THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION

Second Edition

Advocacy in International Arbitration

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Chapter 17

ADVOCACY IN INTERNATIONAL ARBITRATION[1]

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I. INTRODUCTION

The importance of advocacy is not a recent development. Well before the days of the New York Convention, good advocacy was the cornerstone of persuasion and dispute resolution throughout the world. The great orators of the Roman Empire used oral advocacy to advance their political agendas in the Roman Senate and to resolve legal disputes before the Roman courts. The eloquent barristers of early England argued before lay juries to advance their clients' interests, as did the first great American jury trial lawyers. Even the Prophet Mohammed, far away from the legal traditions of the Americas and Europe, used his charisma and command of language to arbitrate disputes among Arabic tribes. All of these individuals, from different backgrounds, appreciated that good advocacy skills were a key part of successful dispute resolution.

In today's world of high-stakes international controversies, the importance of advocacy has never been greater. Large sums of money and the interests of major organizations and governments regularly ride on the outcome of an international arbitration. In addition, highly complex legal theories are often advanced along with comprehensive prayers for relief that would have been unthinkable only a few years ago.[2] This Chapter is designed to show that in

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[1] The author would like to thank Kinan H. Romman, Anibal Sabater, and Kevin O'Gorman for their assistance in the preparation of this chapter.

[2] *See Siemens v. Argentina* (ICSID Case No. ARB/02/8), Award *passim* (6 February 2007)(raising complex arguments with respect to expropriation as well as

international arbitration, good advocacy begins not with the oral presentations at the final merits hearing, but at the outset of the dispute and continues through each aspect of the matter through the final award or settlement.

In the modern international arbitration era, the concept of effective advocacy encompasses many sets of skills – oral skills, analytical skills, written skills, negotiation skills, interpersonal skills, and organizational skills. Achieving a command of these disparate advocacy skills requires natural talents, the right opportunities, tireless practice, and consistent experience. Add to this the myriad cultures, customs, traditions, languages, and rules that interact regularly in the international arbitration context, and the result is that complete advocacy at a high level is something that comes to a legal practitioner over time, not overnight.

II. INITIAL REVIEW AND ANALYSIS OF CLAIM

Advocacy in international arbitration begins when a client first broaches the possibility of an international matter. The advocate must begin thinking about a number of critical issues to best position the client for a successful outcome.

The lawyer should focus on creating a good relationship with the client. The relationship between the client and the lawyer can have a profound impact on the lawyer's ability to advocate effectively. A good relationship helps facilitate candid communication and encourages mutual trust. It allows the lawyer to act quickly and creatively on the client's behalf. Creating this kind of relationship requires, among other things, an understanding of the client's background.

In a world increasingly dominated by cross-border commercial arrangements, the international practitioner must be able to

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the various standards of investor protection available under international law); *City Oriente Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)* (ICSID Case No. ARB/06/21), Decision on Provisional Measures *passim* (19 November 2007)(enjoining the Government of Ecuador from collecting taxes from the claimant pending the resolution of the dispute).

communicate with and understand clients ranging from a German pharmaceutical company to a Japanese electronics manufacturer to an Islamic bank. This kind of skill is developed by representing many different kinds of international clients; and there is no substitute for an international arbitration lawyer doing his or her homework on every client.

Ideally, the international arbitration practitioner will assist the client in planning all aspects of a long term dispute-resolution strategy. Single-minded focus on the specific issue often leads to overlooking the critical importance of preserving all rights from the relationship between the parties. Early involvement of the international arbitration advocate can increase the chances that a potential arbitration case will be effectively handled and pleaded with the overall interests of the client in mind.

As to the specific dispute, the client and lawyer should collaborate on a claim evaluation. The most important issue here, from an advocacy perspective, is that the lawyer begin to understand the strength or weakness of the client's legal position. This will help the lawyer counsel the client on whether to attempt settlement or how to best strategically pursue the arbitration. In analyzing the claims, a good advocate will evaluate all possible claims and legal theories while providing a realistic, honest, and cautious prediction of the chances for success. Unrealistic enthusiasm or an overly cautious approach equally disserves the client.

