screens*: Counsel (i.e., the speaker) should have a minimum of two screens in front of them. In fact, three screens are recommended: one that shows a live broadcast of the hearing, one that displays the exhibits and demonstratives, and one for the live transcript. This allows counsel to self-monitor while keeping an eye on the tribunal and the transcript effortlessly.
- *Cameras*: Counsel should decide on how many cameras they would like to use. Two or three cameras are recommended to properly show the different speakers and prevent any mishaps. The type of camera to be used is a matter of personal preference, but it is

advisable to avoid using sound-activated cameras. These cameras usually make it hard for the tribunal to focus on the speaker, as the video may switch to the noise source at the slightest sound.

- *Microphones*: Counsel should use any microphone they feel comfortable with so long as the audio is clear. In general, a podium microphone or a headset with a working microphone is recommended since built-in microphones tend to pick up noise interference and provide lower sound quality.
- *Backgrounds*: As explained above, it is recommended to avoid filters and artificial backgrounds.
- *Lighting*: Lighting will affect how a speaker appears on screen. Counsel should consider in advance which lighting settings work best, whether it is daytime or night-time when the oral presentation is being delivered and the changing light throughout the presentation.

Oral openings and closings

Know your tribunal

Good oral advocacy in virtual hearings is not only grounded on the counsel's skills, but also on how prepared the tribunal is to receive the information and arguments conveyed. This, to a certain extent, depends on the tribunal's technical set-up. Counsel should ask what technology the tribunal is using and adapt their advocacy accordingly.

For instance, it is important to know how many screens each tribunal member is using. Ideally, each arbitrator should have three: one to look at the lead advocate, one to follow the documents being referred to and a third to follow the live transcript of the hearing. However, there will be instances where a tribunal member has one or two screens only, in which case counsel will have to decide what they want the tribunal to focus on.

If the tribunal only has one screen, one must decide if it is more important that the tribunal be able to look at the advocate as he or she presents the argument, or to look at the documents as the lead advocate delivers the opening. An easy solution is to ask if the arbitrator would prefer to have hard copies made available, in which case the screen can be used to show the advocate. If the arbitrator has two screens, it is possible to show the documents and the lead advocate simultaneously, but the live note will not be visible to the arbitrator. In any situation where the arbitrator cannot see the live note, it is advisable to speak clearly and at a moderate pace to ensure that every argument is clearly communicated to the tribunal.

In certain cases, it is preferable to deliver hard copies of the submissions, hearing bundles or demonstratives to the tribunal members subject to their confirmation, as they can then use the hard copy to take notes during the hearing. In that case, delivery of the hard copies should be arranged in advance.

What is a good presentation in a virtual hearing?

Good advocacy in a virtual setting requires counsel to be in full control of the technical equipment, especially the camera, and to skilfully present the key arguments and exhibits. A fine balance needs to be struck between the tribunal looking at the material and focusing on the speaker.

Reinforce – don't distract – with PowerPoint

PowerPoint presentations can be a valuable part of an opening statement, but they can also distract arbitrators if used improperly. The key is to make sure the slides track very closely with what counsel is saying. If the slides contain more information than the attorneys convey orally – or if the slides include distracting pictures, charts or graphs – the tribunal may focus on trying to decipher the slide, at the risk of no longer listening closely to counsel. That is unlikely to be the intended goal. Rather, slides ought to be used to reinforce, not distract from, oral submissions.

Typically, I do not find it helpful for counsel deliberately to provide more PowerPoint slides than they intend to cover in their presentation. Counsel may hope that by submitting more slides than are discussed during the oral argument, they are getting an 'extra' submission of material to which the tribunal may refer after the hearing concludes. Even if that were an acceptable practice, however, in my experience, arbitrators focus on the slides that were discussed during the hearing, rather than on slides that were not discussed or explained.

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To assist the tribunal, counsel should, on the one hand, emphasise their strongest arguments at the hearing and establish eye contact with the tribunal, and, on the other, pace the presentation so that the tribunal has some time to breathe. An advocate should try to pick up the tribunal's non-verbal cues as much as possible, even if it might be harder to do than in an in-person hearing. Here, the role of the second and third chairs at the hearing becomes even more important; it is simply not possible for the lead advocate to deliver the speech, look into the camera and pick up on all of the tribunal's cues at the same time. The second and third chairs should be focusing on the tribunal's reactions and informing the lead advocate as the hearing goes on, so that he or she can adapt the advocacy.

Presentation technology is similarly a matter of fine balance. Every party wishes to be fully heard, and tightly packed presentation slides may, from a party's point of view, appear helpful and informative. PowerPoint, Prezi or other presentation software might appear at first glance like a good opportunity to refer to more exhibits, include more arguments and generally cover more ground. However, if used excessively, slide decks can hinder effective advocacy: the tribunal could lose its path in badly structured presentation materials or could get easily bored if too much text is squeezed into one slide. The presentation material should be succinct and impactful to help the tribunal understand the core issues and narrative of the case. Slides should not inundate the arbitrators with pointlessly complex arguments and references to exhibits. The goal of a good presentation is to give the tribunal a structure with which to follow the hearing; allowing the arbitrators to understand what the key documents are (and what the parties' contentions regarding them are) so that it can later be used by the tribunal for its deliberations.

To screenshare or not to screenshare?

The lead counsel or his or her team (and not the service provider) should control the screensharing function and make clever use of it. This will allow counsel to turn it on and

off depending on whether the attention of the tribunal should be directed to the presentation materials or the speaker. It might, at times, be more important to share the PowerPoint presentation while in other instances, it might be preferable to have the tribunal focus on the speaker. If done properly, screensharing will allow counsel to save time by assisting a witness to immediately spot the document at issue. These decisions will have to be made during the hearing by the second chair (or the third chair), who must evaluate the circumstances, and adapt to them. For this to happen seamlessly, the counsel team should rehearse several possible situations in advance and have multiple plans for how they wish to use the screensharing function.

Based on recent experience in virtual hearings, it is recommended that someone within the counsel team, who is already acquainted with the material, control the screensharing function. The second or third chair will be familiar with the presentation material, having created and reviewed it in advance. For example, with respect to a PowerPoint deck used in an opening statement, the legal team will have likely worked together before, rehearsed or have access to a script and know when to move on to the next slide. The legal team will have in-depth knowledge of the exhibits, having reviewed and relied on them for prior submissions, and will know where they are saved, and which page of the exhibit is relevant. Conversely, delegating the above (i.e., control of the screensharing function) to a service provider is not recommended because that person would not have this extensive knowledge of the material. The more the service provider stumbles, the more likely that the tribunal will be subconsciously annoyed by any additional disruption.

If possible, counsel should avoid splitting screens when using the screensharing function. Although this allows the display of multiple exhibits at once and facilitates comparison, it is at times counterproductive. That is because depending on the size of the participants' screen, split screens might prevent the witness and the tribunal from properly seeing and reading the exhibits.

Use of videos in oral statements

PowerPoint slides have often been used during in-person oral openings, and they continue to be popular presentation tools in virtual hearings and webinars. However, rarely do counsel in an arbitration use video clips as part of their advocacy in oral openings or closings. Virtual hearings and videoconferencing platforms undoubtedly make the use of videos easier because people are already looking at a screen. Counsel should consider utilising video clips as part of their advocacy, if it fits the case.

This might have been a divisive suggestion if hearings were to remain in-person, since showing short video clips in hearing rooms could be complicated and cumbersome given the sound quality, video setting and connection issues. However, these are mostly cancelled out in a screen-sharing setting.

Some further benefits of using video clips are as follows:

- With respect to oral closings (if ordered by the tribunal), the use of video clips of witness testimony can be quite effective since it gives a more 'live' feeling of the evidence (rather than simply quoting from a transcript).
- In construction disputes, videos could be paired with 3D design to give the viewers a better understanding, especially if it involves technical issues.
- Videos can also be a useful medium to change the pace or mood of a presentation.

Reinventing oral arguments with video clips

Video clips could be another useful weapon in a counsel's arsenal, and counsel should grab the advantage of being able to use videos in virtual hearings to make presentations shorter and more effective. For instance:

- In lieu of a traditional oral opening, counsel could present a pre-recorded video of an oral presentation to introduce the case, its core issues and the parties' respective positions. Each presentation would be between 15 and 30 minutes followed by an oral session during which the tribunal may ask questions and improve their understanding on specific issues.
- During opening or closing presentations, counsel could present pre-recorded video clips of witnesses, whether they have been cross-examined or not. The recordings would not be used to introduce new evidence but as the audio-visual transposition of the witness statement, that is, the parties would prepare both written and audio-visual written statements. Hearing and seeing a witness often has greater impact on the tribunal than simply reading written witness statements.

Cross-examination of fact witnesses and experts

Effective cross-examination

Mostly, the end goal of a hearing is to persuade the tribunal that the harm a party suffered merits compensation. This effort at persuasion takes many forms, one of which is the cross-examination of fact witnesses and experts. Cross-examination is significant because it is the only time when counsel have direct access to the counterparty's witnesses and experts and gets the opportunity to offset the impact of their testimony. More often than not, cross-examining experts and fact witnesses is a document-oriented process. Because counsel rely on documentary exhibits to try and impeach the credibility of a witness, cross-examinations are almost always document-intensive. Hence, the flawless handling of exhibits in a virtual hearing is a core element to successful virtual advocacy.

Although technology has come a long way, counsel should consider that successfully using technology to cross-examine witnesses in virtual hearings and in-person hearings is fundamentally different. Due to technical issues, progress in virtual hearings might be slower than usual. For instance, there might be a lag with the video or audio technology. Or it could happen that live notes stop working intermittently so that the cross-examination is constantly interrupted. Therefore, due to time constraints and shorter attention span, counsel should favour short, impactful questions in a virtual setting. Here, using long set-up questions or extensive document-heavy questions for one issue is less effective and more time-consuming. Indeed, counsel must strike a balance between using shorter questions and set up with the key documents on a particular issue.

Using materials during cross-examination

Another major aspect of virtual hearings is whether the fact witness or expert has access to hard copies of the exhibits, soft copies via screensharing only or both hard copies and soft copies on a separate monitor where the witness can flick through the exhibits.

Whether the fact witness or expert has access to one or all of the above will vary depending on counsel's preference and what the parties agreed.

On the counsel side, the lead counsel (or the person screensharing the materials) should make use of all the tools available to direct the tribunal's and witness's attention to the material sections of the exhibit. This could be done by zooming in on the relevant section of the document or highlighting it. It is also useful to provide a list of exhibits that counsel intend to introduce later during cross-examination to the service provider prior to the session to save time and ensure a natural flow during cross-examination.

Counsel should also consider how to effectively invite the tribunal after the hearing to review or highlight the documents shown during cross-examination. In an in-person setting, handing out a cross-examination binder was an option, but that option becomes less handy in a virtual setting. At the same time, virtual hearings make it possible to share hyperlinked digital binders, where all documents that will be used for cross-examination are available and important parts have been highlighted, which the tribunal can use both during the hearing and after. Counsel should consult with the tribunal, as preferences will necessarily vary between arbitrators.

Monitoring while cross-examining

Another novelty that virtual hearings will bring about is the increase in monitoring one's oral advocacy. As participants can see not only themselves, but also opposing counsel and the tribunal on the screen at the same time, the act of someone monitoring the flow of the hearing will probably increase.

To maximise the effectiveness of monitoring, counsel, and participants in general, should (1) turn off the cameras of non-speakers, leaving on only the cameras for the tribunal and the speakers, (2) position the tribunal members' screens in an easy-to-monitor location, to better observe when and where the tribunal is focusing its attention, and (3) self-monitor from time to time to ensure that they are clearly visible to the tribunal and appear professional.

Don't underestimate the impact of interpretation

Last but certainly not least, counsel should be mindful of the impact of interpretation on cross-examination. The issues that interpretation may cause in an in-person hearing will be magnified in a virtual setting. For instance, the virtual setting has made it harder for counsel to interject and oppose any inaccuracies in the interpretation without cutting the flow of the cross-examination. Furthermore, the quality of the interpretation is intrinsically linked to the sound quality. As such, if available, counsel should consider the option of simultaneous interpretation rather than consecutive interpretation as the latter interrupts the flow of questioning and eats up cross-examination time.

Concluding tips and best practices

To conclude this chapter, the key tips and best practices to achieve effective oral advocacy at virtual hearings are as follows.

- Practice is the key to a successful virtual hearing. Take every opportunity available, such as virtual conferences and webinars, to practise.
- Know your best angle.

- Less is more. Be brief and to the point, during the opening statement, cross-examination and closing statements.
- Keep in mind tiredness, both digital fatigue and fatigue due to time differences.
- Give the tribunal a hyperlinked hearing bundle with the exhibits already highlighted where relevant.
- Do not panic even if something goes wrong. Your technical setting might fail or technical glitches of other participants might adversely impact the flow of your advocacy. This can always happen – just rectify the issue and carry on.
- Virtual hearings allow for self-monitoring, so ensure you take advantage of it. Keep in mind that the screen size will differ depending on the videoconferencing platform used.

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Cultural Considerations in Advocacy: East Meets West

Alvin Yeo SC and Chou Sean Yu[1]

Introduction

Arbitration practitioners today argue their cases all over the world. More than ever, they act for parties from every conceivable jurisdiction.

The global rise of arbitration is perhaps most evident in Asia. Home to the two most populous countries in the world, Asia is not only the world's largest manufacturer but also the largest recipient of foreign investment and net capital exporter.[2] The opening of major Asian markets to foreign investors, coupled with the advent of the Belt and Road Initiative, has increased trade and solidified arbitration as the preferred cross-border dispute resolution mechanism, rather than national courts. The statistics demonstrate this; for example, the Singapore International Arbitration Centre (SIAC) dealt with 1,080 new cases in 2020, the first time SIAC's caseload crossed the 1,000-case threshold;[3] 1,018 of these cases were international in nature (94 per cent). This 1,080 figure represents a 125 per cent increase from the 479 cases filed in 2019 and a 169 per cent increase from the 402 new cases filed in 2018. The annual caseload of the China International Economic and Trade Arbitration Commission (CIETAC) was 3,615 new cases in 2020, compared with 1,352 cases in 2010

1 Alvin Yeo SC is the chairman and senior partner and Chou Sean Yu is a partner at WongPartnership LLP. The authors would like to thank Oh Sheng Loong Frank, a partner at WongPartnership LLP, for his invaluable assistance with this chapter.

2 Huang Jing, 'The Rise of Asia: Implications and Challenges', Lee Kuan Yew School of Public Policy, at [1] <https://lkyspp.nus.edu.sg/gia/article/the-rise-of-asia-implications-and-challenges>.

3 Singapore International Arbitration Centre [SIAC], 'Where the World Arbitrates', Annual Report 2020 at 16, 31 March 2021 <https://www.siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2020.pdf> (accessed 1 April 2021).

(an increase of 167 per cent);[4] 739 of these 3,615 new cases were foreign-related.[5] By comparison, 946 new cases were filed with the International Chamber of Commerce (ICC) in 2020,[6] compared with 793 new cases in 2010 (a 19 per cent increase).[7] In 2021, Singapore tied in first place with London as the most preferred seat of arbitration in the world ahead of Hong Kong, Paris and Geneva. The SIAC also ranked as the most preferred arbitral institution in the Asia-Pacific and the second most preferred arbitral institution in the world, after the ICC.[8]

Disputes referred to international arbitration often bring together arbitrators, counsel and witnesses from different jurisdictions with different cultures and practices – in 2020 alone, the SIAC appointed 288 arbitrators (and confirmed another 145 nominated arbitrators) from more than 20 countries, including Australia, Austria, Brunei, Canada, Chile, China, France, Germany, Hong Kong, India, Indonesia, Iran, Ireland, Italy, Lebanon, Malaysia, the Netherlands, New Zealand, Nigeria, Russia, Singapore, South Africa, South Korea, Sweden, Switzerland, Thailand, the United Kingdom, the United States and Vietnam.[9] Despite increasing harmonisation in international arbitration (for instance, the advent of the UNCITRAL Model Law on International Commercial Arbitration in 1985 and its revision in 2006 in a bid to assist states in reforming, modernising and harmonising their laws on arbitral procedure), there remain inevitable differences arising from varied backgrounds and environments. With trade disputes worldwide increasingly involving an Asian nexus,[10] and the number of Belt and Road disputes involving Asian parties expected to increase in the near future,[11] an acute understanding of these differences would prove an invaluable soft

4 CIETAC Annual Caseload Statistics <http://www.cietac.org/index.php?m=Page&a=index&id=40&l=en> (accessed 15 April 2021).

5 CIETAC 2020 Work Report and 2021 Work Plan <http://www.cietac.org/index.php?m=Article&a=show&id=17433&l=en> (accessed 19 March 2021).

6 International Chamber of Commerce [ICC], 'ICC announces record 2020 caseloads in Arbitration and ADR', 12 January 2021 <https://iccwbo.org/media-wall/news-speeches/icc-announces-record-2020-caseloads-in-arbitration-and-adr/> (accessed 19 March 2021).

7 Thomson Reuters Practical Law, 'ICC publishes 2010 statistics', 8 February 2011 <https://uk.practicallaw.thomsonreuters.com/3-504-7454?__lrTS=20210214090951233&transitionType=Default&contextData=%28sc.Default%29> (accessed 16 April 2021); ICC Digital Library, ICC Statistical Reports <https://library.iccwbo.org/dr-statisticalreports.htm> (accessed 16 April 2021).

8 White & Case LLP, '2021 International Arbitration Survey: Adapting arbitration to a changing world', 6 May 2021 <https://www.whitecase.com/sites/default/files/2021-06/qmul-international-arbitration-survey-2021-web-single-final.pdf> (accessed 16 June 2021); SIAC, Press Releases 2021, 'SIAC is Most Preferred Arbitral Institution in Asia-Pacific and 2nd in the World', 7 May 2021 <https://www.siac.org.sg/images/stories/press_release/2021/Press%20Release%20SIAC%20is%20Most%20Preferred%20Arbitral%20Institution%20in%20Asia-Pacific%20and%202nd%20in%20the%20World.pdf> (accessed 16 June 2021).

9 SIAC, 'Where the World Arbitrates', Annual Report 2020 at 19-20 <https://www.siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2020.pdf> (accessed 1 April 2021).

10 Michael J Moser, 'How Asia Will Change International Arbitration' in Albert Jan van den Berg (ed.), *International Arbitration: The Coming of a New Age?*, International Council for Commercial Arbitration [ICCA], Congress Series, Volume 17 (Kluwer Law International 2013), 62 and 63.

11 Christine Sim, 'SIAC Congress Recap: Interviews with our Editors – Perspectives from Singapore with Ariel Ye', 2 September 2020, Kluwer Arbitration Blog <http://arbitrationblog.kluwerarbitration.com/2020/09/02/siac-congress-recap-interviews-with-our-editors-perspectives-from-singapore-with-ariel-ye/> (accessed 23 March 2021).

skill for an advocate in his or her consideration of how best to represent the client's interests in the context of cultural diversity, particularly in a continent as varied as Asia.

Arbitration advocacy

Advocacy is the art of persuasion and the goal of an advocate is to persuade.[12] In an arbitration, the object of persuasion is the arbitral tribunal.

To effectively persuade the members of the tribunal, an advocate first has to understand how they process information and make decisions. Arbitrators, like all human beings, are complex. They do not make decisions in a vacuum – a submission from an advocate is tested and compared against the arbitrators' personal perceptions of the world and their own life experiences,[13] and decisions are made through this same lens. These perceptions are, in turn, shaped by factors such as age, gender, place of birth, social and educational background, training, work experience and culture.[14] Culture is 'the shared knowledge and schemes created and used by a set of people for perceiving, interpreting, expressing, and responding to the social realities around them'.[15] In other words, in coming to their decisions, arbitrators, like anyone else, rely on their 'sense' of how things ought to be, and this 'sense' is shaped by the cultural and social groups to which they belong.[16] People tend to focus on information that accords with their existing beliefs, and they assess information positively if it is consistent with those beliefs and negatively if it discredits them.[17]

If tribunal members, advocates and witnesses hail from different backgrounds (as is often the case for international arbitrations), the cultural diversity makes the process of persuading the tribunal complex and often difficult. For example, a tribunal's assessment of the level of competence expected of a director of a company may vary depending on each tribunal member's expectations of competency.[18] Even when all the participants to the arbitration are Asian, effective advocacy is by no means an easy task – Asia is a vast, disparate region that is home to a myriad different countries, cultures, religions, races, languages and legal traditions.[19]

12 Lord Igor, Singapore Academy of Law Annual Lecture 2012 – 'The Art of Advocacy' (2013) 25 *SAcLJ* 1 at 16 <https://journalsonline.academypublishing.org.sg/Journals/Singapore-Academy-of-Law-Journal/e-Archive/ctl/eFirstSALPDFJournalView/mid/495/ArticleId/521/Citation/JournalsOnlinePDF>.

13 Masua Sagiv, 'Cultural Bias in Judicial Decision Making', (2015) 35 *Boston College Journal of Law & Social Justice* [*BCJL & Soc Just*] at 232.

14 Greg Laughton SC, 'Advocacy in International Arbitration', Selborne Chambers at 29; Jos Hornikx, 'Chapter 4: Cultural Differences in Perceptions of Strong and Weak Arguments', in Tony Cole, *The Roles of Psychology in International Arbitration* (Kluwer Law International; Kluwer Law International 2017) at 75.

15 J P Lederach, *Preparing for peace: Conflict transformation across cultures* (Syracuse University Press, 1995) at 9.

16 Masua Sagiv, 'Cultural Bias in Judicial Decision Making', (2015) 35 *BCJL & Soc Just* 229 at 232 to 235.

17 Jos Hornikx, 'Cultural Differences in Perceptions of Strong and Weak Arguments' in *The Roles of Psychology in International Arbitration* (Kluwer Law International, 2017), 88 to 90.

18 See, e.g., Won Kidane, 'Chapter 12 – Conversations on the Role of Culture in International Arbitration' in *The Culture of International Arbitration* (Oxford University Press, 2017) at 275.

19 Patrizia Anesa, 'Arbitration discourse across cultures: Asian perspectives', (2017) 13 *ESP Across Cultures*, 20 to 21.

Developing an advocacy strategy before an Asian tribunal

The following section discusses what an advocate can consider and do when appearing before a tribunal consisting predominantly of Asian members, who may perhaps not be cut from the traditional 'international arbitrator' cloth.

Know your tribunal

Where an arbitration involves arbitrators and advocates accustomed to different cultures, issues may arise from the inevitable differences in communication methods, meaning of communications, mental interpretations and behavioural expectations. For example, *ex parte* communications with arbitrators are generally prohibited in Western countries, but it is not uncommon in jurisdictions such as China, where an arbitrator may also take on the role of a mediator in the same dispute.[20] The Hong Kong Court of Appeal had granted leave to enforce a China-seated award (and dismissed a challenge on grounds of bias) where an arbitrator conducted mediation during a private dinner with (and paid for by) one party in the absence of the other, on the basis that such a practice was found to be acceptable by the courts of the arbitral seat.[21] Differences can even be seen from something as seemingly minor as deciding how long the tribunal should sit on a particular day or perhaps on which days to sit. For instance, considerable deference should be made to avoid a hearing over noon on a Friday if one of the arbitrators is a Muslim.[22] Equally, a hearing during the month of Ramadan should perhaps also be avoided, where possible. Similar caution should be exercised when scheduling hearings close to major festivals in Asian countries, for instance, the Golden Week in China or the Lebaran festival in Indonesia.

Accordingly, effective arbitration advocacy starts with getting to know the members that make up the tribunal and understanding their likely attitudes and beliefs, and how these attitudes and beliefs might be changed if necessary. With this understanding, an advocate can frame his or her arguments and develop a targeted presentation of the case that will resonate with the tribunal members and motivate them to decide in his or her favour.[23] For instance, a retired Asian judge from a more formal national court structure sitting as an arbitrator may be more comfortable conducting proceedings in a manner not too dissimilar to his or her former environs. A good advocate must therefore be prepared for

20 Sundaresh Menon, 'Some Cautionary Notes for an Age of Opportunity' (keynote address at the Chartered Institute of Arbitrators Arbitration Conference, Penang, 22 August 2013) at 6 <https://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/keynote-address-by-cj-sundaresh-menon-at-ciarb-conference---22-august-2013.pdf>; Catherine Rogers, 'Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration', 23 *Michigan Journal of International Law* at 363; Wang Wenying, 'The Role of Conciliation in Resolving Disputes: A P.R.C. Perspective' (2005) 20 *Ohio State Journal on Dispute Resolution* at 435 ('the practice of combining arbitration with conciliation originated absolutely from Chinese indigenous cultures and legal traditions') <https://kb.osu.edu/bitstream/handle/1811/77095/1/OSJDR_V20N2_0421.pdf>.

21 *Gao Haiyan v. Keeneye Holdings Ltd & New Purple Golden Resources Development Ltd* [2011] HKCA 459 at [102].

22 'Part II: The Process of an Arbitration, Chapter 9: Hearings', in Jerry Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012) at 725.

23 Richard Waites and James Lawrence, 'Psychological Dynamics in International Arbitration', in Doak Bishop and Edward G Kehoe (eds.), *The Art of Advocacy in International Arbitration,* 2nd Ed (JurisNet, 2010), 73 to 75.

How to cross-examine Chinese speakers

Anyone who has taken part in advocacy trainings on cross-examination has been taught to ask questions that call for short, 'yes' or 'no' answers. However, this type of questioning often tends to be less effective when it comes to Chinese witnesses. Chinese people tend to be less direct than Westerners, and will frequently express themselves in a roundabout way instead of using explicit language. Pressing the witness to answer a question will rarely help, and might come across as rude or inappropriate in the eyes of Chinese arbitrators. Western lawyers who are cross-examining Chinese witnesses should, therefore, be prepared to ask the same questions from different angles, consider asking more open-ended questions, and be prepared to leave markers for the transcript in circumstances where a line of questioning fails to achieve the desired result. Another frequent difficulty arises from the complexity of the Chinese language, which almost invariably results in difficulties of interpretation during cross-examination. Speaking slowly is therefore essential, and it might sometimes be advisable to consider consecutive, rather than simultaneous, interpretation.

– Emmanuel Jacomy, Shearman & Sterling LLP

such cultural differences, which perhaps may not represent the international norms that he or she is used to.

An advocate's job to persuade can perhaps be made easier through the thoughtful selection and nomination of an arbitrator with the desired understanding of the legal and business culture for the case at hand. Since it is safe to assume that arbitrators talk to each other about the case during arbitration and deliberations, such an arbitrator can play the role of a 'cultural intermediary and translator'[24] by explaining the social and cultural intricacies relevant to the dispute (the understanding of which may be helpful or even essential to the advocate's case) that the other members of the tribunal might otherwise be unable to comprehend because of inexperience or lack of knowledge. A civil law arbitrator may, for instance, be better placed to understand the business law norms of an Indonesian or a Japanese party.

It is not the intention of this chapter to explore the precise differences in communication and behavioural norms that exist between arbitration participants from different cultures. However, we will briefly discuss a few points of which an advocate can usefully take note.

Language

If the language of the arbitration is English but English is not the first language for one or more participants, or if the participants have varying levels of proficiency in the language, it is necessary for the advocate to tailor his or her written and spoken communications to ensure that everyone involved can understand them. In such situations, an advocate

24 Ilhyung Lee, 'Practice and Predicament: The Nationality of the International Arbitrator (With Survey Results)', (2007) 31 *Fordham International Law Journal* at 604.

Efficiency versus cultural sensitivity

That parties should have a reasonable opportunity to present their case has become widely accepted international practice. Some lawyers from developing countries lack the advocacy skill to efficiently help their client to present the case. International arbitration is an activity in which one side can easily be a relative newcomer. Arbitrators should give some consideration and additional opportunities for them to present their client's case.

In addition, lawyers in many common law countries are not familiar with advocacy skills such as cross-examination. Many lawyers may have to use language of arbitration that is not necessarily their native language. To be patient with the advocacy of these lawyers is a must for international arbitrators.

Having a flexible attitude to meet the conflicting interests of disputing parties is a delicate balance that the arbitrators should work out with the parties who come from different legal and cultural backgrounds so that the arbitral procedure will not be unreasonably delayed and, at the same time, parties will have real and reasonable opportunities to present their case.

– Jingzhou Tao, Arbitration Chambers

may wish to adopt clear, simple and concise language without colloquialisms,[25] while at the same time ensuring that the language used is not so basic as to lose the interest of an arbitrator whose first language is English.[26] Conversely, if the arbitrator's first language is not English, the advocate would do well to ensure that his or her oral submissions are clearly understood.

An advocate also has to be cognisant of the fact that translations are rarely perfect – words spoken by a native English speaker may not have the same meaning once translated into another language, and vice versa. With the rise of cross-border arbitration involving international parties, being conversant in multiple languages or having an advocate on your team with this linguistic capability can only be an advantage.

Technical language proficiency aside, the manner in which people communicate, both verbal and non-verbal, differs from culture to culture, notwithstanding the fact that they might be speaking the same language. Participants in an arbitration frequently converse in the same language but sometimes do not fully understand the meaning of or the reasons behind what is said, resulting in them talking past each other.[27] Words, facial expressions, body language and gestures can be interpreted differently by people of different cultures. This is particularly the case for South Asians, where a shake of the head may mean an affirmation of a point rather than a denial. Further, something as simple as a wave of the palm can carry multiple meanings, and can be read in a different manner depending on a person's culture.

25 Fernando Dias Simoes, 'The Language of International Arbitration' (2017) 35(1) *Conflict Resolution Quarterly* at 94: 'An arbitrator who lacks the necessary fluency in the language of arbitration may fail to understand some of the crucial issues necessary to resolve the dispute.'

26 Greg Laughton SC, 'Advocacy in International Arbitration', Selborne Chambers at 60.

27 Fernando Dias Simoes, 'The Language of International Arbitration' (2017) 35(1) *Conflict Resolution Quarterly* at 95.

Style and tone of communication

Apart from language, an advocate should also be aware of the cultural sensitivities of the tribunal members and tailor the style and tone of his or her communications accordingly, to maximise the persuasiveness of his or her message.

For example, an American litigation lawyer who is used to advocating before lay juries in the US courts may subconsciously advocate his or her case in an international arbitration with the same level of aggressiveness as in an adversarial system. Accustomed to oral depositions of witnesses where the 'goal often is to create . . . short snippets of testimony in the form of admissions that can be inserted into summary judgment papers . . . to show the presence or absence of factual issues',[28] he or she may also carry over the same aggressive, accusatory questioning style when cross-examining witnesses in international arbitration. This would not be well received by an East Asian civil law arbitrator who is more used to an inquisitorial and conciliatory approach, and who, because of social conventions influenced by Taoist or Confucian precepts that define how East Asians behave and communicate,[29] is sensitive to behaviour that implicitly diminishes the position of the recipient and results in a loss of face.[30] If one or more members of the tribunal hails from an East Asian jurisdiction, an advocate may wish to consider adopting a measured and neutral tone in his or her communications, while explaining the case in a clear, concise, accurate, reasoned and authoritative way.

An East Asian arbitrator also may not appreciate a zealous and aggressive cross-examination of an elderly Asian witness.[31] Deference and courtesy are important, expected behavioural norms for an advocate who wishes to command the respect of an Asian arbitrator.

Similarly, an East Asian arbitrator may not favour the arguments of an advocate who is not alive to the nuances of the 'high context' communication style (i.e., with much of the meaning derived from the background culture and left unsaid) of an East Asian witness (as opposed to Western 'low-context' communication styles, which are generally more explicit) and who, as a result, relies on the witness's apparent reticence as evidence of a lack of credibility.[32]

An advocate therefore has to be mindful of and sensitive to cultural differences in his or her communications and behaviour during the arbitration, so as not to offend any arbitrators and other participants to the arbitration or detract from the persuasiveness of his or her arguments.

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28 Doak Bishop and James Carter, 'The United States Perspective and Practice of Advocacy', in Doak Bishop and Edward G Kehoe (eds.), *The Art of Advocacy in International Arbitration*, 2nd Ed (JurisNet, 2010) at 521.

29 Christopher Lau, 'The Asian Perspective and Practice of Advocacy', in Doak Bishop and Edward G Kehoe (eds.), *The Art of Advocacy in International Arbitration*, 2nd Ed (JurisNet, 2010) at 567.

30 Patrizia Anesa, 'Arbitration discourse across cultures: Asian perspectives' (2017) 13 *ESP Across Cultures* at 22.

31 Kyu-taik Sung, 'Respect for Elders: Myths and Realities in East Asia' (2000) 5(4) *Journal of Ageing and Identity* at 198 to 201, underlining the historical and cultural aspects of respect for the elderly in East Asia.

32 Theodore Cheng, 'Developing Skills to Address Cultural Issues in Arbitration and Mediation' (2017) 72(3) *Dispute Resolution Journal* at 2.

Role of mediation and conciliation

An international arbitration advocate should also be aware of and prepared for the importance of mediation and conciliation in some Asian cultures, and their influence on the arbitration process. As a result of the influence of Confucian values[33] and principles in some East Asian cultures, non-confrontational methods of conflict resolution (such as mediation and conciliation)[34] have historically been the preferred methods of dispute resolution in countries such as China[35] and Japan,[36] and are still ingrained in their legal cultures. This can be seen in the arbitration laws and rules of arbitration institutions from these countries. For example, the arbitration laws and rules of China, Hong Kong and Japan contain specific provisions for conciliation, mediation and settlement to be conducted by the arbitral tribunal, and for the tribunal to render an award in terms of the settlement.[37] Arbitral tribunals comprised of Chinese or Japanese arbitrators may therefore expect, or even request, parties to attempt to mediate and reconcile their differences before the substantive hearing; it is a widely held perception among Chinese arbitrators that it is the goal of the arbitrator to ensure that parties are able to preserve their long-term relationship.[38] It has been observed that in countries like China, Korea and Japan, contracts and legalism are seen 'as something as of a last resort, [used] only if personal relations and verbal agreements fail'.[39] A survey conducted with Chinese arbitrators showed that they regard the combination of mediation and arbitration as 'reflective of traditional values', including that of 'the pursuit of harmony' and 'avoiding litigation'.[40] Similar cultural influences exist in other parts of Asia. For example, Indonesia's underlying philosophy of *Pancasila* calls for 'deliberation to reach a consensus and discourages contention in all things, where possible'.[41]

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33 See, e.g., Confucius, The Analects Book XIII (Robert Eno trans) <http://www.indiana.edu/~p374/Analects_of_Confucius_(Eno-2015).pdf>: '子曰：聽訟, 吾猶人也, 必也使無訟乎' (The Master said: 'In hearing lawsuits, I am no better than others. What is imperative is to make it so that there are no lawsuits.'). See also, Shahla F Ali, 'Barricades and Checkered Flags: An Empirical Examination of the Perceptions of Roadblocks and Facilitators of Settlement among Arbitration Practitioners in East Asia and the West' (2010) 19(2) *Pacific Rim Law & Policy Journal*, 257 to 262.

34 Patrizia Anesa, 'Arbitration discourse across cultures: Asian perspectives, (2017) 13 *ESP Across Cultures* at 22.

35 Gabrielle Kaufmann-Kohler and Fan Kun, 'Integrating Mediation into Arbitration: Why It Works in China' (2008) 25(4) *Journal of International Arbitration* at 480.

36 Tony Cole, 'Commercial Arbitration in Japan – Contributions to the Debate on Japanese "Non-Litigiousness"' (2007) 40(1) *New York University Journal of International Law and Politics*, 59 to 63; Lara M Pair J D, 'Cross-Cultural Arbitration: Do the differences between cultures still influence international commercial arbitration despite harmonization?', (2002) 9(57) *ILSA Journal of International and Comparative Law* at 68.

37 See, for example, Section 33 of the Hong Kong Arbitration Ordinance; Article 36 of the HKIAC Administered Arbitration Rules 2013; Article 47 of the CIETAC Arbitration Rules; Article 38 of the Japanese Arbitration Law; and Article 43 of the Arbitration Rules of the Beijing Arbitration Commission 2015.

38 Shahla Ali, 'Approaching the Global Arbitration Table: Comparing the Advantages of Arbitration as Seen by Practitioners in East Asia and the West', (2009) 28(4) *Review of Litigation* at 784.

39 Jun Hee Kim and Zachary Sharpe, 'Culture, Contracts and Performance in East Asia', 72(1) *Dispute Resolution Journal* at 5.

40 Fan Kun, 'Glocalization [*sic*] of Arbitration: Transnational Standards Struggling with Local Norms through the Lens of Arbitration Transplantation in China', 18 *Harvard Negotiation Law Review* (2013), 214 to 215.

41 Karen Gordon Mills, 'National Report for Indonesia (2018 through 2019)', Lise Bosman (ed.), ICCA, International Handbook on Commercial Arbitration (Kluwer Law International 2019, Supplement No. 104, February 2019) at 1.

A good example of cultural differences – traits of Asian witnesses

In this era of cross-border disputes and globalisation, arbitrators need to be sensitive to cultural differences and different legal traditions. Tribunals must earn the respect of all parties involved, which invariably means affording them, their culture and their laws the respect they deserve. There may also be a mismatch of representation, which needs to be recognised sympathetically. For Asian witnesses, aggressive cross-examination that makes them lose face may backfire with the tribunal, particularly if they are based in Asia. Asian witnesses may smile during cross-examination but this is not a sign of agreement with the other side's case, or a show of disrespect. Conversely, in some Western cultures, they see this as a sign of mental instability or a suspicious attempt to win over the tribunal.

– David Bateson, 39 Essex Chambers

Advocates who appear unprepared for, or unwilling to attempt, reconciliatory measures may be perceived as insincere and disrespectful towards the dispute resolution process.

The entry into force of the Singapore Convention on Mediation, also known as the United Nations Convention on International Settlement Agreements Resulting from Mediation, on 12 September 2020, with signatories from Asian states such as China, Korea, Laos and the Philippines, reflects the rising primacy of mediation and conciliation as a dispute resolution tool.[42] Advocates should be attuned to the cultural preferences of the members of the arbitral tribunal, in considering the possible role of mediation and conciliation in or alongside the arbitration process.

Know the opportunities for persuasion

Besides knowing the tribunal, it is also important for an advocate to recognise that advocacy is not just about oral or written submissions at the merits hearing. An arbitrator's decision-making process starts from the time of his or her appointment, as that is when he or she starts to evaluate and assess the parties, their advocates and the information presented. While written and oral submissions represent the two most obvious opportunities for advocacy in international arbitration, every action taken, and every contact with, statement made or document submitted to the tribunal at every stage of the arbitration represents an avenue for persuasion, and should be made with the ultimate aim of instilling confidence in one's case and the result sought in the tribunal.[43] This is particularly the case for arbitrations involving Asian parties and arbitrators.

Even though parties to an arbitration generally agree (failing which, the tribunal would direct) on the arbitration rules that lay out the basic procedure for the arbitration, differences in the individual legal traditions and practices of advocates and arbitrators still often

42 Singapore Convention on Mediation Media Release, 'Singapore Convention on Mediation Enters into Force', 12 September 2020 <https://www.singaporeconvention.org/media/media-release/2020-09-12-singapore-convention-on-mediation-enters-into-force>.

43 Peter Leaver and Henry Forbes Smith, 'The British Perspective and Practice of Advocacy' in Doak Bishop and Edward G Kehoe (eds.), *The Art of Advocacy in International Arbitration*, 2nd Ed (JurisNet, 2010) at 474.

give rise to different expectations of how these rules are to be applied and followed. While the many differences between the legal traditions and practices of different countries cannot be oversimplified, there are striking differences between the two legal families to which most legal systems belong – that is, common law and civil law; to further complicate matters, there are significant procedural differences that exist even within the two legal families.[44] An international arbitration advocate seeking to persuade members of a tribunal from different legal systems would be well advised to keep these differences in mind when formulating a persuasion strategy.

Pleadings

While pleadings are an essential part of every arbitration and institutional arbitration rules provide for the submission of such documents setting out each party's case, there is no fixed precept in international arbitration on (and the institutional rules often do not stipulate) how detailed a party's pleadings must be. Some arbitrators and advocates would be used to, and may prefer, a concise document setting out central propositions of fact and law on which the party relies, while others may expect a full statement of a party's case, complete with all the particulars and evidence supporting it.[45] An advocate therefore has to take into account the background and likely preferences of the members of the tribunal in deciding the level of detail of the pleadings, so as to ensure that the party's case is effectively conveyed and easily understood.

An arbitrator from an Asian jurisdiction with a common law heritage (likely to be inherited from the British) would perhaps be more accustomed to exhaustive pleadings than an arbitrator from a background where pleadings play a less important role.

Documentary evidence

One can expect a party to voluntarily disclose all documents on which it relies and that are necessary to support its case. But what about relevant documents that a party chooses not to disclose, perhaps because they are unhelpful to its case? Common law arbitrators and advocates would be familiar with applications and orders for document production to compel a party to search for and produce these documents; however, this practice may not be palatable to Asian civil law arbitrators and advocates since, with their legal background, parties are generally under no obligation to disclose documents in their possession or control that are unhelpful to their case, and civil law courts in Asia generally refuse to assist with such applications.[46]

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44 'Part I: Policy and Principles. Chapter 1: The Nature of Procedure and Policy Considerations', in Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012), 41 to 42.

45 Nikola S Georgiev, *Cultural differences or cultural clash? The future of International Commercial Arbitration* (School of Oriental and African Studies, University of London, 2012), 13 to 14.

46 See, e.g., Anna Magdalena Kubalczyk, 'Evidentiary Rules in International Arbitration – A Comparative Analysis of Approaches and the Need for Regulation' (2015) 3(1), *Groningen Journal of International Law* at 93; Craig Wagnild, 'Civil Law Discovery in Japan: A Comparison of Japanese and US Methods of Evidence Collection in Civil Litigation' (Winter 2002) 3(1), *Asian-Pacific Law & Policy Journal* at 16; Qifan Cui, 'Document Production in Chinese Litigation and International Arbitration' (2011) 6(2), *Journal of Cambridge Studies* at 73.

While the International Bar Association's (IBA) Rules on the Taking of Evidence in International Arbitration aim to balance common and civil law approaches in respect of document disclosure,[47] it has been observed that the extent to which production of documents is granted is still unpredictable and differs from case to case.[48] The overall structure in different arbitration proceedings may appear similar, but their details may differ significantly as a result of arbitrators from different legal and cultural backgrounds employing their own approaches within the framework set out in the IBA Rules. This phenomenon is certainly true in Asia.

An advocate should therefore take into account the legal background of the members of the tribunal in deciding how best to pitch an application for document disclosure, and the scope of disclosure sought. For example, an Asian civil law arbitrator may view a request for a wide-ranging discovery order to be a redundant and inefficient exercise that slows down the arbitral process, and be less inclined to grant it. Conversely, an arbitrator accustomed to the common law legal system may be more inclined to draw an adverse inference against a party that is not forthcoming with the disclosure of evidence. The advocate's submissions would therefore have to be tailored to take into account such sensitivities.

Witness evidence

It is fairly standard practice in international arbitrations for parties to tender statements from their witnesses prior to the substantive main hearing. However, cultural differences may give rise to different expectations regarding the scope and content required in such statements. Asian civil law advocates and arbitrators may expect witness statements to simply set out a short summary of the evidence or topics on which the witness may address the tribunal at the hearing, with the witness to give oral evidence beyond the statement during the hearing;[49] whereas common law advocates and arbitrators may expect witness statements to cover every point at issue and contain everything the witness has to say. Where there is ambiguity on the expected scope and content of witness statements, an advocate in an international arbitration may wish to seek the tribunal's directions on this issue so that he or she can prepare the witness statements in the form that would be most persuasive to the tribunal.

One thing an advocate should note when dealing with witnesses from Asian countries where business cultures are heavily influenced by Confucian ideals (such as China, Japan and Korea) is the importance and influence of hierarchy in business organisations. In these countries, junior employees may not feel comfortable about disagreeing with someone of a higher level in the business hierarchy, and may in fact go out of their way to ensure that their recollections are consistent with their more senior colleagues. As observed by a senior arbitration practitioner, the junior employee does this not out of a desire to be dishonest, but because of a perceived duty to support and be loyal to one's superiors, such that if the

47 D W Shenton, 'An Introduction to the IBA Rules of Evidence', (1985) *Arbitration International*, 119 to 120.

48 Pierre Karrer, 'The Civil Law and Common Law Divide: An International Arbitrator Tells It Like He Sees It' in *AAA Handbook on International Arbitration and ADR*, 2nd Ed (JurisNet, 2010), 53 to 54.

49 Anthony Sinclair, 'Differences in the Approach to Witness Evidence between the Civil and Common Law Traditions', in Doak Bishop and Edward G Kehoe (eds.), *The Art of Advocacy in International Arbitration*, 2nd Ed (JurisNet, 2010), 34 to 35.

junior employee's account is inconsistent with that of a more senior employee, the more senior employee must be right.[50] An advocate should be aware of this possibility when confronted with consistent accounts that seem too good to be true, and when dealing with his or her own witnesses, take the necessary steps to pre-empt the probability that the truth would be revealed in cross-examination during the substantive hearing.

Use of experts

A good advocate should be aware that whether a tribunal considers an expert to be reliable or qualified may depend on culture-driven expectations of each tribunal member, and this should therefore be a factor to be taken into consideration when selecting experts.[51]

In recent years, arbitral tribunals in Asia have increasingly adopted the practice of witness conferencing, or 'hot-tubbing', as the preferred method of expert evidence presentation. As with general cross-examination, even when posing questions to an Asian witness, an advocate should keep in mind the Asian sensitivity to 'loss of face' and not be overly aggressive in his or her questioning. Some Asian experts can be fairly modest and less participative when engaged in a witness conferencing session and a good advocate would have to be astute to ensure that his or her expert's effectiveness is not diminished because of a cultural disposition.[52]

Concluding remarks

'A good lawyer knows the law, but a great lawyer knows the judge.' While this phrase is often used in a humorous manner to depict the legal profession, it encapsulates one essential quality of a good advocate, which is to understand the attitudes and beliefs of the decision makers. As highlighted in this chapter, an advocate in an international arbitration involving participants from different cultures in Asia should go beyond that and seek to understand not just the members of the tribunal, but all the participants, including witnesses and opposing counsel. Only then can an advocate develop a persuasion strategy that is truly effective.

50 Christopher K Tahbaz, 'Cross-Cultural Perspectives on Effective Advocacy in International Arbitration – or, How to Avoid Losing in Translation' (2012) 14(2), *Asian Dispute Review* at 52.

51 Jos Hornikx, 'Cultural Differences in Perceptions of Strong and Weak Arguments' in *The Roles of Psychology in International Arbitration* (Kluwer Law International, 2017) at 92.

52 See, e.g., Cooke, Ellis, Hayler, Choo, Tan and Church-Morley, 'Heated Debates: Giving Concurrent Evidence in the Hot Tub' (2019) *Singapore Academy of Law Practitioner* 7 at para. 13 < https://journalsonline.academypublishing.org.sg/Journals/SAL-Practitioner/Arbitration/ctl/eFirstSALPDFJournalView/mid/590/ArticleId/1370/Citation/JournalsOnlinePDF>.

14

Cultural Considerations in Advocacy: United States

Amal Bouchenaki[1]

The advocate must think his way into the brains of the audience.[2]
Richard A Posner

In a recent publication suggesting tools for effective 'global communicators', the authors, two faculty members at NYU School of Professional Studies, defined culture as 'patterns of thinking and doing'.[3] According to the authors, successful communication across cultures entails 'recognizing the communication patterns between us'.[4] 'Recognizing these patterns', they explain, 'is our key to communication success.'[5] They mention new research that 'shows that cultivating skills with a certain *cognitive flexibility* is what unlocks the skills of cultural competence – a global mindset'.[6]

In our office, we practise in a team of international arbitration practitioners trained in at least nine different jurisdictions. We regularly appear before tribunals where not one co-arbitrator was trained in the same jurisdiction as the other. Awareness of the legal cultures that inform our team's, our opponents' and our adjudicators' approaches to advocacy aims precisely at developing the type of cognitive flexibility needed to 'transcend legal, cultural, contextual and even linguistic barriers to secure a favourable outcome for one's client'.[7]

The corresponding chapter in the previous edition offered a US perspective on best practices in cross-examination and other aspects of oral advocacy. I will not repeat those

1 Amal Bouchenaki is a partner at Herbert Smith Freehills. The author wishes to thank Christopher Boyd, an associate in the firm's New York office, for his assistance.

2 Richard A Posner, *Judicial Opinions and Appellate Advocacy in Federal Courts - One Judge's Views*, 51 Duquesne Law Review 3 (2013), 35.

3 Raúl Sánchez and Dan Bullock, *How to Communicate Effectively with Anyone, Anywhere*, 2021, 141.

4 Id. at 141.

5 Id. at 142.

6 Id. at 166 (emphasis in original).

7 Introduction to 4th edition of *The Guide to Advocacy*.

considerations, which remain valid and relevant. This chapter provides some of the procedural, ethical and societal considerations against which the cognitive framework of advocates in the United States has developed.

Procedural considerations

In a 1950 speech to the New York City Bar Association about the Basic Rules of Pleading,[8] Professor Jerome Michael took stock of, and set the context for, how advocacy developed in the United States:

> *[I]n our courts, when we are at peace or at relative peace, we conduct our controversies by way of language. It follows, of course, that if you want to understand procedural law, you must understand the intellectual activities.*
>
> *What, then, are those activities? In general they consist of forming issues of law and of fact; of trying issues of law by argumentation, and of deciding them by deliberation; of trying issues of fact by evidence, and of deciding them by a calculation of probabilities; and, finally, of determining the legal consequences of the decisions of the issues of law and of fact.*[9]

The decision-making process in the United States, at least in the first instance, is therefore structured around three main stages:

- First, legal issues are formulated with the assumption that the facts alleged are true and that their accuracy can be established.
- Second, each party must prove its case or disprove its opponent's case through an evidentiary phase where the parties debate the admissibility of documentary and witness evidence, and the credibility of the proof presented to a judge and, when applicable, a jury.
- Third, the parties debate the legal consequences that they wish the adjudicators to draw from the facts and the law that will have been brought to their attention.

The above outline of the stages of the decision-making process is subject to the specific rules of the trial court. Moreover, an appellate court will in most cases review evidentiary findings of the lower court for clear error, which tends to truncate the above stages to focus on issues of law. But, from the point of view of identifying 'patterns of doing and thinking,' US advocacy and the rules of evidence before the US courts are nevertheless shaped by this three-stage structure of decision-making. 'The conventions of the Anglo-American law of evidence are historically related to the development of the jury system . . . .'[10]

The function of the first procedural stage is to lay out and formulate what is to be proved and disproved during the evidentiary phase that follows. But during this stage, the 'truth' of the facts alleged is not tested. Rather, defendants would typically seek to identify and then convince the court of fundamental defects in the legal theory of the plaintiff's case that prevent the case from proceeding to the evidentiary phase. This entails both written pleadings and oral advocacy before a professional judge. At this stage, written and oral

8 Jerome Michael, *Basic Rules of Pleading*, 5 REC. Ass'n B. CITY N.Y. 175 (1950), 175.

9 Id. at 176.

10 Jerome Michael & Mortimer J Adler, *The Trial of An Issue of Fact: I*, 34 Colum. L. Rev. (1934), 1235.

Effective oral advocacy generally does not require standing

It is not uncommon for US lawyers, particularly those who are relative newcomers to international arbitration proceedings, to leave the counsel's table and to stand at a podium facing the arbitrators when delivering oral opening and closing statements. Usually, the lawyer's presentation is accompanied by a slick (and frequently lengthy) PowerPoint presentation. I have never seen lawyers of other nationalities make their oral submissions from a standing position (unless possibly compelled to do so for medical reasons), although a fondness for PowerPoint slides is not uniquely American, and their use today in international arbitration proceedings is widespread.

Now, I have never seen an international arbitral tribunal object to a US lawyer standing and facing the tribunal, and I have no particular issue with an advocate wishing to do so. However, if US lawyers believe that by adopting a vertical posture, their oral advocacy will be more effective in an international arbitration, I would have little hesitancy in disabusing them of that notion. Effective oral advocacy in an international arbitration generally does not require standing and can be accomplished just as effectively sitting down. Moreover, standing tends to add a layer of formality to a presentation in a proceeding at which the advocate should be seeking to establish a comfortable and relatively informal rapport with his or her audience (the tribunal), rather than delivering a formal speech to them.

– *Eric Schwartz, Schwartz Arbitration*

advocacy would not typically revolve around issues of fact, for example, the facts pleaded by the plaintiff are accepted as true for purposes of a motion to dismiss, and to prevail on a motion for summary judgment, the movant must demonstrate that there is no genuine dispute as to any material fact on which the relevant claim rests. This phase consists of arguing the sufficiency of the legal elements of the claims before the court.

The second stage is the trial. It ensues if the plaintiff's case survives this first stage. Litigation in the United States has developed around the principles that 'a trial is a legal proceeding in which a legal tribunal acquires knowledge',[11] and that 'it is often unjust to resolve controversies on the pleadings because of the very frequent discrepancy between what can be alleged and what can be proved.'[12] The US system of resolution of controversies is therefore rooted in the burden that falls on each party to demonstrate to the court, and the jury when applicable, the truth of their respective allegations.

> *Some advocates may fear that a judge will feel patronized if the lawyer tries to explain the case to him in words of one syllable. Fear not; in my thirty years of judging, I have never encountered a judge who took umbrage at being spoon-fed by the lawyers.*[13]

11 Id. at 1233.

12 Jerome Michael, *Basic Rules of Pleading*, 5 REC. Ass'n B. CITY N.Y. 175 (1950), 189.

13 Richard A Posner, Judicial Opinions and Appellate Advocacy in Federal Courts – One Judge's Views, 51 Duquesne Law Review 3 (2013), 36.

Effective advocacy does not necessitate lengthy PowerPoints

I have nothing against PowerPoint slides particularly, as they can be useful when used relatively sparingly, primarily for the purpose of either illustrating complex technical matters or presenting key evidence (and saving the tribunal the effort of having to look it up in a voluminous set of documents).

Too often, however, slides are used to lay out the arguments that have already been made in pre-hearing written submissions and operate as a straitjacket that actually detracts from the effectiveness of the advocacy. More importantly, they have the disadvantage of directing the tribunal's attention towards the slides, while the effective advocate's principal objective should be to establish eye contact with the tribunal: to have the tribunal looking at him or her, while the advocate is looking at the tribunal, as if the advocate were having a conversation with the tribunal, thus placing the advocate in a better position to gauge the tribunal's reactions (from the raising of an eyebrow to a quizzical stare, or inattention or boredom), thus signalling to the advocate whether it is best to change course, to add additional emphasis or simply move on to the next point. Effective advocacy does not necessitate a lengthy set of PowerPoint slides.

– Eric Schwartz, Schwartz Arbitration

Distinguishing scientific truth from the truth of which lawyers have to convince their adjudicators, Professor Jerome points to the 'great misfortunes' of lawyers who, unlike mathematicians, deal with probabilities that are 'relatively indeterminate'. In this context, he comments that '[t]he function of the judge or the jury is to estimate the probabilities of the material propositions in the light of the proofs and disproofs.'[14]

The third stage appeals to the less rational aspect of decision-making. This is where advocates seek to convince adjudicators that their version of the truth is the one that ought to prevail, and of the legal consequences that should be drawn from such truth.

Advocacy in the second and third stages of this process differs. The second stage proceeds within a rational framework of evidentiary rules that govern which pieces of evidence can be properly admitted for consideration by the judge and the jury, and which should be excluded. Advocacy in this second stage cannot be separated from the rules of evidence. An important component of effective advocacy in the United States is knowledge of the exclusionary rules. As professors Michael and Mortimer had put it in the 1930s, these evidentiary rules are imposed by 'the rules of reason without which [proof] is not proof'.[15] There is less room for appealing to the emotional brain of the adjudicator during this phase. Advocacy during this stage is driven by a deep knowledge and understanding of the rules of evidence, and a crafty and strategic use of them.

Appeal to emotions through advocacy comes into play during the last stage of this process. This phase calls for less rational advocacy techniques, because 'reasonable men can in some cases be differently persuaded by the same proof.'

14 Jerome Michael, *Basic Rules of Pleading*, 5 REC. Ass'n B. CITY N.Y. 175 (1950), 196.

15 Jerome Michael & Mortimer J. Adler, *The Trial of An Issue of Fact: I*, 34 Colum. L. Rev. (1934), 1235.

> *[T]he task of the advocate in what can be called probative opposition is different from his task as opposition in persuasion; in the former, he tries to make certain proofs and to prevent or counteract disproofs; in the latter, proofs and disproofs having been accomplished, he carries the opposition by forensic oratory in which he tries to persuade either judge or jury or both to estimate the probabilities of the propositions, which have been proved in a certain way.*[16]
>
> *The character of persuasion which occurs during the stage of proof is subtle or covert, whereas summation is avowedly and openly a process of persuasion. It is the persuasive aspect of the stage of proof which is indicated by the phrase 'flirting with the jury'.*[17]

Commenting on how far an advocate should go in appealing to the emotions of his or her adjudicators, Professor Jerome pointed to a statement by the Supreme Court of Tennessee in response to a complaint about defendant's lawyer weeping when making his case to a jury: '[i]t is not only counsel's privilege to weep for his client; it is his duty to weep for his client.'[18]

Addressing the appellate advocate, Judge Richard Posner wrote:

> *Most judges are a blend of formalism and realism. They want to reach a sensible, reasonable result in those cases that are not governed by clear statutory text or precedent. They are interested not only in the rule, but also in the purpose of the rule that you are invoking; and not only in the facts that have been developed in an evidentiary hearing, but also in the non-adjudicative facts that illuminate the background and context of a case – that makes the case come alive to a person not immersed in the field in which it arises.*[19]
>
> *[R]arely is it effective advocacy to try to convince judges that the case law compels them to rule in your favor. Just think: how likely is it that if the case law relating to the case at hand were one-sided, would the case . . . have gotten to the appellate stage?*[20]

Advocacy in the United States is often criticised as relying on a web of complex and cumbersome rules of evidence that make the process inefficient. As discussed below, arbitration often prides itself for being a more flexible and efficient process, free of US evidentiary rules where extensive discovery practices have developed. International arbitration advocates also at times like to distinguish themselves from more aggressive and guerilla-like advocacy techniques that are associated with US-style advocacy.

Advocacy in the United States: an inherently immoral endeavour?

In a 2008 legal ethics book,[21] Professor Daniel Markovits stirred, or revived, a debate around the ethics of adversarial advocacy in the United States. At the risk of oversimplifying, Professor Markovits's proposition was that American lawyers' ethical obligations,

16 Id. at 1240.

17 Id. at 1240, n.19.

18 Jerome Michael, *Basic Rules of Pleading*, 5 REC. Ass'n B. CITY N.Y. 175 (1950), 200.

19 Richard A. Posner, Judicial Opinions and Appellate Advocacy in Federal Courts - One Judge's Views, 51 Duquesne Law Review 3 (2013), 36.

20 Id. at 37.

21 Daniel Markovits, *A Modern Legal Ethics: Adversary Ethics in a Democratic Age*, 2008, Princeton University Press.

Speak with, not at, the arbitrators

Throughout my career as a lawyer, I stood in awe of the great oral advocates (co-counsel and adversaries alike) that I encountered in US litigations and international arbitrations. I admired (and envied) the confidence of their voices, the eloquence of their words and the majesty of their presentations during oral openings, closings and other arguments. I admired them so much, I didn't always hear what they actually said.

My perspective has changed since I began sitting as arbitrator, initially part-time while I continued to practise as an attorney, and now full-time since I retired from my law firm. As arbitrator, I still admire the skill and performances of the great orator advocates who appear before me, but I find myself more readily persuaded by advocates who adopt a conversational, less dramatic, approach to oral argument. When lawyers speak with me person to person, rather than at me as performer to audience, the psychological distance created by our respective roles as advocate and arbitrator narrows, and I find myself more focused on what they say than on how they say it. The conversational argument remains a performance, of course – and not an easy one – but it is a performance that engages as much as it impresses.

Speaking with, rather than at, your arbitrators is a matter of both style and substance. As for style, the advocate who speaks with arbitrators prefers to present argument from his or her seat rather than from behind a podium, adopts a conversational tone rather than an argumentative one, and refers to his or her notes as little as possible so as to maintain eye contact with the arbitrators. As for substance, the advocate puts himself or herself in the arbitrators' shoes (empathises with them, in non-legal parlance), identifies with candour the issues the arbitrators are likely to be struggling with, and explains why his or her proposed solutions to those issues are the most sensible and fair. 'Let me try to address the key questions that I imagine the tribunal may be asking itself', the conversational advocate might begin. And just as conversation is both give and take, so is the persuasive advocate's argument both assertion and concession. While many lawyers are reluctant to concede anything on any issue, the most persuasive ones concede what should be conceded – and find something to concede if no other concession is apparent. Concessions beget credibility, in life and in law. Persuasive advocates use candour and concession to gain in credibility more than they lose on the merits.

The best way for an advocate to appreciate the power of speaking with, as opposed to at, arbitrators is for the advocate to serve as an arbitrator himself or herself. I can think of nothing in my career as an attorney that improved me more as an advocate than my experience as an arbitrator.

– Robert H Smit, Independent arbitrator

particularly their loyalty towards their clients, fostered unethical conduct 'deeply ingrained in the genetic structure of adversary advocacy'.[22]

22 Id. at 2-4.

This view was criticised[23] as misunderstanding the principles that underlie adversarial advocacy. 'Advocacy's legitimate and central role in [the US] legal system' is 'to facilitate construction of an accepted and authoritative version of truth upon which disputes can be resolved and justice administered.'[24] The reality that shapes the art of advocacy is that truth in litigation is mostly uncertain. No one actor in the litigation process can claim full access to the truth. 'As opposed to the certainty of theoretical knowledge, practical knowledge is contingent and contextual. In Aristotle's words, it is at best "approximately" true . . . . Circumstances are always subject to change, information is always incomplete, and human action is always enveloped in some degree of uncertainty.'[25]

The function of advocacy then, is to 'facilitate construction of an authoritative version of the truth upon which disputes can be resolved and justice administered'.[26] One has to agree with professors Hazard and Remus when they dismiss the criticism that the ethics of advocacy in the United States lead to a type of loyalty towards one's client's version of the truth, that would inherently obscure the truth. First, loyalty to clients is at the centre of any legal practitioner's values in a democratic society. It is not specific to the United States. It is shared among advocates of both the common law and civil law traditions.

Second, such a criticism is based on an incorrect assumption: that 'lawyers have access to "correct" and "proper" views in the first place',[27] which they would then choose to distort out of loyalty towards their clients. But '[a]s an initial matter, and as Aristotle explains, uncertainty inheres in any context of "practical knowledge" – any context of human affairs. This uncertainty is heightened in the subset of human relationships that deteriorate into litigation . . . .The engagement of lawyers will not dissipate the disagreement or clarify the objective truth of a dispute.'[28]

The advocate's role is, therefore, to assist a tribunal in reconciling conflicting accounts of a dispute. But because the advocate is educated about the case by the clients' perception of their story, they tend to develop a natural bias towards their clients' story and version of how a dispute should be adjudicated. This is not to say that zealous advocacy cannot also rely on trickery and cheating. But such conduct is not inherent in how lawyers implement procedural and evidentiary rules. On the contrary, the rules that govern the admission of proof are intended to create a predictable, rational playing field, consistent with the principles of due process and other considerations, such as privacy, that are prevalent in a given society.

In this regard, while in many respects the flexibility or absence of precise rules of evidence in international arbitration can be celebrated, they can also raise issues. Unlike the more limited scope of discovery in international arbitration, which is viewed as a positive,

23 Monroe H Freedman & Abbe Smith, *Misunderstanding Lawyers' Ethics*, 108 Mich. L. Rev. 925 (2010); Geoffrey Hazard, & Dana A Remus, Advocacy Revalued (2011), Faculty Scholarship. Paper 1103, http://scholarship.law.upenn.edu/faculty_scholarship/1103?utm_source=scholarship.law.upenn.edu%2Ffaculty_scholarship%2F1103&utm_medium=PDF&utm_campaign=PDFCoverPages.

24 Id. at 756.

25 Id. at 758.

26 Id. at 755.

27 Id. at 760.

28 Id. at 760 (internal citations omitted).

in the words of one of my very experienced litigation colleagues, 'throwing out hundreds of years of evidence can be a negative.'

A non-exhaustive look into how some key exclusionary rules in the United States compare to the 2020 IBA Rules on the Taking of Evidence in International Arbitration sheds some light on how unsettling international arbitration advocacy can be for a US litigator. For example:

> *Federal Rule of Evidence (FRE) 611. Mode and Order of Examining Witnesses and Presenting Evidence*
>
> *(a) Control by the Court; Purposes. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:*
>
> *(1) make those procedures effective for determining the truth;*
>
> *(2) avoid wasting time; and*
>
> *(3) protect witnesses from harassment or undue embarrassment.*
>
> *(b) Scope of Cross-Examination. Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct examination.*
>
> *(c) Leading Questions. Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:*
>
> *(1) on cross-examination; and*
>
> *(2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.*

This Rule can be used for a number of different objections during cross-examination, for example, 'argumentative', 'asked and answered', 'assumes facts not in evidence', 'compound', 'cumulative', 'leading' and 'non-responsive'.

