EFFECTIVE ADVOCACY IN ARBITRATION: THE HEARING

The relative merits of oral argument and post-hearing briefs

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Introduction

A full hearing on the merits has essentially two objectives: to hear live testimony from witnesses and experts, and to hear the oral submissions of the parties. This paper will focus on the making of oral arguments and compare this mode of advocacy to the submission of post-hearing briefs.

The right to oral argument

Numerous arbitration rules acknowledge the right of the parties to make oral arguments to a tribunal. Article 19.1 of the LCIA Rules, for example, states this in terms:

> "*Any party which expresses a desire to that effect has the right to be heard orally before the Arbitral Tribunal on the merits of the dispute, unless the parties have agreed in writing on documents-only arbitration.*"

Article 15(2), first sentence, of the UNCITRAL Arbitration Rules also expressly provides for this right:

> "*If either party so requests at any stage of the proceedings, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument.*"[1]

Article 32 of the ICSID Arbitration Rules clearly entitles the parties to oral argument:

> "*(1) The oral procedure shall consist of the hearing by the tribunal of the parties, their agents, counsel and advocates, and of witnesses and experts. … (3) The members of the Tribunal may, during the hearings, put questions to the parties, their agents, counsel and advocates, and ask them for explanations.*"

The same meaning is gleaned from Article 16(1) of the American Arbitration Association International Dispute Resolution Procedures, which grants broad powers to a tribunal to conduct the arbitration "*provided that … each party has the right to be heard and is given a fair opportunity to present its case.*"

Article 15(2) of the ICC Rules adopts a less categorical approach, calling instead on the tribunal to "*ensure that each party has a reasonable opportunity to present its case.*"[2]

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[1] See also Article 24(1) of the UNCITRAL Model Law (2006).

[2] See, e.g., Y. Derains and E.A. Schwartz, *A Guide to the ICC Rules of Arbitration*, 2d. ed., 2005, at p. 293; see also Article 22(1) of the ICC Arbitration Rules.

Equivalent provisions are found in Articles 19(2) and 34 of the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce. What is a reasonable opportunity in the circumstances of each case would in the first instance be left to the discretion of the arbitral tribunal. Even so, the scope of that discretion will likely be determined by the arbitration law at the seat, or legal place, of the arbitration. If the arbitration is seated in Sweden, for example, Article 24, first paragraph, of the Swedish Arbitration Act will provide a more express recognition of the right to oral argument:

> "*The arbitrators shall afford the parties, to the extent necessary, an opportunity to present their respective cases in writing or orally. Where a party so requests and provided that the parties have not otherwise agreed, an oral hearing shall be held prior to the determination of an issue referred to the arbitrators for resolution.*"

The limits of oral argument

The purpose of oral argument is closely linked to the purpose of oral evidence: to establish direct communication with the Arbitral Tribunal regarding the central issues of the matter, allowing the Tribunal to interact fully with the parties' advocates.[3]

Three specific aims of oral argument would include:

(1) to set the context (including a party's case on the law) for the evidence to be heard (in opening statements);

(2) to summarize the central points of fact and their legal implications based on the evidence heard (in closing statements); and

(3) to answer specific questions put by the Arbitral Tribunal.[4]

The right to oral argument is not absolute, in the sense that it is not unrestrained.[5] The length of oral argument in a hearing on the merits can only ever extend to a reasonable proportion of the overall time available, as most of the time must be devoted to the hearing of witness and expert evidence. This will of course remain under the control of the Arbitral Tribunal.[6]

Other issues that often arise in connection with the presentation of oral argument include:

(1) reliance on new authorities or, occasionally, new documents not previously available to a party, after the evidentiary record is closed;[7]

(2) the use of visual aids and whether they may be regarded as new documents not previously presented;[8] and

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[3] *See*, 1996 UNCITRAL Notes on Organizing Arbitral Proceedings, §75.

