"The Art of Advocacy in International Arbitration[1]"

(Paper abstract)

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"...good advocacy skills today are even more important in arbitration than in court litigation as the legal guidelines are much more opaque in arbitration and there are not many procedural constraints involved in arbitration. The strict rules against hearsay and other grounds for inadmissibility that are often found in State Courts do not strictly apply in international arbitration[2]."

1. No general worldwide consensus of the function and meaning of advocacy in international arbitration

There is no true consensus ad idem on the meaning and function of the advocacy process in international arbitration. It is a generally known fact that the approach and reliance of the skills of an advocate in cross-examination and general advocacy in both arbitration and state courts is more prevalent in Common law countries because of the development of the legal systems and overall adversarial approach to how dispute resolution is carried out in contrast to the inquisitorial systems of the Civil Law countries.

However, even if one were to look beyond the Common-Civil Law divide itself, and just we look at the approach taken by Civil Law world arbitrators, we see that they are also divided in their views of what is the meaning and function of advocacy[3].

2. Skilful Advocacy can be more important than an impeccable knowledge of the law in International Arbitration

As strict procedural rules that govern court litigation are not adopted in the international arbitration process, this has meant that the concepts of disclosure or discovery are not

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[1] This is a summary of a paper that is to be presented on the 15th October 2007. Much of the paper will be based on the author's forthcoming "*Advocacy and Cross-Examination*" of *The Leading Asian Arbitrators Handbook* (Juris Publishing 2007), Chapter 12 at 313.

[2] Supra Footnote 1 at page 314.

[3] Supra Footnote 1 at page 314 and see R. Doak Bishop, "*The Art of Advocacy in International Arbitration*", Juris Publishing Inc (2004) at pages 136, 152 and 195.

strictly adhered to in international arbitration[4]. In fact Article 9(1) of the IBA Rules provides that "*The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.*" This essentially allows great leeway to an arbitral tribunal to consider the acceptance or rejection of evidence that would generally not be admissible in state court litigation, where such admission were to fail any of the strict procedural rules that are provided in the appropriate court rules or "white books", as the case may be. In such a scenario, one can see the great importance of the oral and written advocacy skills of an advocate in international arbitration.

3. The importance of Cross Examination in Advocacy

The taking of evidence in chief in international arbitration is based on written witness statements. Due to the emphasis on the written word, good cross examination techniques are now even more important in assisting counsels to tip the balance between winning and losing a case. Despite the divergence in theories as to the meaning or function of cross-examination, it is now almost universally accepted that the main purpose of cross-examination is to weaken or discredit the evidence that has been given by opposing witnesses. Skilled counsel also use cross-examination techniques to obtain admissions from opposing witnesses to provide favourable evidence that can be used by the cross-examiner for submissions.

4. Techniques in Cross-Examination

Leaving aside the fact that parties in certain situations tend to gravitate to limited time arbitrations, it is also important for the advocate to "*....decide what are his strongest points on which to focus his case and the attention of the tribunal*[5]"

A good preparation and understanding of the facts of the case at hand is the first and most important step to building up a successful advocacy strategy for the arbitration.

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[4] See, the IBA Rules on the Taking of Evidence in International Commercial Arbitration (1999)

[5] Supra Footnote 1 at page 316.

The preparation will enable the advocate to have a good understanding of both the facts and the applicable principles of law and this will assist him to prepare his examination in chief through written witness statements. The preparation process will also assist the advocate in preparing his mind on how to conduct the cross-examination effectively and systematically.

"*At all times, the advocate must remain in control of the pace of the cross-examination and keep the witness under a tight parameter ....*[6]"

An advocate should not cross-examine unless he has no choice and he has weighed the consequences of cross-examining a witness on various aspects of the case. A witness whose credibility survives hostile cross-examination and who has been successful in repeating what was said in his examination in chief, would have strengthened his standing in the minds of the arbitral tribunal because he has been consistent under intense cross examination attacks. In addition, such unsuccessful cross examination by an advocate who persists on a futile quest to try to make a witness change his mind on an unassailable issue would simply irritate the arbitral tribunal and focus the tribunal to accept the evidence of the opposing witness.

It is advisable for counsel to sum up and condense the documents complicated and voluminous documents accurately into a brief, eloquent and manageable format for the tribunal. A proper and accurate presentation of factual material and a correct presentation of relevant legal principles backed up by relevant authorities will generally impress upon the arbitral tribunal[7].

Counsel should select and limit cross-examination to relevant areas only and should refrain from providing inaccurate or distorted presentations of clear facts. In addition, an advocate should avoid excessive repetition of points in cross-examination of witnesses as well as general advocacy.

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[6] Supra Footnote 1 at 318.
[7] Supra Footnote 1 at 319.

A good presentation as well as a professional demeanor by counsel will assist the tribunal in absorbing facts and relevant principles greatly as opposed to a rude or emotional presentation. The general advocacy style and cross-examination should be done clearly, logically and in an orderly manner to assist the arbitral tribunal to understand the case faster[8].

Where dealing with an expert witness, it would be useful to focus on attacking selected key factual areas that cannot easily be refuted by the expert without causing some damage to the expert witness' reputation for appearing to be truthful or neutral.
An advocate who knows the background of the arbitrators may have the advantage of knowing how best to prepare his case and how best to address the tribunal. In such cases, it may be useful for the advocate to prepare and cater his oral and written presentation techniques in a way that would best suit the arbitral tribunal.

Lawyer counsels in particular should bear in mind that international arbitration will generally not impose strict practice directions onto counsels such as the coaching or preparation of witnesses. The lack of any universal ethical guidelines in international arbitration as to how much interaction a counsel may have with his witness is often a difficult issue to deal with[9]. Whilst lawyers may have grown accustomed to Bar rules that prohibit or limit excessive coaching of witnesses, such ethical constraints are not present to non-lawyer advocates.

However, it can equally be said that lawyers may be perceived to have an advantage over non-lawyers in getting their points across to the tribunal if they have properly harnessed the many years of litigation skills and advocacy as practiced in the courts. Weaker advocates who are not gifted with the power of speech and oratory persuasion skills may find it helpful to employ visual aids and images to increase the persuasive power of their arguments[10].

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[8] Supra Footnote 1 at 320 to 321.
[9] In reality, the practice directions and ethical regulations of different jurisdictions are often very different and counsel have to be aware and prepared for the same.
[10] Supra Footnote 1 at 325.

If one may sum up what are good advocacy skills in a nut shell, a possible summation could be an effortless presentation of both the facts and the supporting law of an advocate's case theory, and if the same could be done in a simple, coherent and persuasive manner. A good commitment, solid preparation, thorough strategic analysis and a certain degree of flair in presentation may well assist an advocate in tipping the scales of justice in his favour.

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