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A new Age of Enlightenment in International Arbitration?

Looking ahead to the 2020 ICCA Conference in Edinburgh – Part 2

Contents

Introduction

The ICCA 2020 Congress is taking place in Edinburgh in May 2020. CMS is delighted to be the platinum sponsor for this global event.

The theme of the Conference is "Arbitration's Age of Enlightenment". In recognition of this, we are publishing a series of nine thought leadership pieces on this theme in the lead up to the Conference.

In December 2019, we shared the first three articles in the series, one by our Scottish team on technology inspired by Adam Ferguson, one by our Singapore colleagues on diversity inspired by Mary Wollstonecraft, and one by our German colleagues on emergency procedures inspired by Adam Smith.

In this issue, it is the turn of colleagues from our London, Budapest and Dubai offices who have produced pieces inspired by Rousseau, Voltaire and Descartes on the significance of precedent, equality of arms and advocacy in international arbitration.

We hope you find these articles thought provoking and look forward to sharing the final three articles with you in the Spring.

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Ensuring equality of arms and fairness in International Arbitration

> God is not on the side of the big battalions but on the side of those who shoot best
>
> *Voltaire, Notebooks (c.1735-c.1750)*

Voltaire was – amongst other things – a law student who over his lifetime would have called many cities, that have become leading European centres of arbitration, his home, among them Paris, London, Geneva and The Hague. He is the personification of the *philosophe* and the humanist of the Enlightenment, and was a staunch advocate of personal autonomy, intellectual liberty and equality before the law, all preconditions for religious tolerance – lack of which he perceived to be the ultimate barrier to prosperity and free commerce.

These ideas also underpin the basic tenets of international arbitration, including equal treatment of the parties, expressing the principle of the rule of law in the terms of due process. No arbitration law or rule is complete without ensuring the parties' equality of arms and indeed, a material breach of the principle should result in the setting aside or unenforceability of the award.

Equality of Arms in Arbitration

Beyond expressing the equality of the parties, arbitration laws and rules provide express specific rules embodying that principle.

Arbitrability

The rules of non-arbitrability delineate subjects that are fit for arbitration from those that are not. Employment and labour disputes, consumer claims and claims against entities under liquidation have been held non-arbitrable in some jurisdictions due specifically to the inherent imbalance of power between parties that casts doubt on the validity of the arbitration agreement and the ability of the arbitral proceedings to maintain the equality of arms. The fact that the sphere of arbitrable disputes and subjective arbitrability is now expanding indicates a growing trust in the ability of arbitral proceedings to effectively manage such power imbalances and ensure equality of arms.

Yet in other cases, it will be the inherent asymmetry of power and arbitration's aspiration to ensure equality of arms that will be the primary reason that the parties seek arbitration instead of the ordinary courts. For instance, in commercial disputes with state entities – particularly where there is a perceived lack of judicial independence – removing the dispute from the bench of national courts will serve as some safeguard against extra-judicial state meddling.

The Right to be Heard

Once a dispute is admitted to arbitration, equality between the parties is primarily ensured by the right to be heard and balanced evidentiary procedures, particularly relating to document production rules. Tribunals should be careful to provide adequate time for each party to present their case, which will often require considering not just equality but also fairness. Where one party's case is more nuanced or requires extensive witness testimony, equal hearing

time would lead to an inequality and so fairness requires allocation of time proportionate to each party's needs. Furthermore, a party's ability to present and evidence their case will oftentimes be hampered by informational asymmetry that tribunals can remedy through document production mechanisms and careful consideration of evidentiary motions.

Impartiality

The right to an independent and impartial arbitral tribunal is ensured by, amongst other things, the conflict of interest rules which reduce the advantages that repeat users or their counsel might amass. The waivable red and orange list of IBA Guidelines on Conflicts of Interest in International Arbitration provides guidance where the arbitrator's relationship with the parties or their counsel or where previous services rendered to one of the parties might cast doubt on his or her impartiality.