[4] *See "Oral Argument": Report of the Session*, in ICCA International Arbitration Congress, *International Arbitration 2006: Back to Basics?*, ICCA Congress Series No. 3, 2007, pp. 829 at 830 (presentation by Mr. Robert Briner), 832 (presentation by Ms. Teresa Cheng) and 835 (presentation by Mr. Yves Fortier).

[5] Although a truism in this specific context, the point is relevant to the overall conduct of international arbitration. "All legal power is limited. … *To claim legal power is to accept its limits.*" P. Allott, *Eunomia*, 1990, §11.20, at p. 173.

[6] *See*, 1996 UNCITRAL Notes on Organizing Arbitral Proceedings, §§78-80.

[7] *See*, ICC International Court of Arbitration, *Techniques for Controlling Time and Costs in Arbitration*, §76 (Cut-off date for evidence), in ICC Bulletin, vol. 18, No. 1 (2007), pp. 23 at 41.

(3) the submission of skeleton arguments and whether they may be regarded as a distinct and unscheduled written pleading.[9]

A Narrowing Window for Oral Argument

In contrast to the introduction of new evidence, it is generally understood that a party is not prevented from introducing new legal theories for its claims or defences in the course of oral argument. The consequence of doing so, however, may include an adverse impact on the credibility of a party's case. Nonetheless, it is not difficult to imagine circumstances that could justify the introduction of new arguments during a hearing, such as the novelty or complexity of the facts, instruments or legal issues in dispute,[10] the late appointment of counsel to a matter, or (perhaps most frequently) the late introduction of arguments or documents by the opposing party during the written phase of proceedings.

This will likely be a critical juncture in the handling of the proceeding by a Tribunal. A tribunal will not want the proceedings to be extended unnecessarily by the appearance of late arguments, especially if it senses that such arguments might be no more than last-ditch attempts to run a claim or a defence. In order to discourage or curtail the appearance of new legal theories during oral argument, a tribunal may limit the time for oral submission to a minimum (e.g. one hour per party at the beginning or at the end of the hearing).

The refusal of a tribunal to hear any oral argument, against the wishes of one or more of the parties, is unusual.[11] Because such a refusal potentially touches upon the fundamental right of a party to a full or fair opportunity to present its case, the circumstances that could justify a tribunal's decision to forego oral argument would probably be limited to cases where the tribunal is certain that oral argument (or at least oral argument by the party requesting such an opportunity) will have no material impact on the issues in dispute. For example, a tribunal might consider that the heads of liability and damage it has found to be viable are essentially uncontroversial within the overall context of the case, despite these questions being resisted as a matter of principle by the respondent party who seeks to make oral submission to the tribunal.

The Opportunity to Respond in Oral Argument

In the normal course, the parties will be allowed a complete opportunity for oral argument. Beyond the question of the timing of initial presentations, that opportunity typically entails two further dimensions in the conduct of the proceeding: (a) the opportunity to respond to the opposing party's submissions; and (b) the opportunity to answer questions posed by the tribunal to the parties.

The opportunity to respond an opponent's oral submission, or to questions from the bench, is often associated with the core skill or art of oral advocacy. This is so because of the

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[8] *See "Oral Argument": Report of the Session*, in ICCA International Arbitration Congress, *International Arbitration 2006: Back to Basics?*, ICCA Congress Series No. 3, 2007, pp. 829 at 836-839 (presentation by Prof. Albert Jan van den Berg)

[9] *See*, 1996 UNCITRAL Notes on Organizing Arbitral Proceedings, §84.

[10] Counsel in one of the first arbitrations to be conducted under Chapter Eleven of the North American Free Trade Agreement ("*NAFTA*"), when articulating a new position on attribution of conduct to the State during the hearing, affirmed to have experienced a "*legal epiphany*" of the meaning of the NAFTA provisions.

