

**EFFECTIVE ADVOCACY IN ARBITRAL HEARINGS: MANAGING
EVIDENCE, WITNESSES AND TRIBUNAL ENGAGEMENT**

**TRAINING PROGRAMME FOR STATE ATTORNEYS UNDER THE
OFFICE OF THE SOLICITOR GENERAL**

VENUE: ARUSHA INTERNATIONAL CONFERENCE CENTRE

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EFFECTIVE ADVOCACY IN ARBITRATION AND LITIGATION

Talking Notes by Panelist: A.H.Gonzi, (J).

ADVOCACY (IN LAW) DEFINED:

Advocacy is the **means** by which an Advocate **puts their case to the court or Tribunal**. It may be **written or oral**. Advocacy is a **specialist skill**.

In law, advocacy is the **practice of presenting a client's case to a court or tribunal**. A Lawyer will use their advocacy skills and their knowledge of the law **to persuade a judge, tribunal, or jury** to reach a judgment in their favour.

ORAL AND WRITTEN ADVOCACY

Oral advocacy is primarily a **performance skill**. It requires the advocate **to address the court persuasively and concisely, presenting a case in a manner that is clear, well organised and efficient**.

Written advocacy involves drafting documents intended for the Court or Tribunal. It includes **Pleadings** and **Submissions**.

Key advocacy skills: include **case analysis**, the correct use of skeleton arguments, oral submissions, examination-in-chief and cross-examination, pleas in mitigation and legal submissions.

CONNECTING FACTORS ARBITRATION AND LITIGATION

They are methods used to resolve legal disputes, whereby:

- (a) Both are **formal in procedure**;
- (b) They are **adversarial in nature**;
- (c) Involve a **neutral third party**;
- (d) Neutral 3rd Party **reviews evidence and applies applicable laws**;
- (e) **Neutral** 3rd Party issues a **legally binding decision**;
- (f) Determine a **winner and a loser**.

POINTS OF DEPARTURE: ARBITRATION AND LITIGATION

(a) Nature of the process:

Voluntary process: Arbitration requires the **consent of all parties involved, either through a pre-existing agreement or by mutual consent to arbitrate.** **Litigation** involves formal and public court proceedings, **conducted according to established rules and procedures** while arbitration offers an informal and private dispute resolution mechanism, with **proceedings tailored to the specific needs and preferences of the parties involved.**

(b) Nature of the Decision-makers:

If litigation is the dispute resolution method, decisions are made by judges who apply the law to the facts presented and render a judgment. **If arbitration is chosen, decisions are made by arbitrators that are chosen by the parties or specified in the agreement.** They have the authority to resolve the dispute and issue a final and binding arbitration award. Arbitrators make the final and binding decision

in arbitration based on the evidence presented. However, Arbitrators are typically chosen for their expertise and experience in the relevant area of law, providing parties with a decision-maker who is knowledgeable about the issues involved.

(c) Control over the process

The litigation process is controlled by court rules and procedures, with limited flexibility for parties to customize the process. During the arbitration process, parties have more control and can tailor the proceedings to suit their needs, including selecting the arbitrator, setting the schedule, and establishing the rules governing the arbitration.

(d) Privacy and confidentiality

Arbitration proceedings are generally conducted in private offering greater confidentiality compared to litigation.

(e) Finality and appeal options

Litigation allows for appeals on merit of the decision in higher courts. Arbitration typically results in a final and binding decision, with

limited grounds for challenge and normally not on the merit.

Therefore: Some of the **Advocacy skills would have to be slightly modified to reflect the peculiar settings of Arbitration.** One cannot apply the litigation skills wholesome to Arbitration.

SELECT AREAS OF THE THEME: EFFECTIVE ADVOCACY IN ARBITRATION AND LITIGATION

I will chip in the presentations made on this area on 3 aspects where I think more attention should be put: **issues framing, effective written argument and **being active in the 1st preparatory meeting in Arbitration.****

(A) PROPER FRAMING OF ISSUES

Role of issue framing in effective Advocacy:

In "A Lecture on Appellate Advocacy", Karl Llewellyn (1962) University of Chicago Law Review 627 at 630 said that:

"[T]he first art [of effective advocacy] is **the framing of the issue**

so that if your framing is accepted the case comes out your way....
Second, you have to capture the issue, because your opponent will be framing an issue very differently....
And third, you have to build a technique of phrasing of your issue which not only will help you capture the Court but which will stick your capture into the Court's head so that it can't forget it."