Lastly, the attorney should, based on the claim evaluation, jointly create a case plan with the client. Among other items, a basic case plan should take into consideration factors such as the strength of the client's case, the experts needed, the nationality of the opposing party, the seat of the tribunal, the specific administering institution, and the nature of the claim (commercial or investor-state).

The advocate and the client need to promptly identify the legal team that will participate in the dispute – especially if the case involves foreign law or presents close ties with a foreign jurisdiction. When lawyers from various firms or jurisdictions need to work together on the same case, a clear division of tasks, deliverables, and expectations must be put in place in the case plan.

III. APPOINTMENT OF THE ARBITRAL TRIBUNAL

International arbitration is unique in that the advocate actually has the opportunity to play such a large role in the selection of the ultimate decision-maker(s). This presents a significant opportunity to advance the client's goals in the dispute. Selecting an arbitrator that will remain impartial and independent but understand the advocate's arguments, and who has the right personality to convince the other arbitrators during deliberations, is the ideal choice. This often requires an arbitrator to have procedural and substantive expertise coupled with a personality calculated to create a strong chemistry with co-arbitrators. Finding the perfect arbitrator can be challenging and the process is more art than science. However, to state the obvious: it is impossible to select the perfect arbitrator for the case you will be advocating if you don't know what that case is at the time you select the arbitrator.

An important consideration is whether to nominate an arbitrator from a civil law or common law background, or from a particular jurisdiction. Arbitrators from different legal traditions do not necessarily decide cases differently, particularly if they are widely experienced. But differences do exist, and it may make more sense to select an arbitrator from one legal heritage over another.

For example an advocate may choose to nominate an arbitrator from a common law background if the controversy involves a choice of law provision referencing a common law jurisdiction, or if the dispute involves U.S. or Commonwealth parties. It also might be reasonable to do just the opposite. Perhaps a civil law arbitrator might take the better approach to the case because of his or her views on related companies. Also in play is the arbitrator's credibility with the other panel members. It may be the best strategy to nominate a common law lawyer who has studied civil law rather than selecting a civil law lawyer as in the previous example if the other arbitrators on the panel are likely to be common law lawyers. An appropriately experienced common law lawyer there might best gain credibility with others on the panel, while still employing a civil law mindset.

Expertise and educational background are also critical factors. The right arbitrator for a complex competition dispute might not be the right arbitrator for an upstream energy case. Strong expertise in a particular area can be key if the advocate seeks to advance complex industry-specific claims. On the other hand, if the advocate wishes to make arguments of a broad or equitable nature, perhaps expertise in the field is less desirable than significant commercial experience.

The availability of an arbitrator can also be part of the advocate's strategy. For a party interested in the prompt resolution of the dispute, it may be quite advantageous to secure an arbitrator whose diary will allow for early hearings in the case. Similarly, if delay is your client's objective, then selection of an arbitrator whose diary is full can be good advocacy.

Another important consideration in selecting an arbitrator is language. Virtually every international controversy involves lawyers, witnesses, and parties who speak different languages. More importantly, documents are often in more than one language, requiring either translation or multilingual capabilities. Multilingual arbitrators can be either advantageous or disadvantageous depending upon the circumstance.

The arbitrator's publications and decision history should also be considered. The advocate should, to the extent possible, discover what the potential arbitrator has written and how the arbitrator has decided similar controversies. The effective advocate should use all the necessary research tools, including routine online searches, to gather as much data about each potential arbitrator as possible to make the best selection. This process should be carefully undertaken as it will have a significant bearing on the outcome of the dispute.

The selection of the arbitration panel's chair obviously raises important strategic issues. In the common scenario where the parties have agreed to a three member panel, with the chair to be selected by the two party-appointed arbitrators, it is best if all agree that each advocate can communicate with their appointed arbitrator (and the

client) regarding suitable chair candidates.[3] As with other issues discussed, the lawyer should work within ethical bounds to advocate for the selection of a third arbitrator who not only meets the traditional criteria of knowledge, experience, independence and impartiality, but is perceived as being a good fit to hear and decide the parties' case. These same considerations, of course, apply in cases where a sole arbitrator will be selected to decide the case.

