

The ASA Charter of Advocacy in International Commercial Arbitration

As a constituent part of international commerce, international commercial arbitration must be at the service of the international business community. This implies that the principal objective of international commercial arbitration must be the efficiency of the process, avoiding unnecessary confrontation, producing fair and equitable results and contributing to the restoration of constructive business relations.

The arbitral process must be tailored to meet the needs and legitimate expectations of the users, namely the parties. The parties' representatives, referred to here as "counsel", have a key role to play in this process. First of all, counsel owe loyalty and effective services to their clients. However, the Charter considers the role of counsel in its entirety, which encompasses all of the required skills that counsel need to master in order to ensure that the international commercial arbitration process is responsive to the needs and expectations of its constituency. It is these skills that form effective advocacy in international commercial arbitration and that the Charter seeks to promote. ASA is aware that these objectives can be promoted in a variety of ways. Therefore, the present Charter sets out some basic principles. As experience in the application of the Charter advances, these principles may evolve and may be refined.

1. Counsel and the Arbitral Tribunal

Effective advocacy in international commercial arbitration is above all communication with the arbitral tribunal, understanding its task and assisting the arbitral tribunal in meeting its obligations. This implies the following:

- Making a clear, concise and user-friendly presentation of the case, setting out the position of the party represented by counsel and identifying those aspects in which this position differs from that of the opponent(s);
- ensuring that all submissions, whether written or oral, are logically structured and as succinct as possible;
- presenting the evidence in a manner which facilitates the task of the tribunal in establishing the facts that are relevant for its decision;
- assisting the tribunal in understanding the legal and technical rules relevant for the resolution of the dispute;
- ensuring that evidence and argument on legal and technical matters are not presented in a misleading manner; and
- assisting the tribunal in understanding the cultural, commercial and technical context in which the client and other protagonists conduct their business and the perspective in which they perceive the case.

In preparing and presenting the case, counsel should be mindful that the arbitral tribunal must reach a decision without the support of outside assistance; user-friendly presentation of the material is desirable.

Further, it should be borne in mind that the procedure is not assisted by counsel entering into long, protracted, argumentative and non-constructive correspondence with the other side and most importantly, with the arbitral tribunal.

Such tactics prove to be costly and are contrary to the principal objective of international commercial arbitration, which is to provide users with an efficient instrument for the resolution of international disputes.

2. Counsel and the Arbitral Procedure

Most counsel in international commercial arbitration have received their training and initial experience in or by reference to some form of domestic litigation. When approaching international arbitration proceedings, counsel should be mindful that the training and experience of other players in the process may differ, having regard to various legal, social and cultural backgrounds.

Whilst the rules and practices in domestic civil procedure may have features which are useful also for international arbitration, counsel should not be concerned with the exportation of these rules and practices into the international arena but rather, with the efficiency in presenting the parties' cases, thereby avoiding unnecessary cost and delay. It is important to bear in mind that each case has its own specificity and needs, and as such, counsel should cooperate with the arbitral tribunal in ensuring that the needs of the case are best met by the procedure.

The purpose of the procedure is to resolve the dispute and not to settle personal scores between the protagonists. Counsel should contribute to a sober and business-like approach to the procedure. Cooperation with the arbitral tribunal and opposite counsel in the organisation of the procedure is desirable, for it promotes the efficient conduct of the arbitration and assists in concentrating the time and energy of all the participants on the substantive resolution of the dispute.

In some cases, "ambush" tactics may create short-term advantages, but ultimately resort to such methods neither assists the arbitral tribunal nor contributes to the sound administration of justice, which requires that both parties have a fair chance to be heard. Such manoeuvres cause a loss of time and money, not to mention the ill feelings created by a sense of unfairness which normally would attach to an ambush. Therefore, they do not even serve the interests of the lawyer's client.

3. Counsel and the Other Players in the Arbitral Process

An arbitral tribunal normally approaches the case from the assumption that the parties to the dispute have legitimate reasons to differ in their positions. Effective advocacy respects this basic assumption. Consequently,

- the dignity of the other party, its witnesses and experts should be respected;
- they should be treated with courtesy;
- personal attacks should be avoided; and
- allowance should be made for difficulties in communication due to differences in language or cultural background.

4. Counsel and the Client Party to the Arbitration

It is counsel's principal task to convey to the tribunal the client's perspective of the dispute forcefully and convincingly.

In order to do this effectively, counsel should seek to promote a realistic assessment of the case and its possible outcome with the client. This will require: a critical analysis of the client's views and positions; pointing out strength and weaknesses of the case to the client; and associating the client closely in the development of strategic options. Counsel must continuously update the assessment of the strengths and weaknesses in the client's case as the case progresses. This ensures that the case strategy is always properly monitored.

The in-depth and continuous assessment of the strengths and weaknesses of the client's case also enables counsel to advise the client on opportunities for settlement. This is an important task of counsel, for it serves the ultimate purpose of the process: the rapid and cost-efficient resolution of disputes. A major function of counsel's role is to assemble the evidence that is to be presented to the arbitral tribunal. Counsel should perform this task with critical objectivity, developing the case theory based on the evidence that is available, rather than bending the evidence to meet a case theory that has been preconceived by the client or created to meet its expectations.

Efficiency in preparing and conducting the case may require mobilisation of the client's in-house resources. Counsel should be open to this potential but at the same time should keep the strategic control over the process. If other services are required, such as technical experts, accountants or claims consultants, it is counsel's obligation to see to it that their contribution addresses the points in issue and assists the tribunal.

Counsel must be mindful of the cultural and commercial context of the client. One of the principal tasks of counsel consists in assisting the tribunal in understanding this context. In all cases, counsel must retain the requisite independence from the client and avoid any uncritical personal espousal of the client's position. Although this is one of the most difficult tasks for counsel, it is of paramount importance and constitutes one of the most effective hallmarks of effective advocacy in international commercial arbitration.

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