Global Arbitration Review

The Guide to Advocacy

General Editors
Stephen Jagusch QC and Philippe Pinsolle

Associate Editor
Alexander G Leventhal

Fourth Edition

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Contents

Introduction 1
Stephen Jagusch QC, Philippe Pinsolle and Alexander G Leventhal

1 Case Strategy and Preparation for Effective Advocacy 3
Colin Ong QC

2 Written Advocacy 20
Thomas K Sprange QC

3 The Initial Hearing 37
Grant Hanessian

4 Opening Submissions 51
Franz T Schwarz

5 Direct and Re-Direct Examination.. 69
Anne Véronique Schlaepfer and Vanessa Alarcón Duvanel

6 Cross-Examination of Fact Witnesses: The Civil Law Perspective................. 84
Philippe Pinsolle

7 Cross-Examination of Fact Witnesses: The Common Law Perspective 94
Stephen Jagusch QC

8 Cross-Examination of Experts 108
David Roney

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9 The Role of the Expert in Advocacy 127
Philip Haberman

10 Advocacy and Case Management: An In-House Perspective 140
Marco Lorefice

11 Closing Arguments 146
Hilary Heilbron QC and Klaus Reichert SC

12 Tips for Second-Chairing an Oral Argument 160
Mallory Silberman and Timothy L Foden

13 The Effective Use of Technology in the Arbitral Hearing Room 172
Whitley Tiller and Timothy L Foden

14 Advocacy Against an Absent Adversary...186
John M Townsend and James H Boykin

15 Advocacy in Investment Treaty Arbitration 197
Tai-Heng Cheng and Simón Navarro González

16 Advocacy in Construction Arbitration 207
James Bremen and Elizabeth Wilson

17 Arbitration Advocacy and Criminal Matters: The Arbitration Advocate as Master of Strategy 218
Juan P Morillo, Gabriel F Soledad and Alexander G Leventhal

18 Advocacy in International Sport Arbitration..233
James H Carter

19 Cultural Considerations in Advocacy: East Meets West 245
Alvin Yeo SC and Chou Sean Yu

20 Cultural Considerations in Advocacy: India...257
Tejas Karia and Rishab Gupta

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21 Cultural Considerations in Advocacy: The Arab World – A Recast 263
Mohamed S Abdel Wahab

22 Cultural Considerations in Advocacy: Continental Europe 282
Torsten Lörcher

23 Cultural Considerations in Advocacy: United Kingdom 295
David Lewis QC

24 Cultural Considerations in Advocacy in Latin America: Brazil 302
Karina Goldberg

25 Cultural Considerations in Advocacy: United States 308
Laurence Shore

26 Cultural Considerations in Advocacy: Russia and Eastern Europe..............317
Anna Grishchenkova

Cultural Considerations in Advocacy: Africa

27 Cultural Considerations in Advocacy: English-Speaking Africa 331
Stanley U Nweke-Eze

28 Cultural Considerations in Advocacy: French-Speaking Africa....................336
Wesley Pydiamah and Manuel Tomas

29 Cultural Considerations in Advocacy: Portuguese-Speaking Africa 342
Rui Andrade and Catarina Carvalho Cunha

The Contributing Authors 349
The Contributing Arbitrators 369
Contact Details 389
Index 397

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Index to Arbitrators' Comments

Stanimir A Alexandrov

Closing arguments, answering the tribunal's questions 154

Cross-examination

approach expert conferencing with caution 123

avoid harassing witnesses.. 87

legal experts 115

Direct examination, recommended 72

Initial hearing

agreeing procedural issues in advance... 40

backup hearing dates 45

Investment treaty arbitration, transparency is key 203

Opening submissions

address weaknesses before hearing... 59

avoid bombast 54

don't keep tribunal waiting... 61

using PowerPoint.. 64

Re-direct examination, err on side of caution 81

Second-chairing oral argument, a smooth and efficient hearing.......................163