[11] It is not, however, unheard of, even in large cases. The author knows of a proceeding, in which the amount claimed runs to several hundreds of millions of dollars, where the tribunal has declined to hear any oral argument on the merits of the dispute.

immediacy of the task. As regards responding to opposing counsel, the advocate must be able to identify the opponent's vulnerable points and construct an argument in a matter of minutes. Arbitration tribunals will seldom, if ever, be as exacting as certain national courts in expecting an uninterrupted flow of argument as between one side and the other. A tribunal will typically grant a reasonably brief pause between a respondent's principal argument and a claimant's rebuttal, and between the claimant's rebuttal and respondent's surrebuttal, to the extent not already marked by a scheduled pause in the order of proceedings.

A party's response to questions from the Tribunal may be different, depending on the nature of the question. Certain questions may require an immediate answer, for example because they are meant to elucidate the meaning or implications of a specific point made by a party, which that party (or its advocate) would be expected to command. Certain questions may refer to the place in the record where a certain point is analyzed or a document is found, requiring a minor lapse before the answer is provided.

Other questions, however, may go the crux of the issues of the case, and these may be factually complex, legally novel or far reaching, or concern the application of rules whose contours are particularly uncertain or ill-defined. As much as a party (or its advocate) may be prepared to provide an immediate response, the party may wish to be cautious and reserve the possibility of a written response.[12] Tribunals will often be aware of the sensitive character of this sort of questions and some may readily offer the opportunity of a written response when putting the question to counsel.

As in other circumstances, procedural fairness will normally require the opposing party to be given the opportunity to respond to the first party's oral response to a question by the Tribunal. Very rarely, a tribunal will not afford the opposing party that opportunity during the hearing (perhaps, for example, out of time pressure if the questions are asked at the end of the last day of the hearing).[13]

These and other circumstances may, and usually do, lead to a final and limited opportunity for the parties to state their respective positions on substantive questions posed by the arbitral tribunal, i.e., to do so in a post-hearing brief.

The opportunity and purpose of post-hearing briefs

Unlike the right to submit oral argument to a tribunal, arbitration rules are normally silent on the opportunity of the parties to submit post-hearing briefs. This silence in itself denotes the secondary and contingent character of such presentations as a matter of affording due process to the parties, i.e., that post-hearing submissions normally are not a part of the full opportunity of a party to present its case.

This view is reflected clearly in the 1996 UNCITRAL Notes on Organizing Arbitral Proceedings, §40:

> "*Practices differ as to whether, after the hearings have been held, written submissions are still acceptable. While some arbitral tribunals consider post-hearing submissions unacceptable, others might request or allow them on a particular issue. Some*

[12] *See, e.g.*, *Redfern and Hunter on International Arbitration* (Redfern, Hunter, Blackaby and Partasides, eds.), 2009, §6.247, at p. 429.

[13] This was the case of an ICSID Convention proceeding in which the author acted as co-counsel for the respondent party.

> *arbitral tribunals follow the procedure according to which the parties are not requested to present written evidence and legal arguments to the arbitral tribunal before the hearings; in such a case, the arbitral tribunal may regard it as appropriate that written submissions be made after the hearings.*"

Since 1996, the surge in the practice of international arbitration, both under institutional sets of rules (such as those of the ICC Court, the LCIA, the AAA and ICSID, to name just a few) and under rules governing ad hoc proceedings (notable the UNCITRAL Arbitration Rules), has brought with it the expectation that the parties will first put their entire case to the tribunal in writing, before the tribunal hears the parties orally on the merits of their dispute. The need for post-hearing submissions in light of this practice may not be obvious.[14]

As noted by leading commentators on the practice of the Iran-U.S. Claims Tribunal, which established its rules of procedure on the basis of the UNCITRAL Arbitration Rules, that Tribunal revealed "*a predisposition against post-hearing submissions*" for the sake of the orderly conduct of proceedings.[15] Of course, the Iran-US Claims Tribunal had a unique mandate.

