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Advocacy in International Commercial Arbitration

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TABLE OF CONTENTS

Foreword
Elliott Geisinger and Guillaume Tattevin................................. v

About the Editors ........................................................................ ix

About the Authors ........................................................................ xi

Part I. Advocacy: Which Qualities for Advocates? ...................... 1
Advocacy in International Commercial Arbitration:
What For? .................................................................................. Elliott Geisinger 3
Laudatio of Franz Schwarz, Recipient of the Inaugural ASA
Prize for Advocacy in International Commercial
Arbitration ................................................................................... Bernard Hanotiau 23
Laudatio of Philippe Pinsolle, Recipient of the Second ASA
Prize for Advocacy in International Commercial
Arbitration .................................................................................. Henry Peter 29

Part II. The Advocates: Roles and Rules for Counsel ............... 31
Professional Conduct in International Arbitration — A Discipline
of Its Own for a Discipline of Its Kind ......................................... Matthew Gearing and Sheila Ahuja 33

Part III. Advocacy Training ....................................................... 55
Advocacy Training of International Commercial and
Investment Arbitration ................................................................. Jeffrey Waincymer 57
Institutional Advocacy Training .................................................. 87
SAA—Swiss Arbitration Academy ................................................. 87
FIAA—Foundation for International Arbitration Advocacy ....... 88
MIDS—Geneva Master in International Dispute Settlement ....... 89
Advocacy Training for International Commercial and Investment Arbitration

Jeffrey Waincymer

1. INTRODUCTION

A paper dealing with advocacy training for international arbitration should seek to resolve some conceptual tensions before it can set out any meaningful practical blueprint. These tensions involve a consideration of the essential nature of advocacy, which in turn may be affected by differences in procedural and evidentiary approaches to adjudication between key legal families. These differences have led to differences in legal education, both in terms of curriculum and pedagogy, and hence the way graduates approach contentious cases.

At the extreme, to some civilian scholars and practitioners, advocacy as a legal skill is seen as more relevant to the common law oral tradition and its bifurcated profession, where contentious legal work is divided between solicitors and barristers. Even within the common law world, advocacy is too often seen as the exclusive preserve of the barrister class, best learnt on the job via pupillage and experience. Conversely, a civilian lawyer’s key role might be suggested as being to understand the scientific theory underlying the relevant law, muster the appropriate evidence and assist an inquisitory adjudicator who would frame the process as best as possible within a broad discretion.

This article seeks to argue against these extremes. It argues that neither extreme view gives appropriate deference to the essential nature of advocacy as persuasion; neither is relevant for modern adjudication in any legal system; and both are certainly inappropriate for international arbitral practice.

The article first looks at the nature of advocacy; differences among legal families as to evidence and procedure that may impact on advocacy skills; then considers the key elements of advocacy; considers teaching options and finishes with a practical training blueprint, outlining the key elements of a training model for law firm and university training.

1 I would like to acknowledge the invaluable assistance of Alex Fawke in the research and development of this chapter.
THE NATURE OF ADVOCACY

It is necessary to first consider what we mean when we talk about advocacy. To advocate a position in an adjudicatory context is to seek to convince the adjudicator of the relative merits of that position. Essentially, advocacy is persuasion, involving doing everything necessary to persuade the tribunal to do what you want it to do. A couple of comments can be made about this at the outset.

The most crucial observation in that context, is that it should be a seamless and integrated process, encompassing all steps in an adjudicatory exercise and being of primary concern to all members of a common legal team. The client wants his lawyer to ultimately be successful, meaning that the lawyer will have successfully persuaded the adjudicator. Every activity should be engaged in with that central goal in mind.

When seen in the above manner, it becomes immediately apparent that advocacy is not simply learning to speak in an eloquent manner at an oral hearing.

Tschanz has noted, "[t]he arbitrators must think that the case is good, to be a strategy of persuasion adopted throughout. As Pierre-Yves Tschanz has noted, "[t]he arbitrators must think that the case is good, not that counsel is brilliant." 3

In order to be convincing enough to win any case, counsel must use the Award or Order? This tells you which arguments you need to run and where your research efforts are best needed, both as to law and facts.

The second key observation is that, persuasion, like any dynamic communication activity, must be focused on the communicator, ie, what will best convince the adjudicator given their legitimate and personal known and predicted concerns? Because arbitrators differ, one style cannot fit all. Advocacy is therefore about the utilisation of dynamic skills on a case by case basis.

Thirdly, it must be stressed that, because advocacy describes such a broad range of activities aimed at a broad range of persons, it requires a broad set of skills. Being a good advocate means being a good lawyer in all respects.

4 For further definitions, see David Beech, QC, ADVOCACY 1 (2nd ed., 2007); Ian Morley, THE DOCK'S ADVOCATE: A SHORT JURUSM ON HOW TO BE SERIOUSLY GOOD IN COURT 6 (2nd ed., 2009).

3. ARBITRATION ADVOCACY AND DIFFERENCES IN PROCEEDURE AND EVIDENCE AMONG LEGAL FAMILIES

There are undoubtedly significant differences in advocacy practice across different countries and legal systems. Where arbitration is concerned, the key differences are more evidentiary than procedural. Because mandatory norms of most lex arbitri provide for each party to be given an adequate opportunity to present its case, even trained arbitrators are not unduly inquisitorial.

The key differences are in relation to oral versus documentary evidence; access to documentary evidence; competent witnesses and the respective roles of parties and adjudicator. These can often be explained by cultural differences and variations in legal procedure, evidentiary norms and history.