Written advocacy

compelling narrative in requests for arbitration... 29

explaining the respondent's motive 31

post-hearing submissions – focusing on the specifics 32

Essam Al Tamimi

Arab world, embrace the differences..267

Henri Alvarez QC

Initial hearing, general rules 48

Written advocacy, general rules 24

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David Bateson

Construction arbitration, assertive case management........209

East meets West, traits of Asian witnesses........253

George A Bermann

Closing arguments, map out your case for the tribunal........148

Cross-examination, expert testimony can be critical........126

Direct examination, invite written witness statements........72

Investment treaty arbitration, sovereign state as a party........199

Role of the expert, filling gaps and winning cases........129

Juliet Blanch

Closing arguments, what to address........155

Cross-examination

- avoid over-preparing a witness........106
- emulating an expert........112
- good preparation takes time........98
- when a witness refuses to answer........102

Initial hearing, a good investment........38

Opening submissions, tips for preparation........52

Re-direct examination, only when critical........81

Written advocacy, set out your case chronologically........22

Stephen Bond

Absent adversary, no guarantees of victory........193

Cross-examination

- dealing with untruths........89
- differences between civil and common law........89

Role of the expert, invest in their knowledge........128

United Kingdom, merits of memorial procedure........297

Written advocacy

- importance of brevity........25
- using arbitration requests to seek early settlement........30

Stavros Brekoulakis

Absent adversary, trust the tribunal........187

Construction arbitration, build on the evidence........211

Cross-examination, map it out for the tribunal........86

Second-chairing oral argument, confidence in less senior counsel........168

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Charles N Brower

Case strategy, the arbitration clause ... 8
Continental Europe, extricating documents ... 290
Direct examination, proper preparation of witness statements ... 76
Investment treaty arbitration
    catch everybody's every word ... 204
    presence of witnesses ... 204
Written advocacy, frame your case simply ... 33

Nayla Comair-Obeid

Arab world
    beware misunderstandings ... 264
    detailed rules of procedure ... 264

William Laurence Craig

Written advocacy, the language of contracts ... 23

Yves Derains

Absent adversary, the tribunal is not an opponent ... 195
Continental Europe, re-direct without leading questions ... 292
Direct examination, address embarrassing facts ... 74
French-speaking Africa, adapt to chair's culture ... 337

Donald Francis Donovan

Closing arguments, closing down open points ... 147
Cross-examination
    staying in command ... 95
    engaging with both adversary and tribunal ... 100
Initial hearing, cooperate with tribunal from the outset ... 43
Opening submissions, using non-traditional media ... 66

Yves Fortier QC

Closing arguments, oral closing a rarity in international arbitration ... 149
Cross-examination
    unsettling an adversary's witness ... 103
    using experts against experts ... 110
Opening submissions
    preparation without overkill ... 57
    targeting one arbitrator ... 53

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Andrew Foyle
Opening submissions, use limited time effectively 60

Pierre-Yves Gunter
Closing arguments, advantages of an oral closing 156
India, examples 259

Jackie van Haersolte-van Hof
Cross-examination
remember the expertise of the tribunal 109
spotting the tribunal's signals 90
United Kingdom
optimise your style 299
what is normal procedure? 301

Bernard Hanotiau
Closing arguments, post-hearing brief v. closing submission 149
Cross-examination, traditional approach is unhelpful with legal experts 115
Direct examination
expressing quantum in clear terms 75
language of arbitration 70
Initial hearing
seek extensions of time early on 46
beware flouting the rules 46
Opening submissions
quantum arguments also need detail 65
stick to the point 58

Hilary Heilbron QC
Cross-examination, common pitfalls 85
Re-direct examination, eliciting a favourable answer 81

Clifford J Hendel
Sport arbitration
keeping your distance 236
specifics in basketball cases 239

Kaj Hobér
Case strategy, convincing the tribunal 15
Closing arguments, getting a favourable award 151

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Ian Hunter QC

Case strategy, simply stay in control 11
Continental Europe, avoid open questions 285

Michael Hwang SC

Cross-examination
eliciting direct answers 113
quit while you're ahead 99
Re-direct examination, using re-direct for correction 80

