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# Kluwer Arbitration Blog

## Arbitouille: Arbitration Counsel as a Restaurant Chef

Guilherme Rizzo Amaral (Souto, Correa, Cesa, Lummertz & Amaral Advogados) · Friday, May 10th, 2024

Previous posts have addressed advocacy techniques in arbitration (for example, see [here](#), [here](#), [here](#), [here](#), and [here](#)). This is not an attempt to summarize them, but rather to present the topic in a different light. As [psychologists have long discovered](#), information that provides imagery and vividness has a greater impact on inferences and memory retention. This article leverages that knowledge. So, let's dive in: imagine counsel as restaurant chefs and the arbitral tribunal as patrons. Welcome to the *Arbitouille*!

### 1. Checking for Allergies

As delicious as it may be to some, a shrimp cocktail can send others to the hospital due to an allergic reaction. The same goes for certain arguments or actions that look good on the surface but, once put forward, will start a chain reaction with grim consequences for a case. So, always check for allergies.

When it comes to arbitrators, checking for allergies means being aware of their “[culture, legal training background, attitudes, or beliefs](#)”, their prior work as scholars or even as arbitrators (whenever the information is available), as well as understanding how [psychology](#) comes into play when trying to persuade them. Avoid behaviour (such as grandstanding or adulation) or arguments that will trigger a bad reaction.

In addition, some topics or lines of argument can be toxic to a case. Fight the urge to quickly retort with new reasoning before carefully checking where it might lead you down the road. For example, before hammering the opposing party for not meeting a certain standard of proof, check if you meet it when the burden falls on you. Before citing a specific statute, make sure its interpretation is straightforward and not capable of producing adverse effects on your case.

During cross-examination, asking questions you don't know the answer to is equal to failing to check for allergies. In the best scenario, things might turn out all right if you try to “wing it”. But chances are you will go down a rabbit hole, with an undesired deviation from your line of questioning, or, worse, reveal or emphasise facts that were unknown to you and that are damaging to your case theory.

## 2. Pairing Ingredients

I recall an [episode](#) from the series *Friends*, in which the character played by Jennifer Aniston, Rachel, mixes up the recipes for an English trifle and a shepherd's pie. Enter Joey Tribbiani, the Italian-American character played by actor Matt LeBlanc. He seems to enjoy eating the weird concoction, uttering the famous line: "What's not to like? Custard? Good! Jam? Good! Meat? Good!".

Well, arbitrators are not Joeys, and some arguments simply do not mix well together. Therefore, be careful when pairing arguments. Before challenging your opponent's claim, see if your argument does not cut both ways. For instance, you don't want to argue that the opposing party's action on a given date was an anticipatory repudiation when that would mean your client's claim would have come after the contractual limitation period has run out.

## 3. Written Submissions: The Buffet

I, for one, love buffets. Not having to wait for the food, choosing whatever I want from numerous options, skipping what I do not like and, finally, eating as much as I want, will close the deal for me (like Joey, I am of Italian descent, yet that is a mere coincidence; I do not believe in stereotyping). Buffet tables can vary in length, which usually means more food variety the longer they get.

I like to think of written submissions as buffets, especially when they contain alternative arguments to support the same claim. Of course, arbitrators are expected to go through all of the submission, yet they may discard lines of argument that do not sit well and instead focus on what they perceive as a strong and sufficient argument to support a claim. There is also a usual order for a buffet: salad, main dishes, dessert. It is kind of universal, which helps patrons navigate through the options without having to move up and down the table. Written submissions should also be presented in a clear order, with an intuitive structure, so that arbitrators do not waste time trying to connect arguments. This structure, however, may vary from case to case. A case dealing with project delays might be enhanced by a chronological narrative, while one involving defects in a purchase agreement might benefit from a more direct and theme-focused approach.

