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ADVOCACY IN INERNATIONAL ARBITRATION

WRITTEN ADVOCACY

Written Advocacy

1. Fundamental to the role of the advocate in the persuasion process is the ability of the advocate to communicate effectively and persuasively both:
   1.1 orally; and
   1.2 in writing.
2. In recent years, written advocacy has assumed greater importance because of the pressure on Courts to resolve cases quickly and efficiently. It has resulted in a significant amount of both evidence and argument being reduced to writing.

International Arbitration

3. In international arbitration, written advocacy is of paramount importance.
4. Gibbs CJ observed:[1] *"…written words remain and the written outline of submissions remains visible when the sound of Counsel's voices no longer vibrates in the memory…"*
5. The personality of the advocate and the party's integrity as indicated by the advocate's communication with the arbitral tribunal is perceived, accurately or not, through the advocate's correspondence and email exchange with the arbitral tribunal long before the substance or potential issues are framed.

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

6. Each arbitrator evaluates the case through the advocate, who represents the party from the very first communication. The process does not end until the award is entered.
7. The advocate must be mindful of the impact on each arbitrator of even the most elementary communications with the tribunal.

8. Persuasion continues with the exchange of documents fundamental to the arbitral process:
   - 8.1 written memorandums;
   - 8.2 the notice of dispute, if the advocate has drafted it;
   - 8.3 the initiating process;
   - 8.4 the statement of claim;
   - 8.5 the response;
   - 8.6 comprehensive written submissions by each party at the conclusion of the evidence;
   - 8.7 witness statements;
   - 8.8 (perhaps) a rejoinder;
   - 8.9 affidavits;
   - 8.10 submissions on arbitral procedures, interim measures or other matters;
   - 8.11 documentary and other demonstrative evidence; and
   - 8.12 "post hearing" briefs, which parties may have the right to file at the conclusion of the submission process,.

9. To be persuasive, written advocacy generally needs to:
   - 9.1 be structured;
   - 9.2 be clearly expressed;
   - 9.3 identify with precision what the party is seeking to put before the tribunal; and
   - 9.4 make efficient use of language.

10. Like oral advocacy, written advocacy needs to be pitched according to:
    - 10.1 the nature and complexity of the case; and
    - 10.2 the extent of the issues 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.

11. Written advocacy has the obvious difficulty that the writer is unable to test whether the reader is receiving and understanding the message that the writer intends to convey. The rules for persuasive oral advocacy apply to written advocacy as much as is possible.

Pleadings

12. The start of the persuasion process is the originating document. A well pleaded claim; indictment; notice of appeal or other document, that effectively communicates the moving party's assertions can be a powerful tool in the persuasion process.
13. A well pleaded defence or document in reply that articulates the defence can do the same.
14. The pleading assists to clearly define the issues.
15. Human nature being what it is, we tend to dismiss a poorly drafted pleading particularly if it requires the reader to search for the message the pleader is attempting to convey.

Statements/Affidavits

16. Witness statements form part of the persuasion process. Statements that are properly drawn; concise and compliant with the rules of evidence applicable to the arbitration are persuasive in themselves.
17. They need to be logical and well structured.
18. The easiest way to develop the story is to tell it in chronological order.
19. Drafting affidavits is a topic of its own, but a witness is more credible if his or her evidence is easily understood and developed in a logical step by step way.
20. Some tips on drafting affidavits:
    - 20.1 introduce the witness;
    - 20.2 develop the witness' account logically and chronologically;
    - 20.3 avoid irrelevances;

20.4 make the affidavit a reflection of the person. There is no point making an unskilled labourer into a rocket scientist. It makes the evidence of the witness difficult to accept;

20.5 be prepared to tell a story in the statement.

