
Kluwer Arbitration Blog

Young ICSID Advocacy Skills Training: Making an Effective Opening and Closing Statement

Ajoo Kim (Assistant Editor for Investment Arbitration) · Wednesday, June 21st, 2023

On May 22, 2023, Young ICSID's first "**Advocacy Skills Training: Making an Effective Opening and Closing Statement**" took place. It was opened by Celeste E. Salinas Quero and featured Klaus Reichert SC and Donald E. Vinson, Ph.D., who are authors of "**Arbitration: The Art & Science of Persuasion**". The two-hour training, held both online and in person at ICSID, succinctly uncovered and unraveled the book on how international arbitration and behavioral science intersect, as well as the key to effective advocacy before arbitral tribunals, particularly in the areas of opening and closing statements.

International Arbitration and the Art of Advocacy

International arbitration, as Mr. Reichert observed, is comprised of different legal cultures and people from around the world which makes it a perfect subject for analysis of how the scientific, psychological world and legal world can carefully intersect with one another. Per Mr. Reichert, it is a process where one reconstructs the experience of others into a narrative that fits into the legal framework and certain consequences. This should then be translated into an award which would have its own real-life consequences. Dr. Vinson added that just like jury trials in U.S. courts, international arbitration entails an art of advocacy and is a process of attempting to develop persuasive communication to convince some audience of some courses of action for some decisions to take or not to take.

Psychology of Advocacy: Observations from an Arbitrator

Mr. Reichert, having been an arbitrator for an extensive number of years, observed that time management is essential given the limited amount of time one has particularly for opening and closing statements, the principal areas of oral advocacy in international arbitration. One can easily be tempted and try to cover everything. Nevertheless, one should not offer too much information but, instead, be selective. Mr. Reichert elaborated that one must work out which of the points he/she needs to tell the tribunal after having identified which ones are important and which are not. Rushing onto something is not a persuasive approach of advocacy because the tribunal may rush along, skipping the points that should otherwise be emphasized or that are of importance. Mr.

Reichert emphasized to “anchor things that are important.”

Dr. Vinson added that advocacy is an art that can be learned and practiced. An art that must be applied keeping in mind that on the receiving side there are human beings who feel, think, and make decisions. One must acquire information and be able to process such information. Dr. Vinson underscored that feelings are infinitely more important than cognition.

The Art of Effective Opening Presentation: Understanding Human Perception

Dr. Vinson then spoke on how feelings inform decisions and how decisions lead to judgments. He addressed what one must think about when structuring and making the art of effective opening presentation and that is human perception. Perception is how we hear, see, feel, or interpret things—an incoming stimulus that affects our decision-making. Per Dr. Vinson, perception works from a psychological perspective through stimulus factors and personal factors.

Stimulus Factors

Stimulus factors include contrast, colour, sound, and movement. The way in which you conduct speech pattern like slowing down, raising voice, using visual aids, or leaning forward are good examples. At the end of the day, one would want to think about what to do to enhance these stimulus factors and influence what the audience receives, though one must be aware these can also get in one’s way: once an arbitrator is distracted, counsel might not be able to regain their attention, regardless of how much preparation they have done.

Personal Factors

Personal factors reside in an arbitrator him/herself, such as intelligence, emotional state, and cognition. Mr. Vinson, by citing an unnamed study, explained that these concern how long humans can pay attention for, and it is typically about 20 minutes. Intelligence is already much seen in international arbitration. Emotional state is about how one perceives what is received from others; and one’s emotional interference can inhibit his/her reaction to what is presented. Cognition generally refers to one’s attitudes, values, and beliefs. The closely held values such as fairness and what is right or wrong can be reinforced through interactions in society, yet very resistant to change. Attitudes are less closely held and thus are susceptible to change, leading to attitude-change. Beliefs can be considered as opinions and they are very susceptible to change. Good advocacy can be effective for reinforcing beliefs and, thus, for the art of advocacy, one would need to know who the audience is by figuring out their culture, legal training background, attitudes, or beliefs. Mr. Reichert suggested that counsel should find out as much as possible about the “three tiers—values, attitudes and beliefs” of the arbitrators in a tribunal.

Mr. Vinson elaborated that attitude-change may occur in the forms of rejecting, distorting, minimizing the importance, or contriving (rejecting and contriving alternative explanation). The least likely thing to happen, Mr. Vinson went on, is changing attitude. He suggested that as one prepares an oral opening or closing statement, one should not make mistakes or simply assume pure logics or statistics are going to change the mind of an arbitrator. Mr. Reichert added that there can be different attitudes within a cross-cultural tribunal and advocacy may play a part in shaping the tribunal’s approach to a case.

Gestalt Psychology

Dr. Vinson pointed out that **Gestalt psychology**, which has been around since the late 1800s, is one interesting aspect of social psychology particularly relevant for effective advocacy in international arbitration. Dr. Vinson provided a few visual examples to demonstrate how one can perceive or interpret a single image differently, how something can take less of cognitive work for one to figure out or interpret something, and how one's experience or way of thinking can affect one's interpretation or understanding of something. With that in mind, Dr. Vinson noted that one should carefully think about testing out one's visuals before presenting them and examine whether one is sending the message he/she wants the audience to receive.

