THE GUIDE TO ADVOCACY

SIXTH EDITION

Editors
Stephen Jagusch KC, Philippe Pinsolle and Alexander G Leventhal

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Alexander G Leventhal

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Publisher's Note

Global Arbitration Review (GAR) is delighted to publish this new edition of *The Guide to Advocacy*.

For those new to GAR, we are the online home for international arbitration specialists, telling them all they need to know about everything that matters.

Most know us for our daily news and analysis. But we also provide more in-depth content, including books like this one, regional reviews, conferences with a bit of flair to them and time-saving workflow tools. Visit us at www.globalarbitrationreview.com to find out more.

As the unofficial 'official journal' of international arbitration, we sometimes spot gaps in the literature. At other times, people point them out to us. That was the case with advocacy and international arbitration. We are indebted to editors Philippe Pinsolle and Stephen Jagusch KC for having spotted the gap and suggesting we cooperate on something.

The Guide to Advocacy is the result.

It aims to provide those newer to international arbitration with the tools to succeed as an advocate, whatever their national origin, and to provide the more experienced with insight into cultural and regional variations. In its short lifetime, it has grown beyond either GAR's or the editors' original conception. One of the reasons for its success are the 'arbitrator boxes' (see the Index to Arbitrators' Comments on page xv if you don't know what I mean) wherein arbitrators, many of whom have been advocates themselves, share their wisdom and war stories, and divulge what advocacy techniques work from their perspective. We have some pretty remarkable names (and are always on the lookout for more – so please do share this open invitation to get in touch with anyone who has impressed you).

We hope you find the Guide useful. If you do, you may be interested in some of the other books in the GAR Guides series, which have the same tone. They cover energy, construction, M&A, mining, telecoms, intellectual property and investor–state disputes, in the same unique, practical way. We also have a guide to

assessing damages, and to evidence, and a citation manual (*Universal Citation in International Arbitration – UCIA*). You will find all of them in e-form on our site, with hard copies available to buy if you aren't already a subscriber.

My thanks to our editors, Stephen Jagusch KC, Philippe Pinsolle and Alexander G Leventhal, for their vision and editorial oversight, to our exceptional contributors for the energy they have put into bringing it to life, and to my colleagues in our production team for achieving such a polished work.

David Samuels
Global Arbitration Review
London
July 2023

Introduction

Stephen Jagusch KC, Philippe Pinsolle and Alexander G Leventhal[1]

It is with great pleasure that we welcome you to the sixth edition of Global Arbitration Review's *The Guide to Advocacy*. Each edition offers the opportunity to explore new aspects of the advocate's role in international arbitration – from the artistry of oral and written advocacy to the expertise of regional or sector-specific arbitration to the guile of a master strategist. With this sixth edition, we are pleased to offer our esteemed readers new perspectives on second-chairing an oral argument and on cultural considerations in India.

The sixth edition carries the honour of being this publication's first edition to be released in a fully post-covid era. The pandemic forced arbitration practitioners to explore new ways of pursuing the administration of justice, adopting tools of technology that have been available for some time, but ill-exploited for a multitude of reasons. By no means have old methods become obsolete. However, there can be no doubt that the virtual era of arbitration has left its mark.

This is apparent in the technological trappings that can be expected in any arbitration. Remote hearings, paperless filings and virtual bundles are now a common feature of any arbitration and are here to stay for good. That is not without its effect on how the arbitration advocate approaches his or her task – whether that may be the significant challenges of cross-examining a witness remotely or using the benefits of technology to produce a more compelling written brief. Arbitration practitioners have had to adapt their advocacy to these exciting new conditions – as the sixth edition's authors explain.

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1 Stephen Jagusch KC, Philippe Pinsolle and Alexander G Leventhal are partners at Quinn Emanuel Urquhart & Sullivan LLP.

However, that is not all. The post-covid world has given new voice to practitioners in jurisdictions and sectors beyond those historically favoured by arbitration. This edition seeks to give those practitioners an opportunity to explain to the rest of us the unique tasks of an arbitration advocate as well as the aspects that are common to virtually all jurisdictions and sectors.

Advocacy in arbitration covers a limitless array of concepts, skills and viewpoints. It is, no doubt, the art of persuasion: the capacity to transcend legal, cultural, contextual, linguistic and technological barriers to secure a favourable outcome for one's client. It is the arrows in the advocate's quiver that allow him or her to marshal evidence and present it in such a way that it guides the arbitrators' decision-making – the power of trenchant and tactful prose, a compelling opening presentation, the artfulness of a line of questioning in cross-examination, and the ability to transcend distance and physical barriers to draw the decision maker into one's argument. But advocacy in arbitration is also the art of strategy: the ability to craft a case theory from a boundless set of facts and an exotic applicable law, the adroitness to tailor the arbitral process to suit one's strategy. *The Guide to Advocacy* seeks to pull together the diverse strands of arbitral advocacy in one compendium and offer the reader the views of some of the most renowned practitioners in the field.

As you pore over the pages of this Guide, leading arbitration practitioners will invite you into their breakout room and offer you their thoughts on advocacy through each step of the arbitral process. They will share with you their meditations on how to forge a robust case strategy, execute eloquent written advocacy, conduct effective direct and cross-examination, act as an indispensable resource for the first chair in a hearing, deliver persuasive opening and closing presentations, and much more.

CHAPTER 13

Cultural Considerations in Advocacy: East Meets West

Alvin Yeo SC, Chou Sean Yu and Frank Oh Sheng Loong[1]

Introduction

Arbitration practitioners today argue their cases all over the world. More than ever, they act for parties from every conceivable jurisdiction.

