

Global Arbitration Review

# The Guide to Advocacy

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General Editors

Stephen Jagusch QC and Philippe Pinsolle

Associate Editor

Alexander G Leventhal

Fourth Edition

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# Contents

Introduction .....	1
<i>Stephen Jagusch QC, Philippe Pinsolle and Alexander G Leventhal</i>	
1 Case Strategy and Preparation for Effective Advocacy .....	3
<i>Colin Ong QC</i>	
2 Written Advocacy .....	20
<i>Thomas K Sprange QC</i>	
3 The Initial Hearing .....	37
<i>Grant Hanessian</i>	
4 Opening Submissions .....	51
<i>Franz T Schwarz</i>	
5 Direct and Re-Direct Examination.....	69
<i>Anne Véronique Schlaepfer and Vanessa Alarcón Duvanel</i>	
6 Cross-Examination of Fact Witnesses: The Civil Law Perspective.....	84
<i>Philippe Pinsolle</i>	
7 Cross-Examination of Fact Witnesses: The Common Law Perspective .....	94
<i>Stephen Jagusch QC</i>	
8 Cross-Examination of Experts .....	108
<i>David Roney</i>	

## Contents

9	The Role of the Expert in Advocacy .....	127
	<i>Philip Haberman</i>	
10	Advocacy and Case Management: An In-House Perspective .....	140
	<i>Marco Lorefice</i>	
11	Closing Arguments .....	146
	<i>Hilary Heilbron QC and Klaus Reichert SC</i>	
12	Tips for Second-Chairing an Oral Argument.....	160
	<i>Mallory Silberman and Timothy L Foden</i>	
13	The Effective Use of Technology in the Arbitral Hearing Room.....	172
	<i>Whitley Tiller and Timothy L Foden</i>	
14	Advocacy Against an Absent Adversary.....	186
	<i>John M Townsend and James H Boykin</i>	
15	Advocacy in Investment Treaty Arbitration.....	197
	<i>Tai-Heng Cheng and Simón Navarro González</i>	
16	Advocacy in Construction Arbitration .....	207
	<i>James Bremen and Elizabeth Wilson</i>	
17	Arbitration Advocacy and Criminal Matters: The Arbitration Advocate as Master of Strategy .....	218
	<i>Juan P Morillo, Gabriel F Soledad and Alexander G Leventhal</i>	
18	Advocacy in International Sport Arbitration.....	233
	<i>James H Carter</i>	
19	Cultural Considerations in Advocacy: East Meets West .....	245
	<i>Alvin Yeo SC and Chou Sean Yu</i>	
20	Cultural Considerations in Advocacy: India.....	257
	<i>Tejas Karia and Rishab Gupta</i>	

## Contents

21	Cultural Considerations in Advocacy: The Arab World – A Recast .....	263
	<i>Mohamed S Abdel Wahab</i>	
22	Cultural Considerations in Advocacy: Continental Europe .....	282
	<i>Torsten Lörcher</i>	
23	Cultural Considerations in Advocacy: United Kingdom .....	295
	<i>David Lewis QC</i>	
24	Cultural Considerations in Advocacy in Latin America: Brazil .....	302
	<i>Karina Goldberg</i>	
25	Cultural Considerations in Advocacy: United States .....	308
	<i>Laurence Shore</i>	
26	Cultural Considerations in Advocacy: Russia and Eastern Europe.....	317
	<i>Anna Grishchenkova</i>	
 <b>Cultural Considerations in Advocacy: Africa</b>		
27	Cultural Considerations in Advocacy: English-Speaking Africa .....	331
	<i>Stanley U Nweke-Eze</i>	
28	Cultural Considerations in Advocacy: French-Speaking Africa.....	336
	<i>Wesley Pydiamah and Manuel Tomas</i>	
29	Cultural Considerations in Advocacy: Portuguese-Speaking Africa .....	342
	<i>Rui Andrade and Catarina Carvalho Cunha</i>	
	The Contributing Authors .....	349
	The Contributing Arbitrators .....	369
	Contact Details .....	389
	Index.....	397