Because this article concerns advocacy in international arbitration, the topic naturally invites a more in depth comparison and discussion of these differences. We will also consider whether there are common optimal norms and how this all impacts upon the art of persuasion. Brief comments are made in this section, with more detailed analysis in the context of advocacy best practice dealt with in the following section, where each stage of the process is separately analysed.

Where oral evidence is concerned, the common law has a long history of jury trials which are usually unknown in civilian systems. When the jury system began, many jurors could not read, and so courts focussed on oral advocacy and minimised written submissions. Because of the concern with lying, great reliance was placed on the cross-examination stage as the testing ground for witness veracity.

Both systems have a certain appeal. It does stand to reason that, by seeing a witness respond to questions in person, we might be able to discern more about the truth of their statements. Advantages include the ability to explore points and have a nuanced discussion. On the other hand, when taken to extremes, some cross-examinations are deliberately rhetorical or argumentative, pave over unimportant subject matter, and can unfairly make genuine witnesses appear untrustworthy. Other disadvantages include the expense and the ability of more eloquent witnesses to be unduly persuasive. Such a process can also advantage articulate liars over less sophisticated but truthful witnesses.

In contrast, civilian cases were heard by educated judges and tensed to rely on documents more heavily, on the basis that contemporaneous evidence seems more reliable and because of a greater scepticism as to the ability to determine witness veracity. As Baum has phrased it, civilian courts have traditionally treated oral evidence with "far less importance, if not outright scepticism". This has meant that common law advocates are usually trained in the examination of witnesses, while this may be foreign for many civilian lawyers. Conversely, common lawyers have less practice at persuasive writing.

More contentious is the approach to fact-finding and inferences from facts. It has been suggested that common law lawyers focus more on a rigorous examination of the facts of the case, while civilian lawyers may concentrate more on a scientific analysis of the law and legal policy. The more inquisitorial style might encourage lawyers to wait for adjudicatory guidance in generating the key facts. Even entire legal questions may be left for civilian judges under the doctrine of non obstante curia.

Another point at which the two systems differ is in collating the documentary evidence. Common law lawyers expect the opposing party to produce all relevant documents for inspection through the discovery process. It is an important part of the advocate's job to elicit and analyse all of the documents produced and, if this is not done, to seek an order requiring it. By contrast, judges in civilian systems will not automatically require one side to produce additional evidence.

Both approaches have understandable rationales. On the one hand, if relevant evidence exists, it seems like it is in the interests of justice for it to be produced in the pursuit of truth. On the other hand, a defendant might reasonably claim that it should not have to do anything to assist the claimant that has chosen to invade its liberty, presumably on tenable grounds. If the grounds are indeed tenable, the claimant should have had sufficient evidence before it decided to initiate the claim.

The systems also differ in their use of expert witnesses. The common law approach is for the parties to appoint their own experts, while civilian systems tend to rely on court-appointed experts.

Again, both approaches have some appeal. If a party can find an expert that supports its side of the case, it would seem unfair not to allow it that evidence to be heard. On the other hand, there is the potential for a party-appointed expert to be biased, and a court-appointed expert seems like a more neutral and reliable option. Even

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7 Baum, International Arbitration: The Path towards Uniform Procedures, 53.
8 See Doak Bishop, Towards a Harmonized Approach to Advocacy in International Arbitration, 454-456.
10 Baum, International Arbitration: The Path towards Uniform Procedures, 53.
truthful party appointed experts that differ as to their testimony require a mechanism by which a non-expert tribunal can resolve the differences.

While these are important differences generally and also in the context of advocacy and the processes of developing case strategies, this article argues that the suggested differences are too often exaggerated. There are several reasons for this.

First, common law and civilian law systems are often discussed as if the distinction is pure and obvious. This is misleading. No legal system is purely common law or purely civilian. Over time, both systems have begun to borrow from each other and exchange ideas. Common law and civilian systems now also vary greatly amongst themselves. So the distinction between the two systems is narrowing.

This is understandable from a policy perspective. Each is trying to promote optimally fair and efficient dispute resolution processes. Because it is often difficult to maximise both fairness and efficiency without compromise and because policy makers in different cultures might naturally make differing trade-offs, it can be presumed that all systems seek to gravitate towards common ideals from at times differing starting positions.

Secondly, any single proceeding in a common law country may be more "inquisitorial" than a proceeding in a civilian system. Much depends on the facts of the case, the parties and the disposition of the adjudicator. The difference often lies more in tactics and personal style than the legal system in which the parties are operating. James Crawford has noted, in a similar vein, that "even two parties from civil law backgrounds, represented by European lawyers, will usually present their cases in a thoroughly adversarial way."12

Finally, in international arbitration, we can now say that some steps have been taken towards a harmonisation of approaches. The most important step was probably the publication and increasing use of the IBA Rules on the Taking of Evidence, now recently revised.14

The two key points to be drawn from the foregoing analysis in the context of this article are first, that there is a convergence of norms and second, that advocacy as persuasion must consider how to present the most persuasive factual record in the context of these differing

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11 GARY D. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, THIRD EDITION, 1789.
13 See, Born, 1790.
of drafting an arbitration agreement, if for example, the agreement calls for utilisation of the IBA Rules or similar evidentiary norms.

4.2. Mastering the Facts and the Law

Even the best advocates are of little use without an understanding of the facts and the law relevant to the case. Mastering these is the first step in any proceeding.

In international arbitrations, unlike domestic litigation, mastering the law does not simply mean finding the appropriate statute or case. There can, of course, be disputes as to which law is applicable, and this can be crucial in determining the outcome of the case. An advocate needs to be persuasive as the methodologies available for choice of law issues, whether conflicts approaches or approaches based on identified implied choice of the parties. Such choice of law issues can also impact upon choice of arbitrator. Mastering the facts requires consideration of the fact finding issues referred to above. An optimal persuasion strategy will need to factor in the way evidence is admitted and evaluated by any tribunal.

