ADVOCACY AND THE FUNCTIONS OF LAWYERS IN INTERNATIONAL ARBITRATION

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International arbitration is a form of dispute resolution distinguished by its transnational character, its flexibility and party control. It has experienced spectacular growth in recent years, accelerated in the first decade of the 21st century by the demands of investment arbitration. Delocalisation, the competition between arbitral seats, the interaction with public international law, the borrowings of arbitral procedure from distinct legal traditions and the expansion of the bounds of party autonomy have distanced international arbitration from domestic litigation. International arbitration has become increasingly specialised. It has given rise to a specialist class of lawyer.

What are the particular skills required of a lawyer for a party to an international arbitration? As a form of dispute resolution, many of the skills will be shared with other forms of dispute resolution. But given its specialised nature, international arbitration also demands particular skills from its practitioners, or requires traditional skills to be adapted to a complex, dynamic and challenging context.

This article considers the functions of the arbitral practitioner representing a party in an international arbitration. It proposes that there are four fundamental functions of a lawyer advising a client in an arbitration dispute: strategy; investigation; management; and advocacy.

This fourfold classification of the lawyer's function in international arbitration does not refer specifically to legal advice. This is because it is self-evident (and indeed is a tautology) to say that the function of a lawyer in international arbitration is to advise on the law and

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practice of international arbitration. Legal knowledge infuses all four of these functions. The purpose of this article is to dilineate clearly the different roles played by the lawyer in the arbitration process where he or she will apply their legal knowledge and training as well as to identify the other skills demanded by those roles.

All four functions are important to the the success of the lawyer in international arbitration. However, strategy and advocacy are probably the two most sophisticated functions for the arbitration lawyer and require the broadest range of skills to be performed successfully. For this reason, the analysis, discussion and training in these two skills might be expected to be part of the lively debate and numerous training programmes in the international arbitration community today. However, while this is certainly true for advocacy in recent years, the skills of strategic decision-making have been largely overlooked. Indeed, the degree of interest in advocacy, and the ambiguity of this term in an international context, has meant that advocacy is in danger of losing any precise meaning and becoming an amorphous term synonomous with nothing more than the work of the arbitral lawyer. The strategic function has been subsumed and therefore overlooked because of lack of precision in the discussion of advocacy.

Accordingly, the dual objectives of this article are first to describe the four distinct functions of the lawyer in international arbitration. Secondly, having seperated advocacy from what is not advocacy, I will attempt to elaborate the particular skills that properly form part of advocacy in international arbitration. There are six such skills: expertise in law (an indispensable part of all the jobs of the arbitral lawyer, as noted above); powers of logical reasoning; mastery of the techniques of case presentation; skills of expression; understanding the ethics of advocacy; and tactical dexterity.

By way of introduction the first section of the article addresses this phenomenon of the interest in and ambiguity of «advocacy» in international arbitration in recent years. The second section elaborates the functions or «law jobs' of the lawyer representing a party in an international arbitration. The third section analyses the skills of the arbitral advocacy. The article concludes in its final section with some observations on the future of advocacy and the other legal functions in international arbitration.

I. THE AMBIGUITY OF «ADVOCACY» IN INTERNATIONAL ARBITRATION

There has been a surge in interest in advocacy in international arbitration in recent years, manifested in books, articles, training courses and conferences. Multiple factors have probably contributed to this phenomenon. The rules of procedure and evidence —that form the framework for the practice of advocacy— have received sustained attention in recent years in an effort to harmonize international arbitral practice in these areas. The detailed examination of procedure and evidence invariably provokes questions about advocacy. There has been considerable discussion of arbitral decision-making, particularly in the context of the consistency and correctness of awards in investment arbitration. Advocacy has a close relationship with judicial or arbitral decision-making as a favourable decision is the ultimate purpose of advocacy. Investment arbitration has placed a spotlight on the mechanics of the decision, and advocacy is more visible as a result.

The interest in advocacy might also represent an increasing «americanisation» of international arbitration. The United States has a mature and self-conscious tradition of advocacy. The variety of professional literature relating to advocacy in the United States far exceeds any other jurisdiction. Teaching and continuing professional development courses in advocacy are well established in the United States. For American lawyers it must be perfectly natural to carry their conscious attention and discussions of the most effective and appropriate methods of advocacy into international arbitration. The staple pedadogical technique for advocacy in United States law schools is the moot, which has become a successful export to international arbitration. The William C. Vis Moot in international commercial arbitration in Vienna now constitutes the largest annual gathering of international arbitration lawyers, and has encouraged other mooting competition such as the Spanish language equivalent in Madrid (*Competición Internacional de Arbitraje y Derecho Mercantil (Moot)*), and the Frankfurt Investment Arbitration Moot Court. The popularity of student mooting competitions in international arbitration has increased the awareness of the skills of advocacy amongst the younger generation of arbitral lawyers.

However, even in the United States the literature of advocacy is uneven in quality. Advocacy is a difficult subject to write about well. A listener might sense and admire the effectiveness of the advocacy of a fine advocate, but putting the experience in writing invariably fails to fully convey the impression. Qualities that are sublime in action are commonplace in description. There are few comprehensive treatments of advocacy that rise above the ordinary, and much of the best writing on advocacy is brief, partial treatments that offer a glimpse of the essence without seeking to capture the whole. Advocacy is an elusive art.

