# A View From The Other Side: Advocacy Tips from Leading Arbitrators of the Chartered Institute of Arbitrators

CIArb
evolving to resolve
Singapore Branch

Advocacy Tips from Leading Arbitrators of the Chartered Institute of Arbitrators

# Contents

# Preface

This is simply an exceptional piece of work. While there are many publications that teach us about the law and practice of commercial arbitration, there are few, if any, that offer practical tips on oral and written advocacy in arbitration proceedings.

As an arbitration practitioner, these bite-sized advocacy tips from 50 top arbitrators from across the globe, all of whom are Fellows or Chartered Arbitrators of CIArb, are priceless. Priceless, because they offer insights from the eyes and ears of those receiving the evidence gleaned in examination of the witnesses and experts, and the arguments and submissions of counsel for the parties. This guide should be on the bookshelf of everyone engaged in the practice of arbitration.

Having myself been an author and editor of legal publications, I appreciate the enormity of the time and effort that has gone into producing a work of this magnitude. I am therefore exceptionally proud to acknowledge that this guide is the effort of members of the Singapore Branch of CIArb. Conceptualising the project, liaising with contributors, editing the content, proof-reading the manuscripts and finalising the layout for publication are all down to the hard work of three Singapore Branch members. My thanks therefore go to Gerald Leong and Roger Milburn, both of whom are active members of the Young Members' Group (YMG), for their sterling efforts in the production of this guide. I am so encouraged that we have such committed, passionate and energetic young members within our ranks. My deepest gratitude also goes to Sapna Jhangiani QC for her tireless enthusiasm and energy in driving the publication of this guide. Despite her busy practice, Sapna has been a great source of support in her role as Vice Chair of the Branch, often single-handedly driving various initiatives of the Branch.

On behalf of all the members of the Singapore Branch, I would also like to express my sincere appreciation to our Patron, the Honourable Justice Quentin Loh, for accepting our invitation to write the foreword for the guide. Last but not least, our thanks go out to each and every one of our amazing contributors for sharing their invaluable "trade secrets"!

**Paul Sandosham C.Arb, FCIArb**

*Chair, Chartered Institute of Arbitrators, Singapore Branch*



# Introduction

It gives us immense pleasure to present to you this compilation of advocacy tips from a diverse group of leading lights of the CIArb. The practical suggestions cover all aspects of advocacy, from written submissions and oral delivery, to courtesy, integrity, preparation, witness evidence, virtual hearings and so many other topics – a true embarrassment of riches which we share with you with delight. We hope you will enjoy reading these offerings as much as we have enjoyed the process of curating and editing them.

The genesis of this publication was our collective experience that the best and most practical way to learn advocacy "dos" and "don'ts" is to sit as an arbitrator, or alternatively, assist a tribunal as a tribunal secretary. Regularly experiencing the tradecraft of advocates in all its forms and styles instils a keen sense of what works and what does not work. It therefore occurred to us that there was clearly a worthwhile project to be undertaken to collate bite-sized nuggets of advice on advocacy from those who find themselves most often on the receiving end of it – and that this might particularly benefit the younger members of CIArb, to whom this publication is dedicated. Hence the title of this publication: "*A View from the Other Side*", and the words of counsel which are included in its pages, which emanate from a wide range of eminent CIArb members who have significant practices as arbitrators.

As beautifully and succinctly explained by the 2021 Global President of CIArb, Ann Ryan Robertson, in her incoming message as President on 8 January 2021, the three primary aims of CIArb for 2021 to 2023 are as follows:

- Promote the constructive resolution of disputes across the globe;
- Be a global inclusive thought leader; and
- Develop and support an inclusive global community of diverse dispute resolvers.

It is our audacious hope that this publication contributes to all three of these aims.

Because we limited ourselves to 50 contributors, there were necessarily many excellent arbitrators who were not approached by us to contribute to this book. As much as the publication would have been enriched by their wisdom,

we trust that they will excuse us for this omission. With the assistance of the contributors who do feature, we hope that we have been able to demonstrate thought leadership which is both inclusive and diverse. To again quote Ann Ryan Robertson from her maiden speech as President: *"[t]he strength of our organisation is its diverse and committed membership"*. We have sought in these pages to take advantage of the significant diversity in the membership of CIArb, which is a truly global institution.

We take this opportunity to express our thanks to the board of directors of the Singapore Branch of CIArb and in particular Sean Yu Chou, Immediate Past Chair of the Branch, under whose leadership this book was commenced, and Paul Sandosham, current Chair of the Branch, under whose leadership the project has concluded. We would also like to thank the publishers Naili Print Media Pte Ltd for their creativity and flexibility in assisting us with this publication.

Most of all, we are entirely indebted to each of our contributors, who gave freely and generously of both their time and their wisdom to the project. All of them are well known practitioners in the field, with an impressive list of achievements and accolades. However, in describing them in these pages, we have – so far as possible – aimed to capture their current and past roles with an arbitral institution; their CIArb membership status and any current or past CIArb roles; the jurisdictions in which they are admitted; and any current judicial offices. Please be aware that their achievements well surpass this limited biographical data!

We are equally indebted to the Honourable Justice Quentin Loh, Judge of the Appellate Division and President of the Singapore International Commercial Court, Supreme Court of Singapore. Justice Loh is the patron of the Singapore Branch of CIArb, and his support of the branch has been both constant and unwavering. As you will see on the following page, Justice Loh has graciously crafted an erudite and thoughtful foreword for this publication, and for this, we extend to him a heartfelt thank you.





As you embark on discovering 50 fantastic insights on the art of advocacy, we end our introduction by honouring and expressing our gratitude once again to Justice Quentin Loh, as well as to each of the contributors to this publication. Whilst our role in this production was to assist behind the scenes by casting, tweaking the script and designing the stage, it is of course they – the headline acts - who are the real stars of the show.

EDITOR

**Sapna Jhangiani QC FCIArb**

*Vice Chair,*
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# Foreword

If domestic litigation exists in a three-dimensional world, then international arbitration sits in a multi-dimensional universe. Different legal systems interact, civil law principles and sometimes diametrically opposed common law concepts head for a collision, counsel who are brought up with different training, professional rules and different cultures meet in the arena and the referees are calling out different rules of the governing law, the law of the seat and arguing over whether a rule is procedural or substantive. Navigating through all that and delivering the prized award to your client is nothing short of an extreme art to which not all that many are initiated. It is no wonder that the titans of international arbitration are held in such awe.

When I was called to the Bar in 1975, there was almost no international arbitration in Singapore. Domestic arbitration was the only fare. As Singapore developed commercially, more complex domestic arbitrations emerged, mainly in the construction, sale of industrial machinery, insurance and reinsurance areas. Eventually international arbitration began to arrive at our shores. In those early years, lawyers launched into that formative world with little to guide them save for their own instincts and ingenuity.

We now have many textbooks on international arbitration to guide us. There are now more than just a few very useful text and reference books on Singapore international arbitration law that practitioners can reach out to. There is a growing body of jurisprudence from the Singapore Court of Appeal on this subject. That is all, what I would call, hard law.

What about an equally important dimension – the art of the advocate, who delivers, in international arbitrations? This book fills that dimension, some may use the term "void". It is a very important collection of wisdom and advice from some of the best advocate-practitioners and arbitrators of world-class standing who generously dispense invaluable advice on how to excel in that arena. Many are titans of the world of international arbitration and they have that wealth of experience which they so generously share.

I cannot commend this book strongly enough. It behooves aspiring practitioners in this field to have this book and to make an assiduous study of it. Even the more experienced advocates will find this book a good refresher.

The contributors come from all parts of the commercial world, they have diverse backgrounds and their advice covers a very wide spectrum of necessary knowledge and skill. The common thread is their acknowledged expertise and their reputations need no burnishing.

It would be remiss of me not to acknowledge that many of the contributors are also my good friends or those I have come across during my time at the Bar, indeed even while on the Bench. However, I can truthfully say that if I were to put that to one side, I would still hold them in great admiration for their expertise, deep knowledge in this area and most important of all, for their integrity. They are all fine and upright lawyers who will never compromise their principles. That makes them special gems in this universe.

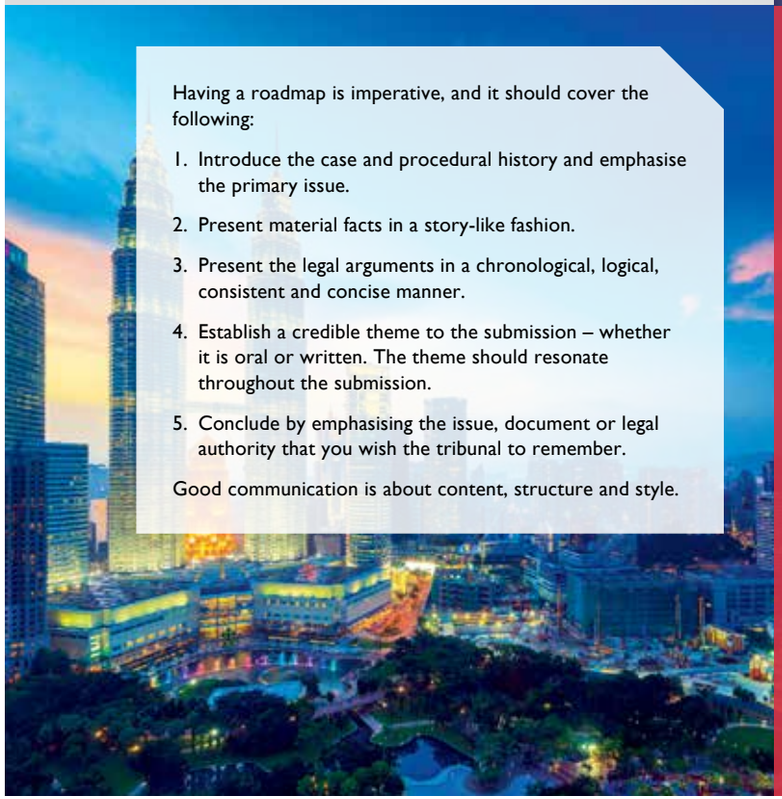
**Quentin Loh**

*Judge of the Appellate Division and*
*President of the Singapore International Commercial Court,*
*Supreme Court of Singapore*

# List of Contributors

# Content, Structure and Style – but Structure First!

*"The art of persuasion is a symbiotic relationship involving substance and style. And the way you structure your argument is key."*



Having a roadmap is imperative, and it should cover the following:

1. Introduce the case and procedural history and emphasise the primary issue.
2. Present material facts in a story-like fashion.
3. Present the legal arguments in a chronological, logical, consistent and concise manner.
4. Establish a credible theme to the submission – whether it is oral or written. The theme should resonate throughout the submission.
5. Conclude by emphasising the issue, document or legal authority that you wish the tribunal to remember.

