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ADVOCACY IN INTERNATIONAL ARBITRATION

Table of Contents

GREG LAUGHTON SC

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 by the structured, hierarchical societies that require propriety and virtue defines relationships in business; family and wider society, and emphasises the needto 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]

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.

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 has been described as "tact in action".[2]

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.

15. In an adversarial context, as in cases involving 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, to persuade the tribunal to accept the version of events and legal consequences that best suit the case of the person whom the advocate represents.

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[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).

[2] 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.

16. A number of matters need to be kept in mind in the context of the apparent adversarial nature of international arbitrations:

    16.1 for an arbitration to occur at all, the parties have agreed to resolve their dispute by a less formal, alternative dispute resolution process, which is essentially co-operative; flexible and bipartisan.

    16.2 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;

    16.3 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.

17. These matters are dealt with more fully below under the heading "Strategy".

How does the Advocate Persuade

18. The Penguin Dictionary of Psychology defines persuasion as "*a process of inducing a person to adopt a particular set of values, beliefs or attitudes.*"[3]

19. 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.

20. Written advocacy is particularly important in international arbitration, and is dealt with in more detail below.[4]

21. Often some or all of the arbitrators in an international arbitration do not have the language of the arbitration as a first language.

22. That makes communication an exercise that needs to be carefully considered by advocates.

23. Irrespective of how it is put, the message that the advocate conveys needs to be understood by the tribunal.

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

[4] See paras 91 to 117.

24. The more that the argument appears to be "common sense" or unassailable and the tribunal is able to identify with it, the more likely the tribunal is to adopt and accept it.

25. As touched upon at paragraph 9 above, rapport and sincerity are important. They are achieved by creating a perception of commonality or common ground.

26. 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 decision is likely to be against the advocate's client.

27. 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.

28. A number of factors are likely to be used in the process of persuasion, including:

    28.1 the message itself;

    28.2 the arguments presented;

    28.3 the credibility of the source;

    28.4 the medium used - oral or written or both;

    28.5 aspects personal to the recipient of the message, such as:

        28.5.1 the person's original beliefs;

        28.5.2 the person's credulity.

29. 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.

30. 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.

31. 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

32. The persuasion process has three elements:

    32.1 The advocate cannot coerce the tribunal in order to persuade it.

    32.2 The case put forward by the advocate must be credible; plausible and logical, and be supported by the facts and the law.

    32.3 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 28 above.

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

    33.1 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.

    33.2 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.

    33.3 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.

34. 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.

35. 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.[5]

Know Your Audience

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

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[5]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).

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

38. 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.

39. The underlying culture of the tribunal needs to be understood by the advocate.

40. Culture has various meanings, including:

"Culture is the collective programming of the mind which distinguishes the members of one category of people from another."[6]

"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."[7]

"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."[8]

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

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

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

    42.2 the response by a person to particular stimuli;

    42.3 the consequence of the person's analysis;

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

43. 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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[6]Geert Hofstede, 'National Cultures and Corporate Cultures' in L. A. Samovar and R. E. Porter (eds) *Communication between Cultures* (Wadsworth, 1984), 51.

[7]J. P. Lederackh, *Preparing for Peace: Conflict Transformation Across Cultures* (Syracuse University Press, 1995), 9.

[8]Ralph Linton, *The Cultural Background of Personality* (Appleton-Century Co, 1944), 32.

44. 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).
45. For instance, as outlined above at paragraph 33, there is a significant difference between civil and common law jurisdictions regarding witness evidence, particularly in commercial cases.
46. 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.
47. 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.
48. In civil law jurisdictions, on the rare occasions that witness statements are admitted, they are given very little weight.
49. Oral evidence at a hearing involves an inquisitorial process with the court asking most of the questions.
50. 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.
51. 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

52. The ability to communicate, both orally and in writing, with the tribunal effectively is vital.

53. It is a skill that can be learnt by addressing; studying and analysing its component parts.

54. 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.

55. The language of the arbitration may not necessarily be the first or even second language of the arbitrators.

56. 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.

57. The stages in the communication process are:

    57.1 the sender determines what he or she seeks to communicate;

    57.2 the message is then encoded using the personal experience; cultural background and other aspects of that person;

    57.3 the message is then sent using words/silence/body language;

    57.4 the receiver then decodes the message;

    57.5 the decoder may be a person with a totally different experience; background and culture with which to work.