The perennial problem of the elusiveness of the qualities of advocacy is likely to be magnified in international arbitration. International advocacy brings together distinct juristic traditions that have very different perceptions of advocacy. In the common law world civil procedure has centred around an event called a «trial», which historically was an exclusively oral event. In England, and some other common law jurisdictions, a specialised professional advocate —the barrister— represented the parties at the trial. The role of the advocate in the common law tradition includes the oral presentation of a party's submissions, legal argument, examination and cross-examination of witnesses, and all other skills involved in the communication of a party's case to the tribunal. On the other hand, formalistic pleading for a long time impeded the development of written advocacy in common law jurisdictions. In contrast, in continental jurisdictions civil procedure has had a different character, with a radically different balance between the oral and written elements of the process. The greater relative weight to documentary evidence and the formal role for the judge in questioning witnesses has meant advocates from continental jurisdictions have not needed to develop the techniques of witness questioning of common lawyers.

It is true that the traditional equation of common law advocacy with the oral appearance before a tribunal has gradually broken down. The volume and complexity of modern litigation have meant that the length of oral hearings has been restricted in many common law jurisdictions, at least where it is possible to do so without raising issues of

fundamental rights.[869] One consequence has been the increase in the relative importance of the written briefs submitted to appellate courts, and therefore recognition and attention to the skills of written advocacy. International arbitration has successfully blended common law and continental elements into a standard procedure, where the statement of claim or claimant's memorial normally involves a full exposition of the party's case, accompanied by exhibits, witness statements and legal authorities, and where oral hearings are often subject to time limitations. Common lawyers have learnt to recognize a greater relative importance of the written to the spoken word than in a domestic action. Continental lawyers have had to learn how to question witnesses as effectively as their common law counterparts.

Notwithstanding the successful procedural harmonisation of international arbitration, the origins and training of an advocate are likely to continue to influence their perception of advoacay in unsuspected ways. A lawyer's perception of the sources of law and of legal reasoning determine the arguments they make as an advocate. The doctrine of precedent requires a different technique of reasoning and argument than *jura novit curia*. The rules of evidence in which a lawyer is trained inevitably shapes the manner they question witnesses and present facts to the arbitral tribunal.

Particular features of international arbitration that add to the ambiguity of the term «advocacy» are its multi-jurisdictional character, the importance of party autonomy and the flexibility of its procedure. International arbitration offers much wider opportunities than domestic litigation for choosing and defining the forum, law and applicable procedural rules. The proper selection and use of these opportunities is a highly skilled legal function, involving distinct skills and forms of analysis from the presentation of a case to a tribunal. However, does the fact that these skills are a fundamental part of the job of the arbitral lawyer, and demand high levels of knowledge experience and judgement, mean that they are properly described as advocacy? If the term «advocacy» should be confined to case presentation before the tribunal, then what is the correct description for this legal function? Similarly, what are the other distinct functions that a lawyer might exercise in an arbitration?

The ambiguity of the term «advocacy» in the context of international arbitration is well illustrated by the various contributions to *The Art of Advocacy in International Arbitration*.[870] Emmanuel Gaillard and Philippe Pinsolle, in a contribution entitled *Advocacy in International Commercial Arbitration in France*,[871] begin from the premise that inter-

(869) This has been particularly apparent in the appellate jurisdictions of the United States, where each counsel is normally limited to 30 minutes for oral argument in the United States Supreme Court and sometimes to as little as 15 minutes in other appellate jurisdictions: see Robert J Martineau *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom 72 Iowa L. Rev 1-33 (1986)*

(870) R. Doak Bishop (editor) *The Art of Advocacy in International Arbitration* (Juris Publishing, Inc. 2004). This book consists of a series of essays, beginning with advocacy before the International Court of Justice and in other State-to-State proceedings, private disputes before international claims resolution bodies, and the WTO Dispute Resolution Panels followed by ten chapters of 'cross-cultural advocacy by region» dealing with individual jurisdictions, and two concluding chapters by the editor. For a review, see *54 I.C.L.Q 801-803 (July 2005); www.transnational-dispute-management.com, vol. 3 issue 2 (April 2006) (David. JA Cairns).*

(871) R. Doak Bishop (editor) *The Art of Advocacy in International Arbitration* (Juris Publishing, Inc. 2004) at 133-149

national arbitration of France confers a broad procedural liberty on the parties, and that therefore «making choices' is a fundamental job of a party's legal representative. «Advocacy», the authors say, «is all about making these choices in manner consistent with the strengths and weaknesses of the case at issue.»[872] They then provide a series of examples of these choices, which makes clear the authors' conception of advocacy as relating to the most fundamental planning of the arbitration, and not limited to the presentation of evidence and argument to the arbitral tribunal. For instance, they discuss the parties' choices of forum in a dispute arising from a complex commercial relationship involving multiple arbitration agreements and raising issues of distinct applicable law and language, and show how these choices can interact.

Pierre-Yves Tschanz in an article in the same volume describes advocacy as «the preparation and presentation of a party's case, in order to convince the arbitrators of the merits of the case.» [873]. This definition connects advocacy with persuasion or effective communication with the tribunal. This conception excludes the type of choices described by Gaillard and Pinsolle, which do not involve communication with the tribunal. However, Tschanz immediately recognizes that lawyers in international arbitration also perform jobs «relating to the arbitration process itself», such as establishing the tribunal and appropriate procedure, definition of the issues, whether or not to bifurcate the proceedings and choice of language. He describes these skills as «process advocacy». His discussion of preparation and presentation of a party's case includes both written and oral advocacy (including the questioning of witnesses) but he also refers to the jobs of marshalling the evidence and handling discovery and document production. Other contributions to this book show that some lawyers consider procedural or evidential topics such as discovery and privilege are part of advocacy while other do not discuss them.

