POST-EVENT REPORT ON MASTERING WRITTEN AND ORAL ADVOCACY WORKSHOP

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YOUNG AFSA

YOUNG ICCA
OPENING THE DOORS OF INTERNATIONAL ARBITRATION

INTRODUCTION

The hybrid Young AFSA and Young ICCA workshop on Mastering Written and Oral Advocacy in International Arbitration, which was held on 26 September 2024, offered young legal professionals a unique platform to refine their advocacy skills. The workshop was generously hosted by AFSA and kindly sponsored by BriefCo and Baker McKenzie. Featuring sessions led by seasoned practitioners, the workshop explored essential techniques in written and oral advocacy, emphasising the importance of preparation, clarity, and adaptability. Participants engaged in discussions on the nuances of international arbitration, including understanding cultural sensitivities, crafting persuasive arguments, and handling unexpected challenges. This event was not only a deep dive into practical advocacy but also an invaluable opportunity for young legal practitioners to connect and learn. The online recording of this event is available at the following link: https://www.youtube.com/watch?v=RCseHXgeE0c.

KEYNOTE ADDRESS BY MOHAMMED CHOHAN SC

In his keynote address, Mohammed Chohan SC emphasised that advocacy is an art built on preparation, clarity, and ethical integrity. He described advocacy as a blend of skill and intuition, sharing an analogy: just as no one would trust an untrained pilot, clients rely on advocates who are prepared and experienced. This need for readiness was illustrated by a personal story where Mohammed had to take over a cross-examination unexpectedly, reinforcing that preparation is the foundation of effective advocacy.

Mohammed also highlighted simplicity in expression, noting that clear language enhances understanding and reduces ambiguity. He referenced the humorous example from Lynne Truss's book, *Eats, Shoots & Leaves*, showing how even minor grammatical errors can alter meaning and reception. Advocates, he argued, should focus on straightforward, impactful communication.

Integrity, Mohammed stressed, is fundamental to advocacy. Advocates should never mislead the court or surprise the opponent with hidden arguments. Ethical practice builds trust, he explained, not just with the client but with the tribunal itself.

He further advised on the subtle power of body language and visual aids, explaining that non-verbal cues like posture and eye contact significantly affect perception. Visual aids, he noted, are particularly useful in enhancing retention - judges retain about 60% more information when visuals are used effectively. While written and oral advocacy differ in style, Mohammed urged young practitioners to master both, as each form complements the other.

Concluding, he encouraged continuous learning, underscoring that advocacy training is a lifelong journey. Mohammed's address set an inspirational tone, urging young advocates to build careers marked by preparation, clarity, and ethical responsibility.

MASTERING WRITTEN ADVOCACY IN INTERNATIONAL ARBITRATION

Following the keynote address, the workshop proceeded to the first panel discussion on "Mastering Written Advocacy in Arbitration – from the basics and beyond", which was moderated by Nakasamba Banda-Chanda (AMW & Co. Legal Practitioners, Zambia).

The Panellists comprised of seasoned practitioners (i) Pranisha Maharaj Pillay, an advocate and member of the Johannesburg Society of Advocates with over 14 years' experience in the Constitutional and Superior Courts of South Africa, and regularly undertakes arbitrations; (ii) Jack Ferris, a South African advocate with more than 16 years' experience. He is the director/head Industrials, Manufacturing and Trade Sector at CDH, a leading firm in Africa, (iii) John Ohaga SC a renowned international arbitrator and Managing Partner at TripleOKLaw in Kenya and (iv) Kameshni Pillay SC, a member of the Johannesburg bar since 2001 with extensive experience in commercial disputes.

Pranisha Pillay outlined the necessity and importance of written advocacy during the arbitration process in persuading the tribunal that one's case contended for, should be the case that succeeds. In the art of persuasion, she highlighted that written advocacy is as powerful a tool in persuasion as oral advocacy. Quoting the words of Thomas Sprang Casey in the Guide to Advocacy, 6th edition, she noted that "*oral advocacy heroics will rarely overcome a failure to coherently articulate the thrust of a case in writing prior to a hearing*". And that is why written advocacy is important, acting as the roadmap for one's entire case. It gives the first impression to the decision maker long before the contest and the hearing even starts. She broke down the requirements, emphasising that these would ultimately depend on the rules applicable, but ultimately providing a description of the relevant facts and agreements supporting either your claim or defence, legal theory, points at issue and the relief or remedy sought. As written statements serve as the first opportunity to present uninterrupted intelligible and coherent overview of your client's case, participants were reminded to make an impactful first impression to the arbitrator /decision maker on your client's case.

Emphasising the critical role of preparation in the art of advocacy, she identified the first and most important step of establishing one's case theory as a precursor to developing the roadmap. This determines the relevant facts to be brought out, witnesses, documents or other evidence needed, and ultimately finding a place where the law and the facts will intersect to achieve the outcome sought by a client in arbitration. Undertaking curveball preparation is a crucial step in developing your case, thus appreciating the strengths and weaknesses of your opponent's case. In making first impressions, she highlighted the need for impeccable presentation of everything gathered in formatting, spellings, and grammar.

