
Advocacy in International Arbitration: How to Avoid Cultural Traps for the Unwary

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Collectors of English historic prints will be familiar with the world of Henry Bateman, an artist famous for his “The Man Who...” series of cartoons. With titles such as “The Man Who Lit His Cigar Before the Royal Toast” and “The Man Who Threw a Snowball at St. Moritz,” these drawings featured comically exaggerated reactions to insignificant upper-class social mistakes.

For the advocate in international arbitration who fails to understand the “social norms” relevant to a tribunal in a given seat, applying a particular curial law and often from a particular legal culture, the outcome may be very far from comical.

Rather than any humorous outcome, there is a significant risk that core elements of legal submission may be misunderstood and a greater risk that procedural disputes will arise. Whether the result is at the benign end of the spectrum, where a submission is “lost in translation,” or is something more serious, leading to procedural disruption, there is a clear risk that a client’s case is not effectively advanced. Moreover, the tribunal’s focus may be lost, shifting to the procedural when it ought to be on the substantive.

This article focuses on what an advocate and her or his team can usefully do to ensure that there are no unpleasant surprises and that relevant differences of approach are identified and taken account of from the outset of proceedings. Although there are probably significant differences in the “norms” attaching to international arbitration advocacy as between some common and some civil law systems, there can be just as significant differences between distinct civil law systems and distinct common law systems. This article provides guidance as to how

to anticipate, recognize, and take account of differences of approach in the conduct of written and oral advocacy in international arbitration.

That exercise starts with the recognition that all advocates are to some measure the product of the legal culture they “grew up” in. Effective advocates in international arbitration will appreciate early on that there are many equally valid and effective approaches to a given situation and that it is seldom a case of the approach they are most familiar with being “right” and another approach “wrong.” Indeed, taking such an approach and failing to deal with such differences at an early stage will serve only to cause procedural difficulties, disruption, and delay later in the proceedings.

The goal must be to ensure that areas where differences of approach are likely to arise are foreshadowed and that some measure of guidance is provided by the tribunal in advance. This should ideally follow discussions at an early stage—for example, at the first procedural meeting attended by the parties and their counsel. An experienced tribunal chair will anticipate areas of potential difficulty and proactively give guidance in a draft procedural order that is then the subject of debate and discussion at the procedural meeting. Such discussion can itself be invaluable in bringing to the surface likely areas where differences of approach exist.

Assistance may also be found by incorporating at the start of proceedings such established measures of international “good practice” as the IBA Rules on the Taking of Evidence in International Arbitration (the “IBA Rules”). This will not,

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however, always be possible, and in those jurisdictions where the IBA Rules are only capable of being applied following express agreement between the parties, there may be tactical reasons why such agreement is withheld by one

party. Experience demonstrates that it is a mistake to assume that an application of the IBA Rules (including on a non-binding basis) is non-controversial and universally accepted—including where leading law firms in major arbitral centers are involved.

Where the IBA Rules are not to apply, flushing out key areas of difference on procedural issues at an early stage and seeking to agree a robust procedural order is all the more important.

Even before any procedural meeting, it will be necessary to have an appreciation of the areas of both written and oral advocacy where differences are most likely to arise. That appreciation may very well inform a party's choice of arbitrator. It may also inform the manner in which pleadings, evidence, and oral submissions are prepared and advanced, as may the background of the arbitrators chosen to hear the dispute.

The experience of the author, significantly focused upon differences between the English common law model and the Scandinavian civil law model (one significantly influenced by the ubiquity of domestic arbitration in Scandinavian commercial disputes) is set out below, by way of illustration of the sorts of questions that should be asked in various areas where diversity might come as something of a surprise and give rise to challenges.

Written Advocacy–Pleadings

- What is the status from a pleading perspective of the request for arbitration and any answer—how far will these be treated as “pleadings”?
- What status will inter-parties correspondence have—how far will the tribunal accept that the case may be “pleaded” through correspondence?
- How far will a request for clarification of a pleaded case be accepted as requiring a response?
- How far is it necessary to attach relevant evidence to a pleading? What are the consequences of not doing so?
- Must all exhibits be cited by reference to the pleaded case? What is the status of uncited exhibits? If no explanation is given as to their relevance, what basis can there be for their inclusion in a hearing bundle?
- Should pleadings be structured on a responsive basis or an iterative basis?
- What approach should be followed to referencing within a pleading?
- Should there be post-hearing submissions, and if so, what relationship do they bear to any oral closing argument? Do they take the form of a further pleading?

Witness Statements and Expert Reports

- Are statements instead of or in addition to direct examination of a witness?
- In circumstances where witness statements are in addition to significant direct examination, then what limits, if any, attach to direct examination, and what are the consequences of evidence being adduced on direct that appears nowhere in witness statements but that could have been provided in earlier written statements?
- Will the tribunal be starting from the assumption that a witness statement reflects the witnesses own words, or simply that the statement is being prepared with little reference to a witness and that it is entirely drafted by counsel?
- Must documents referred to in statements/reports be exhibited? If not, what are the consequences? Can provision of such material be compelled by way of document production?
- How far is an expert witness required to produce documents upon which he has placed reliance in the preparation of this report? Can there be a proper basis for him not providing such material, and what are the consequences of this?
- In circumstances where an expert report is prepared by joint authors, are the authors to be cross-examined jointly or separately?
- Is an advocate entitled to elect which of the two joint experts should answer a question put as cross-examination?
- Can experts expect to be asked questions by the tribunal? May the tribunal appoint its own expert?
- Is expert conferencing/hot-tubbing likely? If so, what ability will there be to cross/redirect experts upon what is said?
- To what extent is independence necessary on the part of a party-appointed expert? Will a party-appointed expert be criticized for opting to “advocate” his client’s case or is that to be expected?
- May an expert pose questions directly to another expert (outside of witness conferencing)?
- At what stage may responsive expert evidence no longer be introduced?