58. In order to communicate effectively, it is essential to:

    58.1 clearly identify who the audience is;

    58.2 identify the purpose of the communication;

    58.3 use the vocabulary that is appropriate in the circumstances;

    58.4 bear in mind the outcome that is to be achieved at the end of the communication.

59. It is necessary to tailor the vocabulary to be used during the communication to the audience, so that where, for instance:

    59.1 the language of the arbitration is English;

    59.2 one arbitrator has English as a first language;

    59.3 an arbitrator has English as a second language; and

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

    the entire tribunal understands the rhetoric and communication put forward.

60. It is really 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.

61. That includes:

    61.1 speed of delivery;

    61.2 pronunciation/diction;

    61.3 the language used;

    61.4 body language;

    61.5 mannerisms;

    61.6 eye contact.

62. 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 that is being delivered, such as poor body language; unnecessary gestures or poor and stilted delivery, can mean the difference between achieving effective communication and not.

63. In addition, the advocate must ensure that he or she:

    63.1 understands the process of communication;

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

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

64. Invariably, an advocate speaks in his or her first language, and has a "set" vocabulary and style of speaking and writing.

65. However, that position needs to be modified according to the conditions in which the communication is taking place.

66. It is also important to understand how people, such as arbitrators and judges, receive information.

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

    67.1 orally, ie by hearing it;

    67.2 reading it; and

67.3 hearing it, and then writing it.

68. Some arbitrators make copious notes. Others make none at all and rely on reading the transcript. Some make short jotted notes as triggers.

69. 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.

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

71. It is important to understand the physiological basis upon which information is received and sent by the brain by neural pathways on two levels:

71.1 surface structure; and

71.2 deep structure.

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

72.1 hearing;

72.2 sight;

72.3 touch;

72.4 smell;

72.5 taste.

73. These include:

73.1 language (hearing);

73.2 tone (hearing);

73.3 body language (seeing);

73.4 visual images and gestures (seeing).

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

75. The meaning of emotional value to what is observed is processed through the deep structure pathway.

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

77. 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.[9]

78. At its heart is the image produced by the advocate's words in the mind of the arbitrator with all its elements including:

78.1 opening and closing addresses;

78.2 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.

How to Check if the Message is Being Received by the Arbitrators

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

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

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

Strategy

80. A primary consideration is the relationship between the parties.

81. 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.

82. Consideration then needs to be given as to what the respective parties hope to achieve in the arbitration, such as preserving their relationship.

83. Close consideration needs to be given to the potential outcome of an arbitration in the context of the relationship between them.

84. 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 arbitrationat all.

85. Considerations that should be understood include:

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[9] 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.

85.1 whether the commercial relationship between the parties needs to be preserved;

85.2 the strength of the moving party's case;

85.3 whether the potential outcome justifies the expenditure of significant amounts of costs;

85.4 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;

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

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

85.7 what, if any, interim measures are required;

85.8 whether the clients are appropriate for arbitration;

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

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

85.11 how submissions are to be delivered, that is written or orally.

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

86. 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.

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

88. 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:

88.1 the arbitrator(s)' background;

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

88.3 the arbitrator(s)' cultural background;

88.4 the arbitrator(s)' "track record",

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

89. 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.

Written Advocacy

90. Persuasion starts withthe Notice of Dispute; Originating Process and means used to defend proceedings such as responses and replies.

91. Invariably, the first contact that an arbitral tribunal has with the advocate is in the advocate's written documents:

91.1 the notice of dispute, if the advocate has drafted it;

91.2 the initiating process;

91.3 the statement of claim;

91.4 the response;

91.5 witness statements;

91.6 affidavits;

91.7 submissions on arbitral procedures; interim measures or other matters.

92. Written advocacy generally needs to:

92.1 be structured;

92.2 be clearly expressed;

92.3 identify with precision what it is seeking to be put before the tribunal;

92.4 make efficient use of language.

93. Written advocacy in international arbitration is of paramount importance.

94. Oral advocacy is significant, but because of the ways in which most arbitrations are structured, written advocacy assumes greater importance in these than most cases heard in Court.

95. Gibbs CJ observed:[10] "…written words remain and the written outline of submissions remains visible when the sound of Counsel's voices no longer vibrates in the memory…"

96. Written aspects of an arbitration that form part of the persuasion process include:

[10] H T Gibbs, 'Appellate Advocacy'(1986) 60 ALJ 496, 497.

96.1 the notice of dispute that will be delivered to the arbitrator(s);

96.2 the statement of claim and/or terms of reference;

96.3 the statement of defence;

96.4 (perhaps) a rejoinder;

96.5 submissions or outline of case;

96.6 reply or response;

96.7 comprehensive written submissions by each party at the conclusion of the evidence.