It focuses on the form or timing of questions; it stands for the elaborate protocol surrounding evidentiary issues that so characterises litigation in the United States. In comparison, there is no parallel guidance under the IBA Rules, which do not contain this level of granularity.

Yet, this rule does play an important role in demonstrating the truth US counsel is seeking to prove by tying and limiting testimony to facts that have been deemed admissible as evidence. This winnowing function limits and focuses the scope of the inquiry on cross-examination by virtue of the prior admissibility and other evidentiary rulings.

> *FRE Rule 701. Opinion Testimony by Lay Witnesses*
>
> *If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:*
>
> *(a) rationally based on the witness's perception;*
>
> *(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and*
>
> *(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.*

This Rule can be used for objections such as 'speculation' or 'improper lay opinion'.

> *Not only does the rule require that the opinion be 'helpful' [to the jury's determination of a factual issue] (requirement (b)), but also that it be 'rationally based on the perception of the witness' (requirement (a)), that is, the witness must have first-hand personal knowledge of facts that reasonably justify the conclusion the witness has reached.*[29]

The rule therefore aids the advocate to highlight how – apart from experts and character witnesses – the admissibility of 'opinion' is strictly limited under the Federal Rules of Evidence. Also 'helpful[ness]' to the jury is the basis for the rule, a consideration that obviously doesn't arise in the arbitration context.

Unsurprisingly, there is no parallel rule under the IBA Rules and objections drawn from such a rule in cross-examination of witnesses in international arbitration proceedings is rarely available.

> *FRE Rule 702. Testimony by Expert Witnesses*
> *A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:*
> *(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;*
> *(b) the testimony is based on sufficient facts or data;*
> *(c) the testimony is the product of reliable principles and methods; and*
> *(d) the expert has reliably applied the principles and methods to the facts of the case.*

Rule 702 governs expert testimony, which is another area where broad contrasts can be drawn to the IBA Rules.

Article 5 of the IBA Rules gives the parties wide discretion on the individuals that can be appointed as an expert.

In US litigation, an expert may be challenged initially in an admissibility hearing (a *Daubert* hearing) on the basis of this rule, and the expert's opinions could be excluded from the universe of proofs that form the basis of the adjudicator's determination.

Under US rules of evidence, expert testimony is essentially a carve-out from the general rule excluding 'opinion' testimony, hence the rigorous, complex procedure for defining 'expertise', which generally limits the scope of potential experts in US litigation compared to arbitration.

> *FRE Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay*
> *(c) Hearsay. 'Hearsay' means a statement that:*
> *(1) the declarant does not make while testifying at the current trial or hearing; and*
> *(2) a party offers in evidence to prove the truth of the matter asserted in the statement.*

Section (d) details the statements that are not hearsay.

29 Paul Rothstein, *Federal Rules of Evidence*, (3d ed.), Rule 701.

Rule 801 defines hearsay, while the rules that follow in Article VIII play other key roles in relation to hearsay, for example, Rule 802 (prohibiting hearsay); rules 803, 804, 807 (key exceptions to hearsay).

The IBA Rules do not refer to hearsay. Yet, hearsay is a key tool in cross-examination. The purpose of the rule is designed to, in theory, at least, ensure the reliability of witness

Learn to read the room

Every arbitration has its own culture. No algorithm or artificial intelligence will completely sniff it out. It is always unique and sometimes subtle. Advocates who home in may adapt to, shape or even resist the case culture but will surely benefit from understanding it. Those who miss it will be at a distinct disadvantage.

Much has been written about cultural distinctions between the civil and common law traditions, the inquisitorial tribunal as against the adversarial system and the benefits of harmonisation. Attention to these factors should not obscure the fact that, in every commercial arbitration, there are a lot of individual actors, including parties, companies (with corporate cultures), counsel, witnesses and arbitrators. In many cases, human factors, less binary and more complex than classic cultural divides, may prove more important. And while individuals are shaped by their cultural background, life experience and policy preferences, in any particular matter they may react against type.

It is critical, then, to understand the human element in every case and the way in which the unique mixture of human beings who have come together is functioning. Be attentive to whether the arbitrators, to use Professor Draetta's phrase, are visibly a 'triad', working in an integrated and complementary way, or if there are signs of stress, silos or even hostility. Note in real time whether the tribunal seems interested and engaged or bored; receptive to opening statements or impatient to dig into the facts. Consider how aggressive questioning, legal arguments, logic or even humour will land with this group of individuals. The advocates' relationships with each other and the tribunal may have an impact. Cultural background and experience have the potential to affect how deferential an arbitrator will be to expert testimony and how documentary and witness evidence will be perceived, but we cannot assume how these predilections will unfold in an actual case.

Too often, I think, counsel seem inattentive to what is happening in the room and unprepared to adjust. There is the advocate who ploughs on with an unwelcome US jury-style opening, persists in objections the tribunal has made clear it doesn't want to hear, or in arguments the tribunal has heard enough of. Sometimes even major cultural issues of the moment may be a subtle influence though they are not directly relevant. Life assuredly would be easier for the advocate if it were possible to sit in one's office before a hearing and define cultural issues in terms of nationality, legal tradition, race, gender or other objective information about the tribunal. All that may be relevant, but it is surely just a start. Real-world arbitrators may not be predictable in their outlook and, indeed, may act in ways that are counterintuitive to a fact-based profile. The wise advocate will be prepared to pivot in reaction to the real-time dynamic of what is happening in the room.

– Mark C Morril, MorrilADR

statements. It can aid counsel overall by restricting the scope of material for an adjudicator to consider.

By contrast, arbitration is predicated on the idea that arbitrators will generally be in a position to make wise and informed choices about the reliability of testimony – the arbitrators do the winnowing. By excluding such testimony altogether on hearsay grounds, Article VIII of the FRE in a sense may take certain issues off the table by excluding them from the adjudicator's consideration. The lawyers in the case, by being expert at the evidentiary rules such as the rules on hearsay, separate the wheat from the chaff.

These rules are also viewed as rational tools to contain lawyers' zealous partisanship and temptation to seek to engage in the type of immoral advocacy for which they are sometimes criticised. One of the reasons for Hazard and Remus's defence of adversarial advocacy as not inherently immoral is precisely that the advocate's rhetorical skills are contained in a system of rational and predictable evidentiary rules.

But in international arbitration, cross-examination has been adopted by practitioners of all legal traditions, without the system of evidentiary rules within which cross-examination sits in the United States. This takes me back to Laurence Shore's dismay[30] at a French arbitrator's frustration in reaction to the 'textbook cross-examination' Dr Shore had just conducted. Contrary to what would have happened in a US trial, cross-examination of the witness was that arbitrator's only opportunity to hear from that witness in the witness's own words. A written witness statement, carefully crafted by counsel, can be a poor substitute for a direct examination of a witness, conducted within the confines of applicable evidentiary rules, and an unsatisfactory precursor to cross-examination. But who knows? Could a year of pandemic-driven virtual interactions inspire some tribunals and parties to give a chance to Dr Shore's suggestion that parties submit videos of their witnesses' direct examinations, in lieu of witness statements.

Societal considerations: a white, male-driven culture?

In 2017, and again in 2020, the New York State Bar Association (NYSBA) conducted an extensive and sobering survey on the level of gender diversity among advocates holding lead advocate positions in federal and state courts in the State of New York. The 2020 Report summarises results from over 5,000 responses. A few numbers:

> - *Female attorneys represented 26.7% of attorneys appearing in civil and criminal cases across New York.*
> - *Female attorneys accounted for 25.3% of lead counsel roles and 36.4% of additional counsel roles. This represents a disappointingly tiny increase of only one-half of a percentage point in lead counsel roles but a healthy increase of 9 percentage points in additional counsel roles – which means that more women attorneys are appearing in court even if they are not lead counsel.*
> - *In the current study, women made up 35.1% of public sector lead attorneys but just 20.8% of private practice lead attorneys. . . . These figures show little progress with respect*

30 Laurence Shore, 'Cultural Considerations in Advocacy: United States', *The Guide to Advocacy* (4th ed., Global Arbitration Review 2020).

> *to private sector attorneys, whose appearances as lead attorneys grew by just over one percentage point* [compared to the 2017 Report].[31]

The 2020 NYSBA Report also points to an American Bar Association (ABA) study of randomly selected federal cases. The study found that 76 per cent of trial teams and 79 per cent of criminal teams were led by men.[32] In the United States Supreme Court, 'a mere 12 per cent of the arguments were conducted by women during the 2017-18 term.'[33] Further studies show that underrepresentation of female advocates is even more blatant when it comes to women of colour.

This data is difficult to ignore when addressing cultural considerations of advocacy in the United States. What to say about the place of women advocates in the United States? I would venture two observations on where we are.

First observation: while best practices in advocacy should be gender-neutral, they are not. Professor Lara Bazelon, USF School of Law Chair of Trial Advocacy and former prosecutor concludes a story in *The Atlantic*[34] on sexism in the courtroom with this 1820 quote from Henry Brougham:

> *An advocate in the discharge of his duty knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and among them, to himself, is his first and only duty.*

Yet Lara Bazelon reckons that she cannot train her female students to be trial beasts without telling them that 'in the courtroom . . . women lawyers don't have access to the same "means and expedients" that men do.' Professor Bazelon undertook to interview numerous women advocates across the United States. She gives colourful examples of the sexism they continued to encounter in 2018. She explains that every woman she has interviewed recognised having found themselves facing the 'double-blind' of 'the imperative to excel under stressful courtroom conditions without abandoning the traits that judges and juries positively associate with being female. It is a devilishly narrow path to walk . . . .'

So, she writes:

> *I tell my female students the truth: that their body and demeanor will be under relentless scrutiny from every corner of the courtroom. . . . That they will have to find a way to metabolize these realities, because adhering to biased expectations and letting slights roll off their back may be the most effective way to advance the interests of their clients in courtrooms that so faithfully reflect the sexism of our society.*

Gender and race biases are undoubtedly part of the cognitive flexibility that female, as well as minority advocates continue to have to master in the United States and elsewhere. '*The*

31 Report of the NYSBA Commercial and Federal Litigation Section, The Time is Now: Achieving Equality for Women Attorneys in the Courtroom and in ADR, 2020, p. 6.

32 Lara Bazelon, 'What It Takes To Be A Trial Lawyer When You're Not A Man', *The Atlantic*, September 2018.

33 Report of the NYSBA Commercial and Federal Litigation Section, p. 14.

34 Lara Bazelon, 'What It Takes To Be A Trial Lawyer When You're Not A Man', *The Atlantic*, September 2018. .

American Lawyer has forecast that given current trends, gender parity among equity partners [in law firms] will not be achieved until the year 2181.'[35] The proportion of female equity partners in law firms is one indication of how the allocation of advocacy roles can operate.

However, and this would be my second observation, the legal community in the United States is moving the needle. Law firms are having to catch up, and as a result of this movement, law firms in the United States are increasingly attentive to the development of more diverse talent. The United States judiciary has been particularly innovative, with many judges, men and women, starting to amend procedural rules to foster more diversity in the pool of advocates that argue before them.

'[M]any judges [are] now adopting standing orders that encourage participation from less-experienced lawyers.'[36] Following the NYSBA 2017 Report, 'legendary federal judge Jack B Weinstein in the Eastern District of New York, amended their practice rules by inviting "junior members of legal teams" to argue "motions they have helped prepare and to question witnesses with whom they have worked."'[37] These new rules also removed the limits on the number of advocates authorised to appear for each party so that more than one lawyer can argue for one party. The 2020 Report has counted that '[s]ince 2017, more than 150 state and federal judges have adopted some variation of the rule, where "less experienced lawyers, lawyers from diverse backgrounds and lawyers who are women" or historically underrepresented attorneys are encouraged to participate in courtroom proceedings.'[38]

35 Report of the NYSBA Commercial and Federal Litigation Section, p. 8, fn.5.

36 Id at p. 14, (referring to Britain Eakin, 'Judges Outline Ways Judiciary Is Pushing For Attorney Diversity', Law360, (27 September 2019)).

37 Id. at p. 61.

38 Id. at p. 62.

15

Cultural Considerations in Advocacy: Spanish-Speaking Latin America

Paola Aldrete, Ana Sofía Mosqueda and Cecilia Azar[1]

Latin America has managed to overcome several obstacles in developing and embracing commercial arbitration.[2] In the 1990s, Mexico and other Latin American countries constitutionally recognised arbitration as a valid method of dispute resolution, as most of these countries adopted modern arbitration legislation[3] and arbitration-related international treaties and conventions.[4] The myth of 'the hostility [of Latin America] towards international commercial arbitration can definitely be put to rest.'[5] This is worthy of recognition, as countries from the region have civil law systems, which, as explained below, differ greatly from international arbitration practice.

Recently, government lockdowns (including the temporary closing of courts), along with other government measures adopted during 2020 and 2021 to combat the pandemic, created the need for, and encouraged the use of, alternative dispute resolution mechanisms

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2 In general, Latin American countries have adopted arbitration laws based (to different degrees) on the UNCITRAL Model Law on International Commercial Arbitration.

3 The following Latin American countries have adopted arbitration laws: Mexico (1993, 2011), Guatemala (1995), Peru (1996, 2008), Colombia (1996, 2012), Bolivia (1997), Costa Rica (1997, 2011), Ecuador (1998), Venezuela (1998), Panama (1999, 2013), Honduras (2000), Paraguay (2002), El Salvador (2002), Chile (2004), Nicaragua (2005), Cuba (2007), Dominican Republic (2008), Argentina (2018) and Uruguay (2018). See Luis O'Naghten and Diego Duran, 'Latin America Overview: A Long Road Travelled: A Long Road to the Journey's End', *International Arbitration Laws and Regulations 2020*, available at: https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/6-latin-america-overview-a-long-road-travelled-a-long-road-to-the-journey-s-end.

4 An important adoption was that of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

5 Andrés Jana L, 'International Commercial Arbitration in Latin America: Myths and Realities', *Journal of International Arbitration* (Kluwer Law International 2015, Volume 32 Issue 4) p. 446.

such as commercial arbitration.[6] As a result, parties have increasingly turned to ADR to solve their disputes. The golden age of Latin American arbitrations may finally have arrived.

In this chapter, the authors address several aspects of advocacy in Spanish-speaking Latin American countries, including effective advocacy in Latin America; ethics of counsel and arbitrators; written advocacy; and oral advocacy and management of evidence.

Effective advocacy in Latin America

In analysing effective advocacy, it is first necessary to define it. Advocacy may be difficult to ascribe a single meaning to since it can be approached from different perspectives: some perceive it as a technique, and others as the art of persuasion.[7]

For example, Emmanuel Gaillard and Philippe Pinsolle define advocacy as a choice-making process 'in manner consistent with the strengths and weaknesses of the case at issue',[8] while Pierre-Yves Tschänz describes advocacy as 'the preparation and presentation of a party's case, in order to convince the arbitrators of the merits of the case'.[9]

Advocacy is then a combination of choice-making, the identification of strengths and weaknesses of the case, strategy, and excellent planning, requiring the broadest range of skills to persuade the arbitral tribunal. Advocacy is commonly assumed to pertain only to oral arguments or examination of witnesses; however, such assumptions are incorrect, as '[l]imiting advocacy to the oral argument of the advocate or indeed to the examination of witnesses does not do justice to this concept.'[10]

In the case of Latin American arbitrations, cultural implications are of special relevance as Latin America countries are mainly civil law jurisdictions. Effective advocacy requires a particular set of skills, some of which are addressed below.

Strategy design

A skilled counsel should identify, design and apply the best possible persuasion strategies. To do so, counsel should detect the most relevant elements of the claim (or defence) and the strengths and weaknesses of the case.

In designing the legal strategy, the 'appointment of the arbitrator is a very calculated'[11] and crucial decision. It is therefore important to identify and appoint an arbitrator who is familiar with the context of the case, as well as to answer the following question: has the arbitrator handled similar cases in the past, or written opinions on a related subject matter? To confirm these qualifications, counsel must investigate the past rulings of the arbitrator,

6 As an example, during the covid-19 related lockdown, Mexican courts closed their doors to non-emergency cases. As a result, when the courts opened their doors, the caseload exponentially increased, exceeding the courts' capabilities to manage and resolve the cases.

7 Antonio Crivellaro, 'An Art, a Science or a Technique?', in Albert Jan Van den Berg (ed), *Arbitration Advocacy in Changing Times*, ICCA Congress Series, Volume 15 (ICCA & Kluwer Law International 2011), pp. 9–24.

8 R Doak Bishop (ed), *The Art of Advocacy in International Arbitration* (Juris Publishing, Inc. 2004), p. 136.

9 Pierre-Yves Tschänz, 'Advocacy in International Commercial Arbitration in France', ibid., p. 195.

10 Antonio Crivellaro, 'An Art, a Science or a Technique?', in Albert Jan Van den Berg (ed), *Arbitration Advocacy in Changing Times*, ICCA Congress Series, Volume 15 (ICCA & Kluwer Law International 2011), pp. 9–24.

11 Bruno Guandalini, 'Economic Analysis of the Arbitrator's Function', International Arbitration Law Library, Volume 55 (Kluwer Law International 2020), pp. 273–330.

if they are available. Unlike common law practitioners, civilian lawyers are unaccustomed to this practice.

Investigation

It is essential for a lawyer to develop skills related to the identification, compilation, review and organisation of the entire case and arbitration record.[12] Cooperation from the client is crucial; counsel must develop strong communication skills to obtain crucial information and unveil the true interests of the client.

Decision-making

Counsel must determine the course of the case by making certain decisions and taking into account the political, economic and legal interests that may influence the tribunal's decision.

Counsel should be 'aware of how arbitrators interpret the law [that] will constitute a road map for the counsel's arguments and approaches'.[13] Accordingly, it is important for counsel to identify: the legal tradition of each arbitrator; the religion, if any, of the arbitrators; the ideological preferences of the tribunal;[14] and the language and style of each of the members of the arbitral tribunal.[15]

Counsel must be aware that, contrary to common law arbitrators, Latin American arbitrators tend to interpret the law by applying strict legal principles and rules.

Efficiency and flexibility

Efficiency will often be achieved by adapting best practices from both common law and civil law traditions, since 'a skilled advocate . . . is one who can engage in and efficiently use the procedural mechanisms of both worlds.'[16]

Flexibility can be accomplished by promoting the use of international guidelines and passing over certain formalities.

Within the region, compliance with procedural formalities is important. Meeting these, however, often results in rigid arbitration proceedings. To overcome this problem, Latin American countries have attempted to favour flexibility and efficiency over procedural formalism. As an example, in 2017, Mexico added to its Constitution a paragraph that

12 David J A Cairns, 'Advocacy and the Functions of Lawyers in International Arbitration', in Miguel Angel Fernandez-Ballester and David Arias Lozano (eds), *Liber Amicorum Bernardo Cremades*, (La Ley 2010), p. 297

13 Mary Mitsi, 'The Decision-Making Process of Investor-State Arbitration Tribunals', International Arbitration Law Library, Volume 46 (Kluwer Law International 2018), pp. 1-18.

14 It is known that '[t]he attitudinal or behavioural model postulates that judges decide not only in light of the facts of the case but also based on ideological preferences.' See Mary Mitsi, 'The Decision-Making Process of Investor-State Arbitration Tribunals', International Arbitration Law Library, Volume 46 (Kluwer Law International 2018,) pp. 23-42.

15 Fernando Miguel Dias Simões, *Commercial Arbitration between China and the Portuguese-Speaking World* (Kluwer Law International 2014), p. 115.

16 Torsten Lörcher, 'Cultural Considerations in Advocacy: Continental Europe', *The Guide to Advocacy* (Law Business Research 2020).

commanded 'the authorities [to] give priority to the solution of the conflict over procedural formalisms.'[17]

Although commercial arbitration in the region has taken advantage of these principles, the concern about following procedural formalities remains. The region continues to struggle to eliminate these hurdles (which are intrinsic to civil law practice and second nature to civil law practitioners), aiming to erase from arbitration practice the formalist stamp of litigation practice.

Since current arbitration practice is closer to the practice of common law than civil law, arbitration practitioners in this region have to be versatile enough to operate in both arenas. Practitioners must consider and adapt to the fact that, unlike in other jurisdictions, in Latin America the gap between litigation and arbitration is wide.

Ethics: counsel and arbitrators

Parties agree to arbitrate because they trust in the effectiveness of the proceeding and in the impartiality of the arbitrators. Loss of confidence in the arbitral tribunal and the proceedings could imperil the arbitration itself. Ethics are therefore fundamental for effective advocacy.

The existence of stereotypes regarding the ethics of Latin American judicial proceedings is undeniable. Sadly, a recent arbitration corruption case in Central America has confirmed such stereotypes.[18] However, corruption is not the rule, as ethical standards within the Latin American arbitration community are ordinarily high.

The arbitration community is relatively small within the region. Therefore, reputation is the main asset of any practitioner who wishes to grow within the community. In the region, experience and high ethical standards are essential for maintaining a good reputation.

Although bar associations are, generally, not mandatory within Latin America,[19] arbitration practitioners (especially arbitrators) follow and apply general ethics rules (soft law), as it is well known that '[a]rbitration requires a neutral and impartial climate [which] can only be achieved if all doubt regarding the integrity of the arbitrators has been dispelled.'[20]

In consequence, practitioners aiming to excel within the Latin American arbitration community must bear in mind that ethical behaviour is essential.

17 Constitución Política de los Estados Unidos Mexicanos, CPEUM, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 11-03-2021.

18 Carlos A Matheus López, 'On Corruption in Investor-State Arbitration: The Case of Odebrecht Against the Peruvian State', Kluwer Arbitration Blog, 2 April 2020, available at: http://arbitrationblog.kluwerarbitration.com/2020/04/02/on-corruption-in-investor-state-arbitration-the-case-of-odebrecht-against-the-peruvian-state/.

19 As an example, membership of a bar association is mandatory in Guatemala and Costa Rica, while it is voluntary in Mexico, Chile and Bolivia. See 'El Ejercicio de la abogacía en América Latina: en la búsqueda de una agenda de trabajo', Volumen I, Centro de Estudios de Justicia de las Américas, 2020, pp. 113-114.

20 José Carlos Fernández-Rozas, 'Clearer Ethics Guidelines and Comparative Standards for Arbitrators', in Miguel Angel Fernandez-Ballester and David Arias Lozano (eds), *Liber Amicorum Bernardo Cremades* (La Ley 2010), pp. 413-449.

Written advocacy: pleadings and evidence

Most of Latin America's justice systems are situated in the civil law family. Contrary to common law systems, civil law systems rely heavily on documentary material as opposed to oral testimony. That is why, as noted before, the civil law tradition is characterised by its emphasis on formalities. For example, Article 16 of the Mexican Constitution requires judicial resolutions to be supported and reasoned, requiring the judge to review and address any and all arguments submitted by the litigator.[21]

Because of this, judicial resolutions are long and greatly detailed. Naturally, Latin American arbitrators tend to issue arbitral awards that are longer and more heavily detailed than the resolutions of common law arbitrators. Formalism, once again, comes into play. For example, procedural background commonly constitutes an extensive chapter of the award to demonstrate that due process has not been violated. Naturally, excessive detail and length increase the risk, if the award is under judicial review for set-aside, for such judicial review to be deeper and more complex.

However, Latin American arbitrators who participate in international commercial arbitrations may depart from local rules[22] to follow the international practice wherein the arbitrator 'is not bound to examine every and all arguments by the parties and answer them all', allowing the award to be less extensive than those in which additional formalities must be met.

Moving to arbitration counsel, the effect of local judicial formalism seems to replicate itself in local arbitration practice: to avoid any right to be deemed waived, arbitration practitioners from the region tend to draft briefs or submissions that are both long and repetitive, and which include in great detail the background, arguments and evidence.

With respect to the taking of evidence, civil law's judicial approach differs from that of common law by emphasising the burden of proof and the reliability of evidence, rather than searching for the truth.[23] In civil law, the scope of requests and orders regarding the production of documents is commonly narrow.[24] Discovery of documents 'as practiced in the United States is vigorously rejected in the civil law world',[25] since it is perceived as an intrusion and invasion of privacy. Practitioners tend to oppose the production of document requests most strongly when it is considered a 'fishing expedition'.[26] These oppositions (and subsequent replies) are increasingly longer and more detailed because of the aforementioned formalism, perceptions regarding invasion of privacy and the fact that Latin American practitioners are unaccustomed to such a procedural stage.

Once again, the exception to this rule is found in the commercial international arena, where practitioners from the region draft and submit briefs, writs and document production requests that are more succinct.

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21 Constitución Política de los Estados Unidos Mexicanos, CPEUM, DOF 05-02-1917, últimas reformas DOF 11-03-2021.

22 Pierre Lalive, Journal of International Dispute Settlement, Vol. 1, No. 1 (2010), pp. 55–65.

23 Reto Marghitola, Document Production in International Arbitration, International Arbitration Law Library, Volume 33 (Kluwer Law International 2015), pp. 11-14.

24 Ibid., p.15.

25 Ibid., p.16.

26 Ibid., pp. 61-62.

In summary, one may expect formalism to take a role in the preparation and outcome of briefs, writs, document production requests and awards when the arbitration is local, or when it takes place between Latin American parties. However, when the arbitration is international, even when the place of the arbitration is within Latin America, one must expect that the Latin American arbitrators or practitioners will not consider excessive local formalities.

Oral advocacy and management of evidence

Latin American arbitration practitioners from the civil law tradition may be unfamiliar with the oral tradition specific to common law litigation. The reason is that judicial proceedings in civil law countries are mostly (or at least used to be) document-based proceedings, wherein judges would rather rule on the basis of the documentary evidence and written submissions filed by the parties. Judicial systems within the common law tradition, on the other hand, have long included both oral and document stages as part of proceedings.[27]

In consequence, oral skills such as storytelling, cross-examination, the use of visual aids and techniques for reading the room, were historically outside the teachings of law schools in Latin America. However, following amendments to national commercial and civil legislation,[28] it will soon be expected for law schools in the region to include oral skills-related courses in their programmes.[29] While the Latin American law community waits for younger generations schooled in oral advocacy to emerge, current lawyers gain their knowledge through trial and error.

In arbitration, Latin American practitioners obtain oral advocacy skills by researching, reading and experimenting. Theatre-like techniques are often applied by practitioners around the world, and are used increasingly by lawyers from the region. The increasing use of visual aids is also notable within Latin American law.[30]

These skills are tested during arbitral hearings, when the examination and cross-examination of witnesses (fact and expert) takes place. The question of whether to examine or cross-examine should be dealt with case by case; however, in Latin America, written witness statements are more common than direct oral examination, for the many reasons explained in this chapter (formalism, a strong reliance on documents, etc.).

In relation to witness evidence, it does not come as a surprise that in the civil law tradition, 'witness testimony is de-emphasised in favor of documentary evidence'.[31] It is often said that 'witness testimony remains less significant in civil law litigation systems and, less markedly, in international arbitrations conducted among civil law parties and lawyers'.[32]

27 As an example, in Mexico, commercial litigation proceedings used to be document-based only. It was not until 2011 that oral judicial proceedings were included in the Mexican Commerce Code.

28 In 27 January 2011, small claim (under 220,533 Mexican pesos) oral trials were (for the first time) included in the Mexican Commerce Code. After several modifications, from January 2020 oral trials have been available for all commercial disputes without regard to the amount in dispute.

29 Some law schools in the region have already included these courses in their programmes.

30 In Mexico, visual support designers and service providers started to grow in 2018.

31 Jennifer Kirby, 'Witness Preparation: Memory and Storytelling', Journal of International Arbitration (Kluwer Law International 2011, Volume 28, Issue 4), p. 403.

32 Gary B Born, *International Commercial Arbitration* (Third Edition) (Kluwer Law International 2021), pp. 2553-2554.

One relevant issue is the preparation of witnesses. While the preparation of witnesses (for direct and cross-examination) is common in international arbitration, civil law courts do not commonly allow for this, as the legitimacy of this practice remains in question. Naturally, and especially from the standpoint of civil law, the preparation of witnesses raises ethical concerns, being widely perceived as a technique used to influence the witness, corrupting his or her memory.[33]

Furthermore, arbitral tribunals with a civil law context 'tend to impose greater limits on cross-examination, both in terms of length of examination, scope of questions and counsel's efforts to "control" a witness'.[34]

When the arbitrators' background lies within the civil law tradition, practitioners must pay special attention to the preparation of witnesses to avoid creating the perception that they have been influenced and corrupted. During cross-examination, it is not uncommon for the cross-examiner to ask the witnesses if they received any help in the preparation of their statement and in preparing for cross-examination.

Finally, with respect to closing statements, the reader must bear in mind that, within the region, closing statements in arbitration proceedings commonly differ from those of civil law judicial proceedings. The former encompass a high-level summary of the case's main facts, and of the claims and relief sought (commonly addressing issues that arose during the hearing), whereas the latter include a more detailed repetition of the case's facts, claims and relief sought. Such differences are reflected in the ability of a Latin American arbitration practitioner to prepare a closing statement that is succinct and on-point.

Conclusion

Several jurisdictions from the region seem to be moving in the right direction by taking big steps towards further adopting and encouraging arbitration as an alternative dispute mechanism. Indeed, Latin American practitioners continue to grow within the region and internationally by overcoming, mostly through trial and error, the obstacles described in this chapter.

Due to the formalism attached to the civil law tradition of most Latin American jurisdictions, and because of the gap between arbitration practice (closer to common law) and civil law practice, it is common for practitioners from the region to face more obstacles in entering the arbitration world than common law practitioners do. Therefore, when an arbitration involves Latin American parties, or parties from other countries with similar legal traditions, the cultural considerations addressed in this chapter should be taken into account to maintain the flexibility and efficiency of the arbitration.

33 Jennifer Kirby, 'Witness Preparation: Memory and Storytelling', Journal of International Arbitration, (Kluwer Law International 2011, Volume 28, Issue 4), p. 401.

34 Gary B Born, *International Commercial Arbitration* (Third Edition), (Kluwer Law International 2021), p. 2457.

16

Cultural Considerations in Advocacy in Latin America: Brazil

Karina Goldberg[1]

The aim of this chapter is to outline some of the aspects of evidence production in arbitration proceedings held in Brazil that highlight some of the peculiarities of our domestic practice in relation to standard international practice, which is mainly due to our civil law tradition and the influence of domestic litigation.

In this regard, three important methods of evidence production are considered: (1) witness examination, (2) document production and (3) technical evidence production.

In Brazil, as in the international context, the procedural aspects of arbitration are not exhaustively disciplined by the Brazilian Arbitration Law (Law No. 13.129/15) nor by the rules of the arbitral institutions.[2] As is the case in most jurisdictions, Brazil's Code of Civil Procedure (applicable to domestic litigation) is not automatically applicable to arbitration proceedings,[3] in which arbitrators boast extensive powers in regard to the production of evidence.

It is precisely in the discipline of evidence that there is one of the greatest 'clashes' of arbitration: flexibility against legal certainty.[4] Although it is not intended to compromise the flexibility of the procedure, it is necessary that the stages for the production of evidence are predictable. Uncertainty about the specific procedural rules governing testimonial evidence, for example, can risk due process and the efficiency of the proceeding.[5]

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2 Miranda, Daniel Chacur, 'A Produção da Prova Testemunhal na Arbitragem à Luz da Flexibilidade e da Previsibilidade na Prática Internacional' in *Revista Brasileira de Arbitragem*, Vol X, Issue 3, 2013, pp. 30 to 45.

3 Nunes Pinto, José Emílio, 'As anotações Práticas sobre Produção de Prova na Arbitragem' in *Revista Brasileira de Arbitragem*, Vol.VII, Issue 25, 2010, pp. 7 to 28.

4 Montoro, Marcos André Franco, 'Flexibilidade do Procedimento Arbitral', Doctoral Thesis in Law, Faculty of Law of the University of São Paulo (2010).

5 Miranda, Daniel Chacur, ibid. (see footnote 2, above), at p. 43.

Article 21 of the Brazilian Arbitration Act (Law No. 9.307/96) establishes that the arbitration proceeding will be conducted as agreed by the parties in the arbitration agreement, including evidence production questions. Paragraph 1 of the same article provides that, if the arbitral agreement does not specify how the procedure should be conducted, and if the parties do not reach an agreement on the matter, the arbitrators will settle it. The procedural rules must respect the due process of law, and Paragraph 2 of Article 21 highlights the principles of adversary proceedings, equality between parties, arbitrator impartiality and free evaluation of evidence. This applies to rules created by both the arbitrators and the parties. The non-observance of the provisions laid out in Paragraphs 1 and 2 of Article 21 could lead to the annulment of an arbitration award in a lawsuit before state courts.[6]

In view of this, it is the duty of the arbitrators, respecting the will of the parties, to establish the necessary rules for conducting the production of the oral examination according to the needs and form of the arbitration proceeding. It is not common practice for Brazilian parties in domestic arbitration, at the outset of the proceeding, to apply the IBA Rules for Taking of Evidence or even to agree on procedural rules for witness testimony (or the production of evidence in general terms), that is to say, in the terms of reference or Procedural Order No. 1.

In domestic cases, Brazilian arbitrators often issue a procedural order at the end of the pleading phase (memorials phase) inviting the parties to state whether they want to produce testimonial evidence and to submit the names of the factual witnesses, identifying the specific facts about which the witnesses may testify. Some arbitrators invite the parties to submit witness statements before the evidentiary hearing, but this is not common practice in domestic arbitration in Brazil.

Regarding the dynamics of the production of testimonial evidence in domestic cases, a witness examination is generally carried out first by the counsel of the party who appointed the witness for direct examination. Subsequently, the witness will be questioned by counsel of the opposing party (cross-examination), whose questions are limited to the subjects that were addressed during the direct questioning or to the questions posed by the tribunal. Re-direct examination followed by re-cross examination by the opposing counsel is also possible, but always limited to the answers given by the witness during the first examination.[7]

Contrary to international practice, in most domestic arbitration cases, testimonial evidence does not encompass witness statements made before the evidentiary hearing. This may be an issue for the opposing counsel's preparations, as he or she will not have details of the testimony to be presented at the hearing. Brazilian arbitrators usually consider that witnesses act more spontaneously during direct examination and therefore prefer this method. Direct examination also allows more flexibility to conduct cross-examination as the scope of the testimony may become broader than is usual in a written witness statement.[8]

6 Lopes, Paulo Guilherme de Mendonça, 'Algumas Observações sobre a Produção de Provas nas Arbitragens Nacionais e Internacionais', *Revista dos Tribunais*, Vol. 56 (2018), pp. 5 to 9.

7 Beraldo, Leonardo de Faria, 'Curso de Arbitragem: Nos Termos da Lei nº 9.307/96' (São Paulo: Atlas, 2014), pp. 336 to 337.

8 In international arbitrations, the witnesses who provided written statements will be questioned only by counsel of the opposing party (cross-examination). Cross-examination will always be restricted to the

Show arbitrators you are not afraid of the facts, even unwelcome ones

In my years of experience as counsel and arbitrator, few were the occasions where a party was 100 per cent right and the other was 100 per cent wrong.

Therefore, rare exceptions aside, presenting a case in black-and-white terms will most likely come across as far-fetched. Instead, it is more effective to rely on the techniques of framing and to focus the tribunal's attention on certain aspects of the case, namely those favourable to the client.

However, opposing counsel will certainly do the contrary, drawing the tribunal's focus towards other matters pertinent to the dispute. Consequently, it is just as important to be prepared to address the *unfavourable* aspects of a case.

In this scenario, appraising the conflict under notions of justice, fairness and reasonableness – even in arbitrations in law – may assist counsel in presenting their client's best possible case to the tribunal, limiting the impact of its unfavourable aspects.

This does not mean that counsel should rely on smoke and mirrors. Arbitrators are seasoned professionals and will not be receptive to attempts to disguise or confuse the facts.

Finally, I recommend studying to understand how an arbitrator's mind works, and which steps he or she will need to take to reach a decision. Invest time in identifying which are the key issues at hand and present them clearly and in an orderly manner to the arbitrators. Showing arbitrators that you are not afraid of the facts is essential to gaining their attention and, hopefully, winning the case at the end.

– Eleonora Coelho, Eleonora Coelho Advogados

As a rule, arbitrators do not allow leading questions during a direct examination,[9] only during cross-examination. Further, in domestic cases, arbitrators will very often reject questions to factual witnesses regarding contractual interpretation or that contain arguments from the party.[10]

Cross-examination can also be used for experts contracted by the parties to provide technical evidence.[11] In most cases, examination is limited to the content of an expert's report and arbitrators can invite experts for both parties to focus only on the technical issues on which they disagree. As may be seen in the following section, in domestic cases it is common for arbitrators to appoint their own expert to opine upon the adversarial technical reports brought by the parties.

Another peculiarity of Brazilian domestic arbitration is the potential application of rules of domestic litigation when questioning parties' legal representatives. Whereas in

facts stated in the declaration. (Harbst, Jan, 'A Counsel's Guide to Examining and Preparing Witnesses' in *International Arbitration*, 2015, pp. 67 to 96).

9 Beraldo, Leonardo de Faria, 'Curso de Arbitragem: Nos Termos da Lei nº 9.307/96' (São Paulo: Atlas, 2014), p. 337.

10 Abbud, André Albuquerque Cavalcanti, 'Cross examination: algumas questões', *Revista dos Tribunais*, Vol. 57 (2017), pp. 423 to 429.

11 Bianchi, Beatriz Homem de Mello, 'Provas na Arbitragem e a Carta Arbitral', *Revista dos Tribunais*, Vol. 59 (2018), pp. 213 to 244.

international proceedings a party's representative is heard in the same capacity as a factual witness,[12] in Brazil the legal representative may not be sworn to testify under oath and, consequently, arbitrators may not give the same weight to their testimony.[13] In other words, legal representatives may not have the same obligation as factual witnesses to tell the truth under the charges of false testimony provided in Article 342 of the Criminal Code.[14] In contrast, in international arbitration, legal representatives are always sworn and shall testify with a commitment to tell the truth.[15]

In Brazilian domestic arbitration, parties can expect the proactive participation of arbitrators at the evidentiary hearing, who, in addition to the elucidative interferences, can, at any moment, formulate questions about topics not addressed by counsel and determine the examination of witnesses not appointed by the parties. Arbitrators have a duty to oversee the process of witness examination and any actions that may affect the effectiveness of the proceedings, such as curbing any language that may cause offence and otherwise protecting witnesses, and discouraging dramatic performances and overlong questioning.[16]

Document production

The Brazilian Arbitration Law allows the parties of domestic arbitration a great deal of freedom in choosing the rules that will be applicable to the procedure,[17] which means that the Brazilian Code of Civil Procedure is not automatically applied.[18] When it comes to document production, parties may agree to follow international arbitration procedural rules, such as the IBA Guidelines or the UNCITRAL Arbitration Rules.

Because of this, in practice, arbitration is more flexible than court procedures – which are commonly described by national doctrine as rigid[19] – including regarding the production of documentary evidence. In court procedures, there are specific timings and methods to be observed: the parties usually attach available documents to their initial complaint (i.e., the statement of claim), but only after they have responded to each other's claims are they able to specify the type of evidence they intend to produce in the court, indicating its relevance to the judgment of the case.

Therefore, if a party wishes to request production of a document by its adversary, it often has to wait until the specified time for submission of evidence to file its request. Only after that, based on the parties' allegations, will the judge determine what evidence needs to be produced and what does not. If the judge admits a request for production, the requested

12 IBA Rules for Taking of Evidence, Article 4.2: 'Any person may present evidence as a witness, including a Party or a Party's officer, employee or other representative.'

13 Muniz, Joaquin de Paiva, *Guia Politicamente Incorreto da Arbitragem Brasileira: visão crítica de vinte anos de sucesso*, Vol. 50 (2016), pp. 213 to 227.

14 Bianchi, Beatriz Homem de Mello, 'Provas na Arbitragem e a Carta Arbitral', *Revista dos Tribunais*, Vol. 59 (2018), pp. 213 to 244.

15 Cairns, David J A, *The Premises of Witness Questioning in International Arbitration*, Vol. 19 (2017), pp. 302 to 321.

16 Cahali, Francisco José, *Curso de Arbitragem: mediação, conciliação, Tribunal Multiportas* (São Paulo: Thomson Reuters Brasil, 2018), p. 287.

17 Article No. 2, caput and Paragraphs 1 and 2 of Law No. 13.129 of 26 May 2015 (Brazilian Arbitration Law).

18 Beraldo, Leonardo de Faria, 'O impacto do Novo Código de Processo Civil na Arbitragem' in *Revista de Arbitragem e Mediação*, Vol. 49 (2016).

19 Montoro, Marcos André Franco, *Flexibilidade do Procedimento Arbitral* (São Paulo, 2010).

party may only exempt itself from presentation of the document in the instances expressly stated in the Code of Civil Procedure.[20]

In domestic arbitrations, on the other hand, these formalities do not necessarily apply, and tribunals usually have greater discretion in comparison with court judges to make alternative and original decisions to allow the production of evidence. As established by national doctrine, this is mostly due to the fact the ultimate goal of arbitrators is to find the material truth behind the parties' allegations, in spite of procedural aspects.[21]

In practical terms, this means that arbitrators can determine, for instance, that a party presents documents at an earlier or later stage of the procedure; or that a certain type of evidence (such as documentary or testimonial) is produced before the technical evidence;[22] or even that international requirements are applied to a domestic arbitration, such as cross-examination (as discussed earlier), party-appointed expert witness, depositions, and even the adoption of the Redfern schedule for document production.

Furthermore, a request by one party for production of documents by its adversary is more widely admitted in arbitration than in court procedures. This is partly because the duty to cooperate, which derives from the nationally established principle of good faith, is more intensely applied in arbitration. But it is not only the parties who are subject to the duty to cooperate: arbitrators are too, and must therefore assist the parties in obtaining a specific document or information that is essential to resolving the conflict.[23]

Nevertheless, this does not mean that an arbitral tribunal should admit requests for production of documents indiscriminately. A request can be analysed according to international guidelines (such as the IBA Guidelines or UNCITRAL Model Law),[24] considering criteria such as (1) the relevance of the requested document, (2) the materiality of the document, (3) the specificity of the document, (4) proportionality and (5) non-privilege of one of the parties.

If the request is admitted, the refusal of the requested party to present the document may lead the tribunal to seek enforcement before judicial courts, since, according to the Brazilian Arbitration Law, arbitrators are not competent to enforce orders.[25]

Alternatively, if the party's refusal is justified by confidentiality issues, the tribunal may demand that the party presents the full document to the arbitrators and an edited version to the requesting party, providing to the latter only those parts of the document that are essential for clarification of the specific allegation.[26] Finally, the tribunal may also draw

20 Article 404, I-IV of the Code of Civil Procedure.

21 Pucci, Adriana Noemi; Cunha Neto, Mauro Azevedo, 'Introdução ao procedimento arbitral', in Neto, Francisco Maia; Figueiredo, Flavio Fernando, *Perícias em Arbitragem*, *São Paulo: Liv. e Ed.*, (São Paulo, 2012).

22 Pinti, José Emilio Nunes, 'Anotações Práticas sobre a Produção de Prova na Arbitragem' in *Revista Brasileira de Arbitragem*, Vol. VII, Issue 25 (2010).

23 Beraldo, Leonardo de Faria, 'O impacto do Novo Código de Processo Civil na Arbitragem' in Rev*ista de Arbitragem e Mediação*, Vol. 49 (2016).

24 Straube, Frederico Gustavo; Souza, Marcelo J Inglez de; Gagliardi, Rafael Villar, 'Leis aplicáveis à arbitragem', in Basso, Maristela; Polido, Fabrício Bertini Pasquot (org.), *Arbitragem Comercial: Princípios, Instituições e Procedimentos*, *A prática no CAM-CCBC* (São Paulo: Marcial Pons, 2013).

25 Bermudes, Sergio, 'Medidas coercitivas e cautelares do processo arbitral' in Martins, Pedro Antonio Batista; Garcez, José Maria Rossani, *Reflexões sobre Arbitragem: In memoriam do Desembargador Cláudio Vianna de Lima* (São Paulo: LTr, 2002).

26 Pucci, Adriana Noemi, ibid. (see footnote 21, above).

adverse inference from the allegation that is related to the requested document, although this is less common in domestic arbitration.

Party-appointed experts

As has been discussed, arbitration proceedings held in Brazil can be influenced by domestic litigation rules. Even with the efforts of the parties and arbitrators to free themselves of domestic procedural laws, establishing the arbitration as an independent field of procedure, the Brazilian Code of Civil Procedure remains a strong source of influence.

These interactions with national legislation have both advantages and disadvantages. For the purposes of this chapter, we focus on a particular concern, namely issues pertaining to the production of expert evidence.

As in most countries with a civil law tradition, Brazil's Code of Civil Procedure establishes that a tribunal-appointed expert must produce a technical report. In this situation, the judge should nominate an expert that he or she trusts, who should thereafter work alongside the parties and their own experts – to assist counsel with any work outside their area of expertise[27] – to produce an official technical report.

The first problem in these circumstances is the number of experts incurring expense for the parties. Not only will the parties have to bear the costs of their own experts, who are indispensable for the proceeding, they will also need to pay for the expenses incurred by the expert nominated by the judge – or arbitrator, as this approach is commonly adopted in domestic arbitration. Second, instead of each party presenting its own technical reports with its memorials (during the pleading phase), there will be another stage of the proceeding specifically for the technical evidence to be presented, as proposed by the expert appointed by the tribunal. In general, arbitration can take up to six months longer when this method of presentation of technical evidence is used. Further, the tribunal-appointed expert is usually chosen from a list that does not necessarily include the most capable or best-informed professionals on the specific topic,[28] and who may also attempt to form his or her own opinions on a particular subject.

International arbitration practice is different. The emphasis is on the cross-examination and focusing on the right of the parties to obtain evidence, and technical reports are usually produced by party-appointed experts.

If this is the case, instead of the arbitrator nominating an expert, each party will appoint its own expert, who will prepare individual technical reports. In some situations, and particularly during cross-examination, party-appointed experts will even play the part of technical witnesses, answering questions from both the parties and the arbitrators. As pointed out by Professor Carlos Alberto Carmona, one of Brazil's most prominent lawyers in this field, this

27 As the Code of Civil Procedure establishes in Article 465: 'The judge shall appoint an expert specialised in the subject matter of the production of expert evidence and promptly determine a deadline for the submission of the technical report. § 1 The parties must, within fifteen (15) days of the notification of the appointment of the expert: I – move for the disqualification of the expert, when deemed appropriate; II – appoint a retained expert; III – submit questions.'

28 Rosen, Howard, 'How Useful Are Party-Appointed Experts in International Arbitration?', in Albert Jan van den Berg (ed.), *Legitimacy: Myths, Realities, Challenges*, ICCA Congress Series, Volume 18 (Kluwer Law International; ICCA & Kluwer Law International, 2015) pp. 379 to 430.

may be seen as an interesting alternative to the exclusion of tribunal-appointed experts, as is so often the case in domestic arbitration in Brazil, outlining that arbitral proceedings should not be influenced by national procedural law.[29] As has been discussed, this is not the usual process in Brazil – in view of the influence of national legislation – but as arbitration procedures develop, the removal of tribunal-appointed experts may become a normal part of proceedings.

29 Carmona, Carlos Alberto, 'Flexibilização do Procedimento Arbitral' in *Revista Brasileira de Arbitragem* (Comitê Brasileiro de Arbitragem CBAr & IOB, 2009), Vol. VI, Issue 24, pp. 7 to 21.

17

Cultural Considerations in Advocacy: English-Speaking Africa

Stanley U Nweke-Eze[1]

Legal systems of English-speaking African countries

The legal landscape of English-speaking African countries[2] is primarily based on the common law system,[3] although a few English-speaking countries in Africa are rooted in a combination of the civil and common law systems.[4] Various historical foreign influences shaped the formation of the English-speaking African countries (and indeed African countries in general) prior to their legal and political independence. These influences also shaped the practice of law in these countries – arbitration being no exception.

With a particular focus on advocacy in arbitration, the common and civil law divide suggests different styles of presentation and expression, both orally and in writing, in the course of arbitral proceedings. The common law system adopts the adversarial style, in which it falls on the advocate to take control and present his or her client's case, with the arbitral tribunal playing the part of an umpire. The civil law system, on the other hand, is embedded in the inquisitorial style with minimal emphasis on oral advocacy and the arbitral tribunal tasked with taking control of the fact-finding exercise in the course of the proceedings. The advocate's role would usually be limited to presenting his or her client's

1 Stanley U Nweke-Eze is a senior associate at Templars.

2 Core English-speaking or anglophone African countries include Botswana, Eswatini (Swaziland), Ethiopia, Ghana, Kenya, Lesotho, Liberia, Malawi, Namibia, Nigeria, Sierra Leone, Somalia, South Africa, Tanzania, The Gambia, Uganda, Zambia and Zimbabwe. See Herbert Smith Freehills, 'A Multi-Jurisdictional Review: Dispute Resolution in Africa' (2nd Edition, September 2016), 6.

3 Ghana, Kenya, Liberia, Malawi, Nigeria, Sierra Leone, Tanzania, Uganda and Zambia operate common law legal systems. See Herbert Smith Freehills, 'A Multi-Jurisdictional Review: Dispute Resolution in Africa' (2nd Edition, September 2016), 6.

4 Botswana, Ethiopia, Lesotho, Namibia, Somalia, South-Africa, Swaziland, The Gambia and Zimbabwe operate mixed common law and civil law legal systems. See Herbert Smith Freehills, 'A Multi-Jurisdictional Review: Dispute Resolution in Africa' (2nd Edition, September 2016), 6.

case in accordance with the directives of the tribunal, which plays an active part in the taking of evidence, including the examination of witnesses and experts.

This dichotomy between the common law and civil law systems notwithstanding, international arbitration is increasingly proving disruptive in limiting the influence of cultural considerations and legal traditions in arbitral proceedings within most countries in the English-speaking African region through the provision of standardised frameworks, guidelines and international soft laws (such as the IBA Rules on the Taking of Evidence in International Arbitration) that govern arbitral proceedings across the board. Indeed, a number of English-speaking African countries have already aligned their arbitration rules and practices with recognised international or uniform standards,[5] or are in the process of doing so.

Perception of 'advocacy'

Advocacy as an art of persuasion is probably as old as law itself. It is no exaggeration to say that cases are won on good advocacy, while others are lost on bad advocacy. Advocacy in its purest form is generally considered, particularly in most English-speaking African countries, as a technique that is designed to ultimately persuade an arbitral tribunal to accept the arguments and position of an advocate and consequently grant the relief that he or she seeks. This objective is ideally achieved by thoroughly understanding the facts of the dispute (which is usually rooted in the contract) and being able to relay it to the tribunal in a structured and chronological manner; and assisting the tribunal to understand the issues for determination in the case that is being presented, in a clear, efficient and persuasive manner, as far as the factual background and applicable legal principles permit.

Arguments are generally based on legal precedents (to the extent possible) and applicable legal rules, which are then applied to the facts. When novel and contemporary legal problems present themselves, advocates within the region are typically expected to rely on treatises, academic articles and other secondary sources.

Oral advocacy

Representation of parties in arbitral proceedings

Restrictions, where they exist, on legal representation before national courts in English-speaking African jurisdictions are typically embedded in the relevant country's local laws or court decisions. However, this form of restriction is generally not extended to arbitral proceedings.[6] There is usually no restriction within the region on who may represent a party in arbitral proceedings as many local laws do not have express provisions on representation. In practice, however, legal practitioners tend to represent parties in arbitral proceedings, presumably because arbitral proceedings are usually adversarial, and legal practitioners, with their experience in court-room advocacy, are familiar with the procedure

5 An example is the United Nations Commission on International Trade Law's Model Law on International Commercial Arbitration.

6 For example, Ghana, Botswana, Kenya, Namibia, South Africa and Swaziland have no restrictions in this regard. In Kenya, for instance, other professionals, such as engineers and architects, would typically represent parties on construction disputes. See Herbert Smith Freehills, 'A Multi-Jurisdictional Review: Dispute Resolution in Africa' (2nd Edition, September 2016), 153.

and practical aspects of arbitration, while relying on expert evidence, where necessary, for the technical aspects of the dispute.

Whether a prospective advocate before an arbitral tribunal must be qualified in the relevant jurisdiction that is the seat of arbitration differs from one legal system to the other. In Nigeria and other similar jurisdictions, although foreign counsel advise parties in international arbitration, they do not typically act as advocates during such proceedings.[7]

Selecting the tribunal members

Selecting the tribunal is a very important aspect of the arbitral proceedings because it is generally believed that parties sink or swim with their arbitrators. Where the parties are, by their arbitration agreement, required to choose the arbitrators, they must take care to ensure that competent and appropriate arbitrators are appointed. Particularly, the parties must look out for the language, background and experience of the proposed arbitrator candidates. For instance, in arbitral proceedings that are required to be conducted in English, the parties must avoid appointing an arbitrator who does not have a good understanding of the language, so that nothing is lost in communication.

Oral presentations

It should be borne in mind that a tribunal is made up of human beings who are, in most cases, influenced by 'human elements' that are extraneous to the subject of the arbitral proceedings. For example, an unpleasant tone, an irritating choice of words or an antagonistic disposition towards the tribunal could have a negative effect on tribunal members and ultimately affect their view of the merits of the case. Hence, advocacy as a technique must be used effectively and within the bounds of reason, and an advocate must be able to properly interpret the human elements of pride, fear and confidence (among others) while interacting with the actors of arbitral proceedings, including opposing witnesses, advocates, experts and the members of the tribunal.

Separately, most arbitral tribunals in English-speaking African countries expect an advocate to have a good grasp of the applicable procedures governing the proceedings as well as the principal issues for consideration in the case, and to present those issues in a structured and concise manner so that the tribunal can follow the advocate's case and presentation, and to be able to answer any follow-up questions. It is also important that advocates realise that a courtroom presentation to a judge may differ from a presentation made during arbitral proceedings in certain circumstances, particularly if the members of the tribunal are not legal practitioners. It follows, therefore, that an advocate should minimise legalese and empty rhetoric, and be mindful of the audience at all times.

7 In Nigeria, although there appears to be no express restriction on representation of parties in arbitration proceedings because Article 4 of the Arbitration Rules contained in the First Schedule to the Arbitration and Conciliation Act provides as follows: 'The parties may be represented or assisted by legal practitioners of their choice.' Nigerian courts have not interpreted this provision, but a domestic arbitral tribunal has interpreted same as restricting the representation of parties in arbitral proceedings to persons qualified to practise Nigerian law. See Herbert Smith Freehills, 'A Multi-Jurisdictional Review: Dispute Resolution in Africa' (2nd Edition, September 2016), 229.

Similarly, an advocate must have insight into how an arbitrator's cultural background affects his or her actions and omissions, and prepare for such. Despite the existence of only two major legal systems, the English-speaking African region comprises many ethnicities, languages, religions and customs. In particular, religion and ethnicity considerations form a bedrock of the identity of some African arbitrators, even more than national identities.

In most ethnic groups, values of conciliation are emphasised, and many customary laws are conciliatory in nature. An excessively adversarial stance, particularly in relation to minor procedural issues, could be frowned upon by some tribunal members. Also, it may be necessary for advocates to consider religious factors by not scheduling arbitral proceedings on or close to Christian and Muslim holidays, prayer times and fasting periods. It is therefore necessary for every advocate to be familiar with the legal, social, cultural, religious and political backgrounds of arbitrators before appointment.

Overall, an advocate must strive for a favourable first impression. Appearance is an integral part of African values and an advocate's conduct during initial contact and examination of the first documents may dull cultural sensitivity. Full disclosure of evidence and a complete, yet concise, statement of one's legal position are important in creating a favourable first impression.

Examination of witnesses and experts

The choice and presentation of witnesses and experts in arbitral proceedings fall to the advocate in most cases, rather than the tribunal, especially when the legal background of the tribunal members is rooted in common law. A tribunal that is made up of people with a civil law background normally approaches its tasks inquisitorially.[8]

In any case, the witnesses and experts put forward by each party will generally be expected to front-load their written statements, which will constitute their testimony in the proceedings. These witnesses or experts can then be cross-examined by the opposing advocate based on the written statements, if necessary, following their adoption as evidence in the arbitral proceedings.

The style of cross-examination of witnesses to be used during proceedings is largely dependent on and determined by the legal traditions (civil law/common law) of the members of the tribunal. This could also inform the sorts of questions that would be deemed acceptable by the tribunal. In any case, the cliché of 'the sky is the limit in cross-examination' is usually not obtainable, as questions are generally expected to be limited to relevant issues for determination. Indeed, the tribunal has, in most instances, the power to moderate the range of questions without necessarily encroaching on the general liberty afforded to the advocate to cross-examine the witness or expert.

Cross-examination questions would usually be detailed as the advocate strives to drive home and restate important points about which he or she wishes the tribunal to take note.

Advocates must always recognise that background and jurisdiction create a chasm in educational foundation and, as such (depending on the nature of the matter), possible witnesses and experts would be drawn from a range of the different societal classifications. Understanding this reality means that the advocate must endeavour to understand the

8 Cross-examination of a witness is unlikely to occur if the advocate or the tribunal has a civil law background.

witness and expert in question to tailor the style of questioning that can elicit the most favourable answers and aid his or her case. A 'one size fits all' approach is never appropriate.

Due to the multiplicity of witnesses' backgrounds, counsel should adopt simple and clear language to convey questions, while avoiding being too forceful or taking any other actions that may be considered disrespectful. Witnesses should always be treated with sensitivity.

Effectiveness in the course of cross-examination requires a combination of using leading questions to steer the witness tactfully in the direction the advocate seeks and maintaining brevity. Employing the use of long-winded questions creates a risk of the witness, expert or even the tribunal missing the crucial point that the advocate seeks to make.

Virtual hearings

Arbitration practitioners are not entirely new to virtual hearings in various aspects of arbitral proceedings. For example, discussions on administrative and procedural matters are usually held via telephone and videoconferencing. However, the covid-19 pandemic has hastened the adoption of virtual hearings in full scale following the imposition of lock-downs and travel restrictions in various countries across the globe.

Factors to consider in relation to advocacy in virtual hearings in English-speaking Africa (and most other African countries) include time-zone differences, allowance for disruptions due to power outages and internet connection issues, data protection and privacy concerns, and issues concerning specialised arbitral proceedings, such as construction disputes where site visits could be helpful.[9] There is also a need for advocates to recognise that long virtual sessions may be inimical to their cause, and therefore agree on shorter periods for each day as well as increase the number of breaks during the sessions.

Similarly, virtual hearings do not fully convey the use of voice intonation, gestures and body language. Advocates should opt to convey the entirety of their position through simple and concise language. Most importantly, advocates must ensure they are adequately prepared and knowledgeable in the use of virtual hearing platforms.

Written advocacy

Although oral advocacy is given more emphasis in common law jurisdictions that make up the bulk of English-speaking African countries, the ability of an advocate to express himself or herself in writing is as important as the ability to express himself or herself orally. Indeed, a few arbitral proceedings, particularly construction-related disputes, are conducted solely in writing, with no hearing at all.

There has been a shift in recent years towards significantly limiting the time allowed for oral advocacy in court to save time and reduce the ever-rising cost of litigation. Likewise, many arbitral tribunals are moving inexorably towards written advocacy. The trend is to have advocates simply adopt their arguments and use the limited time to adumbrate on certain important issues. Hence, the choice between written and oral submissions is not typically an 'either-or' situation.

9 See Stanley U Nweke-Eze, 'Virtual Hearings in Arbitration: The Way Forward or Not?' (Africa Arbitration Blog, 2020), available at <https://africaarbitration.org/2020/10/14/virtual-hearings-in-arbitration-the-way-forward-or-not-by-stanley-u-nweke-eze/>.

Pleadings, as well as interlocutory, opening and closing submissions, are expected to be well written and supported by the relevant authorities being relied on. It is generally believed that the hallmark of good writing is clarity, and that transcends merely staying within the confines of conventional grammar, punctuation, syntax and semantics. In other words, a good advocate should eloquently work towards a clear goal with every piece of writing. Arguments on the issues for determination should be canvassed in chronological order and devoid of ambiguities.

Conciseness and structure are also key. This entails being brief with an appropriate level of detail (depending on the context and subject matter involved), and conveying points succinctly, without the use of superfluous words. A deliberate and meaningful structure has to be considered. For example, the first couple of paragraphs or sections should be used to summarise an advocate's views as logically as possible.

Nonetheless, arbitrators from a civil law background may expect substantially detailed documents, including a full statement and all particulars and evidence in support. An advocate should be informed and guided by the background of the arbitrator in preparing written submissions.

Further, while most common law arbitrators would be willing to order a party to search for and produce documents unhelpful to its cause, some civil law arbitrators may be unwilling to grant such applications. Despite the aim of the IBA Rules on the Taking of Evidence in International Arbitration to balance these considerations, the production of documents can differ in each case. An advocate should, therefore, consider the background of the tribunal members before submitting an application for disclosure of documents, especially where such application has a wide scope or will be unhelpful to the cause of the other party.

Concluding remarks

Most English-speaking African countries share similar degrees of professional and cultural experience. This affinity can be traced to the fact that most of the English-speaking legal systems in Africa, with a few exceptions, are cut from the same stock – the common law system. That being said, the flexible nature of arbitration encourages arbitral tribunals, advocates and parties to structure the applicable procedure to the circumstances of the dispute and the background of the advocates and tribunal members. Consequently, tribunals are usually eager to adopt features from the common law and civil law systems to achieve efficiency during arbitral proceedings.

To effectively represent clients in English-speaking African countries, there must be a thorough understanding of the various nuances that could come into play. Advocates are generally expected, in adopting the art of advocacy in all its forms, to be proficient and persuasive in eliciting what is relevant and support the client's position, on the basis of the available evidence and legal principles. An excellent oral advocate is capable of grasping the essential issues of a case and conveying them to the tribunal in the manner that best suits the client's interests. Effective written advocacy in particular connotes the ability to bring the issues into the central arena and assist the tribunal in having a meaningful dialogue with the advocate, where the need arises. This, in turn, will assist in a speedy determination of the issues in question.

18

Cultural Considerations in Advocacy: French-Speaking Africa

Wesley Pydiamah and Manuel Tomas[1]

The genesis of this chapter mirrors what every arbitration practitioner is currently witnessing: international arbitration and Africa remains a prolific topic these days, and one arrives at this conclusion simply by looking at the number of (virtual) arbitration conferences with 'Africa' as the overarching theme.

This is not surprising. With its immense natural resources and need of infrastructure to sustain its economic growth, Africa is more than ever the promised land for foreign capital, investments and projects. Although the covid-19 pandemic may have slowed down certain large-scale projects, there is no doubt that foreign and intra-African investments will be strongly encouraged by governments eager to resume the economic growth levels that their economies were experiencing before the pandemic. But on the other side of the coin is the proliferation of disputes and arbitrations in particular. To have a better sense of recent developments, one can look at the statistics published by leading arbitral institutions, such as the International Chamber of Commerce (ICC), the London Court of International Arbitration and the International Centre for Settlement of Investment Disputes, which show that arbitrations with an African nexus are on the rise.

Likewise, the number of arbitral institutions in many African countries has rocketed in recent years, and various countries and cities have their own 'arbitration week' (e.g., Mauritius and Johannesburg) or 'arbitration day' (e.g., Casablanca). In 2016, the International Congress and Convention Association held its annual congress in Mauritius, the first to take place on the African continent. All in all, the trend denotes what some describe as the 'Africanisation of international arbitration' and the willingness of all stakeholders to promote international arbitration as part and parcel of Africa's prosperity.

Seasoned arbitration practitioners with significant experience of disputes in Africa will always have those overarching words of caution: never consider Africa as one reality. The

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You will have to adapt to the arbitrators' culture – particularly the chair's

Cultural neutrality is one of the qualities expected from a good international arbitrator. He or she must be able to understand the cultural context of the positions adopted either by the parties or the other members of the arbitral tribunal. This requires both knowledge and humility – knowledge of the major differences between the legal systems with respect to substantial solutions and procedure; humility, to avoid the natural assumption that one's own system is superior to all others. Good counsel in international arbitration proceedings need the same qualities, as, unless they are lucky enough to appear before a tribunal composed of arbitrators who are really culturally neutral, they will have to adapt to the arbitrators' culture, in particular that of the chair. In any case, arbitrators are human beings and cannot completely detach themselves from their own cultural bags and baggage. Thus, a common lawyer should be aware that an arbitrator trained in the civil law system has little interest in strictly procedural issues and will be rapidly irritated by numerous objections during the examination of witnesses. Counsel should refrain from making such objections unless they are absolutely necessary. Likewise, a civil lawyer should know that common law arbitrators find it normal to interrupt counsel with embarrassing questions during their oral argument and that it is not a sign of partiality or hostility, contrary to what they may be inclined to think. They just should be patient and take the question as an opportunity to further explain their case.

– Yves Derains, Derains & Gharavi

continent is indeed very diverse, and it would be a mistake to think that the three subsections of this chapter could capture the full African reality.

