Strategies for Successful Arbitration
Leading Lawyers on Preparing Your Client, Evaluating Potential Witnesses, and Achieving Success in Dispute Resolution
Elements of International ADR

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International Arbitration

The practice of international arbitration has become far more visible in recent years, breaking out of a niche practice involving mostly European law firms, to become a truly global practice. Part of this increase in the use and visibility in international arbitration certainly is due to increased trans-border commerce, and especially of large international projects in capital expenditure-heavy areas such as power, telephony, mining, and other infrastructure sectors. In these large-scale transactions involving multiple parties from vastly diverse backgrounds, international arbitration is frequently a practical necessity for effective dispute resolution.

International arbitration may provide great benefits when a party to a transaction has legitimate doubts as to the partiality or convenience of the domestic legal system of the other party with which it is dealing. In those circumstances, arbitration provides a neutral, and often confidential, forum in which disputes can be resolved by qualified arbitrators chosen by the parties. The final award then is enforceable in many jurisdictions worldwide, due to the existence of multilateral treaties concerning the enforcement of such awards, thus providing a reliable, neutral, and effective venue for the resolution of international disputes.

With the benefits and typical environment in which international arbitrations are used in mind, it is perhaps intuitive that the practice of international arbitration is an art of cross-cultural legal communication. Such communication may be broken down into three “modules.”

First, an arbitration lawyer must understand the substantive claims involved in the arbitration. This involves grasping, with the help of experts, different legal cultures, and legal regimes. For example, I have pled cases involving as diverse legal systems as Brazil, England, Wales, Indonesia, Japan, Mongolia, New York, the People’s Republic of China, the Philippines, Portugal, Spain, Turkey, Uruguay, and Venezuela, as well as public international law. This experience is representative of the breadth of legal systems with which international arbitration lawyers are confronted.

Second, one has to become acquainted with the different procedural rules of the arbitration, meaning the arbitration rules chosen by the parties, as
well as the relevant law of the place where the arbitration is “seated” as a matter of the agreement of the parties. These procedural rules broadly set out how a tribunal can be constituted, how an arbitration will be run, when counterclaims have to be made, how much discovery is available, what court relief is available to support the arbitration, among other things.

Finally, an international arbitration lawyer must be able to communicate these elements to a diverse panel of arbitrators, coming frequently themselves from different legal traditions, speaking different native languages, and thus possibly having different reflexes to any one case situation.

To further complicate matters, international arbitration ranges across a broad gamut of disputes, each requiring different approaches, as well as a cast of players of its own. On one end of the spectrum, the practice may be engaged in a litigation-style confrontation, with sophisticated counter-parties and highly experienced dispute counsel. On the other end of the spectrum may be disputes that are not yet fully crystallized, and where there is a lot of room for settlement simply by “translating” the expectations of the parties for one another and facilitating a response to the gap between both parties.

On the whole, it is the former and not the latter in which clients employ international law firms, as by the time international counsel becomes involved in a case, a dispute is likely to be complex, involving high stakes that may approach the hundreds of millions or billions of dollars, and may be fought on almost the same grounds as a major U.S. litigation. Even in those circumstances, however, there remain important differences between arbitration and litigation. Three differences between litigation and arbitration that a practitioner should bear in mind are (1) the lack of dispositive motion practice in arbitration; (2) the highly flexible procedural framework in arbitration (meaning no page limits, little or no sanctions for delays, etc.); and (3) the heightened importance of written, rather than oral, advocacy.

In sum, international arbitration lawyers have to adjust to the peculiarities of the arbitral process, which require them to handle complex factual issues in large scale projects applying law that may well be foreign to all
participants, parties and arbitrators alike, acting in a malleable procedural framework giving little support and extensive freedom. Although daunting at first, the potential for the efficient resolution of important disputes—and professional satisfaction—are tremendous.

**ADR Lawyers and Laws**

International arbitration differs from other modes of dispute resolution in the manner in which each dispute follows down a procedural and substantive path that is essentially different from previous cases. The malleable nature of arbitral proceedings and the sheer complexity of substantive issues that can arise require that lawyers be able to customize their approach to each new situation rather than relying on prior templates. That does not mean that one is not without guideposts. Yet, the guidelines for a good international arbitration lawyer may be far more conceptual than they sometimes are in other practice areas.

