THE ART OF ADVOCACY IN INTERNATIONAL ARBITRATION

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Chapter 20

THE BRITISH PERSPECTIVE AND PRACTICE OF ADVOCACY

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I. Introduction

This chapter outlines best practices in the advocacy and resolution in England of international commercial disputes. It compares English litigation and arbitration, and highlights features which may make England distinctive from other jurisdictions.

The art of advocacy is the art of persuading another person to decide or act in accordance with one's wishes. In international commercial dispute resolution in England, the art of advocacy is influenced by two central features.

The first feature is the object of persuasion. Whether in litigation or arbitration, this will usually be a court or tribunal comprising one or more middle-aged lawyers who will know little or nothing of the facts, may know little or nothing of the law relevant to the issues they have to decide, and may have no assistance other than the advocates appearing before them. The court or tribunal is likely to be motivated, above all, to decide the case in a manner: (1) which accords with legal principle and due process; (2) which it personally believes is just, fair and reasonable; and (3) which it hopes will be respected by the parties, appellate courts, and enforcing courts.

The second feature is the inherent complexity of the exercise. The parties will disagree about what happened, why it happened, and what is the right outcome. The facts may be extensive, and expert assistance may be required. The law is simple in essence, but complicated in detail. While all of this is true of wholly domestic disputes, disputes involving parties or facts from more than one

country present special difficulties. Facts which arise abroad may be more difficult to understand and to prove than facts which arise in a purely domestic context. International cases tend to be larger than purely domestic cases. Law tends to become more difficult when different countries are involved. Problems of choice of law arise. Foreign or international law may be more difficult to identify and apply than local law. Enforcement may be required abroad.

Although always dependent upon the circumstances, effective advocacy in England lies generally in providing the court or tribunal with a clear, simple, and reliable path to a solution which is right (and is sought by one's client). Everything should be made as simple as can be. The court or tribunal should be told what happened, what it must decide, what the relevant legal principles are, and how they apply. A path through the complexity should be provided. The path should be consistent with the contemporaneous documents: oral evidence is less likely to be believed if it is inconsistent with the documentary record. Problems should be addressed; inconsistencies should be explained; irrelevant matters should be ignored. What is said should instil in the court or tribunal the confidence to decide that the proposed solution is, indeed, the right solution.

Effective advocacy is not limited to the final hearing, but is required from the outset of the dispute. The parties' legal teams must understand the facts and evidence, and must decide their strategy and case which they must advance and adjust as events unfold. Every contact with, or document prepared for, the court or tribunal is important, from the first statements of case, through procedural hearings, disclosure, evidence, submissions and trial. Every statement made or document put forward involves advocacy: it should all, in its own way, be calculated to instil confidence in the solution that is proposed.

Although litigation or arbitration may be accompanied by negotiation with the other side, it is not itself negotiation. One does not negotiate with a court or tribunal: one tries to persuade it. This requires honesty and candour. This does not preclude novel legal arguments or fall-back positions, but it does mean that, in general, it is unlikely to be advantageous to take factual or legal positions which

are clearly wrong. The adverse consequences of taking bad points may go well beyond the loss of the point itself. It gives the other party something to attack; wastes the time of the court or tribunal; distracts from one's other positions; and most problematic of all, reduces the credibility of the person taking the bad point, be that the party, its advocate or its factual or expert witness. The saying goes, "when in a hole, stop digging"; better still, do not get in the hole at all. Once taken, positions can be difficult or impossible to retract. Clients accustomed to commercial negotiation sometimes require time to understand this.

Effective advocacy, and effective dispute resolution, is the same whether the international commercial dispute is being resolved in the English High Court or in international arbitration. It is therefore unsurprising that recent years have brought convergence in best practices in the resolution of international commercial disputes in litigation and arbitration in England.

By a series of reforms over the past thirty years, the English High Court has abandoned what was once a primarily oral procedure. The High Court now pursues a mixed written and oral procedure which seeks to be responsive to the size and nature of the case (and, within limits, the wishes of the parties); which involves written evidence and submissions; and in which the function of oral hearings, culminating in the final trial, is to enable the court to hear oral argument and to test the written evidence by cross-examination.

International commercial arbitration now follows much the same approach. A written procedure is supplemented (even in continental Europe) by an oral hearing in which written evidence and submissions are tested by cross-examination and oral argument.

Increasingly, therefore, the choice between litigation and arbitration in England is finely balanced. This convergence is something to be welcomed, whether one calls it the 'judicialisation of arbitration' or the 'arbitralisation of litigation'. Litigators and arbitrators have much to learn from each other, as they strive to provide the commercial community with first class dispute resolution. For their part, those responsible for forum selection agreements should ensure that such agreements record, as precisely

as possible, the kind of dispute resolution that the commercial parties they represent want.

II. English lawyers, courts and arbitrators

A. English lawyers

For historical reasons, English lawyers are divided into barristers and solicitors. Until recently only barristers could appear as advocates in the English High Court. However, clients could not instruct barristers directly. Only solicitors could instruct barristers. Barristers could not practise in partnership, and therefore formed 'chambers' with other barristers with whom they shared costs but not profits. Solicitors formed law firms with other solicitors with whom they shared profits.