The first subsection concerns cultural considerations in French-speaking Africa, and the immediate question is what do we understand by that? Are we speaking of those countries where French is the official language or countries where French is used alongside other languages, with no particular status as to its official character or otherwise?

French-speaking Africa in fact cuts across extremely different realities where French as a language may not be the most appropriate means to categorise a particular country. In some countries, French is the only official language,[2] and in others it is just one of the official languages.[3] In a few countries, such as Mauritius, French is more widely spoken than English but the latter is the only official language. Then again, there are some countries, such as Algeria, where French is used to conduct business but is not an official language.

In fact, even if the French language can be considered the common denominator for states and geographical areas that may otherwise have little or nothing in common, the one other aspect that does have importance is the legal system. And while French-speaking Africa is a particularly fragmented space, culturally, politically and economically, its civil law tradition – inspired and inherited mostly from French law – is rather striking.

2 In Benin, Burkina Faso, the Republic of the Congo, the Democratic Republic of the Congo, the Ivory Coast, Gabon, Guinea, Mali, Niger, Senegal and Togo.

3 In Rwanda, Chad, Burundi, the Central African Republic, Comoros, Equatorial Guinea, Djibouti, the Seychelles, Madagascar and Cameroon.

This is where 'Africanisation' comes into play. African states are no longer satisfied with just their heritage and have decided to embark upon their own reforms. This is particularly true in West Africa, which constitutes a large part of the so-called French-speaking Africa. It is in this region that one of the most important unifying efforts of the whole continent has emerged in implementing the OHADA (Organisation for the Harmonisation of Business Law in Africa) system.

OHADA is an intergovernmental organisation for legal integration and is composed of 17 Member States,[4] most of which are French-speaking. Its purpose is to achieve legal consistency and uniformity among the Member States. In December 2017, the OHADA Council of Ministers adopted three new instruments for arbitration and dispute settlement in general, namely a modified Uniform Act on arbitration, revised Common Court of Justice and Arbitration (CCJA) Arbitration Rule, and a new Uniform Act on mediation, which all have the aim of modernising the practice of arbitration and mediation in the OHADA zone.

This is the first cultural consideration in French-speaking Africa. Arbitration practitioners need to understand the proper legal framework of these countries. Language is a common feature but, more importantly, understanding the legal system, its roots, evolution and current state is of paramount importance.

Choice of arbitrators

The second cultural consideration is the choice of arbitrators in cases involving French-speaking Africa.

At the outset, it bears noting that the number of African appointments remains low, and this is regrettable. According to the 2019 ICC statistics, 3.6 per cent of the total appointments were of African origin (2 per cent from sub-Saharan Africa and 1.6 per cent from North Africa). This is compared with 2 per cent in 2016, 3.9 per cent in 2017 and 3.1 per cent in 2018.

There are two main aspects to note in terms of choosing arbitrators. First, the choice is often determined by the subject matter of the dispute, the seat as well as the law applicable to the substance of the dispute. Although there is no reason why an arbitrator with a common law background would not be able to handle an arbitration seated, for instance, in Dakar and subject to Senegalese law, prior experience of the relevant laws would be advisable or at least an acquaintance with the legal space in which the arbitration will be operating.

The law of the seat is notably relevant for potential set-aside proceedings, status and scope of the applicability of the New York Convention or other relevant treaties, and any other mandatory requirements with which international arbitrators will not be familiar. Similarly, as regards the substantive laws, in many French-speaking African countries, there is quite often a specific legal framework relating to natural resources sectors, and in particular the petroleum and mining sectors.

4 Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, the Democratic Republic of the Congo, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Côte d'Ivoire, Mali, Niger, Senegal and Togo.

Second, and this is related to the first point, there is a tendency for parties originating from French-speaking Africa to sometimes pick arbitrators who have a good reputation locally (lawyers, former judges or law professors). This may make complete sense when the arbitrator is the only individual on the three-member panel to have the knowledge and practical experience of the relevant laws (of the seat or the substance of the dispute). However, we have come across many such instances during the past decade when this has proved not to be entirely effective.

In the context of an arbitration initiated against a German multinational company, conducted under the aegis of the CCJA and seated in Abidjan, the claimant, a Congolese national assisted by Congolese counsel, had thought it relevant to appoint as arbitrator a former *bâtonnier*[5] of the Ivory Coast.

It was most likely a choice influenced by the presumed ability of the former *bâtonnier* to influence the panel, in particular because he would have been the only individual to be well versed in the relevant laws. However, it quickly became clear that this arbitrator, although he did undeniably have some natural authority, lacked arbitration experience. He did not participate at all in the hearings, asked no questions and is likely to have been of little assistance to the panel when it came to deliberations and drafting the final award.

Selecting arbitrators with a reputation in the local market reflects a more traditional approach that has been, in our experience, predominant for a long time in French-speaking African countries, and was clearly a cultural consideration that advocates had to bear in mind when presenting their arguments to a panel of arbitrators with different backgrounds. However, things are moving in a different direction nowadays, and towards harmonisation, as African parties favour technical and experienced arbitrators with specific sector expertise and acquaintance with the applicable laws. The good news is that the pool of arbitrators available locally and who would meet these criteria is also increasing significantly.

Oral submissions and management of oral evidence

Whether we are in a French-speaking African context or not, the efficiency and smooth running of the arbitration primarily depends on the quality of the arbitrators but also on the degree of sophistication and experience of the parties and their counsel. One well-known arbitrator noted what has become a famous saying: 'Tant vaut l'arbitre, tant vaut l'arbitrage.'[6] The respected Pierre Lalive extended this to the parties' counsel and one can only subscribe to both propositions.

For most of French-speaking Africa, oral pleadings generally follow the same legal traditions as in other civil law jurisdictions. In particular, the oral aspects of the proceedings are not emphasised as much as they would be in a common law context. It is therefore not unusual to see experts and witnesses relegated to a secondary role.

In a recent case brought before the CCJA, one party had decided to request a law professor to clarify a point of local law, which was critical to the resolution of the dispute. The opposing party objected to this request by arguing that the CCJA's Arbitration Rules, in the 1999 version, did not explicitly provide for the recourse of the parties to an expert,

5 A lawyer elected as president of a local bar association.

6 The good arbitrator ensures an efficient arbitration.

which is true. Indeed, the Rules explicitly provided that only the arbitrators may have recourse to such experts.

Counsel's objection did not reflect so much a lack of sophistication – he was otherwise quite brilliant and effective – but had a cultural bias that reflected the way in which court proceedings are handled in civil law countries. In those instances, and unlike common law jurisdictions, witnesses and experts are often called to testify in very specific instances.

Another cultural consideration in French-speaking Africa is that parties may not be used to the intricacies of cross-examination. This can derail the arbitration proceedings.

In an investment dispute in which a West African government was respondent, the claimant had decided to have a certified accountant testify and had submitted a lengthy affidavit from this witness. The claimant's counsel, of a civil law background, apparently did not consider so carefully the conditions under which his witness could be heard. Indeed, in civil law courts, not only is it extremely rare to hear witnesses but, if they are heard, they are unlikely to be cross-examined.

In other words, from the claimant's counsel point of view, it was the written testimony that mattered. He therefore did not fully consider what the cross-examination would entail and consequently did not prepare his witness, as common law or arbitration practitioners would automatically do. This proved to be disastrous in this case as the accountant had not yet obtained his certification at the time he signed his affidavit. Despite having covered various topics in his affidavit, it was clear on cross-examination that he had not even reviewed the relevant documents and was thus not sufficiently familiar with the issues at stake. In the end, the tribunal placed no reliance on that affidavit, which was struck off the record.

It is finally worth noting that arbitrators with a French-speaking African background – although that reflects a general attitude of arbitrators with a civil law background – are generally less interventionist than their common law counterparts. This is notably true in the context of oral presentations, which are often uninterrupted, or the examination of experts and witnesses, where leading questions are often tolerated.

Written pleadings

Written pleadings are the sacrosanct aspect of legal proceedings in French-speaking Africa. This is a key cultural consideration and comes as no surprise considering that civil law traditions are predominant in these countries. From the practitioner's perspective, written pleadings constitute the main means of persuasion while oral advocacy is to some extent secondary and treated more as a superfluous exercise. This explains why certain practitioners are still reluctant to use transcripts, let alone have recourse to the use of a transcriber during oral hearings.

Importantly, one other cultural consideration is the lack of familiarity with the concept of disclosure and the document production stage, which is almost always present in any draft procedural order communicated by the arbitral tribunal in the early stages of the proceedings. We have encountered several arbitrations in which parties and their counsel were wholly unfamiliar with that process and ended up making the wrong decisions by refusing to produce documents. This would not necessarily have been because there was a deliberate intent to withhold documents and information that were unfavourable to the

outcome of their case but simply because disclosure is not a common feature of civil law jurisdictions and French-speaking African countries. The reluctance of parties to produce documents may thus be explained by this cultural difference, and we have been witness to several cases in which arbitral tribunals have drawn adverse inferences against parties that otherwise had a good case on the merits.

Situations such as we have described above arise because parties and their counsel were not well versed in international arbitration practices. However, those differences are lessening, and while they will – and should – continue to exist to a certain extent, the wide acceptance of international arbitration as a peaceful means of resolving commercial and international law conflicts is no longer in question. That applies to French-speaking Africa where much progress has been made. It is thus just a question of time before modern international arbitration practices are reflected in all quarters.

The famous French anthropologist and philosopher Claude Lévi-Strauss was a firm supporter of cultural diversity as the source of all creation and progress. He was dead right and modern international arbitration practice is squarely a field that has been shaped and inspired by various cultural approaches, and which has benefited from the best of many spheres.

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Cultural Considerations in Advocacy: Portuguese-Speaking Africa

Rui Andrade and Catarina Carvalho Cunha[1]

In formal terms, Portuguese-speaking Africa, also known as Lusophone Africa, is made up of six countries in which Portuguese is an official language: Angola, Cape Verde, Guinea-Bissau, Mozambique, São Tomé and Príncipe, and Equatorial Guinea. The latter amended its Constitution in 2011 to include Portuguese as one of its official languages, tellingly, as part of a strategy to accede to the Lusophone Commonwealth or Community of Portuguese Language Countries, to which Brazil and Timor-Leste also belong.

Now, whereas Angola, Cape Verde, Guinea-Bissau, Mozambique and São Tomé and Príncipe were colonies of Portugal until the mid 1970s, Equatorial Guinea was claimed from Portugal by Spain in 1778 and remained part of the latter's empire until 1968. Thus, whereas the first five countries' legal regimes and advocacy culture stem from and were built upon the same backbone, this is not the case with Equatorial Guinea, whose law and regime, though also civil law-based, has significant differences. This chapter is therefore focused on those first five Portuguese-speaking African countries.

Since their independence from Portugal, Angola, Cape Verde, Guinea-Bissau, Mozambique, and São Tomé and Príncipe have developed and shaped their legal regimes, in the majority of sectors, to fit their own individual needs – quite significantly in Guinea Bissau's case since, in 1994, it acceded to the Organisation for the Harmonisation of Business Law in Africa (OHADA) Convention and adopted its Uniform Acts. Nevertheless, all these countries still incorporate as their own the 1966 Portuguese Civil Code (which is, for the most part, the same Code that is in force in Portugal to date) though with variances that have been adopted over time – mostly to do with family law – and the 1967 Portuguese Code on Civil Procedure. However, Mozambique, Cape Verde and, most recently, Angola have since adopted new statutes to regulate insolvency – a field of law that was formerly provided for in the Code on Civil Procedure – which they did, respectively, via Law No. 1/2013 dated

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4 July 2013, Law No. 116/VIII/2016 dated 22 March 2016 and Law No. 13/21 dated 10 May 2021, while Guinea-Bissau has adopted the OHADA Uniform Acts on Insolvency, and on Simplified Recovery Procedures and Measures of Execution. Angola has also been working on new legislation in this domain, but as at June 2021, this statute has not yet been enacted.

It follows that Angola, Cape Verde, Guinea-Bissau, Mozambique, and São Tomé and Príncipe all share a civil law legal system, with statutes as their primary source of law. Consequently, there is no system of precedent and case law, which are viewed as secondary sources of law, as is legal writing. Additionally, to date, none of these countries has set up relevant case law records or databases to be available for consultation by the general public or those engaged in the legal profession, it being common for lawyers exercising law in these jurisdictions (and the judiciary itself) to revert to Portuguese jurisprudence as a means to sustain and uphold legal arguments. On the other hand, it is worth mentioning that in certain areas of law, traditional customary law still plays a crucial role in these countries.

Written stage of proceedings: pleadings

In Angola, Cape Verde, Guinea-Bissau, Mozambique, and São Tomé and Príncipe, civil proceedings are designed to incorporate four stages of written pleadings within specific deadlines.

To launch proceedings, the claimant must file a statement of claim (SOC)[2] before the court with an outline of its underlying factual and legal reasoning, the relief sought and an indication as to the claim's economic value, which must be submitted with all the necessary evidentiary documents to support it. Judicial costs (an initial fee) indexed to the claim's value must be paid when the SOC is filed.

As soon as the SOC has been filed, the court clerk verifies that all the necessary formal requirements have been met and summoning of the defendant to the proceedings follows.

Service under the law of Angola, Cape Verde, Guinea-Bissau, Mozambique, and São Tomé and Príncipe is, as a rule, carried out in person and not by post; in addition, personal service is exclusively carried out by judicial clerks or officials, that is to say the law does not allow for service to be rendered by attorneys or any other service agents as occurs in other parts of the world. If the defendant is a company, service will be carried out before its legal representative at the company's headquarters or, if this is not possible, before any company employee.

When the defendant lives or is domiciled abroad, service is carried out in accordance with the provisions set forth in international treaties or conventions to which the relevant country is a party, or, and in the absence of any such provisions, through diplomatic means via rogatory letters. Naturally, this delays proceedings considerably since serving parties abroad in all these jurisdictions typically takes up a great deal of time.

On this note, it is worth highlighting that although the law allows and foresees that when a defendant lives or is domiciled abroad and there is no applicable treaty or convention on the matter, he or she may be summoned to the proceedings by registered courier with acknowledgment of receipt, this never occurs in practice. This is because postal

2 The Portuguese term is *petição inicial*.

services in these countries are very rudimentary. It also means that all subsequent notices to be made within proceedings are dependent on the relevant attorneys' visits to court. When proceedings are pending with courts that are a significant distance from the attorneys' or parties' offices, or both, this translates into added constraints, since parties and their attorneys are frequently contacted by the courts to arrange for transport of the relevant notices.

In its statement of defence, the defendant must offer all factual and legal grounds that make up for its defence, alongside all the evidentiary documents to support it. Counterclaims may also be filed by the defendant with its statement of defence so long as the grounds emerge from the facts and grounds of the SOC. Set-off claims are allowed so long as they are in accordance with the underlying legal requirements.

Joinder and rejoinder follow.

Pleadings are markedly formal in both style and language. Since judges are historically generalists, rather than specialists in specific areas of law – except those who preside over specialised courts, such as those set up to govern tax or maritime law issues – objective, clear-cut and succinct pleadings are advisable.

Once the written stage of proceedings is over, the judge may choose to convene a preliminary hearing with a view to reconciling the parties. If no such hearing is held, the judge then draws up a court order ruling on any pre-emptive issue of law raised by the parties in their pleadings and with a selection of facts (1) that are deemed to have already been established in the proceedings based on party confession or documents with full and complete evidentiary force and (2) that are still to be proven. At this stage, the presiding judge may in any case find that he or she is already able to decide on the merits without going to trial either because the merits of the case are solely based on legal grounds or, when this is not the situation, he or she finds that the proceedings already contain all the necessary elements for a judgment to be delivered.

Courts' prerogatives

The Code on Civil Procedure in Angola, Cape Verde, Guinea-Bissau, Mozambique, and São Tomé and Príncipe presents a mixed approach between the inquisitorial and adversarial systems. Thus, although the general rule is that each party must prove the facts that it claims, courts also have the duty to seek the truth, and in view of such a duty, can order that evidence be provided for this purpose *ex officio*. This means that in these jurisdictions the court may, on its own initiative, or following the request of one of the parties, request that certain information, opinions, photographs, drawings, objects and any document necessary to the clarification of the truth be disclosed or brought before it. Should parties refrain from filing the requested documents, this may result in reverting to the rules on the burden of proof or lead to the determination of fines or the court adopting coercive measures to guarantee proper filing.

The court will also decide whether to waive certain privileges, if so requested.

Court hearings and taking of evidence

The means of evidence available to counsel for parties under Angola, Cape Verde, Guinea-Bissau, Mozambique, and São Tomé and Príncipe law are evidence by party confession, documentary evidence, expert evidence, judicial inspections and witness statements.

Though all these means are provided for in the law, as a rule, parties tend to stick to party confession, documentary evidence and witness statements. Further, although party representatives may be heard before court, their statements only bear value to the extent that they confess facts that have been claimed against them. This means that it is the counterparty who will ask that the other party's representative be heard on specific facts of which it has direct knowledge. It also means that, although party representatives are often the people best suited to provide the court with a true version of the facts (they are often the only people that can testify on what happened or what a given party's true intent was when entering into an agreement, among other things), unless the representative's statements are a confession of facts claimed against them by the counterparty, the courts will not be able to rely on these testimonies as evidence.

As to witness statements, these are, as a rule, offered in person before the court; the witnesses are generally questioned by the party that has presented them to the proceedings and then cross-examined by the counterparty's counsel. The presiding judge will intervene and ask questions whenever he or she deems it necessary – though it is not unprecedented for a judge to take on the enquiry him or herself, leaving only small clarification requests to be made by the parties' counsel.

Witness preparation is not just highly controversial, it is actually forbidden by most of statutes of the relevant bar associations. This does not mean that witnesses will not be approached by counsel prior to hearings (as a means of forestalling surprises), yet it must be carried out with utmost circumspection. Written statements are only allowed when the conditions for pretrial testimonies are met or when the witnesses live outside the district where the hearing is to take place. Those people who carry out public authority roles may be heard by the court at their own homes or place of work.

When weighing evidence, courts in these jurisdictions tend to focus more on the documentary evidence brought before them than on witness statements and they will quite often dismiss these testimonials entirely.

In addition, there is no real-time transcription of witness statements nor are they generally recorded although the law foresees that parties may request that testimonies be recorded, provided the court is appropriately equipped or parties bring their own equipment to court.

There is also still a level of bias (which varies from jurisdiction to jurisdiction) towards domestic parties that cannot be overridden when advocating in these jurisdictions.

Closing arguments and final judgments

Closing legal arguments are typically rendered in writing. The judgment is then rendered by the judge. Now, whereas the judicial systems in Angola, Cape Verde, Guinea-Bissau, Mozambique, and São Tomé and Príncipe have become increasingly reliant over time, they are also all still exceedingly slow. Typically, it takes about five years for cases to be ruled on in the first instance and it is not impossible for cases to drag on for 10 years or more with appeals. It follows that as a means to manage expectations, these circumstances need to be amply discussed by attorneys and their clients when seeking to have disputes resolved in these Portuguese-speaking African countries.

Generally, there are two levels of appeals available to parties, although in some cases, and subsequent to a given set of specific and limited prerequisites, it is also possible to launch an additional appeal before the Constitutional Court.

Interim relief

To ensure the outcome of the proceedings when the effectiveness of a possible favourable ruling is at risk, an applicant may request the adoption of interim remedies. These measures may be requested before or after the main claim has been filed and will lead to independent and separate proceedings with a separate court order.

In general, when requesting interim measures, the applicant must demonstrate that the following requirements have been met: (1) *fumus boni iuris* – prima facie case, the applicant has a justifiable claim on the merits against the respondent; (2) *periculum in mora* – there are circumstances giving rise to the urgency of safeguarding the applicant's purported entitlement; and (3) the damage the applicant intends to avoid must not exceed the damage caused by the interim measure, if granted, to the counterparty.

As to the measures that may be requested, the law provides for a range of specified (such as provisional alimony, restitution of possession, lien on assets and preventive arrest) and unspecified measures.

Arbitration as a valid alternative dispute resolution mechanism

For a long time, arbitration was almost non-existent in Angola, Cape Verde, Guinea-Bissau, Mozambique, and São Tomé and Príncipe. Although its legal provision dates back to the Portuguese 1876 Code on Civil Procedure, this alternative dispute resolution (ADR) mechanism was then subject to the control of state courts, the same solution having been adopted in the subsequent 1939 and 1961 versions of this statute, rendering it void of use.

However, the truth is that these countries have progressively become aware that commercial and investment arbitration has a key role in contributing to their economic development. Consequently, they have all devised and enacted their own statutes to govern this vital alternative dispute resolution mechanism:

- Angola enacted the Voluntary Arbitration Law – Law No. 16/03, dated 25 July – in 2003, which governs both domestic and international arbitration.
- Cape Verde's primary source of law relating to arbitration is the Law on Arbitration, Law No. 76/VI/2005 of 16 August, which also governs both domestic and international arbitration.
- In Guinea-Bissau, although arbitration is foreseen in the country by Law No. 19/2010, dated 8 October, as an OHADA Member State, it is the OHADA Uniform Act on Arbitration, enacted on 11 March 1999, that applies to both domestic and international arbitrations when the seat of arbitration is in Guinea-Bissau.
- In Mozambique, the Law on Arbitration, Conciliation and Mediation, Law No. 11/99, dated 8 July, applies.
- In São Tomé and Príncipe, the matter is governed by Law No. 9/2006 of 2 November.

Further to this, the five countries have also established arbitration as an alternative to state courts transversely, it now being common to see this ADR mechanism provided for in

the countries' private investment laws, laws regulating labour and public policy and those governing and regulating the energy and oil and gas sectors.

Another indication of these countries' growing and enhanced openness to arbitration is the fact that most of them – though only in the last decade in most cases – have acceded to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Angola in 2017, Cape Verde in 2018, Mozambique in 1998, and São Tomé and Príncipe, 2012,[3] though in case of the latter, despite its instrument of accession being deposited with the Secretary General of the United Nations on 20 November 2012, the Convention is not yet in force in the country. Cape Verde, Guinea-Bissau, Mozambique, and São Tomé and Príncipe are also all Member States of the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States;[4] however, it is not yet in force in Guinea-Bissau.

This, aligned with the time taken for proceedings to be ruled on by the courts of Angola, Cape Verde, Guinea-Bissau, Mozambique or São Tomé and Príncipe, the level of bias that parties will still encounter when litigating against local entities or parties and the lack of technical expertise of the more generalist judges presiding over such courts, has resulted in arbitration developing at a stout pace. This is particularly true of the past decade, with arbitration being generally and increasingly recognised by the relevant judicial courts and national authorities in these countries. As a consequence, arbitration is now the dispute resolution mechanism that is most often provided and resorted to in commercial agreements entered into by foreign companies and entities that have projects in Angola, Cape Verde, Guinea-Bissau, Mozambique, and São Tomé and Príncipe, all of which have begun to set up a number of arbitration institutions in their territories.

So how do national courts deal with court proceedings that are instituted despite an existing arbitration agreement? An agreement to arbitrate implies a waiver by the parties to initiate state court action on the matters or disputes submitted to arbitration. As a result, in all the jurisdictions to which our discussion relates, once the parties have agreed to resort to arbitration to solve their underlying disputes, the intervention of the judicial court will be limited to those instances set forth in the relevant arbitration acts of each country. Consequently, should proceedings be filed with a judicial court in any of these countries, the relevant arbitration agreement may be relied upon by the defendant summoned to proceedings to have them dismissed, the court being prevented from ruling on the case's merits.

However, it must be said that given the way the subject matter is still dealt with within the Code on Civil Procedure, the court will not address this matter *ex officio*, and the interested party will have to make a plea in its statement of defence.

Further, according to the governing law in these countries, actions concerning the validity of an arbitration agreement (i.e., not involving a dispute covered by the arbitration agreement) that are filed with a judicial court after the arbitral tribunal is constituted will not be admissible, as per the principle of 'competence-negative effect of competence'.

3 For a list of contracting states, see www.newyorkconvention.org/countries.

4 For a list of states that have signed the ICSID Convention, see https://icsid.worldbank.org/en/Documents/icsiddocs/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf.

This said, when deciding the seat for the arbitration, practice shows that when possible – and it is not always possible given the specific limitations provided for in local law intended to safeguard certain economic sectors deemed to be vital to the underlying economies – parties will almost always avoid choosing Angola, Cape Verde, Guinea-Bissau, Mozambique or São Tomé and Príncipe. Instead they will opt for a neutral and more arbitration-friendly jurisdiction. Although this avoids having to interact with national courts when their assistance proves necessary or launching set-aside proceedings with these same courts – whose experience in dealing with arbitration is still undeniably limited – it still does not avoid having to institute recognition proceedings prior to enforcement therewith when a party is a national of one of these countries or has assets located therein.

The downside of parties avoiding seating their arbitrations in Angola, Cape Verde, Guinea-Bissau, Mozambique or São Tomé and Príncipe is that it precludes the national courts and practitioners from dealing with arbitration more regularly. However, it is hoped that the growing use of domestic arbitration, and of the arbitral institutions that each country has been setting up, will balance this out.

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Cultural Considerations in Advocacy: Continental Europe

Torsten Lörcher[1]

Introduction

When one hears the word 'advocacy', the first image that is most likely to come to the mind of many people is that of a skilled lawyer interrogating a person in the witness box. Alternatively, one might think of a lawyer giving an eloquent and fierce closing statement, at the end of which you would simply have no choice but to find in favour of the lawyer's client.

In particular, the cross-examination of a witness is highly unlikely to occur in civil law state court proceedings[2] and dramatic closing statements also tend to be the exception rather than the rule. This is largely due to the fact that in civil law tradition, it is not the lawyer who is in the driving seat – the judge is in charge regarding the course and conduct of the proceedings. The lawyer's task, on the other hand, is to present the client's case adequately within this framework.

However, this difference in roles does not mean that advocacy requires fewer skills in civil law proceedings than in common law proceedings. Rather, acting as a lawyer in civil law proceedings requires its own set of advocacy skills, which focus on the inquisitorial nature of the proceedings. On the one hand, a skilled civil lawyer tries to anticipate the aspects the judge is most likely to raise and deals with these points when presenting the case. On the other, the civil lawyer must accept that it is not always possible to foresee how a judge will conduct the proceedings. Consequently, a decisive skill for a civil law advocate is the ability to react swiftly and adapt the presentation of a case to the views expressed by the judge during the proceedings and the changes of circumstances that might arise in the hearing.

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2 Mekat, 'Cross Examination: Das Kreuzverhör in der deutschen Schiedsverfahrenspraxis', *SchiedsVZ* 2017, 119.

Although international arbitration has developed its own particular rules, the civil law principles for litigation in national courts may still influence the style in which both arbitrators and counsel with a civil law background will conduct arbitral proceedings, namely if they and the parties in such an arbitration share this background. Therefore, this chapter addresses some of the key features of continental civil procedure and how it affects advocacy. In a further step, there is an assessment of whether and how much these principles have an effect on civil law arbitration proceedings.

Advocacy in continental court proceedings

As a characterisation of the differences in procedure between common law and civil law jurisdictions, common law proceedings are often described as being of an 'adversarial' nature whereas civil law proceedings are supposedly 'inquisitorial'. Under common law, the parties' counsel are the main actors, particularly when it comes to the taking of evidence. The judge's task is confined to acting as an umpire in the fact-finding process by monitoring the oral arguments and witness examinations, and guaranteeing compliance with certain procedural rules.[3] In contrast to this, the judge takes a more prominent role in civil law proceedings. In particular, it is the judge who is in charge of the taking of evidence. This is well illustrated by the continental approach to the handling of witnesses and experts. Other important traditions of continental European court proceedings that will affect the style in which a case is presented are the applicable standard of proof, the evidential value the court places on different types of evidence and the role of the 'truth' in the proceedings.

Witnesses

One of the most significant differences in approach between common law and civil law systems relating to the handling of witnesses are the principles governing witness preparation and the hearing of a witness. While they have been bridged to a large extent in international arbitration by converging practices, they do have an important role in state court proceedings.

Examination of witnesses

As pointed out in the introductory remarks, in civil law systems the judge has a primary role in directing the proceedings. The predominant role of the judge in continental European civil proceedings becomes particularly obvious when it comes to examining witnesses. As a general rule, the questioning of witnesses is led by the judge, who will have read the submissions of the parties in advance of the hearing so as to prepare all the relevant questions to be put to each witness and who will be fully prepared at the hearing.[4] The judge will primarily address open and non-leading questions that focus on those contentious issues for which the witness was called,[5] and that the judge finds relevant for the

3 Elsing, 'Procedural Efficiency in International Arbitration: Choosing the Best of Both Legal Worlds', *SchiedsVZ* 2011, 114, p. 117; Harbst, *A Counsel's Guide to Examining and Preparing Witnesses in International Arbitration*, 2015, p. 6; Waincymer, *Procedure and Evidence in International Arbitration*, 2012, p. 42.

4 Elsing/Townsend, 'Bridging the Common Law Civil Law Divide in Arbitration', *Arbitration International*, Vol. 18 (2002), No. 1, 59, p. 62.

5 Harbst, *A Counsel's Guide to Examining and Preparing Witnesses in International Arbitration*, 2015, p. 11.

determination of the dispute at hand. In contrast, the role of the lawyers is more limited. They may only ask questions when the judge has finished his or her examination. In some civil law countries, such as Germany, parties' counsel have the right to address those additional questions directly to the witness. In parts of continental Europe where civil procedure rules are even stricter in this regard, such as in France, counsel may only forward their own questions to the judge, who will ask them himself or herself to avoid any direct confrontation between counsel and a witness. However, if the judge is well prepared, additional questions by counsel may not be needed to retrieve all relevant information from the witness and the lawyers may even decide to forego further questioning. If the parties' counsel still insist on their own examination, they will have to respect the limits of permissible questions. They are therefore advised not to ask leading or repetitive questions and not to focus on non-contentious issues, as this type of questioning will mostly be disallowed or cut off by the judge.[6]

The passive and more observational role of civil law counsel during the hearing of a witness as described above is one of the most controversial issues in the debate between different litigation cultures, especially when compared to the common law practice in which the parties' lawyers are primarily responsible for conducting the questioning of a witness through direct or cross-examination.[7] However, there are comprehensible reasons why the civil law tradition takes a different approach from the common law-style adversarial confrontation of a witness. The arguments put forward are that a neutral person appears better suited to examine a witness because the questions themselves, and in particular the way they are addressed, are not influenced by party interests.[8] In addition, the civil law approach entails a focus on providing additional information to the court. In contrast, the purpose of cross-examination is not necessarily aimed at providing information but can rather be designed to draw the consciousness of the court to the arguments the common lawyer wishes to make.[9] However, continental lawyers and judges often consider putting words into the mouth of a witness through leading questions to be of limited value.[10] In times where court, and in particular arbitral, proceedings are faced with criticism regarding increasing costs and a lack of efficiency, this aspect will – at least when parties from civil law jurisdictions are involved – remain important in the future of advocacy in international arbitration.

Preparation of witnesses

Not only the examination of witnesses but also the preparation of their oral testimony prior to the hearing has been a source of controversy between different legal systems. In this respect, it is not possible to establish a consistent civil law culture with respect to the legitimacy of preparing a witness before his or her testimony in court; looking at the differences between US and English law in this regard, the same is true for the common law world.

6 ibid., at p. 12.

7 Mekat, 'Cross Examination: Das Kreuzverhör in der deutschen Schiedsverfahrenspraxis', *SchiedsVZ* 2017, 119.

8 Harbst, *A Counsel's Guide to Examining and Preparing Witnesses in International Arbitration*, 2015, p. 6.

9 Cairns, 'The Premises of Witness Questioning in International Arbitration', in Menaker (ed.), *International Arbitration and the Rule of Law: Contribution and Conformity*, 2017, p. 306.

10 ibid., at p. 313.

Avoid open questions

I have noticed some inexperienced advocates asking open questions in cross-examination – don't do it. You should put your case politely but firmly. Even if the witness disagrees with you, hope that the tribunal will accept your version of events. If you ask open questions, there is a much greater risk of getting answers that you really don't want or need.

– Ian Hunter QC, Essex Court Chambers

Whether and to what extent witness preparation by counsel is legally permissible varies widely between the different continental European legal systems. The general assertion that civil law systems on the whole do not permit preparation of witnesses is not correct. Although this is true for countries such as Italy, Belgium, Switzerland and France, where the practice is forbidden, in other civil law countries, such as the Netherlands, Sweden and Austria, counsel is actually allowed to approach a witness before a hearing. In Germany, no statutory provisions expressly prohibit witness preparation before a hearing, which is why it is argued that counsel can question a witness prior to his or her testimony as long as he or she is not induced to give a false statement.[11] Yet even where witness preparation is not prohibited, there is no uniform culture with regard to the methods used in practice as they differ across the continental civil law systems. Most European lawyers will tend to opt for witness familiarisation aimed at explaining the theory, practice and procedure of giving evidence.[12] On the other hand, content-specific witness training involving discussions on the subject matter[13] are less customary. Witness preparation involving mock examinations – a common practice in the US legal system – are even rarer and more unusual.[14]

Expert witnesses

In line with the typical continental notion that the judge is the master of the taking of evidence, expert witnesses are predominantly appointed by the court.[15] In the civil law tradition, the purpose for calling in experts is seen as assisting the court to understand a particular issue that requires certain expertise. The parties will usually have the opportunity to question and refute the expert's findings, for example, by offering their own expert's opinion to the court; such experts are retained by the respective party and, in contrast to common law proceedings, they do not owe a particular duty to the court. The corresponding expert reports will therefore be considered as part of the respective party's

11 Schlosser, 'Verfahrensrechtliche und berufsrechtliche Zulässigkeit der Zeugenvorbereitung', *SchiedsVZ* 2004, 225, p. 228.

12 Harbst, *A Counsel's Guide to Examining and Preparing Witnesses in International Arbitration*, 2015, p. 176; Bertke/Schroeder, 'Grenzen der Zeugenvorbereitung im staatlichen Zivilprozess und im Schiedsverfahren', *SchiedsVZ* 2014, 80, p. 82 et seq.

13 Harbst, *A Counsel's Guide to Examining and Preparing Witnesses in International Arbitration*, 2015, p. 175.

14 Blackaby, 'Witness Preparation – A Key to Effective Advocacy in International Arbitration', in van den Berg (ed.), *Arbitration Advocacy in Changing Times*, 2011, p. 123.

15 Waincymer, 'Advocacy Training for International Commercial and Investment Arbitration', in Geisinger/Tattevin (eds.), *Advocacy in International Commercial Arbitration*, ASA Special Series No. 36, 2013, p. 61.

submissions and not as some kind of neutral evidence, meaning that the court will not place more weight on them just because the party has obtained its information from an expert.[16] Frequently, courts will follow the findings of the expert it has appointed and use them as the foundation of its decision, provided the court considers the expert's findings to be convincing.[17]

The reasoning behind this approach is that court-appointed experts are deemed to be more neutral and, thus, their findings more reliable, whereas party-appointed experts are considered more likely to let the respective party's interests influence their work. Even leaving aside the risk of bias, there is the issue that a party will often be able to find an expert to support its side of the case. In support of the civil law approach regarding experts, it is usually put forward that by letting the court appoint the expert, a battle between parties appointing experts and so-called 'shopping for experts' is avoided.[18]

Standard of proof

Another subtle yet potentially crucial difference between civil proceedings in common law and continental jurisdictions is the applicable standard of proof and the threshold that needs to be met to enable the court to render a decision in favour of the party bearing the burden of proof.

Although approaches to the standard of proof differ to some extent within continental Europe, the civil law tradition generally focuses on the inner conviction of the judge when assessing whether the burden of proof has been discharged.[19] German law, for example, stipulates that the judge needs to be 'convinced' of the truth of the party's statement. In that regard, while a degree of conviction bordering on certainty is not necessary, the judge must be sure – as the German Federal Court of Justice puts it – to a practically viable degree of certainty that silences doubts without eliminating them entirely.[20] Similarly, French and Belgian law stipulate that to satisfy the burden of proof, the party needs to establish the existence of a probability or likelihood that is sufficient to convince the judge.[21]

In common law, the doctrine of 'preponderance of evidence' (e.g., the United Kingdom and the United States) or 'balance of probabilities' (e.g., Canada and Australia) applies in civil proceedings. According to this doctrine, the standard of proof is discharged if the fact sought to be proved is more likely true than not.[22] Consequently, and in contrast to the

16 Elsing, 'Procedural Efficiency in International Arbitration: Choosing the Best of Both Legal Worlds', *SchiedsVZ* 2011, 114, p. 123.

17 Elsing/Townsend, 'Bridging the Common Law Civil Law Divide in Arbitration', *Arbitration International*, Vol. 18 (2002), No. 1, 59, p. 63.

18 Waincymer, *Procedure and Evidence in International Arbitration*, 2012, p. 932; Elsing, 'Procedural Efficiency in International Arbitration: Choosing the Best of Both Legal Worlds', *SchiedsVZ* 2011, 114, p. 122.

19 Smith/Nadeau-Séguin, 'The Illusive Standard of Proof in International Commercial Arbitration', in van den Berg (ed.), *Legitimacy: Myths, Realities, Challenges*, 2015, p. 141.

20 German Federal Court of Justice, NJW 1993, 935, p. 937; German Federal Court of Justice, NJW 2004, 777, p. 778.

21 Smith/Nadeau-Séguin, 'The Illusive Standard of Proof in International Commercial Arbitration', in van den Berg (ed.), *Legitimacy: Myths, Realities, Challenges,* 2015, p. 141.

22 ibid., at p. 137 et seq.

civil law tradition, common law seeks to apply an objective standard of persuasion.[23] When trying to put this standard into numbers, one could say that as soon as the likelihood has reached 51 per cent, the burden of proof is discharged. In comparison, a mere 51 per cent conviction would not be considered sufficient to silence doubts without eliminating them entirely as required under German law, for example.

Therefore, it seems that civil law applies a stricter standard and, consequently, it is more difficult for a claimant to convince a continental court of law than a common law court. This also means that counsel must be capable of adapting its form of reasoning to the standard of proof required in continental European litigation. The presentation of the case before a civil law judge generally demands more elaborate and detailed arguments as the lawyer must convince the judge to a viable degree of certainty. In common law proceedings on the other hand, lawyers might content themselves with the presentation of a plausible and consistent argument that will suffice, in many cases, to establish a predominant likelihood to the judge.

However, in certain civil actions where important rights are at issue, common law also requires a heightened standard of proof whereby the evidence needs to be 'clear and convincing' (United States) or 'more cogent' than usual (United Kingdom).[24] This standard applies in cases where one party seeks to prove wilful, wrongful and unlawful acts, fraud or undue influence, or gross negligence.

Evidential value

When it comes to assessing the evidence, continental courts – unlike common law courts – traditionally tend to place greater weight on documentary evidence than on witnesses.[25]

The emphasis that common law places on oral testimony is a principle originally born out of necessity.[26] The roots of this tradition go back to the Middle Ages, when the jury system was introduced in England.[27] At the time, many jurors, who were mostly common men, could not read or write, so everything had to be presented to the jury orally.[28] Even written evidence was introduced to the jury by a witness who read the document out loud, which explains the importance of witness examinations prevailing today.[29] By contrast, in the civil law tradition, the judge will be literate and will have studied law,[30] with the

23 ibid., at p. 142.

24 ibid., at p. 139 et seq.

25 Harbst, *A Counsel's Guide to Examining and Preparing Witnesses in International Arbitration*, 2015, p. 9.

26 Cairns, 'The Premises of Witness Questioning in International Arbitration', in Menaker (ed.), *International Arbitration and the Rule of Law: Contribution and Conformity*, 2017, p. 307.

27 Demeyere, 'The Search for the 'Truth': Rendering Evidence under Common Law and Civil Law', *Schieds VZ* 2003, 247, p. 249.

28 ibid.; see also Lord Wilberforce, 'Written Briefs and Oral Advocacy', *Arbitration International*, Vol. 5 (1989), No. 4, 348.

29 Cairns, 'The Premises of Witness Questioning in International Arbitration', in Menaker (ed.), *International Arbitration and the Rule of Law: Contribution and Conformity*, 2017, p. 307; Lord Wilberforce, 'Written Briefs and Oral Advocacy', *Arbitration International*, Vol. 5 (1989) No. 4, 348.

30 Waincymer, 'Advocacy Training for International Commercial and Investment Arbitration', in Geisinger/Tattevin (eds.), *Advocacy in International Commercial Arbitration*, ASA Special Series No. 36, 2013, p. 60.

consequence that written evidence did not need a preliminary introduction into the proceedings by the testimony of a live witness.

In line with this traditional approach, a court in a civil law jurisdiction, as a rule of default, will consider a document to be self-authenticating when it is submitted by a party – which is usually done well in advance of the oral hearing.[31] Another reason why civil law judges tend to attribute a higher probative value to documents is their scepticism regarding the reliability of witness evidence, the court's ability to correctly determine the truthfulness of a person's statement and the risk of witness testimony being 'tainted' by bias.[32] The latter aspect particularly applies if the witness is somehow connected to either of the parties. Additionally, there is the simple truth that the human memory is prone to cognitive imperfections and deception.

The common law tradition also recognises these potential flaws in witness testimonies, yet it has ventured to conquer them by employing cross-examination.[33] The civil law system resolves this problem by placing more emphasis on other available and more 'neutral' sources of evidence, namely contemporary documents.

While the tendency to prefer documents over witness statements as evidence is found in every civil law country, there are quite significant differences on a national level as to the extent of this preference within continental Europe. In Belgium, for example, courts almost never admit witness evidence in commercial disputes,[34] whereas in Germany, witness statements are quite commonly obtained, albeit they may not have a crucial role in the court's decision-making process.

The pursuit of truth

When analysing the pursuit of truth in continental court proceedings, one needs to bear in mind the purpose of such proceedings. From a continental European judge's point of view, his or her primary task in disputes relating to civil law claims is to resolve the dispute that is before the court. The court does not consider itself obliged and competent to determine all the relevant facts before rendering its decision. Instead, its judgment will be based on the 'relative truth' or 'procedural truth'.[35] In line with this approach is the principle of adduction of evidence that prevails in civil procedure, which means that the court will only take into account those facts of the case that have actually been presented by the parties. If a fact has not been introduced by a party, the court is barred from considering it and may, in principle, not initiate any further taking of evidence – despite the otherwise inquisitorial nature of civil law proceedings. This rule applies even if the court considers that there is more to the case than the parties have so far provided.[36] Thus, civil courts are willing to accept that

31 Elsing/Townsend, 'Bridging the Common Law Civil Law Divide in Arbitration', *Arbitration International* Vol. 18 (2002), No. 1, 59, p. 61.

32 Waincymer, 'Advocacy Training for International Commercial and Investment Arbitration', in Geisinger/Tattevin (eds.), *Advocacy in International Commercial Arbitration*, ASA Special Series No. 36, 2013, p. 60.

33 Harbst, *A Counsel's Guide to Examining and Preparing Witnesses in International Arbitration*, 2015, p. 9.

34 Born, *International Commercial Arbitration*, 2nd ed. 2014, p. 2, 205.

35 El Ahdab/Bouchenaki, 'Discovery in International Arbitration: A Foreign Creature for Civil Lawyers?', in van den Berg (ed.), *Arbitration Advocacy in Changing Times*, 2011, p. 85.

36 Harbst, *A Counsel's Guide to Examining and Preparing Witnesses in International Arbitration*, 2015, p. 7.

Be ready to champion discovery and the IBA rules

In a globalised and simultaneously fragmented world, attention must still be drawn to cultural differences. There remain certain practices, tendencies, preferences and values, both social and legal, that differentiate advocacy in one jurisdiction from another. Although the dividing lines between common law and civil law countries are increasingly becoming blurred in international arbitration, as participants become more experienced and sophisticated, the contrasting points of view nonetheless continue to influence advocacy with respect to the elicitation and communication of evidence and the questioning of witnesses. With the civil law background of most countries in continental Europe, parties are generally not under an obligation to disclose documents. Though some jurisdictions in continental Europe provide for requests for production of documents, whereby one party can ask the other to produce internal documents, the procedure is of very limited scope and, some may say, of little use. In any event, the procedure bears no comparison with the expansive system available under some common law jurisdictions, in particular the United States. While the IBA Rules on the Taking of Evidence in International Arbitration now embody a document production regime as an acceptable practice, it should not be overlooked that parties from civil law jurisdictions that are not familiar with an obligation to disclose have difficulty accepting the idea of being compelled to provide the opposing party with documents that are prejudicial or potentially damaging. To create a level playing field, counsel have to educate their clients early on and convince them of the importance with which the obligation to produce must be treated, as well as the benefits of complying.

– Georg von Segesser, von Segesser Law Offices

their decision might not be based on the actual truth and may thus not be 'correct'.[37] The continental approach is the result of a balancing of interests in which one party's interest in obtaining all relevant facts is weighed against another party's interest in maintaining its privacy as well as the costs accompanying a fully fledged exploration of the facts.[38]

Accordingly, there is less likelihood in civil law of obtaining evidence that is in the possession of the other or a third party, the key word in this regard being 'discovery' or 'disclosure of documents' or, rather, the lack thereof. This does not mean that the search for the truth has no role in civil law proceedings. For example, courts in continental Europe are prohibited from taking into account evidently false or even contradictory statements made by a party. However, obtaining all the information relevant to the case is neither required nor a top priority before rendering a decision. Thus, civil law systems have refrained from vesting the parties of civil proceedings with a broad right to seek evidence and information it does not possess.[39] Only in limited cases may one party request the other to hand

37 Wirth, 'Ihr Zeuge, Herr Rechtsanwalt! – Weshalb Civil-Law-Schiedsrichter Common-Law-Verfahrensrecht anwenden', *SchiedsVZ* 2003, 9, p. 10.

38 El Ahdab/Bouchenaki, 'Discovery in International Arbitration: A Foreign Creature for Civil Lawyers?', in van den Berg (ed.), *Arbitration Advocacy in Changing Times*, 2011, p. 85 et seq.

39 ibid., at p. 85.

Smoking guns are not a myth

Document production requests, these days sometimes resulting in Redfern schedules of even 100 pages or more, are at the same time the bane of opposing parties and tribunals alike, but also the potential path to the 'smoking gun'. I recall in particular a contractual case between the parastatal company of an EU Member State as claimant and a state applying for EU membership as respondent. The claimant's counsel researched the index to the archives of the EC relating to that application and thought they had identified a document, though they were unable to examine the document itself, that might be that 'smoking gun'. Notwithstanding repeated and ingenious efforts on the part of the respondent to avoid disclosure, the tribunal, on which I was a co-arbitrator, succeeded in compelling the respondent to disgorge the document itself. Bingo! It was a letter to the European Commission (EC) from the respondent government, in effect begging the EC not to impose a certain condition on the respondent, since (I paraphrase with poetic licence) 'If you do that, it will put us in breach of our contract with the claimant EU Member State's parastatal!' The European Union had since imposed that condition, hence the respondent had confessed. So, don't be afraid of making precisely targeted requests for production of documents. You owe it to your client, even if the process drives your opponent and the tribunal crazy with work.

– Charles N Brower, Twenty Essex Chambers

over documents that are in its possession. Under German law, for example, such a request is only successful if a party is obliged to do so under substantive law[40] or if the opposing party has referred to a document in the proceedings as evidence without submitting it to the court.[41] Alternatively, the court may order a party to produce documents on its own initiative if either party has made reference to a particular document.[42] French and Italian civil procedural laws are even stricter in this regard.[43]

In contrast to this, common law considers that the main goal of court proceedings is to determine the truth, that is the 'absolute truth'.[44] One reason for the difference in approaches is rooted in the tradition of jury trials in the common law system. The jurors were the adjudicators of the facts, but had no legal background. They were therefore assumed to be unable to see through the trickeries and pleadings of the lawyers appearing before them.[45] The quest for the truth is the dominant purpose of common law proceedings and it is considered to prevail over other potential interests involved, such as a party's right to maintain its privacy, the proportionality of the evidentiary methods and the protection of

40 German Code of Civil Procedure, Section 422.

41 ibid., Section 423.

42 ibid., Section 142, para. 1.

43 Emanuele/Molfa/Jedrey, *Evidence in International Arbitration: The Italian Perspective and Beyond*, 2016, p. 62 fn. 2.

44 Wirth, 'Ihr Zeuge, Herr Rechtsanwalt! – Weshalb Civil-Law-Schiedsrichter Common-Law-Verfahrensrecht anwenden', *SchiedsVZ* 2003, 9, p. 10.

45 El Ahdab/Bouchenaki, 'Discovery in International Arbitration: A Foreign Creature for Civil Lawyers?', in van den Berg (ed.), *Arbitration Advocacy in Changing Times*, 2011, p. 72.

Cross-examination mistakes to avoid, as a civil lawyer

Under the inquisitorial system applied in most civil law countries, counsel lack the opportunity to develop skills for conducting an efficient and professionally structured cross-examination. So, what do they do? Either they try to go by the book and concentrate on closed propositions limiting the witness to answering 'yes' or 'no', or they ask the witness open-ended questions that allow him or her to comment at random on whatever they consider to be important from their perspective. Neither of those alternatives really produce what the tribunal would like to hear from the witnesses. While the style of the American litigation lawyer used to advocate before lay juries in the United States may be considered by the tribunal as too aggressive and long-winded, too limited a focus on getting the witness to respond with 'yes' or 'no' may also not be very helpful. Arbitrators, especially those from a background with an inquisitorial approach, are interested in why and when a witness did what he or she did. In addition, in civil law jurisdictions, written evidence is often considered more reliable than oral evidence. However, this does not require counsel to ask a witness to read a document or to confirm that what has been read to him or her by counsel is correct. Of course, certain questions need an introduction or require a witness to be guided through a number of documents, but very often arbitrators and witnesses are taken through a string of documentary evidence that could more efficiently be summarised or incorporated in a short and straight question.

– Georg von Segesser, von Segesser Law Offices

personal data.[46] Accordingly, common law permits both parties to request the production of all relevant documents for inspection, including those that are unfavourable to the party, so as to bring all relevant evidence to light.[47]

In international arbitration, this practice often leads to lengthy and cost-intensive proceedings. It is not uncommon for proceedings on the issue of document production alone to become a time-consuming intermediate dispute. The procedure is often very labour intensive for both the submitting and the receiving party that has to analyse the documents.[48] It is obvious that there is a tension between these procedures and the aim to conduct arbitral proceedings quickly and efficiently.

Advocacy in international arbitration in continental Europe

One of the crucial advantages of arbitration compared to state court proceedings is that it provides the parties with a significant degree of autonomy and flexibility in resolving their disputes. Arbitration allows parties and arbitral tribunals to tailor the procedure to the specific situation, the parties' expectations and the individual circumstances of the dispute. In fact, arbitration allows the parties to choose and apply the most suitable features from

46 ibid., at p. 86.

47 Brower/Sharpe, 'Determining the Extent of Discovery and Dealing with Requests for Discovery: Perspectives from the Common Law', in Newman/Hill (eds.), *The Leading Arbitrators' Guide to International Arbitration*, 3rd ed. 2014, p. 594.

48 Schardt, 'Neue Regelungen der DIS-Schiedsgerichtsordnung zur Steigerung der Verfahrenseffizienz', *SchiedsVZ* 2019, 28, p. 32.

Advice for civil lawyers on how to re-direct

Civil lawyers are increasingly used to the practice of interrogating witnesses in international arbitration. However, less experienced counsel face huge difficulties with re-examination. Strangely enough, many of them do not read carefully the instructions given by the arbitrators in this regard. One of them is that re-examination is limited to issues raised in cross-examination. Too many counsel use it as an opportunity to ask questions that they could not put in direct examination because not enough time was available or they just forgot.

It may work if the opposing counsel does not pay attention, since the arbitrators will not always intervene. Many arbitrators think that their role is not to help incompetent counsel. But most counsel are good and experienced, and will make a justified objection that will be sustained. The result is that the witness is embarrassed, loses the confidence that he or she was recovering after a damaging cross-examination and, in any case, precious time has been wasted when a chess-clock system is applied to the time sharing.

Don't be De Gaulle

To conduct an efficient re-direct examination, counsel should not initiate a line of questions without mentioning that the issue was discussed during the cross-examination, provided it is true. But no counsel should ever try to imitate General de Gaulle in his press conferences, when, to make an important statement, he would simply pretend he had been asked a completely different question and give the answer he wanted to that.

Use the transcript

When the cross-examination has lasted many hours and the issue is very discrete, counsel should be able to refer to precise lines of the transcript in case the opposing counsel suggests that it never asked questions relating to that issue; some counsel do that just to obstruct the re-direct examination, counting on the passivity or the poor memory of the arbitrators. That is a dangerous game because a good memory is one of the qualities of a good arbitrator. Yet, it is taking a chance to overestimate it and nothing is easier than asking a junior associate to take note of the time when embarrassing or imprecise answers are given by the witness during the cross-examination.

Leading questions

Not to ask leading questions is another rule of the game that civil lawyers have difficulty assimilating. Although it applies to direct examination as well, it is in re-direct that the rule is often breached because re-direct cannot be prepared in advance. A question that contains its answer, such as 'When did you inform the seller of the defect of the good?' to obtain evidence that the seller was duly informed – a fact that the witness had forgotten in cross-examination – is not only impermissible, it is inefficient, as the arbitrators will not give much weight to an answer that was put in the witness's mouth. This explains why experienced counsel sometimes refrain from objecting to leading questions.

– Yves Derains, Derains & Gharavi

both the civil and the common law systems for each particular arbitration. An international arbitration between a German or a French party on the one hand and a party from the Netherlands or Switzerland on the other may look quite different from an arbitration between a US and an English party in respect of the above-mentioned features. The parties, often with the arbitral tribunal, can tailor and adapt the procedure to the individual expectations and needs of the particular dispute. Assuming that there is one 'gold standard' for how an international arbitration should always and without exception be conducted would deprive arbitration of one of its main advantages – its flexibility and adaptability.

Because of the freedom granted to the parties, a key issue in every arbitration is the establishment of the procedure for the individual case. While the institutional and ad hoc rules provide the framework, they are often deliberately silent on many procedural aspects. Thus, the needs and expectations of the parties decisively influence the structure of any individual arbitration. These needs and expectations should be determined as soon as possible, at the latest after the constitution of the arbitral tribunal. In practice, this is often done by way of a case management conference where the parties can communicate and exchange their ideas with each other and the tribunal.

As has been mentioned, there is no uniform or gold standard when conducting international arbitration proceedings. This is because whenever parties come from different jurisdictions, their expectations and experiences will differ; a fact that can be accommodated by adapting the arbitral proceedings accordingly. This applies in an arbitration between common law parties, as well as in a dispute between two parties with a civil law background. By way of example, the International Bar Association's Rules on the Taking of Evidence in International Arbitration (the IBA Rules) have rightly become widely accepted and used in international arbitration.[49] They represent a compromise and an attempt to bridge the gap between the differences in civil law and common law jurisdictions so as to prepare a level playing field for the parties in a dispute that are from these different legal backgrounds.[50] While sometimes the parties to an arbitration agree on the binding applicability of the IBA Rules, they are more frequently agreed upon as guidelines for the taking of evidence in an international arbitration, or in disputes between parties from civil law jurisdictions.

However, there is no reason to apply them blindly to any international arbitration. To a large extent, it is fair to say that the IBA Rules introduce common law elements into an arbitration.[51] It may well be that, in a dispute between civil law parties, the parties happily choose to rely on the IBA Rules because they are familiar with them or have a particular interest, for example, in document production by the respective other party.

Additionally, as of December 2018, the Rules on the Efficient Conduct of Proceedings in International Arbitration (the Prague Rules) provide a new set of rules for the taking of evidence in international arbitration. The primary goal of the Prague Rules is to encourage

49 Rombach/Shalbanava, 'The Prague Rules: A New Era of Procedure in Arbitration or Much Ado about Nothing?', *SchiedsVZ* 2019, 53, p. 54.

50 Berger, 'Common Law vs. Civil Law in International Arbitration: The Beginning or the End?', *Journal of International Arbitration*, Vol. 36 (2019), Issue 3, 295, p. 302 et seq; Rombach/Shalbanava, 'The Prague Rules: A New Era of Procedure in Arbitration or Much Ado about Nothing?', *SchiedsVZ* 2019, 53, p. 54.

51 Henriques, *The Prague Rules: Competitor, Alternative or Addition to the IBA Rules on the Taking of Evidence in International Arbitration?*, ASA Bulletin, Vol. 36 (2018), No. 2, 351, p. 354; Rombach/Shalbanava, 'The Prague Rules: A New Era of Procedure in Arbitration or Much Ado about Nothing?', *SchiedsVZ* 2019, 53, p. 54.

arbitral tribunals to take greater control of proceedings and to make use of the powers vested in them with the aim of reducing the time and cost of an arbitration.[52] The proactive role of the tribunal envisaged by the Prague Rules reflects the already described approach applied in civil law state court proceedings as opposed to the approach taken in common law countries.[53]

According to the principle of party autonomy, the parties to an arbitration are free to agree on the procedure that best represents their interests and is suitable for the specific case at hand. Especially for parties with a civil law background who seek a more active tribunal, the Prague Rules may constitute an alternative to the IBA Rules.

Another frequent feature in arbitral proceedings between civil law parties is written witness statements, which are helpful in preparation of the taking of evidence. Further, the parties in such proceedings may agree, with regard to the taking of witness evidence, that, instead of the tribunal, the parties are to be in the driving seat.

However, these principles should not be applied without due consideration. It is a rather essential part of the advocacy skills of any arbitration practitioner, in particular of those with a civil law background, to be aware of the differences between, and the pros and cons of, the different systems. It is also essential to be fully familiar with the skills required under the different systems (including the proper conduct of document production, the preparation of written witness statements and, last but not least, the examination of witnesses and experts, both civil and common law-style) as this is the key to tailoring the individual proceedings to the expectations and interests of the party represented while taking into account the individual circumstances of the case.

Conclusion

There is no one-size-fits-all format for international arbitration proceedings in a dispute with parties from different jurisdictions. On the contrary, it is one of the crucial advantages of international arbitration that it is possible to adapt the conduct of the proceedings to the parties' needs and expectations. In terms of advocacy skills, it is therefore essential that legal counsel and arbitrators alike are able to adapt proceedings to the individual case at hand, which may well include a combination of elements from both civil law and common law, if suitable in the individual case. In other words, a skilled advocate in international arbitration is one who can engage in and efficiently use the procedural mechanisms of both worlds. Procedural flexibility is one of international arbitration's most attractive features. Accordingly, versatility is one of the most important advocacy skills for practitioners in this field.

52 Rombach/Shalbanava, 'The Prague Rules: A New Era of Procedure in Arbitration or Much Ado about Nothing?', *SchiedsVZ* 2019, 53, p. 55; Henriques, *The Prague Rules: Competitor, Alternative or Addition to the IBA Rules on the Taking of Evidence in International Arbitration?*, ASA Bulletin, Volume 36 (2018), No. 2, pp. 351 and 355 et seq.

53 Rombach/Shalbanava, 'The Prague Rules: A New Era of Procedure in Arbitration or Much Ado about Nothing?', *SchiedsVZ* 2019, 53, p. 55.

21

Cultural Considerations in Advocacy: Russia and Eastern Europe

Anna Grishchenkova[1]

If I were asked to select three top tips for advocacy in Russia and eastern Europe, I would choose the following:

- using storytelling;
- considering the influence of the first impression; and
- remembering the 'IKEA' effect.

In short, these can be used – albeit with some modifications – in arbitration in any jurisdiction. I begin by commenting on each of these tips in more detail and then touch on some specifics for arbitration in Russia and eastern Europe.[2]

Use storytelling

In my view, storytelling is one of the most underestimated tools of advocacy, which, if used correctly, can help you gain a competitive advantage over your adversaries.

By storytelling I mean the skill of adequately preparing and then getting across to your audience the case theory supported by relevant documents.

Numerous researches confirm the benefits of storytelling:

- A well-told story results in both the listener's and the speaker's brain being activated in the same spheres – in other words, the brains of the listener and the speaker work in the same manner – and this is exactly how a shared narrative is born.
- Stories facilitate a better understanding and make it easier to memorise large quantities of information.

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2 This chapter describes the specifics of arbitration in Russia, Ukraine and Belarus; some of the features described may also be present in arbitration in other eastern European countries.

Usually words (legal concepts in particular) are perceived by the left hemisphere of the listener's brain and are analysed logically. Moreover, in general, people can perceive and remember no more than between five and seven pieces of new information.

Conversely, stories that create pictures in the listener's mind activate the right hemisphere of the brain, which in general is in charge of creativity and the emotional perception of events. As a result, a 'virtual' picture of events is created and fixed in the listener's mind. Different pieces of information united by one story can be seen as a single piece of information and, therefore, can be more easily remembered.

Further information is also perceived more easily and inserted as an additional piece in the existing picture.

The effect of confirmation bias[3] leads to information that fits into the story being accepted and information that does not fit being rejected and ignored.

Experienced lawyers recommend verifying a story or a case theory using 'head, heart and gut'[4] and I fully agree with this advice.

Verifying using the head

Normally, lawyers do not experience any problems in this regard. After they have been instructed in a case, they start by analysing relevant laws, court practice, legal doctrine and then construct their legal theory for the case.

However, in my experience, dispute resolution lawyers' desire to win is often so strong and prevailing that after they make a determination as to the legal theory in the case, they tend to be susceptible to a certain level of self-deception, which can lead to a belief that any existing weak points are not weak points at all, and that strong arguments are much stronger than they actually are.

For self-verification, I always recommend making notes of the first impressions formed after examination of the files so as not to lose sight of an 'objective' reality in the future. It may also be useful to draw up a decision tree during the initial stage so that you are able to understand easily which elements of your legal theory are supported by evidence and which are not, and this will allow you to make a realistic assessment of the situation.

Verifying using the heart

We are all human beings and, of course, arbitrators are no exception. Consequently we seek to make fair judgements, or at least we wish to believe that the judgements we make are fair.

Many arbitrators (particularly those in civil law jurisdictions where more weight is given to enacted laws rather than evaluating a person's conduct in terms of good faith or bad faith) would never openly admit that they look at not only laws and legal propositions, but also at who is right and who is wrong in a given case, who the 'good guy' is and who the 'bad guy' is. However, as my practical experience has shown, our subconscious mind will make an evaluation of the parties and their respective conduct in this way, almost automatically, and this can affect whether we find in favour of one party or another.

3 A tendency to search for or interpret information in a way that confirms one's preconceptions.

4 See, e.g., Doak Bishop and Edward G Kehoe (eds.), *The Art of Advocacy in International Arbitration* (Juris, 2010).

Hence, it is essential that your case theory clearly demonstrates why it is your client who is right and why justice and fairness must eventually be on his or her side.

Verifying using the gut

As one of my partners would say, this type of verification is done by answering the question: 'Do I believe in this story or do I not?'

In fact, we may justify our position from a legal standpoint, and verify it from the point of view of fairness, but arbitrators may not believe it anyway and may think that in reality everything happened in a different way.

My top tip when verifying a case theory using your gut is to read it to somebody and then listen (as patiently as you can) to that person's feedback and, potentially, their criticism. If the person finds the case theory is not realistic in terms of common sense or from a business point of view, then you will need to work on the case theory again.

It is also paramount, starting from day one of working on a case, to draw up a timeline.

This advice may appear basic and obvious. However, it is often the case that lawyers do not start to prepare a timeline until midway through arbitral proceedings or even close to the end of the proceedings, and only if requested by arbitrators. That will be the time they find out that the theory that has become a fundamental part of the case does not correspond to the actual facts, as events have developed a little differently (or probably completely differently) from what the client has told them. A regular revision of the timeline helps to prevent such situations from arising.

After your story has been verified using the head, heart and gut, it must be then be coherently reflected in all the documents and oral statements, and in your conduct, throughout the case.

First impressions matter

The power of the first impression has been widely discussed in publications covering psychology in arbitration.[5]

The gist of it is that the first impression functions as a filtering device through which a person processes further information. Research confirms that after a person arrives at a certain conclusion, he or she tends to disregard any information that contradicts the conclusion made. And, more importantly, this disregarding of information occurs subconsciously.

Thus, in a recent study, English doctors were given carefully measured doses of information relating to the state of patients' health. The doctors arrived fairly quickly at a diagnosis based on this partial information. Further information that was meant to change the diagnosis was ignored by the doctors, and they relied only on the data confirming the opinion they had formed initially.[6] The research showed that decision-making through the rejection of information that does not fit into a previously formed opinion occurred

5 *The Roles of Psychology in International Arbitration* (International Arbitration Law Library Series, Volume 40), T Cole (ed.) (Kluwer Law International, 2017).

6 P Ayton and G Helleringer, 'Bias, Vested Interests and Self-Deception in Judgment and Decision-Making' in *The Roles of Psychology in International Arbitration* (International Arbitration Law Library Series, Volume 40), T Cole (ed.) (Kluwer Law International, 2017), p. 42.

with any participants of relevant experiments regardless of their social status and occupation: gamblers, potential jurors, ordinary people, professional experts, including referees in boxing matches, auditors and sales assistants.[7]

With arbitrators, the first impression that is formed following the initial contact with the parties is based on an examination of the first documents and depends on a lawyer's conduct while preparing for a case.