Approaching the organization of an international arbitration, and advocacy presented in it, from this functional point of view, it is key to understand the basic objective of international arbitration: the efficient resolution of complex international disputes.

- Thus, arbitration can only work if it addresses a “dispute.” The process cannot work properly if the underlying disagreement between the parties has not yet crystallized sufficiently to allow the participants in the arbitral process to address specific legal and factual issues underlying it.
- The efficiency further does not necessarily refer to the speed with which these disputes get resolved. Rather, it refers to the flexibility of procedures available in arbitration in order to address the underlying issues in the best way possible. Efficiency thus refers to the ability of the case to be resolved correctly, first, and then to reach such a correct result in the most direct way possible.
- International arbitration may not necessarily always be the most efficient way to resolve disputes for simple, or simple municipal disputes, considering that these disputes frequently do not require the kind of procedural flexibility or international expertise that complex international disputes do. These disputes in many
instances may be better resolved in the courts of the relevant country.

To apply this functional approach to a specific situation requires one to ask oneself, first and foremost, if one is dealing with a legal dispute that is capable of legal resolution. Next, the arbitration lawyer must properly weigh the competing factors for an efficient resolution of the case, taking into account which issues in the case will require longer thought, and thus briefing and time spent on them, and which issues can be treated in a more summary fashion. Putting these specific virtues of international arbitrations in terms of functional goals, the first goal is to understand and put the dispute into clear and concise legal terms; the second is to devise a procedural framework in which these legal issues can be addressed by an uninterested neutral in a direct fashion. As the second goal flows from the first, it is thus the most important, and frequently most challenging part of international arbitration to gain a clear and concise understanding of the legal dispute in question.

In order to be able to meet these goals, many fine international arbitration lawyers are able to penetrate sometimes entirely foreign factual and legal scenarios to extract the pertinent information to the case, structure this information in a way that is readily digestible by the arbitrators, and communicate to clients the challenges inherent in the arbitral process.

The first skill is perhaps the most difficult to acquire, as it requires experience dealing with such foreign fact patterns and legal sources. There are no real short cuts to obtain it other than through continued practice. That said, there is a distinct “flattening” of legal diversity in international arbitration, or, as some say, a resurgence of the *lex mercatoria*. Cynically speaking, as arbitrators do not have the time to familiarize themselves with the underlying legal systems, they apply an internationalist minimum set of contract or tort principles to many disputes. A skilled arbitration lawyer, therefore, will understand how and where such principles will be most effective in addressing the underlying dispute.

It may be intuitive that a quality synthesizing as many moving parts is not easily translated into basic good habits for the aspiring arbitration practitioner, nor can be broken down into an exhaustive checklist.
Nevertheless, in asking oneself whether one has understood the dispute properly, the following questions may be useful: (1) Do the facts, as my client has communicated them to me correlate to legal rights and obligations under the applicable law in my mind? (2) Do they do so when presented to an expert on the relevant law? (3) Do the rights and obligations invoked by the facts in the case have an analogue in the laws most frequently applied in international arbitration (e.g., France, England, Wales, New York, and Germany)? (4) If understood accordingly, do the rights and obligation gain a different, more readily understandable quality? (5) Can I put each point in dispute in simple, declaratory terms in a sentence such that there is an obvious legal answer to it in the applicable law that also can be explained in a syllogism spanning one paragraph or less?

As discussed above, international arbitration can be impacted by almost any law on the substance of the dispute, depending on the choice of law provision in the underlying contract. In order to be an effective advocate, an international arbitration lawyer also must be familiar with the procedural laws and rules applicable to international arbitrations. These laws, generally speaking, are far more uniform than the substantive laws relating to the dispute. The chief U.S. law practitioners should be familiar with is the Federal Arbitration Act. Further, those interested in joining an international arbitration practice should also familiarize themselves with the English Arbitration Act (1996) and the UNCITRAL Model Arbitration Law. The main treaties they should familiarize themselves with are the Convention on the Recognition and Enforcement of Foreign Arbitral Award of 1958 and the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965. These statutes and treaties set out in detail how international arbitrations should proceed and what concerns will lead to an invalid international arbitral award. The basic principle each of these legal texts protect is the basic equality of the parties in their right to present, adduce, and respond to facts and legal arguments on the basis of which arbitral tribunals will decide the case before them.