The prevalent practice of allowing post-hearing briefs

Today it is nevertheless possible to point to an opposite tendency, that is, towards the frequent use of post-hearing briefs in arbitration proceedings where substantial amounts or issues are in dispute. This seems to be true particularly in the field of investment treaty arbitration, as reflected in the arbitration proceedings pending before ICSID. Of the 125 ICSID arbitration proceedings pending as of 31 January 2010, 35 proceedings have held a hearing on the merits (which for these purposes means a hearing on liability or on liability and damages). Post-hearing briefs have been filed in 28 of these 35 cases, that is, in 80% of the pending matters that have held a hearing on the merits. For the 15 cases which have held hearings on issues other than liability and damages, post-hearing briefs were filed in 9 of these cases, that is, in 60% of the total. While data for concluded ICSID cases and for arbitrations under other rules are not as readily available, the perception (as stated by one leading arbitrator) is that "*closing written submissions*" have become "*universal practice*."[16]

In this context, it might be said that post-hearing briefs have become a function of the multiplying demands on the time of those who serve as arbitrators and counsel.[17] Arbitrators who are approached more and more frequently to serve on tribunals can set aside fewer consecutive days on a calendar for a hearing on the merits. Counsel might thus not be able to present a party's entire oral evidence or argument in the time available.[18] Arbitrators who serve on multiple tribunals simultaneously might not find the necessary time to digest the document record or to structure and draft an award promptly after a hearing. They would thus seek to rely on the parties to condense their respective cases into a digestible form.

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[14] *See, e.g.*, ICC International Court of Arbitration, *Techniques for Controlling Time and Costs in Arbitration*, §47 (Avoiding repetition), in ICC Bulletin, vol. 18, No. 1 (2007), pp. 23 at 37.
[15] D.D. Caron, L.M. Caplan, and M. Pellonpaa, *The UNCITRAL Arbitration Rules: A Commentary*, 2006, pp. 500-501.
[16] See *"Oral Argument": Report of the Session*, in ICCA International Arbitration Congress, *International Arbitration 2006: Back to Basics?*, ICCA Congress Series No. 3, 2007, pp. 829 at 836 (intervention by Professor Capper).
[17] *See* ICC International Court of Arbitration, *Techniques for Controlling Time and Costs in Arbitration*, §10 (Counsel with time), §12 (Arbitrators with time), in ICC Bulletin, vol. 18, No. 1 (2007), pp. 23 at 30-31.
[18] *Redfern and Hunter on International Arbitration* (Redfern, Hunter, Blackaby and Partasides, eds.), 2009, §6.243, at p. 428.

Thus, post-hearing briefs in today's arbitration landscape might be seen as a supplement to oral advocacy. As a supplement, it is normally used only as and when needed, and it would be exceptional for a tribunal to schedule post-hearing submissions in the procedural calendar.[19] Instead, they are normally ordered at the conclusion of a hearing. In the same way as oral argument, post-hearing submissions are subject to certain constrains. First and foremost, the evidentiary record would be closed and no new documents would be allowed.[20] Second, there is usually a page-limit on the post-hearing brief, in order to ensure that it provides a summary and not a regurgitation or expansion of a party's main arguments.

Within these limits, a post-hearing brief may play an important role in assisting the tribunal in rendering its award. The roadmap such a brief could provide might consist roughly in issues of fact and issues of law.

As regards issues of fact, a post-hearing brief could:

- set out the undisputed facts of the matter;
- show how the evidence proves the key facts of the party's case;
- analyse the key aspects of the documentary record;
- point to central concordances and contradictions in the witness evidence, on the basis of the hearing transcript;
- point to, and distinguish between, sound and weak expert evidence, on the basis of the hearing transcript;
- update, and provide alternative, quantum calculations; and
- make cost submissions if so ordered by the tribunal.