# Index to Arbitrators' Comments

## **Stanimir A Alexandrov**

Closing arguments, answering the tribunal's questions .....	154
Cross-examination	
approach expert conferencing with caution .....	123
avoid harassing witnesses.....	87
legal experts .....	115
Direct examination, recommended .....	72
Initial hearing	
agreeing procedural issues in advance.....	40
backup hearing dates .....	45
Investment treaty arbitration, transparency is key .....	203
Opening submissions	
address weaknesses before hearing.....	59
avoid bombast .....	54
don't keep tribunal waiting.....	61
using PowerPoint.....	64
Re-direct examination, err on side of caution .....	81
Second-chairing oral argument, a smooth and efficient hearing.....	163
Written advocacy	
compelling narrative in requests for arbitration.....	29
explaining the respondent's motive .....	31
post-hearing submissions – focusing on the specifics .....	32

## **Essam Al Tamimi**

Arab world, embrace the differences.....	267
--	-----

## **Henri Alvarez QC**

Initial hearing, general rules .....	48
Written advocacy, general rules.....	24

**David Bateson**

Construction arbitration, assertive case management.....209  
East meets West, traits of Asian witnesses.....253

**George A Bermann**

Closing arguments, map out your case for the tribunal .....148  
Cross-examination, expert testimony can be critical .....126  
Direct examination, invite written witness statements..... 72  
Investment treaty arbitration, sovereign state as a party.....199  
Role of the expert, filling gaps and winning cases .....129

**Juliet Blanch**

Closing arguments, what to address.....155  
Cross-examination  
    avoid over-preparing a witness.....106  
    emulating an expert.....112  
    good preparation takes time ..... 98  
    when a witness refuses to answer .....102  
Initial hearing, a good investment..... 38  
Opening submissions, tips for preparation..... 52  
Re-direct examination, only when critical ..... 81  
Written advocacy, set out your case chronologically ..... 22

**Stephen Bond**

Absent adversary, no guarantees of victory.....193  
Cross-examination  
    dealing with untruths ..... 89  
    differences between civil and common law ..... 89  
Role of the expert, invest in their knowledge.....128  
United Kingdom, merits of memorial procedure.....297  
Written advocacy  
    importance of brevity ..... 25  
    using arbitration requests to seek early settlement..... 30

**Stavros Brekoulakis**

Absent adversary, trust the tribunal.....187  
Construction arbitration, build on the evidence .....211  
Cross-examination, map it out for the tribunal..... 86  
Second-chairing oral argument, confidence in less senior counsel.....168

**Charles N Brower**

Case strategy, the arbitration clause..... 8  
Continental Europe, extricating documents.....290  
Direct examination, proper preparation of witness statements ..... 76  
Investment treaty arbitration  
    catch everybody's every word .....204  
    presence of witnesses .....204  
Written advocacy, frame your case simply ..... 33

**Nayla Comair-Obeid**

Arab world  
    beware misunderstandings.....264  
    detailed rules of procedure.....264

**William Laurence Craig**

Written advocacy, the language of contracts ..... 23

**Yves Derains**

Absent adversary, the tribunal is not an opponent.....195  
Continental Europe, re-direct without leading questions .....292  
Direct examination, address embarrassing facts ..... 74  
French-speaking Africa, adapt to chair's culture .....337

**Donald Francis Donovan**

Closing arguments, closing down open points .....147  
Cross-examination  
    staying in command..... 95  
    engaging with both adversary and tribunal.....100  
Initial hearing, cooperate with tribunal from the outset ..... 43  
Opening submissions, using non-traditional media ..... 66

**Yves Fortier QC**

Closing arguments, oral closing a rarity in international arbitration.....149  
Cross-examination  
    unsettling an adversary's witness.....103  
    using experts against experts .....110  
Opening submissions  
    preparation without overkill ..... 57  
    targeting one arbitrator ..... 53