Good communication is about content, structure and style.


**Tan Sri Dato' Cecil Abraham**

- Chartered Arbitrator and Fellow, Chartered Institute of Arbitrators
- Past Chair of the Chartered Institute of Arbitrators, Malaysia Branch
- Member of the Advisory Council, ICCA
- Admitted in England and Wales, Malaysia and Singapore
- Arbitrator and Counsel

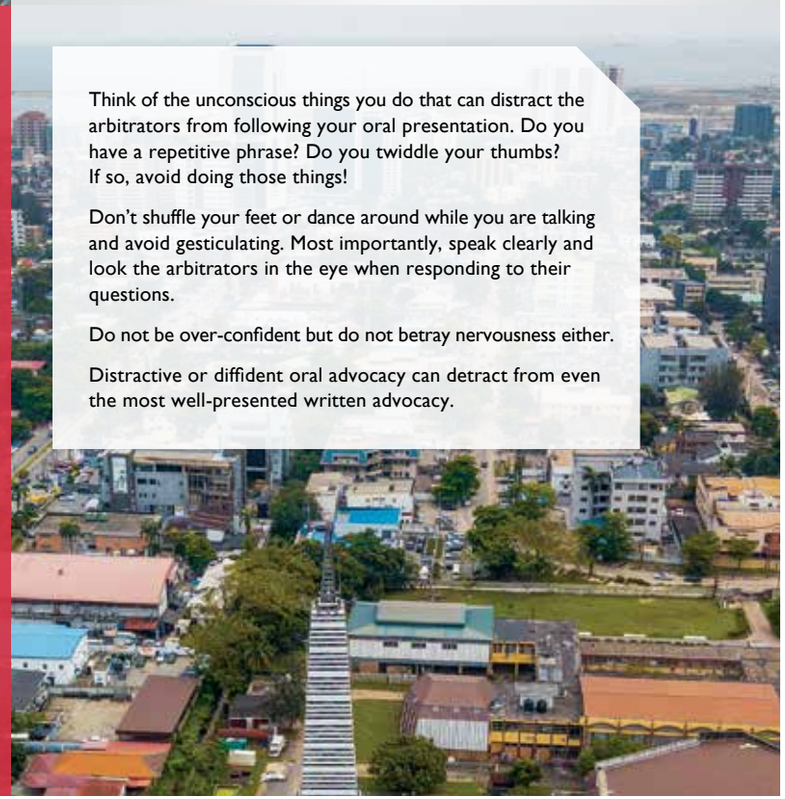



# Beware of Subconscious Habits that may Detract from your Oral Advocacy

*"Aim for self-awareness as to what distracting habits you may have…"*


**Olufunke Adekoya SAN**

- Chartered Arbitrator and Fellow, Chartered Institute of Arbitrators
- Past Chair of the Chartered Institute of Arbitrators, Nigeria Branch
- Governing Board Member, ICCA
- Admitted in Nigeria
- Arbitrator and Counsel

Think of the unconscious things you do that can distract the arbitrators from following your oral presentation. Do you have a repetitive phrase? Do you twiddle your thumbs? If so, avoid doing those things!

Don't shuffle your feet or dance around while you are talking and avoid gesticulating. Most importantly, speak clearly and look the arbitrators in the eye when responding to their questions.

Do not be over-confident but do not betray nervousness either.

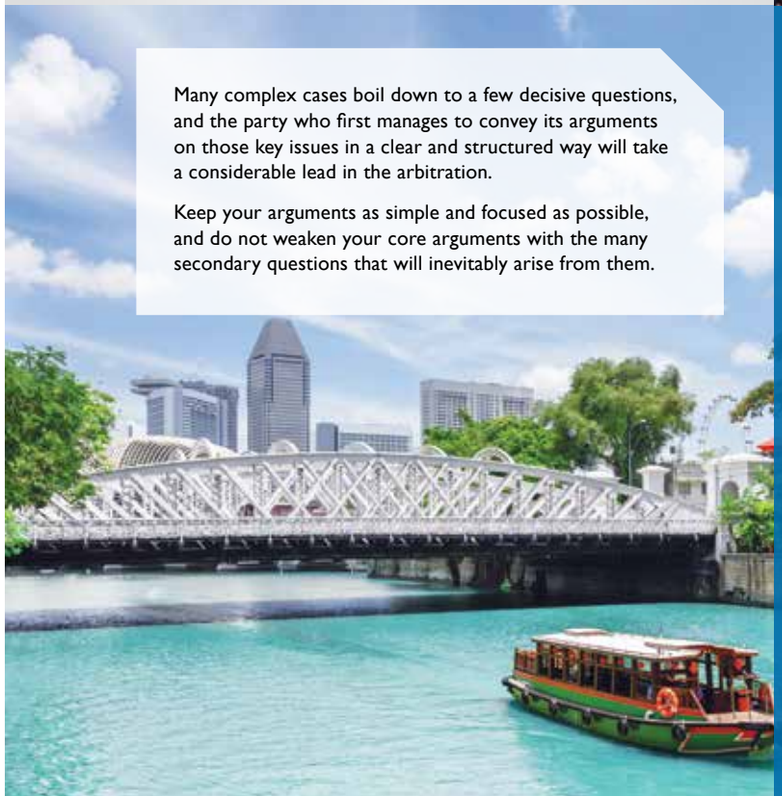
Distractive or diffident oral advocacy can detract from even the most well-presented written advocacy.

## Keep it Simple

*"A good advocate will be able to explain the most complex concepts in simple terms."*

Many complex cases boil down to a few decisive questions, and the party who first manages to convey its arguments on those key issues in a clear and structured way will take a considerable lead in the arbitration.

Keep your arguments as simple and focused as possible, and do not weaken your core arguments with the many secondary questions that will inevitably arise from them.



**Christine Artero**

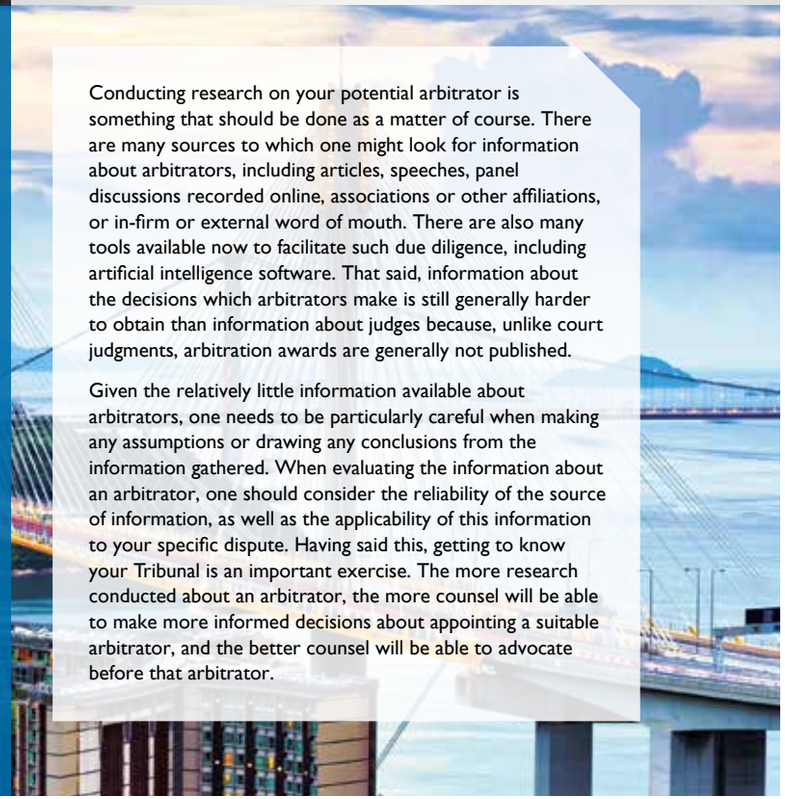
- Fellow, Chartered Institute of Arbitrators
- Admitted in England and Wales and France
- Arbitrator

**Chiann Bao**

- Fellow, Chartered Institute of Arbitrators
- Vice President, ICC International Court of Arbitration
- Former Secretary-General, HKIAC
- Admitted in Hong Kong and New York
- Arbitrator

## Know your Tribunal

*"Make sure you take the time to 'KYT' - Know Your Tribunal - after all, they are the ones you are trying to persuade."*



Conducting research on your potential arbitrator is something that should be done as a matter of course. There are many sources to which one might look for information about arbitrators, including articles, speeches, panel discussions recorded online, associations or other affiliations, or in-firm or external word of mouth. There are also many tools available now to facilitate such due diligence, including artificial intelligence software. That said, information about the decisions which arbitrators make is still generally harder to obtain than information about judges because, unlike court judgments, arbitration awards are generally not published.