The global rise of arbitration is perhaps most evident in Asia. Home to the two most populous countries in the world, Asia is not only the world's largest manufacturer but also the largest recipient of foreign investment and net capital exporter.[2] The opening of major Asian markets to foreign investors, coupled with the advent of the Belt and Road Initiative, has increased trade and solidified arbitration as the preferred cross-border dispute resolution mechanism, rather than national courts. The statistics demonstrate this; for example, the Singapore International Arbitration Centre (SIAC) dealt with 1,080 new cases in 2020, the first time SIAC's caseload crossed the 1,000-case threshold;[3] 1,018 of these cases were international in nature (94 per cent). This 1,080 figure represented a 125 per cent increase from the 479 cases filed in 2019 and a 169 per cent increase from the 402 new cases filed in 2018. The first quarter of 2023 saw a

1 Alvin Yeo, senior counsel, was the senior partner and co-founder, Chou Sean Yu is the deputy managing partner and Frank Oh Sheng Loong is a partner at WongPartnership LLP.

2 Huang Jing, 'The Rise of Asia: Implications and Challenges', Lee Kuan Yew School of Public Policy, at https://lkyspp.nus.edu.sg/gia/article/the-rise-of-asia-implications-and-challenges.

3 Singapore International Arbitration Centre (SIAC), 'Where the World Arbitrates', Annual Report 2020, at 16, 31 March 2021, https://siac.org.sg/wp-content/uploads/2022/06/SIAC_Annual_Report_2020.pdf (accessed 7 June 2023).

historic high of 332 new cases filed with the SIAC.[4] The annual caseload of the China International Economic and Trade Arbitration Commission (CIETAC) was 3,615 new cases in 2020, compared with 1,352 cases in 2010 (an increase of 167 per cent);[5] 739 of these 3,615 new cases were foreign-related.[6] By comparison, 946 new cases were filed with the International Chamber of Commerce (ICC) in 2020,[7] compared with 793 new cases in 2010 (a 19 per cent increase).[8] In 2021, Singapore tied in first place with London as the most preferred seat of arbitration in the world ahead of Hong Kong, Paris and Geneva. The SIAC also ranked as the most preferred arbitral institution in Asia-Pacific and the second most preferred arbitral institution in the world, after the ICC.[9]

Disputes referred to international arbitration often bring together arbitrators, counsel and witnesses from different jurisdictions with different cultures and practices – in 2020 alone, the SIAC appointed 288 arbitrators (and confirmed another 145 nominated arbitrators) from more than 20 countries, including Australia, Austria, Brunei, Canada, Chile, China, France, Germany, Hong Kong, India, Indonesia, Iran, Ireland, Italy, Lebanon, Malaysia, the Netherlands, New Zealand, Nigeria, Russia, Singapore, South Africa, South Korea, Sweden, Switzerland, Thailand, the United Kingdom, the United States and Vietnam.[10] Despite increasing harmonisation in international arbitration (for instance, the advent of the United Nations Commission on International Trade Law Model

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4 SIAC, 'SIAC Announces 2022 Statistics; Q1 2023 Sees High Filings', Press Release, at 1, 4 April 2023, https://siac.org.sg/wp-content/uploads/2023/04/Press-Release-SIAC-Annual-Report-2022-1.pdf (accessed 28 April 2023).

5 China International Economic and Trade Arbitration Commission (CIETAC) Annual Caseload Statistics, www.cietac.org/index.php?m=Page&a=index&id=40&l=en (accessed 28 April 2023).

6 CIETAC 2020 Work Report and 2021 Work Plan, www.cietac.org/index.php?m=Article&a=show&id=17433&l=en (accessed 19 March 2021).

7 International Chamber of Commerce (ICC), 'ICC announces record 2020 caseloads in Arbitration and ADR', 12 January 2021, https://iccwbo.org/media-wall/news-speeches/icc-announces-record-2020-caseloads-in-arbitration-and-adr/ (accessed 19 March 2021).

8 Thomson Reuters Practical Law, 'ICC publishes 2010 statistics', 8 February 2011, https://uk.practicallaw.thomsonreuters.com/3-504-7454?__lrTS=20210214090951233&transitionType=Default&contextData=%28sc.Default%29 (accessed 16 April 2021).

9 White & Case LLP, '2021 International Arbitration Survey: Adapting arbitration to a changing world', 6 May 2021, www.whitecase.com/sites/default/files/2021-06/qmul-international-arbitration-survey-2021-web-single-final.pdf (accessed 16 June 2021); SIAC press release, 'SIAC is Most Preferred Arbitral Institution in Asia-Pacific and 2nd in the World', 7 May 2021, https://siac.org.sg/wp-content/uploads/2022/07/Press-Release-SIAC-is-Most-Preferred-Arbitral-Institution-in-Asia-Pacific-and-2nd-in-the-World.pdf (accessed 7 June 2023).

10 SIAC, Annual Report 2020 (footnote 3), at 19–20.

Law on International Commercial Arbitration in 1985 and its revision in 2006 in a bid to assist states in reforming, modernising and harmonising their laws on arbitral procedure), there remain inevitable differences arising from varied backgrounds and environments. With trade disputes worldwide increasingly involving an Asian nexus,[11] and the number of Belt and Road Initiative disputes involving Asian parties expected to increase in the near future,[12] an acute understanding of these differences would prove an invaluable soft skill for an advocate in his or her consideration of how best to represent the client's interests in the context of cultural diversity, particularly in a continent as varied as Asia.