The overall impression is that there are many and varied functions for lawyers in international arbitration, and there is no shared conception of the ambit of the term «advocacy». In order to clarify these ambiguities the next section seeks to classify the functions of a lawyer in international arbitration, and the subsequent section to elaborate the content of advocacy.

II. THE FUNCTIONS OF A LAWYER IN INTERNATIONAL ARBITRATION

There are four distinct legal functions of the lawyer in international commercial and investment arbitration: strategy, investigation, advocacy and case management.

1. Strategy

The first and broadest function of the lawyer in international arbitration is strategy. Strategy is the task of making informed decisions in order to define the framework of the

(872) *Ibid* at page 136

(873) Pierre-Yves Tschanz *Advocacy in International Commercial Arbitration in France, ibid,* 195-232 at page 195.

arbitration, and the broad outline of a party's case within this framework. ***The essence of strategy is choice and decision.***

The more fundamental choices there are in a dispute, the more important strategy becomes. Party autonomy and the flexibility of international arbitral procedure means that international arbitration is a form of dispute resolution where many of the foundations of the process are negotiable rather than imposed, and therefore the choices for the parties —opportunities for the strategist— are multiplied. These arbitral choices potentially include choice of forum; choice of arbitrators and decisions relating to challenges; choice of law and language; identification and choice of parties; the choices relating to multiple possible proceedings (e.g. contract claims, treaty claims, litigation in domestic courts or before administrative tribunals); decisions relating to interim measures, anti-suit injunctions or expedited procedures; the appropriate timetable and procedural rules of the arbitration; the relationship between the arbitration and negotiation or mediation; the relationship between the arbitration and other commercial, media or political strategies of the client. (874) In investment arbitration there are strategic choices required by «fork-in-the-road» or waiver provisions in treaties. There are many more similar types of strategic decisions that might need to be made during an arbitration. The characteristics of these decisions is their repercussions throughout the arbitration; many of these decisions, once made, are irrevocable.

The strategist understands the dispute in its entirety —seeing the cathedral rather than the masonry— and also the linkages between its parts. The strategist has a clear sense objectives and risk profiles of the parties as well as the possible outcomes of the dispute and the contingencies on which the outcomes depend. In practical terms this requires not only sophisticated legal knowledge, but a broad grasp of context: the nature of the client's business, the nature of the market, the relationship with the other parties to the dispute, and (at least in investment arbitration) the politics of the states involved.

Strategy is a legal function in international arbitration that has received little systematic attention. There would probably be little disagreement that understanding the dispute in its context, considerable experience, and personal qualities of good judgement and decisiveness, are required from the lawyer to perform this function well. However, what further skills might be involved, and whether these skills of strategy can be sharpened by express study and training are questions that are still to be addressed in the arbitral context. Rational decision-making or decision science has received systematic analysis in various contexts, and is most closely associated with the discipline of economics. (875) The use of decision-tree analysis to improve decision-making has been successfully imported into dispute resolution in the negotiation and mediation contexts, and could be equally

(874) On the respondent side, State parties have at times resorted to an 'arbitration frustration» strategy using their internal law and the apparatus of the state to defeat the arbitration: see DAVID. J. A. CAIRNS *Transnational Public Policy and the Internal Law of State Parties Arab Journal of Arbitration, Vol. 10, September 2007, pp. 27-36; www.transnational-dispute-management.com, March 2009, Volume 6, Issue 1.*

(875) See HOWARD RAIFFA *Decision Analysis: A Personal Account of how it got Started and Evolved 50 Operations Research 179-185 (2002).*

used to improve strategical decision-making in arbitration.[876] The dynamics of interactive decision-making with a hostile party are the subject of game theory. There are also efforts to articulate a rational decision-making process that might at a practical level assist legal strategy.[877]

2. Investigation

The second function of the arbitral lawyer is the full factual and legal investigation of the case. This requires the bringing together by the legal team of the entire written record relating to the arbitration, the interviewing of witnesses, the instruction of experts, as well as legal research and analysis. It also requires the examination and investigation of the factual and legal allegations made by the other parties.

The case investigation function requires lawyers to make and respond to disclosure and discovery requests of the other party, to conduct depositions (where available), and to resolve related issues of confidentiality and privilege.

Case investigation requires considerable cooperation from the client. It might also require considerable communication with the legal advisors for the other party, and the referral of outstanding disclosure or evidential issues to the tribunal.

3. Advocacy

The third legal function is case presentation which includes all communication, whether written or oral, with or for the benefit of the arbitral tribunal. This is the legal function properly described as advocacy, and the only legal function that is advocacy. The objective of all case presentation is to persuade the arbitral tribunal to make decisions favourable to the advocate's client. ***The essence of advocacy is the persuasive communication of a party's case to the arbitral tribunal.***

In a standard arbitration and this will include the initial exchanges of position (Request to Arbitrate and Answer); all communications of a procedural nature; the parties' memorials and all documentary exhibits, witness statements, expert reports and legal authorities annexed thereto; the oral questioning of witnesses and experts at any hearings; the oral submission and legal argument of counsel at the hearing; and the closing written submissions. It also includes informal communication with the tribunal, even if only of a courtesy nature. Any communication of a parties position, whether direct or indirect, can affect the impressions of the arbitral tribunal relating to a dispute or its participants, and so falls within the ambit of «advocacy».