Emmanuel Jacomy

East meets West, cross-examining Chinese speakers 249

Doug Jones AO

Initial hearing, collaboration 44

Jean Kalicki

Cross-examination, alleging bad faith 104
Opening submissions
avoid bombast and exaggeration 54
concise road map 56
direct language 57
speak slowly 54
use of exhibits 64
Written advocacy, begin with your conclusion 26

Richard Kreindler

Criminal matters, addressing allegations early on 228

Julian Lew QC

Case strategy, the importance of simplicity 11
Effective use of technology, demonstratives 183
Opening submissions, overcomplication is no help to tribunal 68

Loretta Malintoppi

Investment treaty arbitration, focus on the essence of the case 200

Mark C Morril

United States, learn to read the room 313

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Alexis Mourre

Case strategy, know and understand your tribunal ... 4

Jan Paulsson

Cross-examination
- establish the rules ... 96
- interruption is a distraction ... 105
- keep objections to a minimum ... 91

Opening submissions, etiquette at hearings ... 53

Second-chairing an oral argument, how many mock arbitrators? ... 161

Written advocacy
- characteristics of pleadings ... 34
- less is more, much more ... 21

David W Rivkin

Closing arguments, framing your case for decision-making ... 148

Cross-examination, undermining an expert's credibility ... 111

Initial hearing, create the right procedures ... 50

J William Rowley QC

Closing arguments, there is no substitute ... 152

Cross-examination, defusing an expert's report ... 116–7

Direct examination, the 10-minute rule ... 73

Initial hearing, meeting face-to-face early on ... 39

Opening submissions, distilled statements delivered early ... 55

Written advocacy, dangers of overstatement ... 28

Eric Schwartz

Construction arbitration, don't plead, consult ... 215

United States
- nothing to gain by standing up ... 310
- use PowerPoint sparingly ... 311

Georg von Segesser

Continental Europe
- mistakes to avoid in civil cross-examination ... 291
- obligation to produce ... 289

Cross-examination, technical witness conferencing ... 124

Role of the expert, open discourse with tribunal ... 137

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Christopher Seppälä
Absent adversary, lessons to learn 190

Robert H Smit
United States, speak with, not at, arbitrators 312

Luke Sobota
Effective use of technology, supportive, not distracting 173

Christopher Style QC
United Kingdom
concise written submissions 296
early, comprehensive presentation 297

Jingzhou Tao
East meets West, efficiency versus cultural sensitivity 250

John M Townsend
Closing arguments
being mindful of time limits 150
get the tribunal's attention 153
Cross-examination, questioning the tribunal's expert 121
Direct examination, know your arbitrators' backgrounds 77
Initial hearing, the chair is in control 41
Opening submissions
don't surrender control to PowerPoint 65
welcome tribunal questions 62
Written advocacy, convincing narrative 21

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27

Cultural Considerations in Advocacy: English-Speaking Africa

Stanley U Nweke-Eze[1]

Legal systems of English-speaking African countries

The legal landscape of English-speaking African countries[2] is primarily based on the common law system,[3] although a few English-speaking countries in Africa are rooted in a combination of the civil and common law systems.[4] These facts are laid bare by various historical foreign influences that have shaped the formation of the English-speaking African countries (and indeed African countries in general) prior to their legal and political independence. These divergences seep in and play a considerable part in influencing the practice of law in these countries – arbitration being no exception.

With a particular focus on advocacy in arbitration, the divide suggests different styles of presentation and expression, both orally and in writing in the course of arbitral proceedings. The common law system adopts the adversarial style, in which it falls on the advocate to take control and present his or her client's case, with the arbitral tribunal playing the part of an umpire. The civil law system, on the other hand, is embedded in the inquisitorial style with minimal emphasis on oral advocacy and the arbitral tribunal tasked with taking control of the fact-finding exercise in the course of the proceedings. The advocate's

1 Stanley U Nweke-Eze is an international arbitration and litigation associate at Templars.

2 Core English-speaking or anglophone African countries include Botswana, Eswatini (Swaziland), Ethiopia, Ghana, Kenya, Lesotho, Liberia, Malawi, Namibia, Nigeria, Sierra Leone, Somalia, South Africa, Tanzania, The Gambia, Uganda, Zambia and Zimbabwe. See Herbert Smith Freehills, 'A Multi-Jurisdictional Review: Dispute Resolution in Africa' (2nd Edition, September 2016), 6.

