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ADVOCACY IN INTERNATIONAL ARBITRATION

PERSUASION

Contents

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Introduction

1. The most fundamental skill of an advocate is the ability to persuade the tribunal hearing the dispute that the case contended for by the party whom the advocate represents should be the case that succeeds.
2. International arbitrations throw up more difficulties in the persuasion process than most other cases.
3. Arbitrators are drawn from a diverse range of cultural; linguistic; legal; societal; life situational and geographic backgrounds.
4. In Asia particularly, the diversity is apparent. Western colonialism in Asia brought with it Western legal systems that influenced and integrated with the local legal systems to produce harmonised systems of dispute resolution, impacted by cultural and societal behaviour.
5. Arbitration as a method of dispute resolution has been readily used in Singapore and Hong Kong for many years. Other Asian countries such as Vietnam; the Philippines and Thailand have only recently started to use arbitration.
6. There are significant cultural gaps within Asia itself. For instance, aspects of Taoism and Confucianism determine how East Asians behave and communicate socially and in a commercial context. The influence of the structured, hierarchical societies that require propriety and virtue defines relationships in business; family and wider society, and emphasises the need to defer to those higher in the hierarchy, which affects the reluctance of East Asians to stand up to authority.
7. Before Western influence became stronger, South Asians of Hindu; Muslim; Buddhist and Sikh religions acted similarly.
8. The cultural behaviour changes constantly, influenced by the environment in which communication occurs. This environment is created by demographics including education; religion and ethnicity, and local or national norms together with internal factors such as economics, which produce a better educated and more conscientious person.[1]

[1] More reading on the impact of the cultural differences is available at Christopher Lau, 'The Asian Perspective and The Practice of Advocacy' in R. Doak Bishop and Edward G. Kehoe (eds), *The Art of Advocacy in International Arbitration* (Juris, 2nd ed, 2010), 565; H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (Oxford University Press, 5th ed, 2014).

9. Fundamental to the process of persuading any tribunal is the ability of an advocate to communicate with the tribunal. It is essential to build a rapport with the tribunal by sharing common ground. Sincerity and genuineness are important:

> "*The indispensible requirement for a successful attempt to persuade somebody of something is sensitivity to the occasion and to the audience, an observance of the requirement of courtesy, and a tactful appreciation of the likely response of the audience to particular lines of argument.*"[2]

10. This paper explores the skills required for an advocate in international arbitrations, with particular emphasis on the aspects of communication and persuasion that are needed to be a successful advocate in an international setting.

What is Advocacy

11. Advocacy is the art of persuasion by communication. Sir Owen Dixon described it as "tact in action".[3]

> "*All of us engage in one form of advocacy technique or another every day. Young children persuade their parents to buy them sweets, teenagers present arguments as to why they should be allowed to borrow the family car and parents themselves use sophisticated techniques on each other to influence the choice of holiday destinations, car salesmen are adept at convincing that the vehicle in their showroom is the one we should buy.....*"[4]

12. Never is that description more apt than in international arbitration, in which the diversity of backgrounds of the tribunal member(s) makes the process of persuading the tribunal complex and often difficult.
13. It is for that reason that the language of some advocacy before particularly diverse tribunals sounds similar to the language of diplomacy.
14. Most, if not all, arbitrations tend to be adversarial in nature rather than inquisitorial.

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[2] The New South Wales Bar Practice Course – Advocacy – The Honourable A.M. Gleeson AC Chief Justice of the High Court of Australia

[3] Sir Owen Dixon, 'Address upon the occasion of first presiding as Chief Justice of the High Court of Australia at Melbourne' on May 7, 1952 in Woinarski (ed), *Jesting Pilate and Other Papers and Addresses by the Right Honourable Sir Owen Dixon* (Book Company Limited, 1965), 251.