(876) See, for example, Mnookin Peppet and Tulumello *Beyond Winning: Negotiating to Create Value in Deals and Disputes* (Harvard University Press, 2000) at 232-240; Marc B. Victor *The Proper Use of Decision Analysis to Assist Litigation Strategy 40 Business Lawyer 617 (1985).*

(877) For example, Hammond, Keeney and Raiffa *Smart Choices: A Practical Guide to Making Better Decisions* (Harvard Business School Press, 1999).

4. Management

Broadly conceived case management relates to the proper allocation of resources within the arbitration. It includes the selection and coordination of the legal team; document management; the appropriate use of technology to facilitate the identification, search and classification of evidence, as well as the presentation of the case; establishing the appropriate communication channels between the client, witnesses, experts and the legal team; time management, task allocation and the monitoring of task performance; and the financial planning of the arbitration, including budgeting, funding and the approval of all payments.

5. The Coordination of Legal Functions

There is no temporal separation in the exercise of these legal functions in an arbitration. There performed concurrently throughout the arbitration, although within certain phases of the arbitration one function might predominate. At the beginning of the dispute, before the arbitration is actually being commenced, the emphasis of the legal team is clearly on identifying the first order strategic decisions, case investigation, and the establishment of a management structure, rather than advocacy, while at the oral hearing advocacy will be the dominant function.

The seamless nature of the effective conduct of an arbitration means many decisions involve all four functions. A major strategic decision requires implementation and therefore often has investigative, management and presentational implications. The decision to make claims of a certain nature shapes the factual and legal investigation, may have funding and resource implications that require careful management, and enters into advocacy in the form of the arguments made in the memorials, the exhibits presented and the witnesses proposed, and in the lines of questioning to the other party's witnesses at the hearing. It may be difficult at times even to distinguish the functions —is a decision to require a senior executive of the other party to appear at the hearing to answer questions a strategic decision or a presentational (advocacy) decision? Is the preparation of a witness statement case investigation or advocacy? It is certainly only investigation until a decision is made to present evidence from that witness to the tribunal.

There is no doubt that these four legal functions need to be properly coordinated by a party's legal advisors. They also require distinct legal skills and levels of expertise, and therefore can be divided between the various members of a legal team. For example, there is much work of a routine nature in the factual investigation of a case that can be handled by associates or even paralegal staff.

A significant difference in emphasis exists between strategic decision-making and advocacy in the focus of orientation. The primary focus of strategic decision-making, particularly in the early phases of an arbitration, is the client. What are the options available to the client, what are their implications in terms of time, costs and relationships, and what are the client's priorities and limitations? The primary focus of advocacy is the tribunal and the need to ensure a complete, coherent and convincing position is conveyed to the arbitrators.

The overall responsibility for strategic decision-making, management, investigation, and advocacy may rest with a single person, or may be divided within the legal team. This choice is determined by legal culture and the personal preferences of senior members of the legal team. In England, and to a lesser extent in other common law jurisdictions, the professional separation of barristers and solicitors has meant that oral advocacy is entrusted to a specialist, who is also consulted on key strategic decisions. At the same time, case management and investigatory functions rest primarily with the solicitors. It does not matter how the functions are divided, so long as they are coordinated effectively.

III. THE SKILLS OF THE ADVOCATE

This section identifies and describes the six skills of the advocate in case presentation. This classification is intended to be comprehensive, although further particularisation or other classifications are no doubt possible. These skills overlap and interact, and the advocate must apply them simultaneously and in a co-ordinated manner towards the objective of advocacy of proving the client's case and persuading the tribunal to issue an award in the client's favour.

1. Legal Expertise

The starting point is the shared skill of all four legal functions within an arbitration, namely knowledge and expertise in legal science. The advocate must possess a profound knowledge of arbitration law and its international legal framework. The advocate must understand the different applications and operation of law in domestic and international arbitration, and be deeply familiar with the doctrinal writings and jurisprudence of arbitration. The advocate must also understand the secondary rules of evidence and procedures that apply in international arbitration.[878]

In international arbitration the sources and hierarchy of norms often are not as clearly defined as in domestic litigation. Conflicts of laws issues, *lex mercatoria* and transnational public policy can complicate the application of the chosen substantive law in a contractual dispute. Investment treaty arbitration requires the application of public international law principles, sometimes together with domestic law, and raises issues regarding the status of arbitral jurisprudence.

It is this expertise in legal science that forms the foundations of all the work of a lawyer in an arbitration, including the submissions, proofs and arguments of the advocate to the arbitral tribunal. The lawyer's knowledge of law as well as the skills of reasoning are applied to the facts and other circumstances of the dispute to identify the theory of the case and develop the argumentation before the tribunal.

(878) Cf. Sir Norman Birkett *Advocacy Presidential Address to the Holdsworth Club, 1954 at 22:* «It cannot be too plainly stated that knowledge of the law and continuous mastery of its principles is vital to any success of any kind in advocacy. Some branches of the law are naturally more difficult than others.»

2. Logical Reasoning

The second skill required of the advocate is the facility of logical thought. This is a skill often developed through exposure to various models of legal thought and to the exigencies of professional practice, rather than through conscious study. The case method of legal education in the law schools of the United States and the need for common lawyers to understand *stare decisis* are examples of formal training in legal reasoning, but few lawyers have the benefit of a comprehensive preparation in logic or legal reasoning.