3 Ghana, Kenya, Liberia, Malawi, Nigeria, Sierra Leone, Tanzania, Uganda and Zambia operate common law legal systems. See Herbert Smith Freehills, 'A Multi-Jurisdictional Review: Dispute Resolution in Africa' (2nd Edition, September 2016), 6.

4 Botswana, Ethiopia, Lesotho, Namibia, Somalia, South-Africa, Swaziland, The Gambia and Zimbabwe operate mixed common law and civil law legal systems. See Herbert Smith Freehills, 'A Multi-Jurisdictional Review: Dispute Resolution in Africa' (2nd Edition, September 2016), 6.

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role would usually be limited to presenting his or her client's case in accordance with the directives of the tribunal, which plays an active part in the taking of evidence, including the examination of witnesses and experts.

Without a doubt, the background of the tribunal members and advocates affects their position and approach towards advocacy during arbitral proceedings. This dichotomy between the common law and civil law systems notwithstanding, international arbitration is increasingly proving disruptive in limiting the influence of cultural considerations and legal traditions in arbitral proceedings within most countries in the English-speaking African region through the provision of standardised frameworks, guidelines and international soft laws (such as the IBA Rules on the Taking of Evidence in International Arbitration) that govern arbitral proceedings across the board. Indeed, a number of English-speaking African countries have already aligned their arbitration rules and practices with recognised international or uniform standards,[5] or are in the process of doing so.

Perception of 'advocacy'

Advocacy as an art of persuasion is probably as old as law itself. It is no exaggeration to say that cases are won on good advocacy, while others are lost on bad advocacy. Advocacy in its purest form is generally considered, particularly in most English-speaking African countries, as a technique that is designed to ultimately persuade an arbitral tribunal to accept the arguments and position of an advocate and consequently grant the relief that he or she seeks. This objective is ideally achieved by thoroughly understanding the facts of the dispute (which is usually rooted in contract) and being able to relay it to the tribunal in a structured and chronological manner; and assisting the tribunal to understand the issues for determination in the case that is being presented, in a clear, efficient and persuasive manner, as far as the factual background and applicable legal principles permit.

Arguments are generally based on legal precedents (to the extent possible) and applicable legal rules, which are then applied to the facts. When novel and contemporary legal problems present themselves, advocates within the region are typically expected to rely on treatises, academic articles and other secondary sources.

Oral advocacy

Representation of parties in arbitration proceedings

Restrictions, where they exist, on legal representation before national courts in English-speaking African jurisdictions are typically embedded in the relevant country's local laws or court decisions. However, this form of restriction is generally not extended to arbitral proceedings.[6] There is usually no restriction within the region on who may represent a party in arbitral proceedings as many local laws do not have express provisions on

5 An example is the United Nations Commission on International Trade Law's Model Law on International Commercial Arbitration.

6 For example, Ghana, Botswana, Kenya, Namibia, South Africa and Swaziland have no restrictions in this regard. In Kenya, for instance, other professionals, such as engineers and architects, would typically represent parties on construction disputes. See Herbert Smith Freehills, 'A Multi-Jurisdictional Review: Dispute Resolution in Africa' (2nd Edition, September 2016), 153.

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representation. In practice, however, legal practitioners tend to represent parties in arbitral proceedings, presumably because arbitral proceedings are usually adversarial, and legal practitioners, with their experience in court-room advocacy, are familiar with the procedure and practical aspects of arbitration, while relying on expert evidence, where necessary, for the technical aspects of the dispute.