[4] Reflections on Advocacy and the Art of Persuasion; Martin Hunter [1995] P275

15. In an adversarial context, where cases involve competing facts in which each side contends for a version of facts upon which the decision should be based, the advocate's role is to deal with the facts and submissions with skill and within the bounds of the advocate's ethics, with the goal of persuading the tribunal to accept the version of events and legal consequences that best suit the case of the person whom the advocate represents. The system is structured so that parties are required to gather and present the evidence, and the tribunal decides whether the party that makes the claim has proved its case to the required standard.
16. In the inquisitorial system, the Court/tribunal gathers the evidence, and therefore, the role of the advocate is to some extent reduced.
17. A number of matters need to be kept in mind in the context of the apparent adversarial nature of international arbitrations:
    - 17.1 for an arbitration to occur at all, the parties have agreed to resolve their dispute by a less formal alternative dispute resolution process that is essentially co-operative; flexible and bipartisan;
    - 17.2 the parties may be in an ongoing commercial relationship and often the purpose of the arbitration is to resolve a dispute that has arisen within that ongoing relationship; and
    - 17.3 the advocate's strategy needs to be tailored to the circumstances, including the relationship between the respective parties and whether preserving the relationship is an essential outcome of the arbitration or whether the outcome is to be directed towards terminating the arrangement and achieving a significant award of compensation.
18. These matters are dealt with more fully below under the heading "Strategy".
19. How does the Advocate Persuade? The Penguin Dictionary of Psychology defines persuasion as "*a process of inducing a person to adopt a particular set of values, beliefs or attitudes*".[5]
20. Fundamental to the process of persuasion is communication, oral, written or both, together with an understanding of basic psychology and supported by a detailed knowledge of the factual material.

[5] Arthur S. Reber and Emily S. Reber, *Penguin Dictionary of Psychology* (Penguin Books, 3rd ed, 2001), 529.

21. Written advocacy is particularly important in international arbitration, and is dealt with in more detail below.[6]
22. Often some or all of the arbitrators in an international arbitration do not have the language of the arbitration as a first language.
23. That makes communication an exercise that needs to be carefully considered by advocates.
24. Irrespective of how it is put, the message that the advocate conveys needs to be understood by the tribunal.
25. The more that your message resonates with the tribunal as "common sense" or unassailable, the more likely the tribunal is to identify with and therefore accept it.
26. If your proposition strikes the listener as plain common sense, the more likely you are to persuade the audience.
27. As touched upon at paragraph 9 above, rapport and sincerity are important. They are achieved by creating a perception of commonality or common ground.
28. Further, the message must be memorable. If the tribunal cannot recall what the advocate said or wrote at the time it comes to make its decision, the advocate is unlikely to succeed in persuading the tribunal to his or her point of view, and the decision is likely to be against the advocate's client.
29. The focus of the advocate should be to structure and present the arguments in a way that gives maximum assistance to the tribunal in remembering the points being made.
30. Persuasion is "a process of inducing a person to adopt a particular set of values, beliefs or attitudes".[7]
31. The persuasion process has three elements:
    - 31.1 the advocate cannot coerce the tribunal in order to persuade it;
    - 31.2 the case put by the advocate must be credible; plausible and logical, and be supported by the facts and the law; and
    - 31.3 the case is more likely to be accepted by the tribunal if it is put positively and is not contrary to the basic beliefs of the tribunal. That is, meet the criteria in paragraph 33 below.

[6] See paras 91 to 117.
[7] The Penguin Dictionary of Psychology

32. A number of factors are used in the process, both rational and non-rational, including:

    32.1 credibility of the argument and of the person delivering it; and

    32.2 persuasive communication, including the manner of delivery.

33. These in turn are influenced by:

    33.1 external aspects, such as:

        33.1.1 the message itself;

        33.1.2 the arguments presented;

        33.1.3 the credibility of the source;

        33.1.4 the medium used - oral or written or both; and

    33.2 internal aspects personal to the recipient of the message, such as:

        33.2.1 the person's original beliefs; and

        33.2.2 the person's credulity.

34. Original beliefs and credulity are personal things, driven by a person's age; place of birth; life experiences; education; training and the legal and physical environment in which the person received his or her influences.

35. The process of achieving a persuasive argument is, of course, easier when the advocate sets out to persuade a tribunal with whom he or she shares a similar language and background, and common life experiences.

36. It becomes more difficult and requires more careful consideration if the tribunal has a much wider and more diverse background, be it cultural or otherwise, and/or if a member comes from a legal system that is significantly different from that of the advocate or the other tribunal members.

37. It is important to bear in mind the diversity of opinions in different legal systems:

    37.1 an arbitrator from a civil system may have the view that cross-examination is less important than a document or set of documents, despite a common law lawyer's desire to cross-examine about the effect or true meaning of the document.