Arbitration advocacy

Advocacy is the art of persuasion and the goal of an advocate is to persuade.[13] In an arbitration, the object of persuasion is the arbitral tribunal.

To effectively persuade the members of the tribunal, an advocate first has to understand how they process information and make decisions. Arbitrators, like all human beings, are complex. They do not make decisions in a vacuum – a submission from an advocate is tested and compared against the arbitrators' personal perceptions of the world and their own life experiences,[14] and decisions are made through this same lens. These perceptions are, in turn, shaped by factors such as age, gender, place of birth, social and educational background, training, work experience and culture.[15] Culture is 'the shared knowledge and schemes created and used by a set of people for perceiving, interpreting, expressing, and responding

11 Michael J Moser, 'How Asia Will Change International Arbitration', in Albert Jan van den Berg (ed.), *International Arbitration: The Coming of a New Age?*, International Council for Commercial Arbitration (ICCA), Congress Series, Volume 17 (Kluwer Law International, 2013), at 62 and 63.

12 Christine Sim, 'SIAC Congress Recap: Interviews with our Editors – Perspectives from Singapore with Ariel Ye', 2 September 2020, *Kluwer Arbitration Blog*, http://arbitrationblog.kluwerarbitration.com/2020/09/02/siac-congress-recap-interviews-with-our-editors-perspectives-from-singapore-with-ariel-ye/ (accessed 23 March 2021).

13 Lord Igor, Singapore Academy of Law Annual Lecture 2012, 'The Art of Advocacy' (2013) 25 *SAcLJ* 1, at 16, https://journalsonline.academypublishing.org.sg/Journals/Singapore-Academy-of-Law-Journal/e-Archive/ctl/eFirstSALPDFJournalView/mid/495/ArticleId/521/Citation/JournalsOnlinePDF.

14 Masua Sagiv, 'Cultural Bias in Judicial Decision Making', (2015) 35 *BCJL & Soc Just,* at 232.

15 Greg Laughton SC, 'Advocacy in International Arbitration', Selborne Chambers, at 29; Jos Hornikx, 'Cultural Differences in Perceptions of Strong and Weak Arguments', in Tony Cole (ed.), *The Roles of Psychology in International Arbitration* (Kluwer Law International, 2017), at 75.

to the social realities around them'.[16] In other words, in coming to their decisions, arbitrators, like anyone else, rely on their 'sense' of how things ought to be, and this 'sense' is shaped by the cultural and social groups to which they belong.[17] People tend to focus on information that accords with their existing beliefs, and they assess information positively if it is consistent with those beliefs and negatively if it discredits them.[18]

If tribunal members, advocates and witnesses hail from different backgrounds (as is often the case for international arbitrations), the cultural diversity makes the process of persuading the tribunal complex and often difficult. For example, a tribunal's assessment of the level of competence expected of a director of a company may vary depending on each tribunal member's expectations of competency.[19] Even when all the participants to the arbitration are Asian, effective advocacy is by no means an easy task – Asia is a vast, disparate region that is home to a myriad different countries, cultures, religions, races, languages and legal traditions.[20]

Developing an advocacy strategy before an Asian tribunal

The following section discusses what an advocate can consider and do when appearing before a tribunal consisting predominantly of Asian members, who may perhaps not be cut from the traditional 'international arbitrator' cloth.

Know your tribunal

Where an arbitration involves arbitrators and advocates accustomed to different cultures, issues may arise from the inevitable differences in communication methods, meaning of communications, mental interpretations and behavioural expectations. For example, *ex parte* communications with arbitrators are generally prohibited in Western countries, but it is not uncommon in jurisdictions such as China, where an arbitrator may also take on the role of a mediator in the

16 J P Lederach, *Preparing for peace: Conflict transformation across cultures* (Syracuse University Press, 1995), at 9.

17 Masua Sagiv (footnote 14), at 232–235.

18 Jos Hornikx (footnote 15), 88–90.

19 See, e.g.,Won Kidane, 'Conversations on the Role of Culture in International Arbitration' in *The Culture of International Arbitration* (Oxford University Press, 2017), at 275.

20 Patrizia Anesa, 'Arbitration discourse across cultures: Asian perspectives', (2017) 13 *ESP Across Cultures*, 20–21.

same dispute.[21] The Hong Kong Court of Appeal had granted leave to enforce a China-seated award (and dismissed a challenge on grounds of bias) where an arbitrator conducted mediation during a private dinner with (and paid for by) one party in the absence of the other, on the basis that this practice was found to be acceptable by the courts of the arbitral seat.[22] Differences can even be seen from something as seemingly minor as deciding how long the tribunal should sit on a particular day or perhaps on which days to sit. For instance, considerable deference should be made to avoid a hearing over noon on a Friday if one of the arbitrators is a Muslim.[23] Equally, a hearing during the month of Ramadan should perhaps also be avoided, where possible. Similar caution should be exercised when scheduling hearings close to major festivals in Asian countries; for instance, the Golden Week in China or the Lebaran festival in Indonesia.

Accordingly, effective arbitration advocacy starts with getting to know the members that make up the tribunal and understanding their likely attitudes and beliefs, and how these attitudes and beliefs might be changed if necessary. With this understanding, an advocate can frame his or her arguments and develop a targeted presentation of the case that will resonate with the tribunal members and motivate them to decide in his or her favour.[24] For instance, a retired Asian judge from a more formal national court structure sitting as an arbitrator may be more comfortable conducting proceedings in a manner not too dissimilar to his or her former environs. A good advocate must therefore be prepared for these cultural differences, which perhaps may not represent the international norms that he or she is accustomed to.

