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The Guide to Advocacy

General Editors
Stephen Jagusch QC and Philippe Pinsolle

Associate Editor
Alexander G Leventhal

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Cultural Considerations in Advocacy: United Kingdom

David Lewis QC[1]

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.[2] Any observation that the techniques below are not also followed by counsel

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

2 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.[3] 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',[4] 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'.[5] 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'[6] 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.

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.[7] 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

7 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.[8] 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.

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

David Lewis QC
Twenty Essex Chambers
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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Appendix 2

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Christopher Style is a Queen's Counsel and arbitrator practising at One Essex Court. He has 40 years' experience of international dispute resolution, including acting as counsel and arbitrator in institutional and ad hoc references involving many systems of law and with seats in many of the centres of international arbitration.

Christopher has published numerous articles and is a frequent speaker on arbitration law and practice. He is a Fellow of the Chartered Institute of Arbitrators, deputy chairman of the board of the LCIA and one of the UK's representatives on the ICC Commission on Arbitration.

Stephen Bond
Covington & Burling LLP

Stephen Bond has focused on international commercial arbitration for almost 30 years. A former secretary general of the ICC International Court of Arbitration and US Member of the ICC Court, Stephen participated in the production of the 1998 and 2012 versions of the ICC Arbitration Rules. He has served as an advocate or arbitrator (sole, party and chairman) in well over 100 international arbitrations under the rules of the ICC, the LCIA, the Stockholm Arbitration Institute, the Japanese Commercial Arbitration Association, the Vienna Centre and UNCITRAL, as well as acting as counsel in mediations. Stephen's experience includes disputes in the energy, international joint venture, construction, defence, technology, sales and distribution fields. He is a frequent speaker and writer on international dispute subjects.

Jackie van Haersolte-van Hof
London Court of International Arbitration

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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Successful advocacy is always a challenge. Throw in different languages, a matrix of (exotic) laws and differing cultural backgrounds as well and you have advocacy in international arbitration.

Global Arbitration Review's *Guide to Advocacy* is for lawyers who wish to transcend these obstacles and be as effective in the international sphere as they are used to being elsewhere. Aimed at practitioners of all backgrounds and at all levels of experience, this Guide covers everything from case strategy to the hard skills of written advocacy and cross-examination, and much more. It also contains the wit and wisdom on advocacy of more than 40 practising arbitrators, including some of the world's biggest names in this field.

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