Kluwer Arbitration Blog

Keep it Simple. Keep it Interesting.

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for YSIAC

In an age of ever-increasing complexity, where your watch can open your garage and answer your phone (yes, the Apple watch can really do that), many of us in the international arbitration community have lost sight of the most powerful weapon in the advocate's toolbox: simplicity.

A previous post on this blog eloquently advocated the power of simplicity, as well as that other often forgotten commodity which can be counterintuitive to advocates: silence.

This post focuses on two talks delivered in Singapore in the past year or so by eminent arbitrators on the subject of advocacy in international arbitration. The first, entitled *"The Do's and Don'ts of Presenting a Case to Arbitrators"* was delivered by Neil Kaplan CBE QC SBS to an audience comprised of the Singapore branch of the Chartered Institute of Arbitrators. The second was presented by Toby Landau QC under the auspices of "YSIAC" and was entitled *"An Insider's Guide to Advocacy in Arbitration: A candid assessment, and critique, of common advocacy techniques from the perspective of the arbitral tribunal"*.

Although – sadly – neither of these excellent talks have been published (yet), the author sets out below, for the benefit of others, a combined list of some takeaway points from these presentations (with some development of her own), in the hope that she does them justice:

1. Tribunals are not Superhuman.

This should not be a revelation. However, most Counsel appear genuinely to believe that if you send a tribunal, say, 120 bundles of turgid documents, 25 witness statements and 200 pages of submissions (with 50 accompanying authorities) the tribunal will somehow be able to examine and digest all their contents thoroughly prior to attending a hearing, and then will subsequently ensure that each document had been carefully considered before delivering a reasoned decision.

But if you would struggle to perform this task and would find it impossible, you can be sure that a tribunal would as well. They don't have any greater ability to digest reams and reams of documents than you do. In fact, bear in mind that law firms nowadays have a machinery of associates on every case, whereas most tribunals act alone or with limited secretarial assistance.

2. Find an Opportunity Orally to Present Your Case

Traditionally in common law jurisdictions, judges had little or no opportunity to read into a case before trial. The opening of a case was therefore an important piece of oral advocacy. Counsel had the judge's attention and, hopefully, an open mind – before any evidence had been presented – upon which to imprint all the reasons why the judge should find in their client's favour.

Nowadays, the opposite situation prevails. Judges and tribunals are drowning in written material submitted by the parties. Because of the sheer volume of submissions and evidence (see point 1. above), there is yet again a high likelihood of their not being fully acquainted with a case by the time of the final merits hearing. At a final hearing, each Party is likely only to be afforded a brief opportunity to present their case before the evidence is heard. Counsel should therefore consider finding an opportunity for a full oral "opening" of their case (let's call this the *"Kaplan Opening"*) after the first round of written submissions and witness evidence, and well in advance of the merits hearing. This would enable Counsel to leave an impression of their case on the tribunal whilst the tribunal's mind is effectively a blank slate. It would also promote a dialogue with the tribunal to flush out many of the issues and gaps in the evidence, and enable Counsel to address any shortcomings in their case (including abandoning weak points) in advance of the merits hearing. (See further: *"If it Ain't Broke, Don't Change it"* by Neil Kaplan published by the Chartered Institute of Arbitrators in (2014) 80 Arbitration, Issue 2, pg. 170.)

3. Tell a Story

There are scientific reasons why human beings are hard-wired to appreciate a good story. Stories serve the biological function of encouraging good behavior and conformity to social rules.

Most importantly, stories are a tool of persuasion. Certain neurotransmitters must be present in the brain for it to "change", and they are especially in attendance when a person is curious, is predicting what will happen next and is emotionally engaged. (The author acknowledges (and recommends) *The Storytelling Animal: How Stories Make us Human* by Jonathan Gottschall.) This explains why successful religious texts are not written as lists of nonfiction arguments or points. They are stories. Stories about love, rivalries, betrayals, disasters, journeys and friendships. So if you want to persuade, present your narrative as a tale, and aim to bring out the human aspect of the story. In the words of Bernard Hanotiau, speaking on the advocacy panel at the recent inaugural YSIAC Conference in Singapore: *"A good memorial should read like a good novel"*.

(One caveat here: Don't make up any of the facts and don't get carried away. The tribunal is not going to find in your client's favour based solely on your ability to entertain!).

4. See your Role as that of Assisting the Tribunal

Your role is not to score points against your opponents. It is to present your client's case to the best of your ability and ensure that the tribunal has everything it needs to make a decision (preferably in your client's favour). Co-operation between Counsel will be far more helpful (and impressive) to a tribunal than salvos exchanged between Counsel, however clever.

Further examples of helpful behavior to a tribunal may be as follows:

a. Organising your points in a structured way with the use of headings and diagrams where appropriate;

b. Relying only on authorities that are helpful and directly relevant, rather than electronically

searching by keyword all the issues relevant to your case and sending the tribunal everything that comes out.

c. Not copying the tribunal on all your correspondence with your opponents (this may sound obvious, but experience suggests it is not so to all).

What would be most helpful to a tribunal in practically all cases would be for each Counsel to set out the issues; the options on each side in relation to each issue; and why the tribunal should find in their client's favour on each issue. Sounds simple, doesn't it? Judging from both talks, this 'utopia' of arbitration advocacy practically never occurs.

5. Less is More

This principle goes hand in hand with all those set out above. As Lucy Reed commented in her lecture entitled *"Tribunal Decision-Making: Art, Science, Sport?"* presented in Hong Kong in December 2012 (Cited in *"If it Ain't Broke, Don't Change it"* by Neil Kaplan, (2014) 80 Arbitration, Issue 2, pg. 170.), *"focus not so much on what may go in an arbitrator's head but more on how much can fit in an arbitrator's head"*.

Keep it short and succinct, and whatever you do, don't bore the tribunal (the more verbose you are, the more risk there will be of this occurring). Bear in mind as well that the more reams of paper you throw at a tribunal, the less chance there is of it all being read.

Even a complex legal problem with a complicated factual matrix can capture the tribunal's interest if presented clearly and succinctly, by Counsel seeking to communicate with the tribunal. Don't forget that oral communication is a two-way dialogue. Eye contact is important, as is "reading" the audience you are communicating with to gauge whether they are following you, or need you to pause or explain something further. You may be a fantastic orator but you won't get far in persuading the tribunal if you launch into a 50 page monologue worthy of Shakespeare without any thought for your audience.
I would be delighted to expand further on this point, but in the interest of keeping this blog short and succinct, I will have to end here.

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