4.3. Developing a Case Theory

Developing a good case theory or strategy is the most crucial step in any arbitration or litigation. It is worth expanding on this notion in some detail. A case theory is the central theme or points that need to be presented to convince the tribunal to make an order in your favour. It can only be developed after a thorough analysis of the facts and law and a consideration of the way an arbitral tribunal is likely to handle contentious questions.

Before the case theory is established, the advocate cannot prepare more specific aspects of the case, such as statements at the hearing, examination of witnesses and written submissions. The case theory guides and informs all of these, and so is an important early step for the advocate to take. It should be considered as early as possible as it guides research, choice of evidence and submission focus. Once again, the essential thesis of this article is that on this basis, advocacy has to be seen as a seamless aspect of the entire adversarial process.

Once a case strategy is developed, other choices can be made. For example, a weak argument that is essential for that goal must be prepared and presented as strongly as possible. A weak alternative argument might be dropped or presented briefly. This can be particularly important where there are clear time constraints, such as under chess clock arbitration.

A key element of the case strategy is to consider what factual record to present, including how best to undermine the factual contentions of the other side. Meticulous analysis of the facts and law are required, as well as an ability to present them clearly. Before this, an appropriate factual record must be generated, being an amalgam of witness testimony, party and third party documents and identification of the inferences and conclusions of fact that might be drawn from such a record.

Differences in dispute settlement norms between legal families impact this element, both as to the procedure by which case strategies are presented and as to the admissibility and access to evidence, whether of parties, experts or documents held by the opposing party. This is dealt with in the following sub-sections.

While these differences may impact upon advocacy strategies, in all cases an advocate is essentially trying to tell a compelling story that will hopefully equate strongly with the final award. Because of this, the structure of written and oral submissions should largely follow an ideal award order. For example, when making final submissions at the hearing, or dealing with sequential written submissions, the person speaking or writing first can do this easily. The person responding has to marry this aim with a separate goal of conveying the impression that they are truly responsive to their opponents’ arguments, i.e., try to present your coherent respondent theory and also negate the claimant’s key points in a seamless integrated fashion. If the respondent just presents its theory, it sounds like it has not engaged or responded. If it just attacks claimant’s arguments one by one, there is no overall theory and the ambience is too defensive. Conversely, the claimant aims to deal so comprehensively with respondent’s key points that they are truly responsive to their opponents’ arguments, i.e., try to present your coherent respondent theory and also negate the claimant’s key points in a seamless integrated fashion. If the respondent just presents its theory, it sounds like it has not engaged or responded. If it just attacks claimant’s arguments one by one, there is no overall theory and the ambience is too defensive. Conversely, the claimant aims to deal so comprehensively with respondent’s key arguments in advance, that the respondent will sound unpersuasive, having lost the ability to get any immediate sympathy. As noted, where written submissions are concerned, the above model works naturally when they are directed to be sequential. On the other hand, when they are simultaneous, each must aim to be pre-emptive as to arguments that ought to be anticipated from the other side.

As mentioned, the overall aim of advocacy is to persuade the adjudicator. In order to do so, in my view, your aim is to be seen as a trustworthy, and convincing expert.
To be expert means having and displaying all pertinent knowledge of facts and law as and when needed, but not giving a lecture for its own sake either in written or oral submissions.

To be trustworthy means that the adjudicator trusts you to address all relevant aspects of the argument, law and facts, both those favourable and also those which your opponent will suggest are unfavourable to your case. You generally only believe someone when you can trust that they are not misrepresenting the strengths of their case or glossing over key aspects of it. You still seek to show why the purportedly unfavourable aspects of your case are not determinative, but the adjudicator should at least feel that they do not need to distrust you or at least check up on you. Nothing undermines credibility with arbitrators faster than misleading them. When counsel presents the case in an exaggerated manner, the arbitrators' reasoning tends to be as follows: this counsel has presented certain aspects of the case in a biased way. Therefore, the overall story that he or she is asking me to believe must be distorted. To create such scepticism does a great disservice to the client.

As part of not overstating their case, advocates should be careful in their choice of words. It is tempting to use words like "clearly" and "obviously" in both written and oral submissions. Such language is not only superfluous. It is also risky. Often, the point being made will be far from clear or obvious to the other party or the tribunal. This can easily attract critical comments or questions from the arbitrators. To be convincing, you present a compelling set of reasons why your position should be the preferred one. This covers both substance and presentation.

So what makes something seem sensible and convincing? In other words, what distinguishes a good case theory from a bad one? In my view, to be convincing, you are ideally trying to appeal to "gut", "heart" and "head" all at the same time. By "gut" I mean the intuitive first blush look at a problem (ie the gut reaction). What is the immediate reaction that you think the adjudicator will take and how might you favourably influence this? In this way you try and have the adjudicator on side as early as possible.

It is easier to reinforce a favourable preliminary view taken by the adjudicator than change an unfavourable one. This makes you think about the type of opening remarks that will get the tribunal onside

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18 R. Doak Bishop, Advocacy from the Arbitrator's Perspective, in THE ART OF ADVOCACY IN INTERNATIONAL ARBITRATION: 443 (R. Doak Bishop ed.).
19 Tschanz, Advocacy in International Commercial Arbitration: Switzerland, 206.
20 Tschanz, Advocacy in International Commercial Arbitration: Switzerland, 206.
21 See, Tschanz, above n. 2, 206.
22 R. DOAK BISHOP, ADVOCACY FROM THE ARBITRATORS' PERSPECTIVE, 443.
4.4. Selecting Arbitrators

If persuasion needs to be considered at all stages, then this can even encompass selection of a tribunal. A major difference between domestic litigation and arbitration is the ability for parties, in some cases, to select the arbitrators. Choosing an appropriate or inappropriate arbitrator influences the running of the arbitration and, potentially, the outcome. As such, selecting the right arbitrator is an important part of advocacy in arbitration.