Jack Ferris then proceeded to discuss the South African context and interplay between the attorney and the advocate. He outlined the traditional perspective in South Africa which distinguishes attorneys and advocates, and went further to discuss the evolution of the role of attorneys in South Africa, in particular dealing with arbitrations.

He also emphasised the need to ensure written submissions are fit for purpose, not just with regards the issues, causes of action, or the evidence, but also the individual one is trying to persuade, i.e. the arbitrator. In order to persuade someone, you also need to know the person that you want to persuade. The cultural differences arising from South African court practice and how written submissions are drafted was acknowledged, though gradually changing to align with international style of drafting.

Finally, in addressing the effect of Artificial Intelligence ("AI") on written advocacy in South Africa, he highlighted the use of technology in the preparation of written statements, but cautioned against the manner that it should be used. This is because unlike AI, there are various considerations that the human factor brings to the art of advocacy. And so, AI should be restricted to collating information, research, structure, etc.

Mr. John Ohaga, SC discussed arbitration, in the international context, bringing out the stark differences in the way in which cultural, legal traditions and procedural biases affect arbitration practice. International arbitration essentially takes one out of their comfort zone and these differences require a very thoughtful approach, so as to have a positive impact on the tribunal and get the best possible result for your client. Cultural divide is a divide with respect to legal cultures, and also culture from which the parties come from. Sensitivity and mutual respect is at the core of one's approach.

In summary, he highlighted key considerations arising from this divide, including (i) tailoring one's presentation to accommodate cultural norms (ii) simplicity to ensure effective communication (iii) educating and managing one's clients on what to expect and setting realistic goals (iv) building a rapport with the tribunal through mutual respect, and avoidance of assumptions of superiority of cultures (v) choice of arbitrator who appreciates the relevant cultural differences.

Finally, Kameshni Pilay SC summarised the presentations by the respective panellists and provided tips and style for drafting written statements as follows;

i. First know your procedure, understand your arbitration clause, and study the applicable rules so as to appreciate what is required of you as an advocate.

ii. Be aware of technical requirements as each document required to be submitted may have different set of rules that applies to it.

iii. Understand the nomenclature e.g. Statement of Claim and a Statement of Case are two different documents with different technical requirements. Get on top of time periods, whether you are from the bar or the sidebar, take this responsibility as your own. Make sure that you are not late in your submission of documents. The last thing you want to do is have to apply for condemnation when it could have been avoided.

iv. Investigate and understand your facts thoroughly,

v. Know which law is applicable, the different legal traditions and principles. You must be agile, prepared to grow and learn.

vi. Develop your case theory.

vii. Know the personnel involved and build that rapport with your tribunal.

viii. Be concise, clear, coherent and compelling

ix. Make it simple and easy to follow

x. Ensure to remove all typos and grammatical errors

xi. Get the structure right, using tools like automatic table of contents in Microsoft Word. Include an overview, which provides a quick snapshot of your entire case

Additional tips were shared by the panellists and attendees, including (i) avoiding procrastination in getting written statements done, ensuring each paragraph contains one idea only, use of active and not passive language, personalising one's client, avoiding the use of first-person language such as "*in my opinion*" as that reduces the strength of the argument, emphasising key concepts, etc.

Ultimately, the session outlined the challenges of written advocacy and shared tips to be applied in making this process a success. The theme occurring during the session was that preparation was key to mastering written advocacy. In the words of Ernest Hemingway, "*there is nothing to writing, you just sit down at a typewriter and bleed*".

MASTERING ORAL ADVOCACY IN INTERNATIONAL ARBITRATION

In this panel moderated by Kirsten Wolmarans (Partner at Webber Wenzel, South Africa), which focused on "Mastering Oral Advocacy in International Arbitration", Young AFSA and Young ICCA brought together a distinguished panel of experts to share their insights on effective oral advocacy. Justice David Unterhalter, Michelle Porter-Wright, Lawrence Schafer, and Zelda Hunter guided participants through the art of persuasion in arbitration, covering essential strategies from preparation to closing arguments. Their diverse expertise across arbitration and advocacy provided young practitioners with invaluable lessons in clarity, adaptability, and understanding cultural nuances.

Setting the stage in opening submissions

Opening submissions are crucial for framing the advocate's argument and establishing rapport with the tribunal. Justice Unterhalter highlighted that arbitration, especially in international contexts, requires understanding procedural and cultural expectations. He noted that arbitration procedures are highly varied, with tribunals composed of individuals from diverse legal systems, each bringing unique perspectives on advocacy. Recognising these differences is essential for an impactful opening.