    37.2 a civil lawyer may have the view that third party document production is pointless or a waste of costs, whereas the common law lawyer has

the view that documents are important to determine credibility and substantive issues in the arbitration.

37.3 a civil lawyer may not approve of the advocate speaking to the witnesses before the arbitration as part of preparation, whereas for a common law lawyer, interviewing witnesses is a vital part of the preparation.

38. It is therefore of critical importance to understand, as far as one can, the background; attitude and nuances of the arbitrators. In other words, know your audience.

39. Jan Paulsson, in a chapter in *The Art of Advocacy in International Arbitration*, raises the point that you should also know and understand your opponent as best you can.[8]

Know Your Audience

40. In most advocacy courses, knowing your audience is one of the fundamentals taught.

41. Because advocacy is a personal thing, it is important to know the tribunal before whom you are appearing. It is not necessary to know the person on a personal level, but it is important to know the person's background and what is likely to be acceptable to that person and what is not.

42. Understanding the tribunal gives you a certain insight into the internal aspects of the persuasion process set out in paragraph 33.2.

43. Even if the arbitrators come from a different country but the same legal system, it is important to understand this system and the background of the arbitrators.

44. The procedural differences that are likely to be understood by the arbitrators and the expectations that the tribunal is likely to have are all part of the advocate's preparation for presentation of an international arbitration.

45. The advocate needs to consider:

45.1 Is the audience likely to accept the argument?

[8] Jan Paulsson, 'Cultural Differences in Advocacy in International Arbitration' in R. Doak Bishop and Edward G. Kehoe (eds), *The Art of Advocacy in International Arbitration* (Juris, 2nd ed, 2010).

45.2 How is the argument being delivered? For example, judges and experienced arbitrators generally do not like to be lectured about the law.

46. A case may require argument on a point of law, but a judge seeks assistance rather than a lecture. It must be of direct relevance to the dispute that the judge is required to decide. The same is true in arbitrations.

47. To effectively consider these matters, the underlying culture of the tribunal needs to be understood by the advocate.

48. Culture has various meanings:

> *"Culture is the collective programming of the mind which distinguishes the members of one category of people from another."*[9]
>
> *"Culture is the shared knowledge and schemes created by a set of people for perceiving; interpreting; expressing and responding to the social realities around them."*[10]
>
> *"A culture is a configuration of learned behaviours and results of behaviour whose component elements are shared and transmitted by the members of a particular society."*[11]

49. The variety of content that could make up the arbitrational members' culture as shown by these broad meanings highlights the extent of the potential cultural differences.

50. Culture contains many aspects. Without intending to be exhaustive, these include:

50.1 the way in which a problem is analysed by a person;

50.2 the response by a person to particular stimuli;

50.3 the consequence of the person's analysis; and

50.4 the way in which a person interprets and/or perceives particular conduct.

51. As a result, the advocate needs to bear in mind that what is attractive to one arbitrator may be an anathema to another.

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[9] Geert Hofstede, 'National Cultures and Corporate Cultures' in L. A. Samovar and R. E. Porter (eds) *Communication between Cultures* (Wadsworth, 1984), 51.
[10] J. P. Lederackh, *Preparing for Peace: Conflict Transformation Across Cultures* (Syracuse University Press, 1995), 9.
[11] Ralph Linton, *The Cultural Background of Personality* (Appleton-Century Co, 1944), 32.

52. For the purposes of knowing the audience, it is important to have at least a superficial knowledge of the legal system from which the arbitrator(s) come(s).
53. For instance, as touched on above, there is a significant difference between civil and common law jurisdictions regarding witness evidence, particularly in commercial cases.
54. On the one hand, common law cases involve a careful consideration of evidence, be it oral, or written as affidavits or witness statements, which is usually tested by detailed cross-examination of the witness.
55. Production of affidavits or witness statements involves a detailed preparation or "proofing" of the witness for trial, with the cross-examination conducted by advocates trained in both processes.
56. In civil law jurisdictions, on the rare occasions that witness statements are admitted, they are given very little weight.
57. Oral evidence at a hearing involves an inquisitorial process with the court asking most of the questions.
58. International arbitration is different to civil system commercial court proceedings in that the *IBA Rules on the Taking of Evidence in International Arbitration*; the *UNCITRAL arbitration rules*; the *AAA International Centre for Dispute Resolution International Arbitration Rules* and the rules of the London Court of International Arbitration and the International Chamber of Commerce all provide for the use of witness statements in arbitration proceedings.
59. International arbitration advocates are usually more familiar with the preparation of witness statements and cross-examination, and civil and common law arbitration practice is harmonising. However, the Bar rules in some jurisdictions prohibit advocates from interviewing prospective witnesses.

