

CHAPTER 9

Some Thoughts on Advocacy in International Arbitration: Key Note Speech, Swedish Arbitration Days 2018^{*}

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§9.01 INTRODUCTION

For a speaker to talk about advocacy in international arbitration before an audience as prominent and experienced as this requires a great deal of bravery. Many of you know the subject well and, no doubt, have strong views on it. Let me nevertheless share some thoughts formed on the basis of a few decades of experience as counsel and arbitrator.

§9.02 THE CONCEPT

Advocacy is a somewhat elusive concept. The views on what advocacy is and what constitutes good advocacy differ among practitioners. It is partly a cultural issue.

In classic times, the advocate was often seen as someone specializing in sophistry. Gradually a profession evolved both in the civil courts and in the ecclesiastical administration of divine justice. The devil's advocate was someone engaged to test the holiness of people put up for canonization. Even today, this often seems to be the prime objective for counsel cross-examining witnesses and experts.

Advocacy as generally understood today has many applications. I will of course talk about the concept in the legal context.

The term 'advocacy' in English, according to commonly used dictionaries, basically means the influencing of a decision-maker by the art of persuasion. It is interesting to note that the direct Swedish translation of the word 'advocacy' –

^{*} A somewhat redacted version of the Key Note Speech made at the Swedish Arbitration Days 2018.

advokatyr – denotes efforts to influence the auditorium, be it a court or an arbitral tribunal, by using sophistry and overstretched arguments such that since the times of Socrates more refined souls have always frowned upon. The Swedish language version of advocacy amounts to simple quibbling. But maybe this linguistic oddity is not wholly coincidental. Advocacy in its positive sense was hardly developed in the outskirts of the cold Arctic Tundra. The classical art of advocacy has its origins in Greece and Rome whereas the modern concept has been very much developed in the English tradition. And not to insult our French colleagues – perhaps also by a little bit of French eloquence.

I just referred to advocacy as an art. Art is a pursuit that requires an artist. And to become an artist you do need artistic talent. Advocacy skills can be developed by training. It is a craft that can be taught and learnt. Talent undoubtedly helps. But also for those of us who are not naturally endowed with brilliance there is a glimmer of hope. We can become passable advocates by learning the craft.

The title of this chapter refers to advocacy in international arbitration. This begs the question whether advocacy in arbitration is different from advocacy before the courts. I believe that the answer is yes – and no. The similarities are fairly obvious. The differences perhaps less so. The relative informality of the arbitral process naturally influences arbitral advocacy. In some countries the advocate is a servant of the court. From that would follow certain obligations not only to the client but also to the court. In arbitration the servant duty of counsel to the tribunal is less apparent. However, the recent advent of soft law rules such as the IBA Guidelines on Party Representation in International Arbitration (the ‘IBA Guidelines’) introduces common principles of counsel conduct. The purpose is to achieve harmonization of the rules of conduct so as to create, so far as possible, an even battle ground in international arbitration. The IBA Guidelines do have relevance on advocacy.

They deal with acts to compromise the integrity of the tribunal, the reliance on false evidence and other instances of shady practices and not so much with the Olympic fineries of advocacy with which we are concerned here. The IBA Guidelines are somewhat controversial. Some say that they exemplify the strife for overregulation. The jury is still out on their practical usefulness. I believe that although counsel does have professional duties to the tribunal, to the opposite party and to the process itself, it would not be correct to suggest that counsel in international arbitration should be characterized as a servant of the tribunal.

§9.03 THE PURPOSE OF ADVOCACY

So what is then the purpose of advocacy? The prime goal is of course to influence the decision-maker, in our case an arbitral tribunal, to render a decision as favourable as possible to the client. The arsenal of the advocate to attain that goal contains many tools. The toolbox includes a talent for identifying and discovering the pertinent facts, to structure the case on the basis of the applicable rules of law, to provide strategy, to draft written submissions, to make strong oral presentations and to display a talent for dealing with people especially the client, the witnesses/experts, opposing counsel and

the members of the tribunal. To do all that the advocate needs good judgment, creativity, experience, a quick mind and strong language skills.

§9.04 LINGUISTIC ASPECTS

Dwelling a bit on the language skills, I would point to this. In international arbitration, English has become the predominant language. It goes without saying that this often constitutes a problem. Clearly, an English lawyer, trained at the best schools and universities, linguistically refined by court work, debating unions, cricket matches and sophisticated cocktail parties will have an enormous language advantage over opposing counsel without such graces. If we really want to achieve an even playing field, we should consider a rule requiring all arbitrations to be conducted in Esperanto. But, sadly, any such project is of course doomed to fail. There will be no linguistic Brexit in international arbitration. English is the *lingua franca* of arbitration and will remain so for as long as this congregation needs to bother. The solution for the non-English speaking arbitration lawyer is not to include Google Translate into her toolbox. Eventually, Artificial Intelligence may change all that. Meanwhile the solution is to learn English and to do it well. When I talk to young lawyers about how they might learn a bit of English, I usually suggest that they should read the books of the late Lord Denning, eminent illustrations of how to write on complicated legal matters in very clear and simple language form.