It is a familiar requirement in international arbitration that an award is reasoned, and awards may be annulled or refused execution for defects in their reasoning. An arbitrator can only base his decision on the equities of the dispute where invested with the authority of *amiable compositeur* and cannot be influenced, as juries may be, by their emotional reaction to the positions of the parties. If the tribunal must make a reasoned application of the law to the facts, then the advocate seeking to persuade the tribunal must do likewise. In the highly professionalized world of arbitration, logic is persuasion.

The discipline to reason well adds a dimension of forcefulness to advocacy at all stages of an arbitration. It applies equally in demonstrating the correct legal rule, proving the material facts, and of applying the rule to the facts. Reasoning by analogy or induction are staples of juridical logic where the applicable rules are not clear. The proof of facts routinely requires the advocate to make inferences, address probabilities and explain causation where the success of the submission depends on the correctness of the logic. The application of determined legal rules to proven facts is often made by process of deduction or multiple deductions.

The identification of defects or fallacies in the reasoning of the opposing party is part of the work of the advocate. Lawyers are adept at arguing from hypothesis or making alternative arguments from distinct premises and these types of arguments require great care in their reasoning to avoid falling into error. Much legal reasoning before a judge or an international arbitral tribunal, when stripped to its fundamentals, takes the form of polysyllogistic reasoning, and each step of the process should be subjected to scrutiny for its logical correctness. Lawyers are much given to enthymemes (that is, syllogisms where one premise is unarticulated) where the verification of the logic requires the identification of the unarticulated assumption, which can then be examined to ensure the assumption is true, proven or formally supports the logic of the remainder of the argument. An advocate must be able to reason well not only from the premises of an argument to its conclusion, but also to reverse engineer an argument from its conclusions in order to identify its points of vulnerability.[879]

(879) On syllogisms, enthymenes and polysyllogistic reasoning in legal argument see RUGGERO J. ALDISERT *Logic for Lawyers: A Guide to Clear Legal Thinking* (NITA, 1997) Chapter 5. The nature of reasoning in advocacy can flucuate wildly depending on the character of the decision-maker. Advocacy in international arbitration requires a distinct form of reasoning to, say, trial advocacy before a jury. For a discussion of some dubious forms of reasoning employed by trial lawyers before juries see RICHARD H. UNDERHILL *Logic and the Common Law Trial 18 American Journal of Trial Advocacy 151-199 (1994)*. For a memorable case where a distinguished international arbitral tribunal considered trial advocacy before a jury in Mississippi see *The Loewen Group, Inc. and* RAYMOND L. *Loewen v. United*

The reasoning skills of the advocate are particularly important in the phase of case preparation. When the factual and legal investigation of the case is complete but before beginning to write a brief or prepare an oral argument, the advocate must rigorously scrutinise the evidence and the legal research, strip this material down to its essentials to identify the key issues in the case, and then develop the argumentation that will achieve a favourable award.(880) It is the reasoning skills of the lawyer, together with expertise in law and judgement or tact, that enables the lawyer to identify the theory of the case and to select, prioritise and order the arguments.(881) The theory of the case will provide a unified theme for the presentation, reflected not only in the argumentation but embedded in its structure and guiding the questioning of witnesses and the responses to questions from the tribunal.(882)

3. Questioning and Answering Techniques

There are occasions in advocacy, and particularly oral advocacy, where certain standard responses to the recurring situations have been endorsed by use and experience. Forensic techniques have developed, and by learning, practising and applying these techniques the advocate can respond rapidly and effectively to developments within the arbitration. The most important of these techniques are the techniques of questioning witnesses, and the techniques for answering oral questions from the tribunal.

There are various techniques in questioning that can assist an advocate to elaborate, clarify or challenge the evidence of a witness or expert with brevity and precision. These techniques are highly developed in common law jurisdictions(883), where there are often closely intertwined with complex rules of evidence that have no place in international commercial or investment arbitration. However, an experienced common law advocate has no difficulty in detaching the techniques from the domestic rules of evidence and ap-

States of America (ICSID Case n.º ARB(AF)/98/3) *42 ILM 811 (2003)* at paragraphs 54-87 (use of arguments based on nationality, race and appeals to class prejudice) and 119-123.

(880) Cf. John M. Harlan *What Part does the Oral Argument Play in the Conduct of an Appeal? 41 Cornell L.Q. (1955) 6-11 at 8* («The process of preparation that the appellate advocate undergoes involves, *first*, the selection of the issues he will argue; *second*, a marshalling of the premises on which those issues depend; *third*, planning the structure of his argument; and *fourth*, deciding how he shall express his argument»).

(881) The process of the identification of arguments (the modern legal equivalent to the *inventio* of classical rhetoric) often passes unnoticed in modern textbooks on advocacy. It is a phase of advocacy that occurs in the advocate's office or study, rather then in the hearing room, and this might account for the neglect. The process is visible in treatments of US Supreme Court advocacy, precisely because of the attention these texts give to preparation: see for example, David. C Frederick *The Art of Oral Advocacy* (Thomson West, 2003) Chapters 2-4; Antonin Scalia & Bryan A. Garner *Making Your Case: The Art of Persuading Judges* (Thomson West, 2008) pages 69, 150-160.

(882) On the theory of a case and its importance in advocacy aee David. C Frederick *The Art of Orâl Advocacy* (Thomson West, 2003) Chapter 4; Steven Lubet *Modern Trial Advocacy: Analysis and Practice* (3rd edition, Nita, 2004) at 8-9, 568-474.