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21 Sundaresh Menon, 'Some Cautionary Notes for an Age of Opportunity: Keynote Address by the Chief Justice of Singapore' (2013), 79(4) *Int'l J. of Arb. Med. & Disp. Man.* 393–406; Catherine Rogers, 'Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration', 23 *Michigan Journal of International Law*, at 363; Wang Wenying, 'The Role of Conciliation in Resolving Disputes: A P.R.C. Perspective' (2005) 20 *Ohio State Journal on Dispute Resolution*, at 435 ('the practice of combining arbitration with conciliation originated absolutely from Chinese indigenous cultures and legal traditions'), https://kb.osu.edu/bitstream/handle/1811/77095/1/OSJDR_V20N2_0421.pdf.

22 *Gao Haiyan v. Keeneye Holdings Ltd & New Purple Golden Resources Development Ltd* [2011] HKCA 459, at [102].

23 Jerry Waincymer, 'Part II: The Process of an Arbitration. Chapter 9: Hearings', *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012), at 725.

24 Richard Waites and James Lawrence, 'Psychological Dynamics in International Arbitration', in R Doak Bishop and Edward G Kehoe (eds), *The Art of Advocacy in International Arbitration,* Second edition (JurisNet, 2010), 73–75.

How to cross-examine Chinese speakers

Anyone who has taken part in advocacy trainings on cross-examination has been taught to ask questions that call for short, 'yes' or 'no' answers. However, this type of questioning often tends to be less effective when it comes to Chinese witnesses. Chinese people tend to be less direct than Westerners, and will frequently express themselves in a roundabout way instead of using explicit language. Pressing the witness to answer a question will rarely help, and might come across as rude or inappropriate in the eyes of Chinese arbitrators. Western lawyers who are cross-examining Chinese witnesses should, therefore, be prepared to ask the same questions from different angles, consider asking more open-ended questions, and be prepared to leave markers for the transcript in circumstances where a line of questioning fails to achieve the desired result. Another frequent difficulty arises from the complexity of the Chinese language, which almost invariably results in difficulties of interpretation during cross-examination. Speaking slowly is therefore essential, and it might sometimes be advisable to consider consecutive, rather than simultaneous, interpretation.

– Emmanuel Jacomy, Shearman & Sterling LLP

An advocate's job to persuade can perhaps be made easier through the thoughtful selection and nomination of an arbitrator with the desired understanding of the legal and business culture for the case at hand. Since it is safe to assume that arbitrators talk to each other about the case during arbitration and deliberations, an arbitrator can play the role of a 'cultural intermediary and translator'[25] by explaining the social and cultural intricacies relevant to the dispute (the understanding of which may be helpful or even essential to the advocate's case) that the other members of the tribunal might otherwise be unable to comprehend because of inexperience or lack of knowledge. A civil law arbitrator may, for instance, be better placed to understand the business law norms of an Indonesian or a Japanese party.

It is not the intention of this chapter to explore the precise differences in communication and behavioural norms that exist between arbitration participants from different cultures. However, we briefly discuss a few points of which an advocate can usefully take note.

25 Ilhyung Lee, 'Practice and Predicament: The Nationality of the International Arbitrator (With Survey Results)', (2007) 31 *Fordham International Law Journal*, at 604.

Language

If the language of the arbitration is English but English is not the first language for one or more participants, or if the participants have varying levels of proficiency in the language, it is necessary for the advocate to tailor his or her written and spoken communications to ensure that everyone involved can understand them. In these situations, an advocate may wish to adopt clear, simple and concise language without colloquialisms,[26] while at the same time ensuring that the language used is not so basic as to lose the interest of an arbitrator whose first language is English.[27] Conversely, if the arbitrator's first language is not English, the advocate would do well to ensure that his or her oral submissions are clearly understood.

An advocate also has to be cognisant of the fact that translations are rarely perfect – words spoken by a native English speaker may not have the same meaning once translated into another language, and vice versa. With the rise of cross-border arbitration involving international parties, being conversant in multiple languages or having an advocate on your team with this linguistic capability can only be an advantage.

Technical language proficiency aside, the manner in which people communicate, both verbally and non-verbally, differs from culture to culture, notwithstanding the fact that they might be speaking the same language. Participants in an arbitration frequently converse in the same language but sometimes do not fully understand the meaning of or the reasons behind what is said, resulting in them talking past each other.[28] Words, facial expressions, body language and gestures can be interpreted differently by people of different cultures. This is particularly the case for South Asians, where a shake of the head may mean an affirmation of a point rather than a denial. Further, something as simple as a wave of the palm can carry multiple meanings, and can be read in a different manner depending on a person's culture.

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26 Fernando Dias Simoes, 'The Language of International Arbitration' (2017) 35(1) *Conflict Resolution Quarterly*, at 94: 'An arbitrator who lacks the necessary fluency in the language of arbitration may fail to understand some of the crucial issues necessary to resolve the dispute.'

27 Greg Laughton SC (footnote 15), at 60.

28 Fernando Dias Simoes (footnote 26), at 95.

Efficiency versus cultural sensitivity

That parties should have a reasonable opportunity to present their case has become widely accepted international practice. Some lawyers from developing countries lack the advocacy skill to efficiently help their client to present the case. International arbitration is an activity in which one side can easily be a relative newcomer. Arbitrators should give some consideration and additional opportunities for them to present their client's case.

