Kluwer Arbitration Blog

Young ICCA Workshop at the Occasion of the ICCA Congress, Miami, 10th of April 2014: “The Art of Persuasion”

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The Young ICCA’s Workshop on “The Art of Persuasion” brought together, from all parts of the world, a future generation of arbitration lawyers and the reunited outgoing and incoming presidents of ICCA: Professors Jan Paulsson and Albert Jan van den Berg. Who else would be better to divulge on the subject of persuasive advocacy?

The faculty was complemented with practitioners from an array of nationalities including the Dutch/Bahraini Speaker Professor Marike Paulsson (Director International Arbitration Institute and Lecturer in Law, Miami School of Law), Ms. Neeti Sachdeva (Senior Associate, ELP) of India, and Mrs. Aysha Mutaywea (Acting Senior Case Manager BCDR-AAA) from the Kingdom of Bahrain.

The Session was kicked off by Professor Marike Paulsson, demonstrating the power of silence to the participants and giving a number of lessons. The Findings are related below:

Lessons Learned From Marike Paulsson

It is truly an amazing effect that a measly 30 seconds of silence can have on a room or a tribunal. It is easy for lawyers to hide behind words; in fact, they are the masters of this stealthy technique. The result of this can be that, for some, silence is immensely intimidating. Young lawyers tend to fear establishing a rapport with an arbitral tribunal and doubly have a great fear of silence.

Lesson One: Cross-over from written pleading to the oral argument

Firstly, consistency is key. Counsel must know their case file, i.e. all briefs, exhibits, etc. In some instances, a cross over from the written pleadings happen due to “progressive insight”, which requires counsel to abruptly change course and shift to oral pleadings. If well prepared, the lawyer should be able to manage this shift seamlessly.

Lesson Two: The magic is in the preparation

The one who is most likely to win is the one who knows the file best. Proper organization of the file is key to enabling the lead counsel to access every detail of it subconsciously within the blink of an eye. Useful tools to make large files easily accessible during the hearing are mini bundles, cross references, and chart-overview that set out the line of arguments within each brief.

Lesson Three: Dumbo's stick – have it, use it

Just like the tale of Disney's Dumbo, one can only fly with the aid of a stick. Sometimes one feels safe with presentation aids, power points, visual and audiovisual aids, or written aids. Whatever the "stick" is be comfortable to use it.

Lesson Four: Don't go solo

Remember: you are always part of a team.

The team of lawyers usually consists of a partner, senior associates, mid-level associates, junior associates, paralegals, secretaries, and information technology ("IT") experts. Each member of the team is a vertebrae in the counsel's backbone when presenting oral arguments: "you are only as strong as your weakest link". In the hearing room, only a well-oiled machine will succeed.

Lesson Five: Choose your battles

What is the most important message to get across to the tribunal? Rather than reproducing every single argument contained within the briefs during oral argument, counsel would more likely please the tribunal by simply highlighting the essentials and respecting the time slots that are allocated.

Lesson Six: A l'improviste: yes, if you must

Be prepared to face the unexpected and be ready to deal with issues such as the:

(i) opposing counsel pulling out a "smoking gun";
(ii) arbitral tribunal asking you to waive a due process right with the phrase "all was fine?"
(iii) arbitral tribunal wanting to shorten the hearing; or
(iv) arbitral tribunal changing the sequence of witness examinations.

Lesson Seven: Establish a rapport with the tribunal

Make sure you have done all of the research concerning the tribunal. What is the arbitrator's background? Does the arbitrator come from a civil law jurisdiction or a common law jurisdiction? Does the arbitrator act as counsel as well as an arbitrator? Is the arbitrator known for his or her mathematical skills, organizational skills, etc.?

During the hearing, counsel must never lose connection with the arbitral tribunal. Read the signs. Is the arbitrator asleep? Is the arbitrator checking his/her phone? Does the arbitrator push for questions in a certain direction?

The use of silence is a great tool should you lose the attention of the arbitral tribunal. Make sure to interact with the tribunal by guiding them through all of the exhibits and highlight the important parts therein.

Lesson Eight: Use your own style

It is easy to watch and learn from the senior partner; however, copying style is strongly discouraged. What works for one may not work for the other. One's style must be tailored and should not be copied. Some can persuade arbitrators with a sense of humor, while others are

comfortable with a more formal approach.

Lesson Nine: The art of persuasion is the art of communication

The future generation of arbitrators and current generation of counsel may have lost touch with personal communication. Emerging speech patterns brought about with cultural technology such as Twitter, Facebook, and texting, may be beyond the imagination and jargon of today's pool of arbitrators.

Lawyers are encouraged to pay attention to the types of personalities and cultural backgrounds of arbitrators. Do not attempt to create an environment that levels out all cultural differences. Rather, embrace the cultural difference you will inevitably face in a hearing room.