(883) These techniques are the staple of English and US advocacy handbooks, eg Steven Lubet *Modern Trial Advocacy: Analysis and Practice* (3rd edition, Nita, 2004) at 65-76 and 102-144; Iain Morley *The Devil's Advocate: A short polemic on how to be seriously good in court* (Sweet & Maxwell, 2005) chapters XII and XIII.

plying them flexibly in international arbitration. The techniques of the effective questioning of witnesses include the use of leading and non-leading questions, the appropriate use of open and closed questions, keeping questions brief, incremental questioning, repetition and emphasis, techniques for linking questions, and the importance of structure and chronology.(884)

There are also various techniques to assist counsel where the arbitral tribunal asks questions, or actively seeks to direct counsel to specific issues in the arbitration. «Rejoice when the court asks questions.»(885) The techniques for the effective response to questions from the tribunal are well developed in U.S. appellate practice where there are strict time limits on counsel and active questioning from the bench is commonplace. The most basic of these techniques are the skill of answering a question immediately rather than postponing the question to a moment more convenient for the advocate, and answering with «yes' or «no», rather than taking refuge in series of conditions, hypotheses or qualifications. There are techniques relating to the clarification of questions, invited concessions, and the proper use of affirmative points, including the «segue» or the transition in answering a question directed to weaknesses in the advocate's case to an affirmative strength.(886)

4. Expression

The skills of expression relate to the form that the advocate expresses and therefore conveys their client's case to the arbitral tribunal. This skill relates to the form and medium of an argument rather than its substance.

The primary medium of expression in international arbitration is written prose. The other important medium is speech, either in person or through telecommunications. There are also various visual media, such as diagrams, charts, and powerpoint that can be used in combination with written or oral expression.

Structure is the backbone of expression. Structure should be well adapted to the objectives of a brief or oral presentation, logical in itself and easy to follow. The use of headings and sub-headings in a written brief is a visible manifestation of the structure. The structure should serve as a guide for the tribunal and the advocate throughout the presentation. Where the applicable rules or any procedural direction of the tribunal require specific matters to be addressed in a particular presentation then the structure should normally accommodate these requirements. The structure should emphasise the strengths of the case. The opening should be direct and succinctly state the kernel of the case to follow. Affirmative arguments should precede rebuttal. The closing should be powerful.

(884) On these techniques, and the importance in international arbitration of distinguishing techniques of questioning from prescriptive rules of evidence see BERNARDO M. CREMADES & DAVID. JA CAIRNS *Cross-Examination in International Arbitration (publication pending)*.

(885) JOHN W. DAVIS *The Argument of an Appeal Journal of Appellate Practice and Process Volume 3, number 2 (2001) page 745* (originally published 26 ABA Journal 895 (December 1940)).

(886) The techniques for answering questions effectively are most fully developed in texts dealing with U.S appellate advocacy. For example, see DAVID. C FREDERICK *The Art of Oral Advocacy* (Thomson West, 2003) Chapter 4; ANTONIN SCALIA & BRYAN A. GARNER *Making Your Case: The Art of Persuading Judges* (Thomson West, 2008) pages 189-200.

The style of expression should inform, educate and persuade the tribunal. International commercial and investment arbitration tends to involve complex transactions, controverted facts, technical expertise and sophisticated argumentation. With this subject matter it is not surprising that the modern style of expression places a premium on clarity, precision and, where possible, simplicity. The expression of an argument, particularly an oral argument, must use time wisely. The principle of Occam's razor should guide the advocate in their expression. Nothing should be said that is unneccessary, and where alternative formulations of an argument are equally persuasive then the simplest formulation should be preferred.[887] These qualities complement the logic of a good argument and allow the merits of the argument to do the work of persuasion.

For this reasons, the style of an advocate in international arbitration should avoid needless posturing, *ad personam* arguments against the opposing counsel or parties, and rhetorical flourishes. Metaphors and other figures should be well chosen and used sparingly. Repetition must achieve emphasis, and not appear the result of carelessness. The expression should not be marred by formal mistakes, such as bad grammar, misstatement of evidence, authorities or the position of the other party, inappropriate humour, or any form of disrespect towards the tribunal.

A characteristic of international arbitration that should always be borne in mind by the advocate is that the participants in the process of the arbitration often do not share a single common language. Even where the other participants appear to be fluent in the language of the arbitration, the non-native speaker of a language always suffers from some limitations in comprehension. The advocate should show respect for the non-native speaker in the avoidance of complicated sentence structures, the use of standardised language and avoidance of regional idioms, modulating the speed of delivery, and the avoidance of implied criticisms or the insinuation of an argument. If an argument cannot be stated directly to an international arbitratuion tribunal, then it should not be stated at all.

Where the expression is oral, the advocate must make correct use of their voice and their body. The elaboration of the rules of effective speech often appear to be simple common sense speak clearly, make eye contact, don't read, suppress personal mannerisms, always be courteous but they are nonetheless of the utmost importance to effective advocacy.

5. Ethics

At first sight ethics sits awkwardly amongst the «skills» of the advocate in international arbitration. It might be asked whether ethics is a desirable trait of character rather than a skill in an advocate, especially where there is no written code of ethics for international arbitration lawyers, or any international body to enforce it.

