

ADVOCACY IN INTERNATIONAL ARBITRATION

Joe-han Ho (39 Essex Chambers)

Louise Azmi (Barrister at Law, Solicitor and Advocate of the High Court of Malaya)

Introduction: Arbitration and litigation

- Litigation: ‘Going to Court’
- Arbitration: A private and consensual system of dispute resolution
- Some key differences:
 - Procedural flexibility – although this can be over- stated.
 - Right of appeal
 - Sanctions for non-compliance

Introduction: Arbitration – ‘International’

- Domestic (‘national’) arbitration: Arbitration between entities resident in the same country — will usually involve only the domestic law of that country
- International (‘transnational’) arbitration: International elements are present. Often –
 - International nature of the dispute and parties
 - Multiple laws apply
 - Cultural lens
 - Keep a wide, international outlook

Introduction: Common v civil law

- Common v civil law: Archaic to think of ‘common law approach’ and ‘civil law approach’ to arbitration.
- Starting point is different.
- Modern international arbitration more of a hybrid.
- Commonalities: Pleadings, Disclosure, Hearing, Submissions

Introduction: Broad trends

- Complexity of proceedings: Increasing trend of exhaustive written submissions. This adds considerably to the time and cost of proceedings, thereby reducing key advantages of arbitration. There is increasing recognition of this as an industry-wide problem
- 'Defensive' conduct of proceedings: Due process paranoia
- The role of technology: The profiling of arbitrators, and the impact of electronic data (and meta-data)

Case preparation & strategy: Know your audience

- The Tribunal is the object of persuasion. What do you know about it?
- How will the Tribunal decide the case?
- How will the Tribunal write the award?
- You are the good guys. Win on the facts if possible.

Case preparation & strategy: Pleadings

- Start with the 'pleadings'
- What must be proved?
- To what standard?

Case preparation & strategy: Witnesses

- Do the witnesses address the facts necessary to factually support each head of claim?
- Do I need to amend or provide supplementary witness evidence?
- Claimant – looking for missing evidence, areas to improve
- Respondent – identify flaws and areas of attack

Case preparation & strategy: Plan 'backwards'

- What is the case theory?
- What do I want to say in an ideal Closing?
- Read everything- correspondence, exhibits, look at photos, etc
- Write your fantasy closing submissions

Case preparation & strategy: Prepare Cross Examination

- From your Closing, what do you need from each witness?
- How are you going to get it?

Cross-examination: Often, no ‘smoking gun’

- The modern trend, in both litigation and arbitration, is to focus on the contemporaneous documents.
 - **Simetra Global Assets Limited v. Ikon Finance Limited [2019] EWCA Civ 1413**: *“It has become a commonplace of judgments in commercial cases where there is often extensive disclosure to emphasise the importance of the contemporary documents. Although this cannot be regarded as a rule of law, those documents are generally regarded as far more reliable than the oral evidence of witnesses, still less their demeanour while giving evidence.”* (Males LJ at [48])
 - **Gestmin SGPS S.A. v Credit Suisse (UK) Limited [2013] EWHC 3560 (Comm)**: *“... memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event.”* (Leggatt J at [17])

Cross-examination: A necessary minefield

- Every question in cross-examination invites disaster
- At best, a helpful answer emphasises the other side's weakness
- At worst, a bad answer destroys your case theory
- **Keep it short and stop when you get what you need.**

Cross-examination: Golden rules

- Ask one thing at a time
- Ask leading questions
- Never ask a question to which you do not know the answer
- Never ask the witness to explain
- Stop when you get what you want
- Do not quarrel with the witness

Cross-examination: Tactical call

- Tactical call: When do you press a witness in oral testimony?
- Tactical call: When do you re-examine a witness?

Cross-examination: Experts

- Fact witnesses often do not want to be there. They can react to the pressures of cross-examination in unexpected ways. The Tribunal is often sympathetic.
- In contrast, expert witnesses do this for a living. The Tribunal knows this. The gloves can come off.

Cross-examination: Experts

- Research
 - Who is the expert?
 - What is his/her history? Are there any potential/actual conflicts?
 - What are his/her credentials? Are they *directly* on point here?
- Become an expert. Use your own expert to do so.
- Learn the language of the discipline.
- It is often easiest to attack the assumptions.

Submissions: Your value-add as a lawyer

- Written submissions are your primary tool of persuasion
 - They are there after the hearing when memories have faded
 - They guide the oral submissions/evidence, and are ‘triggers’ to the key points
 - They are often a good starting point to start writing the award...
- Oral submissions are nevertheless important
 - They play a key role in amplifying the submissions and bring points to life
 - They can flush out which points need elaboration or explanation
 - They can flush out which points have – or do *not* have – traction

Submissions: Give the Tribunal what it wants

- What is a Tribunal's dream submission?
 - Succinct, relevant, and coherent
 - Accurate – fair and candid descriptions of the facts/law
 - Clear – identifies the key issues, and tells the Tribunal what the party wants
 - Persuasive – focuses on the best points, and addresses the difficulties
 - Helpful – appropriate cross-references and emphasis
 - User-friendly – a chronology, *dramatis personae*, accurate page citations, etc.

Submissions: Opening and Closing

- Opening
 - Often tentative. You do not know what the witnesses will say.
 - Often to orientate the Tribunal and fire the opening shots.
- Closing / Post-hearing briefs
 - Go for the jugular. Cross-reference to the documents and the transcript, and show how the evidence (documentary and oral) supports the case theory
 - Focus on your best points and address the difficulties you have
 - Address any issues raised by the Tribunal at the hearing
 - Exceptionally, a party sometimes seeks to adduce fresh evidence

Submissions: Tactical calls

- Tactical call: Do you run a weak point, when you have better points?
- Tactical call: When do you abandon points?

Final Thoughts

- To avoid unforced errors in international commercial arbitration:
 - Instil trust from the outset
 - Keep your audience in mind
 - Prepare your case theory early and keep control
 - Follow the golden rules of cross- examination
 - Keep submissions impactful and accurate.