

# THE ART OF PERSUASION

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## ABSTRACT

*This paper deals with the Golden Rules of Advocacy which have to be observed when ‘persuading’ a court or arbitral tribunal of the validity of an advocate’s arguments. It also deals with successful advocacy strategies that could be used in court or arbitration hearings.*

## I INTRODUCTION

In this paper, I propose to review briefly some advocacy strategies which, in my experience, could be used successfully to persuade a court or arbitral tribunal of the validity or importance of an advocate’s arguments. Advocacy ‘is not necessarily a matter of truth, but rather of persuading a court or a tribunal to a point of view, and doing so within the scope of the relevant rules, and without misleading.’<sup>1</sup>

The ability to offer a persuasive argument is a superbly satisfying and gratifying emotion. This is because all advocates want to win their case. This reminds me of a poster that hangs in my study: the poster depicts a tennis player who appears to stretch to get to the ball. It has an inscription which reads: ‘Whoever said, it’s not whether you win or lose that counts,

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<sup>1</sup> Toni Lucev, *Advocacy – Some Essential Tips for Beginners*, Western Australian Courts, Summer Clerks Course, 11 December 2012.

probably lost.’ Over the years, I have observed advocacy performances that were often hampered by common problems, including (but not limited to) an absence of a coherent structure, lack of content, inadequate questions and answers skills, poor time management and a failure to engage with the court or arbitral tribunal. Of course, common sense suggests, and experience confirms, that advocates cannot be equally well qualified: indeed, there are open-ended degrees of excellence and one advocate will necessarily be better or worse than another advocate.

It is important for advocates to understand the forum in which the advocacy happens. Indeed, an advocate will need to adapt their style of speaking to the forum, for example a court or arbitral tribunal. Let us take an arbitral tribunal as an example: an arbitral proceeding cannot be treated as a trial or an appeal to a court. As such, the language used is less formal than the language used in courts. Consequently, it is inappropriate to refer to arbitrators as ‘Your Honour’. Instead, it is customary to refer to ‘Mr (or Madam) President or Mr Chairman (or Madam Chair) and Members of the Tribunal’ or to mention the arbitrators by name.

Also, in an arbitral hearing, as opposed to a court hearing, it may be ineffective ‘to submit’ your argument to the arbitral panel. Indeed, this may be a non-effective way of advocating because, when submitting arguments to the arbitral panel, advocates are, in effect, inviting the arbitral panel to merely consider their arguments and possibly to disagree with them. Instead, in this context, advocacy is about persuading the arbitral panel of the validity of the advocate’s arguments and, therefore, the language used should be more direct than that used in a court. In arbitral hearings, advocates ‘argue’, ‘contend’ or persuasively or directly ‘communicate’ the position of their clients to the arbitral panel.

## II THE GOLDEN RULES OF EFFECTIVE ADVOCACY

There is no mechanical procedure which will necessarily result in successful persuasion. However, my experience of participating in many arbitral hearings and court cases reveals that there are, at least, three rules which should be embraced if an advocate wants to be persuasive. I refer to these rules as the ‘Golden Rules of Effective Advocacy.’

### Rule One: *Successful advocacy requires simplicity*

Without simplicity there will be no persuasion. It might be useful to develop your arguments in a simple way to ensure that an ‘intelligent moron’ would be able to understand them. My ‘intelligent moron’ test is not an oxymoron; it envisages that advocates try out their arguments on a reasonably intelligent person who is not involved with the relevant issues and may not even have been trained in the rigorous discussion of legal or ethical issues. If our ‘intelligent moron’ understands the arguments of the advocate, the arguments have been presented clearly and with precision. Albert Einstein, in a celebrated quote attributed to him, said that, ‘If you can't explain it to a six year old, you don't understand it yourself.’ Indeed, as the relevant laws, rules and ideas which have to be presented to a court or arbitral panel are often very complex, advocates need to develop the skill of explaining complex arguments in a simple way.

### Rule Two: *Sophisticated advocacy requires that all statements be supported by references*

This Rule appears to be incompatible with the previous Golden Rule, but it is not. A long time ago, Leonardo da Vinci reminded us that ‘simplicity is the ultimate sophistication.’ Indeed, simplicity and sophistication are not contradictory or mutually exclusive characteristics of an argument

because sophistication merely requires that all statements made, and arguments developed, by advocates be supported with authorities. These authorities could be facts found in the relevant case file, case law (jurisprudence), doctrinal references or principles of *lex mercatoria*. In this way, the goal of simplicity may even be enhanced if the advocate is able to provide support for all statements made and arguments developed during his/her court appearance or arbitration hearing. Indeed, supporting authorities have the effect of making the arguments developed by advocates clearer, more transparent and, therefore, more simple and possibly more convincing and persuasive.