The above issue is made of facts that point unambiguously to one outcome rather than the other.

How to seize opportunity in framing issue if you are Respondent?

If the appellant has not framed the issue in a way favourable to him, the respondent has been given a free kick in front of goal and should take it. If the appellant has framed the question neutrally you may want to consider

reframing the issue according to your statement of the premises.

Bottom line:

A very important step in **persuading** the court is stating the issue that the court is to consider. **The court can answer a question only when it knows what the question is.** Framing the issue must be done concisely. It **must be fact specific.** It will usually be in the form of premise, premise, question. The premises may be factual or legal or both. They must lead to the question that arises in this case.

(i) The issue that you have framed **will inform the way in which the judges read the case before argument begins;**

(ii) It will also, **inform the way oral argument proceeds;**

(ii) It should also **underpin the way in which the Court sets about preparing its reasons for decision.**

Note that, an issue takes the form of statement, **statement, question.** **The statements are statements of fact. The question is a question of law.** **The question is related to the facts.**

Where you have many issues:

Organise the issues in a logical sequence. Presumably, this will match the way in which you intend to deal with the issues in oral address.

(B) EFFECTIVE WRITTEN ARGUMENTATION

Key Ingredients in a written submissions:

When a judge picks up a set of written submissions filed, the judge wants to know, and **needs to be told:**

(i) What the case is about;

(ii) What information he or she needs to decide it; and

(iii) What is the path that is best followed in deciding it.

Persuasive Legal Writing:

Garner in A Dictionary of Modern Legal Usage, 2nd ed (1995) at pg 471 says that:

"Any piece of persuasive or analytical writing must deliver three things: **the question, **the answer**, and **the reasons for that answer**. The better the writing, the more clearly and quickly those things are delivered."**

Note that: The Question or issue **must be stated in terms that are specific to the particular case. It must be "fact specific". Don't pose general question unlinked to the facts of the case.**

(C) THE FIRST PREPARATORY CONFERENCE - ARBITRATION

This is part of case management in arbitral proceedings and **affects future stages**.

Regulation 32(1) of GN. No. 146/2021:

“The arbitral tribunal shall, within fifteen days after its establishment, conduct a preparatory conference with the parties in any suitable format for the **purpose of organizing and scheduling the subsequent proceedings in a time and cost-efficient manner.”**

Agenda Items for the Preparatory Conference:

In practice, at the 1st preparatory conference the **parties iron out and agree on the main procedural steps** such as:

- 1) Set of **arbitration rules** to be applied in these arbitral proceedings (*if the parties did not agree on this aspect in their arbitration clause*);**
- 2) **Language of proceedings** (*if the parties did not agree on this aspect in their arbitration clause*);**

- 3) **Place of arbitration** (*parties did not agree on this aspect in their arbitration clause*);
- 4) **Administrative services** that may be needed for the arbitral tribunal to carry out its functions;
- 5) **Costs of arbitration and deposits** in respect of costs;
- 6) **Confidentiality** of information relating to the arbitration (and any possible agreement thereon);
- 7) **Routing of written communications** among the parties and the arbitrators;
- 8) **Means of sending documents**, including pleadings, for use in arbitration (including Telefax and other electronic means - *e.g.*, e-mails etc.
- 9) Arrangements for the **exchange of written submissions**: (a) scheduling of written submissions; and (b) consecutive or simultaneous submissions;
- 10) **Practical details concerning written submissions and evidence** (*e.g.*, method of submission, copies, numbering, references, *etc.*);
- 11) **Defining points at issue** – order of deciding issues; and defining relief(s) or **remedy** (-ies) sought: (a) should a list of points at issue be

prepared; *(b)* in which order should the points at issue be decided; and *(c)* is there a need to define more precisely the relief(s) or remedy(-ies) sought;

- 12) Documentary and physical evidence;
- 13) **Witnesses** (whether witness statements and expert reports are necessary);
- 14) **Evidentiary Hearing**; and
- 15) Possible requirements concerning **filing or delivering the award.**

Once this procedural calendar is agreed, **parties are bound by its terms** and can only be departed from upon the tribunal's permission and after the parties have conferred to each other on such departure from the calendar.

Counsel should be active and totally devoted in the 1st Preparatory Conference.