The result was a split profession. Large commercial litigation in England has traditionally been conducted by a unified team combining barristers and solicitors. Although regulatory-driven, this arrangement was largely non-prejudicial to clients. All members of the team contributed, and the teams became well used to working together efficiently and effectively.

The difference in arbitration was that there were never any restrictions upon who could appear as counsel. (However, clients still could not instruct barristers directly.) Accordingly, many solicitors and foreign lawyers have long conducted arbitrations in England to great effect without using barristers. Others have long used barristers for arbitrations, or have alternated on a case by case basis. Many English commercial barristers and solicitors, therefore, have extensive experience in arbitration.

We are now in a period of regulatory change. Since 1990, solicitors have been able to qualify to appear as advocates in English litigation. Foreign or in-house lawyers may now instruct barristers directly, whether for litigation or arbitration. Accordingly, those responsible for the conduct of dispute resolution in England now have wide choice. They can use just solicitors, or just barristers, or both, or neither.

B. English judges

Commercial litigation worth more than £50,000 is generally heard in the High Court, which is based in London at the Royal Courts of Justice on the Strand. It is heard by a single High Court judge without a jury.[1]

There are about 100 High Court judges. They are assigned to specialised divisions, one of which is the Commercial Court. The Commercial Court comprises about 20 judges, who resolve cases without wigs, gowns, or excessive formality. The great majority of cases in the Commercial Court are international commercial disputes: only a small proportion involves domestic commercial disputes. The Commercial Court judges, therefore, have very extensive experience in the resolution of international commercial disputes. They are well versed in dealing with jurisdiction, choice of law, foreign facts, foreign witnesses, foreign languages, and foreign law.

High Court judges are generally appointed at about the age of 40 to 55. The appointment is professional rather than political, and is generally made from the ranks of successful barristers. Most Commercial Court judges are successful former commercial barristers. A few High Court Judges are successful former academics or solicitors.[2]

International commercial litigation in England is, therefore, usually resolved by an experienced and successful lawyer who has

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[1] This has been a gradual development in tandem with the gradual abandonment of the jury trial. Until 1846, all civil cases in England were heard by a jury. Between 1846 and 1980, jury trials steadily declined. Since 1981, the rule has been that a party may apply for a jury trial where the claim concerns fraud, libel, slander, malicious prosecution or false imprisonment, save where the trial requires a prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury (section 69 of the Supreme Court Act 1981). The effective result is that many large commercial disputes cannot be resolved by a jury even if fraud is alleged.

[2] Lord Collins, a member of the Supreme Court (the highest English court), was formerly a successful commercial solicitor, and was (and remains) the author of Dicey, Morris & Collins on the Conflict of Laws, the leading English book on the subject.

spent 20 years or more practising as a commercial barrister, and thus has very extensive experience in resolving international commercial disputes. Most High Court judges are English, but some very successful English judges have come from other commonwealth countries.[3]

C. The composition of an English arbitral tribunal

The parties have first choice how the tribunal is to be constituted, who it is to comprise, and how it is to reach its decision. In so far as the parties do not agree, the *lex arbitri* will supply default rules. A typical result is that each party may select one arbitrator, and that the party-nominated arbitrators, or a third party, may select a third arbitrator who will preside or chair, will not share the nationality of any party,[4] and will have the deciding vote if the party-appointed arbitrators disagree.[5]

Parties often select as arbitrator a professional, neutral lawyer who is experienced in the resolution of international commercial disputes, and whose general approach they feel may suit them. They hope that such an arbitrator will not only decide in their favour, but will be persuasive to the other arbitrators on the tribunal. Selecting a partisan arbitrator may secure one vote, but cede influence within the tribunal. A party may find that an arbitrator from the *lex arbitri* has more influence on the tribunal than an arbitrator from the party's home region, if different. In any case, it is obviously sensible to select an arbitrator fluent in the language of the *lex arbitri*. The parties should also take account of the fact that the governing law, or the language of witnesses or documents, may be foreign to the *lex arbitri*, and should try to anticipate how the other party may choose.[6]

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[3] Lord Steyn and Lord Hoffmann, former members of the House of Lords (now the Supreme Court), are from South Africa.

[4] LCIA Rules Article 6.

[5] English Arbitration Act section 20(4); LCIA Rules Article 26.3; ICC Rules Article 25.1.

[6] For example, if the governing law is foreign to the *lex arbitri*, an arbitrator trained in that law may have significant influence within the tribunal. Each party

It is also common for the chairman to be a professional, neutral lawyer who is experienced in the resolution of international commercial disputes. The chairman's view will often be dispositive if the party-appointed arbitrators do not agree; moreover, the chairman will usually take the lead in running the case and drafting the award. Generally, therefore, the view of the chairman is crucial to the outcome of the dispute.

Given these factors, the composition of an English arbitral tribunal will often resemble closely the composition of the High Court in deciding an international commercial dispute, save that (1) the arbitrators may often come from different countries, while the judge will usually be English, and (2) there will often be three arbitrators rather than one judge, although the view of the chairman will often be dispositive.