Whether a prospective advocate before an arbitral tribunal must be qualified in the relevant jurisdiction that is the seat of arbitration differs from one legal system to the other. In Nigeria and other similar jurisdictions, although foreign counsel advise parties in international arbitration, they do not typically act as advocates during such proceedings.[7]

Oral presentations

It should be borne in mind that a tribunal is made up of human beings who are, in most cases, influenced by 'human elements' that are extraneous to the subject of the arbitral proceedings. For example, an unpleasant tone, an irritating choice of words or a repelling approach towards the tribunal could have a negative effect on its members and ultimately affect their view of the merits of the case. Hence, advocacy as a technique must be used effectively and within the bounds of reason, and an advocate must be able to properly interpret the human elements of pride, fear and confidence (among others), while interacting with the actors of arbitral proceedings, including opposing witnesses, advocates, experts and the members of the tribunal.

Separately, most arbitral tribunals in English-speaking African countries expect an advocate to have a good grasp of the applicable procedures governing the proceedings as well as the principal issues for consideration in the case, and to present those issues in a structured and concise manner so that the tribunal can follow the advocate's case and presentation, and to be able to answer any follow-up questions if necessary. It is also important that advocates realise that a courtroom presentation to a judge may differ from a presentation made during arbitral proceedings in certain circumstances, particularly if the members of the tribunal are not legal practitioners. It follows, therefore, that an advocate should minimise legalese and empty rhetoric, and be mindful of the audience at all times.

Examination of witnesses and experts

The choice and presentation of witnesses and experts in arbitral proceedings fall to the advocate in most cases, rather than the tribunal, especially when the legal background of the tribunal members is rooted in common law. A tribunal that is made up of people with a civil law background normally approaches its tasks inquisitorially.[8]

7 In Nigeria, although there appears to be no express restriction on representation of parties in arbitration proceedings because Article 4 of the Arbitration Rules contained in the First Schedule to the Arbitration and Conciliation Act provides as follows: 'The parties may be represented or assisted by legal practitioners of their choice.' Nigerian courts have not interpreted this provision, but a domestic arbitral tribunal has interpreted same as restricting the representation of parties in arbitral proceedings to persons qualified to practise Nigerian law. See Herbert Smith Freehills, 'A Multi-Jurisdictional Review: Dispute Resolution in Africa' (2nd Edition, September 2016), 229.

8 Cross-examination of a witness is unlikely to occur if the advocate or the tribunal has a civil law background.

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In any case, the witnesses and experts put forward by each party will generally be expected to front-load their written statements, which will constitute their testimony in the proceedings. These witnesses or experts can then be cross-examined by the opposing advocate on the basis of the written statements, if necessary, following their adoption as evidence in the arbitral proceedings.

The style of cross-examination of witnesses to be used during proceedings is largely dependent on and determined by the legal traditions (civil law/common law) of the members of the tribunal. This could also inform the sorts of questions that would be deemed acceptable by the tribunal. In any case, the cliché of 'the sky is the limit in cross-examination' is usually not obtainable, as questions are generally expected to be limited to relevant issues for determination. Indeed, the tribunal has, in most instances, the power to moderate the range of questions without necessarily encroaching on the general liberty afforded to the advocate to cross-examine the witness or expert.

Cross-examination questions would usually be detailed as the advocate strives to drive home and restate important points about which he or she wishes the tribunal to take note.

Advocates must always recognise that background and jurisdiction create a chasm in educational foundation and, as such (depending on the nature of the matter), possible witnesses and experts would be drawn from a range of the different societal classifications. Understanding this reality means that the advocate must endeavour to understand the witness and expert in question so as to tailor the style of questioning that can elicit the most favourable answers and aid his or her case. However, a 'one size fits all' approach is never appropriate.

Effectiveness in the course of cross-examination requires a combination of using leading questions to steer the witness tactfully in the direction the advocate seeks and maintaining brevity. Employing the use of long-winded questions creates a risk of the witness, expert or even the tribunal missing the crucial point that the advocate seeks to make.

Written advocacy

Although oral advocacy is given more emphasis in common law jurisdictions that make up the bulk of English-speaking African countries, the ability of an advocate to express himself or herself in writing is as important as the ability to express himself or herself orally. Indeed, a few arbitral proceedings, particularly construction-related disputes, are conducted solely in writing, with no hearing at all.