Communication

60. The ability to effectively communicate with the tribunal, both orally and in writing, is vital.
61. It is a skill that can be learnt by addressing; studying and analysing its component parts.

62. Good communication skills and techniques play a necessary part in every aspect of acting in international arbitrations, and can be used; modified and varied for any situation.
63. Communication is a complex process with a number of stages. If there is a failure at any one or more of these stages, communication can be lost and the failure is likely to produce a misunderstanding.
64. The stages in the communication process are:
    - 64.1 the sender determines what he or she seeks to communicate;
    - 64.2 the message is then encoded using the personal experience; cultural background and other aspects of that person;
    - 64.3 the message is then sent using words/silence/body language;
    - 64.4 the receiver then decodes the message, however he or she may be a person with a totally different experience; background and culture with which to work.
65. There are three levels at which we may communicate:
    - 65.1 object: talking about tangible material things;
    - 65.2 experience: common experience between the speaker and the listener;
    - 65.3 concept: speaking in terms of concept or broadly.
66. At higher levels of abstraction, ideas increase and the reality received decreases, creating the possibility that rapport or communication will be lost.
67. The audience of an advocate is usually looking to make findings of fact or to determine whether there is a reasonable doubt, rather than looking at notions of truth or seeking to discover what really happened.
68. The most appropriate approach to communication therefore must be taken.
69. In order to communicate effectively, it is essential to:
    - 69.1 clearly identify who the audience is (discussed above at paragraphs 40 to 59);
    - 69.2 identify the purpose of the communication;
    - 69.3 use the vocabulary that is appropriate in the circumstances; and
    - 69.4 bear in mind the outcome that is to be achieved at the end of the communication.

Purpose of Communication

70. Trite though it may be, in a contested hearing of substance, the advocate must have a purpose or clearly defined goal.

71. In both a positive case and a case that involves dismantling the opponent's case, the purpose is to create in the mind of the decision maker(s) a reality, either actual or legal or both, from events that occur in another time and place.

72. The components and tools that the advocate use are words, oral and/or written; voice; movement and images created by witnesses and other forms of evidence such as admissions and evidentiary aids, including photographs; recordings; charts and re-enactments.

73. The advocate needs to know four things:
    - 73.1 the message that needs to be conveyed to build a reality;
    - 73.2 how the message will be constructed;
    - 73.3 the way the message will be conveyed; and
    - 73.4 what the audience will do with the message.

74. It is what the audience does with the message that is most important.

75. The advocate is attempting to create in the mind(s) of the audience a sympathetic approach to the message they convey, however **it is the receiver of the message who determines the persuasive effects of the communication.**[12]

76. In his work on rhetoric, Aristotle identified three primary means of persuasion:
    - 76.1 ethos, an appeal to the audience based on the speaker's character, such as their knowledge or expertise;
    - 76.2 pathos, an appeal to emotion; and
    - 76.3 logos, an appeal to reason or logic.

77. The traditional view of rhetoric divides an argument into five parts:
    - 77.1 invention, the process of finding arguments for the speech;
    - 77.2 arrangement, the organisation of the speech;
    - 77.3 style, the study of the language itself;
    - 77.4 memory, the study of techniques and memorising the content;

[12] The New Rhetoric: A Treatise on Argumentation (Notre Dame: UND1969)

77.5 delivery, the study of techniques for managing the voice; gesture or non-verbal aspects of the speech.

78. It is generally accepted that arbitral advocates need to employ the classic rules of:

78.1 primacy;

78.2 recency; and

78.3 repetition,

all of which psychologists have confirmed are critical to the functioning of the human brain.

79. The task of advocates in international arbitration is made more difficult by the diversity of the decision making pool of arbitrators.

Primacy, Recency and Repetition

80. Generally known as the "order effect" the primacy/recency effect in recalling information are important matters in the persuasion process.

Primacy

81. The primacy effect in communication is the concept that the receiver of the message will tend to remember the first few ideas conveyed, rather than those in the middle.

