Global Arbitration Review

The Guide to Advocacy

General Editors
Stephen Jagusch QC, Philippe Pinsolle and Timothy L Foden

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Cultural Considerations in Advocacy: East Meets West

Alvin Yeo SC and Chou Sean Yu[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 the largest recipient of foreign investment and net capital exporter.[2] The opening of major Asian markets to foreign investors has resulted in increased trade and given rise to arbitration being the preferred cross-border dispute resolution mechanism, in preference to national courts. The statistics show this; for example, the Singapore International Arbitration Centre (SIAC) saw 343 new cases in 2016, compared with 90 new cases in 2006 (a 280 per cent increase), and the China International Economic and Trade Arbitration Commission (CIETAC) saw 1,968 new cases in 2015, compared with 981 new cases in 2006 (a 100 per cent increase). By comparison, 966 new cases were filed with the International Chamber of Commerce (ICC) in 2016, compared with 593 new cases in 2006 (a 63 per cent increase).[3]

Disputes referred to international arbitration often bring together arbitrators, counsel and witnesses from different jurisdictions with different cultures and practices. Despite increasing harmonisation in international arbitration (for instance, the advent of the UNCITRAL Model Law on International Commercial Arbitration in 1985 and its revision

1 Alvin Yeo SC is the chairman and senior partner and Chou Sean Yu is a partner of WongPartnership LLP.

2 Huang Jing, *The Rise of Asia: Implications and Challenges, Lee Kuan Yew School of Public Policy*, http://global-is-asian.nus.edu.sg/index.php/the-rise-of-asia-implications-and-challenges/, at [1].

3 Practical Law Arbitration, *Table of institutional statistics 1992-2006*, Thomas Reuters; Singapore International Arbitration Centre Statistics, SIAC, http://siac.org.sg/2014-11-03-13-33-43/facts-figures/statistics (13 August 2017); 2016 Case Statistics, Hong Kong International Arbitration Centre, www.hkiac.org/about-us/statistics (13 August 2016); Statistics, China International Economic and Trade Arbitration Commission, www.cietac.org/index.php?m=Page&a=index&id=40&l=en (13 August 2017).

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,[4] a good advocate would need to understand these differences and consider how best to represent his or her client's interests in the context of such 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.[5] In an arbitration, the object of persuasion is, of course, 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,[6] 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.[7] Culture is 'the shared knowledge and schemes created and used by a set of people for perceiving, interpreting, expressing, and responding to the social realities around them'.[8] In other words, in coming to their decisions, arbitrators, like any other persons, rely on their 'sense' of how things ought to be, and such 'sense' is shaped by the cultural and social groups to which they belong.[9] 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.[10]

Where 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. Even when, for example, 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 of different countries, cultures, religions, races, languages and legal traditions.

Developing an advocacy strategy before an Asian tribunal

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

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4 Michael J. Moser, 'How Asia Will Change International Arbitration', In Albert Janvan den Berg (ed), *International Arbitration: The Coming of a New Age?, ICCA Congress Series, Volume 17* (© Kluwer Law International; Kluwer Law International 2013) pp. 62–66 at 62–63.

5 Lord Igor, *Singapore Academy of Law Annual Lecture 2012 – 'The Art of Advocacy'* (2013) 25 SAcLJ 1 at [16].

6 Masua Sagiv, *Cultural Bias in Judicial Decision Making*, (2015) 35 BCJL & Soc Just pp. 229–256 at 232.

7 Greg Laughton SC, *Advocacy in International Arbitration*, Selborne Chambers at [29].

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

9 Masua Sagiv, *Cultural Bias in Judicial Decision Making*, (2015) 35 BCJL & Soc Just pp. 229–256 at 232–235.

10 Jos Hornikx, *Cultural Differences in Perceptions of Strong and Weak Arguments*. In *The Roles of Psychology in International Arbitration* (pp. 75–92), (Kluwer Law International, 2017) at 88–90.

Know your tribunal

Where an arbitration involves arbitrators and advocates from different cultures, issues may arise from the inevitable differences in communication methods, meaning of communications, mental interpretations and behavioural expectations. Such differences can be seen from something as seemingly minor as deciding how long the tribunal should sit for a day or perhaps on which days to sit. For instance, considerable deference should be made to avoid a hearing over noon on a Friday where one of the arbitrators is a Muslim. Equally, a hearing over the Ramadan month should perhaps also be avoided, where possible. Similar caution should be borne in mind 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.[11] For instance, a retired Asian judge from a more formal national court structure siting as an arbitrator may be more comfortable in conducting proceedings in a manner not too dissimilar to his former environs. The good advocate must be prepared to be accustomed to such requirements, which perhaps may not represent the international norms that he or she is used to.

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, such an arbitrator can play the role of a 'cultural intermediary and translator'[12] 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 Japanese party.

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

Language

Where the language of the arbitration is English but English is not the first language for one or more participants, or where the participants have varying proficiencies in the language, it is necessary for the advocate to tailor his or her written or spoken communications to ensure that such communications are capable of being understood by everyone involved. In such situations, an advocate may wish to adopt clear, simple and concise language without

11 Richard Waites & James Lawrence, *Psychological Dynamics in International Arbitration*. In Doak Bishop & Edward G. Kehoe (Eds.), *The Art of Advocacy in International Arbitration* (pp. 69–120) 2nd Ed (JurisNet, 2010) at 73–75.

12 Ilhyung Lee, *Practice and Predicament: The Nationality of the International Arbitrator (With Survey Results)*, (2007) 31 Fordham International Law Journal 603 at 604.

colloquialisms, while at the same time ensuring that the language used is not so basic as to lose the interest of the arbitrator whose first language is English.[13] Conversely, where 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*.

