Global Arbitration Review

The Guide to Advocacy

Editors
Stephen Jagusch QC, Philippe Pinsolle and Alexander G Leventhal

Fifth Edition

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For further information please contact Natalie.Clarke@lbresearch.com

Publisher
David Samuels

Business Development Manager
Samuel Romp

Editorial Coordinator
Hannah Higgins

Head of Content Production
Simon Busby

Copy-editor
Tessa Brummitt

Proofreader
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Publisher's Note

Global Arbitration Review is delighted to publish this new edition of *The Guide to Advocacy*.

For those new to Global Arbitration Review (GAR), we are the online home for international arbitration specialists, telling them all they need to know about everything that matters.

Most know us for our daily news and analysis. But we also provide more in-depth content: including books like this one; regional reviews; conferences with a bit of flair to them; and time-saving workflow tools. Visit us at www.globalarbitrationreview.com to find out more.

As the unofficial 'official journal' of international arbitration, sometimes we spot gaps in the literature. At other times people point them out to us. That was the case with advocacy and international arbitration. We are indebted to editors Philippe Pinsolle and Stephen Jagusch for having spotted the gap and suggesting we cooperate on something.

The Guide to Advocacy is the result.

It aims to provide those newer to international arbitration with the tools to succeed as an advocate, whatever their national origin, and to provide the more experienced with insight into cultural and regional variations. In its short lifetime it has grown beyond either GAR's or the editors' original conception. One of the reasons for its success are the 'arbitrator boxes' – see the Index to Arbitrator's Comments on page ix if you don't know what I mean) – wherein arbitrators, many of whom have been advocates themselves, share their wisdom and war stories, and divulge what advocacy techniques work from their perspective. We have some pretty remarkable names (and are always on the look out for more – so please do share this open invitation to get in touch with anyone who has impressed you).

Alas since the last edition we lost one of those remarkable names with the passing of Stephen Bond (1943–2020). Steve was a former head of the ICC and of White & Case's international arbitration team, and a refreshingly clear-eyed thinker. As with Emmanuel Gaillard in 2021, the world of international arbitration was suddenly much poorer when he went. I would urge those who have not seen the two GAR pieces published in commemoration to look them up.[1] One of the things that comes across strongly is how much Steve loved to teach, in his own fashion. With that in mind we thought it would be

1 https://globalarbitrationreview.com/tributes-stephen-bond; https://globalarbitrationreview.com/stephen-bond-1943-2020.

fitting to preserve his arbitrator boxes for the benefit of future generations. So you will still see his name appearing throughout.

We hope you find the guide useful. If you do, you may be interested in some of the other books in the GAR Guides series, which have the same tone. They cover energy, construction, M&A, and mining disputes and (from later this year) evidence, and investor–state disputes, in the same unique, practical way. We also have a guide to assessing damages, and a citation manual (*Universal Citation in International Arbitration - UCIA*). You will find all of them in e-form on our site, with hard copies available to buy if you aren't already a subscriber.

My thanks to our editors Stephen Jagusch QC, Philippe Pinsolle and Alexander G Leventhal for their vision and editorial oversight, to our exceptional contributors for the energy they have put into bringing it to life, and to my colleagues in our production team for achieving such a polished work. And also to practitioners Neville Byford, Stephen Fietta and Sean Upson ('The Role of the Expert in Advocacy') and Flore Poloni and Kabir Duggal ('Tips for Second Chairing an Oral Argument') for giving us extra material to enrich those chapters.

David Samuels
Publisher, GAR
August 2021

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Cultural Considerations in Advocacy: Spanish-Speaking Latin America

Paola Aldrete, Ana Sofía Mosqueda and Cecilia Azar[1]

Latin America has managed to overcome several obstacles in developing and embracing commercial arbitration.[2] In the 1990s, Mexico and other Latin American countries constitutionally recognised arbitration as a valid method of dispute resolution, as most of these countries adopted modern arbitration legislation[3] and arbitration-related international treaties and conventions.[4] The myth of 'the hostility [of Latin America] towards international commercial arbitration can definitely be put to rest.'[5] This is worthy of recognition, as countries from the region have civil law systems, which, as explained below, differ greatly from international arbitration practice.

Recently, government lockdowns (including the temporary closing of courts), along with other government measures adopted during 2020 and 2021 to combat the pandemic, created the need for, and encouraged the use of, alternative dispute resolution mechanisms

1 Paola Aldrete is a senior associate, Ana Sofía Mosqueda is a paralegal and Cecilia Azar is a partner at Galicia Abogados.