(887) Cf. John M. Harlan *What Part does the Oral Argument Play in the Conduct of an Appeal? 41 Cornell L.Q. (1955) 6-11 at 8* («Simplicity of presentation and expression... is a characteristic of every effective oral argument. In the instances where that quality is lacking, it is usually attributable to one of two reasons-lack of preparation or poor selection of the issues to be argued»).

Advocacy is the means by which counsel propose, demonstrate and prove the client's case, and inform, educate, and persuade the arbitral tribunal. Advocacy also offers opportunities to conceal facts, misstate the law, and to misinform, deceive and lead the tribunal into error. Advocacy is forceful, and advocacy without ethics is force without right. In an adversary environment, even without bad faith, advocacy without ethics can quickly debase itself into an ugly partisanship.

The significance of ethical foresight and alertness in advocacy is more apparent in an historical perspective, and in criminal rather than commercial proceedings.(888) The sophistication af arbitral tribunals as decision-makers, the fact that arbitration arises from a consensual commercial relationship, and the relatively small community of international arbitral lawyers (at least until recently) characterised by repeat interactions in the roles of both counsel and arbitrator have probably acted to increase the costs and reduce the temptations of unethical advocacy. Most international arbitral practitioners have substantial experience in their domestic jurisdictions, and instinctively adhere to the professional standards of conduct required at home before an international tribunal.

However, the fact that professional ethics might be second-nature to most international arbitral practitioners should not be allowed to conceal the fact that an acquired ethical alertness is an essential skill of advocacy. An ethical indiscretion can have significant consequences. There is little more damaging to successful advocacy than loss of confidence by the tribunal in the credibility of the advocate. An advocate must also know how to respond effectively to objectionable conduct by the other party or its advocate.

6. Tact

Tact is forensic know-how. It fine tunes an oral or written presentation. It is the skill of putting accumulated forensic experience to good use. It is the skill that separates a competent from a very good advocate.

The main element of tact is good judgement. This judgment guides the advocate in the exercise of their other skills. It guides the advocate in selection of arguments or in the expression of the argument where fine distinctions in its formulation might be significant to its reception by the tribunal. Legal reasoning must be logical, but value judgments must be made in the selection of the premises that begin the argument.(889) Again, the skills in reasoning enable the advocate to ensure arguments based on factual inference or causation are correct, but it is judgment that enables the lawyer to anticipate whether these arguments will convince the tribunal. The techniques of questioning ensure the smooth development of witness evidence, and the theory of the case will guide the content of questions, but judgement is required to know when to avoid certain subjects with a particular witness or to terminate the questioning. Judgement enables the lawyer to anticipate the reaction of the other party or the tribunal to developments and to prepare accordingly.

(888) Ethical controversies played an important role in the development of 19th century English criminal advocacy: see David. J.A. Cairns *Advocacy and the Making of the Adversarial Criminal Trial 1800-1865* (Oxford University Press, 1999) at 8 and chapters 2 and 6.

(889) Ruggero J. Aldisert *Logic for Lawyers: A Guide to Clear Legal Thinking* (Nita, 1997) at 66-68.

Another element of tact is adroitness in the handling of the tribunal. There is normally less uniformity amongst the members of an international arbitral tribunal than a domestic court, as arbitrators may be drawn from different legal traditions, professions and cultures. The advocate must be able to engage and establish rapport with each member of the tribunal, and also to appreciate the internal dynamics of the tribunal.(890) This skill can be particularly important where a member of the tribunal has a difficult personality, is poorly prepared or displays an open hostility to the advocate's argument.

Tact also includes attributes of leadership and responsibility for the client's case before the tribunal. In this way, tact transmits confidence to the tribunal. Leadership and responsibility are particularly important in simplifying and clarifying a party's case. Faced with multiple arguments and legal sources in support of their client's position, the tactful advocate is prepared to discard all but the best, rather than presenting a generous selection to the tribunal in the hope that the tribunal itself might make the choice.(891) Faced with weak points, the responsible advocate is candid with the tribunal in addressing them.(892) The practice of state party advocates in some investment arbitrations to raise formalistically every conceivable objection to jurisdiction or admissability and so create an obstacle course to be navigated by the other party and the tribunal before entering into the merits, or relying on the internal law of the State party in a treaty claim where such arguments have little justification, are examples of poor advocacy.(893) Another example is the practice in ICSID annulment applications of firing off a multitude of arguments «in the hope that at least one of them will score a hit.»(894)

Finally, tact is a self-effacing skill because the subject of advocacy is the client's case and not the advocate's personality. The case presentation should be as natural as possible. The highest expression of the craft of advocacy includes the concealment of all art.(895)

(890) Martin Hunter *Reflections on Advocacy and the Art of Persuasion [1995] The Litigator 275-278.*

(891) Cf. Robert H. Jackson *Advocacy Before the United States Supreme Court 37 Cornell L.Q.(1951) 1-16 at 5* («Multiplicity hints at lack of confidence in any one...experience on the bench convinces me that multiplying [arguments] will dilute and weaken a good case and will not save a bad one») *and 7* («I always look with suspicion upon a proposition with a page full of citations in support. And if the first decision cited does not support it, I conclude the lawyer has a blunderbus mind and rely on him no further»).

(892) Cf. John M. Harlan *What Part does the Oral Argument Play in the Conduct of an Appeal? 41 Cornell L.Q. (1955) 6-11 at 9* («I do not know any way of meeting a weak point except to face up to it... No answer to an embarrassing point is better than an evasive one. With a court, a lack of candour in meeting a difficult issue of fact or law goes far to destroying the effectiveness of a lawyer's argument...»).