82. An unsated assumption by most receivers of information is that the items at the beginning of a series of messages are of greater importance than those conveyed later.

83. The primacy effect works because the listener is more likely to be paying attention at the commencement of the communication than later, either because the listener starts to lack concentration or because the listener is processing the information given earlier in the communication.

84. *"The phenomenon is said to be due to the fact that the short term memory at the beginning of whatever sequence of events is being presented is far less "crowded" and that since there are fewer items being processed in the brain at the time when presented than later, there is more time for rehearsal of stimulus which can cause them to be transferred to the long term memory for longer storage".*[13]

[13] "Primacy Effect" psychology http://psychology.wiki.com/wiki/primacyeffect

Recency

85. The recency effect is the conclusion. The listener tends to remember what is communicated last. The recency effect has the most effect in repeated messages when there is a delay between messages.
86. The primary/recency effect then is that information delivered at the beginning (primacy) and at the conclusion (recency) of a communication is better retained than in the middle.

Repetition

87. Repetition used infrequently and strategically can make particular points memorable but must be done without being obvious or repelling the audience.

Strategy

88. A primary consideration is the relationship between the parties.
89. Consideration needs to be given to the relationship both before the dispute the subject of the arbitration arose, and what it is going to be like after the arbitration, particularly in the event that the moving party succeeds.
90. Consideration then needs to be given as to what the respective parties hope to achieve in the arbitration, such as preserving their relationship.
91. Following from that and given the relationship between the parties, the question arises of whether it is within the interests of the moving party to initiate an arbitration at all.
92. Considerations that should be understood include:
    - 92.1 whether the commercial relationship between the parties needs to be preserved;
    - 92.2 the strength of the moving party's case;
    - 92.3 whether the potential outcome justifies the expenditure of significant amounts of costs;
    - 92.4 the ability of the opponent to comply with the likely orders of the arbitration, that is, will a large award simply result in the respondent

being wound up with minimal distribution available to the moving party following the expenditure of significant costs;

92.5 the strength or weakness of the defence of the respondent;

92.6 whether there are documents available to establish the facts contended for by the moving party, or whether the documents strengthen the defence of the respondent;

92.7 what, if any, interim measures are required;

92.8 whether the clients are appropriate for arbitration;

92.9 whether an award is likely to be enforced in the case of investor/state arbitration against the host state;

92.10 whether the arbitration can separate breach/liability on the one hand and damages on the other (bifurcation);

92.11 how submissions are to be delivered, that is written or orally; and

92.12 how the evidence is to be delivered and whether the advocate is able to speak to witnesses.

93. Notice may be necessary given the arbitration clause or the investment treaty. Consideration should be given to serving a comprehensive and persuasive notice, with a view towards attempting to informally resolve the dispute.

94. Next, preparation of the arbitration before proceedings are commenced begins.

95. The advocate should endeavour to achieve the most experienced arbitrator(s) as possible. If the client has power to nominate an arbitrator, then considerations such as the arbitrator(s)'

95.1 background;

95.2 special expertise in science; engineering; finance or otherwise;

95.3 cultural background; and

95.4 'track record',

need to be evaluated against the case theory and the outcome that the party hopes to achieve.

96. Similar considerations apply to the arbitral procedures that are to be used in the arbitration to ensure that the most suitable arbitrator(s) are appointed.

The Tribunal

97. The parties to the dispute first have an opportunity to determine how the arbitral tribunal is to be constituted.

98. Often, the parties will each have an opportunity to nominate an arbitrator, with the appointed arbitrators then agreeing upon a chairperson, although in institutional arbitrations, the arbitral institution may appoint the chairperson.

99. In the absence of agreement between the parties through an arbitration clause on who is to be the chairperson or who are to be the members of the arbitral tribunal, the governing law of the arbitration will apply its own rules to facilitate the appointment of the chairperson or the whole tribunal.

100. The chairperson will often not be of the same nationality as any party[14] and will have the deciding vote if the party nominated arbitrators disagree.[15]

101. Because the chairperson has the casting vote, his or her opinion as to the result will determine the outcome of the arbitration if the party appointed arbitrators do not agree. The chairperson will usually lead the conduct of the arbitration; the drafting of the award and the manner in which the award is delivered.