*Rule Three: Success ultimately requires flexibility and adaptability*

Effective advocacy usually requires a certain amount of rigidity which enables advocates to provide the court or tribunal with standard replies to predictable questions. Automatism has to be mastered before it is possible to aspire to freedom from rigidity. However, success will often depend on the amount of flexibility or adaptability displayed by advocates. Indeed, as Albert Einstein reminded us long ago, ‘The measure of intelligence is the ability to change.’

The importance of flexibility and adaptability may be illustrated with an example which is relevant to an arbitral hearing. In arbitration, the Respondent will often be asked to start with their arguments on jurisdiction. This is because the arbitral panel obviously assumes that the Claimant is not likely to question the authority of the tribunal to hear the substance of the dispute because the Claimant is the party that initiates the arbitration. However, the Respondent may wish to question the authority of the tribunal and, therefore, this party needs to provide reasons for objecting to the jurisdiction of the tribunal. These objections

vary from case to case and could include, among others, a claim that the dispute is not covered by the arbitration agreement or that the dispute has been initiated in the wrong arbitral institution. The distinct possibility that the Respondent might have to start its arguments first, should alert advocates to the need to be flexible and to prepare arguments which will suit all circumstances.

### III ADVOCACY TIPS

What is the secret of successful persuasion? The answer to that question is as mundane as it is true: success requires very hard work, commitment, devotion, perseverance and enthusiasm, especially in circumstances where the advocate is faced with a new problem that he/she has not encountered before.

Although it is certainly the case that luck is an important factor in determining how successful an advocate will be, a statement credited to the Roman philosopher Seneca the Younger reminds us that ‘luck is what happens when preparation meets opportunity.’

Advocates are actors in that they persuasively present the best case for their client, even if the advocate knows that the arguments are weak. A good actor will attempt ‘to sell’ the client’s case to the court or arbitral tribunal. A good way of facilitating this skill is by imagining that the client is looking over the shoulder of the advocate to see what he is doing to advance their case. However, at the same time, it is important to remember that a counsel only presents the best possible case for their client. The advocate is thus not emotionally affected by the outcome of the dispute because, ultimately, it is the client who wins or loses. The advocate is merely a convenient vehicle used for the purpose of arguing the case on behalf of the client.

The following are merely tips, adherence to which might facilitate successful advocacy. Most tips are firmly rooted in common sense, but some may appear to be slightly unorthodox. They are not listed in any particular order.

(1) Advocates must have a strong opening and a roadmap. Advocates also need to develop a plausible case theory. A strong opening may well be practiced, but it has to be delivered without reading. It could sound like this:

Mr President, Members of the Tribunal. My name is x and I appear for y, which I will refer to as z. This case is about d [*note: this should be a compelling point and delivered clearly*]. I will be dealing with the procedural issues (add time) and my colleague will address the substantive issues (add time).

During their presentations, advocates should indicate to the court or arbitral tribunal when they are moving to their next argument. They also need a very strong closing statement, in which they summarise succinctly their main argument (namely, why their client should win). The closing statement should be a ‘big bang’ statement that emphasises the main points that the advocates would like to make and it should resonate in the minds of judges or arbitrators. Obviously, it is important that the closing statement reinforces the opening statement.

(2) During the advocates’ presentation, it is important that their road map is followed impeccably. The roadmap enhances the structure of the arguments that advocates make during their presentations and, therefore, judges and arbitrators should be regularly reminded of the structure of advocates’ arguments. Some indicative words could generally be used to signpost the structure of the argument. For example, an advocate could

indicate that he or she is moving to another argument by signposting it as follows:

‘Your Honour, or Mr President, Members of the Tribunal, moving to my second argument’ or ‘Madam Chair, Members of the Tribunal, my next argument is ...’.

Some advocates, especially when appearing in court and before moving to their next argument, have a discernible tendency to say:

‘if you do not have any other questions’ or ‘if the court has no questions ... we move to our next argument ....’

Such statements do not operate as signposts, but instead may generate further questioning from the court, thereby endangering the time management of the advocates.

