

Common law advocacy in international arbitrations¹

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This paper addresses the rights and obligations of advocates appearing in international arbitrations, and the forensic tactics which they are able to deploy in presenting their cases. It looks at the different legal cultures in which international advocates have received their training. Specifically, it raises the question: do advocates trained in the common law have the edge over their civil law counterparts? Or do they not? Is there a more distinct approach which is best suited to the exigencies and special characteristics of arbitration?

I start with a proposition which all lawyers – disciples of civil codes and common law – can sign up to. Advocacy is not an abstract intellectual exercise. The purpose of the advocate is to persuade the decision-maker to accept the case they are engaged to present. The key to good advocacy is to get into the mind of the tribunal; to engage its interest; to help it understand the case that is being presented; and to present that case clearly, efficiently, and persuasively.

2,400 years ago the Greek philosopher Aristotle wrote a treatise on Rhetoric. The art of rhetoric is the ancient equivalent of what we now call public speaking; but Aristotle was particularly interested, as we are, in forensic advocacy. He identified three main attributes which the ideal orator – the advocate – must demonstrate: *logos*, *pathos* and *ethos*. These qualities, as I

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shall show, are timeless. They survive as the qualities which all advocates still require.

Logos is the intellectual organisation of both the subject-matter of the dispute and the case the advocate has to advance on behalf of the client.

Pathos is the ability to express the client's case in a persuasive and agreeable manner that will engage the sympathy of the tribunal. ***Ethos*** is the demeanour or behaviour of the advocate. Advocates must demonstrate first a complete grasp of their subject-matter; secondly an attractive, personal style of presentation; and thirdly ethical and professional values which will command the tribunal's respect and trust.

My training and experience as an advocate, in court and in other places, is firmly rooted in the adversarial style embedded in the common law. My experience as an arbitrator has exposed me to a range of different styles of presentation and expression, both orally and on paper. There are some challenging comparisons to be made.

One of the dominant features of the common law system, throughout its long history, is the emphasis on oral advocacy. Despite the inexorable growth of documentary evidence, the increasing practice of ever-lengthening written submissions, and the acknowledgement of the utility of documents-only dispute resolution, common lawyers continue to place their trust – rightly or wrongly – in oral advocacy at a live hearing before the decision-making tribunal, at trial and on appeal.

All barristers practising in England and Wales must belong to and have been admitted to practice by one of the four legal colleges known as the Inns of Court. The Inns, which also boast many overseas members, have historically

taken the lead in the training of barristers in the art of oral advocacy in an adversarial system.³

In an adversarial system it falls to each party to a dispute to present its own case to an impartial and largely passive tribunal, as professionally and effectively as it can, leaving it to the tribunal, whether it is a judge, jury, arbitrator or other body, to reach a conclusion on the evidence and the merits of the case as they have been presented by the opposing parties. A court might well conduct its own research into the law, in so far as it is not already informed of it, but it cannot carry out its own inquiries to cross-check the validity of the evidence, and, unless there are strong public policy reasons for doing so, it will not reach a decision outside the boundaries of the submissions it receives. It will not, for example, uphold or dismiss a claim on grounds which a party has not pleaded.

The duty to present the client's case, as forcefully as the facts and relevant legal principles permit, thus carries with it some ethical questions. How far can a common law advocate go in pursuing the client's case without affecting the due administration of justice? It is sometimes stated to be a weakness in the adversarial system that it may actually obstruct justice - it is essentially a competitive game played by the parties rather than an objective search for the truth. This problem may be avoided when the tribunal is entitled or required to take a more inquisitorial approach, independently seeking the just and correct outcome.

³ Basic training consists of the handling of witnesses, including experts, and making oral and written submissions, including skeleton arguments. Advanced training will extend into examining vulnerable witnesses or non-English-speaking witnesses using interpreters, and more complex work with non-experts and experts.

The English common law system tries to adjust for this. Counsel's obligation of partisanship is overridden by a higher duty, written into the Bar's and the solicitors' Codes of Conduct, to assist the tribunal in the proper administration of justice. For example advocates must draw the tribunal's attention to all relevant legal authorities of which they are aware, whether or not they support their client's case. In an international dispute depending on foreign, i.e. non-English law, that will include ensuring that the applicable law is fully set out and explained to the tribunal by experts, in written reports or orally at a hearing, and by the citation of all relevant legal materials.