97. At the conclusion of the submission process, parties may have the right to file "post hearing" briefs.

98. Like the oral advocacy, the written advocacy needs to be pitched according to the:

98.1 the nature and complexity of the case;

98.2 the extent of the issues that are raised by the parties, including jurisdictional issues; applications for interim measures; any other interlocutory applications such as bifurcation of the proceedings and whether there are cross claims; counter claims or set offs.

Note: witness statements form part of the persuasion process. Statements that are properly drawn; concise and compliant with the rules of evidence that apply to the arbitration are persuasive in themselves.

Written Submissions

99. *"The advocate's central contribution lies in finding a place where the law and the facts will intersect to achieve the outcome sought by the client in the arbitration. Law and facts are critical inputs, but they are not the only source of the theory of the case. It is equally important that the advocate understands the client's business and the theory of the case leads to an award that achieves the desired business objective…"*[11]

100. The basics of persuasive oral argument apply to written submissions, which answer the question of what the advocate is trying to achieve.

[11] Guillermo Aguilar Alvarez, 'Effective Written Advocacy' in R. Doak Bishop and Edward G. Kehoe (eds), *The Art of Advocacy in International Arbitration* (Juris, 2nd ed, 2010), 479.

101. Written submissions must be useful to the decision maker both in substance and in form.

102. Written submissions must help the decision maker to understand what has to be decided.

103. Written submissions only achieve this if submissions are clear. To maximise clarity, the advocate should:

103.1 set out clearly what the party contends for in the arbitration;

103.2 identify why a particular decision should be arrived at by the tribunal;

103.3 formulate each proposition of fact and law supported by the evidentiary material;

103.4 organise the issues in a logical sequence;

103.5 use clear, simple language, bearing in mind the aspects of communication referred to above;

103.6 use short sentences;

103.7 use numbered paragraphs;

103.8 use appropriate headings;

103.9 use an appropriate layout to ensure submissions are well set out and provide space for the decision maker to make notes;

103.10 include cross-references to key documents.

104. Submissions should be coherent: ie have a coherent structure and be easy to read and understand.

105. A document that is well-structured and pleasant to the eye is likely to be more persuasive. The advocate in writing the submissions should:

105.1 begin with a short introduction setting out what the advocate is seeking;

105.2 set out the issues for decision; outline what is not in issue, if appropriate, and set out sufficient facts to enable the decision maker to compare with arguments on the law;

105.3 develop the argument in favour of the advocate's case and deal with any arguments against;

105.4 include a brief summary of why the tribunal should find in the advocate's favour;

105.5 be concise, as concise written submissions are easier for the reader to understand. Too much detail not to the point may distract the reader from the main thesis of the submissions, particularly if the reader does not speak English;

105.6 not overload the submissions with unnecessary case references or lengthy quotations. Pick the best authority; cite the case or annex a copy;

105.7 try to pick the three strongest arguments in your favour on each issue and avoid long lists;

105.8 use as few adverbs as possible;

105.9 use short sentences and paragraphs.

105.10 if there are to be oral submissions, the advocate should leave some matters to be submitted orally.

105.11 put the first draft away and read it through afresh as if he or she were an arbitrator.

105.12 make amendments with short passages, removing anything lengthy or unnecessary

106. Written submissions usually precede oral addresses to the tribunal in international arbitration.

107. Accordingly, the introduction of the tribunal to the proceedings and to the advocate is usually a set of written submissions; case outlines or written openings and provide the first opportunity in the process of persuading the tribunal of the merits of the case of the respective parties, by establishing the credibility of the advocate and the merits and substance of the party's case.

108. Usually, there are directions made at the beginning stages of an arbitrationthat require that statements of evidence be exchanged together with comprehensive outlines of the respective party's position.

109. Most arbitrators will be annoyed or alienated by written submissions that have any of the following characteristics:

109.1 **prolix** - including irrelevances; excessive quotation of fact or authority and failure to distil the essence of the argument;

109.2 **issue overload** - too many points or issues resulting from a failure to reject weak points;

109.3 **incoherence**- a lack of logical, unified concept of theme or an absence of interrelated organisation;

109.4 **inaccuracy** - misstatement of fact or issue; omitting or misquoting authority or quoting out of context;

109.5 **mechanical defect** - such as lack of an index; inadequate chronology; inaccurate references to authorities and transcripts; typographical errors; poor grammar and spelling and the failure to specify the relief sought and, more particularly, why the relief is sought.