Given the relatively little information available about arbitrators, one needs to be particularly careful when making any assumptions or drawing any conclusions from the information gathered. When evaluating the information about an arbitrator, one should consider the reliability of the source of information, as well as the applicability of this information to your specific dispute. Having said this, getting to know your Tribunal is an important exercise. The more research conducted about an arbitrator, the more counsel will be able to make more informed decisions about appointing a suitable arbitrator, and the better counsel will be able to advocate before that arbitrator.

# Complacency can Spell Disaster

*"Never cease to give every case all you can!"*

First, be well prepared; know your papers inside out – Tribunals really do have an unreasonable tendency to do their homework and they know the file.

Second, it is a rare case (even rarer in complex international commercial disputes) that has no weak points. Don't hide them. Don't lead with them, but explain why they do not constitute an insurmountable obstacle to the success of the case. Do not allow opposing counsel to present them to the other side's best advantage and make hay with them.

Third, address the Tribunal politely and clearly; if you say you have five points, do not make it nine or ten. Introduce them, draw attention to the key documents and evidence on which you rely and take them in a logical and coherent order: a Tribunal likes to know that it is in competent hands. Look the members of the Tribunal in the eye – particularly when answering a question – do not patronise, and be responsive to a signal that a particular point or argument has been covered sufficiently and move on.

**John Beechey CBE**

- Fellow, Chartered Institute of Arbitrators
- Governing Board Member, ICCA
- Former President, ICC International Court of Arbitration
- Admitted in England and Wales
- Arbitrator



# Acquire Expertise in both Civil and Common Law

*"International commercial arbitration is not, for the most part, about international law - but about multiple national laws."*

**Associate Professor Gary F. Bell**

- Fellow, Chartered Institute of Arbitrators
- Member of the Barreau du Québec (Barreau de Montréal)
- Arbitrator

If you are from a common law background, learn as much as you can about the basics of civil law, and vice versa. Do not just learn about the other legal tradition on the job, in arbitration case after arbitration case — borrow a few books and learn systematically how the other legal tradition works.

This investment will reap benefits throughout your international arbitration practice on matters of both substantive and procedural law. It will also come in handy in understanding and questioning legal experts from the other legal tradition.

# The 10 Commandments of Written Advocacy

*"How not to annoy the Tribunal…"*

1. Never use an adverb unless it forms part of the cause of action (for example, an act must be done "maliciously"). A denial gains nothing by being made "vehemently", "categorically", "expressly" or "specifically".
2. Never use dreary malapropisms such as "disingenuous", "disinterested", "incredulous" and "egregious".
3. Avoid transparently synthetic self-righteous indignation implicit in terms such "blatant", "brazen", "spurious" and "purported".
4. Do not use pompous archaisms such as "hereinbefore" or "hereinafter" (above and below will do) or "averred" (for submitted) or "inter alia" (for amongst other things - if you must, but see Commandment 6).
5. Do not indulge in turgid cliches like "deafening silence". "plucked from thin air" or "re-writing history".
6. Do not attempt to hedge your bets with jargon phrases like "including but not limited to" or "will refer to the contract for its full meaning and effect" - they are meaningless, unhelpful and beg the question.
7. Do not use footnotes for anything other than references.
8. Do not cut and paste multiple citations from textbooks. Cite a single authority for a proposition and identify the relevant passage.
9. Do not use fonts smaller than 11-point Calibri or 12-point Times New Roman or line spacing less than 1.5, especially when trying to evade a page limit imposed by the Tribunal. You are not publishing a cheap paperback and it is extremely tiring for a Tribunal to wade through hundreds of pages of closely typed text.
10. Never copy the Tribunal into correspondence between the legal representatives unless you are seeking an order. You may be intoxicated with your own advocacy in highlighting the errors and failings of your opponents, but it is just tiresome for the Tribunal.


**Michael Black QC**

- Chartered Arbitrator and Fellow, Chartered Institute of Arbitrators
- Admitted in the DIFC, the Eastern Caribbean Supreme Court, England and Wales and the Singapore International Commercial Court
- Arbitrator and Counsel

**Professor Lawrence Boo**

- Chartered Arbitrator and Fellow, Chartered Institute of Arbitrators
- Member, SIAC Court of Arbitration
- Admitted in England and Wales and Singapore
- Arbitrator


# Be Helpful. Be Creative.

*"Always do things in a way that helps the Tribunal, even if it means doing things differently."*

For example:

1. There is no harm in including in opening or closing submissions a comparative table of each party's arguments. This is very handy for a Tribunal, and the Tribunal (or its secretary) might already be preparing such a table. If you take the initiative, the Tribunal's eyes will be on your product.
2. It is always helpful to have a list of issues upfront, even if this is not an arbitration where this is required (e.g. an ICC arbitration). This helps to focus the Tribunal's attention and limit the scope of the arbitration. When preparing such a list, avoid including loaded facts.
3. You can draft the order you require at the conclusion of the proceedings, to assist the Tribunal.

# Prove the Case

*"Avoid bald unsupported assertions!"*

The Tribunal is obliged to reach its decision on the basis of the applicable law and the evidence adduced. When drafting a statement of case or a defence, particularly in document-based procedures, or any procedure with a strict word-count on submissions, the temptation to make unfounded assertions of law or fact should be avoided. Each element of the claimant's case or the defence presented, should be clearly set out, identified as such and supported by citing accessible authority, with a clear foundation and the best authenticated evidence available. It can be unwise to rely on "judicial notice" of law or fact, or to make an assumption that an essential element of a claim or defence is common knowledge and need not be proven.

If in doubt provide the citation or evidence to support the statement - err on the side of caution!

**James Bridgeman SC**

- Chartered Arbitrator and Fellow, Chartered Institute of Arbitrators
- Past President, Chartered Institute of Arbitrators
- Admitted in England and Wales, Northern Ireland and the Republic of Ireland
- Arbitrator, Mediator and Counsel



# Know your Sales Pitch

*"An advocate is a salesman…."*

….as is anyone who endeavours to persuade another person to accept a proposition, whether to buy a car or a vacuum cleaner, or to agree with one. I learned this at the feet of my father, who was a mid-20th century American advertising mogul - the fact is that advertising does promote sales.

Thus, when working as an advocate, I always endeavoured to find the phrase that would encapsulate my client's case in a few words that inherently would attract favourable attention to the case I was putting.

As an example, years ago I represented a Spanish-speaking country which by decree had expropriated a biodiversity-rich, rare dry tropical forest from its politically well-connected American owners. The expropriation concededly was non-discriminatory and for a public purpose. The only issue to be arbitrated was the compensation that should be paid. The claimant sought upwards of USD 40 million on the basis of its plans to build five-star hotels, first class golf courses and related resort features on the property. Early in the proceedings, however, we succeeded in registering the property in issue with UNESCO as a World Heritage Site (itself an important tactic!).

Thus, the opening sentence of my client's counter-memorial was: "The Claimants wish to Disney-fy a United Nations World Heritage site". At the opening of my oral presentation at the hearing I placed on an easel in front of the Tribunal a poster of the Rosetta Stone I had obtained from the British Museum in London, which however was not labeled as such. As the Tribunal puzzled over the poster I declaimed: "This is the Rosetta Stone. The property in issue is the Rosetta Stone of biodiversity in this world". Happily the eventual award was USD 16 million, including 20 years of interest.

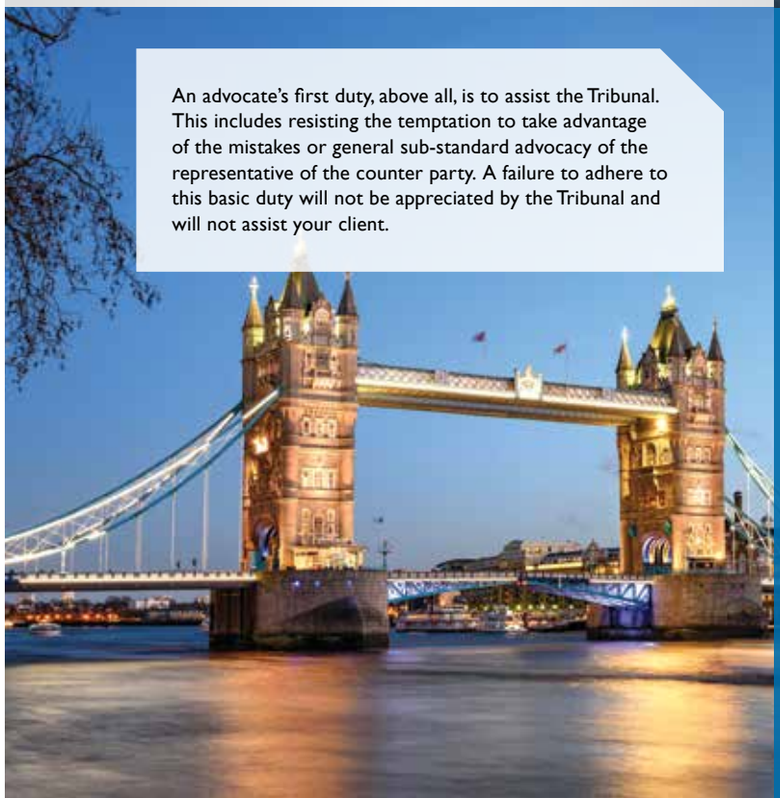
**The Honorable Charles N Brower**

- Chartered Arbitrator and Fellow, Chartered Institute of Arbitrators
- Judge of the Iran-United States Claims Tribunal in The Hague
- Judge ad hoc at the International Court of Justice
- Admitted in the District of Columbia and New York
- Arbitrator

# Avoid being Distracted from your Primary Duty to the Tribunal

*"Focus on your duty to the Tribunal rather than beating your adversary on the other side."*

An advocate's first duty, above all, is to assist the Tribunal. This includes resisting the temptation to take advantage of the mistakes or general sub-standard advocacy of the representative of the counter party. A failure to adhere to this basic duty will not be appreciated by the Tribunal and will not assist your client.



