# 4th IATC Conference 2024

## Keynote Address by
## The Honourable Chief Justice Andrew Cheung
## on 8 April 2024

Honoured Guests, Ladies and Gentlemen,

1. It is a great pleasure to speak to you all today at this 4th Conference of the International Advocacy Training Council. I bid you all a warm welcome, especially those of you joining this conference from overseas.

2. As the theme of this conference is advocacy in arbitration, it may well be thought that it is unusual to invite a representative from the Judiciary to give this keynote speech. I can assure you that advocacy is of great relevance to those of us on the Bench, as the recipients and benefactors of good and effective advocacy. Effective advocacy is a remarkably easy part of the dispute resolution process to overlook, as it is virtually expected of those who appear before courts and arbitral tribunals alike. As any judge or arbitrator will attest to, however, good advocacy is enormously helpful for adjudicators to reach their decisions in a reasoned way.

*The growth of advocacy training*

3. Given the importance of good advocacy, it is hard to believe that up until the turn of the century, the attitude to advocacy was that it was an ability that one either had, or did not have. As the components of good advocacy began to be analysed and broken down, however, the idea of fostering and developing the skills of advocacy which were previously thought to be unteachable began to take hold.

4. This led to the growth of advocacy training at the turn of the century, for example at the English Inns of Court for pupil barristers, to nurture and cultivate basic advocacy skills. This training would then spread across the world to different jurisdictions, and advocacy training is now a standard part of most, if not every practising lawyer's training.

5. Advocacy is now taught at a relatively early stage of professional legal education. In particular, it usually takes the form of small groups, to encourage and develop skills, with instruction being practical rather than didactic. The emphasis of advocacy training is on practical, hands-on exercises, usually led by actual lawyers and judges, with a focus on what effective advocacy is. Of particular importance to advocacy training is the human dimension – to preserve the individual style of each advocate whilst ensuring a firm grasp of the basics of good advocacy. A multitude of different methods of analysing advocacy performance of students is now used, in order to

ensure that advocates are equipped to reflect on their performances and continue to develop their advocacy themselves.

6. From this description of advocacy training, it is clear that much thought and development has gone into advocacy training in the relatively short time it has been going on. Indeed, it is one area of legal education that has experienced rapid growth compared to other areas of law that are taught in a relatively standardised way. This is a reflection on the importance of advocacy to litigation. The continued enhancement of independent advocacy also strengthens public confidence in advocates, and thus reinforces trust in the court system and the rule of law.

*Advocacy training for arbitration*

7. How does this relate to advocacy in arbitration? As you will all be aware, arbitration is a private method of dispute resolution, created by agreement between the parties. This agreement is usually entered into pre-dispute, but agreements to submit a dispute to arbitration may also be entered into after the dispute has arisen. The fact that it is a form of dispute resolution created by agreement is of course critical, as the agreement is the starting point for whether or not the dispute itself is within the scope of the arbitral tribunal's jurisdiction. Whereas a court's procedure is set by the legislature and the courts, the procedure before an arbitral tribunal is determined by agreement between the parties. It is the form of procedure which

determines the type of advocacy to be used before the arbitral tribunal. The parties themselves thus potentially exercise much control over the way their dispute will proceed, and it cannot be overstated how important this is to advocacy in arbitration.

8. Like court advocacy, training for arbitration advocacy has experienced massive growth in the last 20 or so years. To an extent, the principles for effective advocacy in court will also apply to arbitration proceedings.

9. These may include: the need to make a strong first impression; keeping things brief; avoiding unnecessary complexity, for example by introducing matters in chronological order, using illustrations and visual aids; using clear reasoning and arguments and admitting the weaknesses in one's case; maintaining professionalism, including in an advocate's dress and posture. Good advocacy will extend to details such as speaking clearly, creating a variety in an advocate's pace, pitch and volume, avoiding speaking too quickly, avoiding monotony, avoiding sarcasm and avoiding rudeness. These are all skills that should be second nature to advocates, whether in the court or in arbitral proceedings. At the other end of the spectrum, a Canadian court[1] has very recently commented adversely on counsel's "eye rolling, head shaking, grunting, snickering, guffawing and loud

[1] *China Yantai Friction Co Ltd v Novalex Inc* 2024 ONSC 608 (CanLII), [20] – [27].

muttering" during their opponent's submission as being hardly "the hallmarks of an effective advocate".