In addition, lawyers in many common law countries are not familiar with advocacy skills such as cross-examination. Many lawyers may have to use language of arbitration that is not necessarily their native language. To be patient with the advocacy of these lawyers is a must for international arbitrators.

Having a flexible attitude to meet the conflicting interests of disputing parties is a delicate balance that the arbitrators should work out with the parties who come from different legal and cultural backgrounds so that the arbitral procedure will not be unreasonably delayed, and, at the same time, parties will have real and reasonable opportunities to present their case.

– Jingzhou Tao, Arbitration Chambers

Style and tone of communication

Apart from language, an advocate should also be aware of the cultural sensitivities of the tribunal members and tailor the style and tone of his or her communications accordingly, to maximise the persuasiveness of his or her message.

For example, a US litigation lawyer who is accustomed to advocating before lay juries in the US courts may subconsciously advocate his or her case in an international arbitration with the same level of aggressiveness as in an adversarial system. Accustomed to oral depositions of witnesses where the 'goal often is to create . . . short snippets of testimony in the form of admissions that can be inserted into summary judgment papers . . . to show the presence or absence of factual issues',[29] he or she may also carry over the same aggressive, accusatory questioning style when cross-examining witnesses in international arbitration. This would not be well received by an East Asian civil law arbitrator who is more accustomed to an inquisitorial and conciliatory approach, and who, because of social conventions influenced by Taoist or Confucian precepts that define how

29 R Doak Bishop and James Carter, 'The United States Perspective and Practice of Advocacy', in R Doak Bishop and Edward G Kehoe (eds), *The Art of Advocacy in International Arbitration*, Second edition (JurisNet, 2010), at 521.

East Asians behave and communicate,[30] is sensitive to behaviour that implicitly diminishes the position of the recipient and results in a loss of face.[31] If one or more members of the tribunal hails from an East Asian jurisdiction, an advocate may wish to consider adopting a measured and neutral tone in his or her communications, while explaining the case in a clear, concise, accurate, reasoned and authoritative way.

An East Asian arbitrator also may not appreciate a zealous and aggressive cross-examination of an elderly Asian witness.[32] Deference and courtesy are important, expected behavioural norms for an advocate who wishes to command the respect of an Asian arbitrator.

Similarly, an East Asian arbitrator may not favour the arguments of an advocate who is not alive to the nuances of the 'high context' communication style (i.e., with much of the meaning derived from the background culture and left unsaid) of an East Asian witness (as opposed to Western 'low-context' communication styles, which are generally more explicit) and who, as a result, relies on the witness's apparent reticence as evidence of a lack of credibility.[33]

An advocate therefore has to be mindful of and sensitive to cultural differences in his or her communications and behaviour during the arbitration, so as not to offend any arbitrators and other participants to the arbitration or detract from the persuasiveness of his or her arguments.

Role of mediation and conciliation

An international arbitration advocate should also be aware of and prepared for the importance of mediation and conciliation in some Asian cultures, and their influence on the arbitration process. As a result of the influence of Confucian

30 Christopher Lau, 'The Asian Perspective and Practice of Advocacy', in R Doak Bishop and Edward G Kehoe (eds), *The Art of Advocacy in International Arbitration*, Second edition (JurisNet, 2010), at 567.

31 Patrizia Anesa, 'Arbitration discourse across cultures: Asian perspectives' (2017) 13 *ESP Across Cultures*, at 22.

32 Kyu-taik Sung, 'Respect for Elders: Myths and Realities in East Asia' (2000) 5(4) *Journal of Ageing and Identity*, at 198–201, underlining the historical and cultural aspects of respect for the elderly in East Asia.

33 Theodore Cheng, 'Developing Skills to Address Cultural Issues in Arbitration and Mediation' (2017) 72(3) *Dispute Resolution Journal*, at 2.

values[34] and principles in some East Asian cultures, non-confrontational methods of conflict resolution (such as mediation and conciliation)[35] have historically been the preferred methods of dispute resolution in countries such as China[36] and Japan,[37] and are still ingrained in their legal cultures. This can be seen in the arbitration laws and rules of arbitration institutions from these countries. For example, the arbitration laws and rules of China, Hong Kong and Japan contain specific provisions for conciliation, mediation and settlement to be conducted by the arbitral tribunal, and for the tribunal to render an award in terms of the settlement.[38] Arbitral tribunals comprised of Chinese or Japanese arbitrators may therefore expect, or even request, parties to attempt to mediate and reconcile their differences before the substantive hearing; it is a widely held perception among Chinese arbitrators that it is the goal of the arbitrator to ensure that parties are able to preserve their long-term relationship.[39] It has been observed that in countries such as China, Korea and Japan, contracts and legalism are seen 'as something as of a last resort, [used] only if personal relations and verbal agreements fail'.[40] A survey conducted with Chinese arbitrators showed that they regard the combination of mediation and arbitration as 'reflective of traditional values', including that

34 See, e.g., Confucius, The Analects Book XIII (Robert Eno translation), https://chinatxt.sitehost.iu.edu/Analects_of_Confucius_(Eno-2015).pdf, '子曰：聽訟, 吾猶人也, 必也使無訟乎' (The Master said: 'In hearing lawsuits, I am no better than others. What is imperative is to make it so that there are no lawsuits.'). See, also, Shahla F Ali, 'Barricades and Checkered Flags: An Empirical Examination of the Perceptions of Roadblocks and Facilitators of Settlement among Arbitration Practitioners in East Asia and the West' (2010) 19(2) *Pacific Rim Law & Policy Journal*, at 257–262.