Financing

Procedural fairness does not of itself ensure equality of arms. Oftentimes there will be financial barriers of entry to arbitration or one actor's economic wherewithal will significantly exceed the others. Third party financing has served as a great equalizer to ensure that parties have the means and access to first tier counsel and experts.

The Arms Race in Arbitration

Where there is an equality of arms, there is bound to be an arms race to upend that balance.

In Voltaire's lifetime, France was engaged in numerous wars, but perhaps none upset the balance of power in Europe as much as the Seven Years' War. It began with the Diplomatic Revolution and resulted in the rise of both Britain and Prussia – under Frederick the Great's rule – on the world stage, while France was significantly weakened despite its overwhelming economic and military advantage at the beginning of the conflict.

Where battalions cannot ensure victory, there must be another solution. Defeat in the Seven Years' War led to the reform of the French artillery, specifically the introduction of the Gribeauval artillery system, the multidisciplinary and technological innovation of the day. This reform was fuelled not so much by the actual revelations of Newton's grand work on physics, the "*Principia Mathematica*", but by the underlying sentiment of sceptical empiricism. It was in fact Voltaire and Emilie du Chatelet who – in the aptly named Newtonian Wars – championed sceptical empiricism over – the contemporary continental doctrine of deductive reasoning that, in the absence of evidence-based verification, often gave way to colourful and incredible metaphysical accounts of the natural laws. Voltaire perceived this practice to be cartesian *romance* that needed to be rooted out of the sciences. The reform required a better empirical understanding of ballistics, reorganisation of the French artillery academies to enable officers to make use of Newtonian calculus and technological innovations in the design and manufacture of cannons, none of which could have been achieved without this revolution of thought.

The reforms bore their fruit in the French Revolutionary Wars when, faced with overwhelming force, France drove back the First and Second Coalition, including Prussia. In other words, despite not being the "bigger batallion", the French artillery "shot best".

So, what does "*shooting best*" mean in arbitration today?

To shoot best we need skilled professionals, a fact-based understanding of our craft, state-of-the-art technology and strategy.

The stepping-off point is specialisation. Large battalions of lawyers are not necessary for most disputes, but highly skilled and dedicated counsel with specific training in arbitral procedure and the subject matter of the dispute – whether it be construction, energy, finance, or telecommunications – are indispensable.

Specialisation must be informed by both experience and academia. The legal profession of course is itself susceptible to *romance*. Legal scholarship on arbitration include treatises, commentaries and anecdotal recollections that are informative and amusing but stop just short of practical advice and might peddle in long held arbitral myths without substantiation. Following Voltaire's footsteps, crushing the infamy of arbitral romance requires a greater emphasis on empirical research. The already begun empirical turn in legal scholarship should be spurred on by the publication of a greater number of awards in our new era of transparency in arbitration. Our hope is that widespread access to a greater set of awards scrutinized by academia will provide practitioners with a better understanding of the terrain. As the *École d'application de l'artillerie* trained the officers of the French army in the new sciences of Newtonian calculus, so arbitration specialists should be informed by the empirical research of our day to dispel the fog of war.

Embracing technological innovation by legal professionals should be a priority. Large battalions of lawyers may be substituted by deep learning AI for highly labour-intensive work such as initial document review and classification, or due diligence during document production phases. Of course, we also already see application of these technologies in some disputes, such as delay and disruption modelling in construction disputes or the ever-expanding arsenal or programmes available for detailed damages valuation. Similarly, data visualisation tools are indispensable. Once your facts are in order, presenting these to the tribunal in a relatable fashion is key.

These same technologies should also be applied to the management of the arbitral process itself, not just by the parties but also by arbitrators. Legal project management tools appear as the short-term solution to extended arbitral proceedings and spiralling arbitration costs. The ability to design more efficient work processes within firms and setting procedural schedules for the arbitral proceedings will deliver a net benefit to clients by driving down costs.