**Charles Brown**

- Chartered Arbitrator and Fellow, Chartered Institute of Arbitrators
- Admitted in England and Wales
- Past President of the Chartered Institute of Arbitrators
- Arbitrator



# Opening and Closing Statements

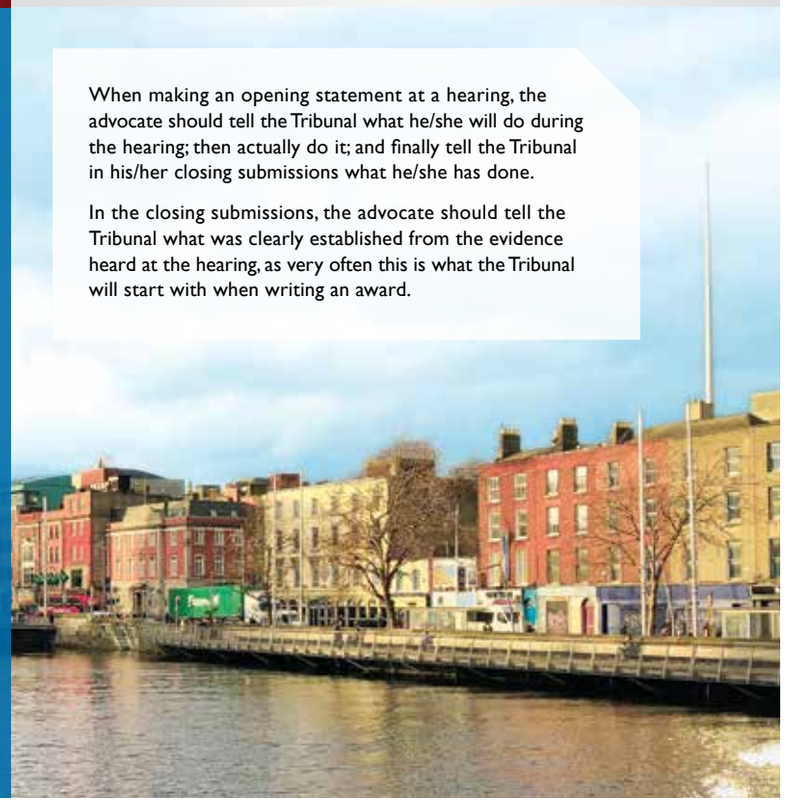
*"Focus on the distinct purposes of opening and closing statements."*

**Professor Dr. Nael Bunni**

- Chartered Arbitrator and Fellow, Chartered Institute of Arbitrators
- Past President, Chartered Institute of Arbitrators
- Member of the Advisory Council, ICCA
- Arbitrator

When making an opening statement at a hearing, the advocate should tell the Tribunal what he/she will do during the hearing; then actually do it; and finally tell the Tribunal in his/her closing submissions what he/she has done.

In the closing submissions, the advocate should tell the Tribunal what was clearly established from the evidence heard at the hearing, as very often this is what the Tribunal will start with when writing an award.



## Keep it Relevant

*"Apply the 'So What?' test to all that you say…"*

Avoid arguing over unnecessary things, whether legal or factual. Stress-test every statement that you plan to make.

Why are parties arguing about this; does it matter to the outcome; and if so, how?

Or, in other words, even if you are right on this point, SO WHAT?

**Chan Leng Sun SC**

- Chartered Arbitrator and Fellow, Chartered Institute of Arbitrators
- Deputy Chairman, Board of Directors of SIAC
- Admitted in England and Wales, Malaysia and Singapore
- Arbitrator and Counsel



## Distil your Case to the Core Issues and Documents

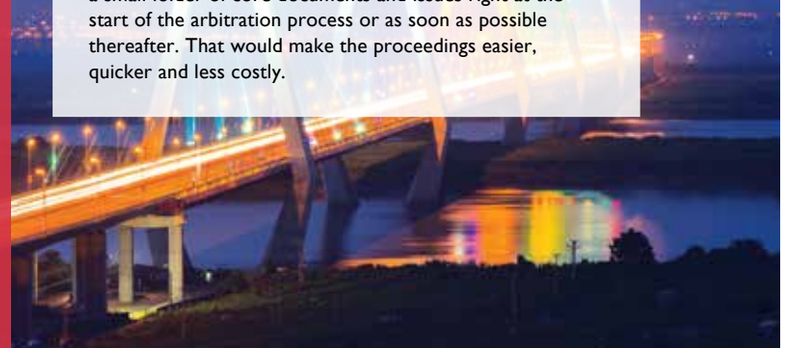
*"Huge bundles are often a waste of paper, time and your client's money."*

**Dr. Hop Dang**

- Fellow, Chartered Institute of Arbitrators
- Alternate Member, ICC International Court of Arbitration
- Admitted in Australia
- Arbitrator

In many (if not all) of the cases that I have sat on, after the conclusion of the submissions and the hearing, the many voluminous folders and even suitcases of documents which have been submitted quickly boil down to only a small number of succinct issues requiring the decision of the Tribunal. These issues can often be contained in a small folder while most of the documents submitted (even the so-called "core bundles") prove to be irrelevant. Seeing them going through the shredder makes me wonder about the time, efforts and costs wasted, not to mention environmental concerns.

I suggest that disputing parties, or at least one of them, should distill all their voluminous documentation down to a small folder of core documents and issues right at the start of the arbitration process or as soon as possible thereafter. That would make the proceedings easier, quicker and less costly.



## Be Yourself as an Advocate

*"Play to your own strengths rather than seeking to mimic others. The hearing room is no different to real life: the art of persuasion requires not merely intellectual but also emotional ingenuity. Use all of your senses to work out the best line of attack."*

Unless you are yourself, you will always be focusing on the wrong target: playing the part you think you should be playing rather than engaging directly with your Tribunal. The best advocates establish intimacy with those they are seeking to persuade. You cannot do so effectively if you are seeking to be something you are not.

There is also no one size fits all. Each Tribunal member may require a different approach and each part of the case, a different style. After every hearing, write down three things you did well and three things you would do differently next time.

Remember always that advocacy is an art and not a science, and that, like life, one is learning all the time.

**Anneliese Day QC**

- Fellow, Chartered Institute of Arbitrators
- Member, LCIA Court
- Admitted in England and Wales and the Singapore International Commercial Court
- Arbitrator and Counsel

**Gavin Denton**

- Fellow, Chartered Institute of Arbitrators
- Admitted in Australia, England and Wales and Hong Kong
- Arbitrator

## Structure your Written Submissions in Relation to each Issue

*"The more clear and concise your reasoning is in relation to each specific issue, and the more your submissions apply the relevant law to the facts of the case, the greater chance you have of persuading the Tribunal of your position."*

Set out your submissions in a clear and logical order, ideally following the framework provided in an agreed list of issues. Under each issue, set out the relevant facts, the applicable law and contractual provisions, and HOW the law applies to those facts, as well as dealing with your opponent's arguments in relation to each issue.

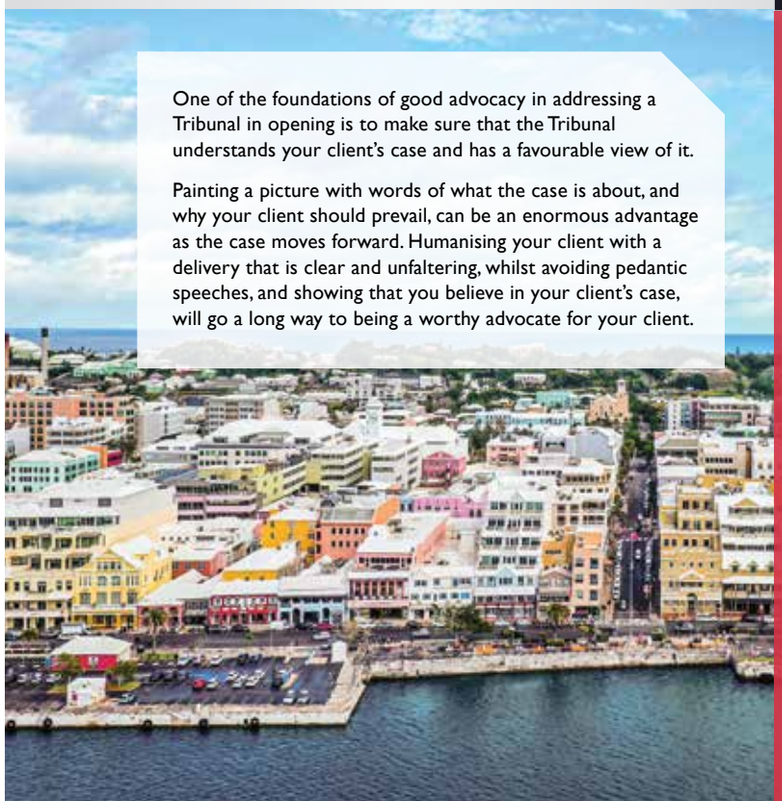
It is surprising how many counsel forget or overlook this basic concept. The Tribunal is required to make rulings on each issue which are based in law and on the relevant facts, and the party who is able to present this clearly in its submissions will potentially have greater influence with the Tribunal.

# Paint a Picture in Words in your Opening

*"Once that picture is painted into the mind's eye of the Tribunal, it can be very hard to displace."*

One of the foundations of good advocacy in addressing a Tribunal in opening is to make sure that the Tribunal understands your client's case and has a favourable view of it.