2 In general, Latin American countries have adopted arbitration laws based (to different degrees) on the UNCITRAL Model Law on International Commercial Arbitration.

3 The following Latin American countries have adopted arbitration laws: Mexico (1993, 2011), Guatemala (1995), Peru (1996, 2008), Colombia (1996, 2012), Bolivia (1997), Costa Rica (1997, 2011), Ecuador (1998), Venezuela (1998), Panama (1999, 2013), Honduras (2000), Paraguay (2002), El Salvador (2002), Chile (2004), Nicaragua (2005), Cuba (2007), Dominican Republic (2008), Argentina (2018) and Uruguay (2018). See Luis O'Naghten and Diego Duran, 'Latin America Overview: A Long Road Travelled: A Long Road to the Journey's End', *International Arbitration Laws and Regulations 2020*, available at: https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/6-latin-america-overview-a-long-road-travelled-a-long-road-to-the-journey-s-end.

4 An important adoption was that of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

5 Andrés Jana L, 'International Commercial Arbitration in Latin America: Myths and Realities', *Journal of International Arbitration* (Kluwer Law International 2015, Volume 32 Issue 4) p. 446.

such as commercial arbitration.[6] As a result, parties have increasingly turned to ADR to solve their disputes. The golden age of Latin American arbitrations may finally have arrived.

In this chapter, the authors address several aspects of advocacy in Spanish-speaking Latin American countries, including effective advocacy in Latin America; ethics of counsel and arbitrators; written advocacy; and oral advocacy and management of evidence.

Effective advocacy in Latin America

In analysing effective advocacy, it is first necessary to define it. Advocacy may be difficult to ascribe a single meaning to since it can be approached from different perspectives: some perceive it as a technique, and others as the art of persuasion.[7]

For example, Emmanuel Gaillard and Philippe Pinsolle define advocacy as a choice-making process 'in manner consistent with the strengths and weaknesses of the case at issue',[8] while Pierre-Yves Tschänz describes advocacy as 'the preparation and presentation of a party's case, in order to convince the arbitrators of the merits of the case'.[9]

Advocacy is then a combination of choice-making, the identification of strengths and weaknesses of the case, strategy, and excellent planning, requiring the broadest range of skills to persuade the arbitral tribunal. Advocacy is commonly assumed to pertain only to oral arguments or examination of witnesses; however, such assumptions are incorrect, as '[l]imiting advocacy to the oral argument of the advocate or indeed to the examination of witnesses does not do justice to this concept.'[10]

In the case of Latin American arbitrations, cultural implications are of special relevance as Latin America countries are mainly civil law jurisdictions. Effective advocacy requires a particular set of skills, some of which are addressed below.

Strategy design

A skilled counsel should identify, design and apply the best possible persuasion strategies. To do so, counsel should detect the most relevant elements of the claim (or defence) and the strengths and weaknesses of the case.

In designing the legal strategy, the 'appointment of the arbitrator is a very calculated'[11] and crucial decision. It is therefore important to identify and appoint an arbitrator who is familiar with the context of the case, as well as to answer the following question: has the arbitrator handled similar cases in the past, or written opinions on a related subject matter? To confirm these qualifications, counsel must investigate the past rulings of the arbitrator,

6 As an example, during the covid-19 related lockdown, Mexican courts closed their doors to non-emergency cases. As a result, when the courts opened their doors, the caseload exponentially increased, exceeding the courts' capabilities to manage and resolve the cases.

7 Antonio Crivellaro, 'An Art, a Science or a Technique?', in Albert Jan Van den Berg (ed), *Arbitration Advocacy in Changing Times*, ICCA Congress Series, Volume 15 (ICCA & Kluwer Law International 2011), pp. 9-24.

8 R Doak Bishop (ed), *The Art of Advocacy in International Arbitration* (Juris Publishing, Inc. 2004), p. 136.

9 Pierre-Yves Tschänz, 'Advocacy in International Commercial Arbitration in France', ibid., p. 195.

10 Antonio Crivellaro, 'An Art, a Science or a Technique?', in Albert Jan Van den Berg (ed), *Arbitration Advocacy in Changing Times*, ICCA Congress Series, Volume 15 (ICCA & Kluwer Law International 2011), pp. 9-24.

11 Bruno Guandalini, 'Economic Analysis of the Arbitrator's Function', International Arbitration Law Library, Volume 55 (Kluwer Law International 2020), pp. 273-330.

if they are available. Unlike common law practitioners, civilian lawyers are unaccustomed to this practice.

Investigation

It is essential for a lawyer to develop skills related to the identification, compilation, review and organisation of the entire case and arbitration record.[12] Cooperation from the client is crucial; counsel must develop strong communication skills to obtain crucial information and unveil the true interests of the client.