The parties should investigate their arbitrators, both before making their selection, and once the tribunal as a whole is known. Arbitrators who are or have been judges or advocates, or who have published or spoken, may have a publicly available record showing their approach. This should influence how the parties approach the case. A number of (but by no means all) former Commercial Court judges become successful arbitrators.

D. Communication

Once the tribunal is selected, it becomes the object of persuasion, and its identity should influence the parties' every step. A style of presentation which English and European lawyers often find persuasive is a measured and neutral tone which explains a party's case in a clear, concise, accurate, reasoned and authoritative way. This style can sometimes appear underdone or unpersuasive to some lawyers, particularly American lawyers. Conversely, an argumentative or overdone presentation can seem distractive and less persuasive to

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must consider whether this is desirable, and how its opponent may choose. One may wish to avoid the situation in which one's opponent has appointed the only arbitrator trained in the governing law.

many English and European lawyers. In England, the key point is that one must explain one's case in a reasoned way. This requires more than tending simply to state one's position or conclusions, a habit of some European courts which many English lawyers find unpersuasive. It is always necessary to consider one's audience: the members of the tribunal, and in particular the chairman.

A good style of presentation is required not only for legal submissions (written and oral), but also for fact and expert evidence (written and oral). Everything that is said by or on behalf of a party to the tribunal should meet the central requirement of advocacy: it should be persuasive to the tribunal. A party whose evidence or submissions are confusing, too short (providing insufficient explanation or ignoring relevant issues), too long (repetitive or containing too much irrelevant detail), or argumentative and overdone, is not giving its case the best possible exposition.

Additional care is required when communicating with arbitrators, counsel, witnesses or experts whose native language is not English. If the *lex arbitri* is English, the arbitrators and counsel will usually speak some English. However, dispute resolution places special demands on language, and it should never be assumed that those whose native language is not English will feel wholly comfortable with this. Moreover, important witnesses and experts may speak no or little English (or any other language common to the tribunal and counsel), so that communication to or by them may need to be translated. Translated communication must be clear if it is to succeed.

The advocates and the tribunal should therefore ensure that their written and spoken communication will be understood by all involved: the tribunal, advocates, witnesses and experts. This means speaking in a clear voice and not too fast. It also means speaking and writing using clear and simple language which is not colloquial and which the audience has the best chance of understanding. The overriding goal is that language should be clear, simple and concise, and neither overstated nor understated. Rhetorical flourishes are to be avoided, not only because elaborate language tends to be unpersuasive, but also because such flourishes tend to be difficult for non-native speakers of English to follow. For the same reason,

language should not be understated, but should clearly state one's position. Excessive subtlety can be missed altogether.

III. Jurisdiction and arbitration agreements

The parties' first opportunity to control the resolution of their dispute is the inclusion of a forum selection clause in their contract. This is an opportunity to set the resolution of any dispute on the desired path.

Under English law, commercial parties have great freedom to agree upon the kind of dispute resolution they want. They can choose litigation (by making a 'jurisdiction agreement'), arbitration (by making an 'arbitration agreement'), or some other kind of dispute resolution. They can choose in what court or tribunal, and under what rules, any dispute should be resolved. They can make their choice exclusive (so as to preclude alternatives) or non-exclusive (so as to permit them). They can agree what law or rules the court or tribunal should apply, or that the court or tribunal should apply no law or rules at all, but decide the case as it thinks fair (*e.g. ex aequo et bono*) or in its absolute discretion. They can agree that their judge or arbitrator should not be impartial, or that one of them should have no legal or procedural rights. They can agree whether there should be disclosure or depositions. They can agree whether their dispute should be decided on paper or following an oral hearing. They can agree whether the decision should be final or subject to appeal. They can agree who will pay the costs of the dispute. They can agree whether any judgment or award may (or may not) be enforced, either generally, or in particular countries or against particular assets.

In general, English law will seek to give effect to the agreement that commercial parties have made. There are limits to this freedom. Some rules of procedure are mandatory, and may not be departed from by private agreement. Other rules may not be mandatory, but one may find that they form part of a definition of a 'court' or 'tribunal', so that their removal may rob a judgment or award of enforceability. However, many rules of judicial or arbitral procedure can be modified by private agreement, often without risk to

enforceability. Even where they cannot, a well-formulated agreement may nonetheless entitle one party to recover from the other party loss caused by the resolution of the dispute in a manner which was not agreed.

The scope for party autonomy makes it too simplistic to describe the choice between litigation and arbitration as a choice between two competing sets of procedure. It also means that it is not entirely fair to blame the dispute resolution community for the 'judicialisation of arbitration' or for the 'arbitralisation of litigation'. Nor is it entirely fair for Americans to complain about a lack of deposition rights, or for Europeans to complain about document disclosure. If commercial parties are not satisfied, the solution is straight-forward: they should rewrite their forum selection agreements. Commercial parties are their own best judges of the dispute resolution they require. Many have sophisticated internal or external counsel quite capable of selecting what is wanted. If commercial parties do not agree, this may of course be because they cannot agree: but still less should the arbitrators or judges then be blamed.