Allegations of dishonesty cannot be made without a firm evidential foundation. In relation to documents, there is an absolute obligation to disclose all relevant documents which the advocate knows about, unless the document is legally privileged, especially if it damages one's own case or helps the other side. In criminal cases the obligations of disclosure imposed on prosecuting authorities, including the police, are even more extensive.

It is not an exaggeration to say that the integrity of the common law system is critically dependent upon the due observance of these overriding obligations. Recent cases in our criminal justice system vividly demonstrate how miscarriages of justice will arise if they are breached.

In international disputes these duties, which are or should be part of the DNA of a common law practitioner, sometimes conflict with different but equally ethical codes binding on opposing lawyers practising in other jurisdictions, and can lead to misunderstandings. There is to my mind an urgent need to develop a generic ethical code for advocates practising in this specialised field, to parallel the IBA's guidelines on evidence.

The English lawyer's duty to the court certainly puzzles some clients. They believe that the gun they have hired can shoot indiscriminately. But respect for these principles is fundamental to the trust which a tribunal can place in the advocate. In its turn, that respect and trust can only assist the client. An advocate who has lost the trust of the tribunal runs the serious risk of throwing away a convincing case. *Ethos* rules.

In the practical presentation of cases, the techniques of oral advocacy show weaknesses as well as strengths. (I should say in passing that Aristotle discusses at some length whether, from a tactical point of view, it is better to start off by emphasising the strength of one's own case before attacking the weak points on the other side, or *vice versa*. I shall go for the strengths first.)

At a time when international and domestic tribunals are overwhelmed by a tsunami of long-winded written opening and closing submissions the short oral opening and closing address is in my view an indispensable aid to understanding, on both sides of the table. Barristers brought up in civil litigation in the English courts expect and welcome constructive dialogue with the tribunal. An important tactic in the advocate's toolbox is to know how to get the tribunal to open its mind on the points in issue, the better to focus the advocacy. On the tribunal's side a hopefully polite conversation can subtly shut counsel down on matters it has already fully understood, cross-question them on points of genuine difficulty, and steer them away from the atrociously bad ones.

The choice and presentation of witnesses in English courts and in most arbitrations falls to counsel rather than the tribunal. Civil code practice is not the same. According to the traditional common law approach, a party presenting a witness of fact is obliged to let them tell their own story. In our

criminal courts that is still the rule. This is achieved by asking open questions: “what is your name?” rather than “is your name X?”, “where were you on 10 January” rather than “were you in your office on 10 January?” and so on. Questions which put words into the witness’ mouth – leading questions – may be objected to. They can certainly weaken the credibility of the witness on crucial parts of the evidence.

There is art and skill in handling evidence in chief. But, outside the criminal courts, getting your own witnesses to tell their own story at trial is, nowadays, a near impossibility. The practice has fallen into desuetude except in the very limited circumstances in which it is desirable to re-examine a witness on points arising out of cross-examination, or, in a sensitive case, the tribunal requires an open examination in chief on some issues.

In the interests of saving hearing- time, and to eliminate the element of surprise, witnesses of fact are now committed to statements drafted for them, sometimes at length, by the lawyers, and then filed with the tribunal in advance of the hearing. At the hearing the hapless witness confirms the ‘truth’ of a statement which he or she would never have written – at least in those terms - and is then exposed to cross-examination by opposing counsel. In my experience some witnesses resent this entire process. They have their own story to tell but the legal process gets in their way.

Tactically, and in the knowledge of this problem, the presenting advocate will always try to have some ‘supplemental’ questions which need to be cleared out of the way, some points of ‘clarification’ or perhaps ‘correction’ which the witness would like to deal with first. But I still regard this process as tainted with artificiality. When the tribunal takes the lead in questioning, the

barriers to getting witnesses to tell their story, and the whole story, would seem to me to be less formidable.

Cross-examination is a different matter. It is looked upon as one of the more conspicuous strengths of common law procedure when it is done well. The main purpose of cross-examination is to test and hopefully damage the case being presented by an opposing witness. A properly conducted cross-examination by opposing counsel, using well-prepared, short, clearly formulated and focused questions, is one of the best ways of testing to destruction a witness' evidence. Leading questions are the weapon of choice.