Painting a picture with words of what the case is about, and why your client should prevail, can be an enormous advantage as the case moves forward. Humanising your client with a delivery that is clear and unfaltering, whilst avoiding pedantic speeches, and showing that you believe in your client's case, will go a long way to being a worthy advocate for your client.



**Jeffrey Elkinson**

- Chartered Arbitrator and Fellow, Chartered Institute of Arbitrators
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- Admitted in Australia, Bermuda, the Eastern Caribbean Supreme Court, England and Wales, Hong Kong, New York, the Republic of Ireland, the US Court of Appeals for the Federal Circuit and the US Court of International Trade
- Arbitrator and Counsel



# Prove Every Aspect of your Quantum Claim

*"Do not expect the Tribunal to do your work for you!"*

**Alec Emmerson**

- Fellow, Chartered Institute of Arbitrators
- Trustee and Chief Executive, DIFC Arbitration Institute
- Former member, LCIA Court
- Formerly admitted as a solicitor in England and Wales and Hong Kong
- Authorised to practise in the DIFC Courts and as a legal consultant in Dubai
- Arbitrator

The quantum of claim(s) is surprisingly often not well-explained or referenced.

In many arbitrations, the most important thing for the Claimant or the counterclaiming Respondent to prove is how much they win. To improve winning chances, quantum should be carefully summarised in oral and written closings by reference to the evidence, and all calculations fully set out. An example of how not to do it from a recent arbitration is to claim as relief the funds in a named account without setting out how much that is, how that balance arose and where the evidence in support is found (and then check that it all adds up). As mentioned above, do not expect the Tribunal to do your job for you!

If an expert on quantum is instructed in relation to part or all of the claim, make sure that his/her calculations are thoroughly understood and checked by at least one person in your team, and that any opinion evidence of the expert is balanced and credible. Most Tribunals see through 'hired gun' opinion evidence and it is a massive own goal!

# Key Points for Oral and Written Submissions

*"Use sign-posts and a clear structure in both your oral and written submissions."*

**Jessica Fei**

- Fellow, Chartered Institute of Arbitrators
- Member, SIAC Court of Arbitration
- Admitted in New York and the People's Republic of China
- Arbitrator and Counsel

For effective oral presentation, use sign-posts to lay out a clear structure at the start. Be logical and adaptable and avoid reading from your script, which may sound too stilted. Most importantly, know when to stop.

In written submissions, it is important to be reader-friendly, bearing in mind the experience level of the Tribunal. Your structure should allow for a quick navigation of the key points.



# Prepare Thoroughly – With the End in Mind

*"Do not take short cuts."*

**Matthew Gearing QC**

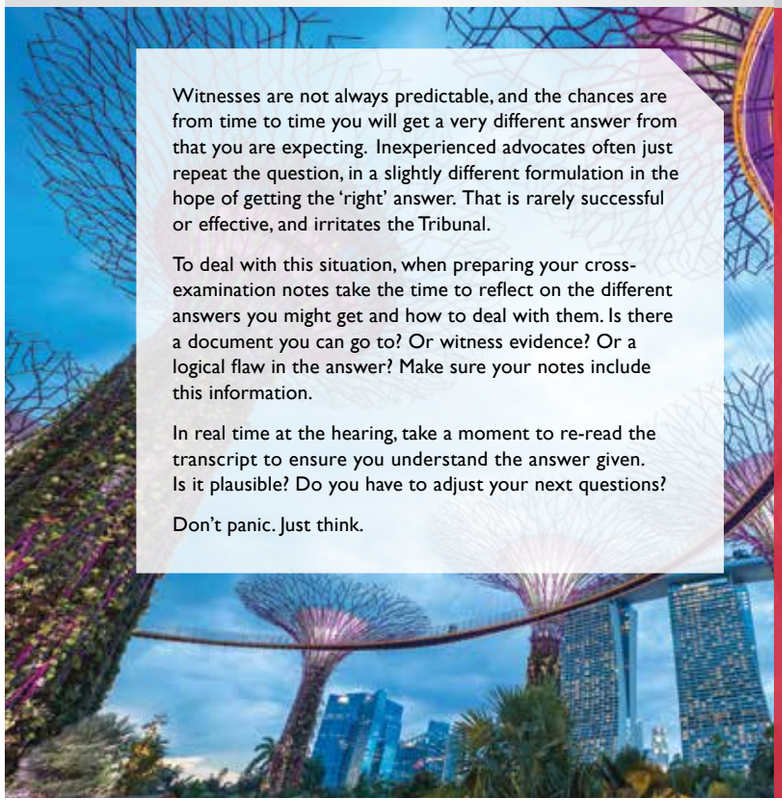
- Fellow, Chartered Institute of Arbitrators
- Member, LCIA Court
- Former Chair, HKIAC
- Admitted in England and Wales and Hong Kong
- Arbitrator and Counsel

The best and most experienced advocates still read most of the file, and do not primarily rely upon advocacy notes drafted by others.

In terms of how to prepare, work out what kind of hearing it is, and prepare your notes accordingly. For example, do you need a detailed run of submissions, or key points in short form that you need to ensure you get across? Tailor your preparation to what is required.

# Cross Examination – Expect the Unexpected

*"Know what you will do with an answer which does not follow your planned path."*



Witnesses are not always predictable, and the chances are from time to time you will get a very different answer from that you are expecting. Inexperienced advocates often just repeat the question, in a slightly different formulation in the hope of getting the 'right' answer. That is rarely successful or effective, and irritates the Tribunal.

To deal with this situation, when preparing your cross-examination notes take the time to reflect on the different answers you might get and how to deal with them. Is there a document you can go to? Or witness evidence? Or a logical flaw in the answer? Make sure your notes include this information.

In real time at the hearing, take a moment to re-read the transcript to ensure you understand the answer given. Is it plausible? Do you have to adjust your next questions?

Don't panic. Just think.

**Judith Gill QC**

- Fellow, Chartered Institute of Arbitrators
- Vice President, ICCA
- Honorary Vice President, LCIA Court (having served as President, LCIA Court)
- Former Member, Board of Directors of SIAC
- Former Member, Board of Directors of AAA
- Admitted in England and Wales
- Arbitrator

**Lucy Greenwood**

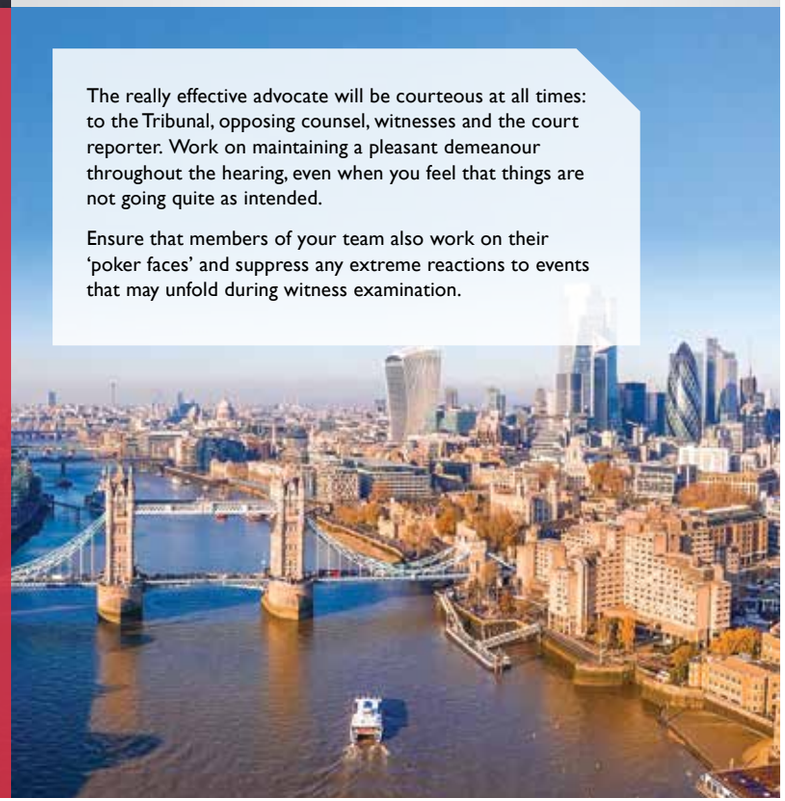
- Chartered Arbitrator and Fellow, Chartered Institute of Arbitrators
- Trustee of the Chartered Institute of Arbitrators
- Admitted in England and Wales and Texas
- Arbitrator

# Hearing Etiquette Counts

*"Be courteous. Good manners cost nothing, but bad manners can prove costly."*

The really effective advocate will be courteous at all times: to the Tribunal, opposing counsel, witnesses and the court reporter. Work on maintaining a pleasant demeanour throughout the hearing, even when you feel that things are not going quite as intended.

Ensure that members of your team also work on their 'poker faces' and suppress any extreme reactions to events that may unfold during witness examination.



# Less is More

*"Filter your case down to the best argument."*

**Dr. Gavan Griffith AO QC**

- Chartered Arbitrator and Fellow, Chartered Institute of Arbitrators
- Admitted in Australia and England and Wales
- Arbitrator

An Australian Solicitor General before the 7 Judges of the Australian High Court (not me) –

SG: *I have 4 propositions for the Court*

Gaudron J: *Might you tell us your best one?*

SG: *I do not know what may appeal to each of your Honours, and I put them equally*

Gummow J: *The more the possibility, the less the probability.*

Moral: Rarely more than one argument has a chance of success, and one winner is all you need.