102. The influence of the chairperson is crucial to the determination of the dispute.

103. Therefore, it is important for the advocate to be aware of:

103.1 the manner in which the tribunal has been appointed; and

103.2 the comparative importance of the chairperson in both the processes of the arbitration and the substantive determination of the dispute.

104. In selecting an arbitrator, it is necessary to consider, among other matters:

104.1 the potential arbitrator's expertise in the industry in which the arbitration/dispute takes place;

104.2 whether they are a black letter lawyer or factual arbitrator; and

104.3 their connection to the jurisdiction in which either the dispute arose or the breach giving rise to the dispute occurred.

105. It is a common practice to interview prospective arbitrators. Most lawyers blanch at the idea of ex parte communication with arbitrators.

106. As the pool of potential arbitrators increases and diversified, the need to use this process increases.

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[14] See for example LCIA Rules Article 6

[15] See for example LCIA Rules Article 23.6; LCIA Rules Article 25.1

107. The Chartered Institute of Arbitrators has developed *Practice Guideline 16*, which sets out recommended procedures for interviewing prospective arbitrators.
108. The Aksen Rule is described by Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 2nd Edition at 4/50.
109. Redfern and Hunter are mindful however that there is a distinction between the general sympathy or predisposition of a particular arbitrator and a positive bias or prejudice.
110. Bias in favour or prejudice against the party involves a willingness to decide a case in favour of the appointing party regardless of the merits or without critical examination of the merits.[16]
111. *Guideline 16* defines what may not be discussed during an arbitrator interview either directly or indirectly, for instance:

    "1. the specific circumstances or facts giving rise to the dispute;

    2. the positions or arguments of the parties;

    3. the merits of the case."

Persuading the Tribunal

112. Invariably, an advocate speaks in his or her first language, and has a "set" vocabulary and style of speaking and writing.
113. However, that position needs to be modified according to the conditions in which the communication is taking place to ensure the message is received.
114. When there are multiple complex issues to be resolved, a single decision maker may be responsive to one type of argument and evidence as to one issue and a different type of argument and evidence as to another issue.
115. Each decision maker has a different set of perceptions and values. When there are multiple decision makers, the way an advocate presents his or her evidence and argument may need to differ from one advocate to another.
116. An argument or evidence that an advocate believes is persuasive may only sway one of the three decision makers and may be rejected by the others.

[16] See Doak Bishop and Lucy Reed in Practical Guidelines for Interviewing Selecting and Challenging party appointed Arbitrators in International Commercial Arbitration; Arbitration International Vol 40 No. 4 at 395

117. Often the advocate must attempt to persuade an arbitrator who is reluctant to accept the advocate's argument, but also find a way of continuing to hold the attention of the arbitrator who is accepting of the argument so that this arbitrator may persuade the other arbitrators during deliberation.

118. It is important for the advocate:

118.1 to look for signs that members of the tribunal are receiving identical messages in different ways or rejecting what is otherwise strong evidence;

118.2 to try to find ways of persuading obviously non-receptive arbitrators;

118.3 to try to arm the favourable arbitrator with sufficient evidence; and

118.4 to assist restricting an argument in an attempt to persuade an unfavourable arbitrator.

119. There are generally two ways to measure whether the arbitrators are receiving the message:

119.1 judge the quality of the communication by comparing the actual communication to its purpose; and

119.2 observe whether the recipient of the communication behaved in accordance with the purpose of the communication.

120. The advocate must not be fooled into assuming that, because one arbitrator appears to be favourable, the others are as well. It is essential to continue monitoring the arbitral panel by looking at all facets:

120.1 their response;

120.2 their body language; and

120.3 cultural aspects.

121. A successful advocate must be able to persuade both orally and in writing. The techniques are different, but each involves a form of communication that the advocate needs to master. As part of the communication process, it is important for the advocate to build a rapport with the audience.

122. It is also important to understand the different ways people, such as arbitrators and judges, receive information.

123. There are three basic methods by which information is received:

123.1 orally, ie by hearing it;

123.2 reading it; and

123.3 hearing it, and then writing it.

124. Some arbitrators make copious notes. Others make no notes at all and rely on reading the transcript. Some make short jotted notes as 'triggers'.

125. Some receive information better from the left side and some receive information better from the right, some orally and some by making eye contact and continuing to do so from front on.