(3) In a hearing, advocates should only bring up their strong points, and never discuss their weak points (in any event, a party’s weak points will undoubtedly be raised by the opposing counsel). It is also recommended that advocates should only reply to the strongest arguments of opposing counsel. In this context, I often tell my audience my toddler story: if you walk in a street, anyone of us would be able to knock down a toddler with the flick of our finger. However, it does not prove that that we are strong. We would only be strong (and be perceived as such) if we are able to knock down a strongly-built person. The message of this story is that, to be persuasive, we need to address the strongest arguments of our opposition and to proceed to discredit them. Then, and only then, will we be regarded as strong advocates. Of course, in order to be able to do this, we need to ascertain the strong points of our opposition (not just our strong points). Thus, advocates need to know their own arguments intimately and must also understand most, if not all, of the arguments that

their opponents might develop. In ascertaining the case for the opponents, advocates should seek 'to stand' in the shoes of their opponents.

It is a dreadful mistake for an advocate to endeavour to communicate all his/her arguments to the court or arbitral panel, regardless of their strength. Not only would it be impossible to do this from a timing point of view, resulting in serious and possibly unsurmountable time management issues, but it would also be strategically disastrous because judges or arbitrators may not be able to distinguish between strong and weak arguments. By and large, the court is most interested in a consideration of the 'crucial' facts or issues which are likely to help them decide the case.

(4) Advocates should be able to use questions asked of them by the court or members of the arbitral panel as an opportunity to advance the interests of their client. Challenges presented through questioning, are not problems, but present opportunities to impart the party's case to the court or arbitral tribunal. Indeed, a good advocate is able to convert even a challenging question into an opportunity to show their level of understanding, knowledge and ability. When a judge asks a question, the advocate should immediately cease speaking, make eye contact with the judge, listen carefully to the question in order to understand its thrust and relevance. There is no harm in thinking about a suitable reply for a few seconds.

(5) The Defendant/Respondent should concentrate on, and respond to, the arguments advanced by the Appellant/Claimant and should not make an independent, parallel speech. Not unfrequently, judges remark that the parties were like 'two ships passing each other in the night.' Such a remark is indicative of the fact that the Respondent failed to respond to



the Appellant/Claimant. If there is an important argument that the Respondent needs to make, but is not responsive to arguments made by the Claimant, this argument may be advanced provided the court or tribunal is alerted to its non-responsive nature.

(6) It would appear almost inevitable that an advocate will make a mistake (or two) during a hearing. For example, an advocate may have the facts mixed up (which may be fatal to their chances of success) or may have forgotten an important fact that is either supportive of one's case or critical of the opponent's case. In such situations, it is advisable to desist from overtly advertising these mistakes to the court/tribunal. Instead, advocates might want to use their skill to minimise the impact of their mistakes, even if the judges/arbitrators are aware of them. This could be done, for example, by saying, with a smile, that 'to err is human.' As judges/arbitrators are human too, they too would have made mistakes in their careers and, hence, could presumably relate to the occurrence.

Although a slip of the tongue may be regarded as harmless, it could actually leave a bad impression on the court or tribunal. For example, if an advocate were to acknowledge the members of the court during an afternoon hearing with a supposedly friendly 'good morning' greeting, such *faux pas* could easily be interpreted as lack of confidence or nervousness on the part of the advocate.

(7) It is constantly necessary to remind the court or arbitral panel why the advocate's client should win. If advocates know (as they should) why their clients should win, that point should be signposted throughout the argument. The simplicity of the argument plays a crucial role in this regard. Simplicity indicates that the advocate clearly knows the strong

position of his or her client's case. It also helps the tribunal to filter out, among the complex factual matrix and several legal principles, the most important points which are important in deciding the case.

(8) Advocates would leave a very bad impression if they were to read their arguments (or a prepared speech). Apart from the obvious fact that reading impedes efforts at maintaining eye contact, it also inhibits the meaningful communication of ideas and, clearly, is not amenable to the development of a sensible discussion among professional people. Indeed, ultimately, a court hearing should become an intelligent and meaningful discussion between counsel and the court. However, any quotes that advocates would like to use during their presentations should be read, lest the advocates be accused of parroting behaviour or of having memorised the quotes by rote learning.

(9) It is important to ensure that judges or arbitrators do understand the argument that is being made. However, after answering a question, advocates should not wait until the judge or arbitrator has commented on the 'quality' or 'correctness' of the answer, hoping to receive their blessings. This generally happens when an advocate becomes silent after answering a question from the court or tribunal. This creates an awkward situation where the counsel is waiting for a comment whilst the court or tribunal is waiting for the counsel to move on with their arguments. Some advocates even use sentences like 'does it answer the question of your Honour?' or other sentences to the same effect. Instead, I suggest that advocates continue with their presentation. However, this should be done in such a manner so as to ensure that the advocate is not evading the question asked of him or her. Apart from wasting valuable time, counsel is expected to cover all their essential arguments and, hence, if time is not

utilised profitably, time management may prevent them from fully developing their arguments in a hearing.