Back your judgment: that is what you are retained to do, and only put arguments that have a chance of succeeding in a claim or defence. Procedural objections rarely win, and detract from substance. If your client protests, say: *"If you have a dog you should not bark yourself."*



# Take Great Care in Deploying Email Evidence with Witnesses

*"Indiscriminate use of email can obscure the goals of witness examination."*

**Professor Thomas D Halket (1948 – 2021)**

- Chartered Arbitrator and Fellow, Chartered Institute of Arbitrators
- Past President, Chartered Institute of Arbitrators
- Admitted in Massachusetts and New York

Email provides what arbitration counsel often perceive as an easy and detailed script to follow for the presentation of a case. However, all too often counsel focus their questioning on the admission of this email record as an end in itself, and lose sight of the reason the witness is being examined.

The purpose of direct is to present the factual argument in support of a client's case – in other words to tell a story. The purpose of cross is to cast doubt on the story the Tribunal has just heard on direct.

On direct, key material emails can certainly be used to buttress a witness' testimony. On cross, on the other hand, a witness should never be shown an email in advance of their answer to a question; an email should be shown to a witness on cross only if the answer is inconsistent with the email. In neither situation should the testimony ordinarily be used to identify and serially admit in evidence masses of emails.

## Advocacy is Education

*"Remember - the Tribunal knows nothing about the facts at the outset."*

The origin of the word advocacy lies in the Latin "advocare", meaning "to summon, or call for help".

In practice, the way to call on a Tribunal to support the client's position invariably involves making sure that the Tribunal properly understands the case that is being presented. This means steering a Tribunal that initially has no knowledge of the facts of the dispute, and/or which may have limited knowledge of the technical aspects of the dispute and/or the relevant law from a state of knowing nothing, to a state in which every component of the client's case is clear and understood.

Make 'learning' easy. Take every appropriate opportunity from the outset to educate the Tribunal (in this sense) by a focused and concise presentation of the case. The steeper the learning curve, the more important this is.

**Anthony Houghton SC**

- Chartered Arbitrator and Fellow, Chartered Institute of Arbitrators
- Past Chair, Chartered Institute of Arbitrators, East Asia branch
- Former Trustee, Chartered Institute of Arbitrators
- Recorder of the High Court in Hong Kong
- Admitted in Hong Kong
- Arbitrator and Counsel



## Think Like an Arbitrator

*"Try drafting the award yourself and you will see where the holes in your argument may be."*

**Professor Benjamin Hughes**

- Fellow, Chartered Institute of Arbitrators
- Admitted in California
- Arbitrator

As counsel, the result you want in any arbitration is an award on the merits in favour of your client. Try to put yourself in the shoes of the Tribunal, and give the Tribunal the arguments – and, in particular, the evidence - it needs to write that award.

What would be most helpful to a Tribunal in making a finding in your favour? What is the simplest path to the desired result? What are the weak points of your client's case which must be dealt with in order to write that award? What are the key legal and factual issues which must be resolved?

# Choose your Targets for Cross-examination Wisely

*"CEOs are often the best candidates for cross-examination."*

The reason that CEOs make such excellent candidates for cross-examination is because their witness statements, being drafted by lawyers, tend to include as many facts as the lawyers think are important, regardless of whether the CEO actually has adequate knowledge of the facts which appear in his or her witness statement to be able to survive cross-examination of those facts.

It is therefore often easy to find matters on which the CEO is testifying, about which he or she has little or no personal knowledge, and therefore his or her credibility will become affected under cross-examination.

**Dr Michael Hwang SC**

- Chartered Arbitrator and Fellow, Chartered Institute of Arbitrators
- Admitted in Australia, England and Wales, Singapore and West Malaysia
- Arbitrator and Counsel

**Justice Philip Jeyaretnam**

- Fellow, Chartered Institute of Arbitrators
- Judicial Commissioner, Supreme Court of Singapore
- Admitted in England and Wales and Singapore
- Formerly Arbitrator and Counsel

# Appreciate - and Address - Questions from the Tribunal

*"Think first, but answer directly."*

Tribunal's questions generally have one of three objectives: clarification; comfort to resolve something troubling them; or a concession. In all cases, make sure you understand what the Tribunal is getting at, and prepare to answer it directly.

When the Tribunal seeks clarification, make sure you provide it, but only after checking that what you say is right.

When the Tribunal is troubled by an aspect of your case, it is much better that they articulate their concern and give you the opportunity to address them on it. Do so directly, and do your best to get to the crux of their concerns. Brushing aside the question will leave the doubt unresolved. Again, ask for time if you need it.

The third type of question is the trickiest. Tribunals naturally want to simplify their difficult task of decision-making by cutting the case down to its essentials. At the same time, once a concession is made, it will be difficult to reverse. So counsel should be very careful only to concede when sure that that is the right thing to do – whether it concerns a legal proposition or a point of fact.

Regard questions from the Tribunal as a gift – it shows that they are listening and engaged.

# Brevity is the Soul of Advocacy

*"The best advocacy is achieved when arguments are presented with brevity and precision."*

Many advocates, diligently seeking to advance their client's interests in every aspect of a case, mistake elaboration for persuasiveness. Counsel should avoid obscuring the real issues in dispute by embellishing their submissions with unnecessary detail. Advocates are at their most compelling when they are able to reduce complex legal issues to their bare essentials, and thus present them to the Tribunal precisely and attractively.

To ensure this, there must be collaboration between counsel and arbitrators. Active Tribunal engagement with the parties, on an ongoing basis, will assist in identifying the true issues in dispute and ensure that submissions are focused only on those issues. Brevity in submissions is ultimately in the interests of all parties: the precise identification of issues will not only allow counsel to argue their cases most persuasively, but also enable the Tribunal to understand the essence of the matter efficiently and economically.

**Doug Jones AO RFD**

- Chartered Arbitrator and Fellow, Chartered Institute of Arbitrators
- Past President, Chartered Institute of Arbitrators
- International Judge, Singapore International Commercial Court
- Admitted in Australia and New Zealand
- Arbitrator



# Always be Reasonable

*"The more unreasonable your opponent is, the more reasonable you should appear."*

**Neil Kaplan CBE QC SBS**

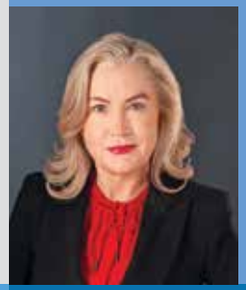
- Chartered Arbitrator and Fellow, Chartered Institute of Arbitrators
- Past President, Chartered Institute of Arbitrators
- Admitted in Australia, England and Wales, Hong Kong and New York
- Arbitrator

Always be reasonable in both procedural and substantive submissions. Nothing irritates a Tribunal more than heated argument as to whether there should be a 48-hour extension of time for service of a pleading or witness statement.

Never get angry. Avoid hyperbole. "Unsustainable" is better than "It's a load of rubbish". But above all, avoid repetition. If you do have to repeat something, introduce it as "you will remember my submission…". You will soon find out whether they do!

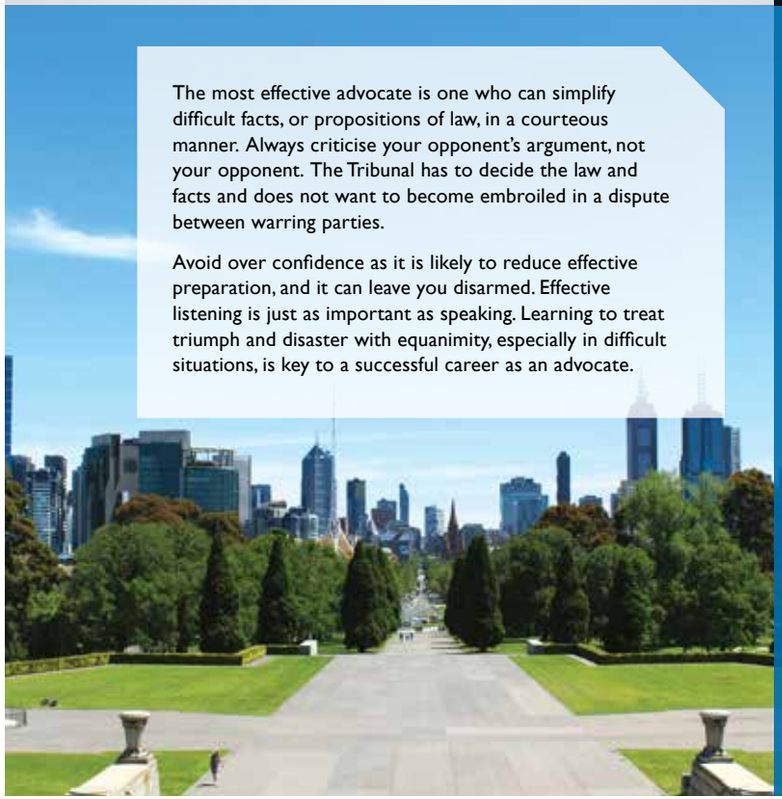
# Avoid Over Confidence and Personal Criticism of your Opponent

*"Both qualities are undesirable personal traits for an advocate."*



The most effective advocate is one who can simplify difficult facts, or propositions of law, in a courteous manner. Always criticise your opponent's argument, not your opponent. The Tribunal has to decide the law and facts and does not want to become embroiled in a dispute between warring parties.

Avoid over confidence as it is likely to reduce effective preparation, and it can leave you disarmed. Effective listening is just as important as speaking. Learning to treat triumph and disaster with equanimity, especially in difficult situations, is key to a successful career as an advocate.