126. Those nuances can be difficult to identify in the communication process.

127. It is important to understand the physiological basis of this process.

128. Information is received and sent by the brain by neural pathways on two levels:

128.1 surface structure; and

128.2 deep structure.

129. Surface structure is what a person observes through the five senses:

129.1 hearing;

129.2 sight;

129.3 touch;

129.4 smell;

129.5 taste.

130. These include:

130.1 language (hearing);

130.2 tone (hearing);

130.3 body language (seeing);

130.4 visual images and gestures (seeing).

131. The information processed through the surface structure pathway is factual data only. The surface structure pathway gives no meaning or emotional value to the observation data.

132. The meaning or emotional value to what is observed is processed through the deep structure pathway.

133. The deep structure pathway contains the person's experiences; values; biases; prejudices; dreams and beliefs.

134. The difference between a proposition that is posited by an advocate and the images that the proposition generates in the mind of the arbitrator represents

the difference between the surface structure/deep structure dynamic that is so critical in advocacy in international arbitration.[17]

135. At the heart of an arbitration is the image produced by the advocate's words in the mind of the arbitrator from all its elements including:

135.1 opening and closing addresses; and

135.2 oral and written evidence,

which combine to produce a case that is persuasive for the arbitrator(s) to make a determination in favour of one party or the other.

Oral Advocacy

136. *"Once the tribunal is selected, it becomes the object of persuasion, and its identity should influence the parties' every step. The style of presentation which English and European law often find persuasive is a measured and mutual tone which explains a party's case in a clear, concise, accurate, reasonable and authoritative way."*[18]

137. An argumentative and florid "over the top" style distracts and is less persuasive.

138. For many arbitrators, *"rhetorical flourishes are to be avoided, not only because elaborate language tends to be unpersuasive, but also because…it tends to be difficult for non-English speakers to follow…"*[19]

139. Understated and unclear language can cause the message to be missed entirely.

140. The tribunal members':

140.1 background;

140.2 life experiences;

140.3 legal background; and

140.4 cultural characteristics,

impact on the resolution of transnational dispute in a significant way.

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[17] Richard C. Waites and James P. Lawrence 'Psychological Dynamics in International Arbitration Advocacy' in R. Doak Bishop and Edward G. Kehoe (eds), *The Art of Advocacy in International Arbitration* (Juris, 2nd ed, 2010), 76.

[18] Peter Leaver and Henry Forbes Smith, 'The British Prospective and Practice of Advocacy' in R. Doak Bishop and Edward G. Kehoe (eds), *The Art of Advocacy in International Arbitration* (Juris, 2nd ed, 2010), 473, 479.

[19] Peter Leaver and Henry Forbes Smith, 'The British Prospective and Practice of Advocacy' in R. Doak Bishop and Edward G. Kehoe (eds), *The Art of Advocacy in International Arbitration* (Juris, 2nd ed, 2010), 473, 480.

141. As arbitrators from more diverse backgrounds enter the system with English as a second, third or even greater language, it is necessary to tailor the vocabulary used during the communication to the audience, so that where, for instance:

    141.1 the language of the arbitration is English;

    141.2 one arbitrator has English as a first language;

    141.3 one arbitrator has English as a second language; and

    141.4 one arbitrator has English as a third or fourth language,

    the entire tribunal understands the rhetoric and communication put forward.

142. It is necessary to adopt vocabulary and communication methodology that, on the one hand, includes the person for whom English is a third language, and, on the other hand, ensures that the language is neither patronising to or is so basic as to "lose" the arbitrator whose first language is English.

143. That includes:

    143.1 speed of delivery;

    143.2 pronunciation/diction;

    143.3 the language used;

    143.4 body language;

    143.5 mannerisms;

    143.6 eye contact.

144. The person for whom English is a second language is usually concentrating very hard on what is being said because it may not be a natural process for that person, and so anything that breaks the arbitrator's concentration on the message being delivered, such as poor body language; unnecessary gestures or poor and stilted delivery, can mean the difference between achieving effective communication and not.

145. For communication with multicultural arbitral tribunals in which English is used, simple English tends to be used by advocates.

146. Simple English is English stripped of polysyllabic words, idioms and regional nuance. It attempts to remove regional accents and metaphorical or anagogical aspects and other attempts at creating word pictures using statements that an English speaker has probably heard, but which a non-first language English speaker may not.