**Andrew Foyle**

Opening submissions, use limited time effectively ..... 60

**Pierre-Yves Gunter**

Closing arguments, advantages of an oral closing .....156

India, examples .....259

**Jackie van Haersolte-van Hof**

Cross-examination

remember the expertise of the tribunal .....109

spotting the tribunal's signals..... 90

United Kingdom

optimise your style .....299

what is normal procedure?.....301

**Bernard Hanotiau**

Closing arguments, post-hearing brief v. closing submission.....149

Cross-examination, traditional approach is unhelpful with legal experts .....115

Direct examination

expressing quantum in clear terms ..... 75

language of arbitration ..... 70

Initial hearing

seek extensions of time early on..... 46

beware flouting the rules ..... 46

Opening submissions

quantum arguments also need detail..... 65

stick to the point ..... 58

**Hilary Heilbron QC**

Cross-examination, common pitfalls..... 85

Re-direct examination, eliciting a favourable answer ..... 81

**Clifford J Hendel**

Sport arbitration

keeping your distance .....236

specifics in basketball cases .....239

**Kaj Hobér**

Case strategy, convincing the tribunal..... 15

Closing arguments, getting a favourable award.....151

**Ian Hunter QC**

Case strategy, simply stay in control..... 11  
Continental Europe, avoid open questions.....285

**Michael Hwang SC**

Cross-examination  
    eliciting direct answers.....113  
    quit while you're ahead..... 99  
Re-direct examination, using re-direct for correction..... 80

**Emmanuel Jacomy**

East meets West, cross-examining Chinese speakers .....249

**Doug Jones AO**

Initial hearing, collaboration ..... 44

**Jean Kalicki**

Cross-examination, alleging bad faith .....104  
Opening submissions  
    avoid bombast and exaggeration ..... 54  
    concise road map..... 56  
    direct language ..... 57  
    speak slowly ..... 54  
    use of exhibits ..... 64  
Written advocacy, begin with your conclusion ..... 26

**Richard Kreindler**

Criminal matters, addressing allegations early on .....228

**Julian Lew QC**

Case strategy, the importance of simplicity ..... 11  
Effective use of technology, demonstratives.....183  
Opening submissions, overcomplication is no help to tribunal ..... 68