In any case, the salad bar should always come first: a short, straight-to-the-point introduction to answer very simple questions: What is the case about? Why should the arbitrators care? Why is my client right? What are the flaws in the opposing party's arguments? How am I going to show it in the pages that follow?

When considering how, the submission's ideal length comes to mind. Can you imagine facing a 100-meter buffet table? You might be full before reaching the best plates down the line. The same goes with long-winded submissions containing unnecessary information: they might inadvertently bury key arguments which would not be fully savoured by the tribunal. It is not that submissions cannot be long in some circumstances, but rather that they should not contain useless or repetitive information. Keep them [simple](#).

## 4. Oral Arguments: The Course Dinner

Unlike the buffet of written submissions, oral arguments are more like a course dinner. Once the arbitrators are seated at the table, they won't be able to pick and choose between dishes. The counsel chef is in control of the entire experience. After checking for allergies, counsel should outline the order of the presentation. This is the right opportunity to build anticipation. No one would sit through a course dinner if the announced grand finale were to be a loaf of bread.

In general, “[how warranted a claim is depends on how good the evidence with respect to that claim is](#)”. Here, good wine-pairing will be key. If possible, counsel should always pair arguments with the key evidence to support them at every step of the presentation. You do not want to pair a light salad with a full-bodied Uruguayan Tannat, or a legal argument portrayed as key with weak or ambiguous evidence.

**Boredom** should be avoided at all costs, which is especially challenging in times of remote hearings. Carefully choose the dishes and their order of presentation so that every single one can be savoured and appreciated by the arbitrators. Most importantly, just as a chef should not try to fit all her repertoire into one single course dinner – as that would cause indigestion – counsel should refrain from doing so with all the arguments of a case. Choose wisely which aspects of the case will be brought to light and which won't.

Just as food cues increase salivation, provide the arbitrators with cues during your opening statement so that they are eager for what is to come at the hearing. A closing statement should be neatly put together, reminding the arbitrators of their previous experiences at the hearing, without attempting to repeat them. Closings should be the cherry on top, not a new course.

## 5. Of Spice and Sausages

In some very specific (and rare) circumstances, to show a small dose of outrage might help advance a point. One such instance is when the opposing party acts in clear and unequivocal bad faith. One should be very careful, however, not to overdo it and end up distracting the tribunal from the real issues at stake. It's like adding too much spice to the food: your patrons' taste buds will end up burnt and they won't appreciate the dish's flavours. Demonisation of the opposing party should be avoided. As George Bermann recently [said](#), “a tribunal does not come to its task supposing that there's a ‘good guy’ and a ‘bad guy’”, despite some [opinions](#) to the contrary. Besides, one often catches more flies with honey than with vinegar.

Also, most people can't resist a good and tasty hot dog. As with most junk food, it influences our brain reward system, releasing dopamine and providing a rush of satisfaction. You cannot, though, build an entire diet on sausages and bread, as they lack key nutrients. The same goes for the use of rhetoric and hyperbole in arbitration. As [some commentators](#) note, rhetoric can be an “excellent device to arouse and recapture” the attention of the tribunal, yet it is “likely to be viewed as argumentative”. This means that pure rhetoric won't provide enough nutrients for the award. A healthy award is built of strong legal foundation backed by hard evidence.

## 6. Digestif

After a long dinner, nothing better than a good Armagnac to aid digestion (granted, there is no

scientific evidence to support that). It will send your patrons away in a good mood. Closing statements or post-hearing memorials are like digestifs. Here, an exercise of empathy is key: if you were in the arbitrator's shoes, what would you like to hear or read so that the task of drafting the award becomes as effortless as possible (or at least less daunting)? One thing is for sure: when it comes to powerful arguments presented by the opposing party, no stone should be left unturned. You should help the tribunal digest even the most intricate of topics. Throwing up your arms and expecting the tribunal to sift through the case files to find a solution for you seldom produces favourable outcomes. From experience, structuring post-hearing memorials mirroring an actual award usually does the trick.

*Bon appétit!*

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