147. Any factual analogy should be simple and tailored to examples within the personal experience of the arbitrator. Multiple factual analogies for a single legal point should be considered to match the experiences of all arbitrators.

148. In addition, as discussed above, the advocate must ensure that he or she:

    148.1 understands the process of communication;

    148.2 ensures that successful communication is being achieved with the arbitrator(s); and

    148.3 looks for feedback from the arbitrator(s) including monitoring his or her body language.

149. The oral communication required includes the ability to:

    149.1 speak clearly and fluently;

    149.2 articulate at an appropriate pace;

    149.3 speak at a suitable volume; and

    149.4 choose the right phrase or the right word for the situation.

150. What is best for the situation depends upon your audience. Of necessity is a judgment call by the advocate.

151. Rapport is one of the most important features of subconscious communication. It is commonality of perspective and being "in sync" with or "on the same wavelength" as the person with whom the communication takes place.

152. There are a number of techniques that help build a rapport, such as:

    152.1 matching your body language, such as posture, gesture and the like;

    152.2 maintaining eye contact; and

    152.3 matching breathing rhythm.

153. Some of the techniques are explored in Neuro Linguistic Programming ('**NLP**'), which is a model of interpersonal communication chiefly concerned with the relationship between successful patterns of behaviour and subjective experiences, especially patterns of thought.

154. It is beyond the scope of this paper to delve into the process of psychotherapy based on NLP, which seeks to educate people in self-awareness and effective communication, and change their patterns of mental and emotional behaviour.

155. However, the co-founders of NLP, Richard Bandler and John Grindler, believe that there is a connection between neurological processes; language and

behavioural patterns that have been learned through experience, and that they can be organised to achieve specific goals in communication.

156. In order to make the case persuasive, it is imperative, as far as possible, that every aspect of the case develops in a logical step-by-step process that makes the case easy to follow for the audience, so:
    - 156.1 the pleadings develop logically;
    - 156.2 the affidavit evidence tells a story in an ordered, logical way;
    - 156.3 the opening tells a story;
    - 156.4 the order in which the witnesses are called, as far as possible, allows the story being put to the court to develop in a logical way.
157. From an overall perspective, the case should appear structured. That is achieved by each aspect of the trial being structured.
158. There is nothing worse than an unplanned, unstructured cross-examination. It detracts from the persuasion process and makes deciding the case for the audience difficult.
159. Similarly the order of the tender of documents should have a logical basis so that the timing of the introduction of particular documents enhances the case.

Non-verbal Communication

160. Non-verbal communication includes the way language and words; tone of voice, posture and movement are used.
161. Non-verbal communication has a number of components:
    - 161.1 eye contact. It is important to build a rapport with others. Avoiding eye contact may, to some people, indicate lack of confidence and untrustworthiness. But overuse of eye contact can be disconcerting or even threatening;
    - 161.2 posture. A person who slouches and looks down frequently and fidgets easily appears unconfident;
    - 161.3 head movement. Holding the head upright and facing straightforward appears strong and confident;
    - 161.4 arm movement. Folded arms tend to indicate a barrier, defensiveness, hostility or lack of confidence;

161.5 hand gestures. Hands on the hips indicates aggression as may waving a pointed finger. Open palms suggests honesty and openness;

161.6 leg movement. Crossed legs can be a barrier.

162. Particularly in cross-examination, interpreting body language can give a clue to the state of mind of the witness being cross-examined.

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- David Ross QC, *Advocacy* (Cambridge University Press, 2007).
- Jawad Ahmad and Paul Tann, 'Playing Hardball in International Arbitration' on Kluwer Arbitration Blog (June 18, 2014) http://kluwerarbitrationblog.com/2014/06/18/playing-hardball-in-international-commercial-arbitration.
- The Honourable George Hampel AM QC, Elizabeth Brimer and Randall Kune *Advocacy: Manual The Complete Guide to Persuasive Advocacy* (2008).
- Rachael D. Kent *An introduction to Cross-Examining Witnesses in International Arbitration*

Some Additional Advocacy Books:

1. Ross on Advocacy: David Ross QC
2. Glissan &Tilmouth: Advocacy
3. The Inns of Court School of Law Advocacy - Appellate Practice Blank & Selby (Editors)
4. The Australian Advocacy Institute - Advocacy Manual Hampel Brimer & Cune