What should parties look for in a potential arbitrator? It might be thought that the most important quality is a predisposition to a party's side of the case. No doubt, this can be one consideration, and many parties naturally feel more comfortable if one of the arbitrators shares their nationality, legal background or expertise. Further, as Charles J. Moxley Jr. has noted, a party may wish to choose an arbitrator with a reputation as a rule-oriented strict constructionist or a more equity-oriented open-minded arbitrator, depending on the advocate's case.

At the very least, parties are well within their rights to ensure that an arbitrator has no predisposition against their case. However, a few words of caution are necessary, drawing on an excellent article by R. Doak Bishop on the matter. There are both legal and practical reasons for not choosing an arbitrator who is obviously predisposed to one side of the case. First, most arbitral rules require arbitrators to be, and appear to be, independent and impartial. Any arbitrator not meeting these requirements can be challenged by the other party and removed. This obviously rules out an arbitrator who has written a specific opinion on the case. But beyond this, it is probably not in a party's interest to choose an arbitrator too favourable to its own case. As Doak Bishop has noted, arbitrators often bond over their shared impartiality and belief that they are working together to decide the case appropriately. A clearly predisposed arbitrator may not bond with the rest of the panel in this way and, consequently, may have little influence on the other arbitrators.

Advocates should be wary of this potential perverse effect. Finally, if there is an incentive for one party to select a more predisposed person, the other party should do likewise, cancelling out any value in the strategy and ensuring a more polarised and possibly less harmonious tribunal.

So rather than looking only to a potential arbitrator's predisposition, a range of other factors should be considered. The arbitrator should be a person of integrity who will not be influenced by inappropriate considerations or pressure. He or she should be intelligent, capable of recognising strong arguments and seeing through weak ones. Expertise in arbitration law or a particular industry is also important, though this depends on the particular facts of the case. Doak Bishop further suggests that the arbitrator should be articulate and have a personality that will enable him or her to develop a good relationship with the parties and other members of the tribunal.

4.5. Documentary Evidence

Evidentiary strategies and the desirability of trustworthiness can depend upon the duty to provide adverse documents and the ability to obtain favourable documents from the opposing party. As noted, legal families differ significantly on these issues.

To the extent that any trend is discernible in international arbitration, it is worth noting that Article 3 of the IBA Rules on Taking Evidence requires parties to submit all relevant documents to the tribunal. A party can also make a "request to produce", requiring the other side to produce specific documents or "a narrow and specified requested category of documents". We might tentatively say, then, that the logic behind the discovery process is becoming more widely

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26 See, R. Doak Bishop, Towards a Harmonized Approach to Advocacy in International Arbitration, above n. 3, 460.
27 Ibid.
28 Ibid.
29 Ibid.
30 Even where this is accepted, it is a classic Prisoners Dilemma where each will adopt the sub-optimal strategy knowing they will be better off if the other side does not do likewise, for fear that the converse will occur where they do not.
31 Ibid.
accepted. Open ended fishing expeditions are not supported, but this is the case with emerging common law practice as well.

From an advocacy as persuasion perspective, the difference means that under civilian norms, an optimal strategy should see the claimant with a sufficient evidentiary record at the outset. A common law approach can hope to generate parts of that record through the document production processes.

4.6. Written Submissions

The exact procedure of the written submissions in an international arbitration will depend on the arbitral rules and scheduling order of the arbitrator. But in most international arbitrations, written submissions are a substantial and important part of the advocates' role. For some common lawyers, the notion of written advocacy is not well understood. In the United States, for example, advocacy in written submissions is almost unknown, because the jury does not see them. But in international arbitrations, written submissions are crucial, as they provide the first opportunity to persuade the tribunal. And, as psychological studies of American juries have shown, first impressions matter—probably more than they should. A few brief, general comments can be made about good written advocacy.

Written submissions are more permanent and enduring than oral submissions. Because of this, advocates should be careful to avoid inconsistency. Once written submissions have been made, counsel should be cautious not to drastically change his or her story, which can, of course, undermine credibility.

32 See SIEGFRIED ELZING AND JOHN TOWNSEND, BRIDGING THE COMMON LAW-CIVIL LAW DIVIDE.
33 Doak Bishop, Towards a Harmonized Approach to Advocacy in International Arbitration, above n. 3, 468.
34 Doak Bishop, Effective Advocacy in International Arbitration, above n. 5, p. 25. Note that this is changing in some common law jurisdictions. In Australia, for example, written submissions have become far more common in the past 25 years. See, Justice JD Heydor, Aspects of Rhetoric in Forensic Advocacy Over the Past 50 Years, in REINVENTING RHETORIC: LAW, LANGUAGE AND THE PRACTICE OF PERSUASION, 217, 231-134 (Justin Gleson and Ruth Higgins eds.).
35 Doak Bishop, Towards a Harmonized Approach to Advocacy in International Arbitration, above n. 3, 470.
36 Doak Bishop, Towards a Harmonized Approach to Advocacy in International Arbitration, above n. 3, 469.