110. Written submissions should:

110.1 be brief; succinct and carefully use language. The written argument should bring material together in a comprehensive and logical manner. Unduly long written submissions deter readers from close and detailed reading, because they require lengthy periods of concentration;

110.2 be logical. The arguments must develop logically and coherently with the stronger and most compelling argument presented first;

110.3 be mindful that rhetoric and adjectival referencing are more in the province of oral argument "the touchstones are condensation and selection;"[12]

110.4 contain propositional arguments;

110.5 shortly state the proposition of law or fact to which the party contends, together with the factual or legal references that support the point. If critical material must be cited, it should be the shortest possible reference.

110.6 use an annexure to the submissions if lengthy quotations or detailed references are required, rather than placing them in the main submission.

111. Written submissions that are properly formatted are more easily absorbed and conducive to the persuasiveness of the document. Avoid complex numbering systems:

[12] J. L. Glissan and S. W. Tilmouth, *Advocacy in Practice* (Lexisnexis, 3rd ed), 202.

"the advocate's central contribution lies in finding the place where the facts and the law intersect to yield the outcome sought by the client in the arbitration …"[13]

112. Again, consideration of the audience is important because of substantial differences in language; legal education and therefore legal skills; life experiences and perceptions. The process of communicating the written message needs to be done with those matters in mind.

113. Further, the written document establishes the credibility of the advocate.

114. As set out in paragraph 28.3, part of the persuasion process includes the credibility of the source from which the submission emanates.

Accuracy

115. Written submissions must be accurate and present an argument fairly. If not, the arbitrator is more likely to put them aside in favour of the opponent's submission.

116. Oral submissions speaking to inaccurate written submissions are not persuasive because they lack credibility.[14]

Comprehension

117. Submissions that omit important details or are selective to the extent of ignoring important issues undermine the credibility of the act and the argument. All issues raised need to be dealt with.

The Law

118. The law needs to be identified clearly and fairly. Misrepresenting the law undermines the credibility of the advocate. Arbitrations are normally heard by experienced lawyers who have a grasp of an extensive body of law.

Case Theory/Case Concept

119. Marcus Stone writes:[15] *"a party's theory of the case is his consistent and integrated view of the undisputed facts, his version of the disputed facts, and what he must prove in the law for the verdict which is his objective. It*

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[13] Guillermo Aguilar Alvarez, 'Effective Written Advocacy' in R. Doak Bishop and Edward G. Kehoe (eds), *The Art of Advocacy in International Arbitration* (Juris, 2nd ed, 2010),479, 203.

[14] Credibility and source needs to be identified

[15] Marcus Stone, *Cross Examination in Criminal Trials* (Butterworths, 1988).

represents a party's position, fully thought-out, rather than an assessment of the evidence."

120. As part of the preparation for the hearing, development of the concept of the case, or case theory is essential.

121. It is, in reality, how the advocate wants the evidence to be and be seen by the tribunal at the conclusion of the evidence.

122. It fits within the applicable law, and when the law is applied to evidence, will, hopefully, achieve the result the advocacy seeks. As the preparation advances, the case theory/concept is refined; modified and some parts are often abandoned.

123. Some advocates prepare their final address before the case commences, and particularly, before the opening commences.

124. In international commercial arbitration, it is important that the case theory/case concept is attracted to the diverse background of the tribunal member(s).

125. Therefore, the identification of a case theory/concept is an important component of the persuasion process.

The Tribunal

126. The parties to the dispute first have an opportunity to determine how the arbitral tribunal is to be constituted, and the members of it.

127. Often the parties will each have an opportunity to nominate an arbitrator, with the appointed arbitrators having the power to agree upon a chairperson, although in institutional arbitrations, the arbitral institution may appoint the chairperson.

128. In the absence of an agreement between the parties to an arbitration clause as to 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.

129. The chairperson will often not be of the same nationality as any party[16] and will have the deciding vote if the party nominated arbitrators disagree.[17]

[16] See for example LCIA Rules Article 6

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

130. 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.

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

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

132.1 the manner in which the tribunal has been appointed;

132.2 the comparative importance of the chairperson in both the processes of the arbitration, and

132.3 the substantive determination of the dispute.

133. *"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]

134. An argumentative and florid "over the top" style distracts; is less persuasive and 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]

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

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[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.