Decision-making

Counsel must determine the course of the case by making certain decisions and taking into account the political, economic and legal interests that may influence the tribunal's decision.

Counsel should be 'aware of how arbitrators interpret the law [that] will constitute a road map for the counsel's arguments and approaches'.[13] Accordingly, it is important for counsel to identify: the legal tradition of each arbitrator; the religion, if any, of the arbitrators; the ideological preferences of the tribunal;[14] and the language and style of each of the members of the arbitral tribunal.[15]

Counsel must be aware that, contrary to common law arbitrators, Latin American arbitrators tend to interpret the law by applying strict legal principles and rules.

Efficiency and flexibility

Efficiency will often be achieved by adapting best practices from both common law and civil law traditions, since 'a skilled advocate . . . is one who can engage in and efficiently use the procedural mechanisms of both worlds.'[16]

Flexibility can be accomplished by promoting the use of international guidelines and passing over certain formalities.

Within the region, compliance with procedural formalities is important. Meeting these, however, often results in rigid arbitration proceedings. To overcome this problem, Latin American countries have attempted to favour flexibility and efficiency over procedural formalism. As an example, in 2017, Mexico added to its Constitution a paragraph that

12 David J A Cairns, 'Advocacy and the Functions of Lawyers in International Arbitration', in Miguel Angel Fernandez-Ballester and David Arias Lozano (eds), *Liber Amicorum Bernardo Cremades*, (La Ley 2010), p. 297

13 Mary Mitsi, 'The Decision-Making Process of Investor-State Arbitration Tribunals', International Arbitration Law Library, Volume 46 (Kluwer Law International 2018), pp. 1-18.

14 It is known that '[t]he attitudinal or behavioural model postulates that judges decide not only in light of the facts of the case but also based on ideological preferences.' See Mary Mitsi, 'The Decision-Making Process of Investor-State Arbitration Tribunals', International Arbitration Law Library, Volume 46 (Kluwer Law International 2018,) pp. 23-42.

15 Fernando Miguel Dias Simões, *Commercial Arbitration between China and the Portuguese-Speaking World* (Kluwer Law International 2014), p. 115.

16 Torsten Lörcher, 'Cultural Considerations in Advocacy: Continental Europe', *The Guide to Advocacy* (Law Business Research 2020).

commanded 'the authorities [to] give priority to the solution of the conflict over procedural formalisms.'[17]

Although commercial arbitration in the region has taken advantage of these principles, the concern about following procedural formalities remains. The region continues to struggle to eliminate these hurdles (which are intrinsic to civil law practice and second nature to civil law practitioners), aiming to erase from arbitration practice the formalist stamp of litigation practice.

Since current arbitration practice is closer to the practice of common law than civil law, arbitration practitioners in this region have to be versatile enough to operate in both arenas. Practitioners must consider and adapt to the fact that, unlike in other jurisdictions, in Latin America the gap between litigation and arbitration is wide.

Ethics: counsel and arbitrators

Parties agree to arbitrate because they trust in the effectiveness of the proceeding and in the impartiality of the arbitrators. Loss of confidence in the arbitral tribunal and the proceedings could imperil the arbitration itself. Ethics are therefore fundamental for effective advocacy.

The existence of stereotypes regarding the ethics of Latin American judicial proceedings is undeniable. Sadly, a recent arbitration corruption case in Central America has confirmed such stereotypes.[18] However, corruption is not the rule, as ethical standards within the Latin American arbitration community are ordinarily high.

The arbitration community is relatively small within the region. Therefore, reputation is the main asset of any practitioner who wishes to grow within the community. In the region, experience and high ethical standards are essential for maintaining a good reputation.

Although bar associations are, generally, not mandatory within Latin America,[19] arbitration practitioners (especially arbitrators) follow and apply general ethics rules (soft law), as it is well known that '[a]rbitration requires a neutral and impartial climate [which] can only be achieved if all doubt regarding the integrity of the arbitrators has been dispelled.'[20]

In consequence, practitioners aiming to excel within the Latin American arbitration community must bear in mind that ethical behaviour is essential.

17 Constitución Política de los Estados Unidos Mexicanos, CPEUM, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 11-03-2021.

18 Carlos A Matheus López, 'On Corruption in Investor-State Arbitration: The Case of Odebrecht Against the Peruvian State', Kluwer Arbitration Blog, 2 April 2020, available at: http://arbitrationblog.kluwerarbitration.com/2020/04/02/on-corruption-in-investor-state-arbitration-the-case-of-odebrecht-against-the-peruvian-state/.