It is very important to remember that one of the characteristic features of arbitration in Russia and eastern Europe is that, often, no distinction is made between a request for arbitration and a statement of claim; in other words, the first document filed in the case constitutes the statement of claim. Consequently, for those lawyers who are accustomed to developing their case and supplementing it as they analyse newly disclosed evidence, it is particularly important to remember that by the time of full disclosure of evidence and a complete statement of one's legal position, arbitrators have already formed their first impression and that will serve as the filter that influences arbitrators' subsequent perceptions and through which the arbitrators will evaluate all further documents, facts and arguments.

For this reason, those documents that are filed first and the conduct of the lawyer during the initial stages of arbitral proceedings are critically important.

Keep in mind the 'IKEA' effect

The IKEA effect is a type of cognitive bias based on the fact that a person who independently assembles a piece of furniture (for example, something obtained from the well-known furniture manufacturing company) values that item more than a piece of designer furniture; in other words, the more someone invests personal effort in doing something or in arriving at a conclusion, the more value that person places on the resulting product. It has been identified and subsequently studied by economist Dan Ariely.[8]

How is the IKEA effect manifested in a courtroom?

However arbitrators arrive at their conclusions, these conclusions are more important to them than everything they are offered by lawyers. Richard Harris wrote in the 19th century, in his book *Hints on Advocacy*: 'And here, it may be observed, there is a mode of creating an impression on the mind of a jury without in the least appearing to desire it, and which is of all others the most effective. All men are more or less vain, and every man gives himself credit for a deal of discernment. He loves to find out things for himself – to guess the answer to a riddle better than to be told it – to think he can see as far into an opaque substance as most people.'[9]

Thus, representatives of both parties may deliver brilliant speeches and propose exciting theories, all to no avail. My experience as an arbitrator shows that sometimes it becomes obvious to an arbitrator that representatives are wasting a lot of time on irrelevant arguments instead of focusing on matters that are significant from the point of view of the arbitrator. An arbitrator may have already formed preliminary conclusions in a case but has

7 ibid.

8 D Ariely, *Predictably Irrational: The Hidden Forces That Shape Our Decisions*, HarperCollins, 2009.

9 Richard Harris, *Hints on Advocacy*, Stevens and Sons, 7th Edition, 1884, p. 17.

certain questions. He or she expects to get those answers from the parties, but they are not always forthcoming.

Hence, if there is an opportunity to deliver information, or a story, in a manner whereby the arbitrators are not simply told that the answer is 'four' but rather are given an opportunity to 'add two and two together', this is likely to be very effective.

One of the ways of achieving such an effect is to show the most important documents to arbitrators in a specifically predetermined order as the proceedings evolve.

The above-mentioned tips are applicable not only to arbitration in Russia and eastern Europe but can also be used in other jurisdictions. However, the rule of thumb is to consider national and cultural differences and to take into account the personalities of particular arbitrators.

I will now move on to the cultural specifics of arbitration in Russia and eastern Europe and offer some practical tips for these.

A 'who's who' of arbitration in Russia and eastern Europe

The face of arbitration in Russia and eastern Europe is primarily formed by its main participants – arbitration institutions, the parties involved and lawyers.

Arbitration institutions

Each country has its oldest arbitral institution, and some have been in existence for more than 80 years. These institutions are proud of their history and background and are sometimes reluctant to change their established traditions. These traditions are often impossible to comprehend by reading relevant arbitration rules and extracts from cases. To be able to understand how to conduct arbitral proceedings in the most efficient manner, taking into consideration the traditions within a particular arbitration institution, it is not enough to be a counsel, one has to act as an arbitrator as well.

However, that landscape is changing. For example, new institutions have been established in Russia as a result of arbitration reform, such as the Russian Arbitration Center, and foreign arbitral institutions (such as the Hong Kong International Arbitration Centre, the Singapore International Arbitration Centre, the International Court of Arbitration of the International Chamber of Commerce and the Vienna International Arbitral Centre) have obtained special permission to act as arbitral institutions in Russia, which has changed the approach by the oldest institutions to administering cases. As a result, long-standing trends are changing and not only the younger institutions but also the more established ones are starting to apply more progressive and transparent procedures.

Nonetheless, from this point on, I shall describe the specific features of considering cases by the more established institutions, as the procedures of administering cases in the newer ones is very similar in many aspects to how cases are dealt with in other jurisdictions and therefore have fewer national specifics. Note also that most of the specifics relate to long-standing traditions and as the arbitration landscape is now changing, new traditions may be formed and the situation may change dramatically in the next few years.

Parties

The majority of arbitration cases are disputes about relatively small sums of money and are handled by in-house counsel. Frequently, it is their first dispute in international arbitration – and probably their last – and their lack of experience can affect the course of proceedings. Sometimes inexperienced parties may undertake uncommon steps or file non-standard requests, thus introducing an element of unpredictability to the proceedings. Besides, it is quite common for less experienced parties to arbitration proceedings to obtain more patronage from arbitrators.

When dealing with clients in Russia and eastern Europe, it is worth bearing in mind that they are typically not willing to pay hourly rates for arbitration but will opt instead for either a fixed fee or an hourly rate with a cap. Consequently, external counsel will need to be able to make a fairly accurate prediction at an early stage of how the dispute is likely to proceed and the scope of services to be provided.

Lawyers

There are numerous law firms (both international and national) that handle international arbitration cases. Many lawyers have degrees that have been obtained abroad, have worked in various jurisdictions and have arbitrated in different institutions and therefore have expert knowledge of and apply best practices in the area of international arbitration. However, it is vital to remember that the application of best practices depends not only on counsel but on arbitrators as well, so the task of selecting your arbitrator must be undertaken with special care.

Selecting the arbitrator

First, it is necessary to keep in mind that in some jurisdictions, parties may select their arbitrator only from those listed with a relevant institution. For instance, in the case of a dispute between Belarusian companies, an arbitrator may be selected only from the closed list of arbitrators in the International Arbitration Court with the Belarusian Chamber of Commerce and Industry.

Further, unless an arbitration agreement provides for otherwise, the chairman of the arbitration tribunal is typically appointed by the institution itself. This can significantly affect the course of the arbitration proceedings. Rather than selecting the most suitable arbitrator to chair a tribunal, institutions customarily chose an experienced arbitrator whom they trust. Thus, in one case I have dealt with, the arbitration agreement contained detailed requirements regarding the arbitrator: more than seven years' experience of dealing with M&A transactions; a partner for more than two years at a law firm recommended by law firm rankings; no conflict of interest. The co-arbitrators selected by the parties complied with these requirements, but the institution appointed a tribunal chairman who did not, since, in the opinion of the institution, the qualifications specified in the arbitration agreement applied only to wing arbitrators, not to the chairman. The parties did not challenge the chairman, but the approach adopted by the institution was taken into consideration for the drafting of arbitration clauses and the pleading of future cases.

Considering the fact that, in most cases, the parties cannot influence the selection of the chairman, choosing a wing arbitrator becomes paramount.

Arbitrators in Russia and eastern Europe may be very roughly divided into three categories (though this description is not intended to be exhaustive).

The first comprises academics and employees of various universities who have acted as arbitrators for several decades. This type of arbitrator sets great store by sticking to traditions, as well as corporate solidarity and the opinions of the secretariat of the institution. These arbitrators often enjoy asking the parties and their counsel questions designed to check their knowledge of legal theories and recent scientific trends and developments.

The second group includes practising lawyers. Considering the relative youth of the legal profession in Russia and eastern Europe (the post-Soviet era), practising lawyers are often young too. Lawyers may become arbitrators when they are quite young in terms of experience – between 30 and 50 years of age. However, the young age of arbitrators is often counterbalanced by being business-oriented and committed to best practices in the area of international arbitration.

Recently, retired judges in Russia have been allowed to act as arbitrators. However, not all former judges have sufficient experience in the area of international arbitration or knowledge of its specifics, as a result of which the former judges' style of arbitration may be less flexible and more authoritative. Further, retired judges are more willing to apply the principle of *jura novit curia* and therefore consider it possible to apply rules of law independently that are relevant to the case, even if the parties do not mention those rules of law in their pleadings.

Clearly, a lot depends on the particular arbitrator, but it is quite common for arbitrators in Russia and eastern Europe (primarily those who are more mature) to perceive themselves as the judiciary and as judges rather than as arbitrators rendering a service to the parties to resolve their dispute. Moreover, there have been heated debates in Russia as to whether arbitration is a service at all. As has been mentioned, the approach of an arbitrators may be evident, among other things, from the way they communicate with the parties. Many arbitrators refuse to give interviews at the time they are selected and refuse to communicate electronically with any of the parties involved while arbitration proceedings are pending, as they believe that, by doing so, their independence may be impeded.

Filing a claim

When filing a claim, the following national specifics must be taken into account.

First, the mandatory pre-arbitration dispute resolution procedure must be complied with. In Russia, compliance with pre-arbitration dispute resolution procedure relates to public policy and, therefore, if an arbitral award has been issued but the claimant fails to comply with the established pre-arbitration dispute resolution procedure, the award may be set aside or its recognition may be denied.

Further, in the majority of cases, arbitration rules provide that arbitration starts as soon as the statement of claim has been filed, not the request for arbitration. Consequently, a party's legal position must be well developed before filing the claim so that it is able to serve as a solid foundation for the party's position. One should take into account that some arbitrators only read the statement of claim and the statement of response and do not consider any of the various supplements and comments, and will therefore aim to gain an understanding during the oral hearing. Therefore, the statement of claim must contain all the critical information supported, if possible, by all the essential evidence available.

To ensure the availability of evidence at the apposite time, it is essential to collect all the necessary evidence and information from the client well before the arbitration proceedings begin.

It is not uncommon for clients (and not only those in Russia and eastern Europe) to provide their counsel with partial information, as they presume that the less their counsel knows, the easier it will be for them to represent their client's position

In our practice, we try to ask a client as many questions as possible right away, since these questions help to form a broad picture of the situation. Often, after answering these questions, clients recall that an important document exists about which they have forgotten.

Some of the common questions are as follows:

- What happened to each party to the dispute?
- Why did they behave in a particular way?
- What were they thinking about, and how did they feel?
- What did they know at the time?
- When the dispute arose, what alternative solutions were available to the parties?
- What did each party attempt to achieve? Why did their attempts succeed or fail?
- What was the impact on all the parties involved?
- Did anyone try to correct the situation? Successfully or unsuccessfully? Why?
- How did the situation end? Who won? Who lost?
- What prompted the initiation of the lawsuit?

Another feature is that any relief requested must be formulated quite clearly right from the start, since attempts to supplement and clarify them later on may not always be welcomed by arbitrators. Besides, after arbitrators have formed their first impression, further changes may be inadvertently ignored.

Preparation for oral proceedings

The way in which arbitral proceedings are structured are specific to the region.

In newer institutions, the procedure is similar to that in the most progressive arbitral institutions.

In older institutions following the filing of a claim, a response to it and the appointment of arbitrators, in most cases there is no communication between the parties and arbitrators. There is no case management conference to jointly determine the schedule of the proceedings, and a Procedural Order No. 1 is very rarely issued. Typically arbitrators decide among themselves when the first (which in most cases is also the last) oral hearing will take place and will determine the deadline for submission of documents. The parties do not participate in this discussion.

On occasion, parties may be more proactive and ask arbitrators in advance not to fix the hearing on a specific date; they may try to agree on the schedule of the case and the dates of document exchange with the other party and to ask arbitrators to approve this schedule.

However, one should be prepared that some arbitrators (especially those of a more mature age) may decline such an arrangement and schedule and set a time that is suitable for them.

Moreover, it should be borne in mind that before an oral hearing takes place, arbitrators are unlikely to resolve any issues, including issues of discovery, granting injunctions

for hearing expert testimony or witnesses. Specific requests may be filed in advance but, in most cases, the outcome of the arbitrators' consideration will be discussed and pronounced at the oral hearing. Thus, a party may be faced with the situation that its motion is denied at a hearing, and an alternative plan has to be implemented immediately. The way in which the communication system operates within a particular arbitration institution also needs to be considered, since arbitrators may not always receive and examine filed requests in a timely manner.

The arbitration rules of each specific institution should be studied carefully, as some have established time limits for filing certain requests. For example, in Ukraine a request for an audio recording of a hearing must be submitted not later than 10 days before such a hearing. It should be understood that recordings of hearings are not universally allowed.

The various institutions treat technological innovations differently. During the course of one of our cases in Ukraine, we managed to agree on conducting the hearing via Skype. In older institutions in other jurisdictions, such a request would most likely be rejected for a number of reasons, not least the possibility of technical complications. The covid-19 pandemic led to changes in arbitration worldwide and online arbitration is now used more frequently. Some CIS arbitral institutions use Zoom, Microsoft Teams or their own platforms. However, some of the older institutions are sticking with their traditions where possible and continue to prefer offline hearings.

In Russia and eastern Europe, bifurcation is very rarely applied. In some exceptional cases, arbitrators may prefer to separate the matter of whether the court has jurisdiction over a given dispute and consideration of a claim on its merits. Issues of liability and damages or compliance with the limitation period and justification of the claims made are not treated separately.

Evidence

It is obvious that persuasiveness of the evidence and arguments you produce depends primarily on the personality of a particular arbitrator; however, there are some commonalities.

In terms of persuasiveness of arguments, first references should be to legislative enactments, followed by any relevant doctrine, and then court practice that relates to the application of particular legal rules.

The greatest evidentiary effect can be achieved by written evidence, primarily documents that have been signed by both parties, whereas witness testimony is not given much weight and is used very rarely. Generally, examination of a witness in the course of arbitral proceedings in Russia and eastern Europe is more the exception than the rule.

When producing evidence, it should be borne in mind that mature arbitrators do not always have a sufficient knowledge of English (many of them learned German as their second language), so documents have to be accompanied with a translation.

Further, even when arbitrators are conversant with the English language, they may still request that documents are translated in consideration of state court judges who may subsequently have to deal with a request to annul the arbitral award.

When preparing for a hearing, remember that even if arbitrators set a time limit for submission of documents, it does not guarantee that the other party will not try to deliver some documents beyond the court-established deadline. Arbitrators respond differently

to such situations, but if a party is persistent in failing to meet the set dates, filing new evidence with other documents in the case may be denied.

However, research shows that if arbitrators have seen certain evidence or are aware of its existence, then, even if that evidence has not been filed, arbitrators will still take it into consideration in the majority of cases.[10] For this reason, in some cases a more advisable strategy would be not to object to new evidence being filed, but to request time for providing clarifications in relation to that evidence.

Discovery in its traditional format does not exist. A party may file a request for documents, but it is not often granted. The most common attitude of arbitrators is that each party must independently collect evidence and produce it to the arbitrators. Even if a request has been granted, a party may still refuse to disclose evidence in its possession. At present, in Russia a provision has been added to procedural codes that courts may assist an arbitral panel in gathering evidence, which means that if courts uphold a request for documents, then a failure to submit those documents will be punished by a penalty. However, the amount of the penalty tends to be so insignificant that it is hardly a compelling reason to comply.

Nevertheless, a failure to produce evidence may result in an adverse inference. This rule has not been fixed in arbitration rules and arbitrators usually avoid mentioning in an arbitral award that a failure to produce evidence was a factor that influenced their decision. However, even if it is not mentioned as such, it is still an influencing factor.

Expert witnesses

It is extremely rare for examination of an expert to be arranged by an arbitral panel. In the majority of cases, expert opinions are provided by the parties. (However, there are specifics here, and one needs to be careful when examining the arbitration rules of relevant institutions; in some instances, experts may be instructed before the arbitrators have been appointed, and some arbitration rules provide exclusively for an arbitrator-appointed expert examination).

Frequently, arbitrators are sceptical about expert opinions that have been prepared for one party, and perceive experts as hired guns who are willing to take any side. In view of this, you should be particularly attentive when choosing an institution or an expert to carry out an expert examination for you.

Witnesses

In Russia and eastern Europe, there is no tradition of preparing witness statements before a hearing. The more progressive arbitrators may suggest that the parties exchange witness statements in advance, although this does not happen very often. In the absence of witness statements, preparations for cross-examination must be done even more carefully than usual, since there are many options as to how a witness will respond to questions. Naturally, these options cannot be predicted beforehand and thus counsel will need to think and react as the proceedings develop.

10 E Sussman, 'The Arbitrator Survey – Practices, Preferences and Changes on the Horizon', *The American Review of International Arbitration* (2015) Vol. 26. No. 4, pp. 521 to 522, fn. 15.

Advice to oligarch witnesses: don't try to win; just try not to lose

In disputes between prominent businesses operating in former Soviet countries (particularly Russia and Ukraine), the cross-examination of the principals (UBOs) often makes or breaks the case in a way that happens only occasionally in run-of-the mill Western European arbitration. I have seen many cases turn in this fashion by the merging of four elements into a perfect (and remarkably common) storm. First, such individuals are used to ruling their business empires in a centralised fashion, and are not accustomed to taking advice from lawyers as to how they should behave or speak. Second, they break the cardinal rule of witness testimony – play defence. The witness cannot win the case during cross-examination, but he or she certainly can lose it. But this is also an unfamiliar role for many Russian and Ukrainian businesspeople, who tend to view themselves as the creators, and therefore the saviours, of their own business. Third, they overestimate the quality of their memory and refuse to dedicate the time necessary to review the documents. And finally, they underestimate the ability of intelligent arbitrators to discern the truth. This is particularly dangerous where the documentary record is incomplete, as is often the case in former Soviet business dealings. It is too tempting to fill those gaps creatively, leaving the cross-examiner an easy way to shred the witness's credibility using prior inconsistent statements and whatever documents there are. My advice to oligarch witnesses (almost never taken): tell the truth, listen to your lawyers, memorise your witness statements and document bundles, and don't try to win the case. Just try not to lose it.

– Noah Rubins QC, Freshfields Bruckhaus Deringer LLP

Examination of a witness rarely lasts for more than an hour. Many arbitrators of a more mature age regard the traditional, common law-style of cross-examination, with multiple closed questions, as strange and unfamiliar. Such questions may be perceived as leading. Consequently, arbitrators may be expecting that a witness will be asked open questions and thus counsel should be prepared for both styles of questioning.

Generally, witnesses do not inspire much trust with arbitrators, as arbitrators are well aware that they have been prepared and assume that witnesses may either deliberately distort their testimony or may be mistaken in their recollections, simply because of how the human memory works.

In general, the most efficient strategy for examining the other party's witness is to avoid any questioning at all to mitigate any potential damage resulting from prepared speeches.

Arbitration hearing

In Russia and eastern European, a counsel's participation in a court session is treated quite formally, so the key advice is not to forget to bring a properly formalised power of attorney. It is also important to remember is that it is an essential requirement in Russia to have the original copy of the arbitration agreement at the enforcement stage.

In most instances, a hearing is arranged within two or three months of the arbitral panel being formed. In Russia, there is usually only one hearing in a given case and this hearing is rarely postponed, although it is possible that this may happen. In other jurisdictions, this may differ. In one case we dealt with in Belarus, we had seven hearings within a period

of six months; each hearing lasted between two and eight hours and the next would be postponed for approximately a month. In another case in Ukraine, there were six or seven hearings and the parties then decided to settle the case.

On average, a hearing takes one day, and sometimes lasts only a few hours. Hearings lasting several days are extremely rare. Therefore, an invaluable skill for an arbitration lawyer is the ability to be clear and concise when speaking. In psychology, there is a rule that one should start with one's strongest argument, because the order in which arguments are presented affects the overall impression. Antonin Scalia, a famous Supreme Court justice, in his legendary book of advice to lawyers as to how to speak successfully in the Supreme Court, said that the first impression is critically important and offered the following comparison: 'If the first sip of wine is awful, no one will drink it till the end.'[11]

It is also vital to be able to answer questions posed by arbitrators clearly and concisely. There is a common stereotype that German arbitrators are proactive and tend to ask lots of questions, while arbitrators from Nordic countries may not raise a single question during the whole hearing. When it comes to Russia and eastern Europe, arbitrators do not have a clearly established style of conduct in the course of a hearing, and a lot depends on the particular arbitrator. Some prefer not to ask questions to avoid giving the parties any clues as to their train of thought, or being accused of bias; others are far more proactive and ask multiple questions; but generally, arbitrators are more likely to ask questions on matters they are interested in rather than sit quietly and give the parties free rein.

Note that in the older institutions, hearings in Russia are often not transcribed during arbitration as they customarily are in international arbitration. In some cases, a report on the hearings may be prepared by the tribunal secretary. In view of this, it is advisable to request that such a report be kept and provided to the parties following the hearing, so as to be able to comment on its completeness and accuracy. However, there is no provision in the procedure for introducing amendments to such a report.

At the end of a hearing, there is rarely an exchange of post-hearing briefs. Only in exceptional cases will arbitrators permit the production of additional documents and clarifications on a very narrow range of issues (as a rule, on those issues in which arbitrators themselves are interested). Further, the procedure for arbitrators' deliberations is such that, more often than not, the award is discussed by the arbitrators immediately after the hearing and then they proceed with drafting it. Hence, additional clarifications submitted a week or two after the hearing are rarely taken into consideration and rarely have the power to change an award that the arbitrators have already decided.

On average, it takes nine to 12 months from the date of filing a statement of claim to the award being issued.

11 A Scalia, B Garner, *Making Your Case: The Art of Persuading Judges*, p. 453.

22

Cultural Considerations in Advocacy: The Arab World

Zaid Mahayni and Mohamed Mahayni[1]

Introduction

There may be various Arab elements to an international arbitration. You may be an Arab lawyer. If you are not, you may be acting alongside or opposite one. You may be advising on an arbitration arising out of a contract governed by the law of an Arab jurisdiction. The arbitration clause in that contract may provide for a seat in that same jurisdiction, or perhaps in another Arab one. One or more arbitrators may be Arab, and so might be some of the fact- and expert witnesses on either side. The administering institution might be based in an Arab territory, or possibly in a jurisdictional freezone like the Dubai International Financial Centre. Or there may be nothing Arab to the dispute, until you identify the award debtor's assets in an Arab jurisdiction and try to enforce your award there.

In practice, the number of Arab elements and the concordance between them can vary. For example, the parties can share the same Arab nationality and agree to a domestic seat and applicable law, yet opt for arbitration under the rules and supervision of a non-Arab institution.[2] A diversity of cultural considerations will likely come into play in this instance.

1 Zaid Mahayni is chief legal officer at SEDCO Holding and Mohamed Mahayni is a sole practitioner and independent consultant.

2 For example, the LCIA Casework Report reveals that five arbitrations commenced in 2020 involved disputes where both the seat and applicable law were Saudi and where, presumably, either or both parties were also Saudi. For their part, the ICC Dispute Resolution Statistics for 2019 note that 27 arbitrations involved Arab parties of the same nationality (i.e. both Emirati, or both Saudi) and were 'domestic', implying that the seat and applicable law corresponded to the parties' shared nationality. See LCIA Annual Casework Report 2020, at p. 17; ICC Dispute Resolution statistics 2019, at p. 10.

The more detailed the procedural rules, the better

When approaching an arbitration case involving Middle Eastern parties, counsel should bear in mind that they are penetrating a legal environment largely dominated by the civil legal tradition, with influences of traditional concepts inspired by shariah law in some parts of the Middle East.

Concretely, this means that it is not infrequent that a number of concepts that are ingrained in the common law tradition, such as the practice of party-appointed witnesses or of cross-examination, are misunderstood by some party representatives who are not experienced in international arbitration. In these circumstances, the preliminary meeting between the parties and the arbitral tribunal will be an essential step towards ensuring that both parties agree on the basic rules that will frame the arbitration proceedings and understand how the subsequent stages of the arbitration will unfold.

Beware misunderstandings

The more detailed the procedural rules, the less room will be left for misunderstandings and diverging interpretations. For instance, in view of the importance of witness examination for both parties, it is essential to foresee at the outset of the arbitration and in the procedural rules, that all technicalities relating to oral evidence on the day of the hearing are determined. This includes a consideration for potential translations of oral testimonies and the use of appropriate and efficient technology if the witnesses are to be heard in different locations.

Due consideration is also to be given to the particularities of the law of the seat of the arbitration. If seated in the Middle East, the *lex loci arbitri* could disallow the application of principles that are well accepted in common law jurisdictions, such as the power of arbitrators to order interim measures, without the parties' agreement to confer such power on the tribunal. Consideration should also be given to principles specific to certain Middle Eastern jurisdictions, such as the necessity for witnesses to swear an oath on a relevant holy book, failing which the arbitral award may be at risk of annulment.

– Nayla Comair-Obeid, Obeid Law Firm

Also by way of example, both parties can be Arab, but they might agree a neutral seat and governing law neither of which are Arab.[3] Cultural considerations will still be relevant here, by virtue of the parties' culture and that of their owners, managers or employees whom you may need to interview to build your case or cross-examine to undermine the other side's.

In either scenario, your Arab culture or understanding of it may guide your approach as an advocate. If you are not Arab, have never lived in an Arab country and never got to

3 Khawar Qureshi, Catriona Nicol, et al. (2020), 'Arab World Litigants in the English Courts (2019–2020)', International Journal of Arab Arbitration, Volume 12, Issue 2, pp. 12–27 (surveying English litigation and arbitration cases where one or both parties were Arab).

experience Arab culture indirectly, you may decide to read up on the subject. What you read may influence the impression that you retain.[4]

However, whatever experience, knowledge or understanding one may have of 'Arab culture' – even as an Arab – will probably be incomplete at best or partial at worst. That is because the 'Arab world' comprises 22 states that have significant cultural disparities both between and within them.[5] These disparities are influenced by a range of social, economic and political factors.[6]

The main unifying features between Arabs are perhaps the Arab language and literature. But there are others relevant to cultural considerations in advocacy involving Arab elements. On one level, Arab states share common legal traditions that continue to be relevant even though they evolved within different socio-political contexts.[7] On another more significant level, various Arab states share ambitions of economic liberalisation and diversification. In pursuit of these ambitions, resource-rich Arab states in particular have adapted their national policies and reformed their legal systems. Their adaptations and reforms have often been modelled on or at least inspired by foreign laws and practices, including the law and practice of international arbitration. This increasingly attenuates cultural gaps and provides lawyers with a common frame of reference when acting in disputes that involve Arab elements.

Notwithstanding these cultural bridges and common frames of reference, lawyers nevertheless may encounter particularities to which they are not accustomed. In previous editions of this book, authors have provided invaluable insight into these particularities. The present chapter is intended to complement those editions' entries rather than substitute them. In doing so, it first presents general observations about Arab states' common legal roots and increasingly common ambitions. Subsequently, it presents a selection of practical cultural considerations that tend to be relevant in the authors' experience and opinion.

Because culture is an inherently human characteristic, these considerations are structured according to their relevance to interactions with other key participants in the arbitration process: namely co-counsel and opposing counsel, arbitrators, administering institutions

4 Compare Joel Carmichael (1943), 'Notes on Arab Unity', Foreign Affairs, Volume 22, Issue 1, pp. 148–153, at p. 149 (describing Arab society as notoriously backward, both socially and economically); Joe Navarro (2002), 'Interacting with Arabs and Muslims', FBI Law Enforcement Bulletin, Volume 71, Issue 9, pp. 20–26, at p. 21 (describing Arabs as 'generous, humanitarian, polite, and loyal people').

5 Namely Algeria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates and Yemen.

6 Economically, while some Arab countries are among the wealthiest in the world in terms of per capita GDP, others are on the UN list of least developed countries (e.g. Comoros, Djibouti, Mauritania, Somalia, Sudan and Yemen). See UNCTAD, 'UN List of Least Developed Countries', available at https://unctad.org/topic/least-developed-countries/list. See also 'Regional Profile of Arab World', Doing Business 2019, The International Bank for Reconstruction and Development, available at www.doingbusiness.org; World Bank, GDP per capita chart, available at https://data.worldbank.org/indicator/NY.GDP.PCAP.CD.

7 David M Mednicoff (2012), 'The Rule of Law and Arab Political Liberalization: Three Models for Change', Harvard Journal of Middle Eastern Politics and Policy, pp. 55–83 (comparing Arab states' trajectories towards rule of law; identifies differences between non-oil monarchies such as Morocco, oil-rich monarchies such as Qatar and the United Arab Emirates, and countries such as Tunisia and Egypt that recently underwent regime changes).

Advice to sceptical Middle Eastern counsel: embrace the process

At the crossroads of the East and the West, the Middle East has historically been the theatre where civil and common law-trained arbitrators and counsels came together. While a lot of ink can be spilt on the differences in the approaches between arbitration practitioners from these two *summa divisio* legal traditions, in my experience, I found civil law-trained counsels from the Middle East were often unused to the dynamics of international arbitration. In particular, I found they tended to be perplexed by the collaborative approach of international arbitrators, especially those coming from common law jurisdictions.

Often parties are invited to engage actively in the arbitral process by expressing opinions on certain issues or clarifying a specific defence. I found that this regularly surprised civil lawyers from the Arab regions who were not used to interacting with arbitrators, who are habitually regarded as judges. To this end, it was not customary for such counsels to engage actively in the discussion of the issues at stake, or even seek to clarify the factual matrix of the case as part of their submissions. Based on my experience, doing so has been traditionally perceived by fellow civil-trained counsels as a form of influence as to the direction of the anticipated final award and, therefore, as an attack on the sanctity of the arbitrator's duties of impartiality and independence.

Such a misplaced belief does not contribute to the spirit of arbitration as a credible, efficient and trustworthy dispute resolution mechanism. As a matter of fact, such an interaction between the arbitrators and the counsels should not be feared, as it does not purport to change the facts or the legal arguments of the case, which ultimately remain untouched by the often-needed clarifications brought to the arbitrators' attention.

Practitioners in the Middle East are now realising that a collaborative approach cannot only assist the parties to streamline and clarify their arguments but, more importantly, can provide valuable support to the arbitrators in reaching a much more informed and just decision.

Undoubtedly, international arbitration is moving towards more efficiency and transparency. One way this can be achieved is through interaction between the parties, their counsel and the arbitrators to get to the bottom of the facts so as to reach a fair outcome in the best interests of the parties. Arbitrators in the Middle East, who are nowadays increasingly adopting a more collaborative approach, should not have their credibility and impartiality called into question for doing so. The traditional litigation-style approach in arbitral proceedings in the Middle East, where the parties would solely file and rely on their submissions and expect the arbitrators to remain silent until the issuance of the final award, is fortunately shifting towards a more collaborative approach, and this can be perceived through counsel's approach and demeanour.

– Essam Al Tamimi, Al Tamimi & Co

(i.e. their members and staff), and national courts (i.e. their judges). There are obviously other participants, starting with the parties themselves.[8] However, because Arab parties are

8 Emmanuel Gaillard (2015), 'Sociology of international arbitration', Arbitration International, Volume 31, Issue 1, pp. 1–17 (describing the numerous participants in the international arbitration field and classifying parties and arbitrators as 'essential actors').

simply too diverse to discern any meaningful cultural similarities between them, we do not purport to offer any comment in their respect.

In fact, this chapter's key take-away point may be that cultural considerations with respect to any Arab participant should not be exaggerated. While they exist, they are increasingly overtaken by other considerations that find their roots in those participants' education, experience, opinions and outlooks. And the most consequential influence on these tends to be whether or not the Arab participant has experience in, knowledge of, and a positive attitude towards international arbitration.

Arab states' common legal roots and ambitions

The legal roots

Writing in 2009, Ibrahim Fadlallah noted that '[t]he law of almost the whole Arab world (except Saudi Arabia and the Sultanate of Oman) is codified in texts inspired by the civil law with a dose of Muslim law'.[9] This commonality is owed in part to the work of Abdelrazzak Sanhouri.[10] Considered to be the modern Arab world's 'foremost comparative lawyer',[11] Sanhouri sought to consolidate the rules of the 1878 Islamic *Majallat* inherited from the Ottoman Empire with those contained in the Napoleonic Code in France at the time.[12] In doing this, he envisioned an Arab region united by a shared legal history.[13]

To some extent, Sanhouri succeeded in achieving his vision. He 'masterminded' the Egyptian Civil Code,[14] which then informed the elaboration of various other Arab states' civil and commercial codes.[15] These codifications diminished the position that shariah (i.e. Islamic law) occupied in most of the Arab region, except in certain states that maintained its relevance by placing it at the apex of their constitutions (e.g. Saudi Arabia, Somalia, Oman, Yemen).[16]

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9 Ibrahim Fadlallah (2009), 'Arbitration Facing Conflicts of Culture', Arbitration International, Volume 25, Issue 3 pp. 303–317, at pp. 307–308.

10 This is a transliteration of his name in Arabic. English spellings may vary.

11 Amr Shalakany, 'Sanhuri and the Historical Origins of Comparative Law in the Arab World (Or How Sometimes Losing Your Asalah Can be Good for You)', in Annelise Riles (ed), *Rethinking The Masters of Comparative Law* (Hart Publishing, 2001), pp. 151–188, at p. 152; cited in Dan E Stigall (2014), 'The Civil Codes of Libya and Syria: Hybridity, Durability, and Post-Revolution Viability in the Aftermath of the Arab Spring', Emory International Law Review, Volume 28, Issue 1, pp. 283–344, at p. 296.

12 Guy Bechor, *The Sanhuri Code, and the Emergence of Modern Arab Civil Law (1932 to 1949)*, (Brill Leiden, 2007), at p. 44 (discussing Sanhouri's intent to bridge cultural differences through the law while also accounting for each Arab country's realities).

13 Ibid.

14 Mark Hoyle (1987), 'Law in the Modern Arab World: A Personal View', International Business Lawyer, Volume 15, Issue 2, pp. 45–47, at p. 45.

15 For example, Syria (1949), Iraq (1951), Libya (1953), Sudan (1971), Algeria (1975), Jordan (1976), Yemen (1979), Kuwait (1980), Qatar (1971), Bahrain (1970), the United Arab Emirates (1987). Sanhouri directly participated in the elaboration of some of these, such as the Iraqi civil code, which he was commissioned to draft. See Nicholas H D Foster (2012) 'Commerce, Commercial Law and Legal Transformation', Journal of Comparative Law Volume 7, Issue 1, pp. 214–226, at p. 224.

16 Saudi Arabia Constitution 1992, Article 1; Oman Constitution 1996, Article 2; Yemen Constitution, Article 3; Somalia Constitution 2012, Article 2(3).

While Arab legal systems generally coincide in their preference for 'Western-style specialist commercial law' when it comes to commercial matters,[17] many did not keep up with the growing complexity of commercial transactions and investments. They acceded to bilateral, regional and international treaties ultimately aimed at encouraging business and attracting investment,[18] but their legal systems sometimes lagged in sophistication, predictability or accessibility.[19]

The legal ambitions

Arab states with the necessary political stability and economic means have sought meaningfully to address their stagnation, not just on paper but also in practice.[20] Some of them have done this progressively, while others precipitously.[21] Either way, Arab states have often looked to more developed legal systems for inspiration, borrowing or altogether transplanting industry-specific legislation from them.[22]

Of course, the effectiveness of these modernisation efforts depends on other factors that require commensurate improvement. In this respect, various Arab states have been investing heavily in judicial reforms.[23] Beyond those aimed at judicial independence and training, reforms include the establishment of specialised bodies tasked with the upkeep of regulations and adjudicative bodies entrusted with the resolution of industry-specific disputes.[24] They also include new policies to implement a greater use of technology in court-related

17 Nicholas H D Foster (2012), supra note 15, at p. 225 (offering an anthropological analysis of the evolution of commercial law in the Arab world); Enid Hill (1978) 'Comparative and Historial Study of Model Middle Eastern Law', American Journal of Comparative Law, Volume 26, Issue 2, pp. 279–304, at p. 300. (noting that 'commercial law was not only the first area of law to influence the societies of the Middle East, but also the area which had the most profound effects upon the societies.').

18 For example, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (Arab states were actually among the earliest to ratify the convention); the Unified Agreement for the Investment of Arab Capital in the Arab States 1980 (initially ratified by Egypt, Iraq, Jordan, Lebanon, Saudi Arabia and Syria); the Inter-Arab Convention on Judicial Co-operation 1983 (between 18 Arab states); Gulf Cooperation Council (GCC) Convention for the Execution of Judgments, Delegations and Judicial Notifications 1995 (between GCC states, namely Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates); World Trade Organization (e.g. Bahrain since 1995, Djibouti since 1995, Egypt since 1995, Jordan since 2000, Mauritania since 1995, Morocco since 1995, Oman since 2000, Qatar since 1996, Saudi Arabia since 2005, Tunisia since 1995, United Arab Emirates since 1996, and Yemen since 2014; various other Arab states are WTO observer governments).

19 'Doing Business in the Arab World', Doing Business 2009, The International Bank for Reconstruction and Development, available at www.doingbusiness.org.

20 For example, Egypt, Kuwait and Saudi Arabia each have devised reform plans to meet economic, social and environmental development goals. These goals, also termed 'visions', are accompanied by roadmaps of required legislative changes.

21 David M Mednicoff (2012), supra note 7, at pp. 56 and 69 et seq.

22 For example the Saudi Capital Market Law in 2003 was transplanted from the United States. Bushra Ali Gouda (2012), 'The Saudi Securities Law: Regulation of the Tadawul Stock Market, Issuers, and Securities Professionals under the Saudi Capital Market Law of 2003', Annual Survey of International & Comparative Law, Volume 18, Issue 1, available at https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1160&context=annlsurvey.

23 For example Qatar, United Arab Emirates, Saudi Arabia.

24 For example, Saudi Arabia has created a Committee for the Settlement of Insurance Disputes that handles disputes relating to insurance and recently enacted insurance regulations.

processes (e.g. issuing powers of attorney, e-filing, summoning by SMS, e-hearings).[25] They further include policies aimed at improving accessibility to laws and court decisions. In Saudi Arabia for example, court judgments are either unpublished or notoriously inaccessible yet carry a growing *de facto* value in legal argument and predictability. Conscious of this, the Saudi Arabian Ministry of Justice recently published a compendium of judicial principles and court decisions rendered between 1971 and 2016 and announced its intention to pursue this transparency effort going forward.[26]

In parallel, Arab states have also been striving to promote and facilitate alternative means of dispute resolution. Some of them have recently overhauled their arbitration regimes to bring them in line with international standards.[27] They also established new arbitration centres that play a significant role in relaying the know-how from experienced institutions,[28] complementing the role that existing institutions had already been playing in this regard.[29] And in doing so, some states like the United Arab Emirates have already established themselves as arbitration hubs.[30]

Simultaneously, mediation is undergoing renewed popularity in the Arab world,[31] further to its traditional importance as a method of dispute settlement.[32] Here again, some Arab states have been actively trying to seeking to facilitate it,[33] sometimes even imposing

25 World Trade Report 2020 on 'Government Policies to Promote Innovation in the Digital Age', available at https://www.wto.org/english/res_e/booksp_e/wtr20_e/wtr20_e.pdf; Susanto, Muhamad Iqbal and Wawan Supriyatna (2020), 'Creating an Efficient Justice System with E-Court System in State Court and Religious Court of Rights', International Journal of Arts and Social Science, Volume 3, Issue 3, pp. 354–361 (arguing that the use of technology in court processes is a valuable tool in speeding the time frame for the adjudication of disputes, facilitating access to justice, and deterring frivolity and corruption).

26 'Saudi Justice Minister Inaugurates Book on Legal Precedents', Arab News, 5 January 2018, available at https://www.arabnews.com/node/1219391/saudi-arabia.

27 For example Saudi Arabia, the United Arab Emirates.

28 For example, the Saudi Centre for Commercial Arbitration (SCCA) from the American Arbitration Association-International Centre for Dispute Resolution (AAA-ICDR), the Dubai International Financial Centre-London Court of International Arbitration (DIFC-LCIA Arbitration Centre) from the London Court of International Arbitration (LCIA), the Bahrain Chamber for Dispute Resolution from the AAA.

29 For example, Dubai International Arbitration Centre (DIAC), Cairo Regional Centre for International Commercial Arbitration (CRCICA).

30 See ICC Dispute Resolution statistics 2019, at p. 14 (noting that the United Arab Emirates was the seventh most common seat in ICC arbitrations in 2019).

31 David Lutran and Joséphine Hage Chahine (2020), 'Mediation: a Culturally Well-Established Dispute Resolution Mechanism in the MENA (Middle East and North Africa) Region Gaining in Momentum', International Journal of Arab Arbitration, Volume 12, Issue 1, pp. 23–40 (reiterating the historical importance of mediation is the Arab World; presenting evidence of its renewed popularity in commercial and investment disputes).

32 Negin Fatahi, 'The History of Mediation in the Middle East and its Prospects in the Future' (Kluwer Mediation Blog, 23 January 2018), http://mediationblog.kluwerarbitration.com/2018/01/23/history-mediation-middle-east-prospects-future/; Said Bouheraoua, 'Foundation of Mediation in Islamic Law and its Contemporary Application', Asia Pacific Mediation Forum, available at http://www.asiapacificmediationforum.org/resources/2008/11-_Said.pdf.

33 For example, Qatar and Saudi Arabia have ratified the recent that entered into force in September 2020, with Saudi Arabia including a reservation that the Convention will not apply to settlement agreements whether either the state or one of its agencies is party. Jordan has signed the convention and has

it as a pre-litigation requirement.[34] Here again too, arbitration centres have been a vector in the supply of rules and services.[35]

The market for provision of legal services is evolving correspondingly. The relevance of generalist lawyers is diminishing in cross-border transactions and disputes, as they are replaced by specialists who often capitalise on their foreign education, experience or affiliations with international law firms. And there is a growing tendency among these local Arab lawyers to dedicate themselves purely to international dispute resolution, especially in jurisdictions that see of lot of it. Within the Arab Gulf region, it is expected that these lawyers will extend their influence in light of regulations that relax restrictions on their ability to practise in other Gulf states.[36]

Practical considerations when dealing with Arab participants

With the above in mind, this section sets out a selection of practical considerations the authors consider to be relevant for arbitration counsel regarding Arab participants (i.e. co-counsel, opposing counsel, arbitrators, administering institutions and national courts).

The lawyers

Selecting co-counsel

Unlike other legal practice codes,[37] many Arab codes do not restrict attorneys from accepting mandates in fields outside their competence. It is unfortunate to come across instances where local counsel do exactly that.

Therefore, consider carefully screening local counsel whenever their assistance is required. Current or previous affiliation with an international firm should not be used as a sole gauge of competence; neither should law firm rankings. Recommendations, based on first-hand practical experience of local counsel's services, should ideally be obtained.

Even then, recommendations may be inconclusive. Consider soliciting a sample memorandum on unrelated legal issues, to assess the rigour and style of the legal advice. Doing this is not customary, but it avoids costly disappointments. Subsidiarily, the tone of local counsel's response to the unusual request may itself reveal whether and to what extent you will want to work with them on a personal level.

Regardless of local counsel's competence, consider asking them to submit the full text of all supporting legal authorities, with translations if the budget permits it. Often local

yet to ratify it. See status at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en.

34 For example, the new Saudi Commercial Court Law and its Implementing Regulations require recourse to conciliation and mediation as a prerequisite to filing certain types of lawsuits.

35 David Lutran and Joséphine Hage Chahine (2020), supra note 31, at paras 34–36.

36 Similarly to Qatar, Saudi Arabia now allows lawyers qualified in other GCC jurisdictions to practise in Saudi Arabia without passing through Saudi lawyers or firms. See Nada Hameed, Arab News, 'Licensed GCC Lawyer Allowed to Practice Law in Saudi', 22 January 2018, available at https://www.arabnews.com/node/1230931/saudi-arabia.

37 For example, New York's Lawyer's Code of Professional Responsibility, sections EC 6-1 to 6-4; International Bar Association, 'International Principles on Conduct for the Legal Profession', Section 9; Solicitors Regulation Authority's Code of Conduct for Solicitors, Section 3.3; Quebec Code of Professional Conduct of Lawyers, Section 10; Paris Bar Internal Regulations, Section 21.3.1.3.

counsel do not have the same intimate knowledge of the case as you do. And they are unlikely to have the motivation to proactively educate themselves on it unless they are paid for it. As a result, when preparing their advice and reviewing legal authorities, they may be unable to identify relevant parts favouring or even undermining your case.

Adapting to opposing counsel

Maintaining a cordial rapport with opposing counsel may be difficult. 'Guerrilla tactics' are still-too common among Arab counsel:

> *In international arbitrations seated in the Arab world or involving Arab parties or counsel, it is not anomalous for counsel to employ one or more . . . dispute-aggravating attitudes or demonstrate a lack of appreciation for arbitration-specific procedures. This is primarily due to lack of specialisation and possible overlap between arbitration and litigation, where counsel's approach to arbitration is profoundly affected by long-standing intricacies and perceptions of traditional litigation in local courts.*[38]

Faced with such 'dispute-aggravating attitudes', responding in kind is counterproductive. It is best to adapt with level-headedness and consciousness of the tribunal's ability for discernment. Depending on the type of stunt opposing counsel pulls, it may be sufficient to draw the tribunal's attention to it, while also reserving the right to respond fully down the line and make any appropriate cost applications.

Even if the attack is personal (e.g. an open accusation of unethical behaviour), it is more effective to respond cordially. The use of strong adjectives and emotive language is superfluous; follow the example of how experienced arbitrators respond to personal attacks against them whenever they are accused of bias. Needless to say, avoid attacking opposing counsel personally or imputing bad faith on their part unless you have proof to back it up.

Similarly, if opposing counsel's case contains flaws apparently owed to inexperience, consider how best to bring the flaws to the tribunal's attention. This can be a fine line in practice. For example, opposing counsel may be unable to formulate their client's case clearly and instead repeatedly confuse the relevant legal tests that they ask the tribunal to apply. While it is incumbent on you to draw the tribunal's attention to the incoherence, the manner in which you do it may influence how you come across to the tribunal, especially if opposing counsel's inexperience is owed to their client's inability to afford better legal advice and representation. It may also reflect negatively on your client.

More generally, early experience of opposing counsel's tactics should be an indicator of what to expect after the award is rendered. If you win, do not expect opposing counsel to advise their client to comply voluntarily. You may have to defend spurious attempts to challenge the award at the seat or resist its enforcement at the place of enforcement. Opposing counsel may be willing to fight until the end if their client supports this and can afford it.

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38 Mohamed S Abdel Wahab, 'Cultural Considerations in Advocacy: The Arab World – A Recast' in Stephen Jagusch QC, Philippe Pinsolle and Alexander G Leventhal (eds), *The Guide to Advocacy* (4th ed), (Global Arbitration Review, 2019), available at https://globalarbitrationreview.com/guide/the-guide-advocacy/fourth-edition/article/cultural-considerations-in-advocacy-the-arab-world-recast.

Counsel can confuse the roles of the tribunal and the institution

'Egypt', as Joshua Karton noted in a November 2018 CRCICA seminar, 'is such a globalised arbitration community even amongst people who never practiced outside Cairo. It is surprising how much what is in Egypt that is similar to what we expect to see in London, Paris or New York and the really large arbitration centers.'

However, some legal counsel in Egypt – and the Middle East more broadly – can confuse the authority of the arbitral tribunal with that of the arbitral institution.

For example, there is a wide misconception among counsel who mix the rules of institutional arbitration and that of ad hoc arbitration to try to get their way in certain procedures. Some refer to the supplemented (i.e., non mandatory) rules of the *lex arbitri* (for example, Egyptian Arbitration Law No. 27 of 1994) in their case and believe it can supersede the applicable institutional rules stipulated in their contract; although the latter shall prevail. Some counsel try to bypass the authority of the arbitral tribunal and request either from the arbitral institution, or even through court proceedings, termination of the arbitral proceedings once it exceeds the time limits for rendering arbitral awards specified in the *lex arbitri* and not applicable to institutional arbitration. In the same pattern, some counsel tend to request the court of the seat to appoint or recuse the arbitrator and to override the applicable rules of the arbitral institution by referring to the rules of the local arbitration law.

Another example is counsel making their submissions without specifying the amount in dispute and attempting to leave it to be quantified by the arbitral tribunal or, at a later stage, through expert reports. Counsel tend to do this so they can manipulate the calculation of fees according to the method of calculation of the arbitral institution. This leads to a deal of frustrating back and forth between the arbitral institution and the parties.

Finally, there are counsel who bring the arbitration institution as respondents in court proceedings filed for the setting aside of awards rendered under the auspices of the institution. These claims usually fail, since the institution has no standing in these cases, but is a significant nuisance for the arbitral institution.

– Ismail Selim, CRCICA

Horror stories aside, the relationship with opposing counsel is habitually cordial, and the possibility of settling one or more disputed issues should not be underestimated.

Initiating a settlement effort may come across as a sign of weakness. It may be received with scepticism. And it may fail. Nevertheless, it is surprising how often an unexpected but genuine show of amicability towards an Arab counterparty is welcomed and reciprocated when opposing counsel are sensible. If you suspect that opposing counsel may unwillingly obstruct the initiative, consider letting it come directly from your client.

In any event, cordiality should not be conflated with carelessness. Owing to their shared legal-family roots and court practices within them, Arab jurisdictions approach issues of privilege similarly by relying on professional conduct rules. These typically require lawyers

to protect the confidentiality of their communications with their clients.[39] And while they implicitly prevent lawyers from disclosing settlement communications, genuine misunderstandings can arise. More importantly, the clients themselves are not bound by confidentiality obligations and remain free to divulge the communications. At least one Arab-based arbitral institution has tried to anticipate this in its rules by requiring arbitrators to take into account applicable rules of privilege.[40]

Consider, therefore, taking all available measures to counter the risk of detrimental disclosure of settlement communications. For example, initial communications should express interest in an amicable resolution of the dispute, without going as far as making any concessions or proposals. Subsequent exchanges should be used to agree terms on which negotiations will take place and any settlement will be formalised. These terms ideally ought to be robust (e.g. a confidentiality agreement with explicit undertakings, coupled with a choice of law and jurisdiction that maximise the agreement's enforceability).

These precautions may come across as excessive given how unlikely international arbitrators are to consider settlement communications that were wrongly disclosed to them.[41] But inexperienced ones may consider it acceptable for truth's sake, so might an Arab curial or enforcement court if the matter ever comes before one.

The arbitrators

Selecting an arbitrator

There is a unanimous consensus that the quality of the arbitration depends on that of the arbitrators. The basic qualities that parties and their counsel should look for in candidate arbitrators are well known. Qualities aside, four interrelated observations are worth considering when selecting arbitrators.

First, some candidate arbitrators may have obtained their education, training and preponderant experience in a particular jurisdiction. Their ensuing national 'legal culture' may well impact their approaches to specific procedural or substantive issues.[42] In theory, conscientious arbitrators must strive to quell the effect of the 'bag and baggage' that they carry over from their national legal cultures.[43] In practice, they may retain their legal

39 'Legal Privilege Global Guide', DLA Piper, available at www.dlapiperlegalprivilege.com/legalprivilege (summarising approach to legal privilege in Bahrain, Egypt, Kuwait, Lebanon, Morocco, Oman, Qatar, Saudi Arabia, United Arab Emirates).

40 SCCA Rules, Article 22 (imposing on the tribunal a duty to 'take into account applicable rules of privilege' and giving by way of example lawyer–client privilege).

41 Peter Ashford, *The IBA rules on the Taking of Evidence in International Arbitration: A Guide* (Cambridge University Press, 2013), at Sections 9-39 and 9-40 (noting that settlement privilege is unanimously accepted in international arbitration).

42 Lawrence M Friedman, *The Legal System: A Social Science Perspective* (Russell Sage Foundation, 1975) at p. 15 (defining legal culture as '[t]hose parts of general culture – customs, opinions, ways of doing and thinking – that bend social forces toward or away from the law and in particular ways.').

43 Bernardo Cremades (1998), 'Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration', Arbitration International, Volume 14, 1998, pp. 157, at p. 170 (stressing the importance for arbitrators to put aside their 'bag and baggage' for the sake of objectivity); Christophe Seraglini (2015), 'L'influence de la culture juridique sur la décision de l'arbitre', in Mélanges en l'honneur du Professeur Pierre Mayer (LGDJ, 2015), pp. 817-831 (discussing areas where national legal culture remains relevant in practice).

Show some deference to ancient (or modern) Arab culture

'Read in the name of thy Lord', states one of the Qur'an surahs (96:1-5). Contrary to what is too often said, Arab advocacy is not based primarily on oral skills and the art of pleading. Writing, papers and documents do play a major role in this culture and are not to be overlooked. This means, in practice, that Arab counsel and arbitrators appreciate accurate, reliable and thorough sources or quotations, rather than vague legal principles. I remember having encountered in some arbitrations (sometimes elaborate) arguments that, purportedly, in some Arab jurisdictions, a woman could not be appointed as an arbitrator, that only counsel based in the jurisdiction of the seat could represent a party or that no non-Muslim witness could be heard . . . It sufficed to dig into the actual sources to show the other party and the arbitrators, some of whom were not Arabs, that, while I could understand where the point was coming from, it was not actually rooted in good law or strictly accurate. The argument could be overcome and proven wrong based on hard evidence, since, today, much more than in the past, all sorts of reliable authorities have become available, especially online, in Arabic (see the *Majallat* available on LexisNexis Middle East database), but also in English (see the *IJAA* available on Kluweronline). By the same token – and this applies to other cultures – each time you demonstrate, to the extent possible, some deference to ancient or modern Arab culture (by referencing, for example an Arabic poem that powerfully illustrates a legal or factual point), to religious nuances (by considering the Ramadan period and the difference in weekends when fixing the procedural calendar, as well as some subtle differences between Shia and Sunni traditions), and to the actual reality on the ground (such as by addressing issues of visas for witnesses of specific nationalities), this will come to support and even enhance your position. Otherwise, you may be less convincing on procedural issues, despite having a very good grasp on the substance of the dispute.

– Jalal El Ahdab, Bird & Bird

culture's influence despite their best efforts to attenuate it, or they may convey it legitimately through their 'legal opinions'.[44]

National legal culture may therefore serve as a criterion by which to assess Arab candidates' strategic suitability for your case. Owing to the shared civil law roots of Arab jurisdictions, the general assumption is that Arab candidates will be predisposed to adhere to civil law approaches.

Second, the above assumption is overly simplistic because predispositions do not automatically translate into dispositions. Experience teaches that Arab arbitrators are able to transcend their national legal culture and to adapt their approaches to the needs of each case.

Third, Arab arbitrators' ability and willingness to adapt in that manner often seems to be contingent on their knowledge and experience of international arbitration theory and

44 IBA Guidelines on Conflicts of Interest in International Arbitration, 23 October 2014, Section 4.1.1. It sets out 'green list' situations and connections that are permitted and where no disclosure is required ('The arbitrator has previously expressed a legal opinion (such as in a law review article or public lecture) concerning an issue that also arises in the arbitration (but this opinion is not focused on the case)').

practice. This can be problematic in cases requiring a tribunal competent in one or more Arab procedural or substantive laws. Relative to the number of lawyers and law graduates in Arab jurisdictions, there is a disproportionate shortage of individuals with expertise in both local Arab laws and international arbitration law. The best ones tend to be too busy or conflicted, or both.

As a result, counsel sometimes make the difficult decision of prioritising expertise in local law over expertise in international arbitration, even though the approach to the former is contingent on a certain literacy in the latter. While this prioritisation may be strategic, its advantages can be rendered redundant by its other consequences.

If short on options, keep in mind that local law expertise is increasingly permeable to foreign scholars and practitioners (similarly to international arbitration expertise regarding non-lawyers). For example, many Egyptian and Lebanese scholar-practitioners are considered excellent picks in cases governed by the law of other civil law states, whether Arab or not.

Fourth, the long-standing apprehension that women may not serve as international arbitrators in shariah law jurisdictions is gradually eroding. In Saudi Arabia for example, the possibility of appointing women as arbitrators is not explicit in the Arbitration Law 2012 or its Implementing Regulations 2017.[45] That said, Saudi courts not only have admitted the appointment of women to arbitration tribunals,[46] but also are planning on finally appointing female judges to their ranks.[47]

Adapting to the tribunal

Notwithstanding their efforts or abilities, Arab arbitrators may retain some influence from their national legal culture. Beyond that, they may also have personal attitudes, preferences and opinions (legal or otherwise). These can impact almost every aspect of the arbitration and will require you to adapt accordingly.

Preliminarily, the law of the seat or of the contract may contain mandatory rules that the arbitrators cannot ignore, especially in light of their potential effect on the validity of the award at its seat or its enforceability elsewhere. Problematically, Arab seats and laws seldom identify whether a given rule or principle is generally mandatory, let alone mandatory in international arbitration proceedings or under international contracts between sophisticated parties. Try to anticipate these – and the abitrators' attitudes toward them – as early as possible in the dispute, as they may affect your entire case strategy.

For example, in Saudi Arabia and Oman, shariah principles on the prohibition of interest and speculation are increasingly relegated to a secondary position each time a *lex specialis* exists in the contract or in an applicable legal rule. That said, the same principles continue

45 Zaid Mahayni and Mohamed Mahayni, 'An Overview Of The New Implementing Regulations To The Saudi Arbitration Law', Mondaq, 13 June 2017, available at https://www.mondaq.com/saudiarabia/arbitration-dispute-resolution/601494/an-overview-of-the-new-implementing-regulations-to-the-saudi-arbitration-law.

46 Mulhim Hamad Almulhim, 'The First Female Arbitrator in Saudi Arabia', 29 August 2016 (Kluwer Arbitration Blog), available at http://kluwerarbitrationblog.com/2016/08/29/the-first-female-arbitrator-in-saudi-arabia/.

47 Statements of Hind Al-Zahid, Deputy Minister of Women's Empowerment at the Ministry of Human Resources and Social Development, in 'Saudi Arabia to appoint female judges soon', Saudi Gazette, 15 January 2021, available at https://saudigazette.com.sa/article/602536.

to weigh on issues such as the validity of certain financial instruments, the recoverability of liquidated damages and interest, and the scope of exclusions in insurance contracts.

Procedure

International arbitration has gone a long way in harmonising approaches to evidence. Parties are free to agree in advance rules of evidence. If they do not, the arbitrators will prescribe them. The rules that they ultimately prescribe will typically depend on the dispute's particularities and the parties' submissions. And the discretion that they exercise when applying those rules will generally depend on how they reconcile competing demands of accuracy, speed, efficiency and procedural fairness.[48]

Given their civil law background, Arab arbitrators are believed to prefer inquisitorial-style approaches to evidence and procedure. This is often contrasted with the adversarial style of common law jurisdictions, which include document production, cross-examination and party-appointed experts. Other commentators have commented at length on these tendencies and their practical repercussions. Suffice it to say that you may have to adapt to the arbitral tribunal's combined experience and preferences unless the parties can agree on mutually acceptable rules.

Substance

To foreign practitioners, various Arab legal systems lack the predictability or maturity to which they may be accustomed. This makes devising a case strategy and articulating a persuasive case on the substance a bit tricky, even with the help of local counsel. For this reason, you may find guidance or support in other legal sources, even where the solution is prima facie already available under the contract and its applicable law. Some of these sources are discussed below.

- *Foreign national law and doctrine*: For example, because of its maturity and influence on other Arab civil and commercial laws, Egyptian law can serve as a useful tool in advocacy where the law of the contract is governed by the law of an Arab state modelled on the Egyptian Civil Code. Lawyers in addition can capitalise on authoritative Egyptian court rulings, and on the breadth and sophistication of Egyptian legal commentary.[49] You may even go beyond that and refer to other relevant civil laws, whether Arab or not.
- *Transnational soft law and industry-specific norms*: The UNIDROIT Principles of International Commercial Contracts can be highly effective in disputes over the interpretation of general principles of contract law. Furthermore, industry-specific norms

48 Authors diverge slightly in the emphasis they place on these. Compare William W Park (2011), 'Les Devoirs de l'Arbitre: Ni Un Pour Tous, Ni Tous Pour Un', Cahiers de l'Arbitrage, Volume 1, available at http://www.williamwpark.com/documents/Devoirs%20de%20l%27Arbitre.pdf; Jeorg Risse (2013), 'Ten Drastic Proposals for Saving Time and Cost in Arbitral Proceedings', Arbitration International, Volume 29, Issue 3, pp. 453-466; Fabricio Fortese and Lotta Hemmi (2015), 'Procedural Fairness and Efficiency in International Arbitration', Groningen Journal of International Law, Volume 3, Issue 1, pp. 110-124.

49 For example, reference to Sanhouri's comprehensive commentary on the Egyptian Civil Code – Al Wasit Fi Sharh Al Qanun Al Madani Al Jadid – is useful in discussions of issues arising from the interpretation or application of Arab civil codes.

can be especially relevant for elucidating the meaning of the contractual terms or the parties' intentions when concluding them. For example, in a sophisticated insurance contract governed by an Arab law, you will look to commentary on the London Engineering Group's suite of exclusionary clauses;[50] in sale and purchase disputes, the International Chamber of Commerce's International Commercial Terms;[51] in construction disputes, the International Federation of Consulting Engineers' relevant contract template.[52]

- *Arbitration-specific commentary*: Particular attention should be paid to the wealth of academic scholarship on international arbitration. Divergences of legal opinions among scholars can be instrumental to arguments on certain issues. For example, whether you are arguing in favour of the strict application of the applicable law or against it, there is a diversity of legal opinions on this issue that you can use.[53]
- *International law*: International law can become relevant in disputes arising out of concession contracts with Arab states or their organs. Even where the contract is governed exclusively by the national law of the state in which the investment is made, mandatory

50 'LEG clauses', London Engineering Group, available at https://www.londonengineeringgroup.com/leg-clauses.

51 'Incoterms 2020', International Chamber of Commerce, available at https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-2020/.

52 'Publications', Fédération Internationale Des Ingénieurs-Conseils, available at https://fidic.org/bookshop.

53 Gary B Born, *International Commercial Arbitration*, 2nd edition (Kluwer Law International 2014), at pp. 1997–1998 and 2703 (emphasising arbitrators' duty to determine the dispute according to the applicable law); Jennifer L Permesly (2018), 'What's Law Got to Do with It? The Role of Governing Law in International Commercial Arbitration', in Carlos Gonzalez-Bueno (ed), *40 under 40 International Arbitration* (2018) (Carlos González-Bueno Catalán de Ocón; Dykinson, S.L. 2018), pp. 453–468, at p. 463 (observing that arbitrators should not pursue 'common sense' interpretations to the detriment of those which are mandated by the law that the parties have chosen); William Laurence Craig (2010), 'The Arbitrator's Mission and the Application of Law in International Commercial Arbitration' (2010), The American Review of International Arbitration, Volume 21, pp. 243–293, at p. 244 (noting that the significance of law on the procedure and substance of the dispute will overarchingly depend on the how the arbitrator 'envisages the role of law in the performance of the contractual mission to determine a dispute between the parties.'); Karl-Heinz Böckstiegel, 'Arbitration and State Enterprises: A Survey of the National and International State of Law and Practice' (Kluwer Law International 1984), at p. 27 (highlighting that the 'usual way' of deciding cases in international commercial arbitration is 'exclusively on the interpretation of contracts and the relevance of trade usages, so that very little depends on the question of the applicable law'.); William W Park, 'The Predictability Paradox Arbitrators and Applicable Law' in Fabio Bortolotti and Pierre Mayer (eds), *The Application of Substantive Law by International Arbitrators*, Dossiers of the ICC Institute of World Business Law, Volume 11, 2014, pp. 60–79, at p. 68 (noting that arbitrators may sometimes apply national law differently to court judges, and recognising that this is not a satisfactory for ideologues or for the sake of legal certainty.); Pierre Mayer (2001), 'Reflections on the International Arbitrator's Duty to Apply the Law (The 2000 Freshfields Lecture)', Arbitration International, Volume 17, pp. 235-247 (asserting that international arbitrators do not approach national law with the same rigid syllogistic approach as state judges or even domestic arbitrators); Joshua Karton (2015), 'The Arbitral Role in Contractual Interpretation', Journal of International Dispute Settlement, Volume 6, Issue 1, pp. 4–41, at p. 14 (presenting evidence that arbitrators 'tend to follow a relatively consistent interpretive approach, regardless of the governing law . . . characterized by invocation of the subjective intention of the parties, an emphasis on reading the contractual text in its commercial context, and an inclusive approach to extrinsic evidence of the parties' intentions.').

principles of international investment law may become relevant depending on the gravity of the alleged violations. Related to the previous point, legal opinions on this diverge.[54] This provides scope for employing supporting opinions in your arguments.

The particularities of each case will inform which of these or other 'outside' legal sources may be relevant or useful.

That said, do not lose sight of the margin for legal argument under the applicable contract law and its principles or rules of interpretation. Contract laws generally seek to strike a balance between *pacta sunt servanda*, on the one hand, and the multitude of exceptions to it, on the other. Judges in different jurisdictions – including Arab ones – will resort to different so-called 'techniques' to strike an appropriate balance.[55] And their willingness to employ these techniques may boil down to how they individually conceive their function.[56]

Arbitrators, in principle, have the same techniques at their disposal. And their willingness to employ them may likewise depend on how they conceive their adjudicative function.[57] Familiarise yourself with them and think about how best to adapt them to the context of international arbitration in general, as well as to that of the dispute in particular.

