THE GUIDE TO ADVOCACY

SIXTH EDITION

Editors
Stephen Jagusch KC, Philippe Pinsolle and Alexander G Leventhal

CHAPTER 2

Written Advocacy

Thomas K Sprange KC[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!

1 Thomas K Sprange KC is the managing partner at King & Spalding.

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. This 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

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 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

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, Independent arbitrator

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

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.

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

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. 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).

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 KC, Vancouver Arbitration Chambers

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 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.

Keep a sharp focus on what is essential

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

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 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).

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.

A submission must be a submission, not an encyclopaedia

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 encyclopaedia. 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

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.

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

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 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.

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 KC, Twenty Essex

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 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.

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

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.

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

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

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 that, 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

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

without having 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 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

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 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 US 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

- 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.

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, Independent arbitrator

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 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.