Gesture with silence, posture, eye contact, and non-verbal communication. Keep the oral presentation simple by understating rather than overstating. Articulate your points clearly and firmly.

Lesson Ten: Believe

Believe in it, even if you do not. Even if your client has presented you with a complex, challenging case to argue, one that is hard to win or hard to defend, believe in it. For if you do not, surely the tribunal will not.

"How do we perceive ourselves in the hearing room" by Aysha Mutaywea

We see the world, not as it is, but as we are[1)]

Mrs Aysha Mutaywea brought forward an array of illustrations and images and relied on their visual effects as a tool in demonstrating their power to influence and convince the relevant audience. Bringing forward the psychological perspective and theory into play, she argued:

"Advocacy means a number of things. Pleadings are one of the main components. When pleading your case, you are advised to take into consideration the following points:[2)]

Theoretical points
(1) Start with jurisdiction issues;
(2) Know your audience, case and your adversary;
(3) Start by stating the main issue;
(4) Lead with strong arguments;
(5) Concentrate your fire – take time to select your best argument; and
(6) Present case law and evidence.

Practical Points
(1) Do not overstate your case;
(2) Occupy the defensible terrain;
(3) Yield indefensible terrain;
(4) Communicate clearly;
(5) Appeal not just to rules, but also to justice and common sense;
(6) Posture and tone; and

(7) Powerful close."

It is not the speed of an answer, but the quality and substance of it

The adaptation of the general rules and guidelines of the profession may seem straightforward, but in fact there is an underlying variable which complicates the implementation of these guidelines.

Taking From Daniel Kahneman's book *Thinking Fast and Slow*,[3)] psychologists have theorized that human beings operate using two mental systems. System One, which operates on effortless impressions, is an automatic and quick system. This system operates with little or no effort and without a sense of voluntary control. This system is responsible for quickly answering questions such as "What's 2+2?" and "Complete the saying 'bread and….'" System One is also able to detect hostility and ranges in tones. This system is otherwise known as "thinking fast."

System Two operates conscious reasoning and decision making; allocating attention to the mental activities and deals with complex operations, choices, and concentration. This is otherwise known as "thinking slow." This system kicks in when one is bracing for the starter gun in the race, looking for a face in the crowd, or when parking in a narrow parking spot.

An oral argument starts with System Two – planned and structured points in accordance with the professional guidelines. However, once the arbitrator interrupts counsel with questions, counsel risks to be thrown off his sequence and System One becomes dominant – the tendency to give quick and obvious answers. This is why it is not always easy to do as we were taught or to follow the guidelines.

This conflict between Systems One and Two creates problems with one's conscious and unconscious decision making. "This is your system one talking, slow down, and let your system two take control". The good news is that system two can change the ability of the way system one works with the aid of time and experience. Just remember that no one will judge you on the speed of your answer, but instead, the quality and substance of it.

Psychology plays a major role in mastering the art of persuasion. Two people can see the same thing, disagree and yet be right; it is not logical, it is psychological. This is called the "Paradigm Shift" . You can demonstrate this with a simple test, by using a single abstract image, you will see that different people see different things. Arbitrators looking at the same set of documents/evidence will not necessarily see one thing, and even if they do, what they see, will depend on their psychology. The phrase "the document speaks for its self" is not necessarily true.

So what are the main components that form the individual psyche? The psychological development of a person is determined not only by their own perceptions but also by complex social and cultural influences. Some of these major components are language, religion, gender, history, life experience, etc. For instance, what does the barrier of language do? If the arbitrator's first language is French, and the proceedings and documents are in English, it is granted that this arbitrator is fully capable to hear the proceedings in English. However, the simple differences in reading text might mean something a bit different from what the arbitrators understand.

Perception is really an externally guided hallucination. Our brains not only process data but also make inferences from it. In conclusion, when we see the world, we see it as we are, not as it is.

The Zen of Persuasion according to Neeti Sachdeva

Neeti Sachdeva argued that in order to be heard one must first listen – that is the Zen of persuasion. Spoken words have the immense power to create or destroy. Hence, it is essential that one speaks only when one's words have more meaning than the comparative silence. The choice of words is most critical to effective and persuasive argument.

Oral argument is an opportunity when counsel has the unique license to modulate her speech in order to emphasize and to use the power of words to reach a conclusion.

In order to be persuasive and convincing, it is essential to have empathy. In Harper Lee's *To Kill A Mockingbird*, Atticus Finch poignantly says to Scout, "You never really understand a person … until you consider things from his point of view." Especially in an international arbitration, with arbitrators from different jurisdictions, it is essential to be empathic of their diverse legal backgrounds in order to be able to make persuasive and convincing arguments. The motive must be to get into the mind of the audience (arbitrators) and get across to them what they really ought to hear.

Drawing on the famous Chinese proverb "spilled water cannot be retrieved", the same applies to words. Once spoken, words cannot be retrieved. Unlike written arguments, where one would have more than one opportunity to review and rewrite before they are published, the same might not always be true for oral arguments.