**Caroline Kenny QC**

- Chartered Arbitrator and Fellow, Chartered Institute of Arbitrators
- Past President, Chartered Institute of Arbitrators, Australia Branch
- Admitted in Australia, DIFC, England and Wales and New York
- Arbitrator and Counsel



# You Will Make Mistakes

*"See your mistakes as an opportunity to learn – never give up!"*

**Jennifer Kirby**

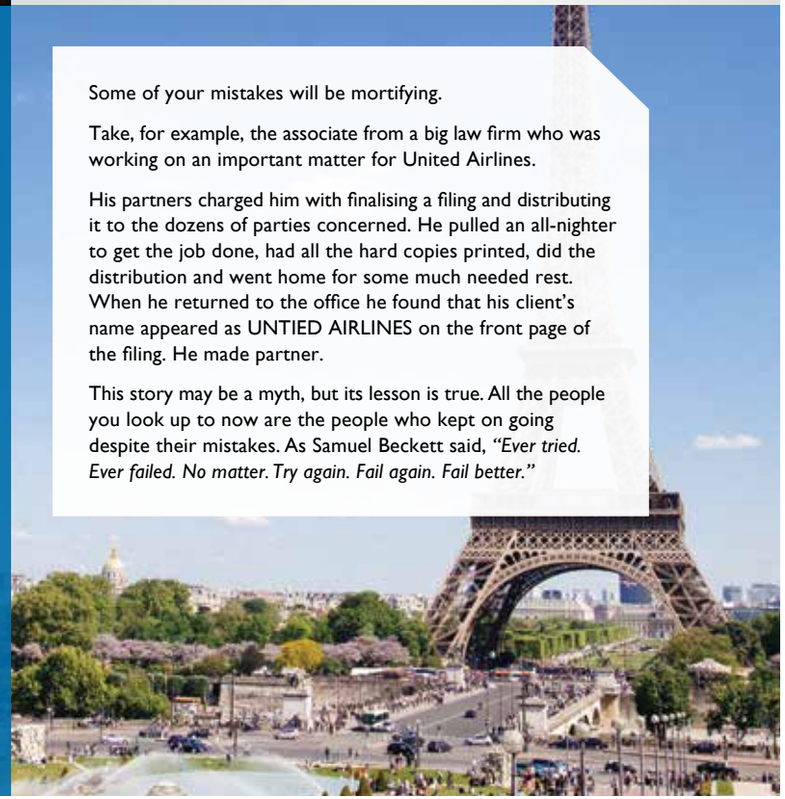
- Fellow, Chartered Institute of Arbitrators
- Former Deputy Secretary General, ICC International Court of Arbitration
- Admitted in New York
- Arbitrator

Some of your mistakes will be mortifying.

Take, for example, the associate from a big law firm who was working on an important matter for United Airlines.

His partners charged him with finalising a filing and distributing it to the dozens of parties concerned. He pulled an all-nighter to get the job done, had all the hard copies printed, did the distribution and went home for some much needed rest. When he returned to the office he found that his client's name appeared as UNTIED AIRLINES on the front page of the filing. He made partner.

This story may be a myth, but its lesson is true. All the people you look up to now are the people who kept on going despite their mistakes. As Samuel Beckett said, *"Ever tried. Ever failed. No matter. Try again. Fail again. Fail better."*



# Focus on EQ Rather than IQ

*"Emotional intelligence is just as, if not more, important than IQ."*

For the duration of any hearing, counsel and arbitrator are thrown together in an intense relationship. They must interact in close proximity for an extended period. And as with any relationship, there is a critical emotional dimension.

The advocate must build rapport, and evoke trust and confidence. And – often most tricky of all – be liked. Ultimately, persuading the arbitral mind is much easier if one has won over the arbitral heart. Advocacy must therefore not be approached as dry, formulaic technique. The core steps to higher EQ are:

(1) self-awareness as to one's own emotions and behaviour, and their potential impact on others;

(2) empathy with the Tribunal – including the most thorough reading of each member, from background, to experience, to personality type, to mood, to likes and dislikes; and

(3) active self-regulation in order to best match one's own emotions and behaviour with the apparent needs, mood and idiosyncrasies of the Tribunal.


**Toby Landau QC**

- Fellow, Chartered Institute of Arbitrators
- Member, SIAC Court of Arbitration
- Governing Board Member, ICCA
- Admitted in British Virgin Islands, DIFC, England and Wales, New York, Northern Ireland and Singapore
- Arbitrator and Counsel




# Avoid Hyperbole

*"Exaggeration and hyperbole rarely assist an arbitral tribunal."*

Instead, counsel should provide the Tribunal with the roadmap it needs to reach a determination in favour of his or her client, focusing on the facts, the evidence, and the law, without overstating any of these, so as not to lose credibility before the Tribunal.


**Professor Julian Lew QC**

- Fellow, Chartered Institute of Arbitrators
- Admitted in England and Wales and New York
- Arbitrator

# Use the Power of Silence

*"Most people run from silence. The best way for them to bring it to an end, is to start speaking…"*

Cross-examination involves many different skills, including meticulous preparation of your questions, keeping those questions tight or closed, maintaining a rhythm and momentum, and taking the witness to where you want them to go.

But even the best prepared cross-examination may not go to plan. Sometimes the witness' answers do not go as far as you want or need. You can of course ask another question, but you may get the same 'half' answer.

So how about just staying silent?

That silence can become deafening.

The witness box is a very lonely place and an advocate simply looking but not saying anything can be very unnerving to a witness. And what about the rest of the room and the arbitrators?

Most people run from silence. The best way to bring that silence to an end, is to start speaking. And once a witness starts to speak they often cannot stop. They are filling the silence vacuum, often with the answer they never intended to give, but one you intended to get.

Silence speaks when words cannot!


**Andrew Miller QC**

- Fellow, Chartered Institute of Arbitrators
- Trustee, Chartered Institute of Arbitrators
- Admitted in England and Wales
- Arbitrator and Mediator




# The Importance of the Written Opening Submission

*"The written opening submission is a key opportunity to persuade the arbitral tribunal to decide in your favour. Do not squander it."*

In many cases, written opening submissions are bloated (because they are a collation of the work product of many lawyers). Instead, a good opening submission should be succinct, identifying the key issues falling for determination, and providing a roadmap to the Tribunal as to how they should decide those issues so as to make an award in your client's favour. By all means, annex a flow chart to the submission for that purpose. As they say, a picture tells a thousand words.

Do not be afraid to face up to and address your weak points, for your opponents will! Avoid pejorative language - it is unhelpful. If possible, provide your submission in electronic form with hyperlinks and pinpoint references to factual exhibits and witness statements. And provide the submission to the Tribunal in good time so that they have an opportunity to properly digest it.


**Albert Monichino QC**

- Chartered Arbitrator and Fellow, Chartered Institute of Arbitrators
- Past President, Chartered Institute of Arbitrators, Australia branch
- Admitted in Australia
- Arbitrator and Counsel

# Build your Client's Trust

*"It is vital to engender the trust and confidence of the client by explaining how things are truly different in arbitration and by establishing that you are the expert in such matters."*

Counsel must exhibit, in a manner which is accepted without question before a word is written or spoken in the fray, that they are the expert in presentation of cases in arbitration, and that they need to have the client's support for the judgments they will be making in the process.

Be frank – and tell the client politely that you are not looking for approval and cannot be ruled by amateur views, whilst at the same time encouraging participation and harvesting all valuable information and ideas.

I used to tell the client: *"you are the expert in what you do, I'll leave that to you; you leave the arbitration lawyering to me"*. Counsel need to develop the personal gravitas and aura of respect to be able to speak in that way to a client and for it to be accepted – work on that! Then you can get on with the arbitration without looking over your shoulder and worrying about what the client makes of it all!

**Andrew Moran QC**

- Fellow, Chartered Institute of Arbitrators
- Part-time High Court Judge, England and Wales and occasional Judge of Appeal, Isle of Man
- Admitted in England and Wales
- Arbitrator



# Don't Just Tell Us, Show Us

*"Make your argument VISIBLE."*

Legal training puts a premium on the spoken and written word. But some of the most effective advocacy can be achieved by way of demonstratives – and not just power points crowding out a projected slide.

Instead, walk the Tribunal through a decision tree. Present graphs and figures. Draw issue maps. Make your position conspicuous. By doing so, you are more likely to capture and retain the Tribunal's attention – and leave a lasting impression - no matter how eloquent your voice may be.

**Dr Michael Moser**

- Fellow, Chartered Institute of Arbitrators
- Past Chair, HKIAC
- Member, Board of Directors of SIAC
- Governing Board Member, ICCA
- Admitted in New York and Washington D.C.
- Arbitrator

# Help the Tribunal to Navigate Through the Complexity

*"Provide the Tribunal with a simple and straightforward path to your client's victory."*

In most complex disputes, the principal role of the advocate at the hearing will be to focus the Tribunal's attention on those matters which are most important to achieving your client's preferred outcome. This can be particularly challenging where "face time" is short and/or where you have no indication in advance of the issues which particularly interest the Tribunal. In such circumstances, concentrate ruthlessly on what you consider to be the most critical arguments. It is better to develop one or two arguments well and ensure that the Tribunal is with you, than to rush superficially through a dozen arguments of varying significance. Open with your strongest point and show why it is compelling. Identify the particular findings of fact or conclusions of law which the Tribunal needs to make in order to reach the right result. Then address the best one or two points taken against you by your opponents and explain why even their strongest arguments are wrong. If there is time, conclude with your next best argument and remind the Tribunal where they can find your other arguments in the written submissions. Just in case, keep handy an extra set of speaking notes for each of the secondary arguments, so that you will be ready to address any argument in which the Tribunal unexpectedly takes an interest at the hearing.

Where there are several rounds of extensive written submissions, busy Tribunals often find it helpful to be provided with a one page document summarising the main arguments and counter-arguments with hyperlinks to the parties' written submissions and evidence.