*The challenges of advocacy in arbitration*

10. However, there are key differences between court hearings and arbitral proceedings. It is generally expected that arbitration will be less formal than court proceedings. Thus, the style of oral advocacy may tend towards a more conversational form, rather than the formality of a courtroom, particularly in addressing the adjudicators, for example. Whilst this may seem to relieve some of the pressure on the standard of advocacy, I would tend to believe that it makes things more difficult, as it is up to the advocates themselves to pitch the formality of their advocacy at the right level. A tone that is either too formal or too casual may put the persuasiveness of the advocacy at risk.

11. In the post-pandemic world, another challenge that advocacy has had to overcome is the introduction of technology, particularly the explosion of remote hearings. Whilst this was a relatively new development for the courts, there is of course a longer history of remote hearings in arbitration. Here again, as we are now learning, the needs for presenting a case online differ significantly from in-person appearances. These are but two examples of the challenges of arbitration advocacy, and one can easily see how there would be even greater impetus for advocacy training in this regard.

12. With the greater freedom of agreement in arbitral proceedings, the very concept of what is considered advocacy may be challenged to its core. Arbitration advocacy may not be limited to the oral performance of the advocate, such as the opening and closing statements, and the handling of witness testimony. Advocacy, for the purposes of arbitration, may also extend to all the aspects of the dispute. These include strategic decisions in the case. Arbitration, under agreement, allows for a wide range of possibilities for the parties and their representatives, far beyond court proceedings, and thus advocates in arbitration must take advantage and make use of those possibilities to the best of their abilities in order to present their cases fully. This is thus not merely limited to the best oral performance that courtroom advocacy would primarily be concerned with.

13. The consensual nature of arbitration may mean that communication with an arbitral tribunal may not be as straightforward as communicating with a judge in a court. As I have already mentioned, the potentially international nature of arbitration may mean that communication must take place online, by remote means. Moreover, members of an arbitral tribunal may not necessarily speak the same language as a first language, and may not be educated in the common law, or trained in the law at all. For example, arbitrators may have been selected for an arbitral tribunal based on the language that witnesses will testify in. In an arbitration, the parties' representatives may also

come from different backgrounds, not just legal backgrounds or training. Representatives may, for example, come from specific technical backgrounds that the issues of the dispute revolve around, and it may be even more important for such representatives to receive advocacy training. There are thus a much greater number of variables involved in arbitral proceedings, and all of those factors may influence how an advocate approaches an arbitral panel, in contrast with how legal representatives may address a judge or present their case in court.

14. Another potential factor which advocates may have to take into consideration are the different jurisdictional backgrounds of arbitrators or members of an arbitral panel. For example, even if an arbitrator does not come from a legal background, the legal tradition they come from may influence how they view proceedings and procedural matters, including what is appropriate and what is not. Amongst the matters this may affect, some key areas of difference between civil and common law legal traditions include the extent to which unilateral communications are permitted between legal representatives and adjudicators of a dispute, the treatment of evidence and witness preparation, as well as contact between witnesses and lawyers. Given the aforementioned freedom of agreement between the parties in respect of the resolution of their dispute by way of arbitration, these matters may or may not be dealt with under the rules which the arbitration is taking place, or it may be taken as implied. It is therefore helpful for training for advocates in arbitration to cover such matters as

well, which may go as much to how one advocates or conducts their case as it is a matter of procedure or strategy. Thus, the limits of court advocacy and what is required for the training of court advocates may not apply to advocacy in arbitration. Another example of this is in the course of arbitration, the time permitted for oral advocacy may be limited by the procedural rules adopted by the parties, and it may therefore be equally important for an advocate's written skills to be as well developed as those of their oral advocacy.

15. In terms of the arbitration processes, to a certain extent, these will be based on those found in the courtroom. However, there are some well established practical limits to the powers of an arbitral tribunal which in turn affect the arbitral processes. For example, it is important for advocates in arbitration to understand how the arbitrator or members of the arbitral tribunal view the rules of discovery and evidence. Most arbitration rules will not allow for the same extensive discovery that court procedure does, and indeed it may not be easy for such discovery to take place or be enforced by an arbitral tribunal, particularly in the case of cross-border arbitrations. The arbitral rules may not allow for depositions of witnesses. Advocates in an arbitration therefore cannot assume that all the tools that would normally be available to a litigator in court proceedings will be available to them. One good example of this is the availability of third party witnesses, whose appearance or submission to the arbitration discovery processes an arbitral tribunal may have little to no power to compel. Gaps such

as these, that would potentially stump litigators, force advocates in arbitration to be creative and effective, and to develop techniques to meet such challenges.