19 As an example, membership of a bar association is mandatory in Guatemala and Costa Rica, while it is voluntary in Mexico, Chile and Bolivia. See 'El Ejercicio de la abogacía en América Latina: en la búsqueda de una agenda de trabajo', Volumen I, Centro de Estudios de Justicia de las Américas, 2020, pp. 113-114.

20 José Carlos Fernández-Rozas, 'Clearer Ethics Guidelines and Comparative Standards for Arbitrators', in Miguel Angel Fernandez-Ballester and David Arias Lozano (eds), *Liber Amicorum Bernardo Cremades* (La Ley 2010), pp. 413-449.

Written advocacy: pleadings and evidence

Most of Latin America's justice systems are situated in the civil law family. Contrary to common law systems, civil law systems rely heavily on documentary material as opposed to oral testimony. That is why, as noted before, the civil law tradition is characterised by its emphasis on formalities. For example, Article 16 of the Mexican Constitution requires judicial resolutions to be supported and reasoned, requiring the judge to review and address any and all arguments submitted by the litigator.[21]

Because of this, judicial resolutions are long and greatly detailed. Naturally, Latin American arbitrators tend to issue arbitral awards that are longer and more heavily detailed than the resolutions of common law arbitrators. Formalism, once again, comes into play. For example, procedural background commonly constitutes an extensive chapter of the award to demonstrate that due process has not been violated. Naturally, excessive detail and length increase the risk, if the award is under judicial review for set-aside, for such judicial review to be deeper and more complex.

However, Latin American arbitrators who participate in international commercial arbitrations may depart from local rules[22] to follow the international practice wherein the arbitrator 'is not bound to examine every and all arguments by the parties and answer them all', allowing the award to be less extensive than those in which additional formalities must be met.

Moving to arbitration counsel, the effect of local judicial formalism seems to replicate itself in local arbitration practice: to avoid any right to be deemed waived, arbitration practitioners from the region tend to draft briefs or submissions that are both long and repetitive, and which include in great detail the background, arguments and evidence.

With respect to the taking of evidence, civil law's judicial approach differs from that of common law by emphasising the burden of proof and the reliability of evidence, rather than searching for the truth.[23] In civil law, the scope of requests and orders regarding the production of documents is commonly narrow.[24] Discovery of documents 'as practiced in the United States is vigorously rejected in the civil law world',[25] since it is perceived as an intrusion and invasion of privacy. Practitioners tend to oppose the production of document requests most strongly when it is considered a 'fishing expedition'.[26] These oppositions (and subsequent replies) are increasingly longer and more detailed because of the aforementioned formalism, perceptions regarding invasion of privacy and the fact that Latin American practitioners are unaccustomed to such a procedural stage.

Once again, the exception to this rule is found in the commercial international arena, where practitioners from the region draft and submit briefs, writs and document production requests that are more succinct.

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21 Constitución Política de los Estados Unidos Mexicanos, CPEUM, DOF 05-02-1917, últimas reformas DOF 11-03-2021.

22 Pierre Lalive, Journal of International Dispute Settlement, Vol. 1, No. 1 (2010), pp. 55–65.

23 Reto Marghitola, Document Production in International Arbitration, International Arbitration Law Library, Volume 33 (Kluwer Law International 2015), pp. 11-14.

24 Ibid., p.15.

25 Ibid., p.16.

26 Ibid., pp. 61-62.

In summary, one may expect formalism to take a role in the preparation and outcome of briefs, writs, document production requests and awards when the arbitration is local, or when it takes place between Latin American parties. However, when the arbitration is international, even when the place of the arbitration is within Latin America, one must expect that the Latin American arbitrators or practitioners will not consider excessive local formalities.

Oral advocacy and management of evidence

Latin American arbitration practitioners from the civil law tradition may be unfamiliar with the oral tradition specific to common law litigation. The reason is that judicial proceedings in civil law countries are mostly (or at least used to be) document-based proceedings, wherein judges would rather rule on the basis of the documentary evidence and written submissions filed by the parties. Judicial systems within the common law tradition, on the other hand, have long included both oral and document stages as part of proceedings.[27]

In consequence, oral skills such as storytelling, cross-examination, the use of visual aids and techniques for reading the room, were historically outside the teachings of law schools in Latin America. However, following amendments to national commercial and civil legislation,[28] it will soon be expected for law schools in the region to include oral skills-related courses in their programmes.[29] While the Latin American law community waits for younger generations schooled in oral advocacy to emerge, current lawyers gain their knowledge through trial and error.