These basic laws are not changing drastically. That said, practice under them has and does change on an almost yearly basis. The ABA’s Year in Review publication is a good source to keep abreast of these developments. The parts of the law most important to arbitrators are the provisions in the
arbitration acts of the jurisdiction in which the arbitration is seated, dealing with the enforceability of the award, or more precisely, the grounds on which it can be set aside.

**Stages of an International Arbitration**

International arbitrations, unlike some domestic arbitrations, do not frequently provide for “mediation-arbitration” or the like. Rather, they are usually “straight” arbitrations. These arbitrations typically have three phases: a jurisdictional phase, a merits phase, and a damages phase. Each of these phases is part and parcel of the same arbitration, however, and cannot easily be separated out. With that said, each of these stages present their own unique challenges and must be viewed both in light of the case as a whole and the relevant procedural stage of the case.

The main objective of the jurisdictional stage of the case is to explain the underlying consent to arbitration by the parties to the tribunal. This requires a discussion of the underlying arbitration agreement in light of the facts and allegations in the case. Most straightforwardly, if the facts of the case fall within the ambit of the arbitration clause, one has met one’s jurisdictional burden on the claimant’s side; if the facts of the case can be shown to be outside of this ambit, a respondent would successfully meet this goal. It is nevertheless important to present a complete case to the tribunal, meaning a case that goes beyond these facial jurisdictional requirements. The most immediately relevant reason for such a facially broad pleading standard is that arbitral tribunals frequently take questions of “admissibility” of claims in account, meaning in essence that a “bad faith” claimant, at the very least in arbitrations against sovereigns, will not be considered to be entitled to an arbitral resolution of the underlying dispute. Notably, while this requirement is not pronounced in most commercial international arbitrations, a later implication of a bad faith invocation of the tribunal’s jurisdiction will have consequences at the merits stage, if only because it will be upsetting to the credibility of the underlying case put forward by the party that is seemingly acting in bad faith. The best practice, therefore, is to operate based on an “open kimono” on jurisdictional questions.

As merits issues are generally far broader than jurisdictional ones, it is not possible to proceed on such an open basis there, if only because doing so
would overwhelm the opposing party with information and thus would be conceived itself as a disreputable litigation strategy to hide important evidence from being discovered. At the merits stage, it is far more important to focus on the key factual moments for the case and to provide as accurate and complete a record of those events as possible, and to require the opposing party to do the same. Based on this factual understanding, it is likely possible to resolve the case before it comes to an award, considering that it will be clearer in most cases who will eventually win the case.

As a matter of the compensation stage of proceedings, it has become an epidemic to overstate damages, and to drag claims and counterclaims into the billions of U.S. dollars. Arbitrators are generally suspicious of such high damage demands. The first best practice therefore is to ask for a reasonable sum of compensation to remain credible. Further, it is important to back up any damages request with full documentation on the basis of which the figure becomes intuitive. The problem many lawyers face is that they present damages models from experts that simply do not translate to the tribunal. The only way to avoid that problem is to break down these models into modules that the arbitrators can understand, place them together in a way that a lawyer, rather than accountant, can make sense of them, and to ask for reasonable figures.