IV. PREPARATION OF WRITTEN SUBMISSIONS AND CASE-RELATED CORRESPONDENCE

Written submissions in an international arbitration include the request for arbitration (and potentially also for interim measures of relief), the answer, counterclaims, pre-hearing memorials, and post-hearing memorials. From an advocacy standpoint, the importance of quality submissions is paramount: written submissions in the international arbitration world are what arbitrators have reviewed and relied upon to form their preliminary views as they come to the merits hearing.

But preparing quality written submissions in the international arbitration context requires more than just good drafting skills. It requires an appreciation of the appropriate writing style. The writing style of the attorney's domestic jurisdiction should never be assumed to be the best writing style in the international arbitration context. The backgrounds of the arbitrators must be taken into account when

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[3] Consistent with this approach, *see*, e.g., Article 7(2) of the Arbitration Rules of the International Centre for Dispute Resolution, which provides that:

"No party or anyone acting on its behalf shall have any ex parte communication relating to the case with any arbitrator, or with any candidate for appointment as party-appointed arbitrator except to advise the candidate of the general nature of the controversy and of the anticipated proceedings and to discuss the candidate's qualifications, availability or independence in relation to the parties, or to discuss the suitability of candidates for selection as a third arbitrator where the parties or party designated arbitrators are to participate in that selection. No party or anyone acting on its behalf shall have any ex parte communication relating to the case with any candidate for presiding arbitrator."

the advocate drafts any sort of written submission. While it is difficult to generalize, if the arbitrators hail primarily from civil law jurisdictions, then a more reserved, respectful writing approach might be most effective. If the arbitrators are all Indian or U.S. lawyers, on the other hand, a more aggressive style may resonate with the panel.

That said, top-line arbitration practitioners and arbitrators have gravitated to a style of written advocacy that cuts across legal heritage and municipal idiosyncrasies. Good writing in international arbitration generally reflects a clean, respectful, and thorough approach that takes into account the sophistication of most international arbitration panels. Arbitration panels are often composed of highly experienced practitioners, leaders in industry, and former high court judges with decades of experience. These arbitrators are selected specifically for the controversy in question precisely because of their knowledge and depth of expertise. This gives the advocate the ability to craft highly technical and creative legal arguments secure in the knowledge that they will be understood and considered carefully by the panel.[4]

The following subsections discuss advocacy relating specifically to the different kinds of written submissions, as well as case-related correspondence:

A. Request for Arbitration, Answer, and Counterclaim

When drafting the request, answer, and counterclaim, the attorney should take extra care in drafting because these documents are generally the very first submissions that the arbitrators will read. A good advocate always strives to make an excellent first impression.

In addition, the attorney should consider how thoroughly to develop these submissions. Depending on the situation, they can be drafted comprehensively, elaborating on the underlying legal theories, or very concisely, essentially giving bare bones notice to the other party.[5] A variety of factors influence which pleading style is most

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[4] *See Siemens*, supra note 2.

[5] To be sure, the applicable arbitration rules set forth the required contents of these submissions, and have an impact on the attorney's pleading strategy. Thus,

beneficial to the client's particular case. A full opening will generally require the other party to respond in greater detail, necessarily revealing more of its case. If time is of the essence, however, a short, notice-style submission may be desirable. The advocate may also want to draft a short pleading if keeping the legal theories vague at the outset of the case makes more strategic sense, for example, in a rapidly developing dispute scenario. It is thus necessary for the advocate to conduct a thorough analysis in order to decide, on the one hand, what information must be provided in the first pleading to allow the arbitration to proceed under the applicable arbitration rules and, on the other, what information can (and, from a strategic standpoint, should) be saved for a later pleading.