As far as writing style is concerned, advocates obviously need to be clear, concise and accurate. Beyond this, a delicate balance must be maintained. On the one hand, written submissions must be interesting enough to maintain the reader's attention, but not too flashy and combative. Confrontational or sarcastic comments are not only unlikely to influence the final award, they can also be offensive to some arbitrators (perhaps especially those with civil law backgrounds). On the other hand, written submissions must be sufficiently academic in discussing the law to convey necessary complexities and detail, but should not be so abstruse and dense as to put the reader to sleep. In considering their writing style, foreign advocates might find it useful to consult one of the numerous books available on writing in English if that is the language of the arbitration.

Finally, unlike litigation in some national courts, all important points should be included in written submissions. Counsel should not save up what he or she perceives to be spectacular surprises for the oral hearings. This might be effective in front of a jury, but is unlikely to impress time-poor international arbitrators.

4.7. Opening Statements

The opening statement, if allowed for, provides another important opportunity to make a strong early impression on the tribunal. Although it is designed to make a good first impression, it should be one of the final things worked on by the advocate. It is not until counsel has a clear idea of how to present the entire case that the opening should be one of the final things worked on by the advocate. It is not until counsel has a clear idea of how to present the entire case that the opening should be developed. What should be included in an opening statement? Essentially, an opening statement should amount to two things: a summary and a

37 See, Justice Kenneth Hayne, Written Advocacy (Paper presented as part of the continuing legal education program of the Victorian Bar, 5 and 26 March 2007) 5.
38 Turbans, Advocacy in International Commercial Arbitration: Switzerland, 216.
39 Doak Bishop, Towards a Harmonized Approach to Advocacy in International Arbitration, above n. 3, 470.
40 Justice Hayne cites as good starting texts: Strunk and White's The Elements of Style, Fowlers' Modern English Usage, Sir Ernest Gowers' The Complete Plain Words, Fowlers' The King's English and Gowers' The Elements of Legal Style.
41 Doak Bishop, Towards a Harmonized Approach to Advocacy in International Arbitration, above n. 3, 469.
43 See, Hampt, Brimer and Kane, above n. 6, 34.
story.44 It is a summary, in the sense that it does not need to contain all of the details of the case. The panel only needs to gain an overall view of the case and its direction. The specifics can often be left for witness testimony or written statements.

At the same time, the opening statement should be a story which captures the panel’s attention and interest. Like a good story, it should be easy to understand and interesting. However, that it should not be overly dramatic or overstated, which, as discussed, can undermine credibility. This may be especially true in front of arbitrators with civilian law backgrounds, where opening statements are often seen as redundant.45

4.8. Examination of Witnesses

The most obvious difference between the two systems probably lies in the examination of witnesses.46 It is important for advocates in international arbitration to be aware of these differences. As Elsing and Townsend have noted, oral evidence that common law lawyers might assume wins the case for them may be unconvincing to a civil law arbitrator more accustomed to contemporaneous documentary evidence. So, too, civilian lawyers should be conscious of the potential for common law arbitrators to place significant weight on oral evidence.47

4.9. Direct Examination of Witnesses

Again with the aim of time efficiency in mind, the examination of the witness should be as brief and concise as possible. Oral evidence is difficult for even the most focussed arbitrators to follow, and this should be kept in mind.

Increasingly, written witness statements are used instead of direct examination of witnesses.48 However, when direct examination of witnesses is permitted, certain rules should be followed. Doak Bishop emphasises that the written statements of the witness can be used to save the tribunal's time and avoid going over uncontroversial points.49

482.

44 Ibid, 65-68.
45 Tschanz, Advocacy in International Commercial Arbitration: Switzerland, 217.
47 See, Elsing and Townsend, Bridging the Common Law-Civil Law Divide.
48 See, Doak Bishop, Towards a Harmonized Approach to Advocacy, 481.
49 Doak Bishop, Towards a Harmonized Approach to Advocacy, 482.

Counsel can simply ask the witness to confirm certain aspects of his or her written statement, and save the oral testimony for the most persuasive parts.

If oral testimony has to be long, then the advocate should vary his or her speed and presentation. It can also be helpful to expressly state when a question is important. According to Doak Bishop, Abraham Lincoln used this technique when he was a trial lawyer, prefacing key questions with phrases such as "the next question goes to the key issue in this case and is very important. Please think about it carefully before you answer."50 Strategies along these lines can be useful for maintaining the arbitrators' attention to the case strategy.

Direct examination can also be an important opportunity to acknowledge and address weaknesses in the case.51 As discussed above in the context of trustworthiness, being upfront about such vulnerabilities reduces the impact that these weaknesses have when raised by the opposing party.

4.10. Cross-examination of Witnesses

As discussed above, common law trial lawyers tend to be extensively trained in cross-examining witnesses. The common law approach assumes that, through oral examination, we can determine the character and credibility of the witness. It is thus a crucial part of the advocate’s role to establish or undermine this credibility. Civilian lawyers, by contrast, often feel uncomfortable about this process.52 Such examination, if it occurs at all, is normally conducted by judges, not the parties’ advocates.53 The role of the advocate is normally limited to suggesting questions for the judge to ask.54

If a harmonised approach is emerging, it is to allow, but limit examination of witnesses by parties. Parties are typically allowed to cross-examine witnesses if they so wish, but effort is made to ensure that these are brief and to the point.55 In this way, the excesses of the common law trial lawyer are constrained, while still allowing the opportunity to present important evidence orally.56

50 Doak Bishop, Towards a Harmonized Approach to Advocacy, 482.
52 Doak Bishop, Towards a Harmonized Approach to Advocacy, 482.
53 See, Elsing and Townsend, Bridging the Common Law-Civil Law Divide.
54 See, Elsing and Townsend, Bridging the Common Law-Civil Law Divide.
55 See, Elsing and Townsend, Bridging the Common Law-Civil Law Divide.
56 See, Elsing and Townsend, Bridging the Common Law-Civil Law Divide.
Cross-cultural issues are still relevant as civilian arbitrators may be uncomfortable with common law techniques. Nevertheless there are some well respected principles and various well-known cross-examiners have developed certain rules for cross-examining witnesses. For experts, these rules can probably be ignored in the right circumstances. But for the vast majority of practitioners, following rules such as these will likely go a long way towards improving cross-examination.