**Karyl Nairn QC**

- Fellow, Chartered Institute of Arbitrators
- Vice President, LCIA Court
- Admitted in Australia and England and Wales
- Arbitrator and Counsel

**Vikram Nankani SA**

- Fellow, Chartered Institute of Arbitrators
- Admitted in India
- Arbitrator and Counsel

# Advocacy Starts on the Drawing Board

*"When preparing your case, read the law again."*

You will be surprised at how you find a new feature or a nuance in the same provision of law which you have read multiple times. That is because given the factual matrix of your case, when you read the law again, you will find an answer you had not previously discovered.

A word of caution, however: as humans, when we are full of our case, we tend to become uni-dimensional. Hence it is necessary to look at the same law from both sides so that you are not surprised at what you may otherwise miss.

The bottom line: while you have to master your facts, do not take the law for granted. In each case you must dive deep, carrying the cylinder of facts, and you will surprise yourself at the discovery of new colours of fresh pearls.

## Be Open-minded

*"Cultural and legal dexterity are a significant advantage as arbitration counsel."*

Advocacy is about open-mindedness and adaptability, which are essential tools of persuasion. In particular, understanding one's own cultural and legal background and adjusting to the specifics of the applicable law in each case, are key when putting forward legal arguments.

Counsel in international arbitration who have an ability to deal with different cultures and have developed a knowledge of both common and civil legal systems are therefore more likely to be on point in their written and legal pleadings, and thus, to be effective advocates.

**Professor Dr Nayla Comair-Obeid**

- Fellow, Chartered Institute of Arbitrators
- Past President, Chartered Institute of Arbitrators
- Member, LCIA Court
- Admitted in Lebanon
- Arbitrator and Counsel



## The Fundamental Consideration: Integrity

*"As Polonius says in Hamlet: 'This above all; to thine own self be true'. "*

**Vinayak Pradhan (1950 – 2020)**

- Chartered Arbitrator and Fellow, Chartered Institute of Arbitrators
- Past President, Chartered Institute of Arbitrators
- Admitted in Malaysia and Singapore

Dato Dr. Sir Peter Mooney once asked me about an aspiring judge, and my answer was that he was undoubtedly financially honest and independent but in matters concerning the Government of the day, one could not be completely sure where his ultimate sentiments would lie. Peter's response was that the man consequently had no integrity. He said: 'Integrity is not compromisable - one cannot have 99% integrity, leaving 1% in doubt."

This also applies to counsel, whose primary duty is toassist the Tribunal as to the facts and the law and not their client. Counsel must be very careful in this process: just be honest and do not fiddle with the facts. If there is a conflict between your duty to the Tribunal and to your client, then take your client into your confidence that your primary duty is to the Tribunal: your client will respect you as a professional for your candour.

Advocates should also develop a camaraderie amongst themselves, which integrity will make possible, and which makes the hearing process more tolerable for yourselves. As eloquently said in Shakespeare's Taming of the Shrew: *"And do as adversaries do in the law, strive mightily, but eat and drink as friends"*. Being a rational member of the profession and recognising that you stand above and beyond your clients is one of the hallmarks of this noble profession.

# Effective Cross-examination

*"Identify the 'forensic targets' you have to 'hit' with the opposing side's witnesses."*

Preparation for cross-examination requires developing a case theory and analysing how each witness statement supports or undermines that case theory. It also entails amassing sufficient "ammunition" to put to a witness in cross-examination i.e. pieces of evidence, facts or matters that suggest a witness' evidence on crucial matters is likely to be wrong.

There is no point in cross-examining a witness on evidence that supports one's case. But where a witness' evidence goes against key aspects of one's case, the advocate must put the main points of difference to that witness. Usually, the witness will disagree with the points so put. The advocate must then systematically draw the witness' attention to facts and evidence which contradict the witness' position. Through leading (as opposed to open-ended) questions, the advocate in effect prompts the witness to explain how, despite the "ammunition" deployed by the advocate, he or she can still credibly maintain his or her evidence on a matter.

The advocate does not argue with the witness. Instead, having elicited the witness' comments on the "ammunition" deployed, the advocate submits in closing that the witness' evidence must be rejected by the tribunal. The witness' evidence will be said to be untenable, because it is vague and improbable, contradicts established facts and reliable evidence, or is illogical and contrary to common sense.

**Professor Anselmo Reyes SC**

- Fellow, Chartered Institute of Arbitrators
- International Judge, Singapore International Commercial Court
- Admitted in Hong Kong and Singapore
- Arbitrator

**Marion Smith QC**

- Fellow, Chartered Institute of Arbitrators
- Trustee, Chartered Institute of Arbitrators
- Admitted in England and Wales
- Arbitrator and Counsel



# A Good Advocate Emulates the Swan

*"You cannot persuade someone who is not paying attention to you."*

A good advocate is someone to whom the Tribunal pays attention.

The Tribunal does not have to like you to give you its attention – although it can help. But it does have to take you seriously and trust you. It is more likely to do that if you seem to be prepared, calm and in control when you appear at the hearing.

It is less likely to take you seriously and trust you if you appear flustered, or anxious, unsure or not confident.

Keep the image of the swan in mind. The swan appears to glide effortlessly through the water; poised, elegant and graceful. Whilst underneath the water, hidden from sight, the swan's webbed feet are vigorously at work, to propel this motion. That image should be you, at all times. So no matter how badly you think the hearing is going, don't signal by your voice or body language a desire to be somewhere else. Emulate the swan and just keep gliding onwards.

# Challenges of Virtual Hearings

*"Virtual hearings present unique challenges, and require specific considerations. Do not assume that they can be approached in the same way as an in-person hearing."*

**Yoshihiro Takatori**

- Fellow, Chartered Institute of Arbitrators
- Admitted in Japan and New York
- Arbitrator and Counsel

The virtual format can hamper an advocate's ability both to read visual cues from the Tribunal, and to object promptly when an objection is warranted.

If an arbitrator is sitting far away from the camera, it is worth raising this and requesting that this is resolved to ensure that a visual close-up of the arbitrator can be achieved. If not, it can be very difficult to follow whether the Tribunal is paying attention, and to gauge their reactions. In any event, bear in mind that focusing for long periods of time during a virtual hearing is extremely tiring, and more short breaks should be factored in than for an in-person hearing.

In relation to objections, it is key to ensure that any objection makes it on to the record, even if it has been raised after the event. It is sensible for counsel to discuss with the Tribunal at the beginning of the hearing how to proceed if an objection has not been raised contemporaneously.



# Contradictory Witness Evidence

*"Taking a sledgehammer to a witness by branding him a liar just because his evidence is disputed is not necessarily the best approach."*

**Richard Tan**

- Chartered Arbitrator and Fellow, Chartered Institute of Arbitrators
- Past Chair, Chartered Institute of Arbitrators, Singapore Branch
- Admitted in England and Wales and Singapore
- Arbitrator and Counsel

Not every witness who tells a different story in a case is necessarily telling a lie or guilty of a deliberate falsehood. There can be different perceptions of reality. A witness may be entirely truthful yet completely mistaken. On the other hand, hyperbole and euphemism may result in so-called "alternative facts" being presented as truths when they are otherwise.

Counsel should be astute to distinguish between naked lies, and gradations and exaggerations of the truth. If it is apparent that a witness is simply mistaken in his or her understanding of the facts or has turned a blind eye to certain matters upon which an objective person would reach an opposite conclusion, a nuanced approach would be far more effective. It is more likely to yield a concession from an otherwise honest witness. Adopting a calibrated approach would result in more effective cross-examination; provide a more accurate and better foundation for submissions on the evidence; speed up the proceedings; create a better impression of the cross-examiner and the party he or she represents; and ultimately, find greater favour with the Tribunal hearing the case.

# Preparation, Preparation, Preparation!

*"Preparation is the number one rule of advocacy."*

It is difficult to overstate the importance of preparation.

Having done the necessary preparation (and sometimes more), you can take comfort in the knowledge that you have mastered the case as an advocate. With that knowledge, the requisite confidence will come naturally.

This is the secret to overcoming one's nerves during the hearing and is perhaps the most important factor that sets you up for success at a hearing.

**Mary Thomson**

- Chartered Arbitrator and Fellow, Chartered Institute of Arbitrators
- Past Chair, Chartered Institute of Arbitrators, East Asia Branch
- Chair, ARIAS Asi
- Board Member, Scottish Arbitration Centre
- Admitted in England and Wales and Hong Kong
- Arbitrator, Mediator and Counsel



# Tell a Story

*"Do not neglect the human element in the case."*

**Professor Albert Jan van den Berg**

- Fellow, Chartered Institute of Arbitrators
- Honorary President, ICCA
- Admitted in the Netherlands
- Arbitrator

There is a human aspect to almost every dispute. Don't neglect to convey this in your advocacy. A powerful narrative or a striking image can go a long way in helping the Tribunal to see the dispute from your client's perspective.

# Make your Written Submissions Appeal to the Gut

*"Look for the immediate gut reaction, whilst appealing to the 'heart' as to principles of fairness, and the 'head' in terms of legal logic of the argument."*

If written submissions are to truly persuade, they should articulate the case strategy as early as possible in the most convincing manner. How can the case be framed so that the reader's immediate response is to be sympathetic, leaving it for later exposition to show that there is indeed a legal and factual basis for the proposition that has been put?

This is particularly important with the first written submission. One fault too often seen is a kind of 'bickering' disposition, with one submission attacking each paragraph in that of the opponents. Even if the attacks in both directions have merit, too often the Tribunal is left to define its own path through 'wounded' propositions.

Here the best advice is to essentially try and draft the Tribunal's award or at least present it with a convincing reason why an award of that nature would be appropriate. By all means along the way criticise opposing arguments, but do not let the reader think that the latter is your ultimate objective.

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# Integrity is Everything

*"Build trust with the Tribunal."*

Advocacy is the art of persuasion. The Tribunal is more likely to be persuaded by counsel who can be trusted with getting their facts right.

Never cut a corner with this rule. And never mislead a Tribunal.

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