Deciding what legal theories to advance is also a significant part of the lawyer's strategy. For example, if the attorney decides to advance every legal theory that bears any relation to the controversy, he or she will lose credibility with the tribunal if some of those theories would have very little chance of success. The close working relationship with the client makes it possible for the good advocate to say "no" to marginal theories.

B. Pre-Hearing Memorials

The pre-hearing memorials present the best opportunity for the advocate to fully present the case. Unlike many time-pressured domestic judges, international arbitrators have the opportunity to consider and to digest the written submissions. The seasoned international advocate understands that arguments presented in a memorial are usually less didactic than the written submissions of many municipal advocates. A memorial in an international case

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for instance, an arbitration request submitted before the International Centre for Settlement of Investment Disputes ("ICSID") must provide more information and details than an arbitration notice delivered under the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL"). *See* Rule 2 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings, and Article 3 of the UNCITRAL Arbitration Rules.

generally presents arguments in a more balanced fashion. An advocate should strive to create an intellectual discourse with the tribunal rather than trying to force feed every possible argument.

Aside from style and depth, the advocate should strive to make the pre-hearing memorials (and all submissions) easy to read and easy to coordinate with other corresponding documents. Many arbitrators do not have clerks or a staff to help manage documents and correspondence. The memorials should be presented professionally with an easy-to-read table of contents, index, and (where needed) appendix. Also, all documents referenced in the memorials should be easy to find. These simple considerations do make a difference, and should never be overlooked.

C. Post-Hearing Memorials

Post-hearing memorials are often submitted after the hearing and generally reference the events of the hearing while recapping major arguments. These submissions are the advocate's last word, making them a very important last impression. The advocate generally should make the post-hearing memorials shorter and more concise than the pre-hearing memorials (indeed, the tribunal often imposes page limitations). They should be prepared after a careful review of the hearing transcripts, and focus on the key issues in the case and major developments during the hearing. The tribunal has already read the pre-hearing memorials and has heard testimony and oral arguments, so a full recreation of them would not be helpful at this stage. But with that said, the post-hearing memorials should contain the major arguments and must allow the tribunal to logically find in the advocate's favor should they re-review previously filed pleadings several months after the hearing.

D. Case-Related Correspondence

Case-related correspondence includes letters sent by counsel to the tribunal or to opposing counsel. These letters are another form of advocacy. They are used to communicate with the tribunal and

opposing counsel about scheduling, document production, or any other case-related issue. Knowing how to use these letters effectively can solidify counsel's credibility before the tribunal and also ensure that requests made to the tribunal or opposing counsel are seriously considered.

When writing a letter to the tribunal or opposing counsel, it is important to find the right balance between deference and overly-aggressive advocacy. The tribunal will not be impressed with either extreme, and the backgrounds of the arbitrators and opposing counsel should be taken into consideration when drafting any sort of correspondence. Finally, the practice in some jurisdictions of writing frequent letters to the tribunal is generally unpersuasive and mostly serves to reduce credibility with the tribunal members not from those jurisdictions where the practice is deeply rooted.

V. THE ORGANIZATIONAL HEARING AND FIRST PROCEDURAL ORDER

The procedural hearing usually presents the first opportunity to advance the client's interests orally in front of the tribunal. In fact, when not conducted by telephone, this hearing, which ultimately results in the procedural order, will usually be the first opportunity for the panel to see the advocates and hear their procedural positions. The attorneys will have a chance to briefly discuss their cases before delving into procedural matters, so a good advocate will come well prepared and ready to make a good first impression.

The procedural order addresses a number of key issues, such as the schedule for submissions, document production, and the type and length of the hearings in the case. A good advocate should recognize the opportunity to shape the order to the client's advantage. Excessive gamesmanship, however, will never impress a panel and can damage the lawyer's credibility for the remainder of the case.