In arbitration, Latin American practitioners obtain oral advocacy skills by researching, reading and experimenting. Theatre-like techniques are often applied by practitioners around the world, and are used increasingly by lawyers from the region. The increasing use of visual aids is also notable within Latin American law.[30]

These skills are tested during arbitral hearings, when the examination and cross-examination of witnesses (fact and expert) takes place. The question of whether to examine or cross-examine should be dealt with case by case; however, in Latin America, written witness statements are more common than direct oral examination, for the many reasons explained in this chapter (formalism, a strong reliance on documents, etc.).

In relation to witness evidence, it does not come as a surprise that in the civil law tradition, 'witness testimony is de-emphasised in favor of documentary evidence'.[31] It is often said that 'witness testimony remains less significant in civil law litigation systems and, less markedly, in international arbitrations conducted among civil law parties and lawyers'.[32]

27 As an example, in Mexico, commercial litigation proceedings used to be document-based only. It was not until 2011 that oral judicial proceedings were included in the Mexican Commerce Code.

28 In 27 January 2011, small claim (under 220,533 Mexican pesos) oral trials were (for the first time) included in the Mexican Commerce Code. After several modifications, from January 2020 oral trials have been available for all commercial disputes without regard to the amount in dispute.

29 Some law schools in the region have already included these courses in their programmes.

30 In Mexico, visual support designers and service providers started to grow in 2018.

31 Jennifer Kirby, 'Witness Preparation: Memory and Storytelling', Journal of International Arbitration (Kluwer Law International 2011, Volume 28, Issue 4), p. 403.

32 Gary B Born, *International Commercial Arbitration* (Third Edition) (Kluwer Law International 2021), pp. 2553-2554.

One relevant issue is the preparation of witnesses. While the preparation of witnesses (for direct and cross-examination) is common in international arbitration, civil law courts do not commonly allow for this, as the legitimacy of this practice remains in question. Naturally, and especially from the standpoint of civil law, the preparation of witnesses raises ethical concerns, being widely perceived as a technique used to influence the witness, corrupting his or her memory.[33]

Furthermore, arbitral tribunals with a civil law context 'tend to impose greater limits on cross-examination, both in terms of length of examination, scope of questions and counsel's efforts to "control" a witness'.[34]

When the arbitrators' background lies within the civil law tradition, practitioners must pay special attention to the preparation of witnesses to avoid creating the perception that they have been influenced and corrupted. During cross-examination, it is not uncommon for the cross-examiner to ask the witnesses if they received any help in the preparation of their statement and in preparing for cross-examination.

Finally, with respect to closing statements, the reader must bear in mind that, within the region, closing statements in arbitration proceedings commonly differ from those of civil law judicial proceedings. The former encompass a high-level summary of the case's main facts, and of the claims and relief sought (commonly addressing issues that arose during the hearing), whereas the latter include a more detailed repetition of the case's facts, claims and relief sought. Such differences are reflected in the ability of a Latin American arbitration practitioner to prepare a closing statement that is succinct and on-point.

Conclusion

Several jurisdictions from the region seem to be moving in the right direction by taking big steps towards further adopting and encouraging arbitration as an alternative dispute mechanism. Indeed, Latin American practitioners continue to grow within the region and internationally by overcoming, mostly through trial and error, the obstacles described in this chapter.

Due to the formalism attached to the civil law tradition of most Latin American jurisdictions, and because of the gap between arbitration practice (closer to common law) and civil law practice, it is common for practitioners from the region to face more obstacles in entering the arbitration world than common law practitioners do. Therefore, when an arbitration involves Latin American parties, or parties from other countries with similar legal traditions, the cultural considerations addressed in this chapter should be taken into account to maintain the flexibility and efficiency of the arbitration.

33 Jennifer Kirby, 'Witness Preparation: Memory and Storytelling', Journal of International Arbitration, (Kluwer Law International 2011, Volume 28, Issue 4), p. 401.

34 Gary B Born, *International Commercial Arbitration* (Third Edition), (Kluwer Law International 2021), p. 2457.

Successful advocacy is always a challenge. Throw in different languages, a matrix of (exotic) laws and differing cultural backgrounds as well and you have advocacy in international arbitration.

Global Arbitration Review's *The Guide to Advocacy* is for lawyers who wish to transcend these obstacles and be as effective in the international sphere as they are used to being elsewhere. Aimed at practitioners of all backgrounds and at all levels of experience, this Guide covers everything from case strategy to the hard skills of written advocacy and cross-examination, and much more. It also contains the wit and wisdom on advocacy of more than 40 practising arbitrators, including some of the world's biggest names in this field.

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