Memory and Retention: Thematic Anchors

Both Dr. Vinson and Mr. Reichert emphasized the need to structure one's persuasive efforts in a way that can be retained by the audience and, in that sense, stressed the importance of having thematic anchors. Thematic anchors, per Dr. Vinson and Mr. Reichert, are two to three major aspects of one's case that the tribunal will remember no matter what. That is, these thematic anchors should capture the essence of what one needs to deliver to the tribunal to get to one's desired outcome. These should be identified and presented up front in one's presentation and their importance should be clearly articulated to the audience. In international arbitration, which is heavily based on memorials or written material-focused, one must build and structure thematic anchors so that the tribunal can become familiar with the overriding theme of one's case. Mr. Reichert pointed out that successfully conveying one's thematic anchors, even without having to use the time one is given, for example, for an opening statement, will leave the tribunal, by the end of one's oral opening, with an idea of how it can effectively deal with the case, *e.g.*, where the tribunal needs to make a factual finding that is of critical importance.

In addition, Mr. Reichert underlined the importance of preparing opening and closing arguments hand in hand so that one's opening and closing statements mirror each other. That does not mean repeating the same thing but keeping consistency. The art of unsaid should also be given due regard and one would wish to question and carefully analyze what was not said, what cues, any body languages, etc.

Conclusion

One should ask him/herself how effective one's openings or closings are likely to be based upon how human beings perceive, process, distort, or reject information. Dr. Vinson analogized it to what makes a great play, which can be based on various factors like the story, choreography, lighting, or sound—and not only about them making sense but also about making them memorable in the right way. In international arbitration, the level of preparation also changed since the introduction of **virtual proceedings**. While it can be convenient to deal with matters or transfer information virtually, Mr. Reichert and Dr. Vinson were both of the view that that comes with a certain cost—the sociological element of the members of a tribunal, which often is a unique group of three that may or may not know or have worked with one another, not meeting together. This can have an ineffective impact on how quickly coalescing takes place or on a group decision-making for a sociological process. Again, advocacy is a human process that needs to take into consideration the feelings, attitudes, and beliefs which are things artificial intelligence is incapable

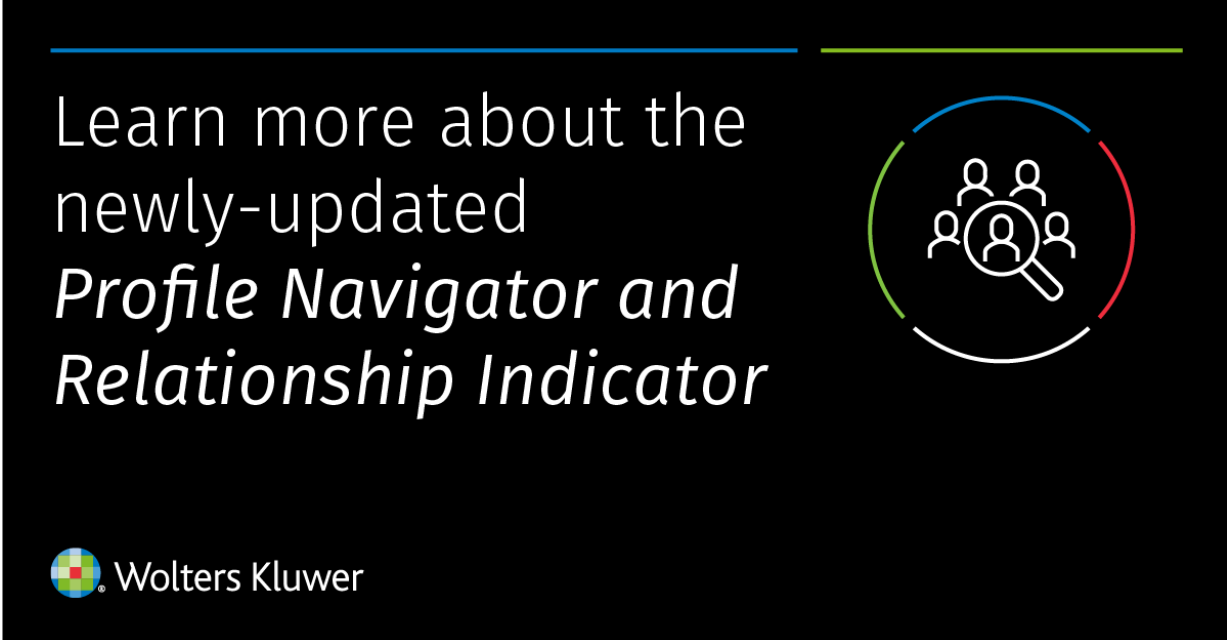
of. Mr. Reichert added that arbitrators also need to realize what is going on from a behavioral point of view and be more sensitive to counsel as to what they are seeking to communicate and their rationale.

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