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Young Canadian Arbitration Practitioners
Jeunes praticiens canadiens de l'arbitrage

YCAP 2015 FALL SYMPOSIUM
in conjunction with Young ICCA

Vancouver, British Columbia: Thursday, 22 October 2015

Oral Advocacy in International Arbitration

POST-EVENT REPORT

By: Salma Kebeich and Alexandra Mitretodis[1]

On Thursday, 22 October 2015, YCAP, in conjunction with Young ICCA, held its Fall Symposium. The event was divided into two panels of distinguished speakers and took place at Borden Ladner Gervais ("BLG")'s office in Vancouver, British Columbia, to discuss practical tips for written and oral advocacy in international arbitration. Over 30 young arbitration professionals attended the event either in person or via webcast. To celebrate the end of a successful symposium, a cocktail reception kindly sponsored by BLG was held for all the participants and panellists.

FIRST PANEL

The first panel was moderated by Ms. Michelle Maniago (Borden Ladner Geravis LLP, Vancouver), and the speakers were Mr. Marek Krasula (ICC/SICANA, NY) and Ms. Sophie Nappert (3VB, London).

The discussion followed the order of the written submissions that guide the arbitral proceeding. Starting with the request for arbitration, Mr. Krasula explained that this submission stands as the first impression of the claimant on the institution, the tribunal and the respondent. Therefore, it is important for this document to: (i) contain sufficient information for the respondent and the institution; (ii) comply with the adequate institutional rules; (iii) draw the attention of the institution and the arbitral tribunal to the key points of the case, which will allow the tribunal to draft the terms of reference; and (iv) show the strength of the case. Ms. Nappert then commented on the importance the request for arbitration has for the institution administering the proceeding. A smooth start of the arbitration will depend on the precision and accuracy of the request of arbitration. This includes a having a well-organized case from the onset, including consistent numbering system of the exhibits and avoiding duplication of exhibits. In case of a lengthy request for arbitration, an executive summary is certainly helpful in guiding the tribunal to the key points of the case.

The second topic of discussion addressed the memorials and other submissions. On this point, Ms. Nappert referred to a movement in the United Kingdom for the usage of plain English and the abandonment of Latin terms. Equally, a special consideration should be taken to the different jurisdictional backgrounds of the tribunal as well as the tribunal's perception of the terms and sarcasm that is distinct from one culture to another, what is well received by one culture may not be in another. She added that while it is helpful to research the background of the members of the tribunal and understand their style and background, practitioners should stay true to themselves so they can produce persuasive arguments. Mr. Krasula also acknowledged the importance of clarity of arguments in arbitral pleadings and commented that arbitral tribunals have become more internationalized and have reached a

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certain level of sophistication that allows them to understand pleadings drafted by counsel with different backgrounds and expertise. In response to Ms. Maniago's question related to the distinguishing tone between the factual and the argument sections of written materials, Ms. Nappert advised that the facts should be written in a neutral tone, which demonstrates the professionalism of the practitioner. From an arbitral institution perspective, Mr. Krasula supported separating the facts and arguments sections in a way that allowed the institution to distinguish disputed from agreed facts.

On the third topic of discussion regarding the drafting of witness statements, Mr. Krasula stated that there are ethical boundaries that should be respected in the drafting of witness statements, and the practitioner plays an active role in making sure that the witness statement has been presented in a manner consistent with the witnesses' actual evidence. Similarly, Ms. Nappert agreed that there is a clear boundary between fact and argument. The written witness statement should be factual and not be a part of the advocacy. A witness statement that extends beyond facts could result in unfairness to the witness during cross-examination.

The session continued with a discussion of visual aids and other communications as a part of the written advocacy. On this point, Mr. Krasula explained that visual aids are mostly used for closing arguments, which serve a role in highlighting the key points of the case without introducing new evidence. However, in some arbitration cases, the usage of visual aids may become highly contested and problematic. In Ms. Nappert's opinion, visual aids are a double-edged sword as they have a great potential for impact on the arbitral tribunal, yet they also have great potential for manipulation. Accordingly, the usage of technology in international arbitration raises several issues, such as the resistance of the arbitrators to such visual aids and the inequality of resources between the parties. She advised practitioners to use visual aids as long as they are presented in a transparent and straightforward manner.

The panel concluded by Mr. Krasula clarifying the difference between civil and common law traditions in written advocacy styles. Ms. Nappert provided her golden rule for written advocacy: focus on what is compelling and address not only the strong points but also the weak points of the case.

SECOND PANEL

The second panel moderated by Mr. Michael Kotrly (Freshfields Bruckhaus Deringer LLP, London) consisted of Mr. Andrew McDougall (White & Case LLP, Paris) and Mr. William Horton (William G. Horton - Commercial Arbitration, Toronto).

The panel opened with a discussion of some of the unique aspects of arbitration, compared to litigation, such as party appointments of the tribunal (which makes the backgrounds of the arbitrators very important), timing (shorter hearings), the fact that the respondent often gets the last word (through a rejoinder), and the lack of strict rules of evidence. The panel then divided their presentation into the following five stages of a hearing: (1) preparing for hearings; (2) openings; (3) direct examinations; (4) cross-examinations; and (5) closings. Mr. McDougall provided counsel's approach for each of these stages, while Mr. Horton provided the arbitrator's perspective.

One of the key takeaways about opening submissions is to keep them brief and address the key concerns that the tribunal will likely have. The panel stressed the importance of identifying one's weaknesses and dealing with them, rather than concealing weak points that may be called out by your opponent. Understanding the level of engagement and familiarity of the tribunal with the case before the hearing begins helps frame the amount of detail required in an opening.

With respect to direct examinations, the panel and the attendees discussed if there is a potential comeback for direct examinations. The importance of easing the witness (who probably has never sat before a tribunal or been present at a proceeding such as this one) into the oral setting before being cross-examined was highlighted. This will not only allow the tribunal to become familiarized with the witness but will also help calm the nerves of the witness before he or she is cross-examined. The panel

also noted the differences between lay witnesses and expert witnesses; namely, that the tribunal may need some time to absorb the expert report, so longer direct examinations for expert witnesses are often helpful.

With respect to cross-examinations, the panel pointed out some of the challenges counsel can face, such as closed and short questions, strict timelines, and interpreters getting in the way of the flow of questioning. The panel emphasized the importance of always maintaining a respectful tone and manner during cross-examination.

On the topic of closing submissions, the panel discussed oral versus written submissions, as well as the timing of when closing submissions occur. The panellists noted the heavy burden placed on counsel to do closing submissions immediately after the evidentiary hearing and suggested narrowing the submissions to only the key issues in dispute and any specific questions or concerns of the tribunal. The panel stated that when drafting post-hearing briefs, counsel ought to keep the preparation of the written award in mind and ponder the outstanding issues of which the Tribunal may need further explanation.

You will be able to access a recording of the complete symposium on the YCAP website shortly, www.ycap.ca.