**Loretta Malintoppi**

Investment treaty arbitration, focus on the essence of the case.....200

**Mark C Morril**

United States, learn to read the room .....313

**Alexis Mourre**

Case strategy, know and understand your tribunal ..... 4

**Jan Paulsson**

Cross-examination

    establish the rules..... 96

    interruption is a distraction.....105

    keep objections to a minimum..... 91

Opening submissions, etiquette at hearings..... 53

Second-chairing an oral argument, how many mock arbitrators? .....161

Written advocacy

    characteristics of pleadings ..... 34

    less is more, much more ..... 21

**David W Rivkin**

Closing arguments, framing your case for decision-making.....148

Cross-examination, undermining an expert's credibility.....111

Initial hearing, create the right procedures..... 50

**J William Rowley QC**

Closing arguments, there is no substitute .....152

Cross-examination, defusing an expert's report..... 116-7

Direct examination, the 10-minute rule ..... 73

Initial hearing, meeting face-to-face early on ..... 39

Opening submissions, distilled statements delivered early ..... 55

Written advocacy, dangers of overstatement ..... 28

**Eric Schwartz**

Construction arbitration, don't plead, consult .....215

United States

    nothing to gain by standing up .....310

    use PowerPoint sparingly .....311

**Georg von Segesser**

Continental Europe

    mistakes to avoid in civil cross-examination .....291

    obligation to produce .....289

Cross-examination, technical witness conferencing.....124

Role of the expert, open discourse with tribunal.....137

**Christopher Seppälä**

Absent adversary, lessons to learn.....190

**Robert H Smit**

United States, speak with, not at, arbitrators.....312

**Luke Sobota**

Effective use of technology, supportive, not distracting.....173

**Christopher Style QC**

United Kingdom

concise written submissions .....296

early, comprehensive presentation.....297

**Jingzhou Tao**

East meets West, efficiency versus cultural sensitivity .....250

**John M Townsend**

Closing arguments

being mindful of time limits .....150

get the tribunal's attention .....153

Cross-examination, questioning the tribunal's expert .....121

Direct examination, know your arbitrators' backgrounds ..... 77

Initial hearing, the chair is in control..... 41

Opening submissions

don't surrender control to PowerPoint ..... 65

welcome tribunal questions ..... 62

Written advocacy, convincing narrative ..... 21

# 23

## Cultural Considerations in Advocacy: United Kingdom

**David Lewis QC<sup>1</sup>**

The incremental globalisation of international arbitration continues to blur the lines between national cultural approaches to advocacy. Historically, the complexion of an arbitration – and particularly of an arbitration hearing – may have been predominantly a function of the seat and the nationality of the arbitrators and counsel. The development of an international arbitration community and of transnational soft law, such as the various guidelines promulgated by the International Bar Association, has tended towards the homogenisation of international arbitration. This progression is reflected by an increasing similarity of approach to advocacy, irrespective of the seat and the nationality of the arbitrators and counsel.

It would be cultural chauvinism to say that the best aspects of current international arbitration practice, and specifically the approach to advocacy, are those attributable to the United Kingdom, and vice versa. It would also not be my view. One of the strengths of international arbitration is that its slow march to uniformity has proven to be an opportunity to optimise practice by drawing on different national approaches. Cases involving arbitrators and counsel from different backgrounds have provided some of my most enlightening professional experiences, and mercifully few clashes of culture.

In the interests of accentuating the positives, below is a subjective summary of certain techniques that, when deployed, may go some way to epitomising the UK approach to advocacy in international arbitration, such as it is. These are no substitutes for the more detailed treatments of the subject of advocacy elsewhere in this book, which may be taken to elaborate upon the UK approach, particularly those on written advocacy by Thomas Sprange QC, on cross-examination of fact witnesses from the common law perspective by Stephen Jagusch QC, and on closing arguments by Hilary Heilbron QC and Klaus Reichert SC.<sup>2</sup> Any observation that the techniques below are not also followed by counsel

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<sup>1</sup> David Lewis QC is a barrister and occasional arbitrator at Twenty Essex Chambers, London and Singapore.

<sup>2</sup> See Chapters 2, 7 and 11.

### **It doesn't help you win if we can't see the wood for the trees**

The advocate seeking to win over a tribunal will, of course, want to drive home his or her analysis of the issues. But too often arbitrators are presented with written submissions that are too long, too detailed, repetitive and include too many long, boring footnotes. We are conscientious, hard-working and committed to doing a really good job, but it doesn't help you win if we can't see the wood for the trees. An effective submission will focus on the reasons why you win. It will not contain string citations. It will not set out every argument on every point. It won't include pages and pages of quotes. It will strike a balance and be realistic, acknowledging and addressing the opposing case. It will form a structured, coherent narrative that is (as far as possible!) supported by the evidence produced in support.

*– Christopher Style QC, One Essex Court*

practising in international arbitration from non-UK backgrounds is in the eye of the beholder. They are also not followed by UK-grown advocates as often as they might be. In my opinion, failure to follow them will lessen the quality of the advocacy.

### **Written advocacy**

The UK approach to written advocacy in international arbitration still tends to favour a court-style process, with pleadings towards the start of the reference and skeletons prior to the main hearing, although fuller written memorials are becoming increasingly common. Whatever the procedure, the following non-exhaustive guidelines also provide some basis for sound written advocacy practice in international arbitration from the UK perspective.