Because it is so challenging, much has been written about the “golden rules” of cross-examination. Advocates with little experience in cross-examination would do well to consult these. One list of cross-examination rules, which is preferred by Professor Hampel, comes from the American advocacy teacher Professor Irving Younger’s 10.57 Obviously, these rules do not tell us everything we need to know about successful cross-examination. But they are certainly a good starting point.

1. Be brief. There are two reasons to do this: The more you do, the more likely you will make an error; and the less the number of key points, the easier they are absorbed, (although the latter point was made in respect of jury trials).

2. Use short questions and plain words.

3. Ask only leading questions. Don’t ever ask non-leading questions. If you do, the witness will run away with it and you lose control.

4. Never ask a question to which you do not already know the answer.

5. Listen to the answer.

6. Don’t quarrel with the witness. If the answer sounds ridiculous, you do not need to point this out and attack the witness.

7. Don’t give the witness the opportunity to repeat their points from examination in chief.

8. Never permit the witness to explain anything. Witnesses are of course entitled to do this, but it is not the role of cross-examination.

9. Don’t ask the one question too many.

57 Hampel, Briner and Kune, above n. 6, 312-141.

INTERNATIONAL COMMERCIAL AND INVESTMENT ARBITRATION

4.11. Expert Witnesses

In international arbitrations, the trend has been to allow both party appointed and tribunal appointed experts. In this way, potentially convincing expert testimony, provided by one of the parties, is not ignored, but there remains an arguably more trustworthy source. The trend is also to utilise witness conferencing to engage the conflicting experts in a discussion that will allow the arbitrator to choose which view to prefer. Persuasion strategies and methods of questioning will obviously differ in each circumstance.

4.12. Closing Statements

Closing statements try and tie it all together and convince the tribunal that counsel did indeed establish the factual and legal contentions needed.

4.13. Language Issues

Because of the global nature of international commercial arbitration, counsel may address arbitrators or witnesses who are not native speakers in the language of the arbitration. Advocates should not ignore possible language barriers. If the language of the arbitration is foreign to one of the arbitrators, it becomes even more important than usual to be clear and precise, using simple, short sentences. An arbitrator is unlikely to admit during a hearing that he or she did not understand a particular phrase, so the onus is on the advocate to ensure that everything is understood. Advocates should be aware of aspects of their language which are unique to one country and may not be universally understood. Care should also be taken to speak in as neutral an accent as possible, though obviously this should not appear too forced. Colloquialisms and slang phrases should of course be avoided. It is important to remember, however, that many international arbitrators speak several languages with near-native fluency. If an arbitrator is clearly very competent in the language of the arbitration, then the advocate needs to be careful to not simplify his or her speech so much as to appear patronising.

If an interpreter is necessary, the advocate should take a number of steps to ensure that nothing is lost or, perhaps worse, distorted in translation. The first task is to choose an appropriate interpreter. If possible, it is preferable to use a reputable translation agency and an
accustomed interpreter. Once an interpreter is chosen, it is important to prepare him or her for the hearing. Oral interpreting is difficult, even for those who have a complete mastery of the two languages, and the advocate should keep this in mind. The interpreter must understand in advance any technical or unusual terms which are likely to be significant at the hearing. It has been suggested that it may be better to have consecutive, rather than simultaneous, interpretation to minimise the chance of confusion.

5. ADVOCACY ISSUES IN LEGAL EDUCATION

If the previous thoughts on the importance of advocacy are valid, the next question is how best to inculcate these skills in law graduates and in law firm trainees.

From a law firm’s perspective, it might explore in-house mentoring programs and/or encourage postgraduate specialist training in suitable areas. Companion papers in this volume address some of the latter. I believe that much more could be done by large firms in-house by having skilled educators work with trainees on real matters being conducted by the firm, to enhance their strategic and practical skills. This could take many forms. One example might be regular meetings in seminar style where trainees working on a particular matter report as to the issues and challenges, have other members of the group consider how they would have approached the matter, and have senior staff explain why they have approached the situation in the way they have.

The latter is an important aspect of having young professionals understand the importance of heuristics, i.e., the way experts go about certain functions. Often it is extremely difficult to set out an objective formula for the way experts behave, why they follow certain norms in most cases and when and why they think it strategically desirable to take a different tack in a particular case. The educator could work with law firm partners to identify suitable cases for such discussions and try and structure the learning program for the trainees. In very large law firms where trainees sometimes feel dissatisfied in being delegated to do more menial tasks without understanding the overall strategy in an individual matter, this can help enhance their job satisfaction as well as their skills development.

Advocacy training in legal education is more contentious. First, the differences in legal families impact upon the differences in legal education. Historically both common law and civilian legal systems eschewed a skills orientation, although this was more marked where civilian legal education was concerned. There are a number of reasons for this. Because civilian law was primarily concerned to deduce conclusions on specific fact situations from broad codified principles, it was said to be more concerned with a scientific synthesis of principle and a rigorous logic. The common law, relying on stare decisis, was more concerned with inductive conclusions from decided cases. The civilian deductive approach could be seen as more akin to higher forms of intellectual analysis on a par with other branches of university thought. Conversely, the common law, drawing inductive conclusions from what actually occurs in cases, had a more necessarily practical orientation, in turn leading to case method as a key form of university teaching.