Changes and Challenges

Investment arbitrations have skyrocketed in number over the last ten to fifteen years. This is going to be one of the growth areas for arbitration for years to come. The same strategies apply here, although interim measures may work differently, depending on the arbitration rules governing the dispute. The growth of investment arbitrations over the years has meant that claimants, sovereigns and, most importantly, arbitrators have gathered a great deal of experience with the arbitral malfeasance of claimants and respondents alike. This has proven a blessing, as both claimants and respondents in these disputes have been known to try to exploit procedural advantages unfairly, such as, in the case of claimants, serving a notice of arbitration during periods of government shut down, or in the case of respondents, using their police powers to coerce claimants into settlements.
This success of international arbitration, however, also presents one of the main challenges facing arbitrators today. The success of international arbitration has led to a proliferation of high-stakes arbitral proceedings, as statistics in the *American Lawyer* arbitration scorecard show. As these statistics also show, the “supply” of reputable arbitrators, however, does not keep up with the rise in international arbitrations. This means that many international arbitrators today are overworked and sometimes cannot devote the necessary time to the arbitration over which they are presiding. This challenge to international arbitration is important, considering that it is beginning to have an impact on the perception of arbitration users of the arbitral process itself: previously having been touted faster, cheaper, and more often tailored to the legal needs of the parties, this problem of over-extension of many of the leading arbitrators has led to a procedural deterioration, in some cases, of each of these advantages of arbitration over litigation.

These developments are caused largely by the explosion of truly international business with the falling away of investment and trade barriers. Yet, as these barriers fall, the domestic judicial systems of many of the host countries to these deals and investments do not provide the kind of efficient and neutral judiciary that contractual counter-parties would rely on. With the increasing use of arbitration clauses in such deals, arbitration is mushrooming, thus causing the strain on the system.

Perhaps the best way for an arbitrator to deal with these challenges is not to accept appointments in certain circumstances. Yet, this opens up a far broader challenge: there is a need for visible and reliable means for new arbitrators to be appointed to new matters. This is a challenge the international arbitration bar, rather than international arbitrators, will have to take ownership of as international arbitration continues to boom.

**Factors and Considerations in Arbitration**

International arbitrations, for the reasons outlined above, can present arbitration counsel and international arbitrators with legally and factually complex problems. Given the use of arbitration throughout different industries, legal systems and business cultures, it may be impossible to compile an exhaustive list of such challenges. Yet, there are some challenges
that arise in international arbitration that are not dispute specific, but perhaps endemic in international arbitration as mode of dispute resolution. In no specific order, some of such challenges are laid out below.

1. **Hostile or opinionated arbitrator**: It is not possible, nor is it advisable, to become embroiled in an effective confrontation with a hostile arbitrator. A hostile arbitrator typically will try to detract counsel from getting to the core part of their argument in hearings. Because it is unwise to confront an arbitrator, one needs to find another way “to let the arbitrator off gently.”

2. **Need for third party evidence to corroborate a point**: There are many legal systems that make it difficult for counsel to obtain discovery from third parties to the arbitration. One such legal system is England and Wales. Many international transactions are structured such that relevant documents can be dispersed over several entities, not all of which are parties to the arbitration. In those circumstances, a tribunal may not have the authority to order these third parties to provide documents. This in turn may make it difficult for the requesting party to gain access to these documents in ancillary court proceedings.

3. **Convincing a client that a short-term commercial interest is outweighed by a long-term litigation interest**: This situation is not unique to arbitrations, but may be more pertinent in this context, as clients may not be as familiar with the arbitral process. There are many situations in which the short-term commercial interests of the client may lead them to want to act in a certain manner that is detrimental to an arbitration position. Depending on the timing of such action, it may be possible that this action would seriously delay the arbitral process by causing a hearing to have to be moved, which, due to the time strain under which arbitrators at times operate, may not be rescheduled for months.

4. **Cross-examining a hostile but preeminent expert witness**: International arbitration differs from ordinary U.S. court proceedings in expressly allowing for the use of legal expert witnesses. Many legal experts are themselves arbitrators and are well known in the arbitration community. It is thus possible that when one cross-examines such a legal expert witness, an arbitrator is friends with the expert, or knows the expert from prior cases.
International arbitration further is a field that is “hierarchical,” in the sense that there are certain senior figures that by their notoriety in the field command instant respect. When faced with cross-examining such a witness, one thus is confronting a person for whom the arbitrators will have a high regard, regardless of their testimony in the case, and whom the arbitrators generally would want to believe due to the witness’ stature alone.