- Will experts be given the opportunity to present their own demonstratives during the hearing? Should these be served in advance? Can they contain any new material?

Hearings

- Who may attend? Should witnesses be sequestered?
- Should sequestering of expert witnesses follow the same approach as for factual witnesses? Is it acceptable that, for example, a respondent's expert may be prevented from seeing the testimony of the claimant's experts whose case he must respond to?
- What constitutes the evidential record? What will be the basis for admitting documents—for example, if they are needed to impeach a witness in the course of cross-examination? What is the effect of any agreed “cut-off” for submission of documentary evidence?
- Will skeleton arguments be used, and if so, what should they contain?
- Will demonstratives be used? What rules attach to their use? How sophisticated an opening presentation is “acceptable,” and at what point may use of, for example, PowerPoint become distracting? Should demonstratives be served in advance so any objections as to their content can be raised in advance of the hearing?
- What access should the opposing side be given to documents introduced during the course of cross-examination for the purpose of impeachment? How should permission to introduce such documents be sought (that is, so as not to inform the tribunal as to the content before a decision has been made re admissibility)?
- Must a case be “put” to a witness in order for conclusions to be drawn from his testimony?
- How will applications to admit “last-minute” factual evidence be dealt with—must a party seek leave in order to make such an application? May the application itself be used as a vehicle for putting the new material before the tribunal?

- Will there be significant direct evidence? If so, what is the status of evidence going beyond a witness statement, and how is cross-examination on such “new evidence” to be handled?
- May more than one counsel cross-examine the same witness?
- Is the use of leading questions on direct permitted? Is the use of leading questions on redirect permitted?
- Upon cross-examination, is it permissible not to take a witness to a full document upon which she or he is being answered questions? Must a full hard copy document always be available? What is the position if only a summary is made available to the witness—for example, an extract on a screen? If LiveNote or an equivalent “real time” transcription service is used, then should the witness have a terminal?
- To what extent will witnesses be entitled to an interpreter? Is the fact that their written evidence was prepared in English likely to limit such entitlement?
- What may be included in an oral closing? May demonstratives be used? What response from claimant is permissible if a respondent introduces new legal arguments or significantly refines previously pleaded arguments?
- What form are written closing submissions to take (written closings or post-hearing briefs)? How are they to be used? Should a page limit be imposed?
- Should there be a right to respond to written closing arguments? Should these be sequential or simultaneous?
- What level of detail is expected in costs submissions? What supporting documents are to be submitted? Can internal management costs be claimed?

It will be obvious that the breadth of areas where differences of approach to what is an accepted “norm” in the conduct of advocacy in international arbitration is wide. It will also be clear that the choice of resolution to many of the queries set out above may quite reasonably take a number of different paths—and that the choice of preferred path will be significantly influenced by what a tribunal member or counsel is most used to. What they are most used to will significantly be a function of the legal culture they most commonly operate in.

It will also be evident that application of institutional rules, the IBA Rules, and other guidance as to the conduct of international arbitration will in many instances provide little actual assistance or guidance. That is in large measure because such rules are necessarily general and “high level,” needing to accommodate a breadth of legal cultures and norms.

The optimal approach to ensuring that potential differences of approach of the sort highlighted above is to raise them proactively as part of the procedural meeting and procedural order stage. How far guidance is effectively given may well depend on the level of genuine cross-cultural experience that the tribunal members themselves have and how active they are prepared (or even able) to be early in proceedings, often before legal and factual issues have been significantly developed. There may be a preference to avoid taking decisions unless and until absolutely necessary and a wish to avoid appearing too restrictive or appearing to favor one “cultural norm” over another. With an internationally inexperienced tribunal, there may simply be a failure to appreciate what the issues actually are.

No tribunal, however experienced, and no procedural order, however comprehensive, can ever foreshadow all the “cultural norm” differences that may be encountered. Significant responsibility in addressing them effectively also lies with counsel, who must show a degree of flexibility and willingness to adapt, as well as be able to explain why it is that a particular approach to a procedural issue is the right one to adopt. All too often there is simply a “due process” incantation with no real effort to explain, demonstrate, and convince why a certain approach is the right one to follow.

Counsel also have a responsibility to explain to their client how it is that approaches to procedural issues in international arbitration may differ from those a client may be familiar with and how there may be no “entitlement” to a particular approach. Such issues are perhaps most often experienced in the context of document production, but may also be particularly acutely felt where witnesses are prevented from attending a hearing. By way of illustration, it would be hard for many common law lawyers to accept that a respondent’s expert witness should be excluded from the hearing room when her or his opposite number is testifying for

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claimant—given it is that person’s evidence he is meant to be responding to. A Scandinavian lawyer may see nothing untoward in it.

Perhaps the best piece of advice (but sometimes the hardest to follow) is to embrace the diversity of approach to advocacy found in international arbitration and to learn from other legal cultures, adapting one’s own approach and adopting from them.

Matthew Saunders spoke at PLI’s program [International Arbitration 2017](#). This article was originally published in the [PLI course handbook](#) for that program.