In looking at key strategies for effective openings:

- Justice Unterhalter advised that opening submissions should be concise, highlighting the main points without unnecessary detail. By the time hearings begin, both the tribunal and opposing counsel have often studied the materials extensively, making it more effective to focus on the core questions.
- Advocates should provide a "roadmap" that outlines the direction and key arguments of their case, helping the tribunal follow and anticipate each stage of the argument.
- Effective oral advocacy relies on balance rather than hyperbole. Justice Unterhalter recommended avoiding an overconfident approach; instead, advocates should focus on establishing credibility by acknowledging any challenges upfront.

Lawrence added that simplicity is critical in arbitration. Unlike courtroom settings, which have formal structures, arbitration is often more relaxed, and the tone should be conversational. He encouraged advocates to make complex arguments accessible and straightforward, which can better capture the tribunal's attention.

Preparation and the power of facts

Preparation was a recurring theme, with panellists emphasising the importance of thorough familiarity with case facts. Lawrence explained that a successful argument often depends more on mastering the facts than on legal intricacies.

The following preparation techniques were discussed:

- Lawrence recommended creating a timeline of evidence to ensure organisation and logical flow during presentations. This approach allows advocates to recall details efficiently and provides a structured narrative for the tribunal.
- Lawrence noted that many witness statements are crafted by attorneys, so advocates should scrutinise them to ensure they accurately reflect the witness's authentic voice.
- Justice Unterhalter advised advocates to be prepared to adapt their presentations based on tribunal questions or unexpected developments, which is particularly valuable in arbitration where flexibility is often required.
- Michelle emphasised that preparation should also consider the style and expectations of the tribunal, especially in smaller markets.

Successful strategies in cross examination

Cross-examination can be the most challenging stage of oral advocacy, where the advocate's skill in questioning is directly tested. The panellists shared insights on how to approach various types of witnesses, from uncooperative individuals to highly skilled experts.

The following techniques for different types of witnesses was discussed:

- Lawrence advised using short, clear questions to counteract evasive witnesses. Repeating questions when necessary signals to the tribunal that the advocate is entitled to a direct answer, which often prompts tribunal support.
- Zelda pointed out that witnesses who appear overly rehearsed can often be unsettled by unexpected documentary evidence or pointed questions that require specific, unscripted responses. This tactic can expose inconsistencies, as rehearsed answers tend to lack depth.
- Justice Unterhalter noted that cross-examining experts requires a different approach. Rather than directly challenging an expert's qualifications, advocates should focus on questioning the underlying assumptions and facts the expert relies on. By shifting the focus to these assumptions, the advocate can reveal weaknesses in the expert's analysis without direct confrontation.

Adaptability and body language in virtual hearings

Body language and adaptability are subtle yet powerful aspects of effective oral advocacy. Non-verbal cues like posture, eye contact, and controlled gestures can convey confidence and authority. Lawrence stressed that maintaining a composed, authoritative presence helps build trust with the tribunal.

Virtual hearings, which have become more common post-COVID, present unique challenges for advocates, particularly in conveying body language and maintaining engagement. Zelda pointed out a concern regarding the effectiveness of virtual cross-examinations, as witnesses tend to feel more at ease behind a screen, potentially limiting the impact of rigorous questioning. She advised that, whenever possible, advocates should conduct cross-examinations in person to capture the full dynamic of face-to-face interaction.

Synthesising the case in closing argument

Closing arguments offer a final opportunity to reinforce key points and address any unresolved issues. Lawrence emphasised that closing submissions should not rehash opening statements or introduce new arguments. Instead, they should synthesise the evidence and arguments presented during the hearing.

The following strategies for effective closings were discussed:

- Lawrence recommended proactively addressing weaknesses in the case rather than avoiding them. This direct approach builds credibility and allows the advocate to frame the issues to their advantage.
- Advocates should provide a logical, structured pathway that leads to a favourable outcome, helping the tribunal understand not only the argument but also the steps needed to reach a decision in their favour.
- Justice Unterhalter noted that tribunals appreciate a realistic portrayal of witness reliability. He advised against portraying all witnesses as entirely reliable or unreliable, as an honest assessment resonates better with tribunal members who understand that human recollections are often imperfect.

Practical advice for aspiring advocates

The panellists offered practical guidance for young advocates looking to establish themselves in arbitration:

- Justice Unterhalter advised young advocates to take on any case they can, regardless of its prominence. Each experience, he explained, contributes to skill development and builds confidence.
- Lawrence recommended ongoing education and participation in low-stakes adjudications to build experience. Specialised courses, he added, can open doors for more complex cases.
- Michelle noted that, especially in client interactions, advocates need to be optimistic and solution-focused. Clients, she explained, want advocates who will fight for them with enthusiasm and perseverance, offering clear solutions rather than only highlighting risks.
- Zelda advised young advocates to approach each case with curiosity and a commitment to thorough research. She underscored the importance of staying adaptable, as every case brings unique challenges and learning opportunities.