As these situations are more typical in international arbitrations as a whole, an arbitral counsel should prepare for and anticipate them whenever possible. The following “basic” considerations can serve as a starting point to formulate such strategies:

1. Does my client understand the legal and procedural question ahead?
2. Have I asked my client to provide me with all the factual information that he has that is pertinent?
3. Have the arbitrators expressed a prior preference of form, procedure, or substance on point, and have I addressed it?
4. Have I explained my client’s position in a way that my non-arbitration law partner can understand it and would agree with me?

As concerns the first two items listed above, it is easy to lose key information in translation in the arbitral process. The main reason that information is lost is that the client does not fully understand what is going on in the arbitration and why certain proceedings take place. It is only by educating the client, and allowing the client to make informed and educated decisions, that this problem can be overcome. This means that the client must be able to participate in strategic discussions and provide its own point of view and inject its commercial experiences. Sometimes, matters are so foreign to a first time arbitration user that clients must be led along with the right questions. This requires that one has at least a rudimentary understanding of the client’s business and administrative methods so that one can ask questions in a way that makes sense to the client.

With regard to the last two items, it is important to remember that the communication of a client’s position is the next key aspect. This has two components. First, many arbitrators have issued previous awards or written
papers in which they discuss a key issue for the case. It is important to take these preferences into account when arguing the case, as the case is being argued to a specific audience of three arbitrators, or maybe even a sole arbitrator. Also, it is easy to become so involved in the complexities of a case, an explanation assumes knowledge that an outsider, and the arbitrator, does not have. It is therefore important to test one’s advocacy with an outsider to see if it is coherent and concise.

Even with that in mind, there is no foolproof way to deal with a hostile arbitrator. The best thing one can do in this regard is to appoint an experienced chairperson of a tribunal. This in itself can often also mean that one appoints a person with considerable scheduling problems. With regard to the chair of an arbitration, however, this may be a worthwhile concession, given that an experienced chair should help counsel to move on in an argument if the exchange with an arbitrator becomes overly repetitive. At some point, it may be necessary to disagree with the arbitrator and ask to move on. Although this is an affront to the arbitrator that will likely be brought up in deliberations, it may in some circumstances be unavoidable. The art in such a situation is to do so in a way that does not offend the remaining arbitrators.

There also is perhaps no good solution to the question of the need for third party evidence to corroborate a point, as counsel cannot change the law. The best answer, if this is factually correct, is to ask the tribunal to consider the documents to be in the “custody, possession, and control” of the arbitration party, regardless of corporate formality due to the close relationship between the parties. Tribunals may in fact follow such an approach in the right factual circumstances. It is still not likely that the request would be heeded, nor is it likely enforceable in court, yet, one may be able to achieve that the tribunal formally or informally makes an adverse inference as to this request.

Sometimes, the only effective way to convince a client that a short-term commercial interest is outweighed by a long-term litigation interest may be to educate the client so that the client can make a truly informed business decision that factors in arbitration risks accurately. As this is a theme throughout the arbitration, it is a key skill for successful arbitration lawyers.
These responses arose out of the situations themselves in many instances. To some extent, the techniques are goal-oriented. It is important to have the right focus on the strategic goals with regard to each difficult situation, and then to focus on how to achieve that overarching goal. Such a focused and goal-oriented way of approaching these problems will allow one not to get sidetracked with ancillary questions. On a broader level, it also helps to have broader strategic goals beyond each case itself to gain the kind of stature and recognition that helps, almost intuitively, with each of the questions. This, however, is almost a secondary concern and one that should come naturally to any practitioner serious about a career in international arbitration.

An immediate measure of success in each case is the obvious one of whether one wins or loses a motion, advances one’s case, or achieves a favorable result. There are, however, also other measures of success that ought not to be forgotten. Any actions one takes in one specific case likely will be known by future co- and opposing counsel, as well as many arbitrators. Thus, it may be that a certain technique or strategy can lead to favorable results over a short stretch of time, but nevertheless, have a long-term negative impact for the client and for the attorney for having resorted to them. In this sense, it would thus be a better measure of success to look to the success one has while following an arbitration style that will leave intact, and indeed bolster, one’s reputation as being honest, reliable, knowledgeable of facts and law, and forthright with the tribunal.