§9.05 FORMS OF ADVOCACY

Advocacy is a broad concept. It includes several forms. Some seem to see it as including only oral and written submissions. Others take a broader view so as to include also the manner in which the advocate structures her case and to all the preparatory phases of the process. I share that view. For my remarks today, however, I will largely concentrate on advocacy in written and oral pleadings.

§9.06 LIMITATIONS

But first a question of general relevance. If the purpose of advocacy is to win the case for the client by persuading the tribunal to award the highest amount of money claimed, does that mean that all effective tools to reach that goal may be employed by the advocate? With important exceptions the answer, I believe, is yes. The client's interest must take precedence, and the ultimate test is whether the advocacy is effective. Points for style are awarded principally in advocate heaven (if indeed such a thing exists – some people suggest otherwise). From the client's perspective, elegance in presentation is less important than results.

Let me then turn to the limitations on good advocacy. There are indeed limitations on what the good and efficient advocate can and should do.

In discussing these limitations, I leave aside the advocate who indulges in falsehoods, be it outright lies on the facts and sometimes on the law. I also discard

instances of improper witness preparation including the drafting of misleading witness statements and expert reports, and the reliance on falsified documents. Those are matters that in large measure are prohibited already under deontological rules in most civilized jurisdictions. They are also dealt with in soft law rules such as the IBA Guidelines.

I have some general points to offer. My first point concerns disloyal practices.

Good advocacy requires counsel to contribute to the arbitral process with a reasonable degree of loyalty and fair play. This means, for instance, that the advocacy should be conducive to attaining the goal on which the disputant parties agreed when in happier times they chose to have their disputes fairly resolved by way of arbitration. Moreover, disruptive gamesmanship and unfair behaviour is usually counter-productive. Such behaviour is quite likely dangerously to increase the blood pressure of the arbitrators. Arbitration by ambush is not a thing cherished by serious arbitrators and the cost for those who try it may be substantial.

Another not entirely uncommon event in commercial arbitration is that counsel requests inordinately long time for filing responsive submissions. Arbitration being meant to be a relatively speedy way to resolve disputes, five-six months for a response is usually over the top. A request for a time plan to that effect suggests that counsel is overworked or indulging in delaying tactics. Such long filing times should only be allowed for very special reasons, typically the preparation of expert reports that could not have been prepared before. This said, tribunals often have to accept very protracted filing schedules simply because equally busy counsel on both sides so agree.

My second point on limitations concerns the quality of the arguments invoked by counsel. Sometimes the arguments in favour of the client's case are strong. But quite often counsel has to advance arguments of a more questionable quality. This may be her duty. But weak arguments should not be weak to the point of hopelessness. It is, I believe, generally thought that the serious advocate ought to discard arguments that are clearly unsustainable on the facts or on the law. To advance lousy arguments is rarely in the interest of the client. Some suggest that counsel, employing a suitable looking glass, in preparing for her case should subject her arguments to a blushing test. If they make her face turn deep red, the argument should be discarded. I would think though that the same should apply if, on testing this method, counsel's face turns very pale.

Turning next to the written and oral aspects of advocacy it is apparent that this is a huge subject on which I can only hope to deal with some few aspects.

§9.07 WRITTEN PLEADINGS

Written pleadings in the age of the word processor tend to be long – very long. They are often repetitive and far too talkative. What purports to be summaries are elaborate exposés rather than useful nutshells. It seems to me that counsel often forgets that after the written submissions there is almost always an oral hearing which should be more than yet another repetition of what has already been advanced at great length in writing. Counsel should bear in mind that on page 234 of a lengthy brief the audience

is likely to have been lost. If very long memorials are required, they need to be well structured and free from repetition and mere rehashing. It is quite common, and not wholly necessary, that in replies and rejoinders counsel set out the entire case again and worse – long quotes and/or misquotes from the latest brief submitted by the other side. It is sufficient to refer the tribunal to the first written submission and briefly to explain what, if anything, needs to be changed or added in the light of the reply from the other side. Indeed, in some jurisdictions, the practice seems to be that the initial written submission is simply updated in the light of what was said by the other side. That model, if in the circumstances it can be applied, may ideally lead to the tribunal having to consider only the updated version of the first written pleadings. It seems to me that this may be a very useful model not only for the tribunal but also for the parties.