16. In the case of dealing with evidence in arbitration proceedings, an advocate must keep in mind the laws or rules of evidence that have been agreed between the parties to apply. Along with being less formal, arbitration proceedings generally will have more relaxed evidentiary rules. One important issue of evidence is that of the acceptance, use and weight given to hearsay, which courts are relatively strict about. By contrast, arbitral tribunals may be more relaxed in this regard, particularly as mentioned, it may not be as easy to conduct discovery for the purposes of an arbitration proceeding.

17. This leads to another important area in which advocacy training is invaluable, the examination of witnesses. The handling of witnesses and their evidence is an important component of court advocacy training, as witness testimony is usually critical in the proof of a case. In arbitration proceedings, dealing with witnesses may become even more important given the potential variety of permutations in the forms of procedure that arbitration, particularly cross-border arbitration, may involve. The scope for miscommunication in these circumstances may potentially be quite great when cases involve parties of different jurisdictions. The handling of witnesses and evidence and what may or may not be

permissible in this regard will, as mentioned previously, differ from jurisdiction to jurisdiction. This may in turn inform an arbitrator or the members of an arbitral tribunal's views as to what is permissible, testing the abilities and creativity of advocates in arbitration proceedings. For those unused to it, where simultaneous interpretation may be involved in cross border or international arbitration, a further level of complication is added to advocacy.

18. The issue of costs management is one that also becomes much expanded in arbitration. Because of the standardized nature of litigation, costs management is relatively predictable. Indeed, much of the modern reforms to civil procedure before the courts in common law jurisdictions are aimed at the management of costs and keeping them low. By contrast, because arbitration is a private method of dispute resolution, it is the parties who will pay for everything from the administrative costs to the rates of the members of the arbitral tribunal. Normally, these fees will be split between the parties, and advocates would thus do well to manage each application and procedural move with care so as not to allow costs to spiral out of control. This again is an aspect of strategy as much as it is procedure, and an area in which training may help make up the difference for a lack of experience when an advocate first begins to conduct arbitrations. Another new development in this regard has been the rise of 'green' arbitration initiatives, or initiatives to reduce the carbon footprint of international arbitration, which continues to gain popularity and is an increasingly

important consideration for parties to arbitration in deciding on an appropriate arbitral procedure and format.

*The growth of arbitration in Asia and cross-border arbitration*

19. Certainly, the statistics show that arbitration, particularly in Asia, has been on the rise. According to the Chambers International Arbitration 2023 guide, the five most preferred arbitral institutions were the International Chamber of Commerce, Singapore International Arbitration Centre, Hong Kong International Arbitration Centre, London Court of International Arbitration and the Chinese International Economic and Trade Arbitration Centre – that is, three out of the five preferred institutions were located in Asia, with the SIAC reporting 357 new case filings, and 515 new case filings for the HKIAC. This growth in arbitration in Asia is raising questions about the impact cultural differences and differences in legal traditions now have on advocacy in arbitration. Some of these issues may not be new to international arbitration – for example, the language capabilities and preferences of members of an arbitral tribunal and witnesses in the proceedings. Connected to this is of course the issues mentioned above that arise from differences in legal traditions, such as permissible contact with witnesses or members of the arbitral tribunal, as well as the extent to which witness preparation may be acceptable.

20. Cultural issues also go to more subtle matters, including for example knowledge of business practices in a particular region, such as the impact of the Lunar New Year holiday on business in China. Advocates may also have to be conscious of the cultural background witnesses come from, including ensuring the clarity of their questions, or where interpreters are involved, working with the interpreter – raising a further issue of the advantages that bilingual advocates may be able to bring to the table, such as being able to make timely objections to misinterpretations and understanding what is being said by those giving testimony. Most relevantly for the conference today, different cultural backgrounds may also impact the style of advocacy, including the level of formality and assertiveness one might expect from an advocate.

21. Arbitration has proven particularly useful in cross border and international disputes, where parties may not be resident in the same jurisdiction. It has also proven extremely adept to more technical disputes and disputes arising from infrastructure projects that may not be as easy for courts to exercise jurisdiction over. Pertinent examples that immediately come to mind are arbitrations that arise out of international commercial agreements and infrastructure projects as part of the One Belt, One Road Initiative. Arbitration advocacy must rise to the challenges that such arbitrations present, and the importance of good quality advocacy in this regard cannot be understated, particularly in light of the deference that courts now have for the arbitration process,

with the grounds for courts to intervene with the decision of an arbitrator or arbitral panel now being quite limited. Hence, the importance of advocacy training.