(10) Of great importance is the power of rebuttal. In a rebuttal an advocate can undo a lot of problems that were caused during the main presentation. However, an advocate should limit themselves to two or maximum three hard-hitting points, and end with a ‘big bang’ statement, namely, as to why their client should win. Under no circumstances can the rebuttal be used for the purpose of introducing new arguments. An advocate may find that they have many points to rebut. Nevertheless, it is important to rebut only those points which are wrong in law or in fact. Moreover, a rebuttal should focus on the opposing counsel’s strong points which the advocate seeks to discredit in his or her rebuttal.

(11) Advocates should try to be on ‘the side of the angels’. This point, which was first indicated to me by Justice Desmond Derrington of the Supreme Court of Queensland, alerts advocates to the necessity of developing arguments in a way which will create sympathy for their case among the judges/arbitrators. Sympathy is often generated by advocates arguing that their client’s actions make sense from a business point of view or by indicating that they were ‘doing the right thing in the given circumstances’ or that they ‘tried to minimise losses as much as possible’ or ‘tried to help the other party in carrying out the obligations under the contract.’

(12) Advocates should desist from putting words in the mouth of the judges/arbitrators and should not use any comments made by arbitrators in order to bolster their own arguments. For example, it is inappropriate to say to a judge or arbitrator: ‘as you yourself have stated when commenting on a point made by the opposing counsel ....’ Indeed, the

value of such a statement is questionable at best because, in making this statement, the advocate assumes that the judge/arbitrator has made up his mind about a certain issue and will necessarily be on the advocate's side on this issue. Instead, the judge/arbitrator may merely have sought further information from the counsel, without wishing to divulge their own view of a matter.

A good advocate may, however, use answers given by the opposing counsel to the questions of the court or tribunal to their advantage. For example, if opposing counsel gave a patently wrong or no answer to a question asked by the court, then a good advocate may preface their own presentation by answering the question. This could be done by saying: 'Your Honour, in answer to the question addressed to opposing counsel, I will provide you with the correct answer/information.' This strategy will be favourably received by the court, for a number of reasons. First, the court will presumably be happy that the counsel has remembered the question. Second, the counsel proves his or her attentiveness to the proceedings and the arguments developed by the opposing counsel. This style of advocacy promotes interactivity and enhances engagement and dialogue between the counsel and the court/tribunal.

(13) Advocates should speak slowly and loud enough, without being condescending. It is the physical environment which dictates how loud an advocate should speak. When the court room is big and the distance between the counsel table and the judges' table is relatively large, then counsel should speak louder than usual. Also, during their presentation, an advocate may vary the pace and pitch of the sound in order to emphasise certain points. For example, if a counsel relies upon a crucial fact found in the file, they should read it slowly and emphasise crucially important words by slightly raising their voice. Advocates should never

underestimate the power of inserting pauses in their presentation. Using fluctuations in delivery enhances a lively presentation while speaking at the same pitch makes the delivery monotonous.

(14) Advocates should ensure always to answer a question asked of them by a judge or an arbitrator. In this context, it is important to never shirk their responsibility by telling the court that this issue will be discussed later or will be addressed by their co-counsel. Therefore, it is important for a good advocate to know not only his or her own issues, but also the issues which their co-counsel will discuss in their presentations.

(15) Never underestimate the power of humour! I recall an arbitration hearing in the late 1990's when counsel told the arbitral panel that 'you do not have to be an Einstein to understand this point.' The implication of this statement was that the statement/argument made by the opposing counsel was so stupid because they could not understand or concede a point which everyone knew to be true or obvious. At the first available opportunity, counsel on the other side, who in effect had been accused of stupidity, retorted that he agreed that 'you do not have to be an Einstein to understand this point,' but then added brilliantly that 'but it does help to be a good lawyer.'

(16) There are many issues, some of which may seem to be trivial, for example, how advocates should be dressed, how much water they should consume during their presentation, among other things. It is not the purpose of this paper to deal with these minutiae, even though they may be relevant in any court or arbitral hearing. Nevertheless, it is useful to point out that advocates should be dressed conservatively and their materials should be neatly organised on the table or lectern before them.