A. Finality

The parties may agree a precise balance between the finality of an award or judgment, and rights of appeal. Jurisdiction or arbitration agreements may seek to secure finality by ousting the right of appeal,[7] or by providing a contractual right of enforcement anywhere or against any assets. Conversely, jurisdiction or arbitration agreements may seek to restrict finality. This may be done by agreeing a contractual right of appeal to another tribunal or to a court, or by agreeing to support (or not oppose) permission to appeal. It may also be done by contractually limiting enforcement, either generally, or in particular countries or against particular assets.

The parties may seek to enhance the right of appeal in more subtle ways. For example, English litigation and arbitration is often

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[7] *Shell Egypt West Manzala GmbH v. Dana Gas Egypt Limited* [2009] EWHC 2097.

conducted under foreign law. In some legal systems, foreign law is applied as a question of fact of a special kind, and is, therefore, subject to more limited rights of appeal than the application of the *lex fori*, in part because of the practical difficulty of recalling expert witnesses on appeal. This is the position in England, where the effect of section 82(1)(a) of the Arbitration Act 1996 is that the (already highly limited) right under section 69 to appeal an award on a question of law is restricted to a question of English law. This can, however, be departed from by agreement. The result is that an agreement to arbitrate in England a dispute which is governed by foreign law should expressly permit an appeal on a question of foreign law if that is a desired possibility. A further possibility, in litigation as well as arbitration, is to agree that foreign law is to be decided on the basis of submissions of counsel. This may bring foreign lawyers into the legal team, reduce the expense and risk of expert evidence, and further enhance the prospect of appeal on foreign law.

B. Confidentiality

Confidentiality is more difficult to secure. It is widely supposed that commercial parties may agree to conduct arbitration in private, but may not agree to conduct litigation in private. This is traditionally said to result from *Scott v. Scott* [1913] AC 417, 436, where Viscount Haldane LC said:

> "... where all that is at stake is the individual rights of the parties, which they are free to waive, a judge can exclude the public if he demits his capacity as a judge and sits as an arbitrator. The right to invoke the assistance of a Court of Appeal may be thereby affected, but the parties are at liberty to do what they please with their private rights. In proceedings, however, which, like those in the Matrimonial Court, affect status, the public has a general interest which the parties cannot exclude, and I am unable to see how their consent can justify the taking of an exceptional course."

Viscount Haldane did not clearly address the question of whether commercial parties could agree that their private rights should be resolved in private by a judge as judge. The problem is not the right of the parties to a public hearing, from which commercial parties can contract out by agreeing to arbitrate in private,[8] and therefore can also contract out by agreeing to litigate in private. The problem is rather the public interest in maintaining confidence in the courts.[9] Although it remains unclear to what precise extent this public interest is inconsistent with protecting the confidentiality of what goes on in litigation, and requires public access to confidential documents and statements produced in commercial litigation, it remains easier to protect the confidentiality of what goes on in arbitration than in litigation. This has been a significant reason for the growth of arbitration in England.

It must be emphasised, however, that full confidentiality can be difficult or impossible to secure even in arbitration. Regulatory or other disclosure obligations may require the disclosure of information relating to the arbitration, or the publication of all or part of an award. For example, a confidential arbitration award may have to be disclosed in related litigation (lest injustice there be done), and may thereby become public knowledge. Moreover, the content of an arbitration award may become public knowledge if the award is appealed to a court or enforcement is contested.

Commercial parties who want what goes on in the resolution of their dispute to be confidential should agree this in their forum selection agreement. They should also select arbitration rather than litigation. Ousting the right to appeal to or resist enforcement in a court may also help secure confidentiality. (If the parties want the right to appeal or resist enforcement, they could agree to do so one or more arbitral tribunals.) However, the parties should understand that these measures may not ensure complete confidentiality.

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[8] *Suovaniemi v. Finland*, 23 February 1999; *City of Moscow v. Bankers Trust Co* [2005] QB 205, 226B.

[9] *Werner v. Austria* 26 EHRR 310, 330, [62]; *City of Moscow v. Bankers Trust Co* [2005] QB 205, 225G.

Judges and arbitrators should write any judgment or award that may become public in a manner which intrudes upon confidentiality to the minimum extent necessary. Where the parties have agreed that their dispute is to be resolved in a confidential manner, judges should consider whether and how they can give effect to this agreement. At the same time, it must be acknowledged that it is in the best English legal tradition for a persuasive judgment or award to explain the relevant facts and law openly and clearly.

C. Other differences between litigation and arbitration

Confidentiality aside, the scope for party autonomy, and the commercial expertise of English judges and arbitrators, makes the choice between litigation and arbitration in England finely balanced. However, there remain important practical differences.

Some points favour litigation. The High Court is a free public institution: commercial parties pay relatively nominal court costs. In arbitration, however, the parties must pay the costs of the arbitrators and of the accommodation used for hearings. Further, the High Court is a standing tribunal in which hearings can be readily scheduled, while an arbitral tribunal takes time to create, and can be difficult to bring together, at all or for any length of time. Moreover, the High Court has greater powers than an arbitrator to compel the production of evidence, consolidate related litigation, and restrain parallel litigation. These powers can greatly assist in the effective resolution of many types of dispute, particularly those involving multiple parties or serious allegations of fraud. These powers can sometimes be made available in support of arbitration, but are more naturally available in support of litigation.