"*Shooting best*" requires an application of all these tools by legal professionals to the client's means and needs in order to obtain their goals.Before pulling the trigger professionals need a clear line of sight and should only fire when any obstacles are out of the way. Still, when there isn't a clear line of sight, the best legal strategies might be likened more to cannonballs than bullets in that they will have a parabolic trajectory to circumvent apparent obstacles. The difference between the Voltairean best shooters and the rest is that they will apply arbitral calculus to find that trajectory, while the latter will just claim that they can "bend the bullet". Nonetheless an arms race need not be a race to arms and sometimes "*shooting best*" might be to not shoot at all. Learning from Clausewitz – who surveilled the battles of his time, including the French Revolutionary Wars – arbitration is merely the continuation of the transaction by other means.

Perhaps though, however convenient, the language of war is not best suited to the idea of arbitration. Arbitration professionals share in the *esprit de corps,* participating in collaborative projects to find resolution to disputes. Perhaps our profession finds better expression in the terms of reason, economy and mutual understanding – which we are sure would have pleased Voltaire very much.

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Is international arbitration stifling the development of precedent-based legal systems?

> Each problem that I solved became a rule, which served afterwards to solve other problems
>
> *René Descartes*

René Descartes' treatise "*Discourse on the Method*" (1637) was unusual for its time, being written in French (rather than Latin) so that it could be read by a wider audience than academics and fellow philosophers. Descartes' stated intention in publishing "*Discourse…*" was that all who had "*good sense*" would, by reading his work, learn to think for themselves.

Many of the principles espoused in "*Discourse…*" remain relevant today in many different contexts. The main quotation in the heading above, for example, provides an effective general method for problem-solving that encourages the application of past experience when dealing with new issues.

That same method is adopted in precedent-based legal systems, where courts derive from the cases before them legal principles that can be applied to subsequent cases with similar issues or facts (thereby avoiding the need for the courts to re-evaluate legal principles and accepted doctrines in every new case). Additional benefits include certainty (since such an approach provides parties with a set of rules or principles and a reasonable degree of certainty that such rules will be applied consistently in future cases) and flexibility (since the system also enables the law to adapt to deal with new commercial developments or changing social values).

However, as discussed below, a number of commentators have voiced concerns that the increased use of arbitration, a private method of dispute resolution, has had the effect of diverting cases away from the courts of precedent-based systems, with the consequence that (using Descartes' language) the courts have fewer 'problems' to solve and, therefore, fewer new 'rules' are being created. In the context of arbitration, this can also mean that each problem solved does not become a 'rule' such that the decision of one arbitral tribunal is of no benefit to another arbitral tribunal solving a similar problem.

This article will consider why arbitration is regarded as a threat to precedent-based systems and whether those concerns are reasonable.

Why is arbitration regarded as a threat to the development of precedent-based systems?

Under precedent-based legal systems, the law develops in part through the accumulation of judicial precedents from decided cases. This requires the application of the doctrine of *stare decisis* ('to stand by things decided'), which, in the context of the courts of England & Wales, has been described as follows:

> "The doctrine refers to the fact that, within the hierarchical structure of the English courts, a decision of a higher court will be binding on a court lower than it in that hierarchy. In general terms, this means that when judges try cases, they will check to see if a similar situation has come before a court previously. If the precedent was set by a court of equal or higher status to the court deciding the new case, then the judge in the present case should follow the rule of law established in the earlier case. Where the precedent is from a lower court in the hierarchy, the judge in the new case may not follow, but will certainly consider, it."
>
> *Slapper and Kelly, "The English Legal System" (2013-2014)*

As such, the judicial precedent system operates in a manner similar to Descartes' method: each set of facts presents its own 'problem' and, where appropriate, a judgment may set out a principle of law (or, as Descartes may have it, a "rule") that can be derived from the case. Such principle may then be relied upon, as either binding or persuasive authority, by other courts and parties in relation to cases involving similar issues or facts. Contrarily, an inconvenient precedent that might otherwise be binding can also be circumvented by distinguishing it on the facts or principle involved. In respect of precedent-based systems in general, and the English legal system in particular, it is arguable that one of its key strengths is the volume of previous decisions and the breadth of issues that those decisions cover. Arbitration (which some say diverts a large volume of cases away from the courts), is therefore regarded by some as a threat to the development of precedent-based systems. In further detail:

1. The nature of the arbitral process means that, in the vast majority of cases that proceed to arbitration, the use of the courts is excluded entirely (in contrast to other forms of alternative dispute resolution, which might be said to be more complementary to court litigation).
2. As arbitration is a private mechanism, any "problem" solved by an arbitral tribunal will not become a "rule" in the sense intended by Descartes. Instead, any "rule" created by an arbitral tribunal will only be binding on the parties to that particular arbitration. This means that, even if a case involving an issue of material significance to a particular industry or area of the law proceeds all the way to an arbitral hearing, the resulting award carries no precedential value (even if published), and therefore does not contribute to the development of the common law.
3. The above issues are thought to be exacerbated in certain areas of law by virtue of the fact that international arbitration has become a popular (if not standard) method of settling disputes in select sectors, such as shipping, energy, construction and infrastructure.

As a result, concerns have been voiced regarding the impact of arbitration on the development of precedent-based systems.

Is it reasonable to regard arbitration as a threat to the development of precedent-based systems?

While the risk presented by arbitration can be expressed relatively easily, the question of whether the above concerns are reasonable is more difficult to establish due to the limitations of anecdotal and statistical evidence currently available. We begin with the anectodal:

Anecdotal evidence

On the one hand, some judges have noted that particular types of cases are being dealt with by courts increasingly rarely. For example, Beverley McLachlin, Former Chief Justice of Canada, stated in 2011 that "*[t]he trend is clear. Fewer and fewer construction cases are reaching the courts where the law is developed… construction disputes are being sent to mediation, arbitration…*". Similarly, Lord Clarke of Stone-cum-Ebony, a former judge of the Supreme Court of the United Kingdom, noted in 2017 that "*in recent years, since I have been in the Court of Appeal, and more recently the Supreme Court … [w]e have comparatively few maritime and commercial cases and live on a diet of judicial review and human rights cases*". Finally, Lord Thomas, former Lord Chief Justice of England and Wales, stated in 2016 that "*across many sectors of law traditionally developed in London, particularly relating to the construction industry, engineering, shipping, insurance and commodities, there is a real concern which has been expressed to me at the lack of case law on standard form contracts and on changes in commercial practice*".

With reference to shipping in particular, in the preface to the seventh edition of his book, '*Laytime and Demurrage*', the author (Joh Schofield) stated that "*In the preface to the fifth edition in 2005, I identified three areas of the law where I thought further judicial scrutiny would be of assistance. Unfortunately more than 10 years on, there has been no significant judicial intervention in any of the areas I identified.*"

On the other hand, Sir Bernard Eder, a former High Court judge noted that a "*quick glance at the law reports and forewords of the major textbooks over recent years would, in my view, show that the [English] common law continues to develop at a pace with a constant stream – indeed flood – of cases over a wide area of jurisprudence.*" The English Court of Appeal judge Sir Peter Gross disagrees that the "*courts and arbitration are in a competition involving a "zero-sum" game, whereby the gain of one means a loss for the other*". Instead, he observed that, for English law at least, arbitration has provided "*cutting edge cases for the courts to consider*" and that, whilst the increased use of arbitration may lead to some loss of precedent, the English courts have derived indirect benefits as a result of practical experience gained by practitioners in arbitrations. Further, in a 2012 speech given by Lord Carnwath of Notting Hill (who became Justice of the Supreme Court of England & Wales in 2012) on the issue of "*Judicial Precedent – Taming the Common Law*", Lord Carnwath referred to the "*sheer volume of case-law with which the courts are increasingly burdened*" and stated that his "*own experience in the Court of Appeal and now the Supreme Court leads me to the view that the greater risk is from too many judgments, rather than too few.*"

There does not appear to be a clear consensus among judicial commentators. However, it is clear that there are concerns that, even if the overall caseloads of certain courts may not be diminishing, there may be (i) fewer commercial cases at the appellate level, as well as (ii) a lack of diversity amongst the cases going before commercial courts (with fewer cases from industries that favour arbitration). We turn now to statistical evidence, to see what light it may cast on the issue.