- Get the opening line right. There is nothing so dreary as a skeleton argument that starts with 'This is the skeleton argument of the claimant for the hearing of its claim against . . .' – the temptation to skim read until something of substance appears may prove irresistible to the arbitrator. The first paragraph should capture the tribunal's imagination with a pithy description of why the case will interest them.<sup>3</sup> Ideally, it might even outline in one sentence why the client's case is right. For the same reasons, the conclusion should be at the beginning of the document (whether or not it is also at the end). Thus, the tribunal will know its destination while reading.
- Short is sweet. Arbitrators are busy people. The ideal is that they read the written submissions carefully and thoroughly. The likelihood of this happening is increased if the submissions are succinct. The simplest way to avoid unnecessary length is to avoid repetition. It is an insult to the intelligence of the tribunal to think they need a submission repeated. No point gets better by its recurrence. If an argument has been crafted with enough care, it will be powerful without repetition. Prolix and repetitive

---

3 This mirrors the advice of Jonathan Sumption QC – later Lord Sumption JSC – when delivering a lecture to the South Eastern Circuit of the Bar of England and Wales on 29 September 2009 on the subject of Appellate Advocacy. It is equally applicable to arbitration. He also commented: 'Appellate Judges are bigger than you and they hunt in packs.' Whether that is equally applicable may depend upon the particular tribunal.

### **Memorials or English-style procedure?**

I find that, very often, the latter is not fit for purpose. A memorial combines in one submission a party's position on the facts, the law and any fact or expert witness statements. The English-style procedure, as often applied by an English (QC) tribunal, consists of first having exchanges on the facts, followed by exchanges of witness statements, and then, a few weeks before the hearing, submissions on the law. This not only strings out the proceedings unduly, but also can prevent any early decision on the case or settlement. In a recent case under this procedure, it was crystal clear that one side had the far better case on the law, but neither the other side nor the tribunal was able to see this until the hearing was almost upon us. No procedure is perfect in every case, but I submit that the memorial procedure is generally preferable in international arbitration.

– *Stephen Bond, Covington & Burling LLP*

### **Front-loading wins hearts and minds**

An advocate seeking to connect with arbitrators with a UK background may think in terms of the traditional procedural approach – first pleadings, then document production, next witness statements, expert evidence . . . Some specialist areas have their own traditions, but looking at international commercial arbitration generally, the modern transnational approach is often more effective. Arbitrators are not judges. They manage the process from cradle to grave. A good arbitrator wants to master the details as soon as possible so he or she can craft a fair and efficient process. It obviously costs the parties more to produce on day one an exposition of the case that includes all the witness evidence, documents and legal authorities on which that party relies; but front-loading wins hearts and minds more effectively.

– *Christopher Style QC, One Essex Court*

submissions are the scourge of arbitrators – many will report as much – so why start by punishing those you are seeking to persuade?

- Know the tribunal. The extent to which the advocate's submissions need to introduce a concept, develop a particular line of argument or explain an area of technical detail is a function of the tribunal's expertise and background. If the members of the tribunal have spent their careers dealing with oil and gas disputes, they will not need an explanation of the basics of a joint operating agreement or production-sharing contract. If the arbitrators are retired high court judges, they will not need extensive citation of authorities on the proper approach to the interpretation of an English law contract. If the tribunal is mixed, a more nuanced approach will have to be taken, but the different members of the panel can be relied upon to bring their different expertise to the decision-making process.
- Avoid adverbs and adjectives; they are not tools of persuasion and can be counter-productive. When Stephen King wrote 'the road to hell is paved with adverbs',<sup>4</sup> he might as well have been thinking of a turgid arbitration memorial. The problem with adverbs is

4 Stephen King, *On Writing: a Memoir of the Craft*, Simon & Schuster, 2010, p. 125.

that they tend to assertion rather than persuasion. Saying an argument is plainly right or wrong is no more persuasive than saying it is right or wrong, when what matters are the reasons that follow. The use of adjectives to heap scorn on an opponent's case – 'flimsy, weak, hopeless, egregious' – also adds nothing to the debate. Such use of language can even be detrimental – it makes the case overblown and implies an insecurity, namely that the writer had to resort to such measures either for want of reasoning or owing to a lack of conviction in any reasoning. A strong argument does not require over-elaboration.