21. Above all else, **the rules of evidence apply to affidavits and statements in the same way that they apply to the oral evidence.** It becomes very difficult to read a coherent version of the facts if, having had large sections of a statement rejected as being inadmissible, the advocate attempts to then supplement the affidavit evidence using oral evidence, as this requires the trier of fact to look at both the statement and the transcript in order to obtain a complete picture of the witnesses' evidence in chief. Mistakes creep in. The trier of fact can lose the thread of the case concept and the witness' evidence, and the persuasion process becomes much more difficult.

Written Submissions

22. In international arbitration, written submissions usually precede oral addresses to the tribunal.
23. 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, which provide the first opportunity in the process to persuade the tribunal of the the case of the respective parties' merits by establishing the credibility of the advocate and the merits and substance of the party's case.
24. The basics of persuasive oral argument apply to written submissions.
25. Written submissions must be useful to the decision maker both in substance and in form. They must help the decision maker understand what has to be decided by clearly setting out the advocate's case theory.
26. *"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…"[2]

27. Accordingly, there is a number of simple rules to follow to create persuasive case theory and submissions:

    27.1 explain at the earliest stage what decision the party wants the Court to make and why;

    27.2 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;

    27.3 formulate each proposition of fact and law followed by the supporting material;

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

    27.5 be concise, as concise written submissions are easier for the reader to understand. Too much extraneous detail may distract the reader from the main thesis of the submissions, particularly if the reader does not speak English. Try to pick the three strongest arguments in your favour on each issue and avoid long lists;

    27.6 use simple language. Everyone's comprehension rate is different, and their backgrounds are different and diverse. The more simple the language, the more likely the correct message is to be conveyed. For instance, use fewer adverbs;

    27.7 use simple ideas. Even the most complex concept can be reduced to a comparatively simple and therefore easily understandable idea;

    27.8 structure, structure, structure. The argument should develop logically;

    27.9 use head notes. Introduce the idea or the conclusion and then demonstrate why it is correct by detailed analysis of the subject matter. In a complex writing, an executive summary is often of assistance. Headings also add to the structure and make the writing easier to understand;

[2] 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.

27.10 use short sentences, numbered paragraphs and appropriate headings;

27.11 ensure that the submissions are well set out, and have space for the decision maker to make notes;

27.12 cross-reference;

27.13 footnote. Notes in the body of the submission often detract from the argument. Referencing at the foot of the page means that the argument flows;

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

27.15 ensure the submission flows and is congruent. It should be easy to read and to understand;

27.16 ensure submissions are precise:

27.16.1 cite only the key passage from the best authority;

27.16.2 use past perfect tense; and

27.17 if there are to be oral submissions, leave some matters to be submitted orally. Rhetoric and adjectival referencing are more in the province of oral argument "*the touchstones are condensation and selection*".[3]

28. Often time will not permit it, but when you have finished writing the submissions, ask:

28.1 is it realistic;

28.2 does it have a chance of success;

28.3 do I need to do more or less;

28.4 is it easy to follow; and

28.5 does it read well?[4]

29. A document that is well-structured and pleasant to the eye is likely to be more persuasive.

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

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

[4] The Australian Advocacy Institute Advocacy Manual Hampel Brimer & Cune P161-172

31. Most arbitrators will be annoyed or alienated by written submissions that have any of the following characteristics:
    - 31.1 **prolix** - including irrelevances; excessive quotation of fact or authority and failure to distil the essence of the argument;
    - 31.2 **issue overload** - too many points or issues resulting from a failure to reject weak points;
    - 31.3 **incoherence** - a lack of a logical; unified concept or theme, or an absence of interrelated organisation;
    - 31.4 **inaccuracy** - misstatement of fact or issue; omitting or misquoting authority or quoting out of context;
    - 31.5 **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.
32. 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.
33. Further, the written document establishes the credibility of the advocate.
34. As set out in the persuasian paper, part of the persuasion process includes the credibility of the source from which the submission emanates.

Accuracy

35. 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 submissions.
36. Oral submissions speaking to inaccurate written submissions are not persuasive because they lack credibility.[5]

[5] Credibility and source needs to be identified

Comprehension

37. 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

38. 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 grasp of an extensive body of law.