Statistics – what they do not tell us

Although courts and arbitral institutions now commonly publish statistics regarding their caseloads, unfortunately, the information available is not sufficiently granular to enable us to come to any reasonable conclusions regarding the impact of arbitration on precedent-based systems. In particular, it is difficult to draw any inferences as to (i) whether there is a general trend of declining caseloads for commercial courts in precedent-based systems as a result of the increased use of arbitration; and (ii) the number of cases that have proceeded to arbitration which had in issue a point of law that would have benefited from consideration by the courts (noting that many cases will simply require an arbitral tribunal to make findings of fact and/or to apply developed legal principles).

It is true that a number of precedent-based systems have, in recent years, experienced declining caseloads. However, there does not appear to be any (i) thorough examination of the reason for such a decline (i.e. whether arbitration or otherwise); or (ii) detailed analysis of whether such a reduction has in fact lead to a stagnation of the law in particular areas. Indeed, whilst the English courts might be regarded as having the most to lose from the increased use of international arbitration (given their traditional role as a forum for the resolution of international disputes), the caseloads of the three specialist sub-divisions of the High Court of England & Wales which typically deal with commercial disputes (the Admiralty Court, Commercial Court, and Technology and Construction Court) had an "*average, but increasing, annual caseload … of over 1,100 cases*" between 2008 – 2012, with the number of cases involving foreign parties varying between 72% to 81% of cases. More recently, the Commercial Court Report (2017-2018) provides that between 2016 - 2018, almost 900 cases a year were commenced in the Commercial Court alone (70% of which were international in nature), whilst the number of cases brought in the Admiralty Court (which deals with shipping cases) increased from 163 to 165.

Further, it is not necessarily the case that the use of international arbitration is inexorably rising (such that we are faced with an ever-increasing arbitration case load and ever-decreasing court case load). Recent statistics setting out the numbers of new arbitration cases issued between 2016 - 2018 with six major international arbitral institutions (LMAA, ICC, SIAC, LCIA, HKIAC, and SCC) show no clear trend of growing caseloads. On the contrary, their caseloads appear to have broadly remained steady, with certain institutions even experiencing reduced caseloads. In particular, the LMAA experienced year-on-year decline between 2016 – 2018, with case numbers falling from 1,720 to 1,561. In addition, the case numbers for the ICC and LCIA both dropped between 2016 – 2017 (although have risen since), while the case numbers for the SCC, SIAC and HKIAC all dropped between 2017 - 2018.

Ultimately, however, there is a limit to the conclusions that can be drawn from the statistics currently available, because they tell us nothing about the types of matters being dealt with or the importance of the underlying issues involved. That is crucial because neither (a) larger caseloads which relate predominantly to issues or facts that are not particularly novel or have been considered by the courts recently; or (b) an increase in the number of cases going to arbitration where such cases stem from disagreements as to the facts or legal principles that are well developed, are likely to stifle the development of precedent-based legal systems.

Conclusion

We therefore find ourselves in the rather unsatisfactory position of being unable to say, with any degree of certainty, whether international arbitration does or does not pose a threat to the development of precedent-based systems.

However, what is clear from the foregoing is that certain eminent commentators do consider this issue to be one of concern, particularly in relation to certain industries, sectors or areas of law.

One possible (and many would say disproportionate and unlikely) solution would be to loosen restrictions on appeals to the courts from arbitral tribunals. However, given the popularity of international arbitration and the competition various jurisdictions face in attracting parties, such an approach is more likely to lead to parties choosing to have their arbitration seated elsewhere, rather than solving the problem in any particular jurisdiction.