35 Patrizia Anesa (footnote 31), at 22.

36 Gabrielle Kaufmann-Kohler and Fan Kun, 'Integrating Mediation into Arbitration: Why It Works in China' (2008) 25(4) *Journal of International Arbitration*, at 480.

37 Tony Cole, 'Commercial Arbitration in Japan – Contributions to the Debate on Japanese "Non-Litigiousness"' (2007) 40(1) *New York University Journal of International Law and Politics*, at 59–63; Lara M Pair J D, 'Cross-Cultural Arbitration: Do the differences between cultures still influence international commercial arbitration despite harmonization?' (2002) 9(57) *ILSA Journal of International and Comparative Law*, at 68.

38 See, for example, Section 33 of the Hong Kong Arbitration Ordinance; Article 36 of the Hong Kong International Arbitration Centre Administered Arbitration Rules 2013; Article 47 of the CIETAC Arbitration Rules; Article 38 of the Japanese Arbitration Law; and Article 43 of the Arbitration Rules of the Beijing Arbitration Commission 2015.

39 Shahla Ali, 'Approaching the Global Arbitration Table: Comparing the Advantages of Arbitration as Seen by Practitioners in East Asia and the West' (2009) 28(4) *Review of Litigation*, at 784.

40 Jun Hee Kim and Zachary Sharpe, 'Culture, Contracts and Performance in East Asia', 72(1) *Dispute Resolution Journal*, at 5.

A good example of cultural differences – traits of Asian witnesses

In this era of cross-border disputes and globalisation, arbitrators need to be sensitive to cultural differences and different legal traditions. Tribunals must earn the respect of all parties involved, which invariably means affording them, their culture and their laws the respect they deserve. There may also be a mismatch of representation, which needs to be recognised sympathetically. For Asian witnesses, aggressive cross-examination that makes them lose face may backfire with the tribunal, particularly if they are based in Asia. Asian witnesses may smile during cross-examination but this is not a sign of agreement with the other side's case, or a show of disrespect. Conversely, in some Western cultures, they see this as a sign of mental instability or a suspicious attempt to win over the tribunal.

– David Bateson, 39 Essex Chambers

of 'the pursuit of harmony' and 'avoiding litigation'.[41] Similar cultural influences exist in other parts of Asia. For example, Indonesia's underlying philosophy of *Pancasila* calls for 'deliberation to reach a consensus and discourages contention in all things, where possible'.[42] Advocates who appear unprepared for, or unwilling to attempt, reconciliatory measures may be perceived as insincere and disrespectful towards the dispute resolution process.

The entry into force of the Singapore Convention on Mediation, also known as the United Nations Convention on International Settlement Agreements Resulting from Mediation, on 12 September 2020, with signatories from Asian states such as China, Korea, Laos and the Philippines, reflects the rising primacy of mediation and conciliation as a dispute resolution tool.[43] Advocates should be attuned to the cultural preferences of the members of the arbitral tribunal, in considering the possible role of mediation and conciliation in or alongside the arbitration process.

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41 Fan Kun, 'Glocalization [*sic*] of Arbitration: Transnational Standards Struggling with Local Norms through the Lens of Arbitration Transplantation in China', 18 *Harvard Negotiation Law Review* (2013), at 214–215.

42 Karen Gordon Mills, 'National Report for Indonesia (2018 through 2019)', Lise Bosman (ed.), ICCA, *International Handbook on Commercial Arbitration* (Kluwer Law International, Supplement No. 104, February 2019), at 1.

43 Singapore Ministry of Law, 'Singapore Convention on Mediation Enters into Force', 12 September 2020, www.mlaw.gov.sg/news/press-releases/2020-09-12-singapore-convention-on-mediation-enters-into-force/.

Know the opportunities for persuasion

In addition to knowing the tribunal, it is also important for an advocate to recognise that advocacy is not just about oral or written submissions at the merits hearing. An arbitrator's decision-making process starts from the time of his or her appointment, as that is when he or she starts to evaluate and assess the parties, their advocates and the information presented. While written and oral submissions represent the two most obvious opportunities for advocacy in international arbitration, every action taken, and every contact with, statement made or document submitted to the tribunal at every stage of the arbitration represents an avenue for persuasion and should be made with the ultimate aim of instilling confidence in one's case and the result sought in the tribunal.[44] This is particularly the case for arbitrations involving Asian parties and arbitrators.

Even though parties to an arbitration generally agree (failing which, the tribunal would direct) on the arbitration rules that lay out the basic procedure for the arbitration, differences in the individual legal traditions and practices of advocates and arbitrators still often give rise to different expectations of how these rules are to be applied and followed. While the many differences between the legal traditions and practices of different countries cannot be oversimplified, there are striking differences between the two legal families to which most legal systems belong – that is, common law and civil law; to further complicate matters, there are significant procedural differences that exist even within the two legal families.[45] An international arbitration advocate seeking to persuade members of a tribunal from different legal systems would be well advised to keep these differences in mind when formulating a persuasion strategy.

Pleadings

While pleadings are an essential part of every arbitration, and institutional arbitration rules provide for the submission of documents setting out each party's case, there is no fixed precept in international arbitration on (and the institutional rules often do not stipulate) how detailed a party's pleadings must be. Some arbitrators and advocates would be accustomed to, and may prefer, a concise document setting out central propositions of fact and law on which the party relies,

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44 Peter Leaver and Henry Forbes Smith, 'The British Perspective and Practice of Advocacy', in R Doak Bishop and Edward G Kehoe (eds), *The Art of Advocacy in International Arbitration*, Second edition (JurisNet, 2010), at 474.