Relatedly, remind yourself that facts may determine outcomes more than law.[58] As arbitrators might concede, the finality of their decisions on the merits places a moral burden on them to try to render what they perceive to be a fair decision. In the authors' modest experience – and further to the observations made earlier regarding arbitrator selection

54 Compare Berthold Goldman, 'Le droit applicable selon la Convention de la BIRD du 18 mars 1965 pour le règlement des différends relatifs aux investissements entre États et ressortissants d'autres États', in *Investissement Etrangers et Arbitrage Entre Etats et Personnes Privées* (Pedone, 1969), at p. 151; Eduardo Silva Romero, 'Dogmatisme et pragmatisme dans l'arbitrage international', in *Mélanges en l'honneur du Professeur Pierre Mayer* (LGDJ, 2015), pp. 833–844, at p. 838.

55 On contract interpretation, scholars highlight how judges use different interpretative techniques to overcome contract problems. See Stefan Vogenaeur, 'Interpretation of Contracts: Concluding Comparative Observations', in Andrew Burrows and Edwin Peel (eds), *Contract Terms* (Oxford University Press, 2007), pp. 123–150, at p. 131 (arguing that the notion of good faith in civil law jurisdictions is capable of achieving a result similar to that achieved in common law jurisdictions through implied terms or contractual interpretation); Nicholas, Barry (1973–1974), 'Rules and Terms – Civil Law and Common Law', Tulane Law Review, Volume 48, Issue 4, pp. 946–972, at p. 950 (illustrating how common lawyers and civil lawyers can solve contract problems albeit through different means).

56 Sara Saosan Razai, 'The Role and Significance of Judges in the Arab Middle East: An Interdisciplinary and Empirical Study', PhD thesis (Faculty of Law of the University College of London, 2018), at chapters 2 and 10 and Figure 32 at p. 242, available at https://www.ucl.ac.uk/judicial-institute/sites/judicial-institute/files/the_role_and_significance_of_judges_in_the_arab_middle_east_0.pdf, (studying, among things, how Egyptian, Jordanian, Lebanese and Saudi judges perceive their function and status; revealing impact of personal self-perceptions).

57 Supra note 53, esp. William Park (2014), at p. 68.

58 Edmund King, 'How to lose a case', Essex Court Chambers, 30 October 2020, at tip no. 10 (emphasising that outcomes depend on fact and their proper analysis and characterisation), available at https://essexcourt.com/publication/how-to-lose-a-case/; Judith A E Gill, 'The Development of Legal Argument in Arbitration, Law as an Afterthought – Is It Time to Recalibrate Our Approach', in David Caron et al. (eds), *Practising Virtue: Inside International Arbitration*, Oxford University Press, 2015, pp. 398–406, at p. 404 (noting that legal argument 'may lie anywhere along the spectrum of being crucial, or largely irrelevant, to the outcome of the case').

– arbitrators differ in their sense of fairness and their ability and willingness to put their legal reasoning at its service.[59] If that is right, neglecting the law would be negligent, but fetishising it would be ignorant.

The arbitration institution

Do not assume that Arab-based institutions – whether old or recently established – lack knowledge of and acquaintance with best practices. Their casework staff are invariably highly qualified and experienced. Furthermore, their ad hoc decision-making bodies and committees typically comprise illustrious members of the international arbitration community. When entrusted with deciding, for example, a challenge against an arbitrator for alleged lack of independence and impartiality, these figures will approach the challenge in line with international practice.

More generally, the assistance of Arab-based arbitration institutions is underrated. In an effort to establish themselves and solidify their reputation, infant institutions in particular tend to go out of their away to provide assistance. When asked, they provide lists of qualified arbitrators, point to relevant publicly available resources and provide supplementary explanations regarding their services, rules and policies. That said, do not expect them to overstep their role and provide legal advice.

The competent courts

The seat of the arbitration remains important irrespective of aspirations for a transnational arbitral legal order.[60] It will determine which courts will provide curial support during the arbitration. It will also empower those courts to rule on the validity of the award, which may impact its enforceability elsewhere.

In this context, the court's attitude towards arbitration is relevant. Even in jurisdictions that recently modernised their arbitration laws and in which the competent courts strive to prove their friendliness towards international arbitration, judges may still lack familiarity with international arbitration law and practice. The inverse may also be true. The same Arab courts' eagerness to manifest their pro-arbitration attitude could cause them to shirk their duty. This risk is merely theoretical and drawn from certain commentators' criticisms of US, English and French courts' arguably overzealous pro-arbitration attitudes.[61] Either way, you

59 For example, International Law Association, 'Ascertaining the Contents of the Applicable Law in International Commercial Arbitration' (Rio de Janeiro, 2008), at p. 18 (noting the different case-variable pragmatic realities that influence international arbitrators' approach to ascertaining the contents of the applicable law).

60 Compare Emmanuel Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff Publishers, 2010), at para. 41 et seq. (arguing in favour); Jan Paulsson, *The Idea of Arbitration* (Oxford University Press, 2013), at p. 33 (arguing against).

61 Derek P Auchie (2007), 'The liberal interpretation of defective arbitration clauses in international commercial contracts: a sensible approach?', International Arbitration Law Reports, Volume 10, Issue 6, pp. 206–229, at p. 206 (bemoaning the 'cavalier attitude' of English courts' interpretation of pathological clauses); Karim Abou Youssef, 'The Present – Commercial Arbitration as a Transnational System of Justice: Universal Arbitration Between Freedom and Constraint: The Challenges of Jurisdiction in Multiparty, Multi-Contract Arbitration', in Albert Jan van den Berg (ed), *Arbitration: The Next Fifty Years,* ICCA Congress Series, Volume 16 (Kluwer Law International 2012), pp. 103–132 (criticising the interpretative pragmatism that some US and French courts employ to include non-signatories to arbitration agreements; remarking that arbitrators themselves

may have to present your arguments didactically, explaining why a particular principle or practice exists, the objectives it serves to achieve, and why the court should either follow or adapt it.

Furthermore, present arguments on the practice of foreign pro-arbitration courts – whether Arab or non-Arab – with consideration. Arab courts will be interested to find out about that international practice but, depending on the court's attitude and perhaps even the specific judge's, arguments rooted in local law and policy may be more effective. In all circumstances, formulate arguments on public policy diplomatically. It would be unwise to argue before a national court that, for example, its jurisdiction's public policy is backward or idiosyncratic.

The same logic extends to enforcement courts. They may differ in their experience of and attitude towards international arbitration,[62] regardless of commitments to enforce foreign awards according to the New York Convention.

Last but not least, local procedures for execution against the award debtor's assets should not be ignored. Idiosyncrasies often come to the foreground here. They are exacerbated when the award debtor is a state or state entity in light of conservative approaches to attaching assets that may be remotely covered by sovereign immunity. Discuss this with local counsel carefully, given the potential complications and associated costs in navigating them.

Concluding remarks

Cultural disparities within the Arab world are numerous. While there is overlap in Arab jurisdictions' legal origins and present aspirations, their legal cultures have evolved separately. Yet, in the field of commerce, the emphasis has been on predictability and modernisation.

As the frame of reference for Arab countries shifts outside the Arab world, so too do the considerations for participants. Cultural considerations remain, but they are increasingly overtaken by others rooted in reformed policies and specialised fields of law, starting with the policies and specialism of international arbitration and the diversity of opinions within it.

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increasingly tend to rule on jurisdictional questions in equity, and that courts increasingly ratify those rulings in a bid to present themselves as pro-arbitration); Lawrence A Cunningham (2012), 'Rhetoric versus reality in Arbitration Jurisprudence: How the Supreme Court Flaunts and Flunks Contracts', Law and Contemporary Problems, Duke University School of Law, Volume 75, Issue 1, pp. 129–159, at p. 131 (criticising the US Supreme Court for side-stepping and distorting rules of contract interpretation when interpreting arbitration clauses).

62 Sergejs Dilevka, 'So You Think You Can . . . Enforce an Arbitral Award in the Kingdom of Saudi Arabia?', Kluwer Arbitration Blog, 7 December 2018, available at http://arbitrationblog.kluwerarbitration.com/2018/12/07/so-you-think-you-can-enforce-an-arbitral-award-in-the-kingdom-of-saudi-arabia/ (pointing to positive trends and changes of attitude among Saudi courts).

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Cultural Considerations in Advocacy: India

Tejas Karia and Rishab Gupta[1]

Globalisation and increased investment flows between countries have led to a surge in cross-border disputes. International arbitration has been, and is likely to remain, the preferred method for resolving these disputes. The advocacy style in an international arbitration depends on a variety of factors, including the nationality of the advocates and arbitrators, the seat of the arbitration and the applicable institutional rules. It is likely, therefore, that one would find notable differences in the advocacy style in a London-seated international arbitration before a panel of European arbitrators, as compared to the advocacy style in a Mumbai-seated international arbitration before a panel of retired judges of Indian courts.

That said, there are various factors that have led to the homogenisation of international arbitration. First, the rise of institutional commercial arbitration has meant that, increasingly, arbitrations are conducted within a pre-established framework and that framework influences the advocacy style followed by advocates. Taking the example of India, a Mumbai-seated arbitration under the Arbitration Rules of Singapore International Arbitration Centre (SIAC) is likely to be conducted in a manner that is very different to a Mumbai-seated ad hoc arbitration. Second, the advent of transnational soft law, such as the International Bar Association (IBA) guidelines, have also had an effect on advocacy. For instance, there has been a convergence in the approach regarding document disclosure or challenges to arbitrators because of the IBA's efforts in these areas. Finally, the surge in investment treaty arbitration has helped. Unlike contractual disputes, which are almost always governed by the laws of a specific jurisdiction, disputes arising under investment treaties are governed by public international law. As a result, investment treaty arbitrations often involve advocates and arbitrators from multiple jurisdictions. The resulting exposure to different advocacy styles has led, over time, to further homogenisation, not just in investment treaty arbitration but also in commercial arbitration.

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India is not immune to these factors. Advocacy in India-related international arbitrations has been influenced by global practices. And that trend is likely to continue in the future. However, there are some important differences to be found in India-related arbitrations. This chapter identifies some of those differences.

Arbitrations seated in India

India-seated arbitrations often look like an extension of the Indian court proceedings. That is the case for a variety of reasons. First, India-seated arbitrations usually involve Indian parties on both sides.[2] Second, when the arbitration involves only Indian parties and the seat is India, the arbitration tribunal must decide the dispute in accordance with Indian substantive law.[3] Third, the Indian legal market has not yet been liberalised and foreign law firms and lawyers are not allowed to practise law in India. A judgment[4] of the Supreme Court has created an exception for international arbitrations;[5] however, whether that judgment will result in foreign lawyers regularly appearing in Indian arbitrations has yet to be seen. Fourth, the majority of India-seated arbitrations tend to be ad hoc in nature (i.e., there are no institutional rules applicable to these arbitrations). A study by PwC in 2013 found that 47 per cent of Indian companies that had chosen arbitration as their preferred method of dispute resolution chose ad hoc proceedings.[6] In ad hoc arbitrations, repeated recourse to Indian courts is usually required to determine contested interlocutory issues. Finally, because India does not yet have a deep pool of qualified arbitrators, courts and parties tend to appoint retired judges as arbitrators.[7]

As a result of the foregoing, India-seated arbitrations often exclusively involve Indian parties, Indian advocates, Indian substantive law and retired Indian judges as arbitrators. In the circumstances, it is not difficult to understand why there is a substantial overlap between the procedures followed in Indian court proceedings and arbitrations. Indeed, domestic arbitration in India has become known as a form of 'after-hours' litigation, with advocates conducting short hearings (usually two to three hours) in front of retired judges after the court closes. These retired judges, and indeed many of the advocates appearing before them, bring many of their past practices (in respect of procedure and evidence) from the court-room into the arbitration.

2 In fact, there is still uncertainty under Indian law as to whether two Indian parties can choose a foreign seat. Indian high courts have issued conflicting judgments on this issue and the Supreme Court has not yet conclusively dealt with it.

3 Section 28(1), Arbitration and Conciliation Act (1996).

4 *Bar Council of India v. A K Balaji & Ors*, Civil Appeal Nos.7875-7879 of 2015.

5 Under Section 2(f) of the Arbitration and Conciliation Act (1996), an 'international arbitration' is an arbitration in which at least one of the parties is based in a country other than India.

6 PwC: 'Corporate Attributes and Practices Towards Arbitration in India', available online at pwc.in/assets/pdfs/publications/2013/corporate-attributes-and-practices-towards-arbitration-in-india.pdf.

7 Law Commission of India, 246th Report on Amendments to the Arbitration and Conciliation Act (2014), p. 16.

Cultural considerations – some examples

Despite globalisation and standardisation, adjusting for cultural differences remains one of the challenges when practising international arbitration. As an example, whereas German, Austrian and Swiss German arbitration practitioners are used to considering the possibility of having arbitrators assist the parties in reaching a settlement (for instance, by providing their non-binding views), practitioners from the United States and the United Kingdom, as well as India, do not feel comfortable with such an approach. Another example is the appointment of experts by the arbitral tribunal. Arbitration practitioners from civil law countries are used to this practice, whereas arbitration practitioners from common law countries always expect the appointment of experts by the parties as a fundamental right. The wrong approach is to take for granted that our own expectations and practices are universal.

– Pierre-Yves Gunter, Bär & Karrer

Pleadings

Not surprisingly, this overlap between court procedure and arbitration procedure has affected the style of advocacy practised in India-seated arbitrations. Take written advocacy, for example.

After the arbitration tribunal is constituted, there will usually be three or four rounds of pleadings: statement of claim, statement of defence and counterclaim (if any), reply to counterclaim and, finally, statement of rejoinder (although many arbitrators take the view that, except in rare circumstances, the latter is not necessary). These pleadings tend to be formal in style and language. Indeed, they read very much like pleadings submitted in court proceedings. Further, unlike in the case of memorials, which have become commonplace in international arbitration, pleadings submitted in domestic arbitration would not be accompanied by any witness statements or expert reports, nor would they set out the parties' position on law. Rather, the pleadings would simply identify the facts supporting or opposing the claim, the points at issue and the relief or remedy sought, but they would not plead any law, save for making averments in respect of the applicable legal principles.

There would be several advantages if Indian arbitration were to reduce its reliance on court-style pleadings and adopting the memorial procedure. First, it would be likely to reduce the length of the proceedings. Currently, exchange of pleadings is followed by 'framing of issues', exchange of witness statements on those issues, cross-examination of the witnesses, then final hearings. It is at the final hearings that the advocates plead law for the first time. In other words, it is only at the final hearing that for the first time law and facts are presented together in support of a party's position. By contrast, in a memorial procedure, the tribunal would receive the entire package together: the facts, supported by witness statements and documents, as well as the law. There would be no need for a separate phase for exchange of witness statements.

Second, by forcing parties to file witness statements, expert reports and legal submissions up front, the strength of a party's case becomes evident very early on. That, in turn, can facilitate early settlement as parties are forced to make a realistic assessment of their

case. In India, however, parties usually wait until final hearings to commence settlement discussions, if at all.

Finally, a memorial-style procedure would also assist in moving away from one of the least attractive features of Indian arbitration: several short hearings are conducted during the arbitration, as opposed to one continuous hearing.

Hearings and cross-examination of witnesses

Since arbitrations in India usually involve multiple short hearings, they tend to resemble litigation. It is common in Indian litigation to appear before courts on multiple occasions for all kinds of procedural matters. Because of the backlog in the courts, continuous hearings are rare. Unfortunately, the same trend has crept into arbitration as well, where the tribunal will hold multiple 'sittings' (a single sitting extending for two to three hours).

The majority of hearing time before an arbitration tribunal is taken up by the examination of witnesses. Direct examination is almost always substituted by witness statements; therefore, witnesses tend to appear before the tribunal solely for the purposes of cross-examination and answering the tribunal's questions. Cross-examination is an art that is well known in the common law tradition, but there are some notable differences in the way that art is practised in arbitration, as compared to litigation. There are many books and articles written about cross-examination techniques and we will not repeat in this chapter the learnings from those publications. Instead, our focus is on identifying factors that an advocate should consider when conducting a cross-examination in an India-seated arbitration. In doing so, we rely on some of the themes that Philippe Pinsolle and Stephen Jagusch have addressed in Chapters 6 and 7, respectively.

Determining whether to cross-examine a witness

It would be rare in the Indian context not to cross-examine a witness. In the absence of a cross-examination, the witness statement in its entirety would most likely stand admitted and that is a consequence that no party would want to face. That is the case even though a tribunal always has the discretion to determine the probative value of the evidence given in a witness statement.

Further, unlike in international arbitration, which often operates on a 'chess-clock system', in India, arbitrators tend to give advocates as much time as they require to conduct their cross-examination. Therefore, availability of time, which is often a key consideration in international arbitration in deciding whether to cross-examine a witness, is a far less relevant factor in Indian arbitration procedure.

Preparation

In any cross-examination, irrespective of where it is being carried out, preparation is key. A necessary precondition to an effective cross-examination is that the advocate must know the case file inside out. Without that level of preparation, it would not be possible to be flexible in a cross-examination and cross-refer to different sections of the case file depending on the answers given by the witness.

Overall, in our opinion, it is not useful to have a long list of prepared questions. Instead, a list of topics or themes on which the advocate wishes to cross-examine the witness, with

citations to key documents, is sufficient. It is also useful to have a separate list of admissions that the advocate would like to draw from the witness. That list in particular helps the advocate to control the length of the cross-examination and know when to quit. If a certain admission has been elicited, the advocate should immediately move to the next topic. Staying on the same topic for too long carries the risk of giving the witness an opportunity to improve on his or her previous answers.

Approach and style

All advocates have their own style of conducting a cross-examination, but there are certain rules of thumb that can help. The most important of these rules is this: always stay in control of the witness. The most obvious – and oft-cited – way of ensuring control is by asking a series of leading questions, which can be answered 'yes' or 'no'. However, for a variety of reasons, that is easier said than done.

Often witnesses will try to give long-winded answers, bordering on becoming short speeches. A typical technique used by well-trained witnesses is to answer a leading question with a 'yes' and then to follow that up with a long explanation that supports the case of the party that has tendered that witness. In these circumstances, it is best to allow the witness to complete his or her answer and then remind them that the question needed only a simple 'yes' or 'no' answer. If the witness continues to give unnecessary explanations, it is usually helpful to ask the arbitrators to remind him or her that such answers are not welcome. However, under no circumstances should an advocate be too aggressive with a witness. Indian arbitrators often dislike such conduct and will remind the advocate to be respectful and courteous to witnesses.

Use of technology

Another problem that one faces in ensuring control over a witness in an India-based arbitration is the absence of real-time transcription – that is, stenographers producing a simultaneous record of the hearing that is provided to the parties live, on-screen and as the words are spoken. This service, although expensive, is now common in international arbitration. However, in India, no court or arbitration reporters currently offer real-time transcription services. In high-value cases, parties might agree to pay for stenographers to fly in from Hong Kong or Singapore to provide an instantaneous transcript, but this happens rarely.

Instead, the general practice in India-seated arbitrations is to have a stenographer to whom the advocate dictates the question that he or she wishes to put to the witness. The transcribed text appears on a large screen that is visible to everyone in the hearing room. Next, the witness dictates his or her answer to the stenographer. If there are any errors in the transcription (and there often are substantial errors), the advocate or the witness will make corrections on the spot. If the arbitrators have any follow-up questions, or require any clarifications from the witness, those questions will also be transcribed in the same manner. Indeed, because retired judges are often appointed as arbitrators in India, arbitrator involvement in cross-examination is usually quite high. Retired judges, who are used to the hands-on approach they would have taken in court, tend to adopt the same approach in arbitrations and will often interrupt cross-examinations.

As should be obvious to anyone, the Indian way of creating hearing transcripts is very inefficient. Among other things, it causes substantial delays – often, it will take an hour to

ask only 20 to 30 questions. This, coupled with the practice of conducting short hearings lasting two to three hours only, means that cross-examination of the same witness continues over several hearings, often with breaks of several days between them. The lack of continuity makes the job of an advocate substantially tougher. It is harder to remain focused for that length of time and witnesses are afforded several opportunities to recover from a bad day at a hearing.

Making use of witness statements

In India, it is usually assumed that a cross-examination should be restricted to areas covered in the witness statement. These instructions, however, are rarely covered in any procedural order. Therefore, if an advocate wishes to cross-examine a witness on matters not covered by the witness statement, it is often prudent to check with the tribunal members or come to an agreement with the opposing side.

Arbitrations seated outside India

The choice of seat depends on a variety of factors, including neutrality and impartiality of the legal system, national arbitration law, track record of enforcing arbitration agreements and arbitration awards, availability of quality arbitrators and arbitration practitioners, as well as efficiency of the local judicial system.[8] Historically, India has fared badly in respect of all these factors. Therefore, not surprisingly, many cross-border contracts involving Indian parties contain foreign-seated arbitration clauses, with Singapore and London being the most common foreign seats. Arbitrations arising pursuant to such clauses are typically subject to institutional arbitration rules (as opposed to ad hoc arbitration, which is the norm for India-seated arbitrations). Further, while retired judges do receive appointments in foreign-seated arbitrations as well, it is rare to find an entire tribunal composed of retired judges for such arbitrations. Instead, tribunals often have a cosmopolitan composition, with arbitrators from many nationalities. Finally, parties will at times instruct law firms or barristers based in jurisdictions outside India to represent them at such hearings.

The application of institutional rules, as well as the presence of foreign arbitrators and advocates, means that these arbitrations are carried out very differently from a typical India-seated arbitration. Indeed, a Singapore-seated arbitration involving an Indian party would, for all practical purposes, resemble any international arbitration carried out in Singapore. And, in that sense, the advocacy style followed by advocates, and expected by arbitrators, would be similar to what has been discussed by other authors in this book. One note of caution, however: because Indian arbitrators and advocates are used to a different style of arbitration, inevitable differences are likely to arise in the context of a foreign-seated arbitration. These differences could range from minor issues (such as the length of a hearing day) to fundamental issues. An effective advocate would try to get to know the tribunal members, understand any cultural differences and develop an advocacy style that is persuasive to all, or at least a majority of, the tribunal members.

8 2018 International Arbitration Survey: The Evolution of International Arbitration, Queen Mary University of London, p. 11 (can be downloaded from www.arbitration.qmul.ac.uk/research/2018/).

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Advocacy against an Absent Adversary

John M Townsend and James H Boykin[1]

On the floors of Tokyo
A-down in London town's a go go
A-with the record selection,
And the mirror's reflection,
I'm a dancin' with myself[2]

Advocates trained in an adversary system acquire a set of skills that is generally useful and effective for dealing with an adversary. They are accustomed to anticipating procedural manoeuvres, positioning the case to put the other side off balance, parrying arguments from their opponents, and demonstrating to the court or tribunal why none of the opponent's evidence or arguments should prevent their client from prevailing. When the opponent refuses to show up, however, a very different set of skills is needed, especially if the proceeding for which the opponent fails to appear is an arbitration rather than a litigation in court.

Every major set of arbitration rules contains procedures that enable an arbitration to proceed through all its stages notwithstanding a respondent's refusal to participate in the process. Arbitration could hardly work if a respondent could halt the proceedings by simply not showing up.[3] However, what no widely used set of arbitration rules contains are proce-

1 John M Townsend and James H Boykin are partners at Hughes Hubbard & Reed LLP.

2 Billy Idol and Tony James, *Dancing with Myself* on *Kiss Me Deadly* (Chrysalis Records) (1981).

3 Article 15.8 of the LCIA Arbitration Rules (2020) provides: 'If the Respondent fails to submit a Statement of Defence or the Claimant a Statement of Defence to Cross-claim, or if at any time any party fails to avail itself of the opportunity to present its written case in the manner required under this Article 15 or as otherwise ordered by the Arbitral Tribunal, the Arbitral Tribunal may nevertheless proceed with the arbitration (with or without a hearing) and make one or more awards.'

Trust the tribunal

When opposing counsel appears to do something that might be inappropriate (e.g., refusing to produce evidence that is plainly beneficial to the position of its party), it is sometimes tempting for counsel to overplay the situation, and even become overly aggressive including with the tribunal. Counsel should fight the temptation and leave the tribunal to address the issue. By showing trust to, rather than demanding from, the tribunal, counsel has more to gain eventually.

– Stavros Brekoulakis, 3 Verulam Buildings

dures, like those found in national rules of procedure, that allow the arbitral tribunal to enter a default award in favour of the claimant simply because the respondent fails to appear.

In a national court, the consequences of not defending against a claim can be extreme for the defaulting party. A failure to appear can swiftly lead to entry of an adverse judgment, often with very limited judicial scrutiny of the merits of the claim.[4] In arbitration, however, a non-participating respondent faces no such repercussions from its decision not to participate. Rather, the other side's failure to appear in an arbitration presents the claimant with a real challenge to the advocacy skills of its counsel: how to present evidence and prove its case to arbitrators who may enter an award in favour of the claimant only if they are satisfied by the evidence that it is appropriate to do so.[5]

One might think that a claimant would be pleased to have its opponent fail to appear. After all, how difficult can it be to win a case with no opposition? The answer is, 'harder than one might think'. This is because the absence of a counterparty alters the dynamic between the claimant and the arbitral tribunal. Instead of impartially and neutrally assessing the evidence presented from both sides, the tribunal's role shifts. It must scrutinise one side's evidence (the claimant's), while simultaneously ensuring procedural fairness for the absentee respondent. The tribunal remains impartial and neutral, but its engagement with the case is solely with the claimant. Both the claimant and the tribunal must therefore be careful to ensure that this shift in the tribunal's role does not go so far as to change their relationship into an adversarial one, in which the tribunal attempts to fill the vacuum created by the absence of defence counsel. What might superficially seem like a boon to the

4 See, e.g., Federal Rules of Civil Procedure, Rule 55 ('(a) When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default. (b)(1) If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk—on the plaintiff's request, with an affidavit showing the amount due—must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person.').

5 Article 29(3) of the International Arbitration Rules of the American Arbitration Association's International Centre for Dispute Resolution (2021) provides: 'If a party, duly invited to produce evidence or take any other steps in the proceedings, fails to do so within the time established by the tribunal without showing sufficient cause for such failure, the tribunal may make the award on the evidence before it.'

claimant – the lack of an opponent – actually thrusts the claimant's advocate into a delicate and difficult situation.

Professor D P O'Connell QC described the difficulties of this situation and the challenges faced by the claimant's counsel when a respondent defaults.[6] In his oral argument before the International Court of Justice (ICJ) in the *Aegean Sea Continental Shelf* case, Professor O'Connell described the difficulties Greece faced as applicant after Turkey refused to participate in the ICJ proceedings:

> *Both the Court and the applicant are put in an embarrassing position [when the respondent fails to appear]. The Court is embarrassed because, in order to preserve the judicial character of the proceedings it must take infinite pains to avoid putting itself in an adversary relationship with the applicant. And the applicant is embarrassed because it must satisfy the Court that the claim is well-founded in fact and law, without the benefit of hearing the arguments that the respondent ought to have made in support of its observations. It has to imagine the arguments that might be passing through the mind of the Court, whether they are so passing or not.*
>
> *So, the applicant has to bring matters before the Court which ought properly to be brought before it by the respondent by way of preliminary objection, and the protection which the Court gives to the respondent paradoxically erodes the protection which the applicant has under the Court's Rules. The greater the protection to the Respondent, the more progressive is the shift in the balance in its favour.*[7]

Framing the case

The advocacy challenges presented by a respondent's failure to appear begin with the claimant's first submission to the tribunal. The claimant must, as Professor O'Connell observed, decide at the outset just how far – and to what extent – to anticipate and respond to arguments that the respondent might have made if it had participated in the arbitration. A concrete example from the context of investor-state arbitration provides a useful illustration of the Scylla and Charybdis between which a respondent's non-appearance can force the claimant's counsel to navigate.

Imagine you are acting as counsel to a claimant against a sovereign state in an arbitration brought under a bilateral investment treaty. The sovereign state refuses to participate in the arbitration. The definition of 'investment' in the treaty requires that the investor's (the claimant's) investment be 'in accordance with the law' of the host (respondent) state. As

6 Daniel Patrick O'Connell QC was the Chichele Professor of Public International Law at the University of Oxford from 1972 to 1979. He was counsel to the applicant, the Hellenic Republic, in the *Aegean Sea Continental Shelf* case against Turkey. The jurisdiction of the International Court of Justice [ICJ], like the jurisdiction of any arbitral tribunal, is based on the consent of the disputing parties. For that reason, proceedings before the ICJ may find useful application through analogy in arbitration, particularly in investor-state arbitration.

7 Oral Arguments on Jurisdiction, Minutes of the Public Sittings, held at the Peace Palace, The Hague, from 9 to 17 October and on 19 December 1978, p. 318, available at https://www.icj-cij.org/files/case-related/62/062-19781009-ORA-01-00-BI.pdf. Sir Gerald Fitzmaurice reproduced Professor O'Connell's observations appear in his article entitled, 'The Problem of the "Non-Appearing" Defendant Government', *British Year Book of International Law*, Vol. 51, Issue 1 (1980), 89, 95.

many readers of this guide will no doubt be aware, respondent states in investment treaty arbitrations frequently invoke such provisions to argue that an arbitral tribunal constituted under an investment treaty lacks jurisdiction to hear the claimant's claim, because the claimant failed in some respect to make its investment in accordance with the respondent's laws.[8] This objection often is accompanied by allegations of corruption on the part of the claimant. Counsel for the claimant faces a difficult choice when assessing to what extent he or she should address such a potential objection if the respondent has not actually shown up to make the objection.

Claimant's counsel cannot just whistle past this graveyard, because the 'in accordance with law' provision can be read as a jurisdictional condition that a claimant must satisfy to establish the arbitral tribunal's jurisdiction over the dispute. If 'legality of the investment' is indeed a prerequisite to obtaining the treaty's protections, including its arbitration provisions, then surely the claimant must say something to address it. After all, a claimant has the burden of establishing jurisdiction. It would therefore seem prudent to include, at a minimum, an allegation that the claimant made its investment 'in accordance with' the respondent's laws. But such an undeveloped and unsubstantiated allegation poses the risk that the tribunal will find, as Professor O'Connell warned, that the claimant did 'not discharge the burden of proof sufficiently'.[9] That risk is probably too great for most counsel to run.

On the other hand, if counsel overdevelops the claimant's response to an unarticulated illegality objection, then he or she risks conveying 'an impression of defensiveness or want of conviction'.[10] Milquetoast pleadings can be unpersuasive, but pleadings that overcompensate run the risk of provoking a counter-reaction. By pre-emptively responding to an unraised allegation of corruption – and doing so too forcefully – the claimant risks inadvertently creating an impression in the minds of the tribunal that 'the wicked flee when no man pursueth'.[11] That is hardly an impression that an advocate would wish to leave with the arbitral tribunal.

Neither extreme is appealing. The challenge that an advocate faces is finding the 'Goldilocks Zone' between saying too little and saying too much.[12] That challenge is heightened, particularly in the context of treaty arbitration, by the absence of agreement among arbitrators about the precise contours of many jurisdictional requirements, such

8 Rahim Moloo and Alex Khachaturian, 'The Compliance with the Law Requirement in International Investment Law', *Fordham International Law Journal*, Vol. 34, Issue 6, 1471, 1475 (available at https://ir.lawnet.fordham.edu/ilj/vol34/iss6/1) ('It has become commonplace for respondents to allege that investors have not complied with the law in making their investment, and accordingly, should be prevented from pursuing their claims.').

9 Oral Arguments on Jurisdiction, Minutes of the Public Sittings, held at the Peace Palace, The Hague, from 9 to 17 October and on 19 December 1978, p. 318, available at https://www.icj-cij.org/files/case-related/62/062-19781009-ORA-01-00-BI.pdf ('It might, by seeking to counter arguments that had not been put, but which imagination could conjure up, convey an impression of defensiveness or want of conviction. Yet, if it does not counter arguments which actually do occur to the Court, it might not discharge the burden of proof sufficiently.').

10 ibid.

11 Proverbs 28:1 (King James Version).

12 In astrophysics, the 'Goldilocks Zone' refers to the habitable zone around a star where the temperature is just right – not too hot and not too cold – for liquid water to exist on a planet.

Two lessons

1

I was once appointed to serve as a co-arbitrator in an ICC arbitration by a respondent who, after submission of the request for arbitration and answer (and possibly a counterclaim), then failed to appear in the case. The claimant appeared and argued its case on the merits but not the respondent.

This raised two issues that both taught me lessons. The first issue for me was how to deal with the respondent's case, given its failure to appear. As the respondent's co-arbitrator, I felt that this placed a special responsibility on me: I had to try, as best I could, to make up for the failure of the respondent to present its case. The president of the arbitral tribunal and the claimant's co-arbitrator – both highly experienced – acquiesced in my position. Accordingly, with their consent, I cross-examined the witnesses of the claimant as best I could and sought to present all the respondent's arguments to them and later, in conference, to my fellow arbitrators.

From this experience I learned that when a party fails to appear to present its case, there is no way that it's co-arbitrator can replace the lawyers who should be representing it. Unlike a party's lawyers, an arbitrator has no means to make an independent factual investigation of the case but must instead make do with such documents and witnesses as the parties may have presented. Moreover, as a practical matter, an arbitrator can make – as in any arbitration case – only a limited legal investigation, if any.

Thus, while I may have made some inroads into the claimant's case, especially its claim for damages (to the extent that it was unsubstantiated), I was no substitute for the lawyers who should have been there for the respondent.

2

When a tribunal decides to proceed with a case in the absence of a party, the tribunal needs to make a particular effort to ensure that it will render an enforceable award, especially against the non-appearing party. To render such an award, it is necessary that each party is given reasonable opportunity to present its case. A party will only have been given such opportunity if it has been invited to do so at each stage of the arbitration proceedings. Thus, it is essential that the tribunal repeat this invitation to any non-appearing respondent (and the claimant) throughout the proceedings. At the same time, the tribunal must take steps to ensure that all its invitations and other communications to the parties are properly addressed to them. Most important, this must be done in such a way as to ensure that the tribunal will have a record of this by, for example, sending all communications by hand or special courier, requesting a return receipt or a statement from the messenger or courier service that this could not be obtained. If the tribunal's award is later challenged, this documentation will be necessary to establish that the respondent had been given a reasonable opportunity to present its case, thereby denying it the possibility of challenging the award successfully on this ground.

These are the two noteworthy points that I recall from my experience of serving as an arbitrator in a case where the party who had nominated me failed to appear to present its case.

– Christopher Seppälä, White & Case LLP

as the requirement that an investment be made 'in accordance with' law. The divergence of opinion among tribunals about the content of these requirements raises the stakes in responding to the unarticulated objection. For example, should a claimant plead that its investment satisfies all the *Salini* factors, even if the arbitration is not taking place under the ICSID Convention, simply because respondent states frequently invoke the application of that test outside the ICSID system?[13] It is easy to imagine how quickly a claimant's submission can become tedious (and unpersuasive) when its counsel – with no opponent with which to join issue – feels compelled to address every conceivable jurisdictional objection, when none has actually been made.

Managing the tribunal

The second difficulty that Professor O'Connell described was the risk that 'the protection which the [arbitral tribunal] gives to the respondent paradoxically erodes the protection which the [claimant] has under the [arbitral rules]'.[14] The primary means through which the arbitral tribunal 'protects' a non-participating respondent is by testing the claimant's evidence. Managing that process can be a real challenge for the claimant's advocate.

A refusal by a respondent to participate in an arbitration puts the arbitral tribunal in a difficult position, and the claimant's counsel needs to be alert to how to help it manage the situation. Even when both parties participate in an arbitration, arbitrators must weigh the evidence and arguments presented to them, and may find themselves sceptical about parts of it. Typically, arbitrators will try to probe the evidence or arguments in a way that does not suggest that they have reached a premature conclusion, while still permitting them to satisfy themselves that they have not accepted evidence that they do not find credible or arguments that they do not find convincing. The absence of a party from an arbitration makes it difficult for the arbitrators to test the evidence without appearing to shift into the role of opposing counsel.

If the arbitrators are the sort who like to ask questions, they find themselves with only one party to question, so they cannot demonstrate their impartiality by asking equally difficult questions of both parties. If, on the other hand, they belong to the school of arbitrators that likes to sit back and listen, then they will hear only one side of the case presented to them, and that presentation will not be tested unless the arbitrators themselves do the testing. Professor Hobér described the dilemma faced by the arbitrators when confronted with a non-participating respondent:

> *The arbitrators have no duty to – and should not – act as counsel or representative of the party who has chosen not to participate. Notwithstanding this, the arbitrators must satisfy themselves that the claims are well-founded in fact and in law.*[15]

13 The tribunal in *Salini Construttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No.ARB/00/4, Decision on Jurisdiction, 23 July 2001, made a list of common characteristics of investments that other tribunals have sometimes applied as a test (called the *Salini* test).

14 See footnote 6, above.

15 Kaj Hobér, *International Commercial Arbitration in Sweden*, Chapter 6, Section 229 (2011).

Default victories don't exist

It happens not infrequently that one side in an arbitration (virtually always the respondent) fails to participate in any phase of the arbitration; however, the claimant must not consider that it will automatically prevail. While both arbitration laws and rules permit a case to go forward in the absence of a party, a 'default' victory does not exist. The claimant must still carry the burden of proof (more probable than not) regarding both the tribunal's jurisdiction and the claims. Indeed, I am aware of one case in which an unopposed claimant lost the case because the tribunal considered that its burden of proof was not carried.

A claimant may think it will coast to victory without an opponent, but I beg to differ. Arbitrating without an opponent is like playing tennis with neither a net nor boundary lines. Because the claimant's case is not tested by an opponent, the claimant has to wonder whether its shots are scoring points with the tribunal, or are wide of the mark (what mark?). As for the tribunal, how do you referee a game and ensure its fairness when only one side is playing?

Here are some guidelines for saving costs, and both winning the case and ensuring that the eventual award is not vulnerable to a setting aside procedure.

For the claimant:

- Plead your case as thoroughly as you would any other, but with one addition. Where normally you might not disclose up front the possible weaknesses in your case, hoping the other side will not spot them, take the initiative to point them out to the tribunal and to deal with them. You don't want the tribunal to spot them when writing the award.
- Having been forthright with weaknesses and dealt with them, consider suggesting that the case be decided on documents only, without a hearing, while at the same time encouraging the tribunal to raise any questions it may have regarding your submissions.
- Double-check that both you and the tribunal notify the respondent of each and every communication, and ensure that there is proof of delivery.

For the tribunal, in addition to ensuring proper notification of all communications, two English cases provide good guidance, the fundamental principle being that due process is observed:

- In *Fox v. Wellfair* (1981 WL 186914), Lord Denning stated: 'I cannot think it right that the defendants should be in a better position by failing to turn up. Nor is it right that the arbitrator should do for the defendants what they could and should have done for themselves. His function is not to supply evidence for the defendants but to adjudicate upon the evidence given before him.'
- In *Interprods v. De La Rue* (2014 WL 287657), Mr Justice Teare observed that, in anticipation of the hearing, the arbitrator wrote to the claimant's counsel: 'I would appreciate it, seeing that there will not be . . . cross-examination, if you, sir, will lead [the witness] through some of his testimony.' One question was asked by the arbitrator. In the award, the arbitrator gave his reasons for regarding the witness's evidence as credible. The judgment considered that '[t]hese reasons demonstrate that the arbitrator did not accept the witness's evidence "uncritically".'

Your serve.

– Stephen Bond

But just how far should the claimant's counsel encourage the arbitrators to go to satisfy themselves that the claims are well founded in fact and in law? If the claimant's evidence has no glaring holes, the claimant's counsel may want to stress that a full picture has been presented. If the tribunal seems reluctant to accept the uncontested expert evidence presented by the claimant, counsel will need to make a judgement about how strenuously to resist the tribunal's urge to test the evidence.

For example, if the expert report addresses a subject with which the members of the tribunal seem likely to be unfamiliar, such as an expert report on the law of the Duchy of Grand Fenwick, then it may be impossible to dissuade the tribunal from retaining its own expert on that subject, and it would probably be a mistake to try. In this situation, a tribunal balancing the claimant's interests in moving ahead economically against the due process rights of the non-participating respondent could well insist on having its own expert, and the claimant's counsel would be well advised to focus his or her efforts on defining the scope of the work to be performed by the tribunal expert as precisely and narrowly as possible.

But what if the subject of the expert report is one about which seasoned arbitrators can be expected to have considerable experience, such as an expert valuation report based on a discounted cash flow model? In such a case, counsel should be able to persuade the members of the tribunal to rely on their own experiences and to focus their efforts on examining the claimant's expert about the assumptions in his or her expert report. It should not in such circumstances be necessary for the tribunal to retain another expert to prepare a competing valuation report in order to discharge its duty to test the evidence. Because the claimant would have to bear the additional costs of paying an expert to assist the tribunal – which can be considerable – the claimant's counsel will have a real incentive to try to rein in the cautious arbitrator's inclination to have both a belt and braces. While the tribunal should award any such additional costs as part of its final award, the claimant can hardly assume that the respondent will pay the award voluntarily if it would not even participate voluntarily in the arbitration.

A more volatile problem will confront the claimant's counsel if the arbitrators, frustrated by the refusal of the respondent to participate, toy with the idea of appointing a sort of *amicus curiae* (or *amicus arbitri*) to perform the adversarial function that the absent party is not performing and that the arbitrators may be uncomfortable about performing themselves. Such a solution can have a superficial appeal to the arbitrators, because it would allow them to sit back and listen, confident that the adversarial process they have engineered will sufficiently test the evidence. The risks posed by such a solution are considerable, however.

First, the tribunal's *amicus* cannot be expected to work for free, so this solution would impose on the claimant the burden of paying for the opposition to its own case. That is unlikely to sit well with the claimant; its counsel would certainly be entitled to protest. Second, the arbitrators may well enlist a more able advocate for the absent party than it would have hired for itself, so that the absentee respondent may find itself in a better position than it would have been in if it had chosen to participate. Third, the advocate thus enlisted can attack the claimant's case without the obligation to offer an alternative case to counterbalance it that normally constrains the aggressive instincts of respondents' counsel. Fourth, because many arbitration rules provide that each party may be represented by persons of their choice, appointing such an advocate could expose an award to challenge

Don't give the arbitrators an excuse to become opposing counsel

The non-participation of your opponent in the proceedings is never good news. It does not speak in favour of the non-participant, but it is only a very superficial advantage. Arbitrators do not judge companies and people in the light of moral standards. They decide cases on the basis of the evidence presented to them and of the applicable rule of law. Do not imagine that the arbitrators will accept anything you say simply because it is not challenged by your absent opponent. They will scrutinise your evidence to assess whether it supports your case. In this respect, you cannot assume that the arbitrators will not look for the weaknesses of your case. Good arbitrators will do this if you do not do it for them and the risk is that they become your opponent's objective counsel. To be on the safe side and avoid it, you must explain in your written submissions why your opponent's possible defences would necessarily fail. If you are lucky enough to have very good documentary evidence, avoid presenting witnesses; in the absence of your opponent at the hearing, the arbitrators would feel obliged to submit them to cross-examination. The danger is that they will enjoy it. Do not ask for a hearing – just say that you are available to answer any of the tribunal's questions. If your written evidence is well presented and supports a balanced legal analysis, the arbitrators may decide that no hearing is necessary, to avoid having a meeting with just one of the parties. In this way, you will avoid being subjected to possibly embarrassing questions.

– Yves Derains, Derains & Gharavi

on the grounds that the respondent had effectively been represented by someone it had not chosen.[16] The claimant's counsel may find his or her tact and diplomacy stretched to their limits, but will want to exert himself or herself to convince the arbitrators that these drawbacks outweigh any benefit they could hope to achieve.

Advocating for a workable process

Second only to presenting a convincing case on the merits, the most effective form of advocacy that a claimant's lawyer can deploy against an absent opponent is to guide the tribunal towards procedural solutions to the opponent's absence that respond to both the sense of responsibility of the tribunal and its frustrations.

In the *Arctic Sunrise* case (*Kingdom of the Netherlands v. The Russian Federation*), an arbitration conducted under the United Nations Convention on the Law of the Sea in which

16 e.g., Article 5 of the UNCITRAL Arbitration Rules (2010) ('Each party may be represented or assisted by persons chosen by it.'). This concern can be particularly acute in the context of an arbitration against a sovereign state. If a state makes a deliberate choice not to participate in an arbitration, that choice reflects the state's sovereign will. The arbitral tribunal may not agree with that choice. The state's choice very well may inconvenience the arbitral tribunal a great deal, but it is the state's inherent right to choose this course of action and accept the consequences of not participating in the proceedings. It is probably better for the arbitral tribunal to respect the state's choice rather than to attempt to override it through the appointment of a 'guardian ad regum'.

the Russian Federation refused to participate, the tribunal voiced the frustration that most tribunals feel when they must proceed in the absence of a party:

> *Russia's non-participation in the proceedings has made the Tribunal's task more challenging than usual. In particular, it has deprived the Tribunal of the benefit of Russia's views on the factual issues before it and on the legal arguments advanced by the Netherlands. The Tribunal has taken measures to ensure that it has the information it considers necessary to reach the findings contained in this Award. These measures include the issuance, on three occasions, of further questions to the Netherlands on issues arising out of its written or oral pleadings. Members of the Tribunal also put questions to the witnesses presented by the Netherlands at the hearing.*[17]

The procedures adopted in the *Arctic Sunrise* case provide a useful template for an advocate to offer a tribunal tasked with deciding a case in which only one party is participating. Those procedures can be presented to the tribunal as fairly striking a workable balance between the interests of the claimant and the interests of the non-participating respondent. The authors are aware of similar procedures having been used in at least five investment arbitrations in which the same respondent did not participate,[18] and are thus worth describing in a bit more detail.

The first step is for the claimant to offer to submit its statement of claim – on both jurisdiction and the merits – with all supporting evidence. In preparing that initial submission, the claimant will still face the difficulties (described above) of determining just how far to address objections to jurisdiction that have not been articulated and defences on the merits that have not been raised. However, these difficulties should be ameliorated by the steps in the procedure described below that call for the tribunal to ask written questions, thereby allowing the claimant to focus its submission on the key points that must be established.

The second step is to urge the tribunal to set a date by which the respondent is required to submit its statement of defence. This has the advantage of documenting the tribunal's reasonable efforts to protect the respondent's right to participate in the arbitration, even if it seems obvious that the respondent has no intention of making any submission at all.

Some tribunals have varied this second step slightly by setting two dates. The first, which is set relatively soon after the submission of the claimant's full statement of claim, is a date by which the respondent is required only to indicate to the tribunal and the claimant whether it intends to submit a statement of defence. If the respondent indicates that it intends to submit a defence, then its statement of defence will be due on the later second date. If the respondent does not indicate its intention to defend the case, then the tribunal can proceed to the next step without waiting until the time limit provided for the respondent to prepare and submit its statement of defence has expired. This variation thus

17 In the matter of the *Arctic Sunrise* arbitration (*Neth. v. Russ.*), ITLOS Case No. 22, PCA Case No. 2014-02, Award on the Merits, Paragraph 19 (14 August 2015).

18 PCA Case No. 2015-07: *Aeroport Belbek LLC and Mr Igor Valerievich Kolomoisky v. The Russian Federation*; PCA Case No. 2015-21: *PJSC CB PrivatBank and Finance Company Finilon LLC v. The Russian Federation*; PCA Case No. 2015-34: *PJSC Ukrnafta v. The Russian Federation*; PCA Case No. 2015-35: *Stabil LLC v. The Russian Federation*; and PCA Case No. 2015-36: *Everest Estate LLC v. The Russian Federation*. The respondent chose belatedly to appear at the quantum stage of the first two cases listed.

balances the claimant's interest in moving forward with the interest of the non-participating respondent in having an opportunity to reconsider – in light of the claimant's statement of claim – its decision not to participate in the arbitration. If the respondent chooses to let that opportunity pass by and does not signal its intention to participate, then the arbitration can move forward to the third step without further delay.

The third step involves encouraging the tribunal to submit to both parties, in writing, any questions that it may have arising from the claimant's statement of claim. By addressing the questions to both parties, the tribunal accommodates the respondent's procedural right to participate in the proceeding and react to the claimant's evidence and legal theories, while simultaneously moving the arbitration forward. The claimant has the benefit of being able to react to and engage with specific questions, rather than having to guess about what is on the tribunal's mind. Such questions free the claimant from having to shadow box against the unknown and permit it to craft responsive (and persuasive) answers. However, because the questions are addressed to both parties, and the respondent is always free to proffer its own answers, the tribunal is not seen as taking sides. Typically, the tribunal will also provide for a second date on which both parties have an opportunity to comment on the other's responses to the tribunal's questions in the event that the respondent reconsiders its original decision not to participate after having seen the tribunal's questions and the claimant's answers.

The final step – after the written question phase – is to encourage the tribunal to hold a hearing at which both parties are invited to participate. This entire four-step procedure can be followed either in a bifurcated or a non-bifurcated proceeding. In a bifurcated proceeding, the tribunal would first follow these steps with questions and hearings limited to issues of jurisdiction and admissibility. Once the tribunal is comfortable that it has jurisdiction, the tribunal may apply the same process to the merits of the dispute. In a non-bifurcated proceeding, the tribunal would put to the parties questions of jurisdiction and admissibility at the same time as questions on the merits, and hold a hearing after the procedure for answering the written questions is completed. Either way, the tribunal will be empowered to draft its award secure in the confidence that it discharged its duty to be fair to the absent party, while having been guided by the participating party's advocate through a full presentation of the case.

Conclusion

The lesson for the advocate is that there are few opponents as difficult to manage as the one who refuses to show up. Every move of an active opponent can be countered and every argument actually articulated by the other side can be refuted, but to convince a tribunal to find in a client's favour and against an absent opponent requires the advocate to rebut unvoiced objections and to overcome unseen obstacles. It also requires him or her to keep the tribunal convinced that it is providing due process to the absent party, without burdening the participating party with the unreasonable costs and unnecessary delays that can sometimes result from a lack of confidence on the part of the arbitrators. By recognising, rather than resisting, the need of arbitrators to feel that a meritorious case has not only been fairly presented, but that it also has been diligently tested, a skilful advocate can steer the participating party through the turbulent waters of unopposed arbitration.

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Advocacy in Investment Treaty Arbitration

Tai-Heng Cheng and Simón Navarro González[1]

> *Of the modes of persuasion furnished by the spoken word there are three kinds. The first kind depends on the personal character of the speaker* [ethos]*; the second on putting the audience into a certain frame of mind* [pathos]*; the third on the proof, or apparent proof, provided by the words of the speech itself* [logos]*. Persuasion is achieved by the speaker's personal character when the speech is so spoken as to make us think him credible.*
>
> Aristotle

As investment treaty arbitration has become more prominent in the past few decades, much has been written about its differences and similarities with commercial arbitration. In terms of pleading a case, the art of advocacy is, in any type of arbitration, the art of persuasion. The ultimate goal is to persuade a neutral or a group of neutrals to adjudicate in favour of one's client. Investment treaty arbitration, however, presents certain unique aspects. It always involves a sovereign state or a state's agency or instrumentality, which incorporates a public component to the factual background of the case. It is typically based on an international treaty, rather than a contract, which determines a different law applicable to the merits – international law rather than national law.

Advocacy in investment treaty arbitration requires at least four particular skills that a diligent counsel should master to present a compelling, persuasive and ultimately successful case: critical thinking, strategy, writing and calibrated drama. This chapter provides an overview of these skills. The purpose is not to present an exhaustive account of the techniques available to counsel, but to group some of them and provide some practical guidelines.

Critical thinking

The roots of critical thinking are traceable to the teaching practice of Socrates, whose questioning method involved seeking evidence, testing assumptions, analysing concepts and

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anticipating implications. This is the first step for counsel in any investment treaty arbitration: apply critical thinking to the facts, the law and the rules of the game.

Learn the facts

The factual predicates of any investment treaty claim are the actions performed by, or attributable to, the state. Typically, the claim will be based on sovereign's acts of government (i.e., executive, legislative or judicial measures), which incorporates a public component to the factual framework of the case, as opposed to commercial arbitration, which is generally based on acts of commerce.

Whether representing a claimant or a respondent, counsel will need to conduct thorough research on the respondent state, its socio-political circumstances, the government policies implemented during the course of the relevant investment period and the public interests behind them. A great number of investment cases further involve heavily regulated sectors, such as energy, mining or telecommunications. The understanding of these sectors will be indispensable to build a solid case. Every minute of properly conducted research at the outset will certainly pay off over the course of the proceeding.

Counsel for the claimant will need to pay close attention to the availability of documentation and witnesses, since investment treaty claims may involve an asymmetry in the access to information. The background documentation on the relevant government measures may be scattered around several national or regional entities, or may not be public at all. Witnesses may further be government officials with no incentive to cooperate with the foreign investor and who may fear retaliation. A diligent counsel for the claimant will seek measures at the outset of the proceeding to ensure the integrity of the documentation and the safety of the witnesses.

Counsel for the respondent also faces factual challenges. First, some of the state measures at issue may be politically motivated and will be harder to justify under the investment treaty. A new elected administration may decide to change long-lasting government policies or openly criticise the actions undertaken by the previous administration. Government officials may also adopt certain measures to preserve their political capital, which may not be in the best interests of the state. An experienced counsel will navigate politically turbulent waters, conveying a uniform and coherent message despite potential changes in government. Second, the state's apparatus typically comprises national, regional and local entities, which may be governed by different political parties or factions within a party. Counsel will need to coordinate the state's public statements at all levels of government to avoid contradictions or acknowledgements that may have a negative effect on the case.

Learn the law

One of the most distinctive features of investment treaty arbitration is the combination of elements of public and private law. It is typically based on an international treaty entered into by sovereign states, while it affords rights to nationals of those states and entitles them to enforce those rights in arbitration. The law applicable to the merits of the case will typically be the bilateral investment treaty (as *lex specialis*), customary international law and, occasionally, domestic law of the host state. Counsel will need to be familiar with the interplay of these three sources of law.

The presence of a sovereign state alters a proceeding

The presence of a sovereign state as party substantially alters a proceeding, and in myriad ways. By way of example, sovereigns may well invoke protections (e.g., sovereign responding to immunity, act of state) that private parties cannot invoke.

From a procedural point of view, states commonly move more slowly, or at least more formally (and formalistically!) than private parties in complying with tribunal orders or participating more generally.

Even the merits of the dispute may be affected by the state's invocation of the public interest in support of its claim or defence. Especially in treaty-based investor-state disputes, jurisdictional issues take on a different colouration. Whether the claimant is an investor that made an investment may sound like a merits question, but it is in fact most often viewed as jurisdictional.

Similarly, whether the claimant failed to satisfy a condition precedent to arbitration (e.g., mediation or litigation for a period of time) is ordinarily viewed as a matter strictly for the tribunal, but may be viewed in the investor-state context as jurisdictional. The latter is precisely the question that divided the US Supreme Court in its landmark *BG Group v. Argentina* decision.

– George A Bermann, Columbia University School of Law

Investment treaties further contain a handful of standards of protection, which are often vaguely drafted and provide, in and of themselves, little guidance as to their application to the particular case. Counsel will need to further research the application of these standards in hundreds of investment treaty awards, which albeit not binding, are granted a reasonable degree of deference by other tribunals.[2] Counsel will need to fill in perceived gaps of the treaty with customary international law and resolutions of the International Court of Justice, as needed. Finally, the advocate may need to be familiar with specific instances of local law, such as to determine the scope of the investor's property rights or to establish whether or not it effected the investment in accordance with the law of the host state.

Learn the rules of the game

This is as crucial as knowing the law and the facts. Written rules include the arbitration law of the seat and the procedural regulations that may govern the arbitration proceeding, whether it be the Rules of the International Center for the Settlement of Investment Disputes (ICSID), Rules of the United Nations Commission for International Trade Law (UNCITRAL), Permanent Court of Arbitration or others. At the outset of the proceedings, particular emphasis should be placed on sections concerning the appointment and recusal of arbitrators, interim measures, bifurcation, interaction with local courts, annulment or enforcement of the award, which could have a direct impact on the preferred composition of the tribunal, the party's ability to present its case, or the integrity of the award.

2 The level of deference to past awards varies in practice, depending on the reasoning or specific composition of the tribunal.

Focus on the essence of the case

Arbitrators can be persuaded if they are genuinely helped.

Counsel need to be clear and assist the tribunal in reaching the best possible decision, in identifying what truly matters for the resolution of the case. Counsel live and breathe the case. They speak to the clients, interview the witnesses or the experts, review and select every scrap of document in the file. Arbitrators, on the other hand, no matter how well prepared they are, will never master a case to the same degree.

Counsel must lead the tribunal through the maze of the case and towards their preferred solution in a clear, concise manner without resort to embellishment or polemic.

In doing so, counsel should be mindful not to lose sight of their positive case and not to get caught in the minutiae of the dispute.

It is important that advocates focus on the essence of the case and the main factual and legal issues, those that they want the tribunal to remember when all is said and done and the lights go off in the hearing room.

– Loretta Malintoppi, 39 Essex Chambers

Unwritten norms include codes of conduct by which counsel should abide. Investment treaty arbitration has been described as a gentlemen's game. Arbitrators sitting on investment treaty cases are among the most experienced and respected professionals in the arbitration community. The tribunal will address counsel with the utmost respect and consideration, and will expect them to follow suit. Counsel's tone and demeanour should be calm and polite. Ad hominem attacks or signs of hostility should be avoided. Zealous advocacy in the client's best interest is always accepted; disrespecting the counterparty or opposing counsel is not.

Strategy

Counsel must develop a clear strategy from the outset, correctly allocating resources and never losing sight of the ultimate goal.

Keep your eye on the end game

The first strategic consideration is setting the ultimate goal. It may not be as straightforward as it seems. For a claimant, the goal may seem to be a favourable award, but most likely is early favourable settlement or, failing that, ultimately collecting payment on the award. Enforcement strategy should be considered at the outset of the proceedings. For instance, out of the dispute resolution alternatives included in an investment treaty, a claimant may lean towards ICSID instead of UNCITRAL arbitration, since ICSID awards are directly enforceable as national court judgments. However, should the investor lack legal personality (e.g., a trust or a limited partnership in some jurisdictions), it may fall within the definition of investor under the treaty but may face some hurdles under Article 25(2) of the ICSID Convention, which provides that the Center has jurisdiction over disputes between the host state and a 'juridical person' of the home state. In this case, UNCITRAL arbitration – containing no such requirement – may be more appropriate. Other early considerations

include whether the relevant investment is still a going concern in the host state or has been irreversibly destroyed, and whether the particular state has voluntarily paid investment awards in the past. This may affect the ultimate goal of the case – to reach a settlement and maintain an amicable relationship, or proceed to an award.

For a state, the ultimate goal may well be an award dismissing the claim. Other political or economic factors may be in play, however, such as the state's intention to project a positive image as a safe destination for foreign investment, or the existence of a third-party funder and the investor's lack of own resources to pay for arbitration costs. These factors may also speak for a settlement rather than a public and lengthy proceeding. Conversely, the goals of government decision-making may diverge from the state's interests. An elected official may wish to delay or reject a settlement, even if favourable to the state, until after critical elections take place. A civil servant may wish to avoid a settlement involving large payments during his or her tenure, leaving the decision to a successor. Experienced counsel must be aware of competing interests in the client's decision-making process and navigate them carefully.

Assess the strengths and weaknesses of the case

Two common and useful pieces of advice for counsel at this stage are not to fall in love with one's own case, and not to hide its weaknesses, allowing the counterparty to expose them. Counsel will often do well to address these weaknesses directly, minimising their impact and relevance for the case.

Appoint the right tribunal for the case

In arbitration, the parties participate in the selection of the tribunal. Additionally, in investor-state arbitration, most of the awards are public. There is, therefore, a vast corpus of decisions that counsel may examine to better understand the arbitrators' positions on certain issues of fact and law that may be applicable to the case at hand. Counsel should also assess whether the candidates' decisions lean towards the investor or the state, for obvious reasons, and whether they frequently issue dissenting opinions, when they have been unable to persuade the other members of the tribunal of their point of view.

The cultural and legal background of the arbitrators is also relevant. It has been traditionally contended that civil law-trained arbitrators tend to rely more on documentary evidence and are reluctant to grant wide-scope discovery, while common law arbitrators pay greater deference to oral evidence and cross-examination of witnesses, and are more prone to discovery. Counsel should assess the particulars of the case and the available evidence to tailor the appointment accordingly. Language skills are relevant too. Most of the documentation of the case may be written, and most of the witnesses may testify in, the host state's official language. An arbitrator who speaks and understands that language will have an edge over other members of the tribunal, thereby avoiding 'lost in translation' issues. Language skills may also be an indirect way for a specific cultural or legal background to permeate the tribunal (e.g., most native French and Spanish speakers are likely to have a civil law background). More broadly, the reputation and credibility of an arbitrator should be paramount factors in the appointment decision.

Finally, investment treaty arbitration is international by definition and it involves different cultural, legal and socio-economic sensitivities. Fostering diversity in the composition of

the tribunal, in all forms, will ensure a broader perspective on the issues at hand, and enhance the quality of the decision-making process.

Anticipate next steps

In the event of a dispute before domestic courts or administrative bodies of the host state, counsel should consider potential jurisdictional hurdles for the investment-treaty arbitration (e.g., cooling-off periods, fork-in-the-road clauses). Moreover, counsel will need to assess the documentary gaps in the case and how to fill those gaps, namely with witness statements or with document production requests to the counterparty.

Writing

Humans are not ideally set up to understand logic;
they are ideally set up to understand stories.

Roger C Schank, PhD

Written submissions are the backbone of investment treaty arbitration – they articulate the narrative and contain the relevant information upon which the tribunal will base its decision. In investor-state arbitration, at least two rounds of written submissions will typically take place before the hearing. Counsel should take advantage of them so that the arbitrators enter the hearing with a clear idea about the case.

Some recommendations on how to write effectively to persuade an adjudicator have been eloquently summarised as follows:

- be clear;
- be brief;
- make it interesting;
- don't misstate the facts;
- don't misstate the law;
- don't stray from your legal argument;
- keep it simple;
- use examples; and
- revise, revise, revise.[3]

These and other practical recommendations can be grouped in three main categories, from the specific to the more general.

Be clear

The purpose of a written submission is to assist the arbitrators and build the advocate's credibility. The guidelines for an advocate are to be clear, rigorous, thorough and structured. Experienced counsel will avoid hyperbole, adjectives or adverbs, unless they are indispensable in conveying the message. Counsel will use the active voice, short simple sentences

3 Aguilar Álvarez, G, 'Effective Written Advocacy' in *The Art of Advocacy in International Arbitration* (Doak Bishop, ed.) (JurisNet, LLC 2010), pp. 206 to 207, citing Scalia and Garner, *Making Your Case: The Art of Persuading Judges*, Thomson/West, 2008, pp. 59, 61, 80, 81, 93, 98, 107, 111 to 113 and 123.

The critical difference is transparency

Investor-state treaty-based arbitration is, of course, different from commercial arbitration in many important aspects. The advocacy skills, however, are not that different. The vast majority of the advocacy tips relevant to treaty-based arbitration are equally relevant to commercial arbitration, and vice versa. The critical difference is transparency. An advocate in treaty-based arbitration should be prepared that the briefs he or she has written would be published and that the hearing, in which he or she would examine and cross-examine witnesses and present oral arguments, would be webcast. This doesn't mean, of course, that the advocate should perform to the audience – the goal of the advocate is to persuade the tribunal. However, public hearings contribute to the accountability of parties, counsel and arbitrators and – as far as counsel is concerned – impose discipline and highlight the duty to act in an efficient and courteous manner.

– Stanimir A Alexandrov, Stanimir A Alexandrov PLLC

and parallel structures. Plain and direct language, conveying one idea per paragraph, is also advisable.

When becoming familiar with the case, the tribunal may instinctively follow one of the briefs filed by the parties; and the chances are that it will choose the brief in which the information is more simply and accurately conveyed, and easier to find and understand. There is no quicker way for counsel to lose credibility than by misquoting or omitting the relevant part of a document, or misstating a date. There is no easier way to lose the tribunal's attention than by being unnecessarily convoluted – the tribunal will immediately turn to the other party's brief for assistance. The ultimate goal of any written submission is, therefore, to be clearer and more accurate than that of the counterparty.

Tell a story

The second step is to include the details of the case within a broader narrative. In the words of film director Jean-Luc Godard: 'Sometimes reality is too complex; stories give it form.' Counsel should convey complex issues in a simple way, within a compelling story. Studies show that we understand, absorb, categorise and memorise information better when it is included as part of a story. A useful way to verify the narrative is by checking the headings included in the table of contents which, by themselves, should paint a complete, compelling and persuasive picture of the case. The story should also be relatable to the reader, for which it may be useful to explain the intent behind the parties' actions. Intent may not be required to establish violations of investment treaty standards, but it may help to draw empathy from the reader.