- Don't allege bad faith unless it is both justifiable and a necessary part of your case. The ethical rules governing the conduct of barristers of England and Wales provide that a barrister must not make any allegation of fraud without 'reasonably credible material which establishes an arguable case of fraud'.<sup>5</sup> Lord Bingham spoke of the need for 'material of such a character as to lead responsible counsel to conclude that serious allegations could properly be based upon it'<sup>6</sup> and the same principle applies to any other allegations of serious misconduct. It is not just a matter of ethics and responsible counsel. Alleging bad faith can lead to a self-inflicted burden of proof that is higher than necessary in circumstances where the client's case can often succeed whether or not there was bad faith by its counterparty. Alleging bad faith without good grounds can also harm the advocate's credibility, which is hard won and easily lost.

## Oral submissions

The UK approach often now involves strict time limits on oral opening submissions, with the tribunal keen to get on and commence hearing the evidence. Real argument may have to wait until closing submissions, but time can often still be tight, in particular if the witness evidence has overrun. The following guidelines help to maximise the efficient use of the time available for effective advocacy.

- Pick the battles that will win the war (or are at least more likely to do so). The successful advocate will know in advance the strengths and weaknesses of a case. Concessions are critical for credibility. If an advocate is arguing every point, the patience of the tribunal may be tested such that it becomes unable, or even unwilling, to work out where the good point is hidden. It is the job of the advocate to pre-select the stronger arguments and focus thereon. There is no zero sum game here. The bad points do not improve by being hidden in the crowd, but the good points do deteriorate when in bad company.
- Test all the consequences of the arguments. A critical part of preparation is to stress-test the potential arguments. A superficially attractive argument may well falter at a hearing. This risk can be mitigated if sufficient time is spent challenging the arguments ahead of the hearing. In particular, the well-prepared advocate will pre-empt the counter-arguments that might be raised by opponents or the tribunal. Assume that what can go wrong will go wrong. The argument may appear persuasive in isolation, but it must be considered in a broader context and any difficulties confronted openly. Problems with the argument cannot be ignored in the hope they will go away. This process allows the positive argument to be refined so that it can be insulated from counterarguments.

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5 Bar Standards Board Handbook, 4th Edition, April 2019, Part 2, The Code of Conduct, Section C2, Rule rC9.2.c.

6 *Medcalf v. Mardell and Others* [2002] 1 AC 120 at [22].

### **How to come up with the optimal advocacy style**

Play to your strengths and weaknesses: if you are not a natural Perry Mason, don't pretend. That said, it is important to be adaptable: advocacy styles that are effective for a tribunal consisting of continental lawyers will differ from those better suited to a tribunal consisting of US trial lawyers or retired English high court judges.

The optimal advocacy style in each case can be portrayed as a matrix, taking into consideration oneself, opposing counsel and the tribunal members. 'Style' in this context is a broad concept, and relates both to more technical aspects – such as how far you should go in complaining about leading or non-leading questions (where a civil lawyer less familiar with the rules may be quite flexible) – and tone and intonation (where the same civil lawyer who may be impressed by the cross-examination may be uncomfortable about the output, or feel that the key issues have still not been addressed). There is no single 'right' style, but you can optimise your performance in each case by being alert to different preferences and expectations.

– Jackie van Haersolte-van Hof, *London Court of International Arbitration*

- Structure is everything. Numbered points are critical to a successful oral presentation. This is not only because they better enable the immediate digestion of the submissions by the tribunal. It is also because the oral submissions will probably be revisited by the tribunal. If this is by the tribunal looking at their handwritten notes, then the numbering will serve as their itinerary for their notes. If it is by the tribunal revisiting the transcripts, then the transcript can be helpfully punctuated and highlighted by free-standing sentences that say 'Point one', 'Point two', etc. With a carefully studied structure, the advocate may not need to resort to any demonstrative exhibits. The tribunal might then maximise its focus on the substance of the submissions and its interaction with the advocate. Such props rarely feature in the UK approach.
- Strive for verbal efficiency. Short sentences are clearer. Long sentences have a tendency to lose the attention of the listener, who diverts to wondering when the speaker may arrive at the critical message. Again, think of the tribunal's notes or the transcripts. There are no rules against single word sentences. 'Damages', followed by a pause, is a better introduction than 'As my next topic, I would like to move on to deal with the question of damages' – 16 of those 17 words are unnecessary. The transcribers may express their gratitude later. The same goes for other filler phrases, such as 'The Claimant's submission is that . . .'. Unnecessary verbiage cannot be excused on the basis that the advocate is playing for time to think of an answer to a tribunal question. If time is required, it is better to ask for a moment to reflect, in silence, before answering the question.
- It is not about you. The case is bigger than the advocate. The advocate is not there to be memorable, or to carve out a reputation, but only to try to win the case. What the arbitrators want to hear – for example, answers to their questions – is as important as what the advocate otherwise wishes to say. Charisma does not go amiss and a tribunal will prefer listening to mellifluous submissions. But ultimately, international arbitration tribunals will be persuaded by content and not by force of personality. This applies equally in the case of witness handling, to which I now turn.