Technical language proficiency aside, the manner in which people communicate, both verbal and non-verbal, is different across cultures, notwithstanding the fact that they might be speaking the same language. Words, facial expressions, body language and gestures can be interpreted differently between people of different cultures. This is particularly the case for South Asians, where a shake of the head by a witness 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 the culture the witness belongs to.

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, an American litigation lawyer who is used 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',[14] 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 used to an inquisitorial and conciliatory approach, and who, because of social conventions influenced by Taoist or Confucian precepts that define how East Asians behave and communicate,[15] is sensitive to behaviour that implicitly diminishes the position of the recipient and results in a loss of face. Where one or more member 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. Deference and courtesy are important, expected behavioural norms for an advocate who wishes to command the respect of an Asian arbitrator.

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13 Greg Laughton SC, *Advocacy in International Arbitration*, Selborne Chambers at [60].

14 Doak Bishop & James Carter, *The United States Perspective and Practice of Advoacy*. In Doak Bishop & Edward G. Kehoe (Eds.), *The Art of Advocacy in International Arbitration* (pp. 519–564) 2nd Ed (JurisNet, 2010) at 521.

15 Christopher Lau, *The Asian Perspective and Practice of Advoacy*. In Doak Bishop & Edward G. Kehoe (Eds.), *The Art of Advocacy in International Arbitration* (pp. 565–582) 2nd Ed (JurisNet, 2010) at 567.

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 and distract from the persuasiveness of his or her arguments.

Role of mediation/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 values and principles in some East Asian cultures, non-confrontational methods of conflict resolution (such as mediation and conciliation) have historically been the preferred methods of dispute resolution in countries such as China[16] and Japan,[17] 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 from 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.[18] 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.[19] Advocates who appear unprepared for or unwilling to attempt reconciliatory measures may be perceived as insincere and disrespectful towards the dispute resolution process.

Know the opportunities for persuasion

Besides 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 to 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 the tribunal's confidence in one's case and the result sought.[20] This is particularly the case for arbitrations involving Asian parties and arbitrators.

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16 Gabrielle Kaufmann-Kohler & Fan Kun, *Integrating Mediation into Arbitration: Why It Works in China* (2008) Journal of International Arbitration 25(4) pp. 479–492 at 480.

17 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 29 at 59–63.

18 See, for example, Section 33 of the Hong Kong Arbitration Ordinance; Article 36 of the HKIAC 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.

19 Shahla Ali, *Approaching the Global Arbitration Table: Comparing the Advantages of Arbitration as Seen by Practitioners in East Asia and the West* (2009) Review of Litigation, Vol. 28 No. 4 pp. 735–789 at 784.

20 Peter Leaver & Henry Forbes Smith, *The British Perspective and Practice of Advocacy*. In Doak Bishop & Edward G. Kehoe (Eds.), *The Art of Advocacy in International Arbitration* (pp. 473–498) 2nd Ed (JurisNet, 2010) at 474.

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 approaches upon which most legal systems are based – that is, common law and civil law. 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 such 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 used to and may prefer a concise document setting out central propositions of fact and law on which the party relies, while others may expect a full statement of a party's case, complete with all the particulars and evidence supporting it.[21] 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 under their legal background, parties are generally under no obligation to disclose documents within their possession or control that are unhelpful to their case, and civil law courts in Asia generally refuse to assist with such applications.[22]

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21 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.

22 See, e.g., Anna Magdalena Kubalczyk, *Evidentiary Rules in International Arbitration – A Comparative Analysis of Approaches and the Need for Regulation* (2015) Groningen Journal of International Law vol. 3(1) 85–109 at 93; Craig Wagnild, *Civil Law Discovery in Japan: A Comparison of Japanese and US Methods of Evidence Collection in Civil Litigation* (Winter 2002) Asian-Pacific Law & Policy Journal Vol. 3 Issue 1 1–22 at 16; Qifan Cui, *Document Production in Chinese Litigation and International Arbitration* (2011) Journal of Cambridge Studies Vol. 6 No. 2–3 69–84 at 73.

While the IBA Rules on the Taking of Evidence in International Arbitration aim to balance common and civil law approaches in respect of document disclosure, it has been observed that the extent to which production of documents is granted is still unpredictable and differs from case to case.[23] This 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. The submissions would therefore have to be tailored to take into account such sensitivities.

Witness evidence

It is fairly standard practice in international arbitrations for parties to tender statements from their witnesses prior to the substantive main hearing. However, cultural differences may give rise to different expectations on the scope and content required in such 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 evidence beyond the statement during the hearing;[24] whereas common law advocates and arbitrators may expect witness statements to cover every point in 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 impact of hierarchy in business organisations. In these countries, junior employees may not feel comfortable 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.[25] An advocate should be aware of this possibility when confronted with consistent accounts that seem too good to be true, and when dealing with

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23 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*, 2nd Ed (Juris Net, LLC, 2010) (pp. 49–63) at 53–54.

24 Anthony Sinclair, *Differences in the Approach to Witness Evidence between the Civil and Common law traditions*, In Doak Bishop & Edward G. Kehoe (Eds.), *The Art of Advocacy in International Arbitration* (pp. 23–48) 2nd Ed (JurisNet, 2010) at 34–35.

25 Christopher K Tahbaz, *Cross-Cultural Perspectives on Effective Advocacy in International Arbitration – or, How to Avoid Losing in Translation* (2012) Hong Kong International Arbitration Centre,Vol. 2012 Issue 2 pp. 51–54 at 52.

his or her own witnesses, 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

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.

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 with 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.

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