Moreover, in common law proceedings, cross-examination is not limited to the evidence which the witness has given in chief. A witness can be cross-examined on any matter relevant to their evidence, including for example documents and events they have not referred to, previous inconsistent statements, and the evidence of others. This can be very damaging to their credibility. One of the duties of counsel calling the witness is to foresee and, within the bounds of propriety, to protect him or her from these lines of attack.

But in some common law jurisdictions – for example in England and Wales – the right to cross-examine is complicated by the duty to put to each witness that part of the opposing case which is in conflict with the evidence of that witness. The jurisprudential basis for this rule is that the other side's witness must be given a fair opportunity to comment on the case he or she has to answer. Thus, a failure 'to put one's case' in cross-examination may lead to objections, on the ground of unfairness, at the stage of closing submissions, and a refusal on the part of the tribunal to accept that part of the party's case. In the United States of America advocates are not bound by this duty:

see Atticus Finch's closing submission to the jury in *To Kill a Mockingbird*, which still provokes outrage in the Inns of Court.

However the duty 'to put one's case' often ends up as a duty to beat one's head against a brick wall. We have all seen terrible cross-examinations, and in some cases it is this very duty 'to put one's case' which is to blame. Cross-examination is bad when the questions are long-winded and convoluted; when they raise several questions at the same time; when they do not follow a logical, or chronological sequence; when they are disorganised; when they do not seem to be aimed at making any particular point; when they are conducted in a discourteous, bullying or hectoring style; and when they are deliberately designed to humiliate or confuse the witness. It is unfortunate that many arbitrators do not have the courage to stop them. Many professional judges are reluctant to intervene. More should do so.

Cross-examination seems to me to work particularly well, and is indeed indispensable, with expert witnesses. I am very sceptical about procedures under which expert evidence is procured and produced by the tribunal, however much liberty is given to counsel to cross-examine. Court-appointed experts in some jurisdictions may be chosen after discussion with the parties. In others, for example in Italy, they are simply recruited from a published list. Many of them have retired from day-to-day practice. The parties may be supported with advice from experts of their own; but it is difficult if not impossible to eradicate the suspicion that, however much counsel may shake his or her evidence, the court- or tribunal-appointed expert will decide the case, if not actually write the judgment or award.

Under the rules of court in England and Wales a judge may be assisted by a court-appointed expert, but the practice is unpopular and rarely invoked, for

that very reason. Arbitrators may appoint an expert ‘assessor’ to help them understand the evidence being given by opposing experts. A non-lawyer arbitrator may appoint a legal assessor to help on points of law; but I do not regard that as the same thing at all.

Absent a tribunal-appointed expert, advocates who are properly briefed by their own expert can conduct a much more challenging cross-examination, and are free to carry out a much wider range of investigation. They have the confidence to know that they are competing on level terms with the expert on the other side, and do not have to fear instinctive bias on the part of the tribunal.

This method also has, in my experience, a salutary effect on the experts too. They will know that their evidence is likely to be rigorously tested in cross-examination by a well-informed opposing counsel, and that it will not be accepted by the tribunal unless it is as watertight as it can be. They will – or should - take a great deal more care in the preparation of their report. Issues can be reduced and shortened, and points of controversy clearly identified. That can only benefit the process.

I turn finally to what I think has emerged as a serious weakness. Traditional techniques of witness-handling pose considerable operational difficulties in cases involving heavy documentation, including (obviously) international arbitrations. Complex documentation, which is frequently excessive and expensively produced, does not lend itself to efficient oral examination in chief or cross-examination. Too much time is spent in turning up or calling up the document. That is followed by excessive reading-out of extracts before the question is put. It takes a lot of skill to ask a pointed question about a document without reading it out first.

In these heavily documented cases I believe that the common law approach to the handling of witnesses has reached the end of the road. There is a strong case in my view, in these instances, for requiring counsel not only to identify in advance the documents on which they are going to cross-examine but also to file the questions they plan to ask. This would not in my opinion derogate from the duty of counsel to put the client's case as forcefully as possible, but it would alleviate much of the burden and indeed tedium of an oral hearing.

Oral hearings serve an important purpose and many clients would be very unhappy if their cases were decided entirely on paper. But it is time, in my view, for common lawyers at least to recognise that some our old practices do not always or adequately meet the demands of today's market.