Nevertheless, while each may have started from differing perspectives, each legal system seeks to resolve the same problems. As a result, legal education ought to cover a similar skills set, albeit in differing ratios. Over time, civilian legal education has incorporated some of the techniques of the common law style such as case method, Socratic questioning and, of most significance to this article, mooting in events such as the Vis Moot. European institutions have also been influential in establishing investment arbitration and World Trade Organisation moots. Such developments have come out of a realisation that expository scientific lectures, important as they may be in terms of the essence of law, can do too much of the work for the student, to the detriment of their intellectual development.

These issues are of even more concern where international issues are concerned. A thoughtful approach to comparative law, both to understand differing cultural norms, draw inspiration for policy conclusions and to understand one of the key influences in arbitral practice, is also a key legal education development. As Klaus Peter

64 K P Berger, Harmonisation of European Contract Law: The Influence of Comparative Law, 36 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 897 (2003); K P Berger, Arbitration as a Source of Inspiration for Comparative Law, Legal Teaching and the
Berger has observed, the "natural comparative orientation and flexible procedural framework" of international arbitration makes it an ideal format in which to consider comparative aspects of legal systems. Thus for arbitration practitioners, a skills oriented advocacy training program should be essential.

6. TRAINING GUIDE TO ADVOCACY PRACTICE

This section sets out some of the key elements of the approach I take to mooting and advocacy training in relation to international commercial arbitration. It essentially occurs in a university environment but would apply equally to law firm training of graduates and mentoring by arbitration practitioners of their support staff.

At the outset, because of the above view of advocacy as seamless persuasion in the context of an optimal case strategy, I see the endeavour as an element of comprehensive practical legal training. Ideally, that involves getting trainee lawyers and students to integrate substantive laws such as contract law, with procedure and evidence, in the simulated context of written and oral advocacy. I believe that this is the best form of legal education, but resources and historical approaches militate against its broad adoption in most law schools around the world. I primarily engage in this process within the context of the Willem C Vis International Commercial Arbitration Moot. The Vis Moot is ideal as it naturally brings together contract issues and arbitral procedure and theory. It is better than other moots for this purpose as it always contains a messy documentary record, with students having to identify contract rights and obligations from hypothetical fact situations as found in typical law school examinations.

Turning to the advocacy itself, I seek to highlight the following key points, many of which have been articulated above.

It is important to remember at the outset that, as with any communication activity, there are different styles that are possible, differing theories, and most importantly, differing listener preferences and attributes, so there cannot be one model that is inherently correct for all listeners in all situations.

Nevertheless, there are techniques that are widely accepted and key challenges and strategies that students should always be aware of. Importantly, even though there is no uniform model, counsel still must

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6.1. Moot Advocacy versus "Real" Advocacy

If a practical simulation is attempted in a university environment, it is important to both convince the students of the value of this approach, but also point out any ways in which the simulation may differ from real practice. In this context it is important for them to understand the distinction between moot advocacy and real world advocacy. In my view, they differ in a few key respects:

1. Moot judges are asked to assess reasoning, presentation and performance and do not assess the underlying merits of counsel's client's case.

2. The less knowledgeable the moot judge is about the law or the intricacies of the particular moot problem, the more they will tend to count performance and style over substance (I do not concentrate on the latter although I do not ignore it either).

3. In most student moots (including Vis), counsel only has 15-20 minutes (including interruptions) to cover material that would take many hours or in some cases even days in a real case. This is unrealistic when a typical moot problem has a range of issues of fact and law to squeeze into that timeframe, but this is still good training. Learning to be succinct without losing persuasiveness is a key skill. I point out that because of this time constraint, it is not essential that students cover all points in a moot, even though they should strive to do so. This is unlike a real case where you must put all arguments you intend to rely upon, although you would drop weak arguments to save costs and not annoy the adjudicator.

4. In a moot, students often do not have all key facts, yet must still argue each issue. This forces them to discuss some hypothetical fact situations in a way which would never happen in a real hearing. I point out that in a real case, the person with the burden on that issue would lose out if they still argue each issue. This forces them to discuss some weak arguments to save costs and not annoy the adjudicator.

5. If the problem gives one party a weak argument, counsel at least needs to consider running it in a moot lest they be seen as avoiding the set challenge (although some moot judges...
suggest the opposite on the basis that it shows good judgment), whereas in the real world you could give it up unless it was essential to you winning. In many moots, the stand-out performers are often the ones with the best ways of handling the weakest points that would not win in a real case no matter how well put. You are being compared to other advocates facing the same challenge and can excel in this way on a comparative basis. (Many judges may not even realise that this is why they are impressed!)

In other respects, the two forms of advocacy are similar. I concentrate on advocacy training for practice and not for winning moot competitions where the two strategies would differ. The following are key extracts from the notes I provide to students and which are the essence of my ongoing engagement with them. Subject to the above caveats, most of the points below are in my view the essence of good real world advocacy.

6.2. The Aims of Advocacy

I first concentrate on:

1. The nature of advocacy, explaining that it permeates all stages of adjudication.
2. The nature and importance of a case strategy and the need to appeal to logic and fairness as quickly as possible, discussed above as appeals to head, heart and gut.

I invite students to consider throughout their preparation whether they would be convinced by their own arguments. If not, more development of crucial arguments and/or presentation is needed. This applies to practitioners as well. Too often people just do "busy" work in preparing, without evaluating how convincing the submissions are likely to be and how they might best be improved. Always ask: if you were your own client, would you be happy to pay for the work done? Clients rightly care about results, not hours worked.