The advocate should try, before the hearing, to agree to procedural stipulations with the other party. This can save time, money, and unnecessary disputes at the hearing. But whether trying

to convince opposing counsel or the tribunal, pushing for an advantageous timetable is exemplary advocacy. For example, a claimant in a dispute may want to make sure that the respondent and claimant file pre-hearing memorials simultaneously, particularly when the respondent has filed a counterclaim. This could result in the respondent not having the advantage of reviewing the claimant's submission before it is required to file its own. The respondent, on the other hand, may try to convince the panel that the memorials should be filed as far apart as possible in order to provide more time to digest the claimant's submission before being required to respond to it.

Aside from tactical timing, the advocate should take advantage of the arbitral process being generally more flexible than court litigation. In making requests at the hearing and in negotiations with opposing counsel, the advocate should think about different aspects of the arbitration that could be advantageously tweaked. For example, limiting the opening or closing arguments, allowing for expanded direct examination of witnesses, or requesting a witness conference could prove strategically useful or detrimental depending on the circumstances of the case. Many of these options are possible so long as the panel is persuaded of the advantages and reasons for doing so. Of course, this procedural advocacy continues throughout subsequent procedural hearings involving document disclosure, interim measures if any, and security for costs.

VI. DOCUMENT DISCLOSURE

Handling document disclosure properly and strategically requires knowledge of (potentially conflicting) international evidentiary laws and customs because of the divergent, and sometimes passionate, views on how document disclosure should be handled. Practitioners with international experience know well that U.S. lawyers routinely use broad-sweeping evidence gathering devices in domestic disputes while lawyers from other legal traditions may find those tactics unusual or even appalling.

Although a discussion of these differences is beyond the scope of this chapter, the important thing to note is that in international

arbitration the parties generally have the latitude to agree to almost any form of document production ranging from broad, powerful "discovery" to a "reliance" approach. That said, a general consensus has emerged in transnational disputes, and parties can usually expect that document disclosure will fall roughly in the middle of the two extremes. It would be exceptionally rare, for example, for a panel to allow for U.S.-style discovery devices, such as depositions, interrogatories, or the like. It would also be unlikely that the panel would prohibit any document disclosure at all.

Nevertheless, the experienced international advocate should view this stage of the dispute as an opportunity to advance the client's interests. A lawyer who understands all the options available can try to push for the most advantageous form of document disclosure for that particular dispute, taking into account the composition of the tribunal. Sometimes the traditional positions can be reversed. In a case involving an American respondent and a European claimant, the European party might wish to seek broad disclosure to obtain as much evidence as possible with respect to the claim. Conversely, a respondent with potentially damaging documents may push for the opposite, the use of reliance documents or very limited disclosure. An effective advocate will work to persuade the tribunal that his or her position makes the most sense.

Once the tribunal decides on the scope of disclosure, the advocate should follow the tribunal's order in good faith. Advocates should understand that when requesting document disclosure, the opposing party and the tribunal will take note of a lawyer who takes one position when asking for disclosure and then takes a contradictory position when responding to a request for disclosure.

VII. WITNESS INTERVIEWS AND WRITTEN STATEMENTS

Interviewing witnesses is a key part of developing an arbitration case. A good advocate will take the time to find the witnesses that could have a significant bearing on important factual matters in the dispute, and will then interview them to decide from whom a witness

statement should be taken. The attorney should be thinking about developing broad case themes at this early stage, and how each witness ties into the advocate's factual story. Aside from substantive matters, the attorney, not just the client, should also assess which witnesses will come across credibly at the hearing. A witness should not only provide relevant and useful testimony, but also be capable of standing up to cross examination.

When drafting the statement, it is important for the witness to limit his or her testimony to important issues and not stray beyond the facts necessary to develop the party's case. This would help ensure that the witness does not unnecessarily open too many doors for opposing counsel on cross examination. The advantages of fully developing testimony must be balanced with the risks associated with providing more opportunities for the cross examination on various issues. Additionally, the advocate should ensure that the written statements are as consistent as they can be with each other. Witness statements that present facts differently provide ammunition for opposing counsel on cross examination.