A different, though equally important challenge in international arbitration is to communicate with the client about the arbitral process to create a level of comfort on the client’s side with the ongoing proceedings. Key issues for corporate clients dealing with international arbitration include the cost of international arbitration, the reliability of international arbitration, and the speed with which they can obtain final relief.

- **Costs**: An experienced tribunal in its first procedural order should categorically put a halt to unneeded and unhelpful correspondence from the parties, and insist on a rigorous organization of the case. This will reduce costs by reducing the temptation for counsel to contact the tribunal on a daily basis, running up legal fees, as well as arbitrator fees.
• **Reliability:** The arbitrators should avail themselves of the option to have parties brief them on issues they do not fully understand, perhaps even asking them specific questions to respond to. This would allow a far more orderly and reliable process for the resolution of these issues and limits the surprise of the parties, if an award is made on a little-briefed or discussed issue.

• **Speed:** The only guarantor of speed is that the arbitrators’ calendar is not overburdened, thus allowing the tribunal to streamline the case efficiently and react flexibly to new developments.

Arbitration clauses, which are created before the disputes occur, have a vital impact on international ADR. Without an arbitration clause, there generally is no recourse to arbitration available. The only exception is an agreement to ad hoc arbitration once a dispute has arisen, which in my experience is a theoretical possibility only, not a practical reality.

The categories of the disputes most often arbitrated internationally depend largely on the area of the world, the overall global business climate, and the parties involved. In a word, there is no generic answer. The most visible cases involve some of the largest infrastructure and natural resource projects in the world, such as the current arbitrations by U.S. oil majors against the Venezuelan government in light of the recent nationalization of their oil properties. The most common type of arbitrations may well be comparatively smaller contractual disputes concerning agreements that contain arbitration clauses. In terms of the large firm arbitration practice, attorneys generally deal with the larger infrastructure or natural resources projects, however.

**Presenting One’s Case in International Arbitration**

There are two aspects to every case, a factual one and a legal one. The resources used to help in deciding or working on either of these issues are different. The main legal resources, further, will depend on the type of arbitration, as the resources used for, say an arbitration under English law, will be different from an arbitration under, say French law. As a general rule, it is useful on the legal side to refer to (a) the arbitration law of the seat
of the arbitration, (b) treatises on the procedural framework in which the arbitration will proceed, (c) in a civilian jurisdiction, the relevant Code for the dispute, and (d) one or several treatises on the underlying area of law the dispute concerns.

On the factual side, this question again is different. To the extent that news sources are available to familiarize oneself with the general background, this is helpful. Thus, the *Financial Times* and the *Economist* have good background materials. Otherwise, each case will present its own fact-finding opportunities; some of which, if one has no ideas at all, may be approached with an initial Google search to find further sources and experts from which to build a case.

The main question lawyers arbitrating complicated corporate contracts need to get a handle on from the beginning is what the underlying provisions in dispute were originally meant to address. This is something that one should work out with the client. Once this underlying intention of the parties is clear, it is possible to work on a legal strategy to arbitrate the case. Thus, if the intention is not clear from the contract, but is favorable, one should do everything possible to allow the negotiation history to be introduced. This is easier in some legal systems than others.

Further, it always important to work on the cross-relations between contractual provisions. Most complex contracts are not “linear” but rather form a web of provisions. It is of crucial importance to understand this web before going into the case, as this may be either helpful or harmful, and in either case, it is important to be prepared. To do so, one should read the contract and its amendments cover to cover first, to familiarize oneself with it. Next, one should look to the choice of law provision, to understand whether any specific legal default mechanisms in the chosen law could have an impact on the contract, at large. In light of this knowledge, one should then track the relevant provisions of the contract, in a table, on a piece of paper or a diagram, from the initial definition through every use and cross reference to get a full picture of the contract.
The Five Basic Steps for Guiding the Arbitration Process are:

1. Understand the facts of your case.
2. Understand the law of your case.
3. Explore whether the opposing party will seek to evade a potentially adverse award.
4. Draft a comprehensive strategy of the case, themed from the request to the award.
5. Implement that strategy diligently, but flexibly in light of how the arbitration develops.