The maxim is that a good story is always more persuasive. Think, for example, how difficult it would be to absorb and memorise a three-paragraph sequence of random numbers. Think, instead, how easy it is to absorb and memorise Aesop's fable of the fox and the 'sour' grapes. It is easy to understand, relatable and it ends with a moral. Now think about framing the actions of the counterparty in terms of Aesop's fable. The state, for example, did not have the resources to pay for a main road that was being constructed by the investor, so it

Listen, especially to your own witnesses

As an advocate it is critically important to listen carefully to every word said in a hearing, especially by your own witnesses. In a treaty-based arbitration the former manager of the claimant's operations in the respondent state became a turncoat. The respondent included a witness statement from him only in its rejoinder memorial, trashing his former employer, the claimant, and favouring the respondent's case. The tribunal then correctly permitted the claimant to file a further witness statement responding to the turncoat's late submission. It came from a senior in-house counsel of the claimant, who testified that he had received a phone call from the turncoat shortly after he was fired, stating that he had done a lot for his former employer, so much so that it should be worth $5 million in severance pay. Cross-examining counsel for the respondent asked the witness, 'Did you report him to the authorities [in the respondent state]?', to which the response was 'No, not then'. Counsel for the claimant missed the significance of this answer, but as one of the arbitrators in the case, when it was my turn to ask questions, remembering the 'not then' that had followed 'No', I asked: 'Did there ever come a time when you reported this person to those authorities?' It opened a floodgate. The response was, 'Oh, yes, we did. After I received that phone call we convened an emergency meeting in the board room, we sent down to our operations in that country a forensic accounting team and they discovered that that person had embezzled $300,000 from the company. With that we went to the authorities!' Counsel for the claimant had missed the significance of the soft 'not then' after the claimant's witness's 'No.'

Moral of the story: catch every word, even of your own witness's answers on cross-examination, as one or two words may be the fuse on a stick of dynamite for you to ignite!

If an obvious witness is missing, expect us to ask

Sometimes it can be very useful for the tribunal in an investor-state arbitration itself to request the presence at the hearing of an individual who has not been offered or called for cross-examination by either party. In one such case, the corporate secretary of the private company that claimed it had been expropriated had given witness statements to both sides but was not called by either party for cross-examination. The two witness statements did not conflict with each other, but each made points somewhat favourable to the party that had presented it. Intrigued by this unusual situation, the tribunal requested that this witness appear at the hearing, and indeed she did. In the end, her testimony proved to be absolutely worthless.

In another case, however, in which a troubled eastern European state was the respondent, the tribunal realised from the written submissions of both sides that a certain billionaire of prominence in the respondent state seemed to be everywhere in the background, yet neither party had submitted a witness statement from him, perhaps with good reason. The tribunal requested his presence at the hearing and he complied. (The only incident along the way was that his bodyguard was unhappily relieved of his weapon by the United Nations guards at the gate to the Peace Palace in The Hague, the venue of the hearing.) In this case, the testimony elicited by the tribunal, in response to which both sides were permitted to ask questions, helped to seal the fate of the respondent. The moral of the story: 'Nothing ventured, nothing gained!'

– Charles N Brower, Twenty Essex Chambers

claimed that there were construction defects. Or the investor did not have the resources to build the road so it claimed that the state's requirements were unfair and unequitable. Story: one of the parties could not reach the grapes so it claimed they were sour. Moral: many tend to find excuses for their own shortcomings.

As the proceeding evolves and the parties produce the bulk of the evidence, counsel's task should further resemble that of the director of a documentary. Ideally, there should be no narrator, no voice-over. The facts and the evidence produced in the proceedings – documents, witness statements or expert reports – should drive the narrative of the case, as footage and interviews drive the story in a documentary. The fewer arguments made by counsel, the better. The facts should speak for themselves.

Simplify

Most written submissions in investment treaty arbitration cover complex factual and legal issues and, unfortunately, tend to be rather lengthy. Once a first draft of the brief has been put together, counsel's task is to revise and simplify it. Then revise again and simplify it again. Then once more. Counsel should boil the brief down to its essentials, stripping it of all unnecessary detail. Less is more – simplicity is the road to persuasion.[4]

Identify key ideas

Compelling stories can be summarised in one paragraph. If the task does not seem possible at any given point in time, the brief may benefit from some extra work. Counsel should further identify the key ideas on which the case rests and adequately convey them to the tribunal. The writing process should therefore be based on describing the facts in a simple way, incorporating those facts into a broader narrative, simplifying the story and breaking it down into a few main drivers.

Calibrated drama

The last stage of an investment treaty arbitration is the oral argument before the tribunal. All practical recommendations for written submissions in investment treaty arbitration (i.e., brevity, clarity, structure, thoroughness, identifying key ideas, simplicity) are directly applicable to an oral presentation. Other features unique to oral advocacy can be summarised through an analogy to the art of drama. For instance, Brutus and Antony's monologues in the third act of Shakespeare's *Julius Caesar* represent a master class in oral persuasion and contain a list of practical dos and don'ts in oral advocacy.

In his monologue, Brutus commences by ordering the audience to listen to him, remain silent and believe him for who he is ('Romans, countrymen, and lovers! hear me for my cause, and be silent, that you may hear: believe me for mine honour, and have respect to mine honour, that you may believe . . .'). Brutus then explains that he killed Caesar in the

4 A good illustration of the road to simplicity is 'The Bull', a series of 11 lithographs created by Pablo Picasso in 1945 that depict the animal in various stages of abstraction. The first lithograph portrays a bull in the utmost level of detail, from the fur to the horns. In the others, Picasso deconstructs the bull and strips it from all ornament, resulting in a last picture, in which he depicts the animal in a few lines. When seeing this drawing, however, no one would question being in front of a bull. In fact, the simplicity of the last picture is far more powerful than the complexity of the first. It represents the idea of a bull.

interest of Rome, because he was too ambitious, focusing solely on justification for his actions ('Not that I loved Caesar less, but that I loved Rome more. Had you rather Caesar were living and die all slaves, than that Caesar were dead, to live all free men? As Caesar loved me, I weep for him; as he was fortunate, I rejoice at it; as he was valiant, I honour him: but, as he was ambitious, I slew him.'). Finally, Brutus forces his conclusions upon the audience, reiteratively defying them to prove him wrong ('Who is here so base that would be a bondman? If any, speak; for him have I offended. Who is here so rude that would not be a Roman? If any, speak; for him have I offended. Who is here so vile that will not love his country? If any, speak; for him have I offended. I pause for a reply.').

In his monologue, Antony follows a very different path. First, he kindly requests the audience's attention ('Friends, Romans, countrymen, lend me your ears.'). Then, he shows respect for Brutus and his arguments ('The noble Brutus hath told you Caesar was ambitious: if it were so, it was a grievous fault, and grievously hath Caesar answer'd it. Here, under leave of Brutus and the rest – for Brutus is an honourable man . . .'). Thereafter, Antony analyses the facts and slowly builds the argument, through structure and repetition, that ambition is not a good enough reason to kill the self-appointed dictator. In this process, he elicits empathy from the listener and, in the end, he does not impose his own conclusions, but allows the audience to reach their own.[5]

Shakespeare engages and persuades the audience using tools that can be as effective before an investment arbitration tribunal. The tone is respectful and direct. The rhythm and cadence keep the audience interested. The message is clear, simple and structured. The content is relatable and elicits empathy from the listener. Caesar's ambition may have well led to the destruction of Rome, as Brutus contended, but the audience remains captivated by Antony's empathetic message of reason and civility. This is the art of persuasion.

Conclusion

Advocacy in investment treaty arbitration is an art, not a science – it is the art of persuading a tribunal. Counsel must learn the facts and the law, carefully design an effective strategy, draft an accurate and compelling story, simplify the messages conveyed to the arbitrators and present them persuasively before the tribunal. He must do so, taking into account the specific particularities of investment treaty arbitration as opposed to other forms of dispute resolution. The facts and the law are the key to being successful in an arbitration, but presenting them in a persuasive manner is certainly the path that leads to that outcome.

5 Shakespeare, W, *Julius Caesar*, Act III, Scene II:

So are they all, all honourable men—
Come I to speak in Caesar's funeral.
He was my friend, faithful and just to me:
But Brutus says he was ambitious;
And Brutus is an honourable man.
He hath brought many captives home to Rome.
Whose ransoms did the general coffers fill:
Did this in Caesar seem ambitious?
When that the poor have cried, Caesar hath wept:
Ambition should be made of sterner stuff:
Yet Brutus says he was ambitious;
And Brutus is an honourable man.
You all did see that on the Lupercal
I thrice presented him a kingly crown,
Which he did thrice refuse: was this ambition?
Yet Brutus says he was ambitious;
And, sure, he is an honourable man.
I speak not to disprove what Brutus spoke,
But here I am to speak what I do know.

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Advocacy in Construction Arbitration

James Bremen and Elizabeth Wilson[1]

Introduction

A number of matters render construction arbitration different from its general commercial cousins; and which, therefore, require particular attention, rigour and strategic consideration to successfully prosecute and defend construction claims in an arbitration context.

That the International Chamber of Commerce has now issued two Construction Arbitration Reports (albeit 18 years apart)[2] is testament to the appreciation of the arbitration community that effective resolution of construction arbitrations involves many specific legal, evidential and practical considerations. Recognition of these differences on the part of both arbitrators and counsel is imperative, particularly given that construction-related disputes comprise a significant proportion of disputes referred to arbitration. The 2019 ICC Dispute Resolution Statistics states that 'Disputes within the sectors of construction/engineering (211 cases) and energy (140) generated the largest number of ICC Arbitration cases and, as in previous years, account for approximately 40% of the ICC Arbitration caseload.'

This is a chapter with the word 'advocacy' in the title. However, the importance of advocacy does not relate only to the performance of counsel at a hearing. Whether in the context of construction or otherwise, the importance of written advocacy and detailed

1 James Bremen and Elizabeth Wilson are partners at Quinn Emanuel Urquhart & Sullivan LLP.

2 The ICC Commission on Arbitration and ADR published its revised report on construction industry arbitrations in 2019 (the ICC Construction Arbitration Report: ICC Commission Report, Construction Industry Arbitrations: Recommended Tools and Techniques for Effective Management, 2019 Update [ICC Construction Arbitration Report] <https://cdn.iccwbo.org/content/uploads/sites/3/2019/02/icc-arbitration-adr-commission-report-on-construction-industry-arbitrations.pdf>. It is not the purpose of this chapter to traverse the recommendations in that detailed report, which should be reviewed by any counsel practising in the area. It is, on its own terms, intended primarily for arbitrators who do not have significant experience in construction arbitrations, by reference (of course) to the ICC Rules and their case management tools. It is not a guide or commentary on advocacy.

evidential preparation in the months or years leading to a substantive hearing should not be underestimated. This is particularly so in construction arbitrations, where understanding, explanation and presentation of technical concepts and the evidential record in an accessible manner is key.

It would be remiss not to mention, given the timing of this chapter, the impact of covid-19 on (1) parties' substantive obligations, particularly in large international construction projects (e.g., where there are increased restrictions regarding movement of personnel and equipment and materials) and (2) international arbitration procedures. In the case of the former, the impacts of the disruption caused by the pandemic in the form of claims for relief will continue to be felt in coming years. In the context of the latter, the pandemic has forced international courts, arbitral tribunals and parties to embrace (or at least tolerate) the conduct of virtual hearings to an extent not previously seen. The impact of that in construction arbitration, given the technically detailed nature of evidence, cross-examination and submission, requires particular consideration when planning for a hearing.

Why is advocacy in the context of construction arbitration different from any other complex commercial dispute?

Claims in construction arbitrations address legal issues that often present themselves in other commercial arbitrations: breach of contract, tort, estoppel, mistake, good faith, the operation of indemnities, warranties. However, they tend to do so in combination with issues that are more specific to construction: the enforceability of liquidated damages and penalties,[3] recovery of consequential or indirect losses, allocation of risk for concurrent delay,[4] the scope and applicability of insurance cover,[5] global claims,[6] the extent of and allocation of liability and responsibility for design and interpretation of applicable engineering codes and standards.[7]

Despite the stereotypical image of construction lawyers and experts drowning in a sea of technical specifications, drawings, programmes, payment certificates (as well as the usual correspondence and emails that arise from commercial disputes), construction disputes can sometimes relate almost solely to issues of contractual interpretation (though there are often follow-on disputes to deal with the implications).

Long-term legal practice in the construction sector brings with it a familiarity as to how construction contracts 'work' (or rather, should work, in many unfortunate instances). This undoubtedly assists in the efficiency and insight of the legal analysis, and the clarity of its presentation.

All lawyers can read and interpret a contract. However, construction projects that lead to international arbitration involve many contracts, between many different parties. While liability between two particular parties is usually defined by the contractual relationship between them, that is rarely the end of the matter in a large-scale construction project. One must often have an eye to, for instance, how one arbitration might affect a subsequent

3 See, e.g., *Cavendish Square Holding BV v. Talal El Makdessi* and *ParkingEye Ltd v. Beavis* [2015] UKSC 67.

4 *North Midland Building Ltd v. Cyden Homes Ltd* [2018] EWCA Civ 1744.

5 *Haberdashers' Aske's Federation Trust v. Lakehouse Contracts and others* [2018] EWHC 588 (TCC).

6 For example, *Walter Lilly & Company Ltd v. Mackay & Anor* [2012] EWHC 1773.

7 *MT Hojgaard A/S v. E.ON Climate and Renewables UK Robin Rigg East Limited* [2017] UKSC 59.

Expect assertive case management

The complexity and voluminous documentation of typically large construction cases requires assertive case management by tribunals to achieve an expeditious and cost-effective outcome, which most institutional rules prescribe, and end users want. An early case management conference to seek effective case management procedures is necessary, as is an early meeting with experts to identify methodologies and issues, well before experts' reports and joint meetings. Redfern schedules should be directed for document requests rather than the old-fashioned common law listing of all documents. It is particularly important to direct joint statements on agreement and disagreement between experts of like disciplines, as properly implemented this can resolve a lot of expert issues. For pleadings, memorials and witness statements, succinct and focused is better than *War and Peace*. Guerrilla tactics by the respondent should be put down firmly, possibly by costs orders.

– David Bateson, 39 Essex Chambers

or different claim against a different project party – for example, an insurer who has otherwise refused to cover damage, a specialist consultant who assisted on a particular scope of work or a subcontractor who allegedly remains unpaid. If the project has been financed by external lenders, is consent required for the action being taken? (It most certainly will be required for any form of settlement.)

These competing considerations bring with them the need for consistency in approach and a cohesive strategy to ensure the interests of one's client are not prejudiced. Contractual arrangements on construction projects are designed to 'fit together' in the sense that risk is often allocated in particular and (for an experienced practitioner) expected ways. One must be mindful of this, while not operating on the basis of assumption. After all, a party's rights and obligations are specific to the particular terms of the contract in question.

Accordingly, legal argument before a tribunal, whether written or oral, also requires an ability to explain clearly and logically the contractual framework and operative risk allocation.

The other obvious, and perhaps more often-quoted, factor that sets construction disputes apart from others is the need for examination of technical matters. 'Technical' in this context entails any of or all the issues that require specialist input before, during the course of or after a construction project (depending on the nature and location of that project). Experienced counsel have the practised project management skills that assist with the navigation, review, analysis and assimilation of vast amounts of technical information, in addition to ways of presenting technical concepts to a tribunal otherwise unfamiliar with the issues.

Are all these documents really necessary?

The potential for enormous amounts of documentation and disclosure is a vision that immediately comes to mind at the mention of construction disputes. It is true that the sheer quantity of documentation involved is something that sets construction arbitrations apart, and that renders successful conduct of construction arbitration particularly challenging.

Different lawyers from different legal systems (and dependent on their perceived position of their clients' position on the merits) may take different views as to the extent of disclosure properly to be expected in arbitration.[8] However, it is the authors' view that, including in their experience of civil law systems where burdensome disclosure obligations are less usual, to prove one's case in a complex construction project there is a minimum of documents that will be required. Unfortunately, the volume of those will necessarily be significant. Technical experts are also unlikely to be able to give informed independent opinions absent analysis of all of the technical documentation that they would normally examine in their specific industry (specifications, drawings, etc.). Any of those documents might impact their view as to what did or did not happen or should or should not reasonably have or could have been done. The nature and number of activities taking place on a construction project (and the number of parties undertaking them) results in the volume of documents so often referred to. It is a rare occasion that a witness remembers precisely what was happening on-site on a Tuesday five years ago on one of the world's largest construction projects. Contemporaneous documentation is essential.

Take, for example, an allegation that the owner terminated a contractor for accumulated poor performance during the course of a project. That, in turn, creates a large number of allegations of failure on the contractor's part, one of which is the late installation of a crucial piece of equipment that prevented the start-up of the facility and earning of substantial revenue for several weeks or months. Consider again, even on this one example, how many activities are taking place on a construction project from design, procurement through to construction.

It is not simply a question of whether the piece of equipment in question was in fact late on site. The owner could have, in parallel, delayed approval of the design of an equally important part of the works, without which the project could not be completed. In turn, that may raise a technical question as to whether the design was adequate.

Drawings, daily, weekly and monthly reports, evidence of orders placed, site photographs, emails, programmes and schedules (in addition to factual and expert evidence) will all be necessary to resolve the question of who caused the delay to completion and to what extent (putting aside the legal result of that).

Putting aside disclosure obligations themselves, for the purposes of analysing one's case and advising one's client, a review of contemporaneous documentary evidence needs to be planned as early in case preparation as possible. It is a costly exercise and parties can (understandably) be resistant to making such an investment so far in advance of formal disclosure and preparation of evidence. However, it cannot be assumed that significant document review and investigation can wait until the formal procedural step of disclosure.

Only if a party has a mastery of the underlying documents and a deep understanding of the evidence and technical issues can the above approach be adequately dealt with. This is critical in large construction cases if they are not to descend into merely a battle of poorly evidenced assertion.

8 For the purposes of this chapter, the authors do not embark on a debate regarding what is most appropriate by way of procedure in construction arbitrations, for example on the topic of pleadings versus memorials.

Build your case around the evidence, not the other way around

It is important that a party's case is thought through from the outset of the arbitration, especially in disputes involving a large volume of facts and technical evidence, such as typically in construction disputes. This requires that delay experts, for example, are engaged at the outset of the arbitration to provide an objective and as detailed as possible assessment of the existing evidence that can enable a party to construct a solid case. The main thrust of the case should be built around the existing evidence and not on evidence that counsel assume will be taken in the course of the arbitration. It is often the case that counsel have to change the whole narrative and supporting basis of their parties' case, or drop some of the claims in the course of the arbitration when they realise that the evidence that was eventually procured does not support the parties' original claims, or at least the full extent of their original claims. When this happens, counsel risk losing credibility with the tribunal in relation to the entire case. Importantly, too, tribunals may be minded to take haphazard handling of evidence into account at the allocation of costs, especially when dropping claims or changing the narrative of a case has resulted in unnecessary delays and expenses.

– Stavros Brekoulakis, 3 Verulam Buildings

Tactical issues

Selection of arbitrators and developments in success of challenges

The key question when it comes to selecting arbitrators in construction arbitrations is whether the arbitrators (or some of them, if a panel of three) should have at least some expertise in construction law, whether as previous arbitrators, judges or experienced practitioners. There is much to be said for this approach, both for the benefit of the parties, and the tribunal members themselves.[9]

Arbitrators with relevant experience understand and are familiar with the legal and technical concepts that arise, as well as the contractual frameworks that operate in large projects. In addition, they are used to managing issues that present evidential challenges in construction cases, such as complicated delay analyses – and the manner in which to examine global claims and causation – and disclosure. These individuals also appreciate and expect the intensive and substantial workload (often taking place over a number of years) that may be required from them in the course of numerous lengthy substantive hearings. In that context, they can also be more realistic in their assessment of the necessary timing of future procedural steps.

The nomination of specialist arbitrators brings with it the issue of what is, relatively speaking, a limited pool of arbitrators that might have the requisite expertise, particularly in dealing with the largest and most complex construction disputes. It also, therefore, gives rise to the potential repeated appointments of particular arbitrators by a party or its counsel or other long-standing relationships between candidates and counsel (whether

9 ICC Construction Arbitration Report: an arbitrator should ideally be a 'cross-functional "construction professional" and possess the ability to grasp – and, ideally, the intellectual curiosity to wish to understand – the technical issues (if a lawyer) and legal issues (if not)' (see paragraph 2.1(a)).

due to prior work as co-counsel or otherwise) and the potential for arbitrators to have been appointed on related matters or disputes on one project. The requisite standard of perceived impartiality of arbitrators, including the extent of disclosures they should make, and the approaches of various institutions, national laws and arbitral customs and practices to those questions, has been the subject of renewed debate in the past year in light of the UK Supreme Court decision in *Halliburton v. Chubb*.[10] Whether a potential nominee may be subject to challenge is a matter for the appointing counsel to consider and the risk of that should be discussed with the counsel's client in the relevant circumstances. However, it can be assumed in any event that one's opponent will look very closely at whether any nomination gives their client cause for concern.

Procedure and timing in construction arbitration

Good arbitrators are often very busy people, who rarely have convenient substantial windows in their diaries waiting to be filled. That problem is obviously exacerbated when the diaries of three such arbitrators need to be coordinated. In addition, one has to have regard to the complexities, volume of material, resources and costs that will be incurred in running (say) a case involving hundreds of individual defects or variations. Nonetheless, as is hopefully already established in this chapter, the complexity of construction arbitration means that particularly large construction disputes cannot be disposed of in their totality in a week, or often even in several weeks.

This being so, it is not unusual to see construction arbitrations broken into phases to enable particular issues or groups of issues to be dealt with in stages over several years. As with other arbitration, thought must be given at an early stage to how that might most sensibly be approached and managed, and which course is the most beneficial to one's case.[11] There are many factors that feed into this question.

However, caution must be exercised. While this course provides parties some welcome, though perhaps limited, relief from the burden of preparing an all-consuming case, it can present problems later. Regard must be had as to whether, if the case is split in a particular way, it will allow a party simply to revisit an argument that should have been disposed of previously. In addition, it is not particularly useful for a claimant to win issues of liability and then learn that the documentary evidence of loss (whether proof of the reasonableness of monies expended in settling claims with other parties, or simply evidence of paid invoices) is inadequate. In practice, many cases settle following a liability determination; however, that cannot be assumed.

Again, the experience of the tribunal will be central. It is essential that arbitrations, including in particular large complex disputes that may otherwise spiral out of control, be carefully and rigorously case managed. Proceeding on the basis that the arbitration must be finished within a defined period, that there will be one substantive hearing only, and setting hearing dates in a manner that allows for little to no flexibility, is counter-productive and quite possibly leads to an unsafe procedure and, therefore, award.

10 *Halliburton Company (Appellant) v. Chubb Bermuda Insurance Ltd* [2020] UKSC 48.

11 See, e.g., paragraph 15 of the ICC Construction Arbitration Report.

Expert evidence

The best construction advocates know how to present technical concepts and arguments to a tribunal in an accessible manner. These advocates spend many hours with the experts, understanding the concepts and, in turn, determining how best to articulate and therefore translate them into written and oral form. Further, while expert evidence is central in construction arbitrations, it is counsel who are responsible for the analysis and development of their client's case. Counsel must understand precisely what analysis is being conducted by any experts, and why; and counsel are responsible for undertaking the relevant factual and legal investigations that inform the scope of the expert analysis.

Cases should not be driven by experts. There are numerous articles, and indeed cases, in the construction context, and otherwise, that illustrate the pitfalls of failing to properly manage the expert process.[12]

Of particular concern in the context of construction arbitration is the unfortunate but seemingly regular engagement of experts who clearly act as advocates for their clients rather than being someone engaged to provide the tribunal with an independent view. This practice continues to this day, regardless of the value of the dispute or the governing law or seat. Most surprising is perhaps the assumption that this approach is desirable before an intelligent and sophisticated tribunal.

While confidentiality in arbitration is of course an advantage, it can provide a cloak of anonymity and unaccountability for many experts who suffer trenchant criticism from tribunals yet simply move on to the next engagement. This emphasises the need for a careful selection process in respect of experts, regardless of an individual's discipline and experience of testifying.

As a related but separate matter, one must be aware in construction arbitration of claims consultants, who tend to be retained by clients during the life of a project to advise and assist in the management of claims. However, they are appointed to fulfil a particular role that is different to that of an independent expert. Further, claims consultants have the benefit of information obtained through discussion with their client over lengthy periods. This raises issues not only of independence but privilege over these communications. It must be remembered that each party's independent expert should be entitled to access the same information to provide their opinion.

Preparation for and advocacy at the hearing (virtual or otherwise)

Preparation for and conduct of advocacy is a matter of personal preference. The best advocates have refined their approach over a number of years. Presentation must also be tailored to the tribunal to which one is presenting and the particular issues being debated. However, there are nonetheless a number of important points to be made.

Any advocate will spend hours with relevant experts preparing cross-examination of their opposite number. However, in construction disputes, there are often several

12 For example, see the cases of *Van Oord UK Limited and SICIM Roadbridge Limited v. Allseas UK Limited* [2015] EWHC 2074 (TCC) and the Ocensa Pipeline Group Litigation (*Arroyo v. Equion Energia Limited* [2016] EWHC 1699 (TCC)) in which the Court made numerous criticisms of appointed experts.

(sometimes more than 10) expert disciplines and, therefore, experts. How that is to be dealt with requires early and realistic consideration.

Preparation time should not be underestimated, particularly in the case of solicitor advocates juggling a busy practice of multiple cases. Construction disputes are won and lost on the detail. All disputes practitioners know that developments across issues can, and often do, occur during hearings, and therefore need to be addressed urgently. This can only be tackled with a deep understanding of the subject matter and underlying evidence.

Preparation must also be such as to allow the advocate to be agile during submissions and cross-examination. If a document in the bundle would demonstrate that the witness is being untruthful, it is of little use if the advocate is unaware of its existence or a team member has failed to appreciate its importance. Assessment as to what should be asked and what responses are likely to be given is a matter of judgement and experience.

One must, therefore, give thought to the formation of the team assisting and their scope and extent of responsibility both during hearing preparation and at the hearing itself. A pure 'divide and conquer' approach is also unlikely to be satisfactory. Counsel are presenting a case theory to the tribunal in its totality.

Of all matters, precision in construction arbitration advocacy is key. It is key in answering the tribunal's questions, key in preparing witnesses for cross-examination, key (perhaps most importantly) in conducting cross-examination. It is the habit of some advocates to ask questions in a deliberately vague manner, seeking to seduce the witness into agreeing seemingly uncontroversial propositions. It is the responsibility, again, of counsel to ensure that witnesses are prepared for such tactics. This approach to cross-examination is unlikely to gain much headway with an experienced tribunal, particularly if the advocate is overly relaxed as to what does and does not need to be put to a witness to test his or her evidence.

Cross-examination is a focus of preparation, for obvious reasons. However, one must always give thought to what else is most helpful to the tribunal by way of presentation of evidence that numbers in the thousands of pages. There are various tools that can be deployed – graphics, flow charts, road maps, brief summaries of key events, chronologies, full sets of photographs collated into a chronological run. Lawyers often think only in words. In general, however, this presentation at the hearing can be an obvious weakness in lawyers who have been entrenched in a matter for so long that they understand every detail but struggle to stand in the shoes of an arbitrator who is (compared to counsel) unfamiliar with the dispute.

Expert testimony

Whatever the approach to expert evidence, one must remember that experts have been retained for their expertise in technical matters. They are not advocates. 'Hot-tubbing', or witness conferencing, is the practice of concurrently cross-examining expert (or factual) witnesses.[13] This method of giving evidence has become increasingly prevalent, particularly in technical disputes; however, in the largest and most complex cases, it does not appear to be the norm.

13 This is anticipated (only where appropriate) for example in the ICC Commission Report on Techniques for Controlling Time and Costs in Arbitration, 2015.

Memorials, please, not pleadings

Because of their complexity, construction arbitrations will usually benefit from the parties undertaking as early as possible during the process, and certainly by the date of the hearing, to do as much as they can to define clearly and precisely for the tribunal the nature and scope of the issues that divide the parties. In my experience, two tools are particularly useful in this regard. The first, which has been commonplace in international arbitrations conducted in many jurisdictions, but to some extent less so in common law jurisdictions such as England, is to jettison the English practice of exchanging pleadings in advance of producing the evidence upon which the parties rely and to adopt instead the continental practice of memorial-style pleading in which the memorials are accompanied by all the evidence upon which the parties respectively rely. This helps to ensure that each party knows as early as possible the case that it is required to meet and avoids tiresome debates between the parties, and before the tribunal, as to whether the pleadings have been sufficiently particularised or effectively amended by evidence subsequently submitted.

Second, early and frequent consultation between the parties' expert witnesses in the disciplines for which they have been retained – leading to the production of one or more joint reports summarising areas of agreement and disagreement between them – is invaluable. This is a practice that is today the norm in some jurisdictions, such as England, but, unfortunately, insufficiently adopted in much of the rest of the world, where experts all too frequently meet each other for the first time at the hearing. Parties and counsel in many parts of the world are reluctant to accept expert witness conferencing of this kind out of fear as to where it might lead. But where it usually leads is to a narrowing of the dispute and, accordingly, greater efficiency, which is ultimately beneficial to the process and very helpful to, and much appreciated by, the tribunal.

– Eric Schwartz, Schwartz Arbitration

A hot-tubbing environment can be both totally foreign and uncomfortable to what is otherwise a very honest and diligent expert who would give straightforward answers to questions reasonably asked. In addition, it is not a format that lends itself to efficient conduct of a virtual hearing. It is more likely to lead to experts and tribunal members (unintentionally) speaking over each other and having to repeat themselves.

The ability of experts to provide lengthy introductory presentations prior to being cross-examined (which seems to be specific to arbitration rather than litigation) appears also to be increasing in prevalence to the point of standard practice. There are issues arising from this approach that counsel must bear in mind. It may be helpful to the tribunal for an expert briefly to set out certain introductory conceptual matters that should be uncontroversial. However, what if an opinion is expressed that does not appear in a written report – how can opposing counsel fairly prepare for cross-examination on such a matter? The potential for an argument of procedural unfairness increases in such a circumstance.

The increase of fully or partially virtual hearings

While for the largest, most complex cases it seems unlikely that fully virtual hearings will be preferred, an increased hybrid approach (with some experts and witnesses appearing remotely) seems inevitable. Where there has traditionally been resistance to anything other than fully in-person hearings, particularly for the purposes of ensuring that cross-examination has maximum impact, there will be cases where the parties or the tribunal will now deem it disproportionate to do so – particularly where the ability to schedule a hearing is impacted by travel restrictions.

Some caution should be exercised by tribunals, however, particularly in cases involving highly contentious evidence or otherwise key factual or expert witnesses. It is too early at this stage (before the full impact of such procedural orders or measures is felt) to determine the prevalence of parties seeking to challenge an award on the basis that they did not have a proper opportunity to present their case as they would have wished at the hearing, due to an order that the hearing or part thereof was virtual against their protestations. Many institutional rules now allow specifically for virtual hearings. Accordingly, parties will need to consider the potential of their deemed agreement on that course depending on their arbitration agreement.

The functionality of e-bundles need not be set out. However, in construction disputes, with the large numbers of documents and witnesses (factual and expert), e-bundles, coupled with live transcripts, simultaneous translations (if necessary) and use of other technology, such as large screens to view technical documents, save substantial time and make the entire experience much more user-friendly (for parties, tribunal members, counsel and witnesses). That is the case whether a hearing is virtual or otherwise. In the context of the increasing advent of fully or partially virtual hearings, this type of functionality is, almost without exception, essential, whether by the most sophisticated high-tech providers or a simple, searchable PDF bundle controlled by the hearing platform provider, albeit depending on the size of the dispute. Confusion as to what particular programme activity, photograph or specification a witness or expert is being directed to can result in disastrous levels of disruption (and use of valuable hearing time). Functionality that ensures everyone is looking at the same page or item on their respective screens is the best way to manage that in a virtual setting in a construction arbitration.

Further to this, and to state the obvious, one must consider their personal workstation set-up and that of their witnesses, experts and clients for such a hearing. A laptop is unlikely to be sufficient to successfully review an electronic hearing bundle, the transcript and one's own notes, and take part in group chats or confer with one's team. Factual or expert witnesses may need to give evidence from a specific location that has the requisite facilities available.

As with all hearing preparation, such matters do not magically organise themselves. The increase of virtual hearings has certainly not decreased the administrative time spent organising hearing logistics. Indeed, the parties and tribunal may require protocols to be agreed, various tests to be conducted to verify connections and an acceptable set-up to be established, including ensuring visibility of witnesses (e.g., to ensure that they do not have their own notes and that they have no one else with them in the room (save any agreed neutral observer)). A great deal of cooperation between opposing solicitors and the various

technical providers is required, along with rigorous attention to detail. All eventualities must be considered and catered for.

Concluding remarks

Early and detailed evidence review is required to identify and refine key arguments and case theory. Investigation should not be driven or limited by an assumption that there will be one short substantive hearing. Rather, the investigations and their outcome should drive identification of the most appropriate procedural course.

Selection and management of expert evidence is crucial. An expert who has clearly undertaken a thorough and independent expert analysis is always to be preferred over one who acts as an advocate for the client and indiscriminately accepts their own clients' evidence.

Even a tribunal fully comprised of construction specialists will need substantial assistance from the parties in the translation of the vast and detailed evidence and documentary record. Written documentation and presentation at the hearing must take account of this.

The best advocacy results from a detailed and deep understanding of the factual, technical and documentary evidence. That is the best tool not only for persuasively responding to assertion from the opposition, but for assisting the tribunal throughout the proceedings and at the hearing in particular.

Parties should always, but are in current times forced to, consider the most efficient, user-friendly and clear ways of presenting their position to the tribunal.

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Advocacy in International Sport Arbitration

James H Carter[1]

International sport arbitration has special characteristics that make it similar to, yet also unlike, most commercial arbitration, and good advocacy must begin by taking this into account. The skills and techniques described in other chapters of this book are applicable in sport arbitration but the context typically is significantly different and requires additional knowledge.

Often the arbitration involves a dispute between an international sports federation and an individual athlete. At the dawn of the modern sports law era, a scholar-practitioner described such a case thus:

> *Typically the exclusive jurisdiction of sporting authorities is set down in the by-laws of federations which grant licences to compete in the course of a season or admission to participate in specific events. The federation in question has generally existed for decades if not generations, and has, without any outside influence, developed a more or less complex and entirely inbred procedure for resolving disputes. The accused participant, on the other hand, often faces the proceedings much as a tourist would experience a hurricane in Fiji: a frightening and isolated event in his life, and for which he is utterly unprepared. The same may of course be said for most litigants in ordinary court proceedings. The difference is that whereas in the latter context the accused may be represented by experienced practitioners who appear as equals before the court, the procedures devised by most sports federations seem to be so connected to the organisation that no outsider has the remotest chance of standing on an equal footing with his adversary – which is of course the federation itself.*[2]

1 James H Carter is a senior counsel at Wilmer Cutler Pickering Hale and Dorr LLP.

2 Jan Paulsson, 'Arbitration of Sports Law Disputes', *Arbitration International*, Vol. 9 Issue 4, 359, 361 (1993).

The situation of the accused athlete today is not always so dire, but sport arbitration often does involve one side that is familiar with the rules of the dispute and is represented by experienced sports law counsel and another side that begins the fight with much catching up to do. If you are the inexperienced sports lawyer in such an arbitration, good advocacy begins with bringing yourself up to speed with the *lex sportiva*.

The lex sportiva

During the past quarter of a century, international sport law institutions gradually have constructed a framework to resolve disputes. It is capped by the Court of Arbitration for Sport (CAS) based in Lausanne, Switzerland, which with the Swiss Federal Tribunal has created a substantial body of both procedural and substantive international sports law, the *lex sportiva*.

International sport is organised primarily in a series of vertical silos, one for each sport. There are national governing boards or federations for each sport (gymnastics, swimming, archery, etc.) and each sport has an international federation sitting above the national federations. There is also a horizontal structure composed of National Olympic Committees (NOCs), which play a part with international federations in regulating access to national Olympic teams and related matters across all the sports that are eligible for Olympic competition in each country and answer to the International Olympic Committee (IOC). Each of these federations and committees has its own set of by-laws and various types of internal disciplinary and review bodies. They are far from uniform.

As a further complication, the international sport anti-doping regime exists side by side with these organisations but under a different roof. The World Anti-Doping Agency (WADA), based in Montreal, Canada, is responsible for establishing annually a list of prohibited substances that are considered either potentially performance-enhancing or dangerous to athletes and, since 2003, has published the World Anti-Doping Code (the WADA Code).[3] Today, the national federations, international federations, NOCs and the IOC virtually all adopt some version of the WADA Code to govern doping offences within their jurisdictions, many of which give WADA or the national anti-doping authority power to bring disciplinary proceedings in its own name against athletes. Some countries have national bodies equivalent to WADA, such as the US Anti-Doping Agency (USADA),[4] which may publish their own protocols or codes based on the WADA Code. These national anti-doping codes sometimes contain differing procedural and other provisions.

In spite of this organisational semi-chaos, fortunately there is a substantial degree of uniformity in one respect: most international sport disputes arising from the activities of athletes and organisations involved in all these contexts, prominently including alleged doping offences, ultimately are subject to resolution by CAS arbitration. This occurs as a result of agreements in several forms: federations and committees specify CAS jurisdiction in their by-laws; the anti-doping codes adopted by the organisations typically do the same;

3 See www.wada-ama.org.

4 See www.usada.org.

and individual athletes agree to CAS jurisdiction either as a condition of membership of a governing body or by agreements when participating in events.[5]

This does not mean that all international sport disputes are heard by the CAS. Many are dealt with, at least initially, by disciplinary bodies established under by-laws of national federations, international federations or NOCs, each with its own membership and procedures. Navigating such a process remains a challenge to the newly minted sports advocate. However, there generally is a right of appeal from the decisions of those bodies to the CAS, where uniform rules of advocacy apply and are available for study. The majority of the CAS's caseload consists of such appeals, mainly from decisions of federations.

International professional sport is also an important part of this picture. The most prominent feature in the case of professional sport is the web of agreements by which FIFA and other components of professional football commit resolution of their disputes, including disagreements about matters such as contracts, player transfers and discipline, to CAS resolution. A variety of commercial agreements involving professional sport organisations, managers and athletes – in both football and other sports – include contract language agreeing to CAS jurisdiction for disputes, as well.

The *lex sportiva* thus consists of the rules and precedents established by all these organisations, plus the national law of relevant jurisdictions. This is primarily Swiss procedural arbitration law, because all CAS arbitrations are sited in Lausanne (although arbitral procedures may take place at other physical locations, all CAS awards are issued from Lausanne) and because Switzerland is the home of a number of international federations. The law applicable to the merits in CAS appeals is made up of any relevant organisation by-laws, rules of law chosen by the parties or, in the absence of such a choice, the law of the jurisdiction where the organisation exists.[6] For ordinary disputes, the law applicable is that chosen by the parties or, as a default, Swiss law.[7] The Swiss Federal Tribunal exercises a limited scope of review authority over CAS awards, as is the case with its role under Swiss arbitration law generally, but it does consider appeals on the basis of grounds found in Swiss law, such as lack of impartiality of arbitrators, absence of jurisdiction and violation of public policy. Courts of other nations may play a part, too, for example when an international federation is located in a nation other than Switzerland or non-arbitrable employee rights are involved.

Finding the lex sportiva

An advocate entering a new jurisdiction is well advised to become acquainted with governing law, which, in the case of the *lex sportiva*, can be challenging. Organisational rules typically are available electronically, as are the arbitration rules contained in the CAS Code

5 An athlete's signed agreement with an international federation referring disputes to the CAS has been found valid under German competition law and public policy and the European Convention on Human Rights (so long as the athlete is given an opportunity for a public hearing, which CAS rules now provide). See Despina Mavromati, 'The Legality of the Arbitration Agreement in Favour of CAS Under German Civil and Competition Law – The Pechstein Ruling of the German Federal Tribunal (BGH) of 7 June 2016', 2016(1) *CAS Bulletin* 27; Caroline Dos Santos, 'European Court of Human Rights Rules Upon Sports-Related Decision: Switzerland Condemned', 37(1) *ASA Bulletin*, 117 (2019).

6 CAS Code, Article R58.

7 ibid., Article R45; CAS Anti-Doping Division [ADD] Rules, Article A20.

Cultura sportiva – and why an outsider isn't necessarily at a disadvantage

Good advocacy in sports arbitration indeed begins with bringing yourself up to speed with the *lex sportiva*. A complementary, and perhaps equally important, task is to become familiar with what might be called the *cultura sportiva* (i.e., in particular, the unwritten codes of conduct and behaviour that characterise sports arbitration and sports arbitration advocacy). While these musings are based exclusively on practice before the CAS, they likely apply to greater or lesser degrees in other sports arbitral bodies.

With a modicum of literary licence (and assuming the risk of over-caricaturing the topic), the culture that I refer to is best observed – or better said, was best observed before the pandemic changed, perhaps forever, entrenched practices involving physical hearings – in the restaurants of Lausanne the evening before a hearing.

At these restaurants, it is commonplace for two or three panels, often with administrative secretaries (or ad hoc clerks, in CAS parlance) and CAS counsel on one or more of these cases to coincide, together with counsel in one or more cases.

This tends to trigger a hearty series of greetings, hugs, back-slapping and kisses among colleagues who usually know one another quite well. Naturally, and despite the congeniality, the arbitrators tend to sit as far from counsel as possible, and any discussions about the cases in hand are, of course, taboo.

The point is that the repeat players – both as arbitrator and counsel – tend to be a rather small number, and, in time, cannot help but become friendly. Counsel unfamiliar with this culture might find this aspect to put them at a relative disadvantage. But this is not necessarily the case: on the one hand, once you've got your first case, you are well on the way to becoming an 'insider' too. On the other, there may even be a competitive edge for the 'outlier', who doesn't consider his or her opposing number a friend to be hugged, back-slapped or kissed on the eve of trial (i.e., the absence of a possible subconscious brake on your interest and ability in 'going for the jugular' and bringing to bear all of your skills and experience to get the best results for your client).

In any case, be alert to these 'cultural' aspects of sports arbitration, as they will surely add a unique flavour to the experience.

– Clifford J Hendel, Hendel IDR

of Arbitration for Sport.[8] The CAS publishes awards rendered in its appellate capacity, unless the parties agree otherwise, and a few awards made in its ordinary jurisdiction (but only if parties agree). These are available electronically and in some CAS print publications, and the Swiss Arbitration Association reports regularly in its Bulletin[9] on Swiss court decisions involving CAS awards and other international sport arbitration matters involving Switzerland. Some anti-doping organisations, such as USADA, publish all arbitral awards to

8 Available at www.tas-cas.org (amended most recently in 2020).

9 *ASA Bulletin*; see also Massimo Coccia, 'The Jurisprudence of the Swiss Federal Tribunal on Challenges Against CAS Awards', 2013(2) *CAS Bulletin* 2; Pascal Pichonnaz, 'Case Law of the Swiss Federal Tribunal on Challenges Against CAS Awards (2015-2019)', 2019 Budapest Seminar, *CAS Bulletin* 68. Some Swiss cases also are reported in the semi-annual electronic CAS Bulletin and online at www.swissarbitrationdecisionscom.

which they are parties in which doping violations are established. Although prior awards generally are not considered binding on an arbitral tribunal, such awards may be and typically are cited to any international sport tribunal by advocates as potentially persuasive.

A quasi-official CAS book entitled *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials*, authored by CAS Counsel Despina Mavromati and CAS Secretary General Matthieu Reeb,[10] is essential reading for the advocate. It discusses procedures under the CAS Code in detail, with extensive advice on unpublished or otherwise little-known practices in CAS arbitrations and examples of CAS documents.

Types of international sport disputes

International sport arbitrations deal largely with three types of disputes: disciplinary issues (including but not limited to doping violations), disputes involving contested eligibility or qualification for competitions, and commercial or other contractual or intra- and inter-federation disputes. Disputes involving 'field of play' errors or disagreements are generally considered best resolved by umpires on the field and are treated as inappropriate for arbitral resolution.[11]

Doping and other disciplinary disputes receive the greatest prominence in the press and make up the largest part of the CAS's docket.[12] They usually are heard by the CAS under its appeal procedures, typically following one or more rounds of proceedings within the governing national federation or international federation. The CAS appeal procedures empower CAS arbitral tribunals to make de novo determinations of issues of both law and fact in such cases.[13]

In the case of some countries, notably the United States and Australia, national laws make CAS arbitration in that country the first-instance procedure for doping cases brought by the country's anti-doping agencies, after (or instead of) which either party may seek what is normally an appellate review before a second CAS panel seated in Lausanne. In 2019, the CAS created a separate Anti-Doping Division (ADD) to decide anti-doping cases as a first-instance authority for international federations and other sports entities that decide to use this mechanism.

Eligibility issues often arise shortly before national or international championship contests, including the Olympics, when federation rules must be interpreted to determine which athletes or teams will be admitted to compete.

Contractual disputes involve the full range of issues that may arise in international commercial arbitrations, distinguished only by the additional fact that the parties are involved in some aspect of sport and have selected CAS arbitration for dispute resolution.

10 Published by Wolters Kluwer Law & Business, 2015 (hereafter, Mavromati & Reeb). For Swiss arbitration law generally as of 2021, see Guido Carducci, 'The New Swiss International and Domestic Arbitration Law, Sport and CAS Arbitration', 2020(2) *CAS Bulletin* 7; Andreas Gurovits, 'Modifications of the PILA: Implications for Sport Arbitration', 2019 Budapest Seminar, *CAS Bulletin* 43.

11 Mavromati & Reeb at 56 and 57.

12 ibid., at 401.

13 CAS Code, Article R57.

The significance of expedited procedures

Because of the nature of sport, expedited procedures are the norm in sports arbitration rather than the exception. Eligibility issues often must be decided on the eve of an event, and doping or other disqualification questions require speedy decisions in light of the relatively few peak performance years available to athletes. The CAS Code and other rules therefore generally prescribe tight time limits for procedures, which may be accelerated even further if circumstances require. For disputes arising during Olympic Games, two special divisions of the Court (one limited to anti-doping cases) are available on-site to be able to rule within 24 hours.

However, not all cases call for special expedition, and this raises considerations for advocates. Some matters, such as commercial sport disputes, may not have the same degree of immediacy and might benefit from more complete development of issues. Doping disputes may require expert evidence, which sometimes is not available at very short notice. Agreement on an expanded schedule may be advisable.

Advocacy under CAS arbitration procedures

The CAS Code provides for three types of arbitration: ordinary, anti-doping (first instance) and appellate. Appeal procedures following initial determinations by sport federations, including doping and other disciplinary and eligibility issues, as well as a substantial number of contractual disputes, have made up about 85 per cent of the CAS caseload historically. The ordinary procedures, used in the remaining 15 per cent of cases, are applicable to de novo proceedings that do not originate in a non-CAS forum.[14] The new ADD, which has its own set of arbitration rules, is expected to take over some of what has been federation first-instance decision-making. There is a right of appeal from the ADD to a CAS appellate panel, but it may be waived if the parties choose a three-member panel as a 'sole instance' tribunal rather than a sole arbitrator for the ADD proceeding.

Article R30 of the CAS Code, applicable to both ordinary and appellate arbitrations, and Article A5 of the ADD Rules permit parties to be represented or assisted by persons of their choice, and non-lawyer sports organisation officials participate regularly in CAS arbitrations. A party's representative need not be a lawyer but must provide a power of attorney to the CAS in compliance with Swiss law. English, French and Spanish are the official languages of the CAS, and English is used most often in CAS proceedings.[15]

The CAS Code permits parties to choose the number of arbitrators but provides for a default choice of a three-person panel in appeal cases, with one arbitrator to be chosen by each party and the third selected by agreement or by the CAS.[16] All arbitrators must be nominated from the list of persons who make up the CAS Court, which is composed of nearly 400 arbitrators of all nationalities. Their CVs are publicly available on the CAS website.[17] Challenges to arbitrators are decided by the Challenge Commission under the International CAS.

14 Mavromati & Reeb at 401.

15 ibid., at 89.

16 CAS Code, Articles R40 and R50.

17 www.tas-cas.org.

How to advocate in front of the Basketball Arbitration Tribunal

In a mere decade and a half, an innovative arbitral institution created to provide a simple, quick, fair and inexpensive forum for the resolution of contractual disputes in global basketball has established itself as a highly successful and interesting model for the resolution of sports-related contractual disputes. One may even speculate as to whether the next decade will show the model being applied not only to other sports but also to the world of commercial disputes.

Created in 2007 by the International Federation of Basketball, the mission of the Basketball Arbitral Tribunal (BAT) is to provide an effective and efficient dispute settlement mechanism to promote respect for contractual relations between clubs, players, coaches and agents operating in the world of basketball. Key features of the BAT to note include its voluntary jurisdiction, its decision system and the fact that reasoned awards are not always provided.

Unlike most global governing bodies whose statutes essentially impose arbitration agreements on athletes (the controversial 'forced arbitration' or 'arbitration by reference' clauses recently discussed by the European Court of Human Rights in *Pechstein*), BAT's jurisdiction is entirely voluntary, requiring a specific agreement between the parties. Most BAT cases are decided in equity, not law, because its standard clause provides for deciding disputes 'fairly and honestly'. The arbitrator must focus exclusively on the specific circumstances, avoiding the costly and time-consuming need to prove the contents of the law in question. But it does not permit the arbitrator to ignore the parties' intent: the first principle is *pacta sunt servanda*.

BAT cases are always decided by a sole arbitrator, never by a panel of three. They are selected from a bespoke list of just eight arbitration experts by rotation. In light of this, hearings in BAT cases are rare too. Unlike in some other arbitral bodies, the mere request for a hearing by one or another party is insufficient of itself in light of the time and cost involved.

What is more, reasoned awards are not always provided. Their use is limited to cases involving disputes in excess of €100,000 or smaller disputes in which one or the other party requests a reasoned award and pays an additional advance on costs to finance it. In all other cases, unless the BAT itself considers that the issuance of a reasoned award is important for jurisprudential reasons, the parties will receive only the 'dispositive' part of the award. Nonetheless, the BAT will maintain an internal memorandum of reasons, which will pass the same process of internal scrutiny.

Given the essentially written nature of BAT proceedings, the relatively focused and repetitive nature of the disputes, the availability of BAT jurisprudence to counsel and the generally experienced and sophisticated nature of the BAT arbitrators, secretariat and officers, wise counsel will want to make submissions that are clear and convincing, supporting factual assertions by such documentary evidence as is available, and focused on the specifics of the contractual relation at hand.

Nevertheless, the figures speak for themselves: from two cases in its inaugural year (2007), BAT's caseload has increased steadily to approximately 200 cases in recent years. By some accounts, this makes the BAT the second most active sports arbitral body in the world, and one that may serve as a model not only for other global sports governing bodies looking for an agile, flexible, sensible and well-accepted dispute resolution mechanism for contractual disputes, but eventually for adaptation and use outside the sporting context.

– Clifford J Hendel, Hendel IDR

The CAS Code contemplates relatively extensive written submissions, including written evidence, followed 'in principle' in ordinary and ADD cases (where there will have been no prior hearing before a national federation or international federation) by what usually is a comparatively brief oral hearing. Brief oral hearings are also normal in appeal proceedings, although the appeal rules and Article A19.3 of the ADD Rules give a CAS panel discretion to decide not to hold an oral hearing if, after consulting the parties, it deems itself to be sufficiently well informed by the written record, including the proceedings at first instance.[18] Hearing some testimony by videoconference is common, and telephone testimony is also authorised. CAS panels have also admitted 'anonymous' testimony in the form of witness statements from persons whose identity was protected for fear of retaliation, with cross-examination through an 'audio-visual protection system'.[19] Although the rules do not require it, the written statements of witnesses and reports of experts often take the form of full affirmative testimony, as is common in international commercial arbitrations.

Articles R44 and R57 of the CAS Code and Article A19.4 of the ADD Rules govern procedures in ordinary, appeal and ADD arbitration, respectively, allowing in each case for considerable flexibility. The procedures in a particular hearing therefore will be influenced by the national traditions of the arbitrators, including especially that of the panel president, who may have either a civil law or a common law background.

Article R44.1 of the CAS Code outlines the ordinary written procedure, stating in the pertinent part:

> *The proceedings before the Panel comprise written submissions and, in principle, an oral hearing . . . As a general rule, there shall be one statement of claim, one response and, if the circumstances so require, one reply and one second response.*
>
> . . .
>
> *Together with their written submissions, the parties shall produce all written evidence upon which they intend to rely. After the exchange of the written submissions, the parties shall not be authorized to produce further written evidence, except by mutual agreement, or if the Panel so permits, on the basis of exceptional circumstances.*
>
> *In their written submissions, the parties shall list the names(s) of any witnesses, whom they intend to call, including a brief summary of their expected testimony, and the name(s) of any experts, stating their area of expertise, and shall state any other evidentiary measure which they request. Any witness statements shall be filed together with the parties' submissions, unless the President of the Panel decides otherwise.*

At the request of a physical person in a CAS proceeding of a disciplinary nature, the hearing will be public unless the arbitrators decide that 'the interest of morals, public order, national security . . . the interests of minors or the protection of the private life of the parties' require otherwise or 'where publicity would prejudice the interests of justice, where the proceedings are exclusively related to questions of law or where a hearing held in first instance was already public'.

18 CAS Code, Article R57; ADD Rules, Article A19.3.

19 Estelle de La Rochefoucauld, 'The Taking of Evidence Before the CAS', 2015(1) *CAS Bulletin*, 28, 35 and 36.

Article R44.2 describes the oral hearing, at which oral presentations by the advocates feature prominently and after which post-hearing procedures are discouraged:

> *If a hearing is to be held, the President of the Tribunal shall issue directions with respect to the hearing as soon as possible and set the hearing date. As a general rule, there shall be one hearing during which the Panel hears the parties, any witnesses and any experts, as well as the parties' final oral arguments, for which the respondent is to be heard last.*
>
> *The President of the Panel shall conduct the hearing and ensure that the statements made are concise and limited to the subject of the written presentations, to the extent that these presentations are relevant.*
>
> . . .
>
> *The parties may only call such witnesses and experts which they have specified in their written submissions. Each party is responsible for the availability and costs of the witnesses and experts it has called.*
>
> *The President of the Panel may decide to conduct a hearing by video-conference or to hear some parties, witnesses and experts via tele-conference or video-conference. With the agreement of the parties, he may also exempt a witness or expert from appearing at the hearing if the witness or expert has previously filed a statement.*
>
> *The Panel may limit or disallow the appearance of any witness or expert, or any part of their testimony, on the grounds of irrelevance.*
>
> . . .
>
> *Once the hearing is closed, the parties shall not be authorized to produce further written pleadings, unless the Panel so orders.*
>
> *After consulting the parties, the Panel may, if it deems itself to be sufficiently well informed, decide not to hold a hearing.*

Document production from an adverse party is in principle limited and follows the pattern of the IBA Rules on the Taking of Evidence in International Arbitration.[20] Article R44.3 of the CAS Code and Article A19.4 of the ADD Rules permit a party to 'request the Panel to order the other party to produce documents in its custody or under its control. The party seeking such production shall demonstrate that such documents are likely to exist and to be relevant'. The ADD Rules add: 'If it deems it appropriate to supplement the presentations of the parties, the Panel may at any time order the production of additional documents or the examination of witnesses, appoint . . . experts, and proceed with any other procedural step.'

Advocacy in doping disputes

The WADA Code, the current version of which became effective in 2021,[21] and its national and federation enactments, emphasise the importance of a level playing field on which athletes compete without the advantage that some might gain from using specified performance-enhancing substances. The Code postulates each athlete's responsibility

20 Available at www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

21 Available at https://www.wada-ama.org. See Ulrich Haas, 'The Revision of the World Anti-Doping Code 2021', 2019 Budapest Seminar, *CAS Bulletin* 24.

for whatever goes into his or her body, whether at the initiative of the athlete, a coach or trainer, or a nutritional or health adviser. The Code provides the possibility of therapeutic use exemptions, which may be granted pursuant to administrative reviews, for athletes whose medical condition makes the use of a particular substance appropriate.

The WADA Code prohibits the use or attempted use by an athlete of a prohibited substance or a prohibited method, as well as any evading, refusing or failing to submit to sample collection or tampering or attempted tampering with any part of doping control activities.[22] It also includes a list of specified substances that are not on the 'prohibited' list because they 'are more likely to have been consumed by an Athlete for a purpose other than the enhancement of sport performance'.[23] Use of specified substances may be subject to lesser sanctions, as described below.

Athletes competing at both national and international levels are tested according to varying doping control protocols, often including testing of urine samples from all medal winners in an event and some random testing both at competitions and out of competition. Each collection results in an 'A' and a 'B' sample. If the A sample is analysed and found to be positive for a prohibited or specified substance, the athlete is given notice of that fact and the opportunity to be present or have a representative present when the B sample is analysed. A positive result from both samples is a necessary predicate for a doping violation charge.

The anti-doping organisation alleging a doping violation has the burden of proof, which is met if it establishes the doping violation by any reliable means 'to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made'.[24] The WADA Code explains that this 'standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt' and elaborates that this standard of proof 'is comparable to the standard which is applied in most countries to cases involving professional misconduct'.[25] The anti-doping organisation normally seeks to satisfy its burden in the first instance by presenting to the arbitrators a written dossier containing test results and chain of custody evidence. Counsel for the athlete will have access to this at a relatively early stage in the proceedings.

One possible area of controversy is the propriety of the procedures followed in a particular test, including the chain of custody of the sample and the testing done at the laboratory. However, Article 3.2 of the Code provides that analytical methods or decision limits approved by WADA after appropriate peer review are presumed to be scientifically valid and that WADA-accredited laboratories are presumed to have conducted sample analysis and custodial procedures in accordance with international standards. The burden therefore is on the athlete to establish a departure from international standards by a preponderance of the evidence.[26]

If testing establishes the presence of a prohibited substance in an athlete's sample, this may lead to sanctions, including disqualification of results, forfeiture of medals, points or prizes,

22 Article 2.

23 Article 4.

24 Article 3.1.

25 ibid.

26 Comment to Article 3.2.2.

and a period of ineligibility for individual athletes extending for as long as four years.[27] Individual disqualifications also may result in team disqualifications in some circumstances.[28]

The WADA Code first makes a distinction between intentional violations, for which a four-year suspension ordinarily is applicable, and those that are not intentional. For unintentional violations, the period of ineligibility may range from none to two years. The disqualification may be eliminated entirely if the athlete establishes that he or she bears no fault or negligence, and the period of ineligibility may be reduced to anything from no ineligibility to two years if there is no significant fault or negligence.[29] The burden is on the athlete to establish, by a balance of probabilities, either that the violation was not intentional or that the presence of a specified or prohibited substance occurred without any fault or negligence on the athlete's part or without the athlete's significant fault or negligence.[30] Much doping jurisprudence involves defining fault or negligence and degrees of fault in particular circumstances.

Intentional conduct is defined by the Code as a category intended to identify athletes who knowingly cheat, either by engaging in 'conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk'. But if the violation involves a specified substance, the use of which is only prohibited 'in competition', a presumption of intent can be rebutted if the athlete establishes that it was used intentionally but only out of competition, when it was permitted.[31]

If a violation was not intentional, attention turns first to whether it involved no fault or negligence. The WADA Code sets a high standard for this defence, stating in an official comment that it 'will only apply in exceptional circumstances, for example, where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor' and that it will not be available where – to illustrate – a positive test is the result of a mislabelled or contaminated vitamin or nutritional supplement about which the athlete has been warned or administration by a physician or trainer without disclosure to the athlete.[32]

But circumstances such as mislabelled vitamins or nutritional supplements, or unauthorised or negligent actions of physicians or trainers, may support a defence of no substantial fault or negligence – the Code Comment to Article 10.4 states – 'depending on the unique facts of a particular case'.[33] It is important to try to establish the source of the substance that caused the positive test. This invites the advocate to base a defence on any relevant unique facts, and success in doing so may result in a reduced suspension period of whatever time the arbitration panel considers proper (so long as, in the case of a prohibited

27 Article 10.1.

28 Article 11.

29 Articles 10.2, 10.4, 10.5; see Estelle de La Rochefoucauld, 'CAS Jurisprudence Related to the Elimination or Reduction of the Period of Ineligibility for Specified Substances', 2013(2) *CAS Bulletin* 18 (discussing cases decided under prior versions of the WADA Code, some parts of which were revised in 2015).

30 Articles 10.4, 10.5.

31 Article 10.2.3.

32 Comment to Article 10.4.

33 ibid.

substance, the reduced period of ineligibility is not less than one-half of the period of ineligibility otherwise applicable).[34]

Advocates often maintain that cases involving the possible reduction of a sanction under WADA Code Article 10.5 should be analysed using the *Cilic* framework, applying the reasoning of a CAS award of 2014 that sought to encourage consistency.[35] The panel in that case introduced the concepts of objective and subjective types of fault and outlined three degrees of fault: considerable, normal and light.

The objective test looks at 'what standard of care could have been expected from a reasonable person in the athlete's situation'. In the case of a positive test following use of a substance generally known to be banned at all times, a high degree of care would be required of a reasonable person, including such steps as reading the label of the product (or otherwise learning of its ingredients), checking the ingredients on the label against the WADA list of prohibited substances and making an internet search of the product.[36]

The *Cilic* panel's subjective test looks at what is to be expected of the particular athlete in question, taking into account his or her personal characteristics, such as age and experience, language or other limitations, and the extent of anti-doping education received by or accessible to the athlete.[37]

Using these concepts, a panel would apply the objective test to place an athlete's standard of expected care in one of the three categories of considerable, normal or light and then look to the subjective test to place the athlete either as a standard case of that type of fault or a greater or lesser example, all within a proposed sanction range. The *Cilic* panel proposed a sanction range of 16 to 24 months for violations involving considerable fault, with a sanction for a standard case of this type of 20 months; a sanction range of eight to 16 months for a case presenting a normal degree of fault, with a standard case sanction of 12 months; and a sanction range of zero to eight months for a light degree of fault, with a standard suspension of four months.[38]

For example, a violation in a case in which the athlete should have exercised normal care (but failed to do so), and his or her personal circumstances were not unusual and therefore standard, would merit a suspension of 12 months.

Determining the date from which a suspension is to run also is important. Although the start date ordinarily is the date of the arbitration decision, it can instead be set at an earlier date if the athlete admits the fact of the violation and accepts a provisional suspension during the pendency of the arbitration, so long as at least half of the time remains to be served after the arbitration decision.[39]

The message to the advocate is clear: analyse and present evidence relevant to both objective and subjective factors applicable to a person accused of a doping violation. To establish favourable subjective factors, normally it is useful to present the testimony of the athlete in person to the arbitration panel if possible. Notably, the WADA Code states that a

34 Article 10.5.2.

35 *Cilic v. Int'l Tennis Fed.*, CAS 2013/A/3327.

36 ibid., paras. 74 and 75.

37 ibid., para. 76.

38 ibid., paras. 69 and 70.

39 Article 10.11.

panel 'may draw an inference adverse to the Athlete or other Person who is asserted to have committed an anti-doping rule violation based on the Athlete's or other Person's refusal, after a request made in a reasonable time in advance of the hearing, to appear at the hearing (either in person or telephonically as directed by the hearing panel) and to answer questions from the hearing panel or the Anti-Doping Organization asserting the anti-doping rule violation'.[40]

Finally, advocates in doping cases should bear in mind that negotiation with anti-doping authorities about the extent of a possible sanction is an important part of the process. They are interested in resolving cases without full adversary proceedings where possible, and they can be expected to have access to arguably comparable case outcomes to discuss.

40 Article 3.2.5.

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Arbitration Advocacy and Criminal Matters: The Arbitration Advocate as Master of Strategy

Juan P Morillo, Gabriel F Soledad and Alexander G Leventhal[1]

It is our great privilege to conclude this edition of the GAR *Guide to Advocacy* with a topic that touches on the role of arbitration advocate, not as master of persuasion but as master of strategy. By now, the reader will have absorbed the prescient insight of our fellow authors. You will have learned how the greatest arbitration advocates devise a winning strategy, draft incisive prose, break down their opponent's case with a thoughtful set of closed questions, and more. You will have gleaned the wisdom tucked into the enlightening anecdotes and counsel of the Guide's text box authors. Now you arrive at the last chapter in this compendium and, perhaps, uncharted territory. Let us assume that you have recently been named counsel in an arbitration with a parallel criminal aspect. Your client may be the victim of criminal misconduct seeking redress in arbitral proceedings, or your client may be the accused – whether such allegations are made for the first time in the arbitration or in parallel criminal proceedings. So now what?

You have been named counsel in an arbitration with a criminal law element

While the other chapters in this Guide have focused on advocacy as the art of persuasion, this chapter takes a broader approach, focusing on orchestrating and executing a multifaceted legal strategy. The reality is that the arbitration advocate is no longer simply a hired gun called upon to switch on his rapier tongue in the hearing room and then move on. Today's arbitration advocate is a master strategist in a complex, multidimensional world.