Other points favour arbitration. In particular, the High Court has less ability to accommodate the wishes of the parties than an arbitral tribunal. Confidentiality is a traditional example, but there are others. For example, an arbitral tribunal can more readily sit in a foreign country or conduct litigation in a language other than English than a court can. (However, the High Court regularly hears translated evidence, and videoconferencing is available). Further, although High

Court judgments are widely enforceable throughout Europe, and indeed outside Europe, particularly where the parties agreed an English jurisdiction agreement, nonetheless an arbitral award may more readily be enforced outside Europe under the New York Convention, which has not been matched by any parallel global convention for court judgments (and indeed may never be).

It is by reference to factors such as these that commercial parties should choose between English litigation and arbitration. Whichever they select, they should seek to agree the procedural rules that they want as precisely as they consider appropriate.

IV. Case management

Justice delayed is justice denied. Yet a 'kangaroo court' (that is, one which denies due process in the name of expediency) is no better for being a 'kangaroo arbitral tribunal'. Moreover, no two cases are the same: each requires its own balance between speed and care. All this makes effective case management critical. It is the responsibility of the tribunal as a whole to ensure that the case is resolved as speedily as is consistent with due process in light of its specific features.

The parties play a leading role in case management, and their agreement is one of the surest signs of due process. Once the dispute has arisen, the parties should consider how they wish the case to be conducted, and when the tribunal is constituted, it should convene a procedural meeting or hearing to decide this: in the High Court, this is called a 'Case Management Conference'. Procedural meetings or case management conferences can be reconvened as necessary. A not insignificant task is to decide when the substantive hearing will be held. Finding a time that suits the court or tribunal and the parties can be difficult; the temptation to agree too short a time period should be resisted.

The tribunal should ensure that the parties are aware of the available flexibility. The parties may not appreciate that the tribunal may be willing to sit, not in London, but on the other side of the world, if that is more convenient (as it often may be, e.g. for parties

based in the Pacific). The parties may not appreciate the financial or legal significance of appeal, confidentiality, disclosure, or deposition rights. They may not appreciate that they can reduce the arbitrators' costs by permitting the chairman to engage a cheaper, younger, lawyer to help administer the case and to research issues which will be dealt with in the award. Now is the time for them to consider in detail how they want their dispute decided, in light of its size and complexity, and the position they find themselves in. Do the parties want a cheap, quick procedure? Or something moderate yet reasonably rigorous? Or the full treatment? The parties are free to supplement, or to agree to revise, the content of their jurisdiction or arbitration agreement.

If the parties can agree, their agreement can be recorded in a procedural order which will govern the arbitration or litigation. A procedure which is agreed by commercial parties should largely be safe from procedural irregularity. If the parties cannot agree, the tribunal or court will have to decide. It will record its decision in the procedural order. The suggestions that follow are premised upon the parties not agreeing to the contrary.

Much will depend upon the size, nature and complexity of the case. If the arbitration is for a small amount, and does not involve allegations of fraud, a cheap and quick procedure may be appropriate. Often, however, international commercial disputes are for very substantial amounts indeed, or involve very serious allegations of fraud. One can understand that commercial parties may not wish to entrust the power to decide important questions to a 'rough and ready' procedure. A finding of fraud by an arbitrator may have the same damaging effect as a finding of fraud by a judge.

A. Arbitration documents

The purpose of documents which are produced in the course of the arbitration, such as statements of case, witness statements and expert reports, is to set out a party's case, to provide the other party with notice of the issues to be decided, and to permit an effective and efficient hearing in which the court or tribunal can decide the issues.

If these documents do not do their job, the hearing is likely to be fragmented, unwieldy and unsatisfactory, causing delay and wasted cost. Moreover, the due process requirement that each party should know the case against it may potentially be infringed.

However, the timing of and relationship between these documents varies from country to country. Arbitration is able to draw on best practices.

In Switzerland, the parties will sequentially exchange a full brief (a 'memorial') which will set out in one place their factual and legal case, and will attach the documents on which they rely. There may then be rounds of reply. The judge will use these briefs to decide which witnesses to question, and how. The questioning of witnesses is reserved exclusively for the judge. The parties' lawyers are permitted neither to question witnesses nor to assist in the preparation of written witness statements: to do so is considered to influence the witness.

In England, statements of case ('pleadings') originated before the introduction of written witness statements, and were for many years the only formal notice of a party's case prior to trial. They are expected to state the central propositions of fact and law on which each party relies. In complex cases, they are often extensive documents, and in English litigation each party must confirm that its statements of case are true. Following statements of case, the parties exchange written witness statements and expert reports, which to some extent duplicate the content of lengthy statements of case. The practice in the Commercial Court is typically to exchange fact witness statements simultaneously, and expert reports sequentially with the claimant's expert going first.