§9.08 ORAL HEARINGS

The oral hearing should usually be the main event. Oral hearings offer an opportunity to display excellence in advocacy.

Here are some aspects that, in my view, the good advocate may wish to consider. I have a brief selection of concentrated and general advice.

Structure usually helps the audience to understand the message. A reasonably clear structure is helpful. Failure to be clear on structure may save counsel from remarks of the kind said to have been made by a well-known judge: *Mr. Smith, if you are unable to put your arguments in some kind of logical order, you might try chronological or, if that too is beyond you, even alphabetical order.*

A tone and conduct appropriate for the occasion is to be recommended. Counsel should be modest and kind or at least appear to possess those qualities. Aggressive behaviour should be avoided. It usually misfires. As to jokes and funny remarks, I would suggest that restraint be observed. Cultural perceptions may cause an innocent joke to turn into an embarrassment.

Sentiments may add a human dimension but should be used sparingly. I vividly recall counsel acting for a state organization in a commercial case being so moved by his own presentation of the client that he could not hold back his tears. That ploy, I would suggest, should be used only in the most exceptional circumstances. If at all.

A cooperative attitude should be displayed both vis-à-vis the opposing party and, even more so, in relation to the tribunal. And do not pick a fight on every procedural or practical issue. The cost in terms of blood pressure increases in the systems of the arbitrators may be considerable and usually with little corresponding benefit.

Counsel should be properly dressed. If not, the risk is that counsel will find himself in the shoes of the American lawyer who was told by a lady judge that anyone appearing before her in a polyester suit would have to carry the burden of proof.

Do not insult the intelligence of your audience. Some lines of argument or factual interpretation may induce a degree of intellectual despair among the arbitrators. That should be avoided.

The ability to resist some points is important. A degree of self-control is useful. No matter how tempting it may be to make a sharp comment the test should be whether

the point considered is beneficial to the client's case. An old and often quoted example of an exchange illustrating this point is when the famous F.E. Smith, elevated to Lord Birkenhead, later to become Lord Chancellor of England, appeared before a judge who made a rather snooty remark:

Judge: Mr. Smith, I have listened to your presentation to the Court and must say that I am no wiser now than I was when you started.

Smith: No my lord, but far better informed.

That remark gave us a good war story. But was it good advocacy in the sense that it promoted the client's case? I would venture to doubt that.

The good advocate has an ability to read the audience. It is often very useful to listen carefully to the questions from the tribunal. It may disclose thought processes that need to be enhanced or to be corrected. And when the members of the tribunal start looking out the window or study the latest stock prices on their mobile phones you know that it is time to stop or to shift the line of argument.

The ability to take a point instantly is helpful. An example of this comes from an old war story where a well-known Danish advocate, Mr Henriques, appeared before the Danish Supreme Court:

The President: Well, Mr Henriques, you were here a month ago arguing the very opposite point to that which you are proposing now? At that time we accepted the point argued and found for your client. What should it be?

Mr. Henriques: Yes, Mr. President, but you will no doubt agree with me that the Danish Supreme Court can be fooled only once!

Be prepared also to deal with the more obvious weaknesses of your case. Whether counsel should volunteer to raise a point that is troublesome for the client's case is, I would think, a question of risk assessment. Unless the risk is not negligible counsel should, I believe, carefully consider whether it is not better for the client that the bomb is defused in a relatively controlled environment compared to a full and sudden explosion at some unknown point in the course of the process.

As to examination of witnesses and experts this is obviously a huge subject which time does not permit me even superficially to address. As a general advice, I would say though that it is usually counter-productive to abuse those who testify. This rarely goes down well with arbitrators, especially not if they come from civil law traditions. The same result can be achieved by more sophisticated means. The Anglo-Saxon idea of controlling the witness so as to elicit only yes and no answers is usually not considered very effective in this part of the world.

A further piece of advice is that counsel should avoid all grandiosity no matter how lovely an advocate he considers himself to be.

And, finally, do stay awake! An unnecessary observation you may think. But I have seen a prominent Swedish advocate falling asleep during his own examination-in-chief of a very talkative witness. I am now eagerly waiting to experience counsel falling asleep during his own cross-examination.

§9.09 CONCLUDING REMARK

If you can master all these requirements, you may in the end turn out as an eminent classic advocate.

If I am permitted a slight travesty of the French artist Daumier, you know that you have succeeded when a tearful client embraces you when you tell him that although the case was lost the client nevertheless had the opportunity to listen to your oral pleadings.