The advocate should also realize that under most rules, including the IBA Rules on the Taking of Evidence in International Commercial Arbitration ("IBA Evidence Rules"), the parties and the tribunal can agree that certain fact witnesses not attend the hearing if it becomes apparent from their written statements that their testimony will not be contested.[6] This can help streamline the process and allow the lawyer to focus on developing key fact issues. The advocate should also consider not calling certain adverse witnesses if an effective cross examination will not be possible and their presence would only strengthen the opponent's case.

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[6] The IBA Rules on the Taking of Evidence in International Commercial Arbitration (1999), Article 4.7 provides: "Each witness who has submitted a Witness Statement shall appear for testimony at an Evidentiary Hearing, unless the Parties agree otherwise."

VIII. EXPERT WITNESSES

Finding the right expert or experts is crucial. The attorney should first decide what kinds of experts will be necessary. This will depend on the facts and issues of the particular case. Nevertheless, when selecting an expert, many of the same concerns involved with selecting an arbitrator arise. The expert should be knowledgeable, respected, and of course receptive to the advocate's position (although an excessive proximity with the advocate or his/her client will undermine the expert's credibility, as discussed more fully below). He or she should also be well known in the field, having written significant publications relevant to the area of expertise for which the expert was retained to testify.

Above all, the expert should be credible. The expert, while presenting a position that benefits the advocate's client, must be – and come across as – unyieldingly scrupulous and trustworthy. The arbitrators will not be swayed, or amused, by an expert who clearly has shed his or her professional integrity for a large sum of money.

In addition, the arbitrators generally will be able to understand complex testimony, particularly if they have been picked for their expertise on the type of controversy before the panel. Nevertheless, the ability of an expert to understandably explain his opinions cannot be overemphasized. Experts will also need to be able to withstand cross examination by the opposing party and questions from the arbitrators that may come without warning – thus making the selection of a good expert even more critical.

So, in interviewing experts, their general disposition, credibility, expertise and ability to react quickly should be probed thoroughly. The selection of the wrong expert can be devastating for the development of a case.

After interviewing and selecting the right expert, the advocate should then assist the expert in preparing the expert report. A good lawyer will work with the expert to revise the expert report for clarity and to narrow the issues – of course, the attorney should not change the substance of the report as the opinions ultimately belong to the expert.

IX. WITNESS AND EXHIBIT PREPARATION

A. Fact Witness Preparation

Preparing a fact witness for an arbitration is both important and challenging from an advocacy standpoint. The manner in which witnesses are prepared for domestic litigation or arbitration in various parts of the world varies dramatically. Some jurisdictions allow lawyers to nearly "coach" the witness while others frown upon any pre-hearing contact with the witness. In international arbitration, a middle ground appears to be developing, particularly under the IBA Evidence Rules.[7] These rules allow an advocate to contact a witness before the hearing and discuss the facts of the case.

While a lawyer must take a factual witness as he or she comes, a good advocate can work within ethical bounds to bring out the best possible testimony from any witness. Some witnesses may be able to handle gamesmanship from opposing counsel during cross examination while others might prove more easily manipulated. Some may be wonderfully articulate and friendly, whereas others may come off as generally disagreeable. The advocate should assess all of these factors, and prepare the witnesses selected for the case accordingly.

To prepare the witness for cross examination, the attorney should inform the witness about the issues and the facts that he or she may be questioned about during the examination. Key documents and exhibits should be reviewed with the witness, and the witness should be prepared for the kinds of questions that opposing counsel may ask depending on the seat of arbitration and the background of the tribunal.

When preparing a witness for examination, factors such as language should also be considered. For example, if the witness speaks two languages, the advocate needs to decide in what language

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[7] The IBA Rules on the Taking of Evidence in International Commercial Arbitration (1999), Article 4.3 provides: "It shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses."

the witness should speak during the hearing. If the witness is not fluent in the language of the arbitration, it will be necessary to determine whether interpreters are needed and, if so, make arrangements accordingly. The language skills of the lawyers, the witness, and the arbitrators would all play into this determination. Also, if the witness is not available to physically testify before the tribunal on the date set for the evidentiary hearing, it will be necessary to determine whether it makes sense (and if the applicable rules allow) to have the witness examined by videoconference.[8]

B. *Expert Witness Preparation*

As for expert witnesses, the preparation suggestions above for fact witnesses apply equally. Additionally, experts should also be prepared for a "witness conferencing," a technique that is sometimes used by international arbitration tribunals to discover all the points of contention between opposing experts. During the conferencing, the experts jointly appear before the tribunal and respond to the panel's questions.