That leads us to another important aspect of effective oral advocacy, which is preparation. Preparation and practice gives a more polished, provocative, and passionate delivery. Oral advocacy requires preparation before delivery. To be able to persuade is a virtue, which comes only with hard work. Being extempore is good, but being prepared is better. It leads one to think on their feet and handle unexpected questions and situations in a more effective manner. Being prepared also means leaving little to chance. Be prepared and think not only about how you would argue your case but rather how your opponent would argue theirs.

As the famous Sufi teacher Idries Shah once said in *Caravan of Dreams*, "Three things cannot be retrieved: The arrow once sped from the bow, the word spoken in haste, and the missed opportunity". During the stage of oral arguments, a counsel should not speak in haste and must take every opportunity to put forth his case in a more coherent manner. It is also essential to hear arbitrators' questions and take note to understand the mindset of the arbitrators and answer accordingly. A counsel should never jump to answering the Tribunals questions in a zest, but rather should put forth a prepared, credible, and persuasive argument.

One major misconception with regard to oral arguments is that that the oral arguments are a test of memory. It is not essential to remember your speech by heart; however, making notes and outlines is highly important. On the other hand, reading out a written speech is monotonous and it will make it hard to get the tribunal's attention.

While delivering the oral arguments, it is essential to appear to be open and appear as ambiguous or equivocal. Be assured but not arrogant; commanding but not closed. Even a simple beginning that states "May it please the Court/Arbitral Tribunal" is an instinctive recognition that the most important key to persuade the audience is by pleasing it. And in order to please the arbitrator one of the tools that should be employed is a weaving of a story around the arguments. A common thread and theme needs to run within one's arguments in order to give it credibility and recall value.

To conclude, given that arbitration offers procedural flexibility, the techniques of persuasion shall continue to be ever evolving and will be an important tool in the hands of counsels to obtain favorable awards.

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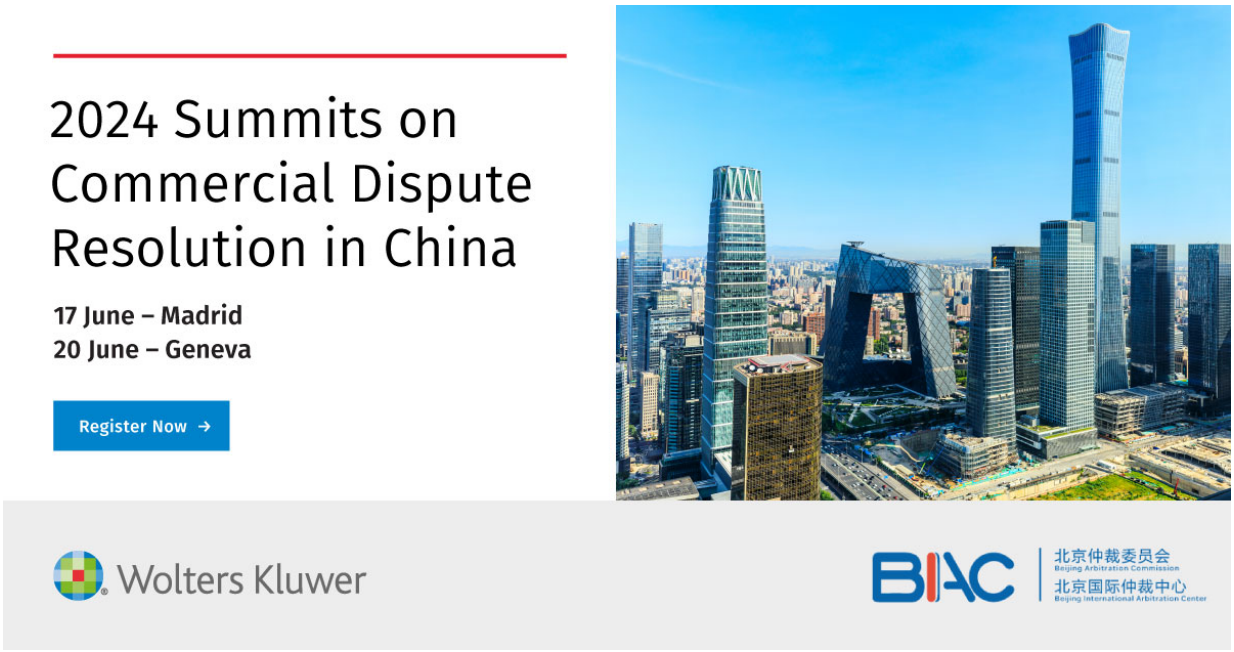

References

?1 To quote Stephan R. Covey.

?2 Antonin Scalia & Bryan A. Garner, Making Your Case: The Art of Persuading Judges (Thomson West, 2008)

?3 D. Kahneman, Thinking, Fast and Slow (Allen Lane, 2011)

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