As arbitration advocate, your immediate goal will be to convince the tribunal that the position you advance is superior to that of the opposing party, and you have various tools in your skill set to do so. However, obtaining a successful result in the arbitration may not be the only – or even the most important – client objective. Arbitration may be but one

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element of a legal strategy aimed at seeking redress through multiple legal channels, or one front in your client's battle to defend itself from allegations of wrongdoing. As proceedings progress before different forums, new facts will come to light and new issues will come into play. Acting as arbitration advocate, you must not only master matters within your ken, you must also advance the client's interest beyond the confines of the arbitration. As you leave the familiar world of arbitration, you may soon realise that you are not in Kansas any more. Don't panic. Come to terms with the gaps in your knowledge and develop the reflexes that will allow you to ask the right questions. Be wary of hidden pitfalls and know how to use your expertise, and that of others, to advance your client's interests.

A host of imponderable issues may sprout throughout the course of an arbitration:

- a challenge to an arbitrator in the middle of the arbitration;
- a proceeding before antitrust authorities;
- a technical issue, such as delay analysis or a dispute involving an engineering issue in construction arbitration;
- an expert investigation, for example, regarding intellectual property or other complex, technical elements; or
- a parallel civil proceeding regarding a closely related issue, such as the parties having signed different contracts through multiple corporate entities, giving rise to overlapping legal disputes involving the same facts or legal issues.

Increasingly, however, the unfamiliar world for the arbitration practitioner will be a criminal law one, whether the criminal element is the central issue in the arbitration or a secondary one, such as possible criminal exposure for your client arising from disclosures made in the arbitration.

As one contributor to this Guide has explained in another work, the world of criminal justice is a 'distant planet' from the world of arbitration.[2] While arbitration is born from the shared will of the parties, criminal law reflects a state's sovereign prerogative to limit party autonomy and impose its mandatory laws. Although arbitrators lack the compulsory powers of most sovereign judges, a criminal law judge, on the other hand, will have robust coercive authority.[3]

Even the tasks of the advocate will be different. Whereas the criminal law advocate will be guided by a comprehensive set of procedural rules drafted by legislators, the arbitration advocate can tailor the process to the needs and interests of his or her client. Whereas the criminal law advocate will be accustomed to pleading before judges with specialist knowledge of the applicable law and procedure, the arbitration advocate will expect to plead before distinguished arbitrators who, although sophisticated, may not be trained in the applicable law, let alone the applicable criminal law. Complicating matters still further, the arbitration advocate dealing with criminal proceedings in a common law jurisdiction will also have to simultaneously navigate prosecutors who jealously guard their investigations and do not want arbitration or other proceedings interfering with them in any way.

2 Alexis Mourre, 'Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator', *Arbitration International*, Volume 22 (2006), Issue 1, 95 to 118.

3 This is particularly true in civil law jurisdictions, where non-criminal judges may have limited authority to order the production of documents, as compared with judges in criminal matters.

Notwithstanding this, as the reader may know all too well, the worlds of arbitration and criminal law can collide. There are two situations in which this may occur.

First, one or both of the parties may be the subject of criminal allegations or a victim of alleged misconduct. These accusations may be made for the first time in the arbitration itself – for example, an allegation that the underlying contract is invalid owing to its illegal purpose or because it was procured by corruption – or in parallel criminal proceedings.

Second, where the arbitration involves a state or a state entity, a party to the arbitration itself may use its police powers to pursue criminal allegations against the private party, or others relevant to the dispute.[4] These proceedings may simply be secondary to the ongoing arbitration or, if the private party alleges in the arbitration that the state's conduct breaches international law obligations, they may be the subject of the arbitration itself.

For you, the arbitration advocate, this multidimensional world is replete with promise and peril. Promise because, for example, criminal proceedings may allow you to obtain evidence and achieve objectives that would not otherwise be available within the confines of the arbitration. And peril because your training as an arbitration advocate alone will not prepare you to manage the high stakes of this unknown world.

Based on our own experience, we offer three simple rules for effective advocacy in arbitrations with parallel criminal law elements:

- Rule No. 1: Know your ethical obligations to avoid becoming part of the story and prejudicing your client, whether you simultaneously represent a client in arbitral and criminal proceedings or you handle the arbitration alone.
- Rule No. 2: Know how to navigate criminal law issues to cover any lacunae in your knowledge and capabilities.
- Rule No. 3: Know when to play offence and when to play defence to make sure the interests of your client are advanced.

We take each of these rules in turn.

Rule No. 1: Knowing your ethical obligations will help you effectively navigate arbitrations with parallel criminal law elements

With criminal matters, the greatest peril is for the advocate to become part of the story. An advocate's credibility is the capital with which he or she will win or lose a case for the client. You must cultivate and preserve the tribunal's trust and avoid engaging in injudicious conduct that might ultimately prejudice your client.

Of course, you should always be aware of your professional responsibility obligations – regardless of whether any criminal law interests weigh on your advocacy. However, where an arbitration involves an ongoing criminal matter – or even if criminal proceedings have not yet begun, but your adversary may make a criminal allegation or referral against the client – the advocate's job is fraught with even greater risk. Criminal matters usually implicate serious allegations of wrongdoing, which, despite the presumption of innocence, can

4 Although, under its domestic law, a state may consider its prosecution and judiciary fully independent, under international law, the actions of those authorities can be attributed to the state. See, e.g., International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp. IV.E.1, Article 4(1).

cast a shadow over the advocate's independence – if, for example, a lawyer is accused of conspiring with his or her client to engage in criminal activity, such as producing a forged document, or even a less serious offence. If you represent a client in an arbitration against a state that has opened criminal proceedings against that client, the risk of becoming part of the story is particularly real. Even where the opposite side is a commercial counterpart, however, your adversary may seek to discredit your advocacy by making you a part of the story.

To avoid the pitfalls that your own advocacy may create for your client (and potentially for yourself) and to obtain a positive result for your client, keep in mind (1) your ethical obligations, (2) any applicable confidentiality obligations, and (3) the candour and honesty of your advocacy. These basic rules carefully followed will ensure that you effectively serve your client's interests.

Be aware of your ethical obligations

Know your professional responsibility rules – in particular, any specific provisions that may apply where criminal conduct or proceedings are involved. For example, if you learn that your client is about to break the law, your professional responsibility rules will most likely require you to take some action.[5] However, also keep in mind that another jurisdiction – namely the one in which criminal proceedings are pending – may also impose ethical obligations. For example, counsel may be subject to disclosure obligations to local authorities if he or she undertakes substantial work in a given jurisdiction, despite the fact that such a disclosure may violate privilege in the lawyer's home jurisdiction. You must take care to navigate what may in some cases be conflicting disclosure obligations with a particular focus on preserving your client's right to avoid self-incrimination and on maintaining privilege protections. A disclosure in an arbitration that inadvertently violates either may result in a broad waiver of your client's rights in a pending or future criminal proceeding.

The most difficult situations will be where compliance with one disclosure obligation will necessarily result in violation of another. This was the case for a German lawyer practising in the United Kingdom, who refused to make a disclosure of client information as required by the British Proceeds of Crime Act 2002.[6] The lawyer was convicted and imprisoned in the UK for refusing to disclose the information – even though the disclosure would have subjected him to disciplinary measures in Germany. Situations such as this are especially delicate and may require seeking out separate counsel to help you navigate them.

Also keep in mind that, as an advocate, your role will always be to advance your client's interests. Therefore, you are likely to have an obligation not to do anything that would endanger your client – for example, by waiving privilege. An inadvertent disclosure may allow prosecutors to seize incriminating information protected by a constitutional right or other privilege. If your adversary in the arbitration seeks disclosure of documents containing

5 You may have to report such conduct to the authorities or the tribunal; see, e.g., New York State Unified Court System, Rules of Professional Conduct (1 January 2017), Rule 3.3(b). Or your obligation may simply be to withdraw from representation; see Internal Regulation of the Paris Bar, Rule 1.5.

6 Catherine Rogers, *Ethics in International Arbitration* 107 (Oxford University Press 2014), citing Hans-Jürgen Hellwig, 'At the Intersection of Legal Ethics and Globalization: International Conflicts of Law in Lawyer Regulation', *Penn State International Law Review*, Volume 27, No. 2 (2008), 395, 399.

such information, know how to explain to the tribunal why the documents simply cannot be produced, and consider whether there is an alternative means by which your adversary can obtain the desired information in a manner that will not violate your client's privilege.

Think before you speak publicly

Throughout the course of the arbitration, you may need to take your advocacy to the public forum. Going public may be necessary to counter the negative public attention brought by criminal allegations or to apply pressure on an adverse party that has engaged in illegal activity. In particular, when the opposing party is a large corporation or a state, a media strategy can remedy the disequilibrium that may exist between the parties and encourage the opposing side to come to the negotiating table.

However, don't forget that, when there are parallel criminal proceedings, the confidentiality or secrecy obligations applicable to the criminal proceedings may extend to the arbitral proceedings.[7] It is thus of vital importance that you understand and preserve criminal confidentiality obligations, such as the US rule of Grand Jury Secrecy, which provides an exception to the public nature of criminal proceedings in the United States at the stage when the charges to be brought against a suspect are being decided. You should understand which details you can share publicly and which you may not, at least until further order by the relevant authorities. When some manner of criminal proceeding is pending, going public without considering applicable obligations can have negative consequences for you and your client. In other words, you must figure out how to use information to advance your client's interests without your disclosure becoming a disadvantage for the client. If you need to disclose information that you have obtained in the course of a criminal proceeding, explore whether you can obtain the information through other, non-protected means.

Even if criminal proceedings have not yet been opened, careless disclosures can have a negative effect on your client's interest. Going public with a criminal allegation against your adversary in arbitration – for example, by making a criminal referral – may jeopardise your credibility with local authorities, which may suspect that your criminal allegation is simply a ploy to gain the upper hand in the arbitration.

Likewise, breaching the confidentiality obligations in the arbitration may cause a party to lose favour with the tribunal, lead to sanctions for counsel and even expose the client to an award of damages or costs.[8] In *Pope & Talbot v. Canada*, for example, a NAFTA tribunal ordered the claimant to pay costs of US$10,000 after its counsel leaked to the media a draft document that was inadvertently sent by opposing counsel.[9] In a decision that was made public, the tribunal found this disclosure to be 'highly reprehensible' and considered it

7 In arbitration, the confidentiality of the arbitration depends on the will of the parties – the arbitration agreement and the arbitral rules chosen by the parties – as well as any applicable national law. The confidentiality or secrecy of criminal proceedings will not depend on the parties, but rather on the mandatory rules of the jurisdiction in which proceedings take place.

8 In addition to allowing the tribunal to allocate costs against the breaching party, breach of confidentiality obligations potentially could also lead to an award of damages if the non-breaching party was prejudiced by the breach. Ileana Smeureanu, *Confidentiality in International Commercial Arbitration*, 179 (Kluwer 2011).

9 *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Decision by Tribunal (27 September 2000).

either 'an intentional violation' of the tribunal's confidentiality order or a 'reckless breach' thereof.[10]

Breaching the confidentiality obligations imposed by criminal law jurisdictions – such as the rule of Grand Jury Secrecy or the confidentiality of criminal investigations – may lead to criminal sanctions and weaken the client's position in criminal proceedings. For example, a French lawyer who violates the *secret d'instruction* – the mandatory secrecy applicable to any details of a pending criminal investigation conducted by a French *juge d'instruction* (equivalent in common law systems to a public prosecutor at the investigation stage) – may risk a year in prison and a €15,000 fine.[11] A disclosure may also harm any goodwill that the advocate's client may have with relevant authorities.

To ensure that there are no confidentiality breaches, you may wish to take two important steps:

- Make sure that you, as arbitration counsel, are involved in developing any media strategy to ensure that confidentiality obligations in respect of the arbitration are respected.
- Be aware of any confidentiality or secrecy obligations that the criminal proceedings impose on you.

Note that confidentiality or secrecy obligations in criminal proceedings may cover the documents disclosed in those proceedings, not just the existence of the proceedings and their status. In some jurisdictions, for example, documents exchanged in a criminal investigation will be classified and counsel may not even provide a copy to his or her client without approval.[12] In other jurisdictions, the confidentiality or secrecy obligation may only cover the state's criminal authorities, or a formal party to those proceedings, such as a suspect.[13] Therefore, you should understand whether documents you receive from your client or criminal counsel may be produced in the arbitration, or cannot be disclosed because they are covered by such an obligation. Likewise, be aware that the opposing party – whether a private party to criminal proceedings or the state itself – may be subject to a confidentiality or secrecy obligation such that its production of documents in the arbitration may violate such obligations.

Ensure that your advocacy of your client's case does not violate your obligation of candour and honesty

Although no binding rules govern the professional responsibility of international arbitration advocates, many tribunals will recognise a duty of 'candour and honesty' owed by

10 ibid., 3.

11 French Criminal Code, Article 226-13.

12 Under French law, for example, the lawyer of an accused party in a criminal investigation must ask permission from a judge to receive a copy of documents in the criminal record, even though he or she may otherwise consult such documents. Criminal Procedure Code, Article 114.

13 See e.g., in France, Criminal Code, Article 11. For example, despite the secrecy rules that govern proceedings, a party may nonetheless produce a document that is obtained from the record in a criminal case. Théobald Naud, 'International Commercial Arbitration and Parallel Criminal Proceedings', *40 under 40 International Arbitration*, 518 (Carlos González-Bueno Catalán et al. eds., Kluwer International Law 2018).

counsel to the tribunal.[14] In a nutshell, you should not make any representation to the tribunal that you know to be false, and you should promptly correct any representation that you subsequently learn to be false.[15] Failure to respect this obligation can lead to public shaming of counsel[16] and even a sanction.[17] At the very least, it will cause you to lose credibility with the tribunal.

While the mere fact that your client is involved in a criminal matter – whether as the subject of criminal allegations or as the party making such allegations – does not mean that your client will provide you with false information or fraudulent documents, you must remain vigilant. You do not want to jeopardise your client's case in criminal proceedings by ceding points in the arbitration that are important in the criminal proceedings. At the same time, you must do all you can to maintain credibility with your arbitral tribunal. In one recent arbitration, the majority of a distinguished tribunal allocated costs against a party whose counsel, it concluded, committed 'fraud on the tribunal' when it advanced an argument based on a document that the majority considered clearly 'false and misleading'.[18] Although the majority stated that 'sometimes counsel can be excused when the real facts are hidden by the clients', it noted that '[t]here are limits to zealous advocacy, and it cannot be acceptable to continue to advance an argument that the evidence clearly shows is not true'.[19] Such a finding may weaken an advocate's ability to effectively present his or her case.

Rule No. 2: Know how to navigate criminal law issues

Arbitration is not a one-man sport. Even in a relatively simple case, you will need to rely on others for information and opinion in areas beyond your expertise. When an arbitral matter implies a criminal element, local criminal counsel will be both your source of specialised knowledge in the relevant criminal law and your gateway to the facts of the criminal proceeding. Whether you are local criminal counsel yourself and represent your client in both arbitral and criminal law matters (whether a criminal proceeding has been

14 The IBA Guidelines on Party Representation in International Arbitration include such a duty. IBA Guidelines on Party Representation (25 May 2013), Guidelines 9 to 11. However, these Guidelines are not binding and some authors – particularly those from a civil law background – suggest that such a duty may not exist. See Alexis Mourre, 'About Procedural Soft Law, the IBA Guidelines on Party Representation and the Future of Arbitration', *The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A Karrer*, 239 (Patricia Shaughnessy et al. eds., Kluwer International Law 2017).

15 See IBA Guidelines on Party Representation (25 May 2013), Guidelines 9 to 11.

16 *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Decision by Tribunal (27 September 2000).

17 While the *Pope & Talbot* tribunal found that it did not have jurisdiction to sanction counsel, the tribunal in *Hrvatska Elektroprivreda, d.d. v. Slovenia* decided that it had 'an inherent power to take measures to preserve the integrity of its proceedings.' ICSID Case No. ARB/05/24, Order Concerning the Participation of Counsel 13 (6 May 2008).

18 *Government of the Lao People's Democratic Republic v. Lao Holdings N.V. and Sanum Investments Limited*, SIAC Case No. ARB No. 143 of 2014, Final Award 68 (29 June 2017). One arbitrator issued a dissenting opinion in which she agreed with the tribunal's findings, but stated that she was 'fully satisfied by Respondents' counsel's express assurance to the Tribunal that it had conducted itself professionally and within the bounds of zealous advocacy on behalf of its clients and had not engaged in any improper tactics'. *Government of the Lao People's Democratic Republic v. Lao Holdings N.V. and Sanum Investments Limited*, SIAC Case No. ARB No. 143 of 2014, Dissenting Opinion of Carolyn B Lamm 20 (29 June 2017).

19 ibid.

opened or is still being investigated) or you represent the client only in the arbitration, you will undoubtedly need to rely on experts to help you navigate the more complex issues with which you lack familiarity or experience. If you do not represent the client in respect of both matters, strong consideration should be given to integrating local criminal counsel into the arbitration team to help you (1) avoid interfering with the criminal proceedings either by antagonising the prosecutor or disclosing privileged information, and (2) leverage the facts of any criminal proceedings and any evidence obtained therefrom for the benefit of the arbitration proceeding, either to show how your client has been victimised or to explain your client's innocence, as the case may be. Your ability to work with criminal counsel will be critical to the success or failure of your advocacy – at least in relation to the criminal matters. Get to know local criminal counsel well and gain his or her trust. Make sure that you remain aware of how each of these matters separately and together may advance your client's goal. Where you seek to represent your client on multiple fronts, make sure you fully comprehend your client's interests in each realm and advise on any trade-off.

In any event, you must (1) coordinate with local authorities so that the arbitration proceedings do not adversely affect criminal proceedings or investigations, (2) ensure that you understand the key facts at issue in the criminal case and are able to effectively communicate them to your tribunal – whether the criminal elements are central to the arbitration and go to the merits (for example, a claim of abuse by a state of its police powers in an investment treaty arbitration) or are only secondary (for example, if your client is the victim of criminal activity that has prevented it from meeting its obligations to its counterparty in the arbitration), and (3) use all means at your disposal to build the evidentiary record.

Coordinate with local authorities to avoid any surprises

While arbitration exists because states allow private actors to exercise some of their judicial functions, criminal law remains the preserve of the state and its application will be mandatory in the view of that state. Even if the state is not a party to the arbitration, local authorities may be interested in developments in the arbitration. This is true whether your client is the subject of a criminal investigation or has worked with authorities to open or further an investigation against another relevant party. When you act only as arbitration counsel, criminal counsel will be your bridge to local criminal authorities. When you represent your client in both criminal and arbitral proceedings, you must be that bridge.

Making sure that local authorities are not caught off guard by developments in the arbitral proceedings – all the while maintaining the element of surprise in relation to your adversary – is important and no one will be better able to facilitate this coordination than local criminal counsel. For example, the mere existence of the arbitral proceedings may be perceived by local authorities as a threat to their exclusive jurisdiction. You – or criminal counsel – should be prepared to explain that arbitral proceedings are not a way of bypassing local authorities and that arbitration is a legitimate forum in which your client is entitled to assert its rights. This is particularly true when your client is the victim of criminal misconduct and seeks to bring perpetrators to justice, though it is also true when your client is the suspect in criminal proceedings and seeking access to arbitration may be perceived as a way of achieving via 'private justice' what cannot be achieved before state courts.

Arbitration and criminal justice, as we have said, are different worlds. Even when, as in civil law jurisdictions, criminal law allows victims to seek redress by joining as civil parties

to criminal proceedings, each forum will have its own *raison d'être* and its own advantages and disadvantages. However, local criminal authorities may not immediately understand this. You will have to explain this to them to effectively advance your client's interests in both forums – regardless of whether you act as lead counsel in both jurisdictions.

Likewise, you may need to understand from local authorities whether and when producing a piece of evidence in the arbitration is appropriate. Premature disclosure of evidence obtained in a criminal investigation may foil the prosecutors' element of surprise and tip off your adversary to the fact that it may soon be the subject of criminal investigations.

Understand the key issues in the criminal proceedings

As the arbitration advocate, you inevitably will need to explain the criminal aspect of your case – whether it is central to the arbitration or secondary – and it is critical that you get it right. Any errors or omissions in the presentation of the facts or law will cause you to lose credibility with the tribunal. Even worse, contradicting the client's position in the criminal proceedings may also jeopardise your client's interests in those proceedings.

In an arbitration in which one of the authors of this chapter acted as counsel to an investor, the opposing party, a state, took a position that was seemingly at odds with the prosecution's case theory in parallel criminal proceedings. While this did not affect the course of criminal proceedings (a sad commentary on the criminal justice system in that state), the investor's legal team used this point to undermine the state's credibility and paint the state's criminal accusations, which were central to the arbitration, as nothing more than a trumped-up attempt to ensnare the investor.

To avoid making such a careless mistake yourself, make sure that criminal counsel reviews all submissions that are liable to have any effect on criminal matters and make criminal counsel aware of your strategy in the arbitration.[20] If criminal counsel is part of the arbitration team, this will be much easier and more straightforward. If you represent your client in both forums, make sure that you review all submissions in detail with a thorough understanding of the impact of your assertions in both criminal and arbitral proceedings.

Use all available avenues to build the evidentiary record

Close collaboration between arbitration and criminal counsel will not only avoid any mistakes that prejudice client or counsel, it may also provide arbitration counsel with a rare opportunity to harness the coercive force of a criminal law jurisdiction to collect evidence that may be used in the arbitration. The criminal procedure codes of most civil law jurisdictions allow private parties in criminal proceedings to play a role in the taking of evidence (i.e., by allowing for a neutral expert to investigate the technical aspects of the alleged wrongdoing), for example, in a case of alleged tax evasion, such an expert might evaluate whether your client actually carried out construction work for which it later claimed a VAT credit – and prepare a report available to the parties; or forcing parties to disclose

20 It may also make sense for arbitration counsel to be involved in, or at least be kept abreast of, the evolution of criminal counsel's strategy. The arbitration advocate will be able to make criminal counsel aware of any aspects of the criminal strategy that may jeopardise the arbitration proceedings.

evidence they might otherwise refuse to provide. For their part, common law jurisdictions have a strong tradition of discovery, even outside criminal proceedings.[21]

If arbitration counsel is properly apprised of the evidence-gathering procedures that domestic proceedings offer, he or she may suggest the use of such procedures in a way that will help him or her to build the evidentiary record in the arbitration. The criminal file will be a useful source of information and criminal counsel will be your guide to this vital resource. Know how to use existing evidence on record in criminal proceedings and understand how to harness the coercive powers of criminal law jurisdictions to obtain further evidence that may be useful in the arbitration.

Likewise, the arbitration proceedings themselves may offer a further opportunity to elicit evidence that exculpates your client or demonstrates how your client has been victimised. Know when and how to make effective document requests that will help advance your case not only in the arbitration proceedings, but in the criminal proceedings.

Notwithstanding the above, do not forget Rule No. 1: both the criminal and the arbitral proceedings may impose secrecy or confidentiality obligations that prevent the use of documents on record in the other proceedings.

Rule No. 3: Know when to play offence and when to play defence

Ultimately, an advocate's job is to implement a strategy that will advance his or her client's interests. At times, as we have noted, this will involve facts and issues foreign to you and outside your expertise. At other times, arbitration will be the 'foreign' element that is not central to the global strategy. As the arbitration advocate, you must know how to make the tools of arbitration available to advance your client's overall strategy and to use external elements to strengthen your hand in the arbitration. To do so, we offer three suggestions: (1) know when making a claim of illegality will be to your client's advantage; (2) use the criminal proceedings to advance the arbitral proceedings; and (3) use the arbitral proceedings to achieve objectives in the criminal proceedings.

Know when to use a claim of illegality to your client's advantage

Illegality will not always be harmful to your client's case. It may be an opportunity to advance your client's goals. For example, whether the client is a state in an investor–state dispute or a private party in a commercial arbitration, showing that a benefit was procured through bribery may allow the arbitration advocate to easily dispose of the case. This may be so under two circumstances.

First, in an investor–state dispute, a showing of illegality may deprive the tribunal of its jurisdiction or render the opposing party's claim inadmissible. The fact that the underlying contract was obtained through corruption may mean that this contract, which would otherwise give rise to an 'investment' under the applicable treaty, cannot allow the investor

21 In the United States, for example, 28 US Code Section 1782 allows a US court to grant discovery requested by a party to a proceeding before a 'foreign and international tribunal,' which may include some international arbitration tribunals. Also note that Rule 2004 of the US Federal Rules of Bankruptcy Procedure contains a similar discovery rule where there is a foreign bankruptcy proceeding.

Address the issue at the earliest juncture

Experience dictates that when it comes to suspicions, allegations or even admissions of bribery and other criminal activity, the good-faith advocate must tread carefully and forthrightly. If the criminal activity at issue is on the side of the opposing party, then to be most helpful to the tribunal the advocate should elucidate to what extent that illegality affects jurisdiction, admissibility and liability respectively, as well as enforceability at least at the seat (in commercial and non-ICSID cases). The effective advocate addresses these matters clinically, carefully and without lording the criminal aspects over the opposing side. By contrast, if the criminal activity at issue resides with the advocate's own party and if the illegality is established, this advocate has the delicate task of addressing to the tribunal whether that activity makes the underlying contract void or voidable, whether the claim would be non-justiciable for reasons of 'unclean hands' and similar doctrines, or whether the illegality in fact has no bearing whatsoever on the procedural and substantive bases for the specific claim.

No matter whose side the criminal activity is said to impugn, the bona fide advocate must address the issue at the earliest juncture, and ensure appropriate transparency and evidentiary good faith towards the fact-finding tribunal. While the challenge might have different wrinkles depending on whether the matter is a contract-based or a treaty-based claim, at the end of the day both domestic and international public policy are likely to have a role, and the diligent advocate should promptly analyse the activity on both a national law and a cross-border level. In so doing, the advocate will be in the best possible position to effectively and accurately inform the tribunal of what the tribunal's rights and duties are, if any, in investigating and drawing consequences from the criminal activity at issue. Here, the advocate must bear in mind the lack of full harmonisation of national laws respecting criminal activity (including burdens and standards of proof). He or she should also consider further the lack of consensus about the existence of a transnational public policy interdicting certain kinds of commercial activity (such as intermediary payments). As a result, the mindful advocate will appreciate that even the best-equipped tribunal may have its hands full sorting out the differing procedural and substantive standards. All the more reason for the forward-thinking advocate to assist the tribunal in this task promptly, clearly and with integrity.

– Richard Kreindler, Cleary Gottlieb Steen & Hamilton LLP

to invoke the substantive protections of the treaty – regardless of whether the treaty explicitly requires that an investment be made in accordance with the host state's laws.[22]

Second, in a commercial arbitration, showing that a contract's purpose is to carry out illegal conduct, or that it was procured by corruption, may prevent the tribunal from

22 *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award 128 (4 October 2013); see also *World Duty Free Co Ltd v. The Republic of Kenya*, ICSID Case No. ARB/00/7, Award 48 (4 October 2006) (finding that, as corruption was contrary to international public policy, the tribunal could not 'uphold' claims based on contracts resulting from corruption); *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award 39 (15 April 2009) ('In the Tribunal's view, States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws.').

granting relief that would give effect to such a contract.[23] This may be because the contract itself will be considered void *ab initio*[24] or because an award giving effect to such a contract is contrary to (international) public policy.[25]

Even after the award has been rendered, and the illegality charge rejected, a showing of illegality may still thwart enforcement in some jurisdictions. A string of decisions has shown that French courts will review the merits of an arbitral award and make their own determination regarding a claim that a contract has been procured by corruption.[26] This is true even if the party to the arbitration did not allege any such corruption before the tribunal[27] or if the party alleging corruption is only able to demonstrate 'red flags' – indicia that corruption may have occurred – rather than actual evidence of corruption.[28] This may not be the case in other jurisdictions, which still grant deference to the findings of the arbitral tribunal, even in cases of corruption. For example, in *Northrop v. Triad*, the US Ninth Circuit Court of Appeals upheld an arbitral award – despite the allegation that the underlying contract was illegal – finding that the arbitrators' conclusions on such issues were entitled to deference as they were 'fully briefed' on the point.[29]

Regardless of whether your client stands to benefit from a finding of illegality, you must know how to use the facts to your client's advantage. If your client is making an allegation of illegality, you are naturally in a position of strength. You may have more than one chance to prove your illegality allegation and you may benefit from a lower standard of proof. If the corruption allegation is made against your client, do not despair; you have plenty of arrows in your quiver. Understand whether relevant case law allows review of the merits of a corruption allegation at the enforcement stage; this will guide your understanding of the level of detail you will have to present to the tribunal. If a relevant jurisdiction will review the merits of the tribunal's findings, make sure that your tribunal has all the evidence it needs to establish that the allegation is baseless. Even if it will not, make sure that the tribunal is 'fully briefed' so as to merit the deference of the enforcement court, where possible. Even where the opposing party's corruption allegation is based on red flags, it can only benefit your client to explain to the tribunal why each of those elements does not point towards corruption.

Use the criminal proceedings to advance objectives in the arbitration

A criminal proceeding may also offer the arbitration advocate an opportunity to advance arbitral objectives in a criminal law forum. If your client is a party to criminal proceedings,

23 See, e.g., Court of Appeal, 1er ch., 21 February 2017, Rev. Arb. 915 (2017); *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award 128 (4 October 2013); Award in ICC Case No. 1110, *Arbitration International*, Volume 10 (1994), Issue 3, 282.

24 Award in ICC Case No. 1110, *Arbitration International*, Volume 10 (1994), Issue 3, 282.

25 Court of Cassation, Cass. 1e civ., 13 September 2017; *World Duty Free Co Ltd v. The Republic of Kenya*, ICSID Case No. ARB/00/7, Award 48 (4 October 2006).

26 Court of Appeal, 1er chambre, 21 February 2017, Rev. Arb. 915 (2017); Court of Cassation, 1er chambre civile, 13 September 2017.

27 Court of Cassation, Cass. 1e civ., 13 September 2017.

28 See also *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award 128 (4 October 2013); Court of Appeal, 1er chambre, 21 February 2017, Rev. Arb. 915 (2017).

29 593 F Supp 928 (1984).

those proceedings may provide evidence-collecting opportunities, as noted above. If your client is not a party to criminal proceedings, you may be able to apply pressure on the opposing party if there is any likelihood that the party has engaged in illicit conduct. For example, if your client has suffered damage as a result of the monopolistic conduct of its contractual counterparty or as a result of the counterparty's corrupt practices, a criminal complaint or referral may be appropriate. This may initially occur if criminal proceedings are already pending or if local authorities are as yet unaware of any hint of criminal misconduct.

Remember that the same criminal misconduct may give rise to overlapping authorities, even in the same jurisdiction. For example, in the United States, the payment of a bribe could trigger an investigation by prosecutors for violations of criminal law, but may also be a breach of securities laws and fall under the jurisdiction of securities regulators. Also, remember that the laws of a jurisdiction that may not otherwise appear to have any relationship with the dispute may nonetheless be applicable – for example, where a company is listed on an international stock exchange found in that jurisdiction.

Notwithstanding the above, once criminal proceedings are likely, or have commenced, you must ensure that you do not in any way threaten the criminal proceedings in an effort to advance the arbitration. In general, you should keep three important points in mind.

First, your professional responsibility obligations may limit the conduct you can undertake – for example, your ability to threaten to bring criminal proceedings.[30]

Second, when going to the local authorities, be careful not to waive your client's right to invoke the arbitration clause. This may happen when a client seeks recourse in local proceedings before it begins arbitral proceedings – for example, where, in a civil law jurisdiction, the party seeks relief as a civil party in criminal proceedings.

Third, make sure that any criminal investigation will not backfire on your client – before seeking to precipitate a criminal investigation you must be sure that in doing so you will not waive your client's right against self-incrimination, or that your client will be the subject of the investigation, or that the arbitral tribunal will consider the measure an unjustified guerilla tactic.

Also keep in mind that, where findings in the criminal proceedings may be relevant to the tribunal's own findings, you may wish to seek a stay of the arbitral proceedings. This may be the case because you believe that a full briefing of criminal law issues by authorities with the coercive powers to conduct a proper investigation will benefit your client. Although the decision of a domestic court will not bind the tribunal strictly speaking,[31] some tribunals have found foreign authorities 'best placed' to collect evidence relevant to the arbitration.[32]

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30 See, e.g., New York State Unified Court System, Rules of Professional Conduct (1 January 2017), Rule 3.4 ('A lawyer shall not: . . . (e) present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.').

31 Alexis Mourre, 'Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator', *Arbitration International*, Volume 22 (2016), 95, 114.

32 *Niko Resources Ltd. v. People's Republic of Bangladesh et al.*, ICSID Cases Nos. ARB/10/11 and ARB/10/18, Decision on Jurisdiction 116 (19 August 2013). While the Niko Resources tribunal did not stay proceedings, tribunals have the discretion to do so, absent agreement otherwise. *Fund Ltd. v. A. Group Ltd.*, Swiss Federal Tribunal, Case No. 4P_168/2006, 19 February 2007.

Use the arbitral proceedings to advance objectives in the criminal proceedings

Although an arbitral tribunal does not enjoy the same coercive powers as a criminal jurisdiction, a tribunal established in accordance with an investment treaty may have the power to order a state to comply with its treaty obligations. This will include the power to order a state to halt a pending criminal proceeding or to cease any other conduct relating to that proceeding. In one case, for example, a tribunal acting pursuant to the ICSID Convention ordered a state to suspend its criminal proceedings against three claimants and withdraw an extradition request against two of those claimants.[33] While the state did not ultimately suspend criminal proceedings, the order compelled the court of a third-party state to refuse the extradition request, which is a significant development.[34]

An order for provisional measures – temporary measures ordered by the tribunal to protect a right in the arbitration pending the arbitral proceedings – may also be used to prevent the state from confiscating key evidence that may be used for the arbitration, or to prevent the state from collecting evidence in a way that violates its own laws or the equality of the parties in the arbitration.[35]

However, the tribunal's power to order provisional measures is not a silver bullet. Tribunals have generally only ordered provisional measures in relation to ongoing criminal proceedings when the integrity of the arbitral proceeding was at stake. What is more, such a measure may not be part of the client's overall goals. Criminal counsel may wish to work with local criminal authorities, and this coordination may be addled if the local authorities are antagonised with a provisional measures order. Before any action is undertaken, the arbitration advocate should understand whether an application for provisional measures is consistent with the client's objectives.

Conclusion

An arbitration advocate in a brave new world

Advocacy is more than just the art of persuasion. A good arbitration advocate will not only effectively plead a client's case before a tribunal, he or she will execute on a global strategy that balances risks and leverages the various proceedings for the client's benefit. While the skills of persuasion may not help you in the brave new world in which your advocacy may take you, your instincts as an advocate will. We have developed the rules in this chapter from our own experience acting as counsel in arbitrations involving criminal matters. However, they are knowable to any advocate and they reflect general principles that should guide your advocacy in any arbitration.

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33 *Hydro S.r.l. and others v. Albania*, ICSID Case No. ARB/15/28, Order on Provisional Measures (3 March 2016). One of the authors of this chapter acted as counsel in that case.

34 *Government of Albania v. Francesco Becchetti and Mauro De Renzis*, District Judge, England and Wales (20 May 2016). As this decision satisfied the tribunal that the claimants would be able to participate in the proceedings, the tribunal later modified its provisional measures order. *Hydro S.r.l. and others v. Albania*, ICSID Case No. ARB/15/28, Decision on Claimants' Request for a Partial Award and Respondent's Application for Revocation or Modification of the Order on Provisional Measures (3 March 2016).

35 See *Methanex Corporation v. United States of America*, UNCITRAL, Final Award (abstract) (3 August 2005); *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on preliminary issues (23 June 2008).

Knowing your ethical obligations, and in particular your disclosure obligations, will ensure that you avoid prejudicing your client (and yourself) and that your client benefits, rather than suffers, from multiple simultaneous proceedings.

To the extent that there are pending criminal proceedings, understanding how to navigate the criminal law aspects – regardless of whether you are also criminal counsel or are relying on local criminal counsel – will allow you to leverage the criminal proceedings while balancing the attendant risks. Understand that you will almost invariably need to rely on others to help you achieve the client's goals.

Know how the criminal and arbitration proceedings (separately and together) can advance the client's objectives, whether this involves taking bold action in one or the other proceeding – such as making a provisional measures request or a criminal referral – or a more conservative approach.

A good arbitration advocate will be able to apply any of these skills to his or her practice.

Appendix 1

The Contributing Authors

Rui Andrade
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Rui Andrade is a partner in the litigation and arbitration practice. He has extensive experience in coordinating matters of litigation, arbitration and labour in Angola, Mozambique, East Timor, Equatorial Guinea, São Tomé and Príncipe, Guinea-Bissau and Cape Verde, representing and advising the most relevant national and international companies, including oil industry corporations.

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Paola Aldrete is a senior associate in the international arbitration and litigation practice at Galicia Abogados, where she focuses her practice on transnational and local arbitration proceedings (institutional and ad hoc) acting as counsel, arbitrator and secretary of the arbitral tribunal particularly in cases relating to construction, infrastructure and shareholders' disputes. Prior to joining Galicia Abogados, Ms Aldrete worked in an international law firm in New York as a foreign associate in the arbitration practice. *Who's Who Lega*l has recognised Paola as a Future Leader in International Arbitration.

Ms Aldrete obtained her law degree from ITESM (2013) and her master's degree in international legal studies with a certificate in international arbitration and ADR from Georgetown University (2017). She is the editor of *Legislación Mexicana de Arbitraje* (Editorial Porrúa, 2015). She is a member of the executive committee of the Arbitration Commission of the Mexican Bar Association, representative of Mexico in ALARB Siguiente Generación and a member of the ICC Arbitration Anticorruption Task Force. Ms Aldrete is a founding member of Mexico Very Young Arbitration Practitioners (MXVYAP) and of the Georgetown Law Association of Mexicans.

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Cecilia Azar is a partner in the international arbitration and litigation practice of Galicia Abogados. She has more than 25 years' experience in arbitration, mediation and judicial procedures related to alternative dispute resolution. She focuses her practice on complex domestic and international commercial disputes, acting as arbitrator, counsel or expert. She has developed broad experience, particularly in cases related to the energy, infrastructure, construction and commercial arbitrations and mediations. She has been ranked in several editions of Chambers and Partners' Dispute Resolution rankings (Global and Latin America) and recognised by Who's Who Legal as a 'Thought Leader' in International Arbitration.

Ms Azar is recognised for her expertise and record of accomplishment in complex judicial proceedings related to arbitration before Mexican courts, such as set-aside and enforcement of awards, interim measures. She advises clients in investor–state dispute settlement matters, specifically by analysing investment protection provisions in investment treaties to which Mexico is party. Ms Azar is an active arbitration practitioner who currently acts as vice president of the Mexican Arbitration Commission of the ICC, formerly acted as president of the Mexican Arbitration Institute and is currently a member of the ICC International Arbitration Court. She is a member of the executive committee of the Women Way in Arbitration (WWA) and a member of the Racial Equality for Arbitration Lawyers (REAL) steering committee.

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John P Bang is a senior partner (foreign attorney) at Peter & Kim in Seoul. He was previously a senior partner at Bae, Kim & Lee LLC, where he worked for 23 years in various roles, including as the co-founder and head of the international arbitration and litigation practice. He has represented parties in over 250 proceedings under the rules of all major institutions and ad hoc arbitrations including the ICC, SIAC, HKIAC, ICSID, LCIA, AAA/ICDR, UNCITRAL, VIAC, SCC, ACICA, CIETAC, KCAB, CAS, CIAC and JCAA. John has led the advocacy as counsel in several virtual hearings in both investment and commercial disputes.

He also acts as arbitrator and is regularly appointed as co-arbitrator or presiding arbitrator by institutions and users. Prior to his work at BKL, John served as a federal law clerk to the Honourable Kathryn C Ferguson. Currently, he is a member of the SIAC Court of Arbitration, an executive committee member of the Korea Council for International Arbitration and a senior officer of the IBA Litigation Committee.

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Amal Bouchenaki is a partner in the New York office of Herbert Smith Freehills, where she specialises in investment treaty, international commercial arbitration, as well as other forms of alternative resolution of complex international disputes. She is a French and Algerian national and is qualified as a French *avocat* and a California attorney.

Amal advises multinational companies and states in the Americas, Europe, the Middle East and South East Asia in relation to complex disputes in a variety of industry sectors

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Amal's working languages are English, French, Arabic and Spanish. She is proficient in Italian, and has a basic knowledge of spoken Mandarin.

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James H Boykin is a partner in the Washington, DC, office of Hughes Hubbard & Reed LLP and chair of the firm's investment treaty arbitration group. Jim focuses his practice on international arbitration and includes state-to-state and investor-state arbitration as well as commercial disputes. Jim has represented parties in treaty arbitrations under the ICSID, UNCITRAL and SCC Rules. In addition, he has represented clients in commercial arbitrations under the ICDR and ICC Rules. Jim is a member of the Expedited Commercial Panel of the American Arbitration Association. Previously, he taught as an adjunct professor at the College of William & Mary, School of Law, and at American University, Washington College of Law.

Jim is an active member of the German-American Lawyers Association and is a frequent speaker and moderator at various international arbitration conferences. Jim received his BA from the University of Virginia and his JD from the College of William & Mary.

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James Bremen is chair of Quinn Emanuel's construction and engineering practice and has more than 20 years of experience in the world's largest and most complex construction projects and most difficult disputes. He has worked in more than 25 countries on both project documentation and claim resolution (including as counsel in some of the world's largest construction arbitrations) in the oil and gas, power and major infrastructure sectors. He is considered one of the world's leading lawyers in major project disputes in the emerging markets, and has extremely broad experience involving Qatar, Saudi Arabia, Malaysia and the CIS countries.

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James H Carter is a senior counsel in the New York office of WilmerHale, where he serves as counsel and as an arbitrator. He was previously a partner at Sullivan & Cromwell LLP, where his practice involved litigation and arbitration of international commercial and investment matters and intellectual property disputes. Mr Carter has been a member of the Court of Arbitration for Sport since 2000 and is an arbitrator appointed by the National Football League Management Council and the NFL Players Association to hear anti-doping disputes in US professional football. He has also participated in more than 150 international commercial and investment arbitration cases. He is a former chair of the board of directors of the New York International Arbitration Center and has served as chair of the board of directors of the American Arbitration Association, president of the American Society of

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Tai-Heng Cheng is a partner and global co-head of the international arbitration practice at Sidley. He is a pre-eminent arbitration practitioner whom clients across industries turn to for sound strategic advice in managing risk, and successfully addressing and solving a myriad of complex business issues. He has earned a reputation for being a stellar advocate, having won nine-figure awards for clients both in commercial and investment treaty arbitrations, and successfully carried out worldwide enforcement campaigns to collect judgments and awards.

With 20 years of experience, he is also a trusted adviser to companies and boards. Although he is based in the New York office, he spends a substantial amount of time in Europe, Asia and Latin America representing clients.

Tai has extensive experience in serving as tribunal chair or co-arbitrator before major international arbitral institutions in multiple jurisdictions, and is a member of the arbitration panels of arbitration institutions in North America, Europe and Asia.

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Chou Sean Yu is head of the litigation and dispute resolution department and a partner at WongPartnership LLP. He is also the head of the banking and financial disputes practice and a partner in the international arbitration, financial services regulatory and the Malaysia practices.

Sean Yu's main areas of practice are domestic and international litigation and arbitration work, with particular expertise in banking and trade finance disputes, commercial and corporate disputes, insolvency and restructuring, corporate fraud, investigations and asset recovery, shareholder litigation and tort and contractual claims.

The Legal 500 describes Sean Yu as a 'thorough and well prepared' practitioner. His clients have noted that 'his excellent legal knowledge and competence, combined with his good commercial thinking allows him to appreciate the commercial aspects of complex business issues and provide holistic advice to clients that goes beyond just legal considerations'.

He is also recognised as a leading lawyer for international arbitration in *Best Lawyers* and is endorsed as a recommended restructuring and insolvency lawyer in *The Legal 500* and a leading restructuring and insolvency lawyer in *Best Lawyers*.

Mr Chou is a fellow of the Insolvency Practitioners Association of Singapore and is on the Panel of Arbitrators of the Singapore International Arbitration Centre, the Asian International Arbitration Centre and the Korean Commercial Arbitration Board. He is also a fellow of the Chartered Institute of Arbitrators and is director (and past chairman) of the board of its Singapore branch.

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Catarina advises clients involved in disputes in Portugal as well as the Portuguese-speaking jurisdictions of Angola, Mozambique, Guinea-Bissau, Equatorial Guinea, Cape Verde and East Timor. Catarina's work also extends to OHADA jurisdictions, such as the Democratic Republic of Congo and Cameroon.

She has advised several clients in the oil and gas, shipping, aviation, hotel management and telecommunications sectors, among others.

Catarina holds a degree in law from the Portuguese Catholic University of Lisbon, Faculty of Law, and has attended a postgraduate course on energy law administered by the same faculty.

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Karina Goldberg has distinguished herself in Brazilian contractual and commercial litigation, alongside an extensive practice in domestic and international arbitration, including contractual and commercial disputes, shareholders and M&A disputes, infrastructure and construction disputes, security and investment cases.

Karina was educated at the Pontifical Catholic University of São Paulo (2001), where she obtained her bachelor's degree in law, and at Utrecht University, Netherlands (2003), where she obtained her master's degree (LLM) in European private law. Karina has been practising dispute resolution since 2001 and worked at the New York office of Debevoise and Plimpton in 2015–2016, as part of the international dispute resolution group.

Karina is currently a member of the ICC Commission on International Arbitration and ADR (alternative dispute resolution), a member of the UNIDROIT Working Group of the International Bar Association and a licensed member of Ordem dos Advogados do Brasil, São Paulo section. She is fluent in Portuguese and English.

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Simón has dual training in civil and common law, is licensed to practise in New York and Spain and is bilingual in English and Spanish.

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Anna is the author of the book *Psychology and Persuasion in Dispute Resolution*, and a co-editor and co-author of a commentary on Russian arbitration law, published by the Russian Arbitration Association.

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Rishab currently serves as co-chair of the steering committee of the Young MCIA (Mumbai Centre for International Arbitration) and as the India representative on the young arbitration committees of the LCIA and the HKIAC. He was recognised in *Who's Who Legal* 2021 as one of the world's leading counsel for arbitration, having previously been named as a 'future leader of arbitration' in *Who's Who Legal* 2018, 2019 and 2020.

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Peter & Kim

Mino Han is a partner at Peter & Kim in Seoul. He specialises in construction and engineering disputes and has acted as counsel under the arbitration rules of the ICC, SIAC, KCAB and JCAA. Several of his matters relate to projects based in the Middle East, Asia, Eastern Europe, Africa or Latin America.

Mino is currently the representative of the CIArb Korea Chapter. He is a steering committee member of KCAB Next and is on the committee of KOCIA (Korean Committee on International Arbitration). Mino is also on the panel of International Arbitrators at KCAB International.

Mino qualified as a Korean lawyer in 2009 and was admitted as a solicitor in England and Wales in 2019. He received a master of laws degree in international arbitration law from Seoul National University in 2012 and an MSc degree in construction law and dispute resolution at King's College, London in 2018.

Grant Hanessian
Hanessian ADR, LLC

Grant Hanessian is an independent arbitrator and neutral in New York, specialising in international, investor-state and complex commercial disputes. For more than three decades, Mr Hanessian acted as counsel and arbitrator in a wide range of commercial and treaty disputes arising under the laws of many common and civil law countries and public international law. Prior to July 2020, he was a partner at Baker McKenzie, where he practised for 33 years, and served as global co-head of the firm's international arbitration practice, head of its international arbitration practice in North America and head of its New York office litigation department.

Mr Hanessian was US member of the ICC International Court of Arbitration from 2015 to 2021 and chair of the ICC-USA/Arbitration Committee of the US Chamber for International Business (US national committee of the ICC) from 2015 to 2020. He is currently US vice president of the London Court of International Arbitration's North American Users' Council, and a member of the ICC's Commission on Arbitration, the American Arbitration Association–International Centre for Dispute Resolution's International Advisory Committee and its Advisory Committee on Brazil, the International Arbitration Club of New York, the Arbitration Committee of the International Institute for Conflict Prevention and Resolution, the New York City Bar Association's Committee on International Commercial Disputes and Club Español del Arbitraje. He is a fellow of the College of Commercial Arbitrators and a founding board member of the New York International Arbitration Center.

Mr Hanessian is editor of *ICDR Awards & Commentaries*, Vol. I (Juris, 2012) and Vol. II (Juris, forthcoming in 2021), *International Arbitration Checklists* (3rd ed., Juris, 2016) and *Gulf War Claims Reporter* (ILI/Kluwer, 1998). He has authored more than 50 articles and book chapters on international dispute resolution topics and spoken at conferences and universities worldwide. He is annually recommended by *Chambers Global* and *Chambers*

USA ('a mastermind'; 'people go back to him again and again because of his command of the matters'; 'exceptionally experienced'; 'his attention to detail and ability to handle complex procedural issues sets him apart'; an 'elite lawyer' who is 'very experienced, hugely knowledgeable and effective'; a 'powerful advocate for clients'), *The Legal 500* ('a great practitioner' with a 'strong commercial profile'), *PLC Which Lawyer?*, *The International Who's Who of Commercial Arbitration* ('superb counsel and arbitrator'), *Expert Guides: Leading Practitioners in International Arbitration* (ranked among the 'Best of the Best' in international commercial arbitration) and *Who's Who Legal Thought Leaders: Arbitration*.

Mr Hanessian is a member of the GAR editorial advisory board and an adjunct professor of law at Fordham Law School, where he teaches international commercial arbitration and the LLM International Arbitration Practicum course.

Hilary Heilbron QC
Brick Court Chambers

Hilary Heilbron QC is a barrister and Queen's Counsel practising from Brick Court Chambers, London. She now focuses on international arbitration, primarily sitting as an international arbitrator. She has been appointed as an arbitrator in well over 100 arbitrations with a range of different applicable laws, seats, institutional rules and subject matters. She also has extensive experience as counsel in both major international arbitrations and commercial litigation, including litigation relating to arbitration, and has acted for a wide range of national and international clients, appearing as leading counsel in the Supreme Court, the House of Lords and the Privy Council.

She is currently a member of various international task forces on current topics in international arbitration and a former member of the LCIA Court and the ICC UK Arbitration and ADR Committee. She has spoken and written extensively on international arbitration and cross-border litigation and is the author of *A Practical Guide to International Arbitration in London* (Informa Law, 2008).

Stephen Jagusch QC
Quinn Emanuel Urquhart & Sullivan LLP

Stephen Jagusch QC is global chair of Quinn Emanuel's international arbitration practice. He specialises in international commercial and investment treaty arbitration, having acted as adviser and advocate in dozens of ad hoc and institutional international arbitrations. A great many of Stephen's cases have been for or against sovereign states or substantial multinational organisations, and he has been lead counsel in many of the world's leading investment treaty cases.

Stephen is recognised as a leading expert in the field of international arbitration and disputes arising under contracts and bilateral or multilateral investment treaties. Leading directories recognise Stephen as a leader in his field, and he has collected numerous awards and received other recognition of his contribution.

Stephen regularly sits as an arbitrator in both commercial and investor-state arbitrations.

Tejas Karia
Shardul Amarchand Mangaldas & Co

Tejas Karia is a partner and head of the arbitration practice at Shardul Amarchand Mangaldas. He has wide experience in handling international and domestic commercial arbitrations across sectors involving disputes relating to oil and gas, shareholders' agreements, joint ventures, construction and infrastructure, insurance, real estate and private equity. He has represented multinational and Indian corporations in ad hoc and institutional arbitrations involving major arbitration institutions such as the LCIA, the ICC, the ICA, the ICADR, the RSA, the ICDR and the SIAC, seated in India, Paris, London and Singapore.

Mr Karia has been part of the committee of the Law Commission of India for recommending amendments to the Arbitration and Conciliation Act 1996 and also of the High-Powered Committee for Institutionalisation of Arbitration in India.

Mr Karia acted as sole arbitrator in an arbitration under ICC Rules having its seat in New Delhi. He has been recognised as a 'leading lawyer in dispute resolution' by *Asialaw Leading Lawyers*, mentioned in *The Legal 500*, ranked in *Chambers & Partners* and listed as a 'future leader' by *Who's Who Legal* 2018.

He is a member of the ICC Commission on Arbitration and ADR, the vice chairman of the Society of Construction Law – India, and the director of the India branch of the Chartered Institute of Arbitrators. He has co-authored a number of publications on arbitration.

Kap-You (Kevin) Kim
Peter & Kim

Kap-You (Kevin) Kim is one of the founding partners at Peter & Kim in Seoul. He was previously a senior partner at Bae, Kim & Lee LLC, where he worked for the past three decades in various roles, including as the co-founder and head of the international arbitration practice and the head of the domestic and international disputes group. Over the past 30 years, Kevin has acted as counsel, presiding arbitrator, co-arbitrator or sole arbitrator in more than 300 international arbitration cases under various arbitration rules. Kevin has extensive experience with virtual hearings, having participated in multiple hearings as both arbitrator and counsel.

Among other positions that he holds, Kevin is presently vice president of the ICC International Court of Arbitration, advisory board member of the International Council for Commercial Arbitration (ICCA) and chairman of the Korean Commercial Arbitration Board's (KCAB) International Arbitration Committee. In the past, Kevin has served as secretary general of ICCA (2010–2014), member of the LCIA Court (2007–2012) and vice chair of the IBA Arbitration Committee (2008–2010).

Alexander G Leventhal
Quinn Emanuel Urquhart & Sullivan LLP

Alexander G Leventhal is of counsel in Quinn Emanuel's Paris office. Mr Leventhal has extensive expertise in international commercial arbitration spanning multiple sectors, including hospitality, telecommunications, entertainment and finance. However, his practice focuses in large part on the energy sector where he has represented clients upstream and downstream in all manner of disputes. He currently serves on the steering committee of the Chartered Institute of Arbitrators' Young Members Group as well as the Continental

Europe Chair for Young ITA, an arbitration think tank with a focus on the energy sector. He also acts as Energy Committee Secretary of the Institute for Conflict Prevention and Resolution (CPR) and sat on a committee that amended CPR's Fast Track Rules.

Mr Leventhal is known for his expertise in investment arbitration. He helped lead a team that obtained an order from an ICSID tribunal that, for the first time, ordered the suspension of extradition proceedings in a third-party state. He is recognised as a young thought leader in the world of investment arbitration and guided a team that prepared a submission to the UNCITRAL Working Group III on behalf of the European Federation for International Law and Arbitration.

Mr Leventhal has received a number of awards and distinctions for his experience in international arbitration (including his ranking as a Future Leader in international arbitration by *Who's Who Legal*), but his experience also extends beyond the world of international arbitration. He has handled numerous multi-jurisdictional disputes and serves on the IBA's Mediation Committee. Mr Leventhal is a founding member of the Rising Arbitrators Initiative, an organisation that provides support for arbitration practitioners receiving their first nominations as arbitrators.

Torsten Lörcher
CMS Hasche Sigle

Torsten Lörcher has been a practising lawyer with CMS Hasche Sigle since 1999. He became a partner in 2007. Before joining the firm, Torsten worked with Professor Böckstiegel at Cologne University and wrote his doctoral thesis on international dispute resolution. He also worked with international law firms in Paris and London.

Torsten's practice is focused on acting as arbitrator and counsel in international and domestic arbitration proceedings under various regimes, including the ICC, DIS, LCIA, CIETAC, CEAC, SCC, UNCITRAL, Vienna, Norwegian, Finnish and Swiss Rules.

His track record as arbitrator comprises more than 70 cases and he has acted as counsel in a large number of arbitrations. His practice is mainly focused on post-M&A, commercial and technology-related disputes, including plant engineering and construction disputes, and disputes from the energy and pharmaceutical sector.

From 2007 until 2014, Torsten was the global head of the CMS international arbitration group, and from 2013 until 2017 he was global head of the CMS dispute resolution group. He has published widely on international arbitration and is regularly named in the legal directories as a leading arbitration practitioner.

Mohamed Mahayni
Solicitor (England & Wales) and Avocat (Paris)

Mohamed Mahayni is a dual-qualified solicitor (England & Wales) and *avocat* (Paris Bar). He spent six years with White & Case LLP in London, Paris and Hong Kong, during which he acted in international arbitrations under various institutional and ad hoc rules, both as counsel and as secretary to tribunals. During that time, he was seconded to two successive counsel positions at the LCIA in London and the DIFC-LCIA Arbitration Centre in Dubai. After a career break, Mr Mahayni returned to private practice in early 2018. His work mainly consists of advising lead counsel on issues arising out of international

arbitration theory and practice. In parallel, he teaches international commercial and investment treaty arbitration on QMUL's LLM in international dispute resolution.

Zaid Mahayni
SEDCO Holding

Dr Zaid Mahayni specialises in commercial law and dispute resolution, with a focus on the Saudi Arabian and Middle Eastern market.

After qualifying as a lawyer in Quebec in 2002, Dr Mahayni spent 10 years in private practice with the Law Firm of Hassan Mahassni, in collaboration with White & Case and other international firms. As a practitioner, Dr Mahayni has been praised by clients for his 'professionalism and concise responses', 'cross-border capability', and 'unparalleled local knowledge and client commitment' (*The Legal 500*, 2011-2015). He has also been recognised as a 'rising star' (*IFLR 1000*, 2015).

Subsequently, Dr Mahayni took up an in-house position within Saudi Economic and Development Holding Co, first as vice head of legal and, since February 2017, as head. His contributions in that role have so far earned him various accolades and awards, including the 'General Counsel of the Year (Large Team)' award in 2018 and inclusion in *The Legal 500* GC Powerlist in the Middle East.

Dr Mahayni also dedicates much of his spare time to writing and teaching. He is a prolific author on Saudi law and practice. He serves as a member of the editorial board of the *Journal of Law in the Middle East*, as well as a member of the advisory board of *Lexis Middle East Law Alert*. Last but not least, he has taught international trade and international investment law at Dar Al-Hekma University in Jeddah.

Juan P Morillo
Quinn Emanuel Urquhart & Sullivan LLP

Juan P Morillo is co-chair of Quinn Emanuel's white-collar and corporate investigations practice in Washington, DC. Mr Morillo's practice focuses on criminal defence, civil litigation, and international arbitration for major financial institutions, Fortune 500 companies, large international companies, international professional services firms and senior executives, as well as matters on behalf of foreign governments. Mr Morillo assists clients with complex, multi-jurisdictional problems, acting as counsel in international commercial and investment treaty arbitrations while also representing these clients in parallel proceedings in other forums. Mr Morillo represents clients before arbitral tribunals and in federal, state and congressional investigations, and advises clients with respect to international extradition matters as well as internal investigations and audits involving alleged bribery, fraud, money laundering and other corporate misconduct.

Mr Morillo further assists clients in developing and implementing crisis management and public relations strategies. He has served as the spokesperson for clients in high-profile matters and has appeared on CNBC, CNN, Fox, NPR and Univision and been quoted in Bloomberg, *Business Week*, *Forbes*, *USA Today*, *The Wall Street Journal* and *The Washington Post*, among other publications.

The National Law Journal has selected Mr Morillo as a 'trailblazer' in recognition of his 'precedent-setting' cross-border experience and victories, and *The American Lawyer* has twice selected him as a finalist for its Transatlantic Legal Awards in recognition of

his US–European practice. Similarly, *Latino Leaders Magazine* named Mr Morillo one of the '25 Most Influential Hispanic Lawyers' in the United States and *Latinvex* named him one of the top five attorneys in the world for white-collar cases involving Latin America. *The Financial Times* awarded Mr Morillo an 'innovative lawyer' award in recognition of his 'landmark' representation of Brazil in the prosecution of senior tax officials for corruption.

Ana Sofia Mosqueda
Galicia Abogados

Ana Sofia Mosqueda is a paralegal in the international arbitration and litigation practice at Galicia Abogados. She is currently studying the eighth semester of law school at Universidad Panamericana in Mexico City Campus. Ms Mosqueda has focused her practice during the past two years on arbitration and commercial litigation, where she has collaborated on several disputes including litigation with national and transnational companies and banks, and in commercial arbitration procedures. Prior to joining Galicia Abogados, Ana Sofia acquired great expertise in immigration affairs.

She was a member of the organising committee of the first Galicia Pre Moot and she also acted as invited arbitrator in the last edition of the II Galicia Pre-Moot.

Stanley U Nweke-Eze
Templars

Stanley U Nweke-Eze is a senior associate in the dispute resolution practice group at Templars. He is admitted to practise law in Nigeria and the state of New York. His practice primarily focuses on complex and high-value commercial and public law litigation, international and domestic commercial and investment treaty arbitrations, commercial mediation, and public international law. He has experience in disputes across a broad range of industries, including energy and natural resources, taxation, media and entertainment, professional services, and general commercial law issues. Before joining Templars, Stanley worked at international law firms in London.

Stanley obtained an LLB degree (first-class honours) from Nnamdi Azikwe University, where he won several academic awards, including for brief-writing and advocacy. He also holds LLM degrees in commercial law and international economic law from the University of Cambridge and Harvard Law School, respectively. At the Nigerian Law School, he won academic prizes in three of the five courses examined during the 2013–2014 academic year.

He has served as an editor of several journals, including the *Cambridge Journal of International and Comparative Law*, the *Harvard International Law Journal*, the *Harvard Negotiation Law Review* and the *Harvard Africa Policy Journal*. He is a member of the Africa Regional Committee of the SIAC Users Council, the Association of Young Arbitrators and the ICC Young Arbitrations Forum, and is currently a group adviser on the Young ICCA Mentorship Programme.

Colin Ong QC
Dr Colin Ong Legal Services (Brunei)

Dr Colin Ong QC is senior partner at Dr Colin Ong Legal Services (Brunei), counsel at Eldan Law LLP (Singapore) and Queen's Counsel at 36 Stone (London). He is regularly instructed as counsel or appointed as arbitrator and has been involved in more than

370 arbitrations conducted under many rules, including AAA, BANI, CIETAC, HKIAC, ICC, LCIA, LMAA, KCAB, KLRCA, OIC, SCMA, SIAC, TAI, UNCITRAL and WIPO. He has experience in many applicable laws, including those of Brunei, Canada, China, England, India, Indonesia, Japan, Korea, Malaysia, Mongolia, New York, the Philippines, Hong Kong, Singapore, Switzerland, Thailand, the United Arab Emirates and Vietnam. Generally he is appointed in complex high-value international disputes, and many of his arbitrations involve values up to some billions of US dollars. Cases range from investor-state disputes to commercial areas encompassing banking and finance infrastructure projects, insurance, mining and minerals disputes, energy disputes, information technology, intellectual property, M&A disputes, shipping, telecommunications, technology transfer, and urban development and wind farms.

In 2010, he became the first non-senior judge from ASEAN to be elected as a Master of the Bench of the Inner Temple. He was the first ASEAN national lawyer to be appointed English Queen's Counsel. He is a chartered arbitrator (CIArb, FCIArb, FMIArb, FSIArb, IDRRMI) and has a PhD, LLM, DiplCArb and LLB (Hons).

Dr Colin Ong is president of the Arbitration Association Brunei Darussalam; chairman of the International Advisory Board of the Thailand Arbitration Center (THAC), the Advisory Board of the Japan Institute for International Arbitration Research and Training, the ICCA-Queen Mary Task Force (Costs), and the Task Force (New York Convention) and 2020 Task Force of the ICC Commission on Arbitration and ADR; a member of the Advisory Council of the Indonesian National Board of Arbitration (BANI) and the Appointing Committee of the Chinese European Commercial Arbitration Centre (Germany); an adviser for the China-ASEAN Legal Research Center; a vice chairman (arbitration) of the Inter-Pacific Bar Association; vice president of the Asia-Pacific Regional Arbitral Group; co-chair of the International Bar Association Asia Pacific Arbitration Group (APAG); a visiting professor in several civil law jurisdictions; and the author of several legal texts in advocacy and arbitration.

He is recognised in all legal directories, including *Who's Who Legal*, as a Thought Leader in arbitration, construction and litigation, and *Expert Guides: Best of the Best (Arbitration)* 2017, 2019 and 2021. In 2006, he was listed in *GAR*'s '45 under 45'. Languages include English (written awards), Bahasa Indonesia/Malay (written awards) and Chinese. *Who's Who Legal: Arbitration 2021* says of Dr Ong: 'His breadth of experience in arbitration is truly impressive.' *The Legal 500: UK Bar* 2021 (London Bar) notes that he is: 'Very hard working, on top of material and the law, and experienced in both common and civil law.'

Tunde Oyewole
Orrick Herrington & Sutcliffe LLP

Tunde Oyewole is of counsel at Orrick Herrington & Sutcliffe LLP, practising as an international arbitration specialist in the firm's Paris office. He represents investors, developers, states and companies in arbitrations under all the major arbitral rules including the ICC, SCC, CRCICA, LCIA and ICSID rules as well as in ad hoc arbitrations under the UNCITRAL rules.

His extensive international experience includes disputes involving countries in the Americas (Brazil, Chile, Peru, Venezuela and Canada), the Middle East and North Africa (UAE, Bahrain, Egypt, Israel, Kuwait, Algeria and Morocco), Asia (China, India and Japan),

and Europe (France, Germany, Italy, Poland, Portugal, Romania, Russia, Spain, Sweden and Ukraine).

