Oral Advocacy in International Arbitration

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"Is international arbitration killing the art of legal oral argument?"

This question was posed by Judith Gill QC, a leading English barrister, at a recent symposium conducted by the *London Court of International Arbitration* in Stockholm, Sweden. The answer to her question was not long in coming.

The responses provided by leading arbitrators from around the world gave little reassurance that the great tradition of oral pleading as epitomized by Cicero, Birkenhead and Darrow is alive and well – or even missed all that much.

Some said that the vast array of documentary evidence and written material, including legal argument in the form of one or two rounds of memorials, which the arbitrators will have received before the evidentiary hearing make oral argument largely un-necessary. Others pointed out that, in international arbitration hearings (which rarely last more than a week or two in even the largest and most complicated cases) there is not enough time for more than an hour or two for each side to introduce its case. One leading arbitrator suggested that the limited time available for opening submissions was best spent giving the tribunal a road map as to where important documents can be found in the exhibit binders submitted by each side.

Some of arbitration's elder statesmen pointed out that oral argument often focused on subjective and irrelevant considerations, in contrast to the objective recitation of facts and law, which were most appropriately presented in writing. Still others pointed out that limiting oral argument leveled the playing field between counsel who spoke English (the most common language of international commercial arbitration) and those who did not. This leveling was said to be even more beneficial considering that English speaking counsel were more likely to be from common law jurisdictions where more emphasis is placed on oral advocacy. Finally, it was observed that closing submissions at the end of a hearing that had just ended was not particularly useful as the tribunal would, in any event, be receiving post hearing written submissions in most cases.

Some common law lawyers and arbitrators at the symposium put forward a few modest suggestions as to the utility of limited oral argument for some purposes. Mention was made of the value of having issues framed by oral argument and the value of an opportunity for the tribunal to ask counsel questions, perhaps after a one day recess following the conclusion of the evidentiary phase. But even the senior arbitrators from common law jurisdictions sought to distance themselves from any suggestion that larger doses of oral advocacy were needed.

One renowned international arbitrator from Australia recalled his recent attendance at the hearing of an application in a court in India to enforce an arbitration award. Submissions went on for well over 20 days. When he expressed surprise at the length of the proceedings, his host remarked "Ah. That is the art of oral advocacy!"

It is a fair summary of the discussion at the symposium, that the consensus among those present did not favour the "art of legal oral argument".

One consoling observation is that this consensus has a particular application to international arbitrations which are conducted using increasingly standardized procedures such as one or more rounds of pre and post hearing memorials, and applies particularly to those arbitrations involving parties from both common law and civil law jurisdictions and mixed tribunals of common law and civil law lawyers. They may apply with somewhat less force where the arbitration has its centre of gravity in common law systems which have a stronger tradition of oral advocacy, for example arbitrations between Canadian, American or English parties or those having a preponderance of common law advocates and arbitrators. Even so, however, certain constraints which apply to all international arbitrations such as the almost universal practice of shorter evidentiary hearings than in court proceedings and the strong emphasis on written materials will ensure that oral advocacy will play a more limited role than in common law court proceedings.

In non-international arbitration, sometimes referred to as "domestic" arbitration, the picture is much more varied, and generalizations about the importance and most effective style of oral advocacy are almost impossible. Commercial arbitrations which are conducted in virtually the same manner as court trials, as many in North America are, may well offer counsel the opportunity and scope to utilize the full toolkit of oral advocacy. Furthermore, arbitrators that sit in such cases may have a lesser degree of familiarity with international practices or indeed with the potential differences that may exist between the role of an arbitrator and that of a judge. In these circumstances it is difficult to generalize about the differences in how oral advocacy can or should be employed in non-international arbitration.

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