45 Jeffrey Waincymer, 'Part I: Policy and Principles. Chapter 1: The Nature of Procedure and Policy Considerations', *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012), at 41–42.

while others may expect a full statement of a party's case, complete with all the particulars and evidence supporting it.[46] An advocate therefore has to take into account the background and likely preferences of the members of the tribunal in deciding the level of detail of the pleadings, so as to ensure that the party's case is effectively conveyed and easily understood.

An arbitrator from an Asian jurisdiction with a common law heritage (likely to be inherited from the British) would perhaps be more accustomed to exhaustive pleadings than an arbitrator from a background where pleadings play a less important role.

Documentary evidence

One can expect a party to voluntarily disclose all documents on which it relies and that are necessary to support its case. But what about relevant documents that a party chooses not to disclose, perhaps because they are unhelpful to its case? Common law arbitrators and advocates would be familiar with applications and orders for document production to compel a party to search for and produce these documents; however, this practice may not be palatable to Asian civil law arbitrators and advocates since, with their legal background, parties are generally under no obligation to disclose documents in their possession or control that are unhelpful to their case, and civil law courts in Asia generally refuse to assist with these applications.[47]

While the International Bar Association's (IBA) Rules on the Taking of Evidence in International Arbitration aim to balance common and civil law approaches in respect of document disclosure,[48] it has been observed that the extent to which production of documents is granted is still unpredictable and

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46 Nikola S Georgiev, *Cultural differences or cultural clash? The future of International Commercial Arbitration* (School of Oriental and African Studies, University of London, 2012), at 13–14.

47 See, e.g., Anna Magdalena Kubalczyk, 'Evidentiary Rules in International Arbitration – A Comparative Analysis of Approaches and the Need for Regulation' (2015) 3(1) *Groningen Journal of International Law*, at 93; Craig Wagnild, 'Civil Law Discovery in Japan: A Comparison of Japanese and US Methods of Evidence Collection in Civil Litigation' (Winter 2002) 3(1), *Asian-Pacific Law & Policy Journal*, at 16; Qifan Cui, 'Document Production in Chinese Litigation and International Arbitration' (2011) 6(2) *Journal of Cambridge Studies*, at 73.

48 D W Shenton, 'An Introduction to the IBA Rules of Evidence' (1985) *Arbitration International*, at 119–120.

differs from case to case.[49] The overall structure in different arbitration proceedings may appear similar, but their details may differ significantly as a result of arbitrators from different legal and cultural backgrounds employing their own approaches within the framework set out in the IBA Rules. This phenomenon is certainly true in Asia.

An advocate should therefore take into account the legal background of the members of the tribunal in deciding how best to pitch an application for document disclosure and the scope of disclosure sought. For example, an Asian civil law arbitrator may view a request for a wide-ranging discovery order to be a redundant and inefficient exercise that slows down the arbitral process, and be less inclined to grant it. Conversely, an arbitrator accustomed to the common law legal system may be more inclined to draw an adverse inference against a party that is not forthcoming with the disclosure of evidence. The advocate's submissions would therefore have to be tailored to take into account these sensitivities.

Witness evidence

It is fairly standard practice in international arbitration for parties to tender statements from their witnesses prior to the substantive main hearing. However, cultural differences may give rise to different expectations regarding the scope and content required in these statements. Asian civil law advocates and arbitrators may expect witness statements to simply set out a short summary of the evidence or topics on which the witness may address the tribunal at the hearing, with the witness to give oral evidence beyond the statement during the hearing;[50] whereas common law advocates and arbitrators may expect witness statements to cover every point at issue and contain everything the witness has to say. Where there is ambiguity on the expected scope and content of witness statements, an advocate in an international arbitration may wish to seek the tribunal's directions on this issue so that he or she can prepare the witness statements in the form that would be most persuasive to the tribunal.

One thing an advocate should note when dealing with witnesses from Asian countries where business cultures are heavily influenced by Confucian ideals (such as China, Japan and Korea) is the importance and influence of hierarchy in

49 Pierre Karrer, 'The Civil Law and Common Law Divide: An International Arbitrator Tells It Like He Sees It', in *AAA Handbook on International Arbitration and ADR*, Second edition (JurisNet, 2010), 53–54.

50 Anthony Sinclair, 'Differences in the Approach to Witness Evidence between the Civil and Common Law Traditions', in R Doak Bishop and Edward G Kehoe (eds), *The Art of Advocacy in International Arbitration*, Second edition (JurisNet, 2010), at 34–35.

business organisations. In these countries, junior employees may not feel comfortable about disagreeing with someone of a higher level in the business hierarchy, and may in fact go out of their way to ensure that their recollections are consistent with their more senior colleagues. As observed by a senior arbitration practitioner, the junior employee does this not out of a desire to be dishonest, but because of a perceived duty to support and be loyal to one's superiors, such that if the junior employee's account is inconsistent with that of a more senior employee, the more senior employee must be right.[51] An advocate should be aware of this possibility when confronted with consistent accounts that seem too good to be true, and, when dealing with his or her own witnesses, should take the necessary steps to pre-empt the probability that the truth would be revealed in cross-examination during the substantive hearing.