Tunde has represented clients in M&A, corporate shareholder, foreign investment and intellectual property disputes in a number of sectors – biotech, engineering and infrastructure, power and energy including renewables, mining, cement, real estate and insurance.

Tunde is a member of the New York and Paris Bars and is fluent in English, French, Portuguese, Spanish and German. He frequently publishes articles and is asked to present on arbitration matters, most recently discussing Early-Stage Investments and the 'Modern' DCF Method in *The Guide to Damages in International Arbitration* (4th edition, Law Business Research 2021).

Philippe Pinsolle
Quinn Emanuel Urquhart & Sullivan LLP

Philippe Pinsolle is head of international arbitration for continental Europe at Quinn Emanuel Urquhart & Sullivan and is based in Geneva. He has acted as counsel in more than 250 international arbitrations, with a particular focus on investor-state arbitrations and commercial disputes involving energy, power, oil and gas, and major infrastructure projects. He has been involved in arbitrations under the aegis of all the major arbitration institutions. He has served as arbitrator (party-appointed or chair) in more than 60 cases, and as an expert witness on several occasions.

Philippe Pinsolle is the senior co-chair of the IBA Arbitration Committee and a former co-editor in chief of *The Paris Journal of International Arbitration/Cahiers de l'Arbitrage*, a leading French publication in the field of arbitration.

Wesley Pydiamah
Eversheds Sutherland

Wesley Pydiamah is the deputy head of the Africa group at Eversheds Sutherland, and a partner in the Paris office. His experience includes dozens of cases in which he has advised and represented governments, state entities and private multinational companies in proceedings before numerous institutional and ad hoc arbitral tribunals (including under ICSID, ICC, SIAC, PCA, LCIA, DIFC and UNCITRAL rules).

Wesley focuses on the regions of Africa and the Middle East. As deputy head of Eversheds Sutherland's Africa group since October 2019, Wesley is responsible for developing the Africa practice of the firm across Africa, and works closely with all local law firms forming part of the Eversheds Sutherland Africa Alliance.

As regards his practice, Wesley is specialised in the energy, telecoms and retail sectors. He has handled numerous arbitrations across Africa and his recent experience includes advising clients in disputes involving countries such as Algeria, Tunisia, Morocco, Libya, Egypt, Mauritania, Senegal, the Republic of the Congo, the Democratic Republic of the Congo, Ivory Coast, Sudan, Nigeria, South Africa and Mauritius. Wesley also has a non-contentious commercial practice where he advises numerous energy clients, in particular on the engineering, procurement and financing of power plants. He also advises on compliance and sanctions matters generally.

Wesley is regularly cited in legal publications. He is listed in *Who's Who Legal: Arbitration 2021* as a Future Leader in international arbitration and was listed in Euromoney's *Expert*

Guides in 2019 and 2020 as one of the 10 rising stars in international arbitration for France. In 2020, *The Legal 500* wrote that 'Wesley Pydiamah is a strong advocate and strategist, who shows excellent grasp of the details of a case', and in 2019, noted that he is 'always helpful and business savvy'.

Wesley lectures on OHADA arbitration and disputes in Africa at the Paris 2 Panthéon-Assas University and lectures at the London School of Economics on arbitration in Africa. He is a member of several arbitral organisations, is a founding member of AfricArb, a not-for-profit organisation aimed at promoting arbitration in Africa, and serves on the advisory board of the MARC Court, the leading arbitral institution in Mauritius dedicated to resolving Africa-related disputes. He regularly publishes articles on arbitration in Africa and is involved in conferences aimed at doing business in Africa.

Klaus Reichert SC
Brick Court Chambers

Klaus Reichert SC is a barrister in practice from Brick Court Chambers in London. He has acted as advocate or arbitrator in more than 300 international arbitrations across a wide range of subject matters, applicable laws, institutional rules and venues. He was called to the Irish Bar in 1992 and was admitted to the Inner Bar (Silk) in Dublin in 2010. In 2017, the College of Commercial Arbitrators admitted him as one of the few Fellows resident outside the United States. In 2020 he was elected, for life, as an advisory board member of the International Counsel for Commercial Arbitration.

David Roney
Sidley Austin LLP

David Roney is a partner and global co-head of Sidley Austin LLP's international arbitration group, based in Geneva, Switzerland. With more than 25 years of experience, he has acted as counsel in international commercial and investment treaty arbitrations involving a broad range of industry sectors, business transactions, governing laws and places of arbitration. In addition, David has served as presiding arbitrator, sole arbitrator and co-arbitrator in numerous international arbitrations under the major institutional and ad hoc arbitration rules.

David features prominently in the international arbitration rankings of the leading legal directories, with clients reporting that he 'provides that edge you are looking for at the top of the arbitration market; he is brilliant regarding commercially sensitive proceedings'. David is 'lauded by clients for his "detailed preparation" of cases and "hands-on" approach' and 'his skill in cross-examination is also singled out for praise'.

David is co-founder and president of the board of trustees of the Foundation for International Arbitration Advocacy. In that capacity, he has provided training in the examination and cross-examination of fact and expert witnesses to hundreds of international arbitration practitioners around the world. He is also a member of the Arbitration Court of the Swiss Arbitration Centre, a member of the Users Council of the Singapore International Arbitration Centre, co-chair of the ICC Commission on Arbitration Task Force on the New York Convention, and an adjunct faculty member at the MIDS – Geneva LLM in international dispute settlement offered by the Graduate Institute of International and Development Studies. He speaks and publishes regularly on international arbitration topics.

Anne Véronique Schlaepfer
White & Case SA

Anne Véronique Schlaepfer has acted as counsel in more than 100 arbitration proceedings involving, among others, construction contracts, pharmaceuticals, energy (upstream and downstream), joint venture agreements, sales contracts, collateral management agreements and know-how licence agreements.

She also regularly serves as arbitrator and represents parties before Swiss courts in arbitration-related court proceedings, in particular in challenges to arbitral awards.

Anne Véronique is senior co-chair of the arbitration committee of the IBA, a member of the ICC executive board, a vice president of the ICC Court and a member of the LCIA Court. She has been at the forefront of the development of international arbitration in Switzerland, including as chairperson of the arbitration court administering Swiss Rules arbitrations (2010–2013), a member of the arbitration committee of the Geneva Chamber of Commerce (until 2014) and a member of the working group for the revision of the Swiss Rules (2010–2011).

Franz T Schwarz
Wilmer Cutler Pickering Hale and Dorr LLP

Franz T Schwarz is a partner of Wilmer Cutler Pickering Hale and Dorr LLP in London and vice chair of the firm's international arbitration group. He has been involved in more than 200 arbitrations as arbitrator or counsel, and has extensive experience with arbitral practice, procedure and advocacy both in civil and common law systems. Mr Schwarz has represented clients in proceedings and before all major arbitral institutions and numerous seats, and frequently advises parties on the protection of foreign investments under bilateral investment treaties and similar instruments.

Mr Schwarz lectures international arbitration at the Universities of Vienna, Zurich and Saarbrücken, and frequently speaks and publishes on topical issues of international arbitration. Mr Schwarz was awarded the inaugural Swiss Arbitration Association's (ASA) Prize for Advocacy in International Arbitration in 2010.

Gabriel F Soledad
Quinn Emanuel Urquhart & Sullivan LLP

Gabriel F Soledad is a partner in Quinn Emanuel's Washington, DC, office. Prior to joining the firm in 2013, Mr Soledad worked in the White House during the Obama administration as a senior official in the Office of the United States Trade Representative and the International Trade Administration, the US agencies primarily responsible for developing and managing the United States' international trade agenda and economic relationships with foreign trading partners.

His practice focuses on cross-border white-collar matters, internal investigations, complex commercial disputes and international arbitrations. His experience as a litigator, his language skills and his unique background in Latin America, Europe and the United States give Mr Soledad the ability to represent clients in matters involving multiple jurisdictions and legal systems.

In the criminal context, Mr Soledad primarily represents foreign individuals and corporations in federal and state investigations involving financial, securities and tax fraud,

bribery, and OFAC violations. Mr Soledad also advises clients in connection with international extradition matters, human rights cases and petitions to Interpol. In the civil context, Mr Soledad represents clients (both plaintiffs and defendants) in cross-border commercial disputes, primarily involving RICO, fraud, money laundering, sanctions and securities violations. He also represents clients in investment treaty and commercial arbitrations under a number of arbitral rules. Mr Soledad's unique government experience enables him to leverage diplomatic channels, as well as differences in foreign legal systems to resolve cross-border investigations and disputes. Mr Soledad further assists clients in developing and implementing crisis management and public relations strategies, as well as in designing corporate compliance and testing programmes.

Thomas K Sprange QC
King & Spalding

Thomas K Sprange QC focuses his practice on advocacy and strategic advice with respect to significant, high-value and complex commercial disputes, many with a multi-jurisdictional element or involving issues of private and public international law. He is the managing partner of the firm's London office and is a member of the international litigation and arbitration group.

As an advocate, Mr Sprange regularly appears in the Chancery and Queen's Bench divisions of the High Court of England and Wales in respect of a comprehensive range of disputes. He has acted as lead counsel in more than 100 international arbitrations in the leading arbitration institutions, including ICC, LCIA, AAA, SCC and ICSID, and a number of ad hoc arbitrations. He also regularly sits as an arbitrator, both as a part of three-member tribunals and as a sole arbitrator.

He has experience is a broad range of sectors, including energy, mining, projects, telecommunications, technology, financial services, pharmaceuticals, fashion and sport.

He has acted in a number of headline disputes, including for the claimants in respect of one of the largest-ever commercial arbitration awards, state-to-state claims involving founding issues of public international law, securing a settlement of $1 billion in one of the largest ICSID claims pursued by an investor, several cases involving freezing orders, enforcement remedies and state immunity, and claims involving the imposition of international sanctions on commercial contracts.

Luke Steadman
Alvarez & Marsal

Luke Steadman is a partner in Alvarez & Marsal's disputes and investigations practice, specialising in expert accounting evidence for international arbitration and domestic litigation. He has over 25 years' experience as a forensic accounting expert across Europe, Asia and the United States. He has acted as both party-appointed and tribunal-appointed expert on over 80 matters in the past five years and has provided both solo and concurrent oral evidence in hearings under ICC, LCIA, Hong Kong, Dubai and other arbitration rules. His written and oral evidence has included considerations of quantum and damage; valuation of assets and businesses; the accounting treatment of complex transactions under international, US and UK accounting standards and principles; and the application of International Standards on Auditing. As an expert in accounting and valuation, Mr Steadman also provides expert

evidence in domestic courts and has appeared in the High Court on many occasions. He continues to receive instruction in High Court matters and has also appeared as an expert on accounting concepts and principles in the First-tier Tax Tribunal. Luke is a fellow of the Institute of Chartered Accountants in England and Wales.

Manuel Tomas

Manuel Tomas is a former counsel in the litigation and dispute management department at Eversheds Sutherland, specialising in litigation and international commercial arbitration.

He assists and represents French and international clients in civil, commercial and international matters before the French courts and in the Organisation for the Harmonisation of Corporate Law in Africa (OHADA) zone, with an emphasis on commercial and corporate litigation, product liability and industrial risk.

His experience also includes cases in which he advises and represents governments, state entities and private multinational companies in proceedings before institutional and ad hoc arbitral tribunals (including under ICC and CCJA).

His most recent experiences include assisting a global energy trading company before the Paris Court of Appeal on a dispute in relation to the implementation of a supply contract of petroleum products in Mauritania; assisting one of the top engineering design firms in multiple disputes relating to alleged defective works and corporate issues; assisting a South Korean conglomerate company in multiple expertise proceedings; assisting an English bank before the Paris Enforcement Judge and the Paris Court of Appeal in successfully resisting the enforcement of a Panamanian arbitral award; assisting a top international logistics company in an arbitration under the auspices of the CCJA; and assisting a trade association of the world's airlines against a Cameroonian party in an arbitration under the auspices of the ICC.

He regularly contributes to legal reviews with articles on both litigation and arbitration.

John M Townsend

Hughes Hubbard & Reed LLP

John M Townsend is a partner in the Washington, DC, office of Hughes Hubbard & Reed LLP and chairs the firm's arbitration and ADR group. Mr Townsend was appointed by President George W Bush to the panel of arbitrators of the International Centre for Settlement of Investment Disputes. He served successively as chair of the Law Committee, chair of the Executive Committee and chair of the Board of Directors of the American Arbitration Association. He served as a vice president of the Court of Arbitration of the LCIA, and is a member of the Arbitration Committee and the Challenge Review Board of CPR and a Fellow of the College of Commercial Arbitrators. He served as an adviser to the American Law Institute's project to draft the Restatement of The US Law of International Commercial Arbitration. Mr Townsend has a degree in history from Yale University and a law degree from Yale Law School.

Elizabeth Wilson

Quinn Emanuel Urquhart & Sullivan LLP

Elizabeth Wilson is a partner in Quinn Emanuel's construction and engineering team. She specialises in advising on both litigation and arbitration disputes arising out of complex

construction projects all over the world. She has spent more than 12 years acting for owners, contractors and designers in projects spanning the oil and gas, power, infrastructure, mining, IT and defence sectors. She has worked on disputes arising out of the United Kingdom, Asia, Europe, Australia, South America, the Caribbean and the Middle East.

Alvin Yeo SC
WongPartnership LLP

Alvin Yeo, senior counsel, is Singapore's foremost arbitration counsel in the field of investor-state disputes and international commercial arbitration; he has acted for and advised international clients in complex, cross-border disputes and multi-jurisdictional enforcement proceedings. His main areas of practice are litigation and arbitration in banking, corporate and commercial and infrastructure disputes.

Chambers Global describes Alvin as 'the most impressive, as an advocate, out of all the Singapore firms' and 'simply outstanding as an international counsel'. *Chambers Asia-Pacific* lauds Alvin for providing 'leadership on SIAC and ICC proceedings' and is 'an excellent strategist as well as a first-rate litigator' who is 'deeply impressive and [an] extremely capable individual'. *The Legal 500* affirms that his 'wisdom and powers of persuasion are phenomenal' and that he is 'one of the best in a court room'. *Who's Who Legal: Arbitration* recognises Alvin as 'a leading light in the market who possesses strong arbitration credentials and experience'.

Alvin is a member of the Court of the Singapore International Arbitration Centre, the International Chamber of Commerce Commission and a fellow of the Asian Institute of Alternative Dispute Resolution, the Singapore Institute of Arbitrators and the Singapore Institute of Directors, and a former member of the London Court of International Arbitration and the International Bar Association Arbitration Committee. He is also on the panel of arbitrators in the Hong Kong International Arbitration Centre, the International Centre for Dispute Resolution, the Korean Commercial Arbitration Board, the South China International Economic Trade Arbitration Commission, and the Singapore Institute of Arbitrators' Panel for Sports in Singapore.

Appendix 2

The Contributing Arbitrators

Stanimir A Alexandrov
Stanimir A Alexandrov PLLC

Stanimir A Alexandrov has more than 20 years of experience working as an arbitrator and counsel in treaty-based investor-state disputes and international commercial arbitrations, and has been appointed to the panels of arbitrators of various arbitral institutions. Until August 2017, he was global co-leader of the international arbitration practice at Sidley Austin LLP. Since then, he has established his own practice as an arbitrator. Mr Alexandrov is consistently listed as a leader in the field of international arbitration in publications including *The Best Lawyers in America*, *Chambers*, *The Legal 500: United States*, *The Legal 500: Latin America* and *Who's Who Legal*, and has been recognised as 'Lawyer of the Year International Arbitration – Governmental' and 'Lawyer of the Year International Arbitration – Commercial'. He is also a professor at The George Washington University Law School. Prior to joining Sidley Austin LLP, he practised at Powell Goldstein Frazer & Murphy from 1995 to 2002.

Mr Alexandrov has published several books and numerous articles on matters of public international law and international arbitration. He obtained his degree in public international law from the Moscow Institute of International Relations, and master's and doctoral degrees in international law from The George Washington University Law School. Prior to engaging in private practice, Mr Alexandrov was vice minister of foreign affairs of Bulgaria. He is fluent in several languages.

Essam Al Tamimi
Al Tamimi & Company

In 1989, Essam Al Tamimi established what is now the largest law firm in the Middle East, Al Tamimi & Company, and is senior partner at the firm. Essam has more than 34 years of experience in litigation and arbitration in the UAE and the GCC countries, covering almost all fields of both private and public law across several industries and sectors, including corporate and commercial, banking and financial, real estate and property.

He has assisted federal and local governments in drafting laws and regulations relating to a range of sectors, including the Telecommunications Regulatory Authority, Dubai Internet and Media City free zones, Dubai International Financial Centre (DIFC) and the Abu Dhabi government's privatisation of water and electricity. He is actively involved in the development of arbitration laws and in the training and development of arbitration in the UAE and the wider region.

In addition to his role as counsel in numerous arbitration matters, Essam has acted as an expert witness in a wide array of litigious matters. He has also been appointed as an arbitrator and chair of arbitral tribunals in proceedings under the ADCCAC, CRCICA, DIAC, LCIA, ICC and PCA Rules.

He is on the ICC Court, serving as vice chair of the ICC Commission on Arbitration and ADR, Paris, a member of the Steering Committee of the ICC UAE Commission on Arbitration and ADR, and is a member and past chairman of the Chartered Institute of Arbitrators (CIArb). He is the founder and patron of the UAE branch of the CIArb, and is chairman of the Board of Trustees of the DIFC Arbitration Institute.

Essam has published a number of articles and books on litigation and arbitration in the UAE and setting up business in the region. He has received the Gulf Legal Lifetime Achievement Award for outstanding contribution to the Gulf Legal Market, and a Lifetime Achievement Award from International Financial Law Review. He is on the editorial advisory board of the ICLR and Global Arbitration Review, former co-chair of the IBA Rule of Law Forum, and is a fellow and faculty member of the International Dispute Resolution Academy.

Henri Alvarez QC
Vancouver Arbitration Chambers

Henri Alvarez QC is an internationally recognised Canadian arbitrator who practises as an independent neutral at Vancouver Arbitration Chambers. Before establishing an independent arbitration practice (effective 1 December 2016), Henri was a partner at Fasken Martineau DuMoulin LLP.

With more than 30 years of experience, Henri has acted as both an arbitrator and as counsel in international and domestic commercial arbitrations involving investments, trade, franchising, licensing, distributorship, construction, forestry, oil and gas, energy, banking, corporate and general commercial disputes. He has served as sole arbitrator, party-appointed arbitrator and chairman under the auspices of several international arbitral institutions (ICC, LCIA, ICSID, AAA, HKIAC) and regularly conducts arbitrations in English, Spanish and French. As a member of the Court of Arbitration for Sport, Henri has served on several panels in anti-doping and eligibility cases. He has also acted as counsel in Canadian courts in disputes over challenges and enforcement of arbitral awards.

Henri is a former member of the SIAC Users Council, a council member of the HKIAC, a former Chapter 19 panellist under NAFTA, a former alternate member (Canada) of the ICC International Court of Arbitration, a former member of the LCIA Court and a former co-chair of the IBA's Arbitration and Dispute Resolution Committee. He served as an adjunct professor at the Faculty of Law, University of British Columbia, from 1985 to 2011.

Henri was appointed Queen's Counsel in 2008 and was called to the British Columbia Bar in 1981.

David Bateson
39 Essex Chambers

David Bateson is a leading international arbitrator who has been involved in more than 150 arbitrations as arbitrator in Asia, Europe, the Middle East and South America. He has acted as chairman, party-appointed arbitrator or sole arbitrator in arbitrations under the rules of the AAA, CIETAC, HKIAC, DIAC, ICC, KLRCA, LCIA, PCA, SIAC and VIAC, or in ad hoc arbitrations.

He has extensive experience in disputes in a variety of industry sectors, including construction, resources, commodities, insurance, joint ventures, shareholder agreements, shipping and telecommunications.

Chambers Asia 2016 described him as 'pre-eminent and widely experienced', 'one of the top arbitrators in the region' who is 'excellent at pretty much everything he is doing' and 'an accomplished arbitrator, who is getting more and more cases in Asia, and worldwide'. *Chambers Asia* 2017 described him as 'a very good arbitrator', 'writing a very good award', 'well able to control an arbitration' and 'culturally sensitive'. *Chambers* 2018 described him as 'an excellent arbitrator in big infrastructure cases'.

Before joining 39 Essex Chambers in Singapore in 2015, David was a partner at Mallesons Stephen Jaques and King & Wood Mallesons, based in Hong Kong. He has more than 37 years of legal experience and is a specialist in all forms of dispute resolution, including arbitration, litigation and alternative dispute resolution. He has been resident in Asia since 1980, before which he lived in Africa, Fiji and New Zealand. He is now based in Singapore.

George A Bermann
Columbia University School of Law

George A Bermann is currently a professor at the Columbia University School of Law, the Jean Monnet Professor of European Union Law and the Walter Gellhorn Professor of Law. He is also a director at the Columbia Law School Center for International Commercial and Investment Arbitration, a professor at the Ecole de droit, Institut des Sciences Politiques in Paris, and a professor on the Geneva LLM course in International Dispute Settlement (MIDS).

He is an arbitrator in international commercial and investment arbitration, having participated in more than 75 cases from 1980 to date, both as president of the tribunal and party-appointed arbitrator; he has also acted as sole arbitrator before all major international arbitral institutions and ad hoc. He has been a foreign law and international arbitration law expert witness in international commercial arbitrations.

Mr Bermann's other major professional activities include being chief reporter in the ALI Restatement of the US Law of International Commercial Arbitration, and an expert on international arbitration and foreign law in US courts, international arbitration and courts abroad.

He is a founding member of the governing board of the International Court of Arbitration of the ICC, a member of the standing committee of the International Court of Arbitration of the ICC, chair of the global board of advisers of the New York International Arbitration Center, director of the American Arbitration Association, a board member of

the Center for Conflict Prevention and Resolution and a Fellow of the Chartered Institute of Arbitrators, London. He was president of the Académie Internationale de Droit Comparé, Paris, between 2006 and 2014 and president of the American Society of Comparative Law between 1998 and 2002.

Publications Mr Bermann has contributed to include 'What does it mean to be "pro-arbitration?"', *Arbitration International*, Volume 34, Issue 3 (2018), 'The Role of National Courts at the Threshold of Arbitration', *The American Review of International Arbitration*, Volume 28, No. 3 (2017) and 'Understanding ICSID Article 54', ICSID Review, Volume 35, Nos. 1-2 (2021).

Juliet Blanch
Arbitration Chambers

Juliet Blanch is a full-time arbitrator, having chaired the international dispute resolution practice at Weil, Gotshal & Manges from 2010 to 2016, and before that the international dispute resolution practice at McDermott, Will & Emery and the international arbitration practice at Norton Rose. Juliet has more than 30 years' experience in the arbitration of international commercial disputes, with a particular focus on energy and infrastructure, mining, commodities, telecommunications, pharmaceutical, hospitality, maritime and shareholder disputes. Juliet has acted as lead counsel or sat as arbitrator in arbitrations held under HKIAC, ICC, ICSID, LCIA, LMAA, SCC, SIAC, UNCITRAL and other rules, which have been seated in several jurisdictions, including London, Hong Kong, Paris, Singapore, Stockholm, Washington DC, and Zurich.

Juliet is a director of the LCIA and chair of the International Arbitral Appointments Committee, and also chairs the review committee of the Energy Arbitrators List. She is vice chair of the Oil and Gas Arbitration Club, sits on the editorial board of *Dispute Resolution International*, is a member of the FDI Moot Advisory Board and is a past chair of the dispute resolution and arbitration committee of the Inter-Pacific Bar Association.

Juliet is consistently ranked highly in legal directories for international arbitration, litigation, and projects and energy in the United Kingdom, Europe and globally, and is recognised as 'a well-known figure in the market and is respected for her depth of knowledge in both litigation and arbitration', as well as for 'her enthusiasm, dedication and magnificent reputation', 'a rare blend of practicality and technical excellence' and as 'a joy to work with, a good leader of people with fantastic judgement and a very sharp intellect'. Juliet was featured in *The Lawyer*'s 'The Hot 100 2015: Litigation' and was included in the 2014 *London Super Lawyers* list as one of the Top 50 Women Lawyers and for her commercial litigation expertise. She was awarded the standout entry by the *FT* in the category of most innovative dispute resolution lawyer for her representation of PGNiG on settling a $12 billion landmark natural gas pricing dispute with Gazprom, and was named by *Chambers Global* as a 'leading' lawyer for 'Dispute Resolution: Litigation and International Arbitration in London' and 'Energy & Natural Resources: Disputes UK-wide'.

†Stephen Bond

Stephen Bond focused on international commercial arbitration for 30 years. A former secretary general of the ICC International Court of Arbitration and US Member of the ICC Court, Stephen participated in the production of the 1998 and 2012 versions of the ICC Arbitration Rules. He served as an advocate or arbitrator (sole, party and chairman) in over 100 international arbitrations under the rules of the ICC, the LCIA, the Stockholm Arbitration Institute, the Japanese Commercial Arbitration Association, the Vienna Centre and UNCITRAL, as well as acting as counsel in mediations. Stephen's experience included disputes in the energy, international joint venture, construction, defence, technology, sales and distribution fields. He was a frequent speaker and writer on international dispute subjects.

Stavros Brekoulakis

3 Verulam Buildings

Stavros Brekoulakis is a professor and the director of the School of International Arbitration at Queen Mary University of London, and an arbitrator at 3 Verulam Buildings (Gray's Inn).

He has been involved in international arbitration for more than 20 years as counsel, academic and expert, and currently serves as arbitrator.

Stavros is widely recognised as a leading authority in the field of international arbitration. He is regularly listed in *Who's Who Legal: Arbitration* and *Who's Who Legal: Construction*, being praised as 'a powerhouse in international arbitration' with 'a seemingly encyclopaedic recall of jurisprudence'; 'a reigning thought leader in the arbitration space' who has 'established a reputation as the go-to in arbitration' and 'one of the great minds in the international arbitration world'; an 'extremely intelligent, hard-working and highly respected arbitrator' who 'stands out as a first-rate arbitrator regularly engaged in matters arising out of major infrastructure projects around the world'. He has been included for several consecutive years in *Who's Who Legal: Arbitration –Thought Leaders* and been previously listed as one of the ten most highly regarded future leaders. He has been shortlisted twice in the past for the *Global Arbitration Review* Best Prepared and Most Responsive Arbitrator Award and received the 2020 GAR Award for Best Public Speech.

Stavros has been appointed in more than 60 arbitrations (investment and commercial) as chairman, sole arbitrator, co-arbitrator and emergency arbitrator under the rules of the International Chamber of Commerce, London Court of International Arbitration, Stockholm Chamber of Commerce, UNCITRAL Arbitration Rules, Abu Dhabi Commercial Conciliation Arbitration Centre, Danish Institute of Arbitration and Court of Arbitration for Sports. His professional expertise focuses on arbitrations in major construction and complex infrastructure projects, investment disputes, energy and natural resources projects, M&A disputes, financial transactions, indemnity and distribution shareholders' agreements, sale of goods contracts, IP contracts and sports disputes.

Charles N Brower

Twenty Essex Chambers

Charles N Brower remains a judge of the Iran–United States Claims Tribunal in The Hague, on which he has served since 1983. As of 2014, he is one of only four Americans ever to

have been appointed as judges ad hoc of the International Court of Justice (having been appointed the most times (three)). He is an arbitrator member of Twenty Essex Chambers in London. Previously he has served as acting legal adviser of the United States Department of State, as deputy special counsellor to the President of the United States (sub-cabinet rank as deputy assistant to the President), and as judge ad hoc of the Inter-American Court of Human Rights. In between these times in public service, he has been an associate, partner and later special counsel at White & Case LLP in New York City and Washington, DC. He also has served as president of the American Society of International Law, chairman of the Institute for Transnational Arbitration, on the executive council of the International Law Association, as a member of the board of governors of the American Bar Association and as a distinguished visiting research professor of law at the George Washington University School of Law.

The many awards Judge Brower has received for his distinguished service and achievements in international law and international dispute resolution are lifetime achievement awards from the Center for American and International Law, Global Arbitration Review and the Section of International Law of the American Bar Association, as well as the Stefan A Riesenfeld Memorial Award of the University of California at Berkeley Law School, the Pat Murphy Award of the Institute for Transnational Arbitration and the Manley O Hudson Medal of the American Society of International Law.

Eleonora Coelho
Eleonora Coelho Advogados

Eleonora Coelho has a law degree from the University of São Paulo Law School (USP) and has a master's degree in litigation, arbitration and alternative methods of dispute resolution (ADR) from University of Paris II – Panthéon Assas. She acts in national and international arbitrations as an arbitrator and as counsel.

Eleonora is currently president of the Centre for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CAM-CCBC) and founding partner of Eleonora Coelho Advogados.

She was a professor on the LLM course in transnational arbitration and dispute settlement at Sciences Po École de Droit (2020/2021) and a guest lecturer at the Paris Arbitration Academy (2019).

She acts as counsel and arbitrator in national and international arbitrations. She has authored several publications on arbitration and ADR and frequently speaks at national and international events about arbitration.

Eleonora is listed as an arbitrator in many arbitral institutions in Brazil. Furthermore, Eleonora was a member of the commission of jurists designated by the Federal Senate to update Brazilian Arbitration Law, is former vice-president of the Brazilian Arbitration Committee (CBAR) and former treasurer of the Brazilian Institute of Construction Law (IBDIC).

Eleonora is fluent in Portuguese, English and French, and has conversational Italian and Spanish.

Nayla Comair-Obeid
Obeid Law Firm

Professor Dr Nayla Comair-Obeid, founding partner of Obeid Law Firm, heads the firm's dispute resolution practice. She is professor of international commercial arbitration at the Lebanese University.

Professor Comair-Obeid has extensive trial experience in the Middle East, where she has represented major domestic and foreign clients, including states and government entities. In addition, she regularly serves as counsel and arbitrator in ad hoc and institutional arbitrations under a variety of international arbitration rules.

Professor Comair-Obeid has authored numerous publications in Arabic, French and English covering a range of legal fields, including international contract law, international arbitration and Islamic finance. She has held, and continues to hold, pre-eminent positions in many of the major international legal institutions. In 2019, she was elected as a member of the executive board of the International Chamber of Commerce. She also has been a companion of the Chartered Institute of Arbitrators since 2018.

William Laurence Craig
Independent arbitrator

William Laurence Craig is a member of the New York and Paris Bars. After a career in Paris devoted to acting as counsel in international commercial and investment arbitration matters, he now acts exclusively as arbitrator, most recently under the rules of the ICC, LCIA, SIAC and ICSID.

Yves Derains
Derains & Gharavi

Yves Derains is a founding partner of the law firm Derains & Gharavi. As a well-known international arbitrator, he has been involved as presiding arbitrator, co-arbitrator in more than 250 international arbitration proceedings, including commercial and investor-state arbitrations. Yves Derains is a former secretary general of the ICC International Court of Arbitration and a former chairman of the ICC Institute of World Business Law (2011–2020). He was chairman of the Working Party on the Revision of the ICC Rules of Arbitration in 1998 and is co-chairman of the ICC Task Force on the Reduction of Costs and Time in international arbitration. He is honorary professor of the law faculties of St Ignatius of Loyola University, the University of the Pacific and the University of Lima, Peru. Yves Derains is also the author of many publications on international arbitration and international business law.

Donald Francis Donovan
Debevoise & Plimpton LLP

Donald Francis Donovan is co-head of the international disputes and public international law groups at Debevoise & Plimpton LLP and serves as counsel in international disputes before courts in the United States, international arbitration tribunals and international courts, and as arbitrator in both commercial and investor-state cases. He is listed in the

top rank in *Chambers Global* in public international law, international arbitration (global) and international arbitration (Latin America). He has been described in that and other publications as 'a dominant figure in the international arbitration scene', 'one of the world's leading practitioners in both investment treaty and commercial arbitration', 'one of the best advocates that you will ever see', a 'visionary', an 'arbitration superstar', a 'tremendous intellect', a 'truly amazing lawyer', a 'towering figure', a 'brilliant' and 'superb' oral advocate who conducts 'flawless and precise' witness examinations, and as 'combative', 'extraordinarily talented' and 'absolutely excellent, truly top of the line'.

Mr Donovan is a former president of the International Council for Commercial Arbitration, a former president of the American Society of International Law and former chair of the Institute for Transnational Arbitration. Among other positions, he serves as a member of the US Department of State's Advisory Committee on International Law; a member of the advisory committees of the American Law Institute for the Restatement of US Foreign Relations Law and for the Restatement of the US Law of International Commercial Arbitration; and a member of the board of Human Rights First and chair of its litigation committee. He teaches international arbitration and international investment law and arbitration at the New York University School of Law.

Jalal El Ahdab
Bird & Bird

Dr Jalal El Ahdab (Jil Ahdab) is a partner in Bird & Bird's dispute resolution group in Paris, head of the arbitration department in France and member of the dispute resolution practice in the UAE, where he offers clients long-standing cross-border expertise in managing international disputes and arbitrations.

His practice covers international business law, notably in Europe, Africa and the MENA region, focusing on international disputes and foreign investments. Having acted as counsel, arbitrator and expert in approximately 100 cases, he has in-depth experience in managing complex disputes involving shareholders' rights, suits against states, class actions, breach of negotiations and bank guarantees. His sector experience includes work for high-profile clients in commodities trade, telecoms, ports, airports, construction, life sciences, sports and more.

In addition to being a regular speaker at international arbitration conferences, he is also the author of numerous articles in professional legal journals and the co-author of *Arbitration with the Arab Countries* (published by Kluwer in 2011), and managing editor of the International Journal of Arab Arbitration (available on kluweronline.com). He is the co-author of a book on arbitration law in France, written jointly with Professor Daniel Mainguy and published by LexisNexis.

Today, he is a former UNCITRAL representative and a member of the International Court of Arbitration of the ICC. He also chairs the European Branch of the Chartered Institute of Arbitrators and is the senior vice-chair of the IBA Arab Regional Forum. He lectures in arbitration law at Versailles University and Sciences Po Paris (IEP).

He is qualified to practise in Beirut, Paris and New York, and is equally fluent in Arabic, English and French.

Yves Fortier QC
Twenty Essex Chambers and Cabinet Yves Fortier

The Honourable L Yves Fortier, PC, CC, OQ, QC is a former chair and senior partner of Norton Rose Fulbright (formerly Ogilvy Renault) in Montreal. He is a graduate of the University of Montreal and McGill University and was a Rhodes scholar at the University of Oxford. He has been president of the Canadian Bar Association, Canada's ambassador and permanent representative to the United Nations in New York and president of the London Court of International Arbitration. He has been counsel for the government of Canada (including in the Quebec Reference to the Supreme Court of Canada in 1998) and has argued cases before all courts and tribunals in Canada and the International Court of Justice in The Hague. During the last 25 years, he has acted as arbitrator and mediator in numerous international arbitrations under the auspices of all the major arbitral institutions. He is ranked as one of the world's leading international arbitration practitioners. He served as chairman of the sanctions board of the World Bank from 2012 to 2015. In 2013, he was appointed member of the Security Intelligence Review Committee of Canada and sworn in as a member of the Privy Council. In July 2016, Mr Fortier was appointed as chairman of the enforcement committee of the European Bank for Reconstruction and Development (EBRD).

Andrew Foyle
One Essex Court

Andrew Foyle was called to the English Bar and joined One Essex Court in 2006. Previously he was a partner at Lovells (now Hogan Lovells) for 24 years. While at Lovells he was head of the firm's international arbitration practice (from 1998 to 2006) and senior partner of the Hong Kong office (from 1994 to 1998). He was one of the UK members of the ICC Court of Arbitration from 2006 to 2012.

In more than 40 years of legal practice as an arbitration and litigation lawyer, he has dealt with a wide range of commercial disputes.

Since joining One Essex Court, he has been appointed in nearly 100 LCIA, ICC and UNCITRAL arbitrations, including 35 as chairman and 16 as sole arbitrator. The seats have included London, Geneva, Paris, The Hague, Dubai, Doha, Muscat and Singapore.

His experience and reputation in international arbitration have been recognised by a number of the leading legal directories, including *Legal Experts*, *The Legal 500*, *Chambers UK*, *Chambers Global* and *Global Arbitration Review*.

Pierre-Yves Gunter
Bär & Karrer

Pierre-Yves Gunter is a partner and co-head of the international arbitration group at Bär & Karrer. He has been acting in the field of international commercial arbitration since 1991.

Until 31 December 2018, he acted as counsel and arbitrator (chairman, sole arbitrator and party-appointed arbitrator) in Switzerland and abroad in a total of 215 arbitration proceedings, both ad hoc (including UNCITRAL) and administered (ICC, Swiss Rules, LCIA, ICDR, WIPO, FOSFA, Vienna International Arbitral Centre, Stockholm Chamber of Commerce, etc.).

He is regularly appointed arbitrator by the leading arbitration institutions.

He is experienced in several fields, in particular disputes relating to the automotive industry, agency, sales, distribution, joint ventures, construction and complex projects, oil and gas, telecommunications and IT, intellectual property, pharmaceutical, real estate, hotel management, commodity and international trade, corporate and post-M&A.

Before joining Bär & Karrer, Mr Gunter worked for 19 years as partner and co-head of arbitration at a law firm in Geneva.

He graduated in 1987 from the Law School of Neuchâtel University (*summa cum laude*) and holds a LLM (1991) from Harvard Law School. He has written various articles on international arbitration and frequently appears as a speaker at conferences on arbitration. He is fluent in English and French and has a good command of German.

Jackie van Haersolte-van Hof
London Court of International Arbitration

Jackie van Haersolte-van Hof became director general of the LCIA on 1 July 2014. Previously, she practised as a counsel and arbitrator in The Hague, at her GAR 100 boutique HaersolteHof. She set up HaersolteHof in 2008 after three years as of counsel in the international arbitration group at Freshfields Bruckhaus Deringer in Amsterdam. She was with Amsterdam firm De Brauw Blackstone Westbroek from 2000 to 2004, and before that Loeff Claeys Verbeke in Rotterdam, which she joined after qualifying in 1992. She has sat as arbitrator in cases under the ICC, LCIA and UNCITRAL rules, and those of the Netherlands Arbitration Institute. She has also arbitrated cases at the Royal Dutch Grain and Feed Trade Association and the Institute of Transport and Maritime Arbitration, both based in the Netherlands. She is on the ICSID roster of arbitrators and has sat on an ad hoc annulment committee. She was also involved in setting up the arbitral process for the Claims Resolution Tribunal in Zurich, which analysed claims from Holocaust survivors regarding dormant accounts in Swiss banks.

She is a member of Global Arbitration Review's editorial board. Her 1992 PhD thesis on the application of the UNCITRAL rules by Iran–US Claims Tribunal was one of the first books to be published on the subject.

Bernard Hanotiau
Hanotiau & van den Berg

Bernard Hanotiau is a member of the Brussels and Paris Bars. In 2001, he established a boutique law firm concentrating on international arbitration. The firm has offices in Brussels and Singapore. Since 1978, Bernard Hanotiau has been actively involved in more than 500 international arbitration cases as party-appointed arbitrator, chairman, sole arbitrator, counsel and expert in all parts of the world.

Mr Hanotiau is professor emeritus of the law school of Louvain University (Belgium), He is a member of the ICCA Advisory Board and of the council of the ICC Institute and a member of the ICC International Arbitration Commission. He is also a former vice president of the Institute of Transnational Arbitration (Dallas) and a former vice president of the LCIA Court. He is a member of the Court of Arbitration of SIAC and of the Governing Board of DIAC (Dubai). He is the author of *Complex Arbitrations: Multiparty, Multicontract,*

Multi-issue and Class Actions (Kluwer, 2006) and of more than 120 articles, most relating to international commercial law and arbitration. In March 2011, Mr Hanotiau received *Global Arbitration Review*'s 'Arbitrator of the Year' award. In April 2016, he received the *Who's Who Legal* 'Lawyer of the Year' award for arbitration.

Hilary Heilbron QC
Brick Court Chambers

Hilary Heilbron QC is a barrister and Queen's Counsel practising from Brick Court Chambers, London. She now focuses on international arbitration, primarily sitting as an international arbitrator. She has been appointed as an arbitrator in well over 100 arbitrations with a range of different applicable laws, seats, institutional rules and subject matters. She also has extensive experience as counsel in both major international arbitrations and commercial litigation, including litigation relating to arbitration, and has acted for a wide range of national and international clients, appearing as leading counsel in the Supreme Court, the House of Lords and the Privy Council.

She is currently a member of various international task forces on current topics in international arbitration and a former member of the LCIA Court and the ICC UK Arbitration and ADR Committee. She has spoken and written extensively on international arbitration and cross-border litigation and is the author of *A Practical Guide to International Arbitration in London* (Informa Law, 2008).

Clifford J Hendel
Hendel IDR

Clifford J Hendel is founder of Hendel IDR, a firm focused on international dispute resolution based in Madrid. Educated in the United States, he commenced his career as judicial law clerk in the US District Court for the District of Connecticut, and subsequently practised corporate and financial law in the New York and Paris offices of a leading global firm. After relocating to Spain in 1997 as partner of a leading Madrid legal boutique, he engaged for over two decades in a wide-ranging practice, involving both international transactions and international dispute resolution, including as arbitrator and mediator. A Fellow of the Chartered Institute of Arbitrators and of CPR's Global Panel of Neutrals and its European Advisory Board, he is deputy chairman of the Dispute Resolution Chamber of the FIFA Football Arbitral Tribunal, an arbitrator of the (FIBA) Basketball Arbitral Tribunal and a former arbitrator of the Court of Arbitration for Sport, an accredited mediator of the Centre for Effective Dispute Resolution, and a member of the governing board of the Club Español de Arbitraje. He is admitted to practise in New York (attorney), England and Wales (solicitor, non-practising), Paris (*avocat*, non-practising) and Madrid (*abogado*).

Kaj Hobér
3 Verulam Buildings

Professor Dr Kaj Hobér is professor of international investment and trade law at Uppsala University, and an associate member of 3 Verulam Buildings in London. He is a past chairman

of the Arbitration Institute of the Stockholm Chamber of Commerce. Professor Hobér has more than 30 years of experience as counsel and arbitrator in international arbitration.

Ian Hunter QC
Essex Court Chambers

A major part of Ian Hunter's practice is concerned with arbitration as both advocate and arbitrator. Since taking silk, he has been instructed in many arbitrations, both of a general commercial nature (including ICC and ad hoc arbitrations) and more specialised, particularly in the insurance and reinsurance fields, with an increasing amount of construction work.

He is sitting as arbitrator in a number of construction cases involving the Middle East. In the past two years he has had two construction cases in which Egyptian law has been relevant, one involving the Cairo Centre for International Commercial Arbitration. Arbitration takes up substantially more than half of his professional time. He has also acted as mediator in matters on a wide variety of subjects.

Michael Hwang SC
Michael Hwang Chambers LLC

Michael Hwang, a senior counsel of the Supreme Court of Singapore and former chief justice of the Dubai International Financial Centre Courts, received his undergraduate and postgraduate legal education at Oxford University, where he was a college scholar and prizewinner. Dr Hwang is active in international dispute resolution as arbitrator (under the auspices of all the major arbitration institutions) and as mediator. He is based in Singapore but associated with chambers in Sydney, and he is active in both commercial and investment treaty arbitration. He has conducted arbitrations in more than 26 cities and spoken at conferences in more than 52. He has also conducted arbitrations under the auspices of the Permanent Court of Arbitration and ICSID.

Dr Hwang has served in various capacities, including as a judicial commissioner (High Court contract judge) of the Supreme Court of Singapore; Singapore's non-resident ambassador to Switzerland and Argentina; president of the Law Society of Singapore; vice chairman of the ICC International Court of Arbitration; vice president of ICCA; court member of LCIA; trustee of DIAC; council member of ASA; council member of ICAS; and commissioner of the United Nation Compensation Commission.

In 2014, he was conferred an honorary degree of doctor of laws by the University of Sydney.

Emmanuel Jacomy
Shearman & Sterling LLP

Emmanuel Jacomy is a partner in the international arbitration group of Shearman & Sterling, based in Beijing and Singapore. He has extensive experience in acting as an arbitrator and counsel advising companies, governments and state-owned entities in international commercial and investment treaty arbitrations, with a particular focus on investment, oil and gas, energy and mining disputes, as well as disputes having an Asian nexus. He is

a visiting lecturer at Tsinghua University and the National University of Singapore, and regularly appears as a speaker on issues of investment arbitration and international commercial arbitration.

Doug Jones AO
Sydney Arbitration Chambers

Doug Jones AO is a leading independent international commercial and investor–state arbitrator with over 40 years' prior experience as an international transactional and disputes project lawyer. Doug is a door tenant at Atkin Chambers in London and has chambers in Sydney and Toronto. He is also an international judge of the Singapore International Commercial Court.

He has been involved in over 150 arbitrations including construction, infrastructure, energy, commodities, intellectual property, joint venture and investor–state disputes spanning over 30 jurisdictions around the world. He has extensive experience as arbitrator under the ICC, LCIA, AAA, ICDR, KCAB, AIAC (formerly KLRCA), CRCICA, SIAC, VIAC, SCC, DIAC, ACICA, Resolution Institute, AMINZ and European Development Fund Arbitration and Conciliation Rules, as well as the ICSID and UNCITRAL Rules, in disputes of values exceeding some billions of US dollars.

Doug has published and presented extensively and holds professorial appointments at Queen Mary College, University of London; and Melbourne University Law School. In addition, Doug has held appointments at several international professional associations, including serving as the president of the Chartered Institute of Arbitrators (CIArb) and the Australian Centre for International Commercial Arbitration (ACICA). In 2018, Doug chaired the International Council of Commercial Arbitration (ICCA) Congress held in Sydney.

Doug was awarded an Officer of the Order of Australia in 2012 in the Queen's Birthday Honours. In 2018, Doug was awarded the John Shaw Medal in recognition of his lasting contribution to the road transport industry in Australia and internationally. He was also elected an honorary bencher of The Honourable Society of Gray's Inn in 2020.

Jean Kalicki
Arbitration Chambers

Jean Kalicki is an independent arbitrator in New York and Washington, DC, specialising in investor–state, international and complex commercial disputes. Until April 2016, she was a partner at Arnold & Porter LLP, serving as counsel in high-stakes international disputes. In January 2020, she joined Arbitration Chambers, an association of independent arbitrators with offices in Hong Kong, London and New York. She was named *Global Arbitration Review*'s 'Best Prepared/Most Responsive Arbitrator' for 2017; *Chambers*' only 'Star Arbitrator' in the United States (above Band 1) for both 2019 and 2020, and a Band 1 ('Most In-Demand') Arbitrator for Global and Public International Law (2017–2021); *Best Lawyers*' 'Lawyer of the Year' for International Arbitration-Governmental in New York (2017 and 2019) and Washington DC (2016); and one of Law360's 'Five Most Influential Female International Arbitrators' for 2016.

Ms Kalicki is a member of the governing board of the International Council for Commercial Arbitration, and a member of the International Chamber of Commerce commission on arbitration and board of directors of SICANA, Inc (ICC North America). She previously served on the London Court of International Arbitration (2014–2021), including as vice president of the court (2016-2021), and as a member of the American Arbitration Association board of directors and council (2010-2021). She is a Fellow of the Chartered Institute of Arbitrators and of the College of Commercial Arbitrators and taught arbitration and advocacy for many years as an adjunct professor at both Georgetown University Law Center and American University Washington College of Law. Ms Kalicki is co-editor of two books, *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill Nijhoff and TDM-OGEMID 2015) and *Evolution and Adaptation: The Future of International Arbitration* (ICCA Congress Series No. 20, Wolters Kluwer 2019), and serves on the editorial boards of *Global Arbitration Review* and *ICSID Review*.

Richard Kreindler
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Richard Kreindler is a partner at Cleary Gottlieb Steen & Hamilton LLP in Frankfurt and New York and has specialised in international disputes matters since 1985. He is a US national, was educated in the United States and Germany, is admitted to the Bar in New York and Paris, and is a professor of law in Germany. Based in Frankfurt, he also works regularly from the firm's New York office. He has acted as counsel, arbitrator, expert and mediator in numerous commercial and investment-treaty based arbitrations. He has been listed in the Top 10 and Top 20 arbitration practitioners worldwide by *Global Counsel* and *Cross-Border Quarterly*; he has also regularly been ranked as a world-leading counsel and arbitrator in *Chambers*, *Who's Who Legal*, *The Legal 500*, *Juve* and others.

He has authored numerous treatises and other publications and lectures; his lectures in 2012 at the Hague Academy of International Law are published in Volume 361 of the Collected Courses. He chaired the global working group resulting in the IBA Rules on Taking of Evidence in International Arbitration. He is a Fellow and chartered arbitrator of the Chartered Institute of Arbitrators. He has served in an editorial or advisory capacity for, among others, *Arbitration International*, *German Arbitration Journal*, the German Institution of Arbitration, *Global Arbitration Review*, the ICC Institute of World Business Law, *International Arbitration Law Review*, *International Legal Materials*, the Swedish Arbitration Association and the Vienna International Arbitration Centre.

Julian Lew QC
Twenty Essex Chambers

Professor Julian Lew is a well-known name in the field of international arbitration, having practised as an academic, counsel and arbitrator. He is now a full-time arbitrator in international commercial and investment disputes. Before 2005, he was a partner and for some years the head of the international arbitration practice group at a leading international law firm. He was awarded 'Best prepared/most responsive arbitrator' by *Global Arbitration Review* in 2015.

Professor Lew was the founder and has been the head of the School of International Arbitration, Centre for Commercial Law Studies, Queen Mary University of London since its creation in 1985. He has written and lectured extensively on many different aspects of international arbitration.

Professor Lew has been involved with arbitrations involving many areas of commercial and investment contracts. They include claimed breaches of investment treaty commitments and disputes regarding purchase and sale of corporate entities and assets, joint ventures, oil and gas exploration, development and production agreements, research and development and promotions of pharmaceutical and chemical products, mining and concession arrangements, distribution and agency contracts, and intellectual property licensing contracts. Many of the arbitrations have a state or state entity as a party.

Loretta Malintoppi
39 Essex Chambers

Loretta Malintoppi is an arbitrator with 39 Essex Chambers, based in Singapore.

Loretta is dual-qualified (Paris and Rome Bars) and specialises in international commercial arbitration, investment arbitration and public international law. She sits as arbitrator in proceedings under several arbitration rules, including ICSID, ICC, UNCITRAL, SIAC, LCIA and DIAC.

Loretta also appears as counsel and advocate in state-to-state disputes before the International Court of Justice and in ad hoc arbitrations.

She was a member for Italy of the ICC International Court of Arbitration from 2000 to 2009 and served as a vice president of the ICC Court from 2009 until 30 June 2015. Currently, she is a member of the governing board of ICCA and a member of the Council of the Milan Chamber of Arbitration.

Loretta is one of the co-authors of *The ICSID Convention – A Commentary*, published by Cambridge University Press in 2009. She is also a member of the editorial board of *The Law and Practice of International Courts and Tribunals*, editor of the *International Litigation in Practice* series and a member of the editorial advisory board of the *Journal of World Investment and Trade*.

Mark C Morril
MorrilADR

Mark C Morril is an independent arbitrator and mediator based in New York City. He has served as sole arbitrator, co-arbitrator and chair in matters involving complex commercial contracts, patents, copyrights, trademarks, oil and gas equipment, construction, mergers and acquisitions, commodities, partnerships, joint ventures, media and entertainment, internet and internet domain names and new technologies.

Mr Morril is a Fellow of the Chartered Institute of Arbitrators and certified by the International Mediation Institute. Previously, he served for 10 years as general counsel of Simon & Schuster and for 13 years as deputy general counsel of the global media company Viacom (now ViacomCBS). Mr Morril's responsibilities spanned Viacom's operating businesses Paramount Pictures, 170 cable TV channels, CBS Broadcasting, CBS Radio,

Viacom Outdoor, Showtime and the discontinued industrial operations of Westinghouse, Gulf+Western and Charter Oil. He was responsible for the enterprise-wide disputed matters docket, transactional matters and worldwide law department management.

Mr Morril is on the roster of many of the leading dispute resolution institutions worldwide. He is a US representative to the ICC Commission on Arbitration and ADR.

Alexis Mourre
Independent arbitrator

Alexis Mourre has served as parties' counsel, president of the tribunal, co-arbitrator, sole arbitrator or expert in more than 260 international arbitrations, both ad hoc and before most international arbitral institutions (ICC, ICSID, LCIA, ICDR, SIAC, SCC, DIAC, VIAC, etc.). He established his own arbitration practice in May 2015, after having founded Castaldi Mourre & Partners in 1996, now a 35-lawyer firm specialising in arbitration and dispute resolution.

He is the author of numerous books and publications in the field of international business law, private international law and arbitration law. He is founder and former editor in chief of *Les Cahiers de l'Arbitrage – The Paris Journal of International Arbitration*, a leading French publication in the field of arbitration.

Since 1 July 2015, Alexis Mourre has been the president of the ICC International Court of Arbitration and was vice president of the Court from 2009 to 2015. He was vice president of the ICC Institute of World Business Law from 2011 to 2015. He has also served as co-chair of the IBA Arbitration Committee (2012–2013), LCIA Court member (2012–2015) and council member of the Milan International Chamber of Arbitration (2006–2014). He is a member of a large number of scientific and professional institutions dedicated to arbitration and private international law. He is the founder and former president of Paris Arbitration, the Home of International Arbitration.

He is fluent in French, English, Italian and Spanish, and has a working knowledge of Portuguese.

Jan Paulsson
Three Crowns LLP

Jan Paulsson has been counsel and arbitrator in several hundred international arbitrations conducted under the rules of all major arbitral institutions. He has also been a member of the governing bodies of many of these institutions, and has served as president of the London Court of International Arbitration and vice president of the ICC International Court of Arbitration in Paris. He holds law degrees from Yale and the University of Paris. His principal publications include the monographs *Denial of Justice In International Law* (Cambridge University Press, 2005) and *The Idea of Arbitration* (Oxford University Press, 2013).

David W Rivkin
Debevoise & Plimpton LLP

David W Rivkin is co-chair of Debevoise & Plimpton's ESG/business integrity group and former co-chair of its international dispute resolution group. He served as president of the

International Bar Association from 2015 to 2016, the first American to serve in that role in 25 years.

Mr Rivkin is consistently ranked as one of the top international dispute resolution advocates and arbitrators in the world. He has handled international arbitrations throughout the world and before virtually every major arbitration institution, and he has won some of the largest investment treaty and commercial arbitration awards. Subjects of these arbitrations have included long-term energy and natural resources concessions, investment treaties, joint venture agreements, pharmaceutical agreements, financial issues, insurance coverage, construction contracts, distribution agreements and intellectual property, among others, and they have involved common law, civil law and Islamic law systems. He also represents companies in transnational litigation in the United States, including the enforcement of arbitral awards and arbitration agreements, and he works actively with clients on various ESG-focused issues. He has authored many articles and frequently spoken about international arbitration and litigation. Mr Rivkin has served in leadership roles in arbitration institutions on five continents, including currently as co-chair of the Hong Kong International Arbitration Centre and a member of the board of institutions in Mumbai, Moscow, Mauritius and Australia.

In 2012, the American Lawyer's *Am Law Litigation Daily* named Mr Rivkin one of two 'Global Lawyers of the Year'. In 2011, the *National Law Journal* named him one of the country's 'Most Influential Attorneys'.

Mr Rivkin is a member of the Council on Foreign Relations, the Council of the American Law Institute, the US Secretary of State's Advisory Committee on Private International Law and the Department of State's advisory subcommittee on economic sanctions, and the board of British American Business, among other public positions.

J William Rowley QC

Twenty Essex Chambers

J William Rowley QC is an arbitrator member of Twenty Essex Chambers. He is chairman of the board of the LCIA and a member of the LCIA Court, and also serves on the board of LCIA India. Before joining Twenty Essex Chambers, he was chairman, and subsequently chairman *emeritus*, of the Canadian national firm McMillan LLP. He chairs the editorial board of *Global Arbitration Review.*

Ranked by *Chambers and Partners* as one of the most in-demand arbitrators globally, he is one of a few Canadian practitioners with a truly international arbitral practice and reputation. He has chaired or participated as a tribunal member or counsel in several hundred international arbitrations, involving a variety of national laws and investment treaty systems. Recent arbitrations have included petroleum industry joint ventures (Iraq oil fields, over US$20 billion; offshore Nigerian oil fields, over US$4 billion), gas pricing and repricing formulae, and multiple commercial and investor-state disputes (ICSID, NAFTA, ECT and UNCITRAL).

Mr Rowley is former chairman of the International Bar Association, Section on Business Law, national representative for Canada and co-founder and chairman of the IBA Global Forum on Competition and Trade Policy. He is a past member of the NAFTA 2022 Committee. He is general editor of Global Arbitration Review's *The Guide to*

Energy Arbitrations and founding editor of *Arbitration World* (2004–2012). He served as a non-executive director of AVIA Canada (1997-2014) and is co-author of *Rowley & Baker: International Mergers – the Antitrust Process*.

Noah Rubins QC
Freshfields Bruckhaus Deringer LLP

A US-, UK- and French-qualified lawyer, Noah Rubins is the head of the international arbitration group in the Paris office of Freshfields Bruckhaus Deringer LLP. Noah is the head of Freshfields' worldwide Russia/CIS dispute resolution subgroup. He has advised and represented clients in over 120 arbitrations around the world, conducted under the International Centre for Settlement of Investment Disputes (ICSID), ICSID Additional Facility, LCIA, International Chamber of Commerce (ICC), American Arbitration Association, Stockholm Arbitration Institute and the United Nations Commission on International Trade Law (UNCITRAL) rules.

He specialises in disputes in the former Soviet Union and investment treaty arbitration. In addition to advising clients, Noah has served as arbitrator in more nearly 50 disputes, conducted under the ICC, ICSID, LCIA, VIAC, ICAC, SCC and UNCITRAL rules.

Noah is widely published in the field of arbitration, and is a frequent conference speaker. He lectured at the University of Dundee, Scotland, and has also served as an adjunct professor of law at Georgetown Law Center in Washington, DC. His most recent publications include *Investment Treaty Arbitration* (Oxford 2nd ed 2020), with Borzu Sabahi and Don Wallace and *International Investment, Political Risk and Dispute Resolution: A Practitioner's Guide* (Oxford 2nd ed 2020), with Stephan Kinsella and Thomas Nektarios Papanastasiou.

Noah received a master's degree in dispute resolution and public international law from the Fletcher School of Law and Diplomacy, a JD from Harvard Law School, and a bachelor's degree in international relations from Brown University. He speaks fluent English, French and Russian, and also speaks Spanish, Hebrew and some Turkish.

Eric Schwartz
Schwartz Arbitration

Eric Schwartz is an American and French international arbitration lawyer. Based in New York, he now practises independently as an international arbitrator and as an arbitrator member of Fountain Court Chambers in London. Until December 2016, Eric was a partner in the international arbitration practice group of King & Spalding in New York and Paris. Earlier in his career, he was a Paris-based partner of Freshfields Bruckhaus Deringer and, from 1992 to 1996, he served as secretary general of the ICC International Court of Arbitration, of which he was subsequently a member and a vice president from 2006 to 2015. During four decades of legal practice, Eric has acted as counsel and arbitrator in international arbitration proceedings in all the principal European arbitration venues, as well as in Africa, Asia and North America. He has particular expertise in relation to disputes concerning large infrastructure projects, investment treaties and complex cross-border transactions in the energy, IP/IT and pharmaceutical sectors.

Georg von Segesser
von Segesser Law Offices

Georg von Segesser practises as an independent arbitrator. He has acted as chairman, co-arbitrator, sole arbitrator and counsel in more than 200 domestic and international arbitrations (ICC, Swiss Rules, ICSID, DIS, VIAC, LCIA, UNCITRAL and others) and as co-director of the Claims Resolution Tribunal for Dormant Accounts in Switzerland. He is an arbitrator of the Court of Arbitration for Sport. His arbitration practice covers a broad range of issues, among them disputes relating to joint ventures, mergers and acquisitions, distributorships, oil and gas, construction, building and manufacturing contracts, service and cooperation agreements, intellectual property rights, investment disputes and trust disputes.

In 1971, Georg von Segesser graduated from Zurich University. He was admitted to the bar in Zurich in 1972. After serving as a district court clerk (1971–1972), he worked as an associate and partner at Pestalozzi & Gmür in Zurich (1973 to 1982) and as a foreign associate with Winthrop, Stimson, Putnam & Roberts in New York (1974–1975). In 1982, Georg von Segesser co-founded the law firm in Zurich which is now Schellenberg Wittmer Ltd and became of counsel in 2015.

Georg von Segesser opened von Segesser Law Offices in 2017.

Ismail Selim
Cairo Regional Centre for International Commercial Arbitration

Ismail Selim is the director of the Cairo Regional Centre for International Commercial Arbitration (CRCICA)).

Dr Selim is secretary treasurer of the IFCAI, a board member of the AfAA, vice chairman of the Egypt Branch of the CIArb and an expert member of the international commercial expert committee of the Supreme People's Court of China. In addition to the above, he is an accredited mediator of the London School of Mediation (LSM) as of May 2019 and was elected as a member of the UNESCO Conciliation and Good Offices Commission as of January 2020.

In 2009, Dr Selim earned his PhD from the University of Burgundy.

He began his legal career as a prosecutor and judge (1998–2009) before joining private practice as partner in renowned law firms (2009–2016).

Dr Selim has taught private international law at IDAI (Paris I University) since 2011 and comparative international arbitration law for the Middle East LLM at Paris I since early 2018. He is also a tutor on the CIArb Approved Faculty List.

Dr Selim is consistently appointed as arbitrator, has acted as counsel in various ad hoc and institutional cases under various rules, and has served as expert on Egyptian and Libyan laws in international proceedings.

In his capacity as director of the CRCICA, Dr Selim has administered more than 300 arbitration cases under the CRCICA rules.

Christopher Seppälä
White & Case LLP

Christopher Seppälä is partner of counsel in the international arbitration group of White & Case LLP, Paris, and founded the firm's Paris arbitration practice in 1988. He has served as counsel or arbitrator in many ICC and other arbitrations. His main areas of practice are international commercial arbitration and international construction.

He is the legal adviser to the FIDIC Contracts Committee, is a former vice president emeritus of the ICC International Court of Arbitration and currently serves as FIDIC's representative on that Court. Chris was co-chair of the group that prepared the ICC Commission's updated (2019) Report on Construction Industry Arbitrations.

He is a lecturer on international construction contracts and disputes at University of Paris II Panthéon-Assas, has a BA from Harvard University and a JD from Columbia Law School, and is a member of the New York and Paris Bars.

Robert H Smit
Independent arbitrator

Robert H Smit is an independent arbitrator in international commercial and investment treaty arbitrations. He is an adjunct professor of law at Columbia Law School, where he teaches courses and seminars on international arbitration and transnational litigation. Mr Smit is a retired litigation partner at Simpson Thacher & Bartlett LLP, where he co-chaired the firm's international arbitration and dispute resolution practice. Mr Smit is also co-editor-in-chief of the *American Review of International Arbitration*, a member of the ICC Commission on Arbitration and an adviser to the American Law Institute's Re-statement (Third) of the US Law of International Arbitration. He is also former US member of the ICC International Court of Arbitration, chair of the New York City Bar Association's International Commercial Disputes Committee, chair of the CPR Arbitration Committee and vice chair of the IBA's International Arbitration and ADR Committee.

Jingzhou Tao
Arbitration Chambers

Jingzhou Tao is an independent arbitrator with Arbitration Chambers in Hong Kong, London and New York. He is an *avocat à la Cour de Paris*. He has more than 35 years of experience advising Fortune 500 companies on the negotiation of hundreds of their transnational mergers and acquisitions, joint venture contacts, international construction contracts, production sharing agreements, etc. He has acted as counsel, co-arbitrator, chair and sole arbitrator in about two hundred international arbitration proceedings before major international arbitration institutions involving construction projects, mining projects, management contracts, joint ventures, mergers and acquisitions, technology transfers, licensing agreements, agency agreements and international trade.

He is a member of the ICC Commission on Arbitration and ADR, the international advisory board of HKIAC, the expert committee of CIETAC, the expert committee of China International Commercial Court of Chinese Supreme People's Court and the editorial board of *Global Arbitration Review.*

John M Townsend
Hughes Hubbard & Reed LLP

John M Townsend is a partner in the Washington, DC, office of Hughes Hubbard & Reed LLP and chairs the firm's arbitration and ADR group. Mr Townsend was appointed by President George W Bush to the panel of arbitrators of the International Centre for Settlement of Investment Disputes. He served successively as chair of the law committee, chair of the executive committee and chair of the board of directors of the American Arbitration Association. He served as a vice president of the Court of Arbitration of the LCIA, and is a member of the Arbitration Committee and the Challenge Review Board of CPR, and a Fellow of the College of Commercial Arbitrators. He served as an adviser to the American Law Institute's project to draft the Restatement of The US Law of International Commercial Arbitration. Mr Townsend has a degree in history from Yale University and a law degree from Yale Law School.

Appendix 3

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