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The Ten Commandments of Written Advocacy in International Arbitration

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ABSTRACT

International arbitration presents special challenges for written advocacy. This short article draws upon ancient wisdom and reviews ten practice points for better persuasive writing in international arbitration.

During an excavation at the ICC Court of Arbitration's headquarters site in Paris, workers uncovered a stone tablet buried under boxes and boxes of petrified arbitration pleadings and exhibits. A team of archaeologists worked for months to decipher and then fully grasp the text of the tablet and its significance for international arbitration practitioners today. What follows reproduces the text of that stone tablet, with annotations provided by the commentator.

Commandment No. 1: SHORT SENTENCES.

Blessed are those who use few words.

Arbitrators are busy people. They often have many files running at once. They travel a great deal. Some read a pleading carefully only in the week or two immediately before the hearing. In that week, they also often have to deal with many other files. They occasionally suffer from jet lag and a compressed schedule when they finally read your brief. Many of the top arbitrators are not native English speakers.

All of this means that the most effective writing style is the one that is easy to understand, not the one with the most elegant or beautifully turned phrases. The simple reality is that it is easier for the brain to process short sentences, and short paragraphs, than long ones. Shorter is better for communication. And communication is the reason the client asks us to prepare a brief in the first place.

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Commandment No. 2: KEEP IT INTERNATIONAL.

The common tongue is understood by all.

One of the great challenges of international arbitration is that of framing your argument in terms persuasive to an arbitrator who grew up in a different legal system and national culture than you did. Meeting this challenge requires consciousness of the differences between your national and legal culture and that of the arbitrators. As a general rule, if you are not sure if a given concept translates, find another way of expressing it.

One potentially dangerous area is that of sports analogies. I have heard a US lawyer make extended references in oral argument to 'getting to third base' and 'hitting a home run'. Lacking a background in the basics of baseball, the European arbitrators on the tribunal were baffled. I have also heard English barristers make references to 'sticky wickets' that similarly served more to mystify rather than clarify.

Another difficult area is civil procedure in national court systems. It is sometimes tempting for counsel to refer to a procedural device in their national system to describe what they wish to accomplish in a request for an arbitral procedural order. The difficulty is that national systems differ in important ways, and a word used to translate a concept in one system may be entirely inadequate outside the context of that system. As one example, the French word '*procès*' is often translated by the English word 'trial'. For a US lawyer 'trial' signifies the hearing on the merits. But for a French lawyer '*procès*' designates the entire procedure, from the filing of the complaint until the final judgment. A French lawyer and a US lawyer discussing 'pre-trial' disclosure may have quite different things in mind.

Latin phrases are another complexity. Some lawyers believe that if they express a concept in Latin, they establish its universality. But not all educational systems in recent decades have valued training in classical languages. As a result, unless your arbitration tribunal is composed of ancient Romans, it is best to express your argument in English terms that you are confident the arbitrators will understand.

The test: if an arbitrator has to get up to look for a dictionary or run a Google search to understand your argument, you are not communicating well.

Commandment No. 3: TOPIC SENTENCES.

Blessed are the paragraphs that begin with the point they seek to make.

Legal arguments are better understood when the reader knows where you are going before you get there. The organization of your argument is stronger and clearer when each paragraph begins with a topic sentence: a sentence that makes or announces the main point of the paragraph.

Legal writing is not like that of a novel – there is no benefit in hiding the point of your narrative until the end, when it surprises the reader. Knowing what the

point is in advance allows your argument to fall neatly in place in the mind of the reader – even a reader who, like many arbitrators, is studying your brief when recovering from a long flight, in between conference calls on procedural issues in other cases.

Commandment No. 4: PARTY NAMES.

Thou shalt describe the parties by their names and not by their procedural position.

Every case has at least one claimant and one respondent. Describing the parties as 'Claimant' or 'Respondent' does not help the arbitrator remember who they are. Even counsel have trouble keeping this straight – I cannot count the number of arguments by opposing counsel I have seen garbled by applying the wrong procedural appellation to their own client.

Moreover, the bland appellations 'Claimant' and 'Respondent' undo all of the efforts an advocate makes to characterize her client as the 'good guy' and the opposing party as the 'bad guy'. The story comes alive when real names are used in a way that it cannot with procedural appellations.

Commandment No. 5: DO NOT GET PERSONAL.

Thou shalt not use 'you' and 'we' in legal writing.

Attorneys, in the interest of their clients, are sometimes required to take tough positions in arbitrations, particularly in procedural correspondence. It is sometimes tempting in correspondence with opposing counsel to refer to counsel or their client as 'you', and to oneself or one's own client as 'we'.

Do not do this. As attorneys, everything we do in an arbitration is on behalf of our clients. None of us likes to feel that we are being accused of misconduct or bad faith. The effect on the blood pressure of the ordinary lawyer of a statement 'you are seeking to delay the proceedings in bad faith' is measurably different from that of 'ABC Corporation is seeking to delay the proceedings in bad faith.' Keep it professional. Refer to the parties, not to counsel, in correspondence and in pleadings.

Commandment No. 6: MINIMIZE ABBREVIATIONS.

Thou shalt abbreviate only when essential.