In English litigation, it is the job of the parties' lawyers to investigate the facts and to orchestrate their presentation. They may question the witnesses of the party they represent, and in large cases will usually write these witnesses' statements, subject to the close review and agreement of the witness, and subject to the professional obligation to ensure that the statement reflects the evidence of the witness and not anything else. This is sometimes misunderstood by continental European lawyers, who fear that it may distort or

suppress evidence. However, it produces a clear benefit, particularly in large cases. It helps the parties to understand their case, focuses the evidence of the witness, and tends to produce a clearer statement of evidence, which better addresses the relevant issues and can more effectively be understood by the judge or arbitrators and cross-examined in the hearing, than a witness statement produced by the witness alone. It is, however, expensive, and it presupposes high ethical and professional standards in the practice of law.

In the United States, initial statements of case are sometimes brief, just identifying claims and defences. However, they may need to be expanded to resist a motion to dismiss the claim or defence. English and European lawyers find it concerning that a party can commence litigation or arbitration without providing any detailed explanation of its case. They worry that this permits 'fishing trips', that is, the launching of a claim in the hope that something will turn up in disclosure or depositions.

Arbitration is able to draw on the best of these practices. One approach which is used increasingly is, in effect, the Swiss approach described above, modified to accommodate disclosure, cross-examination, and lawyer involvement in the preparation and presentation of written evidence. Under this approach, the claimant will serve a statement of case attaching its fact and expert evidence; the claimant will then give disclosure; some time later the respondent will serve a statement of defence attaching its fact and expert evidence; the respondent will then give disclosure; there will then be time for replies. This approach may help to bring forward the identification of each party's case, and to reduce duplication between statements of case and written evidence. However, care is required to ensure that factual and expert evidence is identified with sufficient clarity to permit effective cross-examination. The evidence should therefore be attached to the statement of case, and not scattered (still worse, unattributed) therein.

The English approach is also often used, in which sequential statements of case are later followed by written evidence. This serves to focus the issues increasingly as the case goes on. It is good practice for the later written evidence to be provided sequentially, so that the

claimant's witnesses go first, and the respondent's witnesses do not waste time addressing issues which are not raised. Sequential exchange focuses the dispute and reduces the risk of issues not been addressed by the time of the hearing.

B. Depositions

Parties to American litigation may take advantage of extensive pre-trial fact finding procedures. In particular, they may conduct 'depositions', which are a form of pre-trial cross-examination in which the parties may question witnesses (from the other side, or third parties) in the presence of the other party's lawyers but without the presence of the judge. This produces an extensive evidentiary record in advance of trial.

Depositions are unknown in modern England (save in the limited guise of written interrogatories) and continental Europe. They are popular with many Americans, and sometimes bring forward the identification of the truth and enhance the predictability of trial. However, depositions are expensive, and can be an unjustified intrusion on witnesses. Moreover, unless special arrangements are made, the deposition will be conducted in the absence of the tribunal, and may be less valuable, and less concentrated, than cross-examination in the hearing itself. In general, depositions tend to be more useful in cases which involve fraud or turn on oral evidence, and tend to be less useful in commercial disputes which turn largely on documents.

Depositions are not widely used in international arbitrations, especially outside the U.S. There are limits on the ability of arbitrators and courts outside the United States to order depositions. Where the parties have agreed deposition rights in their jurisdiction or arbitration agreement or procedural order, the court or tribunal can enforce this by refusing to permit a party to put forward a witness whom it has failed to produce for deposition. Where deposition rights have not been agreed, however, the most common approach in English and European litigation and arbitration is not to expect or order depositions. This remains a significant difference in

comparison to litigation in the United States. Parties who want deposition rights in English or European litigation or arbitration should agree those rights in their forum selection agreement.

C. Disclosure

In continental European litigation, the parties are generally required to disclose only those documents on which they rely. They are generally under no obligation to disclose documents within their possession or control which are unhelpful to their case. The judge may order production of such documents, but this is not common (unsurprisingly, since it may not be known what they are).

This has long been of concern to English and American lawyers, who worry that a party may conceal relevant documents and have the court or tribunal decide the case on a false basis. Accordingly, in England and the United States, the parties have long been required to search for and disclose to the other party all relevant documents within their possession or control, whether helpful or unhelpful. However, this approach has become extremely expensive over the years, as cases have grown in size and electronic documents have proliferated. Vast quantities of relevant documents are now routinely disclosed. All such documents must be individually reviewed first by the disclosing party's lawyers (e.g. for privilege) and then by the receiving party's lawyers. Much of the expense of large commercial litigation in England and the United States involves disclosure.

In England, the harshness of the exercise is reduced by the fact that the required search can be limited by proportionality, materiality and relevance. In a large case, the parties are expected to seek to reach agreement on the extent of the necessary inquiry. The court will monitor the process through frequent procedural meetings (case management conferences). Much, as always, depends upon the nature of the issues: a fraud case may require extensive disclosure; a simple breach of contract case very little. Proportionality and relevance are also relevant to United States disclosure, but in practice English judges appear to have kept the extent of disclosure under somewhat

tighter control than their American colleagues. This may particularly be so in relation to electronic documents.