6.3. Structuring Your Argument

Arguments should be structured into a logical framework consistent with the case strategy and the award you are ideally hoping to read in due course. There are a number of subsidiary elements:

- Arguments should normally be introduced by the conclusion you want the tribunal to reach, then the reasoning, then a reiteration of the conclusion. This is for two reasons. Adjudicators always need to know where you are going. Secondly, it is never too early to appeal to the "gut." Thus in opening every issue, the ideal is to introduce it and if possible, characterise the issues and facts so that you have already begun to convince the adjudicator. This is very tricky because if you present a debatable proposition in such an introduction, an adjudicator might justifiably question you at that stage, which leads to the opposite effect, as you didn't want to start your argument in the middle of your introduction, particularly if you are doing so in a defensive fashion in response to an adjudicator who did not accept your characterisation. So how do we deal with this? In a moot context, we aim to continually work to have about 20 or so key sentences that at least appeal to the gut as introductory remarks and which also double as the basis of your last 3 minutes when you are running out of time. (I ask students to do 5 minute moots every day with no notes so that they practice thinking and talking at the same time and also become comfortable with the unrealistic 20 minute timeframe. If they become comfortable with 5 minutes, 20 minutes feels like a luxury. In any event, I point out that if they haven't come up with an idea that convinces in 5 minutes, they probably haven't developed a good argument yet.)

- On the one hand I am trying to train students to squeeze hours of submissions into 20 minutes. Again, it is the key sentences that state it all succinctly and convincingly that we try and develop and work on more and more as we get closer to the formal moot. On the other hand we are eventually brave and strategic in selecting which arguments to run and which not to run. That is most important in practice when clients don't want to pay for long, weak arguments. What I don't want students to do is drop apparently weak arguments before they have developed them as well as can be. Experienced lawyers may do so but as students, exploring all possible arguments is the best way to develop innovative thinking and evaluative skills. Also, given that students are developing advocacy skills at the same time as they develop substantive arguments, often they will lose confidence in a good substantive argument simply because they haven't yet learned how to present it convincingly.
• Beware of internal inconsistencies in your argument methodology, even between two speakers on the one team e.g. if you appeal to plain meaning when it suits you and your or your team-mate refer to a purposive interpretation at other times, can you justify the differing recommendations? The same applies to strident criticisms about sloppy communications or drafting by the opposing party in the contractual communications. Vis Moot problems always have both parties behaving sub-optimally. People in glass houses should be careful of stone throwing. All self-serving arguments do not convince and this is just one example of that kind of argument.

6.4. Handling Questions

• If you present a fully structured and convincing case, you could in theory deflect every reasonable question. To do this you need to be aware of and address your weaknesses, e.g. "while Claimant will rely on . . . or while the Tribunal might think . . . etc., the better view is . . . because . . ." A well structured argument along these lines will usually deflect questioning even from an interventionist arbitrator on your weakest points. This also goes back to the aim of being trustworthy and convincing. You want the listener to think they don't need to probe your argument as you will spoon-feed them with everything they need. They might not agree at the end but they know you will give them every idea they need.

• Nevertheless, a key part of preparation is preparation for questions. To do this you need to be aware of and address your weaknesses, e.g. "while Claimant will rely on . . . or while the Tribunal might think . . . etc., the better view is . . . because . . ." A well structured argument along these lines will usually deflect questioning even from an interventionist arbitrator on your weakest points. This also goes back to the aim of being trustworthy and convincing. You want the listener to think they don't need to probe your argument as you will spoon-feed them with everything they need. They might not agree at the end but they know you will give them every idea they need.

• Students are advised that you do one of three things with questions in a moot, either answer them well, or explain why the question is not necessary to your case theory or say you are unable to help and can you move on. The last option is the
are words interpreted, where does good faith, common sense and commerciality fit in, how does a tribunal deal with inferences from known and unknown facts. These things are natural issues for experienced practitioners but are not taught well or in an integrated fashion in most law schools.

- Remember that you use sources to PERSUADE rather than as common law precedents. That means you don’t cite authorities without explaining why this will help, e.g. you might suggest that a uniform view should be followed for the sake of consistency and because of the logic applied by the arbitrators/authors etc.

- Remember, you are not responsible for weak facts or law in a moot or case, just for weak preparation and presentation.

- You need to find what type of advocacy notes work best for you. As short as possible that still gives you everything you need is the aim. As Respondent you must have space to make notes on Claimant arguments to fit in your general outline. (When students do practice moots in front of me they are never allowed to have more than one page in front of them and I will attack anything that sounds like a rote learned speech.)

- Judges usually do not tell you if they have not understood you. You need to judge by body language and their questions (e.g. where they ask a question that you have answered for the last 5 minutes) and retell the story if the penny has not dropped e.g. “if I can put it another way...”).

- People often don’t listen when they are tired, thinking about lunch or preparing to ask a question. You have to captivate their attention. You may need to get more animated mid-moot if you think they are wondering.

As I keep saying, if you put the effort in, you should get to a standard where you would not fear presenting your case before the most prestigious judges and against the most experienced and capable practitioners. It does take time and perseverance and improvements are not arithmetic and are often not discernible by the students involved. Most importantly, I tell students from beginning to end that I have no interest in competition results. I am only interested in their learning. Positive responses from the best arbitrators at the moot are of course testament to their abilities but only the students and I can know what they were like when they started and the degree to which the process has helped them realise their abundant potential.

7. CONCLUSION

Understanding advocacy as persuasion, as a seamless exercise requiring a case strategy and developing that strategy in the context of the evidentiary approach of a particular tribunal, are key elements of effective practice for lawyers engaged in international arbitration. Firm based and university training to this end are each important initiatives that should be of the greatest benefit to budding practitioners.