## Witness handling

The UK approach to advocacy encompasses a long-standing tradition of witness handling, particularly cross-examination. While the art of cross-examination is beyond the scope of this chapter, below is some brief elaboration on certain of the ‘don’ts’ of cross-examination, which might be said to reflect broadly a UK *modus operandi*.

- Don’t feel inhibited by the direct evidence. This is where the UK approach diverges from – so it is understood – a common approach in the United States. As a matter of UK practice, if a witness has relevant evidence to give on a particular issue, the party tendering that witness cannot avoid questions on that issue simply by choosing not to deal with it in the evidence-in-chief, usually the witness statement. Once the witness has been tendered, the witness is open to be asked about anything material. The only way to avoid that consequence is for the party not to tender the witness at all. Insofar as the object of the exercise is to resolve the disputed facts, the case for the UK approach is grounded on considering the widest available body of evidence. Yet the object of the cross-examiner’s exercise is to resolve the facts in favour of the client of the cross-examiner. The cross-examiner must beware the unguarded questions of the tribunal, which may follow once an issue has been aired.
- Do not use cross-examination to argue the case. It is rare that a case can be won by the end of a particular witness’s cross-examination. More often, success results from the marriage of the facts, including those established in cross-examination, with the law in closing submissions. The witness need not understand why the answers matter one way or another – indeed, it may be better if the witness does not.<sup>7</sup> As soon as the witness has given an answer that is good enough for this purpose, the cross-examiner should stop or change topic. The saying ‘Better is the enemy of good’ – attributed to Voltaire – applies to cross-examination. The question too far is a common mistake. The question that tries to make a good answer better can often have the reverse effect.
- Do not bully the witness. Manners maketh the advocate. The witness is more likely to give up the desired answers to an amiable inquisitor than to a belligerent combatant. Suppose, for example, the witness fails to answer a question. The instinct may be to hector the witness, but a more effective approach is to ask the question again, and perhaps a third time, at most. If the witness reoffends, a courteous ‘thank you’, followed by a glance at the tribunal to pre-empt the later submission, is all that is required. A witness can be controlled with politeness as much as with severity. Such civility is all the more important in international arbitration, which is premised on the consensual involvement of all the participants – the tribunal, the parties and the witnesses.
- Minimise interruptions of an opponent. The advocate should ask: Is the matter really one that cannot continue uninterrupted until it is my turn to speak? Overuse of interruptions can irritate the tribunal and lessen the advocate’s credibility. The over-intervening advocate may find that the tribunal is less interested when a genuine cause for complaint arises. That said, the UK approach could take a leaf out of the US

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<sup>7</sup> Compare one recent suggestion that, in document-heavy arbitrations, the cross-examiner should be required not only to identify in advance the documents to be used but also to file the questions: Derek Wood, ‘Common Law Advocacy in International Arbitrations: Fit for Purpose?’, *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, Volume 84, No. 2, April 2018, at 173.

### Forget ‘normal’

I recall sitting on a three-member tribunal with parties from different jurisdictions, but both represented by English lawyers. While they disagreed about most things, when asked by the chairperson how they wanted to deal with a particular procedural issue, they replied: ‘In the normal way.’ I looked at my neighbours (one English and one Texan), and thought to myself that determining what was ‘normal’ might not be as straightforward as counsel seemed to think. It turned out they had in mind a particular high court procedure, which they were very happy to use in this international arbitration. Obviously it was helpful that they were agreed on something, but the approach did not suggest great sensitivity to what would be the most effective procedure, given the setting of the case.