International arbitration often follows an approach by which parties may request production of categories of documents where this is proportionate to the case. This is quite close to the English approach, and can also be expensive. The IBA Rules on the Taking of Evidence in International Commercial Arbitration can be useful as guidelines in relation to discovery. However, in the experience of one of the authors, the IBA Rules should not become the procedural rules for discovery as the tribunal's discretion can be fettered by their use as such, and their adoption as rules can lead to unnecessary procedural disputes.

Where a party is told that no documents exist and does not believe this, it may be reasonable to ask the other party what searches it has undertaken before giving this confirmation. If the answer reveals that the search was inadequate, it may be reasonable to request a further search, and it may be possible to persuade the tribunal to order this. But if it appears that an adequate search has been conducted, then that is usually the end of the inquiry, and the matter is one for submission in the hearing and the drawing of inferences by the tribunal. As always, European or other commercial parties who are unhappy with the cost or intrusion of disclosure should exclude it in their forum selection agreement.

D. Interlocutory applications

Unless the parties agree a fast-track process, large international commercial disputes generally take some time to resolve, whether in arbitration or litigation. Between one and one and a half years is a common life-span. Given this, it is understandable that a party may wish to seek an early ending to the case, perhaps on the basis that the court or tribunal should not decide the case on jurisdictional or other grounds, or on the basis that the claim or defence is hopeless and should be disposed of without factual inquiry. Or a party may seek to advance the case more quickly than would otherwise occur, by early determination of some preliminary issue.

Such applications may require a lengthy early hearing. Experience tells that it may be better to resolve the case just once in a final hearing, rather than embarking on what may prove to be a series of expensive satellite or preliminary skirmishes (potentially involving appeals), at points in time in which the parties' cases may remain undeveloped, only to culminate in a final hearing in any event.[10] It is therefore unsurprising that courts and tribunals tend to be reluctant to grapple in detail with the issues at an early stage. Moreover, a tribunal that may have struggled to find time in its diary for the final hearing may be reluctant to schedule a sizeable early hearing, particularly if this would defer the date of the final hearing should that still be required.

Yet justice is not always served by letting the case run on. It is wrong to allow a plainly unmeritorious case to continue until trial, with all the expense and disruption of business and personal life that this involves. A jurisdiction challenge may turn on undisputed facts, or discrete facts which can readily be determined at an early stage. Or a party's case may simply be hopeless, and quite insufficient to justify subjecting the other party to the stress, inconvenience and cost of trial and preparation. In practice, however, a compelling case may be required to persuade the tribunal to arrange a substantial interlocutory hearing, and to persuade a court or tribunal to grant dispositive early relief.

Any application for early determination should ideally be made at the first available opportunity. It may be sensible for the parties to discuss any proposed application with the court in a procedural hearing (or case management conference). This may help to indicate whether an application for early determination should be brought at all.

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[10] Early resolution of a jurisdiction challenge or other skirmish may sometimes exercise a useful influence on the outcome of the case, allowing the parties to size up the strength of their position at an early stage. However, it is dangerous to assume that this will occur, or that it will occur for the right reasons and in the right way.

From time to time, the court or tribunal may also be asked to resolve ancillary matters on which the parties cannot agree, from disputes over disclosure, to requests for further information about a party's case, to applications for security for costs, to a wide range of other matters. Periodic meetings can be scheduled to resolve such matters.

V. The Hearing and preparation

The hearing of a large international commercial dispute can occupy a long time. Unless the parties agree a fast-track format, many large commercial arbitrations involve a final hearing lasting several weeks, just like large commercial litigation, although the vast majority of arbitrations last for less than a week.

The main purposes of the hearing are to permit oral argument on the issues that must be decided, and to enable the written evidence to be tested by cross-examination.

Sufficient time should be reserved for the hearing, including overspill time. The last thing anyone wants is for the hearing to be adjourned until all involved can next meet – which may be months or years away. Generally, it does not help to seek to compress too much into too little in the hearing, or to have the court or tribunal sit for long hours to make up for a lack of sufficient time. This tends to be an inefficient method of proceeding, and may lead to a judgment or award that is challengeable on grounds of due process. Hearings work much better if they are concentrated for five or six hours a day, with all involved having time to prepare for the following day. The typical practice of the Commercial Court in a long trial is to sit four days a week.

It is often helpful to schedule a short pre-trial review. This should be well before the hearing. Its purpose is to review the conduct of the hearing, including the order and timing of evidence. It should be possible to indicate when individual witnesses are likely to give evidence, enabling practical arrangements and reducing intrusion upon them. It may also be important to discuss how and when any necessary oral argument will occur, i.e. on legal issues or the meaning

of documents. Any outstanding practical arrangements, such as translation, trial bundles, or the use of live transcripts during the hearing, should also be decided. If such matters can be largely agreed by the parties, it may be possible to hold the pre-trial review by telephone or to dispense with it.

It is generally helpful for the parties to provide the court or tribunal with written opening submissions in advance of the hearing and written closing submissions after it. These documents should explain the parties' cases and provide a guide to the key issues of law and fact which must be decided. These are key advocacy documents, and should be clear, concise, reliable and persuasive. The written opening submissions should be provided sufficiently in advance of the hearting to enable the court or tribunal to read them properly. If they are lengthy, it may be sensible to divide them, for example into 30-page chunks which can be digested in one sitting. Schedules can be an effective way of providing detail without cluttering the thrust of what is being said.