As regards issues of law, a post-hearing brief could:

- provide a list of points at issue. A tribunal may keep a running list of points at issue consisting of an aggregate of points identified by each party. Some tribunals may invite the parties to submit, with their post-hearing briefs, an annotated list of issues making reference to the evidentiary record.
- set out the parties' agreement, the Tribunal's determination, or the submitting party's position on the applicable system of law, in general terms;
- identify the applicable rules of law in a more specific manner; and
- provide citation, web links or copies of pertinent authority.

[19] *See* ICC International Court of Arbitration, *Techniques for Controlling Time and Costs in Arbitration*, §84 (Closing submissions), in ICC Bulletin, vol. 18, No. 1 (2007), pp. 23 at 42: "*Consider whether post-hearing submissions can be avoided in order to save time and cost. If post-hearing submissions are required, consider providing for either oral or written closing submissions. …*".

[20] *See, Redfern and Hunter on International Arbitration* (Redfern, Hunter, Blackaby and Partasides, eds.), 2009, §6.242, at p. 428.

Focus vs. tactics

As can be easily appreciated, these objectives could just as well, given sufficient time, be reached in the course of oral argument at the hearing. If this then confirms the view of post-hearing briefs are supplemental to oral argument, and serve the same purposes, the question may arise as to how to make best use of one and the other. It would seem that there is no univocal answer. This is because, despite the plethora of rules and guidance concerning efficient use of time at the hearing, the decision-makers, the arbitrators, are individuals with their own preferences and their own perception of their mandated tasks. The basic rule of advocacy must prevail, namely, that the advocate must respond to the arbitrators' concerns.

The basics boundaries of the playing field are probably predictable in most instances of international arbitration today. One might expect a week-long hearing, with all or part of the first morning devoted to the parties' opening statements, and statements in rebuttal. Closing arguments might be provisionally scheduled for the last day or not at all. Assuming a transcript is made of the hearing, parties may be confident of the chance to make a closing submission on the basis of it. Unless there is a particular urgency, a final transcript will usually be completed only after the hearing, thus prompting post-hearing submissions.

Beyond this, however, much will depend on the persons sitting as arbitrators. If they are inclined to favour oral argument then the parties should prepare to make use of that opportunity at the hearing (or any extension or adjournment of the hearing), regardless of whatever else they may submit in their post-hearing briefs. If they wish to economize on time and prefer to hear the evidence instead of closing statements, then the parties should plan the hearing with that in mind.

What should probably always be kept in mind is that post-hearing submissions are ancillary. As such, they should be prepared with the same mindset as oral argument, and under the same rules of thumb. Most of all, they should be focused. They are part of the same thought process as oral argument. They should therefore be conceived and outlined immediately following from oral argument.

To be sure, certain parties may use post-hearing tactics as much as may be used ahead of the hearing. They may delay contributions to the costs of the hearing or proceedings. They may seek to introduce new documents or allegations. They may even retain new counsel for their post-hearing submissions and seek and obtain on this basis extensions of time (for example, because they wish to overcome an adverse impression given to the tribunal by their oral evidence). While all of these tactics may be opposed by the other party, the fundamental objective is to maintain the focus and direction of the post-hearing submission. That focus should already be clear by the end of the hearing.

Conclusions

The relative importance of oral argument and post-hearing briefs is likely to be a function of the character and dynamics of the proceeding.

If the case needs to be handled swiftly (because the issues are straightforward, for example), or if the basic facts are undisputed, then the need for post-hearing brief might not be high. The necessary evidence is marshalled at the hearing, legal submissions are made orally, and any further submissions could be limited to a statement of costs. This pattern is not infrequently found, for example, in ICSID annulment proceedings.

If the evidence is complex and contested, or if the legal issues in dispute are novel or not well-defined, then the parties and the tribunal would likely be well served by post-hearing submissions that digest the central issues of fact and law. This will be true especially if time is scarce.

Post-hearing briefs, although in writing, are nonetheless not a different exercise from oral argument. They are a supplement to oral argument and are defined by counsel's experience before the tribunal. They require the same focus and should be part of the same endeavour to persuade to which advocates should devote their skill and their art.