– Jackie van Haersolte-van Hof, *London Court of International Arbitration*

playbook when it comes to the delivery of interruptions. The inefficient ‘I hesitate to interrupt my learned friend, but I have to object to . . .’ could well be replaced by an introductory ‘Objection’, followed by a clipped explanation. The tribunal might equally respond with an efficient ‘Sustained’ or ‘Overruled’, followed by a reason if necessary.

- Do not allege a witness is lying unless it is both justified and absolutely necessary. This is a narrower reflection of the rule not to allege bad faith unless justifiable and necessary. It is common for an opposing witness to say something self-serving and inconsistent with a fact that must be proven to make good the client’s case. This may trigger a temptation to allege that the witness is being dishonest. This temptation should be resisted in the vast majority of cases. It will often suffice to contend that the witness is mistaken. This can be achieved through a combination of effective cross-examination to cast doubt on the witness’s memory and submission as to why the witness is probably mistaken.<sup>8</sup> Such a submission is also more likely to succeed than the more serious allegation – arbitration tribunals are rightly loath to find a witness to have been dishonest if there is an alternative way out.

### Conclusion

The biodiversity of international arbitrators may mean that there are no universally correct approaches to advocacy. The handful of suggestions in this chapter are only some general indications of the UK approach that can be considered a starting point. The devil is in the detail.

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8 The unreliability of memory was recently re-emphasised, including by reference to psychological research, in the judgment of Mr Justice Leggatt in *Mr Jeffrey Ross Blue v Mr Michael James Wallace Ashley* [2017] EWHC 1928 (Comm.) at [66]–[69]. Perhaps the continental European system, with its limited reliance on oral evidence, knew this all along?

# Appendix 1

## The Contributing Authors

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David Lewis QC is a specialist advocate who practises predominantly in international arbitration. He appears as lead counsel in a variety of commercial disputes, with a particular focus on cases involving energy and natural resources, civil fraud and international trade (including both commodities and shipping).

He was called to the Bar of England and Wales in 1999, became a tenant at 20 Essex Street in 2000 and took silk in 2014 at the age of 36. From 2009 to 2010, he was based in Singapore, practising exclusively in international arbitration, and he still returns to Singapore to appear in arbitration hearings. He has also appeared as sole counsel in arbitrations in Dubai and Hong Kong. He is registered as a practitioner with rights of audience before the DIFC courts and to appear before the Singapore International Commercial Court.

He is regularly praised in the legal directories in a number of categories, and especially for his work in international arbitration. He also accepts appointments to sit as arbitrator, both ad hoc and on institutional terms.

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Jackie van Haersolte-van Hof became director general of the LCIA on 1 July 2014. Previously, she practised as a counsel and arbitrator in The Hague, at her GAR 100 boutique HaersolteHof. She set up HaersolteHof in 2008 after three years as of counsel in the international arbitration group at Freshfields Bruckhaus Deringer in Amsterdam. She was with Amsterdam firm De Brauw Blackstone Westbroek from 2000 to 2004, and before that Loeff Claeys Verbeke in Rotterdam, which she joined after qualifying in 1992. She has sat as arbitrator in cases under the ICC, LCIA and UNCITRAL rules, and those of the Netherlands Arbitration Institute. She has also arbitrated cases at the Royal Dutch Grain and Feed Trade Association and the Institute of Transport and Maritime Arbitration, both based in the Netherlands. She is on the ICSID roster of arbitrators and has sat on an ad hoc annulment committee. She was also involved in setting up the arbitral process for the Claims Resolution Tribunal in Zurich, which analysed claims from Holocaust survivors regarding dormant accounts in Swiss banks.

She is a member of Global Arbitration Review's editorial board. Her 1992 PhD thesis on the application of the UNCITRAL rules by Iran-US Claims Tribunal was one of the first books to be published on the subject.

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