(893) State counsel may take these positions because they lack discretion to exercise the leadership and resonsibility required for successful advocacy. See also David. J. A. Cairns *Transnational Public Policy and the Internal Law of State Parties Arab Journal of Arbitration, Vol. 10, September 2007, pp. 27-36 at 35; www.transnational-dispute-management.com, March 2009, Volume 6, Issue 1.*

(894) Christoph H. Schreuer *The ICSID Convention; A Commentary* (Cambridge University Press, 2001) Article 52, paragraph 108.

(895) For this characteristic of tact, and the identification of tact as the 'quintessence of advocacy» amongst commentators at the 19th century English Bar, see David. J.A. Cairns *Advocacy and the Making of the Adversarial Criminal Trial 1800-1865* (Oxford University Press, 1998) at 9.

7. Concluding Comments

These are the skills that comprise advocacy. Their common element is that they all relate directly or indirectly to persuasive communication with the tribunal. Advocacy is a persuasive communicative act.

When advocacy is defined with precision, it is also possible to express with confidence what is not advocacy. Strategic decisions, investigation and case management are not advocacy, although for the reasons already explained they are legal functions that have a dynamic interaction with advocacy.

Legal knowledge, legal reasoning, the persuasive expression of a legal argument are all skills of advocacy, but it is fallacious to assume that law itself is part of advocacy. This is to confuse the craft with the craftsman's materials. For the same reason, the secondary rules governing procedure, evidence and document disclosure as well as facts are the materials of advocacy, but not advocacy itself. Wood is the material of the craft of the cabinet-maker, but only through the application of the skills of the cabinet-maker does wood become furniture.

In this way, the proper definition of the skills of advocacy, which this article has sought to identify, can remove the ambiguity of the term «advocacy» and therefore improve the quality of the debate in international arbitration regarding advocacy and, hopefully, ultimately contribute to the improvement of the standards of advocacy themselves.

IV. CONCLUSIONS: THE FUTURE OF THE ARBITRAL LAWYER

The current attention to advocacy in international arbitration follows in the wake of intense examination of other procedural topics, such as disclosure of documents, the taking of evidence, or disclosure by arbitrators of potential conflicts of interest. The outcome of these procedural discussions tends to be towards increased harmonisation of international arbitral practice, including the promulgation of guidelines and protocols. The same process might well occur now with advocacy.

The most important form of advocacy in international arbitration is written advocacy. A standardised procedure of detailed memorials accompanied by witness statements, documentary proofs and expert reports is now an accepted part of international arbitration. The further refinement of the skills and practices of written advocacy can be expected. The recent debate over the roles of precedent and *jura novit curia* in international arbitration indicates efforts towards harmonisation of reasoning in arbitration.(896)

(896) On precedent see Emmanuel Gaillard and Yas Banifatemi (ed.) *Precedent in International Arbitration* (Juris Publishing, 2008); Andrés Rigo Sureda *Precedent in Investment Treaty Arbitration* in Binder, Kriebaum, Reinisch & Wittich (ed) *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009); Gabrielle Kaufmann Kohler *Arbitral Precedent: Dream, Necessity, or Excuse? (Freshfields Lecture 2006) 23 Arbitration International 357-378 (2007)*; Christoph Schreuer & Matthew Weiniger *A Doctrine of Precedent?* in Peter Muchlinski, Federico Ortino & Christoph Schreuer (ed) *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) Chapter 30.

The examination of advocacy in international arbitration is likely to raise questions regarding oral advocacy and the functions of hearings. This is particularly so given the current concern with the time and cost of arbitration as oral advocacy can add significantly to the length and costs of arbitral proceedings.[897] The extensive reliance on written memorials in international arbitration, accompanied by evidence and legal arguments, and the usual practice of submitting post-hearing briefs effectively means that the parties can present their cases in writing. Arguably, the role of the oral hearing in international arbitration could easily be reduced to just two functions: firstly, the testing of party, witness or expert testimony through cross examination, tribunal questioning, or witness conferencing or confrontation; and secondly, the response of counsel to questions from the arbitral tribunal regarding the legal and factual basis of a party's case. If the oral hearing focuses on witness questioning then arbitral lawyers will need to develop a greater consciousness of good questioning techniques, particularly lawyers not trained in common law cross examination. In contrast, the degree of questioning of counsel by the tribunal in international arbitration is still subject to cultural preferences, as well as a degree of preparation of the arbitral tribunal for the hearing, and is likely to remain so in the foreseeable future.

The four legal functions of arbitral lawyers are all ultimately subject to competitive pressures, and to market-driven trends for efficiency and value. Lawyers that can articulate dispute resolution in strategic terms are likely to be more valued by clients, and particularly senior in-house counsel, than the arbitral technician. Formal training in negotiation and mediation techniques, as well as practical know-how such as how to maintain an effective dialogue with a state party during an investment arbitration, increase the strategic potential of arbitral lawyers. The function of case investigation is already experiencing the impact of cost and competitive pressures, particularly in the areas of voluminous document analysis requiring the application of technology. Parts of the case investigation function are already outsourced by law firms or performed by specialist forensic services firms, and this trend is likely to continue. The pressures for efficiency and value are likely to push advocacy in the direction of further harmonization, shorter and more focused hearings, and more specialised advocacy training.

(897) Report from the ICC Commission on Arbitration *Techniques for Controlling Time and Costs in Arbitration* (ICC publication number 843, 2009) paragraphs 72-84.