The lawyer should also discuss with the expert the possibility of a pre-hearing expert conference. Although relatively infrequent, experts from both sides can be compelled by the arbitrators under the IBA Evidence Rules, both to meet before the hearing and memorialize all the areas in which they differ and agree.[9] This is similar to conferencing and can be useful in distilling voluminous or

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[8] For an explanation on how to conduct this type of examination, *see* A. Sabater and D. Chung, "On the Air in Three, Two, One ... Witness Examination by Videoconference in International Arbitration," 59 *International Law Section e-brief/ State Bar of California,*December 2006

[9] The IBA Rules on the Taking of Evidence in International Commercial Arbitration (1999), Article 5.3 provides: "The Arbitral Tribunal in its discretion may order that any Party-Appointed Experts who have submitted Expert Reports on the same or related issues meet and confer on such issues. At such meeting, the Party-Appointed Experts shall attempt to reach agreement on those issues as to which they had differences of opinion in their Expert Reports, and they shall record in writing any such issues on which they reach agreement."

technical expert testimony down to the key issues to be covered during the hearing. Of course, if the advocate believes his experts will stack up well against those of the opponent, he may request that the tribunal adopt witness conferencing and/or pre-hearing witness meetings.

C. Exhibit Preparation

Exhibit preparation represents perhaps one of the least exciting yet most important aspects of international arbitration. In addition to selecting the appropriate exhibits from a substantive point of view, properly marking and organizing exhibits bears quite significantly on the effective presentation of a case. The advocate should strive to create an organized set of exhibit bundles with a clear master table of contents. The references to the exhibits should be consistent in all the filings. Arbitrators are presented with highly complex controversies that include voluminous supporting exhibits from both parties. The advocate should do everything in his or her power to make the digestion of these materials as effortless as possible.

A good advocate can also work with opposing counsel and the tribunal to whittle down the universe of documents to be relied upon in the case. The parties frequently submit (and tribunals oftentimes request) key-exhibit bundles, containing the selected documents upon which the parties intend to rely more heavily during the hearing. If these are not readily available and easy to follow, the advocate's points will be much diluted (if not lost) in a poorly prepared set of hearing binders or exhibits. Fewer documents will help make the entire process move more smoothly. However, even if opposing counsel will not agree on limiting the universe of documents, the advocate should always be prepared with a concise set of key exhibits as the ready availability of these documents will cause the tribunal to rely on them during the overall presentation of the case.

X. ADVOCACY AT THE MERITS HEARING

A. Generally

The merits hearing provides the advocate with the forum for delivering the case orally. Therefore, it is important that the lawyer be well-prepared, well-rested, and well-groomed before the hearing. All of these establish the advocate's credibility and professionalism. During the hearing, the lawyer should focus on developing consistent themes for the case that tie together the various witnesses, experts, and oral arguments while using a respectful but forceful style of delivery that takes into account the composition of the tribunal.

Because so much often rides on the outcome of an international arbitration, the advocate should take time to anticipate the possible surprises that seem to occur during many hearings. The lawyer should be aware that the arbitrators might interrupt at any time to ask questions, and should see this as an opportunity for effective advocacy. This can also happen during the opening or closing remarks or examination of witnesses. When asked a question, the advocate has the chance to address important issues that the arbitrators find pertinent, and to further develop the themes and arguments of the case. The advocate should also be equally prepared to handle surprises coming from opposing counsel during their oral arguments and cross examination.