Oral opening submissions are generally brief in arbitration: one usually has an hour or so. Here there remains a distinction between the practice in arbitration and that in English litigation, in which oral openings can occupy several days (or even longer) as a supplement to the written opening submissions. Particularly in cases where the documents are important, this can ensure the judge is well-equipped to hear the witnesses.

After opening submissions comes evidence. The usual order of evidence is to begin with the claimant's fact witnesses, followed by the respondent's fact witnesses, and then to conclude with expert evidence, tackled in the same way and discipline by discipline. However, it may sometimes be sensible to depart from this. In a complex case, for example, it may be better to begin with experts, to set the scene for the fact evidence. These matters should be decided by the time of the pre-trial review.

The use of written witness statements has made examination-in-chief (i.e., the questioning by a party of its own witnesses) largely redundant, in both litigation and arbitration. Some arbitrators, particularly from continental Europe, can be distrustful of lawyer-

assisted witness statements, and can therefore seek to hear the witness' evidence in his or her own words through examination-in-chief. It is suggested that this concern is misplaced. The persuasive value of a witness statement depends on its consistency with the documents, its explanatory power and the ability of the witness to withstand cross-examination. There is no reason to disbelieve a clear and coherent witness statement which is consistent with the documents and other evidence and survives cross-examination. Any desire for examination-in-chief should be raised in the pre-trial review.

This brings us to cross-examination, which serves the second of the two main points of the hearing: to enable the evidence to be tested. Cross-examination remains an essential tool in establishing the truth. It may not always achieve this, but it should always be undertaken. It should be emphasised that due process does not require that a party be given unlimited time to make oral submissions or to conduct cross-examination. On the contrary, due process requires only that a fair opportunity to present one's case. A party should not be permitted to cross-examine forever or to ask irrelevant questions: unless it has been agreed, there is no right to filibuster a court or tribunal. However, a party should be given a proper opportunity to conduct cross-examination. As always, much depends upon the nature of the case and on any agreement between the parties. In a large case, however, proper cross-examination for a significant witness (expert or fact) may require days (or even weeks) rather than minutes or hours. Modern arbitration is therefore moving away from the old continental model. The time that is likely to be required for cross-examination should be discussed in advance or in the pre-trial review. The parties sometimes agree time-limits to ensure the arbitration runs to schedule; but the tribunal must ultimately take responsibility for the proper conduct of the case.

It is sometimes suggested that expert evidence should be heard by an 'expert conference', in which all the expert witnesses give their evidence together in the hearing. This sometimes occurs in litigation in Australia, where it is known as a 'hot tub'. In similar vein, it is sometimes suggested that it may be helpful for the experts to meet

following their reports, but in advance of the hearing, to see whether they can agree a joint experts' report. This often occurs in English litigation.

An arbitration tribunal can adopt such processes if they are agreed by the parties, but, it is thought, should be reluctant to impose them. These processes tend to favour experts who are fluent in the language of the tribunal and accustomed to giving evidence (i.e., 'professional' expert witnesses) over experts who may not speak the language of the tribunal and may be unfamiliar with litigation. A live 'hot tub' or 'witness conference' also places a burden on the advocates and the court or tribunal to ensure it is effective and efficient. In the absence of the parties' agreement, it is therefore thought that the experts should be presented and cross-examined one at a time and in the usual way, so that the court or tribunal, and the opposing advocate, can give each expert the full benefit of their attention. For similar reasons, it is thought that a tribunal generally should not require the experts to meet before the hearing unless the parties agree to this.

VI. Award

The parties can agree that the tribunal should deliver either a reasoned or unreasoned award; but if they do not agree, reasons should be given (in practice, most parties want and are willing to pay for reasons, which are an inherent part of justice).

The purpose of any judgment or award is to do justice and to be seen to do justice. The judgment or award should command the respect of the parties and of any appellant or enforcing court or tribunal. To this end, it should meet the basic requirement of advocacy: to persuade. However, this requires neither endless detail nor unnecessary discussion of confidential material. What is required is a clear explanation of whether the court or tribunal has jurisdiction and how; what due process was observed; what it has found to have happened and why; and what it has decided and why. The judgment or award should address each party's case, making it clear why points have been rejected. It should deal with alternative arguments, in case

the primary ground for decision should be found wanting on appeal. All this should be done concisely. Many arbitrators err by producing excessively long awards which risk not being understood. Arbitrators should aim to produce persuasive awards of reasonable length. At all cost, however, an arbitrator should not produce an excessively short award which tends to command rather than to persuade, and which tends to state propositions or conclusions rather than to provide reasoning. That is appropriate only if the parties have agreed to an unreasoned award.

VII. Conclusion

Advocacy plays a major role in all aspects of litigation and arbitration. In England advocacy is both written and oral, but wherever it is deployed, the hallmark of good advocacy is the clear, concise and persuasive presentation of a party's case.