In any case, it is arguable that a more palatable solution already exists: to the extent that parties are finding that their chosen method of dispute resolution (arbitration) is such that, in the language of Descartes, problems once solved do not become rules, and that parties have, as a result, less certainty in the law, the solution, in England at least, might be said to lie in section 69 of The Arbitration Act (1996). However, this is a solution that parties must be willing to avail themselves of and which will necessarily involve "plugging" of gaps in the law in a piecemeal or ad hoc fashion.

Descartes, who noted in "*Discourse…*" that he preferred cities shaped by the vision of a single planner over those developed in piecemeal fashion, might have disapproved of such a solution. But that, one might say, is the difference between philosophy and reality.

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Advocacy in International Arbitration

> People who know little are great talkers, while men who know much say little.
>
> *Jean-Jacques Rousseau*

"*People who know little are great talkers, while men who know much say little*" is a quote taken from "*Èmile; or, on Education*", which was published in 1762 and was immediately banned in France and Switzerland as it criticised religion, causing Rousseau to flee. The treatise tells the story of a fictional man named Èmile and follows his development and education. Rousseau's intention was to capture in Èmile all the virtues of Rousseau's idealised "natural man", who is uncorrupted by modern society. Rousseau goes on to say that:

> "It is plain that an ignorant person thinks everything he does know important, and he tells it to everybody. But a well-educated man is not so ready to display his learning; he would have too much to say, and he sees that there is much more to be said, so he holds his peace."
>
> *Jean-Jacques Rousseau*

For present purposes, it is useful to consider whether Rousseau's opinion of the ideal man might be transposed or applied in the context of advocacy in international arbitration. In the context of international arbitration, it is widely accepted that advocacy is, as described by David J.A. Cairns, the "*persuasive communication of a party's case to the arbitral tribunal*". This includes all communication, whether written or oral, with or for the benefit of the arbitral tribunal. Rephrasing Rousseau's view of the ideal man, therefore, one might ask whether the success of a party's advocacy can be determined by its length? We consider this issue in this article.

Advocacy in international arbitration – an introduction

One of the drivers of international arbitration's popularity as a dispute resolution mechanism is that it allows parties to dispense with many of the more restrictive procedures and formalities required by national courts' litigation procedures. The advocacy required for the purposes of international arbitration, both written and oral, is arguably less "formalistic" in both style and substance than that which is usually required for the purposes of litigation carried out in national courts (particularly, common law jurisdictions).

However, whilst the relaxation of formal requirements may be good news for parties engaged in international arbitration, there is a risk that this is accompanied by an attendant lack of scrutiny of the quality of advocacy in those proceedings, given its private and confidential nature. In addition, the parties' different jurisdictional and, arguably, ethnic backgrounds may lead to vastly different approaches to the style of advocacy they adopt (and, potentially, expected by individual members of the tribunal). Therefore, it remains important that practitioners pay close regard to how they present their arguments to a tribunal in any arbitral proceedings.

The length or duration of a practitioner's advocacy on behalf of their client will, for a large part, be dictated by the complexity of the case and the number of witnesses required, both lay and expert. There is no limit as to the duration of advocacy in any of the arbitral institutions' rules; however, both in our practical experience and anecdotally, it seems that the length or duration of arguments (written or oral) presented to a tribunal will have some bearing on a party's chance of success. Put another way, and to give effect to Rousseau's quote above, a point made clearly and succinctly by a party might resonate more forcefully with a tribunal.

To that end, it is useful to consider whether practitioners might be guided by Rousseau's philosophy in their written and oral submissions.

Written advocacy

In October 2019, the Global Arbitration Review ("**GAR**") published the fourth edition of its guide to advocacy, which includes a chapter giving advice on written advocacy from various experienced international arbitration practitioners.

A point emphasised by those practitioners is that, when drafting written arguments, brevity and simplicity are key. In line with Rousseau's thinking, Thomas K. Sprange QC, a Partner at King and Spalding in London, emphasises "*how less can be much, much more*" and the need to "*wherever possible, simplify rather than complicate*". On the contrary, rambling submissions only serve to irritate and confuse the tribunal and therefore fail to persuade the tribunal of the merits of a party's case. This is supported by other commentators, who have all indicated support for a concise approach to drafting written pleadings; Greg Laughton SC, of Hardwicke Chambers (London) and 13 Wentworth Selborne Chambers (Sydney), in particular is of the view that written advocacy should be brief as "*unduly long written submissions deter readers from close and detailed reading, because they require lengthy periods of concentration*".