*Training for advocacy in arbitration proceedings*

22. The International Advocacy Training Council thus plays a pivotal role in maintaining and enhancing the standards of advocacy in Hong Kong and in other jurisdictions, including the area of arbitration. Since its establishment, it has promoted high standards of advocacy, as well as the best practices in advocacy training, by providing, supporting and co-ordinating advocacy training on an international basis. This has served to promote the independence and integrity of advocates around the world, and the good administration of justice and rule of law.

23. Given the challenges of arbitration for advocates mentioned above, and the expanded scope of duties of an advocate in arbitration proceedings which may fall under the umbrella of advocacy, the quality of training provided by the International Advocacy Training Council is thus required to be both detailed and multi-faceted in order to ensure the effectiveness of the advocates it trains. The quality of this training will be evident just in this conference's programme.

24. Participants will discuss topics such as expert evidence, and ensuring the use of technology is effective. Examples of the extraordinary training provided by the IATC include examining the

mindset and psychological aspects of high level performance through the perspective of sports coaching at the highest level, which one may be surprised by the extent to which such mindset training may be applicable to the equally high stakes and high stress arena of arbitration. It is indeed a rich programme for this conference.

25. Starting with the insights that can be gained from coaching and psychology in high level sports performance, this conference will also delve into handling issues that arise out of cross-border arbitration, including not just multi-jurisdictional issues, but also enhancing awareness of cultural issues and importantly, potential pitfalls. As I had already mentioned earlier, these are matters of potentially critical importance, and ones that litigators in their home jurisdictions might not conceive of, let alone encounter.

26. This will be followed by how to handle witnesses effectively in arbitration, as well as the art of written advocacy. In the ordinary course of training for court advocacy, these topics may not necessarily be tackled to the same breadth, but they are, as mentioned previously, of such importance to the outcome of arbitrations that they are also considered to fall within the scope of arbitration advocacy training.

27. The use and application of technology continues to grow apace in arbitration, perhaps at an even greater pace than in litigation. Thus, this conference will also examine how to use technology effectively for the purposes of dispute resolution. The incorporation of technology in arbitration and indeed court proceedings is one that will hopefully continue to improve the effectiveness and cost-effectiveness of these types of proceedings without sacrificing the quality of justice being sought from the adjudicators.

28. Perhaps unsurprisingly, expert evidence will also feature on the programme of this conference. The handling of expert evidence has always been an area of difficulty for litigation due to the often adversarial positions taken by parties' experts. It is an area in which both the courts and arbitration continue to strive for cost-effectiveness as well as fairness. One method that has emerged in recent years and become increasingly popular in litigation is that of 'hot-tubbing', the process by which experts give their evidence concurrently. The process of having the experts engage in real-time discussion to enable adjudicators to focus on the core issues is key to ensuring that both sides are heard and the process is efficient and effective. In the context of arbitration, where expert evidence is often important, this will be both informative and interesting to see how the broader procedural framework of an arbitral process might help to develop the management of expert evidence and hot-tubbing practices, as well as the role played by advocates in the process.

29. Finally, and perhaps most importantly, there is the final session on what arbitrators themselves want from advocates. This is of course getting it straight from the horse's mouth, as it were – invaluable advice directly from experienced arbitrators. Advocacy is ultimately a performance for a small audience, and it is important for an advocate to be able to put themselves in the shoes of that audience and understand things from their perspective in order to best assist them. This must therefore be the highest standard of advocacy that one can achieve.

*Conclusion*

30. Far from being an innate ability one is simply either born with or without, advocacy is a set of multi-dimensional skills that must be taught and honed for the best effect. The challenges presented by arbitration proceedings to an advocate are even greater than those in a courtroom setting, particularly as unlike court proceedings, there is no one-size-fits-all process in arbitration. The key to good advocacy, whether for the courts or for arbitration, is preparation. Arbitration may be considered somewhat less formal than court proceedings, but given the many procedural options open to parties in arbitration, good preparation remains critical for the effective and successful presentation of an advocate's case. Hence, this conference will be invaluable for effective advocates who hope to be well-prepared for

their work before arbitral tribunals, and I am sure it will stand all of you today in good stead!

31. It only remains for me to wish you all success in your future arbitrations, to thank all the speakers today for their contributions, and to express our gratitude to the International Advocacy Training Council for organising such a useful and interesting conference!