An arbitrator's attention to your arguments is a precious thing. Do not reduce the impact of your arguments by making the arbitrator engage in an exercise of memorizing a succession of abbreviations so that she can make sense of your points. Define an abbreviation only when it is essential to do so. It is not essential in contexts where one would not do so in ordinary speech. We do not stop to define

'John Smith' in ordinary speech, for example – we simply refer to him as 'Smith' or 'Mr. Smith'.

If you do need to define a term for essential reasons of precision, then at least select an abbreviation that reminds the reader of what is being abbreviated. For example, if the term to be defined is 'ABC Engineering and Design Investment Brazil Incorporated', define it as 'ABC Brazil' or 'ABC Engineering' – not as 'AEDIBI'.[1]

Commandment No. 7: DO NOT MAKE YOUR OPPONENT'S ARGUMENT.

Blessed are those who make only their own arguments, and not those of their adversary.

There is a temptation, particularly in responsive pleadings and submissions, to begin a responsive argument by summarizing the point in question. This is necessary to a certain extent. The Tribunal must know which of your adversary's points you are addressing in order to understand your point in response. There are ways to do this, and ways not to do this.

The path *not* to be taken is to begin by summarizing your opponent's argument, and then responding to it. Doing so is confusing for the Tribunal, which expects you to make your client's argument. It is also dangerous – because many times you will be capable of stating your opponents' argument in a clearer and more effective manner than they.

The righteous path is to begin the argument by stating that the adversary's point is wrong. For example: 'ABC Corporation errs in suggesting that the sun rises in the west' or 'ABC's argument that the sun rises in the west is without merit'.

Commandment No. 8: FACTS SHOULD SHOW, NOT TELL.

Blessed are those whose facts lead to the road of righteousness

The fact section of a brief should have a tone different from the argument. It should state the facts in a neutral, non-committal tone. It should not tell the reader what conclusion to draw from the facts that are stated. It should carefully select the

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[1] *Cf. Nat'l Ass'n of Regulatory Utility Comm'rs v. U.S. Dep't of Energy*, 680 F.3d 819, 820-21 n.1 (D.C. Cir. 2012) ("We also remind the parties that our Handbook of Practice and Internal Procedures states that "parties are strongly urged to limit the use of acronyms" and "should avoid using acronyms that are not widely known". Brief-writing, no less than "written English, is full of bad habits which spread by imitation and which can be avoided if one is willing to take the necessary trouble". George Orwell, *Politics and the English Language*, 13 Horizon 76 (1946). Here, both parties abandoned any attempt to write in plain English, instead abbreviating every conceivable agency and statute involved, familiar or not, and littering their briefs with references to "SNF", "HLW", "NWF", "NWPA", and "BRC" – shorthand for "spent nuclear fuel", "high-level radioactive waste", the "Nuclear Waste Fund", the "Nuclear Waste Policy Act", and the "Blue Ribbon Commission".").

facts to be discussed and present them in a way that leads the reader to the conclusion that your client is right and the adversary is wrong. It should show, not tell.

This approach is most effective. A conclusion that the arbitrator reaches herself will be more persuasive to the arbitrator than a conclusion you tell the arbitrator to reach. That is just the way human minds are.

As a general rule, the fact section should be organized chronologically, since that is the presentation that is generally easiest to follow. It should tell a story and touch upon the themes important to the case. As a general rule, the facts discussed should be limited to those that are used in the argument that follows. But the tone should at all times remain factual and neutral, without drifting over into argument.

Commandment No. 9: NO SUPERLATIVES.

Thy words shall not try too hard.

When arbitrators read a pleading, they read it critically. As they read it, they ask themselves whether what you have written makes sense in light of their experience, the other party's assertions and their knowledge of the law and the record. A good pleading is one that withstands a critical read without making the arbitrator pause even once.

Superlatives provide a ready target for an arbitrator's critical read but only rarely are necessary to make the point. An opponent's point may indeed be very, very bad. But one typically needs to establish only the point's lack of merit – adding the superlative is unnecessary. In those rare cases where it is necessary or desirable to convey a stronger degree of emphasis, it is almost always better to do so through careful selection of nouns and adjectives than through the addition of a superlative.

Commandment No. 10: LETTERS BEGIN WITH WHAT YOU WANT AND WHO YOU ARE.

They who state their wishes early and clearly shall be heard.

Always begin a procedural letter to the tribunal with what you are asking. A busy tribunal chair should not have to wait until halfway through your letter before she begins to understand why you have written. The discipline of stating the request in the first line also helps focus your thinking and makes your request more effective.

It is also useful always to begin with a clause stating on whose behalf you are acting. You of course remember who your client is and what their role is in the arbitration. An arbitrator with twenty cases in progress, however, may not immediately and always recall which lawyer acts for which party. This is not something to leave to chance.

As an example, a good letter might begin:

> On behalf of respondent ABC Brazil, we respectfully submit that the Tribunal should deny the request for documents stated in the June 20 letter of claimant XYZ Corp.

* * *

A break in the stone tablet leaves it unclear whether more commandments followed the tenth one. Perhaps excavation will uncover more of the ancients' wisdom in the future. For now, however, we must be satisfied with these ten – which, as interpreted, hopefully provide some small guidance.