B. The Opening Statement

The importance of an effective opening statement in international arbitration cannot be overstated. Humans are swayed and persuaded by good oral advocacy. This is true regardless of how seasoned they might be or from which legal tradition the arbitrators may come. Thus, preparing and delivering a good opening statement is critical. The opening, of course, must take into account the background, experience, and sensitivities of the ultimate fact finder – the Tribunal. It should give the panel a clear roadmap for the case, familiarize the

panel with the witness who will testify, and emphasize the key legal arguments. It should not be read but delivered with open candor. The length of the statement should also be considered. Some presentations are done in 30 minutes, some in 2 hours.

C. Cross Examination

Much of the action in an international arbitration unfolds during cross examination. When preparing for cross examination, the lawyer must thoroughly review the adverse witnesses' written statements along with any relevant documentary evidence relating to this testimony. The lawyer should then narrow down the subjects and themes for a witness's cross examination to those that will elicit favorable testimony – cross examination should not re-hash everything in the witness's statement; and an ineffective cross examination will merely strengthen a witness's credibility and drive home to the tribunal the points made in the witness statement. After the topics for cross examination have been narrowed, the advocate should employ the traditional common law forensic tools such as leading questions, but histrionics are to be avoided. Exhibits to be used should be prepared in advance and sufficient copies available. Much momentum can be lost with a witness when questions are interrupted because exhibits are not to hand or time must be taken to find extra copies. Properly done, cross examination can be one of the most effective forms of advocacy.

D. Closing Argument

Often the oral closing argument, if one is allowed, will be shorter than the opening. It is also more likely to be interrupted by the arbitrators with their questions. Aside from the post-hearing memorials, if any, the closing statement probably will be the last chance for the arbitrators to understand the advocate's position in the case. It will also be the last chance for the advocate to connect with the panel, and a lasting impression can prove invaluable.

For all that, as was touched upon in the section discussing the procedural hearing, in certain circumstances the advocate may want to try to avoid having a closing statement immediately after the hearing. Of course, the tribunal has the ultimate authority here, but the advocate may try to convince the panel to do away with an oral closing, for example, the witness examinations were effective and the advocate would like to end on a high note. Conversely, closing argument may give the advocate the opportunity to repair damage to the case during the witness testimony – as with other advocacy points, the correct answer will vary on the particular case.

XI. SETTLEMENT NEGOTIATIONS

At any stage of the arbitration process, the parties may attempt to settle a case. An effective settlement negotiation demands just as much advocacy, skill and tactical consideration as does a hearing. During this process, the lawyer must vigilantly advocate for the client's interests just as in any other phase of the dispute. The settlement negotiation might take place informally between attorneys, the parties and their attorneys, or in a formalized discussion with either a highly experienced mediator, or in some jurisdictions such as China or Germany, with the tribunal members managing the process. The decision on how to invoke various settlement discussions and the way they are structured, can have a large impact on any case. Eventually, the parties may have their agreement recorded and approved by the arbitral tribunal in a so-called "award by consent," which is permissible under most international arbitration rules.

The attorney should get a clear understanding of the client's objectives and limits with respect to a settlement. It makes little sense for the attorney to enter settlement negotiations without the necessary knowledge and authority. The advocate should also have a clear understanding of the strengths, weaknesses, and pressure points of both sides. This will bear on how hard the lawyer can and should push for the client's demands. Once the attorney is armed with the right knowledge, the lawyer should then press for the client's objectives as vigorously as possible without risking the collapse of

negotiations. The lawyer should also take care not to give up too much ground in the hopes of coming to a quick resolution.

Once negotiations have ended and a satisfactory result has been reached in a memorialized agreement, the advocate should take the final steps in securing the client's interests in the dispute. For example, the advocate may want to make sure that the agreement is incorporated into an award for enforceability purposes and that the parties sign all the appropriate settlement agreements.

XII. CONCLUSION

Effective advocacy in an international arbitration dispute requires a lawyer to zealously advance the client's interests at every step in the dispute process. Advocacy does not begin at the merits hearings but encompasses all aspects of the case. The effective advocate who pays attention to the many ways that advocacy can be deployed will maximize the chances of achieving a favorable result for the client.