The first step is one of the most crucial steps in arbitrations, and yet remains the most overlooked. It is indispensable to have a complete and immediate understanding of the facts in the case to convince a tribunal of one’s point of view and to counter most, if not all, arguments from opposing counsel. Further, without such a factual basis, any pleading will look overly rhetorical and hollow. It is therefore of prime importance to gain such understanding.

To gain this understanding, it is essential to sit down first with all the people that have direct contact with the underlying dispute and interview them, politely but thoroughly, about how the project was first negotiated, then unfolded, came into trouble and failed, or otherwise led to a dispute. During these conversations, the most important question to ask every time the employee brings up a new event is: Do you have a document from that time that confirms this? Through this process, one can then build a comprehensive database of witness testimony and documents for the case from which one can build the case.

The second step involves putting the original legal theories one had when first hearing of the case into context of the facts one has gathered. Here, a chronology can help to bring the facts together in a simple way. These facts should then be subjected to a cursory legal analysis to find topics of interest. These topics should be researched rigorously as a matter of the applicable law. Once one has gained a good understanding of this law, one should then contact a legal expert with whom to test these theories and ask if, in light of the condensed facts, other theories come to mind.
The next step is to investigate whether the opposing side is likely going to move assets out of the jurisdiction or otherwise make the arbitration a practical travesty. To do so, one needs to talk to the client if they have any indication of asset movements. Having talked to the client, it is worthwhile to search public records for any recent deals or other commercial developments. If need be, one can also hire a private investigator. Again, one needs a comprehensive documentary record if there is a threat of such dissipation. One should then seek preliminary measures from the tribunal in line with the broader strategy discussed below.

If one needs to act in this regard before an arbitration request is made, or before a tribunal can be constituted, it is frequently possible to petition the relevant municipal courts for interim relief. Whether such relief is available is a question of the underlying arbitration clause, the rules to which it refers, and the laws of the jurisdiction in which relief would be sought. In most instances, such relief may, however, be available, meaning that this is an important avenue to investigate.

The next step is to draft a comprehensive case strategy. Such a strategy should use the factual development and legal research done at the earlier stages to find both the strong points and potential vulnerabilities of one’s case. Rather than focusing on the immediate needs with regard to a specific pleading, it should look to a theme to run through the entire arbitration that highlights the factual strong points of one’s case. In light of such a broad strategy, it is then possible to implement a tactic stage by stage, submission by submission.

The final step of implementation of this strategy is highly fact dependent. In essence, it requires counsel to understand the overarching strategic goal they have in the arbitration, the facts with which they have to work, the legal handicap they face, the arbitrators to which they are arguing, and the purpose of the specific submission they are drafting. A good execution will always balance these factors through the prism of the overall strategy in the case. Yet, it is impossible to say with more precision how such a process would unfold on a general plain, given that every case is different and every tactic to implement the broader strategy would also be different.
The techniques discussed above regarding fact finding in the ramp up to arbitration are relevant to drawing out the facts and issues during arbitration, too. Moreover, a good tactical understanding of the document disclosure rules under which one operates is instrumental in obtaining further facts from the opposing party. Thus, if it is possible to obtain broad discovery from the opposing party, a broad, U.S. litigation style discovery request can be useful in obtaining more information. If document disclosures are narrower, as they may be in many “civilian” arbitrations, meaning an arbitration that is seated in a civil law country and in which the tribunal is predominantly composed of civil lawyers, then a far more targeted list of requests for specific documents may be more appropriate.

The final decision-making process should be tailored almost like a pyramid, starting out with a broad base of factual and legal disputes that get refined and narrowed as the case goes along. By the time the final award is being discussed, a properly run case should be able to yield from pleadings a largely consistent factual and legal story from both parties, with a detailed elaboration from the parties on the discrepancies in their stories that matter to the outcome of the case. By engaging diligently in this process, arbitrators will not be faced with new questions by the time their decision has to be made, but can instead focus their attention on the final details of their award.