Production of documents and the difference in attitude between Common Law and Civil Systems

Production of Documents Inter-party and by Third Parties in Common Law Jurisdictions

136. Most common law jurisdictions have extensive procedural rules concerning the production of documents. The rules cover production between parties to a dispute through discovery or a Notice to Produce, and by third parties at the direction of the Court through orders such as a subpoena.

137. Common law jurisdiction rules regarding discovery tend to be fairly broad. In the United States, for example, discovery is generally extensive in scope, and covers any document brought into existence during the events referred to in the pleadings, although some states are moving towards a more limited view of discovery.

138. The production of documents in common law jurisdictions is generally constrained by the requirement that the documents or categories of documents that a party seeks to have the other produce are relevant and have a legitimate forensic purpose. The interpretation of what constitutes a "legitimate forensic purpose", however, may be broad.

Legitimate Forensic Purpose

139. A legitimate forensic purpose will be established if the document gives rise to a line of enquiry relevant to the issues before the trier of fact, including for the purpose of meeting the opposing case by way of cross-examination.[20]

140. The necessity of a document to fairly determine issues may not be apparent before the arbitration or trial. The assessment of whether a document has a legitimate forensic purpose needs to take into account this possibility. A document may be required in cross-examination to refute unforeseen evidence-in-chief. The evaluation of whether a document is "necessary" to fairly dispose of proceedings therefore must embrace any document with any

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[20] see *Apache Northwest Pty Ltd &Ors v Western Power Corporation* (1998) 19 WAR 350 at 374; *National Employers' Mutual General Insurance Association Ltd v Waind& Anor* [1978] 1 NSWLR 372 at 385*; Maronis Holdings Ltd &Ors v Nippon Credit Australia Ltd &Ors*(2000) 18 ACLC 609 at 613-614.

apparent relevance, even if this document does not appear necessary at the pre-inspection stage.[21]

141. Similarly, no narrow interpretation of the legitimate purpose of a subpoena in terms of its early return should be taken as this allows the parties to determine the strengths and weaknesses of their case at an early stage.[22]

142. There is no need to avoid "fishing" by requiring the party seeking the documents to have some evidence beforehand that these documents are relevant. All documentary evidence should be available to promote a fair arbitration or trial.[23] Indeed, historically, fishing was undesirable as it concerned the prior pleading of issues of which the evidence sought would be relevant, not the prior possession of evidence.[24]

Production of Documents Inter-party and by Third Parties in Civil Law Jurisdictions

143. Civil systems are far more limited in their use of the production of documents inter-party and by third parties. The production of documents can be ordered following the hearing of a petition, and the Court tends to only allow production where the documents sought are:

143.1 documents referred to in a pleading;

143.2 documents that prove pleaded facts by reference, as far as possible, to the contents of the document.

144. Discovery as such is virtually unknown in a civil system and is only ordered in very limited circumstances. Usually, parties disclose only those documents they wish to, and are rarely compelled to produce those documents that they wish to keep undisclosed.

145. These conflicting attitudes and customs towards the production of documents can cause issues in the arbitration process. For instance, an arbitral tribunal using the procedural rules of a civil law system may reject the production of documents in cases where the documents are helpful in proving an essential element of the party seeking the document's case.

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[21] See *Brand v Digi-Tech* [2001] NSWSC 425.
[22] See *Khanna v Lovell White Durrant* [1995] 1 WLR 121 at 123.
[23] See *Bailey* (supra) at 143.
[24] See *Bailey &Ors v Beagle Management Pty Ltd &Ors* (2001) 105 FCR 136 at 143-144; *Chapman v Luminis Pty Ltd* [2001] FCA 1580 AT [48].

146. In some circumstances, the refusal by a Court or tribunal to order production of documents can facilitate fraud or unconscionable conduct by the party refusing to produce documents, and unfairly disadvantage the other party.

147. In arbitration proceedings, parties are able to nominate the specific procedural rules they are to follow, including those relating to the production of documents. If this fails, the arbitral tribunal can select the rules in accordance with relevant procedural rules of the seat of the arbitration and of the Arbitral Institution, leading to a more hybrid set of procedural rules in international arbitration.[25] These are influenced by the backgrounds of the tribunal member(s). The choice of arbitrator(s) and rules of the proceedings therefore need to be carefully considered by the advocate.

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[25] Rolf Trittmann and Boris Kasolowsky, 'Taking Evidence in Arbitration Proceedings between Common Law and Civil Law Traditions –The Development of a European Hybrid Standard for Arbitration Proceedings' (2008) UNSW Law Journal 31(1), 330-340.

GREG LAUGHTON SC

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