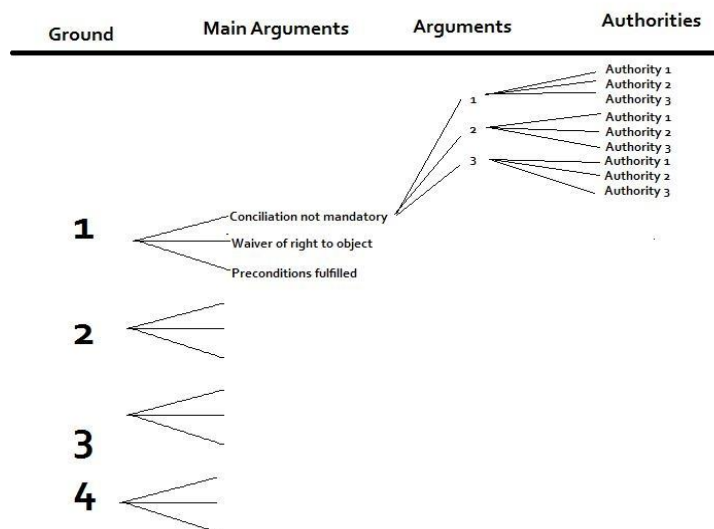
A professional look, attitude and approach are likely to be appreciated and respected by the court or tribunal.

## IV THE SECRET OF SUCCESSFUL ADVOCACY

This strategy, which is discussed briefly here, consists of three planks: (a) the multi-tiered approach, (b) the questions and answers bank, and (c) time management strategy.

### A *The Multi-tiered Approach*

The multi-tiered approach (also known as the 1/2/3 strategy) is a strategy aimed at ensuring that every statement made, or argument developed, by advocates is supported, ideally, by three authorities (hence the 1/2/3 strategy). These authorities could be a fact found in the File, a relevant case, or doctrinal authority. The multi-tiered approach consists of four levels, as diagrammatically seen below.



The first level of the above diagram, developed during the 18<sup>th</sup> Willem C Vis International Commercial Arbitration Moot, has four grounds that the

advocate wants to plead, the first one of which is that the arbitral tribunal does have authority to hear the case. The second level of the first ground are the main arguments in favour of the proposition that the tribunal has the authority to hear the substance of the case, namely that (i) conciliation is not mandatory, (ii) the Respondent waived his right to conciliation, and (iii) the preconditions to arbitration were fulfilled. At the third level, each of these three arguments is further supported by three sub-arguments. Finally, at the fourth level, each level three sub-argument is supported by authorities (a fact found in the File, case authorities, doctrinal authorities, including quotes, principles of *lex mercatoria*, etc.).

This multi-tiered strategy is developed for each ground (including all procedural and substantive grounds). Eventually, impressive diagrams are created which enable advocates, depending on the questions asked of them by judges or arbitrators, to move from one part of their diagrams to the any other part and to return to their main argument after having answered the questions of the court/arbitral panel.

### B *The Questions and Answers Bank*

Advocates should establish a bank of potential questions and model answers. This will undoubtedly help advocates in their attempts to answer questions asked of them by judges or arbitrators. In the unlikely event that a completely novel question is asked, it should be possible to design an answer by combining parts of model answers given to other questions in the bank.

### C *Effective Time Management*

Successful advocates manage their allocated time effectively. Advocates are expected to deal with all the issues which they have foreshadowed in

the roadmap. Occasionally, if not often, advocates may be diverted from their roadmap by the incessant and relentless questioning of the court/arbitral panel. Nevertheless, success will evade the advocates if they do not deliver what they promised to deliver in the roadmap. With regard to time management, the question arises how time can be managed if judges or arbitrators keep on asking questions. Perhaps, good time management may require advocates to admit that they cannot take this issue any further and that, therefore, they propose to move on. As a general rule, if an advocate cannot communicate an argument in, say three minutes, perhaps it should not be delivered at all? The Golden Advocacy Rule of simplicity obviously plays a very important role in this regard.

## V CONCLUSION

In this paper, I have briefly reflected on successful advocacy strategies which could be used, with benefit, by advocates who appear before courts or arbitral tribunals. Although none of the advice proffered in this paper will necessarily result in a successful outcome, I am of the opinion, that these strategies, which I have used successfully during the last two decades, will facilitate the achievement of success and will substantially increase the persuasive nature of an advocate's arguments. Nevertheless, ultimately success will only come through very hard, diligent and persistent work.