In each case, there will be one or two key facts per issue, and likely one key legal distinction that can swing the case. The questions to ask the parties are to give the greatest possible granularity to these factual issues. This likely should be done, not through written advocacy submissions, as much as through the diligent probing of contemporaneous documentary evidence and witness statements. This means that the arbitrators should identify as the case goes along what these key questions are; subtly if possible, but directly, if necessary, to allow the case to develop and the documents to be submitted that are pertinent to the dispute. On the legal side, the arbitrators should look to the parties to provide them with their case without interference from their part, unless the arbitrators see that a key issue they want the parties to address goes ignored. As a final caveat, to the extent that all the questions and all this probing has not yielded a discussion and crystallization of what to the arbitrators are the key factual and legal issues, the materials submitted should not be stretched willy-nilly to get the
tribunal to a certain result, as doing so would risk that the arbitrators acted *ultra petita*, beyond the submissions of the parties.

In this process of arbitration, the role played by arbitration associations and other legal groups should not be discounted. These associations, such as the ICC and the LCIA, or the AAA’s ICDR, are instrumental in helping the dialogue on such practices to thrive. They further sponsor such endeavors institutionally. One of the main sources of best practices in international arbitration, however, is not an arbitration association, but a bar association: the IBA. The IBA in recent years has provided key encouragements with regard to best practices in the document disclosure phase of arbitration and concerning the disclosure requirements for arbitrators prior to taking an appointment. These “best practices” guides have become influential and are cited as authorities on their respective issues in the arbitral process.

There is a temptation to grandstand in international arbitration and coat every submission in unnecessary grandiloquence. My advice would be to avoid this as far as possible and let the structure of a well-planned and factually supported argument do the talking instead. This gives the client the best chance of having its case heard. It increases one’s reputation in the arbitration community as a person who “knows their stuff.” This reputation has many advantages, not the least of which being that experts and opposing counsel will be less likely to try to play fast and loose themselves, given the likelihood of being found out. With this temptation gone, the arbitral process likely will develop far more civilly and will not pose as many last-minute challenges before a hearing.

As this chapter has shown, international arbitration poses procedural and substantive challenges. In many instances, these challenges are harder on the client than they are on counsel, especially if the client has not gathered previous international arbitration experience. Remarkably, however, commercial parties have not been discouraged from seeking international arbitration as a dispute resolution mechanism, even though quite some have bruising tales to tell about their early forays into this manner of dispute resolution. This is particularly interesting, as some recent articles have shown an increased hesitancy by corporate clients to continue to resort to domestic arbitration in light of the increased “formalization” of arbitral proceedings and the related increases in arbitral costs.
The reason that international arbitration thrives at the moment is that there is no reliable alternative on the international stage: parties cannot agree to the courts of a neutral country as the venue for the resolution of their disputes and then enforce a favorable judgment in other jurisdictions with great ease. Thus, if the parties to a transaction distrust each other’s judicial authorities to make a balanced decision with regard to any dispute that may arise between them, they have little choice but to resort to international arbitration—at least, for now. This unique position of international arbitration may come under pressure if the recent efforts to pass a choice-of-court convention were to come to pass, which would allow commercial parties to choose the judicial system of a third country as the situs for dispute resolution and would then foresee the recognition and enforcement of the judgment of such a court on a basis similar to international arbitration.

Although it may be an exercise in reading tealeaves, even the broad ratification of a choice-of-court convention should not displace the attraction of international arbitration. The advantage international arbitration has to offer is the great flexibility with which parties can structure the resolution of their disputes. With an ever-growing international arbitration bar, and an ever growing transactional awareness of the importance of international arbitration as a dispute resolution mechanism, the main trend for short and mid-term is for commercial parties to use this flexibility to their advantage from the contractual drafting stages onwards to ensure that the dispute resolution they want is the one they get. This goal is beginning to be achieved in the drafting of arbitral clause with great finesse and sophistication.

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