Global Arbitration Review

The Guide to Advocacy

Editors
Stephen Jagusch QC, Philippe Pinsolle and Alexander G Leventhal

Fifth Edition

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Publisher's Note

Global Arbitration Review is delighted to publish this new edition of *The Guide to Advocacy*.

For those new to Global Arbitration Review (GAR), we are the online home for international arbitration specialists, telling them all they need to know about everything that matters.

Most know us for our daily news and analysis. But we also provide more in-depth content: including books like this one; regional reviews; conferences with a bit of flair to them; and time-saving workflow tools. Visit us at www.globalarbitrationreview.com to find out more.

As the unofficial 'official journal' of international arbitration, sometimes we spot gaps in the literature. At other times people point them out to us. That was the case with advocacy and international arbitration. We are indebted to editors Philippe Pinsolle and Stephen Jagusch for having spotted the gap and suggesting we cooperate on something.

The Guide to Advocacy is the result.

It aims to provide those newer to international arbitration with the tools to succeed as an advocate, whatever their national origin, and to provide the more experienced with insight into cultural and regional variations. In its short lifetime it has grown beyond either GAR's or the editors' original conception. One of the reasons for its success are the 'arbitrator boxes' – see the Index to Arbitrator's Comments on page ix if you don't know what I mean) – wherein arbitrators, many of whom have been advocates themselves, share their wisdom and war stories, and divulge what advocacy techniques work from their perspective. We have some pretty remarkable names (and are always on the look out for more – so please do share this open invitation to get in touch with anyone who has impressed you).

Alas since the last edition we lost one of those remarkable names with the passing of Stephen Bond (1943–2020). Steve was a former head of the ICC and of White & Case's international arbitration team, and a refreshingly clear-eyed thinker. As with Emmanuel Gaillard in 2021, the world of international arbitration was suddenly much poorer when he went. I would urge those who have not seen the two GAR pieces published in commemoration to look them up.[1] One of the things that comes across strongly is how much Steve loved to teach, in his own fashion. With that in mind we thought it would be

1 https://globalarbitrationreview.com/tributes-stephen-bond; https://globalarbitrationreview.com/stephen-bond-1943-2020.

fitting to preserve his arbitrator boxes for the benefit of future generations. So you will still see his name appearing throughout.

We hope you find the guide useful. If you do, you may be interested in some of the other books in the GAR Guides series, which have the same tone. They cover energy, construction, M&A, and mining disputes and (from later this year) evidence, and investor–state disputes, in the same unique, practical way. We also have a guide to assessing damages, and a citation manual (*Universal Citation in International Arbitration - UCIA*). You will find all of them in e-form on our site, with hard copies available to buy if you aren't already a subscriber.

My thanks to our editors Stephen Jagusch QC, Philippe Pinsolle and Alexander G Leventhal for their vision and editorial oversight, to our exceptional contributors for the energy they have put into bringing it to life, and to my colleagues in our production team for achieving such a polished work. And also to practitioners Neville Byford, Stephen Fietta and Sean Upson ('The Role of the Expert in Advocacy') and Flore Poloni and Kabir Duggal ('Tips for Second Chairing an Oral Argument') for giving us extra material to enrich those chapters.

David Samuels
Publisher, GAR
August 2021

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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] Various historical foreign influences shaped the formation of the English-speaking African countries (and indeed African countries in general) prior to their legal and political independence. These influences also shaped the practice of law in these countries – arbitration being no exception.

With a particular focus on advocacy in arbitration, the common and civil law 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 role would usually be limited to presenting his or her client's

1 Stanley U Nweke-Eze is a senior 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.

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.

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 the 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 arbitral 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 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

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.

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]

Selecting the tribunal members

Selecting the tribunal is a very important aspect of the arbitral proceedings because it is generally believed that parties sink or swim with their arbitrators. Where the parties are, by their arbitration agreement, required to choose the arbitrators, they must take care to ensure that competent and appropriate arbitrators are appointed. Particularly, the parties must look out for the language, background and experience of the proposed arbitrator candidates. For instance, in arbitral proceedings that are required to be conducted in English, the parties must avoid appointing an arbitrator who does not have a good understanding of the language, so that nothing is lost in communication.