There has been a shift in recent years towards significantly limiting the time allowed for oral advocacy in court to save time and reduce the ever-rising cost of litigation. Likewise, many arbitral tribunals are moving inexorably towards written advocacy. The trend is to have advocates simply adopt their arguments and use the limited time to adumbrate on certain important issues. Hence, the choice between written and oral submissions is not typically an 'either-or' situation.

Pleadings, as well as interlocutory, opening and closing submissions are, indeed, expected to be well-written and supported by the relevant authorities being relied on. It is generally believed that the hallmark of good writing is clarity, and that transcends merely staying within the confines of conventional grammar, punctuation, syntax and semantics. In other words, a good advocate should eloquently work towards a clear goal with every piece of

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writing. Arguments on the issues for determination should be canvassed in a chronological order and devoid of ambiguities.

Conciseness and structure are also key. This entails being brief with an appropriate level of detail (depending on the context and subject matter involved), and conveying points succinctly, without the use of superfluous words. A deliberate and meaningful structure has to be considered. For example, the first couple of paragraphs or sections should be used to summarise an advocate's views as logically as possible.

Concluding remarks

Most English-speaking African countries share similar degrees of professional and cultural experience. This affinity can be traced to the fact that most of the English-speaking legal systems in Africa, with a few exceptions, are cut from the same stock – the common law system. That being said, the flexible nature of arbitration encourages arbitral tribunals, advocates and parties to structure the applicable procedure to the circumstances of the dispute and the background of the advocates and tribunal members. Consequently, tribunals are usually eager to adopt features from the common law and civil law systems to achieve efficiency during arbitral proceedings.

To effectively represent clients in English-speaking African countries, there must be a thorough understanding of the various nuances that could come into play. Advocates are generally expected, in adopting the art of advocacy in all its forms, to be proficient and persuasive in eliciting what is relevant and support the client's position, on the basis of the available evidence and legal principles. An excellent oral advocate is capable of grasping the essential issues of a case and conveying them to the tribunal in the manner that best suits the client's interests. Effective written advocacy in particular connotes the ability to bring the issues into the central arena and assist the tribunal in having a meaningful dialogue with the advocate, where the need arises. This, in turn, will assist in a speedy determination of the issues in question.

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Appendix 1

The Contributing Authors

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Stanley U Nweke-Eze is an international arbitration and litigation associate at Templars. He is admitted to practise law in Nigeria and the state of New York. His practice focuses on complex and high-value commercial and public law litigation, international and domestic commercial and investment treaty arbitrations, commercial mediation, and public international law. He has experience in disputes across a broad range of industries, including energy and natural resources, taxation, media and entertainment, and general commercial law issues. Before joining Templars, Stanley worked at international law firms in London.

Stanley obtained an LLB degree (first class honours) from Nnamdi Azikwe University, where he won several academic awards, including for brief-writing and advocacy. He also holds LLM degrees in commercial law and international economic law from the University of Cambridge and Harvard Law School, respectively. At the Nigerian Law School, he won academic prizes in three of the five courses examined during the 2013–2014 academic year.

He has served as an editor of several journals, including the *Cambridge Journal of International and Comparative Law*, *Harvard International Law Journal*, *Harvard Negotiation Law Review* and *Harvard Africa Policy Journal*. He is a member of the Young International Arbitration Group of the LCIA and the Young Public International Law Group, and is currently a mentee on the Young ICCA Mentorship Programme and the Young ITA Mentorship Programme.

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Successful advocacy is always a challenge. Throw in different languages, a matrix of (exotic) laws and differing cultural backgrounds as well and you have advocacy in international arbitration.

Global Arbitration Review's *Guide to Advocacy* is for lawyers who wish to transcend these obstacles and be as effective in the international sphere as they are used to being elsewhere. Aimed at practitioners of all backgrounds and at all levels of experience, this Guide covers everything from case strategy to the hard skills of written advocacy and cross-examination, and much more. It also contains the wit and wisdom on advocacy of more than 40 practising arbitrators, including some of the world's biggest names in this field.

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