Use of experts

A good advocate should be aware that whether a tribunal considers an expert to be reliable or qualified may depend on culture-driven expectations of each tribunal member, and this should therefore be a factor to be taken into consideration when selecting experts.[52]

In recent years, arbitral tribunals in Asia have increasingly adopted the practice of witness conferencing, or 'hot-tubbing', as the preferred method of expert evidence presentation. As with general cross-examination, even when posing questions to an Asian witness, an advocate should keep in mind the Asian sensitivity to 'loss of face' and not be overly aggressive in his or her questioning. Some Asian experts can be fairly modest and less participative when engaged in a witness conferencing session, and a good advocate would have to be astute to ensure that his or her expert's effectiveness is not diminished because of a cultural disposition.[53]

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51 Christopher K Tahbaz, 'Cross-Cultural Perspectives on Effective Advocacy in International Arbitration – or, How to Avoid Losing in Translation' (2012) 14(2), *Asian Dispute Review*, at 52.

52 Jos Hornikx (footnote 15), at 92.

53 See, e.g., Timothy Cooke et al., 'Heated Debates: Giving Concurrent Evidence in the Hot Tub' (2019) *Singapore Academy of Law Practitioner* 7, at paragraph 13, https://journalsonline.academypublishing.org.sg/Journals/SAL-Practitioner/Arbitration/ctl/eFirstSALPDFJournalView/mid/590/ArticleId/1370/Citation/JournalsOnlinePDF.

Concluding remarks

'A good lawyer knows the law, but a great lawyer knows the judge.' While this phrase is often used in a humorous manner to depict the legal profession, it encapsulates one essential quality of a good advocate, which is to understand the attitudes and beliefs of the decision makers. As highlighted in this chapter, an advocate in an international arbitration involving participants from different cultures in Asia should go beyond that and seek to understand not just the members of the tribunal, but all the participants, including witnesses and opposing counsel. Only then can an advocate develop a persuasion strategy that is truly effective.

APPENDIX 2

Contributing Authors

Alvin Yeo SC
WongPartnership LLP

Alvin Yeo, senior counsel, was Singapore's foremost arbitration counsel in the field of investor-state disputes and international commercial arbitration. He acted for and advised international clients in complex, cross-border disputes and multi-jurisdictional enforcement proceedings. His main areas of practice were litigation and arbitration in banking, corporate and commercial and infrastructure disputes.

Chambers Global described Alvin as 'the most impressive, as an advocate, out of all the Singapore firms' and 'simply outstanding as an international counsel'. *Chambers Asia-Pacific* lauded Alvin for providing 'leadership on SIAC and ICC proceedings' and described him as 'an excellent strategist as well as a first-rate litigator' who was 'deeply impressive and [an] extremely capable individual'. *The Legal 500* affirmed that his 'wisdom and powers of persuasion [were] phenomenal' and that he was 'one of the best in a court room'. *Who's Who Legal: Arbitration* recognised Alvin as 'a leading light in the market who possesse[d] strong arbitration credentials and experience'.

Alvin was a member of the Court of the SIAC, the ICC Commission, the LCIA and the IBA Arbitration Committee, and a fellow of the Asian Institute of Alternative Dispute Resolution, the Singapore Institute of Arbitrators and the Singapore Institute of Directors. He was also on the panel of arbitrators in the HKIAC, ICDR, KCAB, the South China International Economic Trade Arbitration Commission and the Singapore Institute of Arbitrators' Panel for Sports in Singapore.

Chou Sean Yu
WongPartnership LLP

Chou Sean Yu is the deputy managing partner at WongPartnership and head of the firm's litigation and dispute resolution group and the banking and financial disputes practice.

His main practice areas are banking and trade finance disputes, insolvency and restructuring, corporate fraud, investigations and asset recovery, financial services regulatory, commercial and corporate disputes, shareholder litigation, tort and contractual claims, and domestic and international arbitration.

Sean Yu frequently sits as an arbitrator and is on the Panel of Arbitrators of the SIAC, AIAC, KCAB, the Maldives International Arbitration Centre, the JCAA, the Hainan International Arbitration Court and the Russian Arbitration Center at the Russian Institute of Modern Arbitration. He is a Chartered Arbitrator of the Chartered Institute of Arbitrators and a former chairperson of the board of its Singapore Branch. He is also a Fellow of the Insolvency Practitioners Association of Singapore.

Frank Oh Sheng Loong
WongPartnership LLP

Frank Oh Sheng Loong is a partner in the banking and financial disputes practice at WongPartnership LLP.

His main areas of practice involve litigation, international arbitration and mediation across a wide range of matters from commercial, international sales, energy to investment, with a focus on complex, high-value and multi-jurisdictional disputes, and insolvency and restructuring.

Frank has advised and acted for global private, public and individual clients from various jurisdictions in the Singapore courts and in both ad hoc and institutional arbitration under various leading arbitral rules (e.g., SIAC, ICC, UNCITRAL, AIAC). Frank has also advised and acted for both private investors and state parties in investment treaty arbitration.

Frank has extensive experience in arbitration-related court proceedings, and he has acted for clients in setting aside and enforcement applications and other court applications arising from arbitration proceedings.

Frank is an accredited mediator at the Singapore Mediation Centre (SMC) and has been instructed on mediations both as mediator and as counsel.

In addition to his practice, Frank teaches at the Singapore Management University School of Law and is an instructor in the preparatory course for the Singapore Bar examinations. Frank is also a mediation trainer and trains participants at SMC's mediation courses and workshops.

WongPartnership LLP
12 Marina Boulevard, Level 28
Marina Bay Financial Centre, Tower 3
Singapore 018982
Tel: +65 6416 8000
Fax: +65 6532 5711 / 5722
seanyu.chou@wongpartnership.com
shengloong.oh@wongpartnership.com
www.wongpartnership.com

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