Some suggestions include considering whether the length of a submission is proportionate to the case at hand and being mindful not to "overegg the pudding". By way of example, Hilary Helibron QC and Klaus Reichart SC, both of Brick Court Chambers (London), consider that: a question on a discreet point of law may not require extensive submissions and numerous folders of supporting documents; and closing submissions should focus on questions raised by the tribunal during the course of the hearing rather than regurgitating the written pleadings. Christopher Style QC of One Essex Court, a barrister and practising arbitrator, remarked that "*too often arbitrators are presented with written submissions that are too long, too detailed, repetitive and include too many long, boring footnotes*". In his view, arbitrators are committed to doing a good job but it doesn't help parties win if the arbitrators "*can't see the wood for the trees*".

There are numerous examples that could arise. However, the point being made is clear: keep written arguments succinct, and to the point.

Oral advocacy

The above considerations apply equally to oral submissions. In its publication 'Funding in Focus Content Series', Vannin Capital asked: "*London - arbitration and litigation: who wins, where and why?*" In compiling the article, Iain McKenny, General Counsel for Disputes at Vannin Capital, asked nine litigation claimants and nine arbitration claimants what the top five issues are that make the difference between winning a case and not winning. Their answers revealed a 7-step method for success which includes "*good, clear, concise pleadings and advocacy*" to prevent arbitrators having to pick the key points of the case out of "*weighty tome or lengthy oral submissions*".

Dr Colin Ong QC, a member of the Brunei, English and Singapore bars and a chartered arbitrator, considers there are, however, some additional factors that practitioners should bear in mind when delivering oral arguments. These include that parties should not underestimate the importance of the hearing and should use the hearing to convey "*a structured and coherent vision of the case*". This requires advocates to define their arguments and present them logically to the tribunal. Advocates should also be prepared to take guidance from the tribunal – for example, if the tribunal has clearly understood the point being made the advocate can move quickly on to the next, while conversely, if the tribunal is clearly unimpressed by a point, an advocate might be wise to move on without delay.

Finally, the effectiveness of oral advocacy can depend on the parties' ability to explain their case coherently within the time constraints of an arbitral hearing timetable. In this regard, some tribunals utilise "stop clock" or "chess clock" methods in proceedings, where time is allocated between the parties equally, to be used as the parties see fit. Once the allocated time has elapsed, no further oral submissions are allowed and extensions are rarely granted. The purpose of the "stop clock" or "chess clock" method is to prevent one party from using up a disproportionate amount of time, and to focus the parties so that they might better understand and express the strengths and weaknesses of their respective cases.

Conclusion

The effectiveness of advocacy in international arbitration will ultimately turn on the substance of the submissions. However, and in line with Rousseau's philosophy, parties can assist themselves by focussing on the key issues and making points succinctly and simply. This is in keeping with the overall premise that the "*golden rule of advocacy should be: help your tribunal.*" In this regard, Alexis Mourre, an independent arbitrator and President of the ICC International Court of Arbitration, considers one of the ways parties can assist their tribunal is by keeping their arguments "*as simple and as focussed as possible*" and in the context of complex cases, parties should seek to "*boil down*" such complexity to "*three or four decisive questions*".

In the context of international arbitration, therefore, it seems that what Rousseau wrote all those years ago still rings true: the length of advocacy will likely have a bearing on the success and effectiveness of the same. Long and descriptive submissions tend to fail to best present the highline points of the case and require extended periods of concentration and detailed reading that can often be lost, even on the most experienced of arbitrators. Accordingly, whether preparing written or oral submissions, parties should be mindful of their duty to the tribunal and should work to structure their advocacy in a way that is clear and concise and focuses on the key points of the case.

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