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 an antagonistic disposition towards the tribunal could have a negative effect on tribunal 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. 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.

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.

Similarly, an advocate must have insight into how an arbitrator's cultural background affects his or her actions and omissions, and prepare for such. Despite the existence of only two major legal systems, the English-speaking African region comprises many ethnicities, languages, religions and customs. In particular, religion and ethnicity considerations form a bedrock of the identity of some African arbitrators, even more than national identities.

In most ethnic groups, values of conciliation are emphasised, and many customary laws are conciliatory in nature. An excessively adversarial stance, particularly in relation to minor procedural issues, could be frowned upon by some tribunal members. Also, it may be necessary for advocates to consider religious factors by not scheduling arbitral proceedings on or close to Christian and Muslim holidays, prayer times and fasting periods. It is therefore necessary for every advocate to be familiar with the legal, social, cultural, religious and political backgrounds of arbitrators before appointment.

Overall, an advocate must strive for a favourable first impression. Appearance is an integral part of African values and an advocate's conduct during initial contact and examination of the first documents may dull cultural sensitivity. Full disclosure of evidence and a complete, yet concise, statement of one's legal position are important in creating a favourable first impression.

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]

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 based on 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

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

witness and expert in question to tailor the style of questioning that can elicit the most favourable answers and aid his or her case. A 'one size fits all' approach is never appropriate.

Due to the multiplicity of witnesses' backgrounds, counsel should adopt simple and clear language to convey questions, while avoiding being too forceful or taking any other actions that may be considered disrespectful. Witnesses should always be treated with sensitivity.

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.

Virtual hearings

Arbitration practitioners are not entirely new to virtual hearings in various aspects of arbitral proceedings. For example, discussions on administrative and procedural matters are usually held via telephone and videoconferencing. However, the covid-19 pandemic has hastened the adoption of virtual hearings in full scale following the imposition of lock-downs and travel restrictions in various countries across the globe.

Factors to consider in relation to advocacy in virtual hearings in English-speaking Africa (and most other African countries) include time-zone differences, allowance for disruptions due to power outages and internet connection issues, data protection and privacy concerns, and issues concerning specialised arbitral proceedings, such as construction disputes where site visits could be helpful.[9] There is also a need for advocates to recognise that long virtual sessions may be inimical to their cause, and therefore agree on shorter periods for each day as well as increase the number of breaks during the sessions.

Similarly, virtual hearings do not fully convey the use of voice intonation, gestures and body language. Advocates should opt to convey the entirety of their position through simple and concise language. Most importantly, advocates must ensure they are adequately prepared and knowledgeable in the use of virtual hearing platforms.

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.

9 See Stanley U Nweke-Eze, 'Virtual Hearings in Arbitration: The Way Forward or Not?' (Africa Arbitration Blog, 2020), available at <https://africaarbitration.org/2020/10/14/virtual-hearings-in-arbitration-the-way-forward-or-not-by-stanley-u-nweke-eze/>.

Pleadings, as well as interlocutory, opening and closing submissions, are 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 writing. Arguments on the issues for determination should be canvassed in 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.

Nonetheless, arbitrators from a civil law background may expect substantially detailed documents, including a full statement and all particulars and evidence in support. An advocate should be informed and guided by the background of the arbitrator in preparing written submissions.

Further, while most common law arbitrators would be willing to order a party to search for and produce documents unhelpful to its cause, some civil law arbitrators may be unwilling to grant such applications. Despite the aim of the IBA Rules on the Taking of Evidence in International Arbitration to balance these considerations, the production of documents can differ in each case. An advocate should, therefore, consider the background of the tribunal members before submitting an application for disclosure of documents, especially where such application has a wide scope or will be unhelpful to the cause of the other party.

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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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*, the *Harvard International Law Journal*, the *Harvard Negotiation Law Review* and the *Harvard Africa Policy Journal*. He is a member of the Africa Regional Committee of the SIAC Users Council, the Association of Young Arbitrators and the ICC Young Arbitrations Forum, and is currently a group adviser on the Young ICCA Mentorship Programme.