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COMMENTARY ON "ORAL ARGUMENT—WHAT IS IT, WHY DO IT, AND WHAT CAN GO WRONG"

by Lindsey Mitchell

I. INTRODUCTION

The Institute for Transnational Arbitration hosted its 34th Annual Workshop and Meeting from June 15–17, 2022 in Austin, Texas. The conference focused on various aspects of the arbitration hearing. This commentary explores the panel discussion, "Oral Argument—What Is It, Why Do It and What Can Go Wrong." The panel was moderated by Klaus Reichert of Brick Court Chambers in London. Panel participants were:

1. Alexander Gunning QC of One Essex Court in London,
2. Yoshimi Ohara of Nagashimi Ohno & Tsunematsu in Tokyo,
3. Babatunde Fagbohunlu of Aluko & Oyebode in Lagos, and
4. Anne Veronique Schlaepfer of White & Case in Geneva.

In his opening remarks, Reichert described the panel as a "masterclass in oral advocacy," considering the diverse experience of each member of the panel. Each panelist spoke on a different aspect of the oral argument, but several recurring themes emerged that were common to each of their perspectives.

II. THE WELL-PREPARED TRIBUNAL

One prominent theme concerned the preparedness of the tribunal. The panelists asserted that counsel should not take for granted that a tribunal has thoroughly considered the entirety of their written submissions, nor should they assume that they are intimately familiar with the nuances of their arguments. Schlaepfer specifically referenced that some arbitrators may prefer to arrive at oral argument "totally fresh," having spent very little time familiarizing themselves with the content of the written submissions.

Ohara focused heavily on this point, highlighting that the prominence of "American style" oral argument is often a cause for concern in civil law jurisdictions. The fear is that tribunals may overlook carefully crafted written submissions in an

effort to avoid pre-judging the case. She emphasized how concerning this practice is, especially when the case involves exceptionally complex facts or is reliant on detailed figures and data that are not easily conveyed orally. An arbitrator who arrives at the hearing having intentionally not meaningfully engaged with the written submissions may make decisions based on their intuition, overlooking critical information best expressed in written form.

The preparedness of the tribunal also understandably affects the style and structure of the oral argument. Tribunals who have digested the contents of the written submissions may treat the hearing as an opportunity to hear arguments regarding the critical issues of the case, rather than as a summary session. Ohara pointed out that tribunals who expect to have the case summarized for them at the hearing may have less incentive to engage with the written submissions beforehand. She suggested that tribunals could be encouraged to focus more on written submissions if the parties invited the tribunal to prepare a list of issues and questions to be addressed during the oral argument after having read the written arguments. This would help focus the structure of the oral argument towards points most concerning to the tribunal while also ensuring that parties need not treat the oral argument as merely an opportunity to summarize their positions.

Reichert described Ohara's plea for greater balance between the weight given to written submissions and the emphasis placed on oral argument as a "considerable challenge to the orthodoxy" of the way in which oral hearings are conducted, especially from the common law perspective. He posited that it may be worth reconsidering the exact purpose of oral advocacy and whether it is the best vehicle by which to express the subtleties present in many complex arbitration disputes.

While I am aware of the emphasis placed on oral argument, especially in the United States, I am surprised to learn that Ohara's statements may be considered controversial by members of the arbitration community. Striving for balance between the oral and written components of the case seems to better fulfill the often-cited, but increasingly elusive, benefits of arbitration—efficiency and cost-effectiveness.

The proposition that a written submission, into which hundreds of hours have been spent meticulously crafting, may only be given cursory consideration by an arbitrator seems like a gross waste of time and client resources. Further, the idea that an arbitrator may have chosen this method of preparation intentionally in an effort to avoid developing preconceived notions about the case seems to defeat the very purpose of providing written submissions.

My research has not revealed what the prevalence of arbitrators who prefer to arrive at the hearing underprepared is. However, as this issue was mentioned by multiple members of the panel, I must assume that there are at least a few who subscribe to this method of preparation, or lack thereof.

One must wonder why a party would select such an arbitrator during the arbitrator selection process? It is challenging to imagine a case in which an arbitrator's lack of preparation would be considered beneficial to one of the parties. Considering that at least some information on arbitrators can be obtained during the due diligence stage, one way this type of attitude towards oral hearings could be reduced is by simply refusing to nominate arbitrators who adopt such a method of preparation. If an arbitrator interview is conducted, parties may ask a prospective arbitrator how they prepare for oral argument. Such questions fall within the types of inquiry considered appropriate by the IBA Guidelines on Party Representation in International Arbitration as well as the Chartered Institute of Arbitration Practice Guidelines.[1] Of course, it still may be difficult to gather concrete information on arbitrators considering the lack of publicly available resources providing this type of insight. However, as resources such as Arbitrator Intelligence continue to develop, parties should take advantage of the information that is out there when trying to discern the method by which specific arbitrators typically prepare.[2]

[1] IBA Guidelines on Party Representation in International Arbitration, Guidelines 7–8 (2013), *available at*, https://www.ibanet.org/MediaHandler?id=6F0C57D7-E7A0-43AF-B76E-714D9FE74D7F; Chartered Institute of Arbitrators, International Arbitration Practice Guideline: Interviews for Prospective Arbitrators, Art. 2 (2016), *available at*, https://www.ciarb.org/media/4185/guideline-1-interviews-for-prospective-arbitrators-2015.pdf.

[2] ARBITRATOR INTELLIGENCE, htttp://www.arbitratorintelligence.com.

A well-prepared tribunal benefits both parties, as each could be more confident that the tribunal has engaged with the nuanced arguments expressed in their written submissions. The parties would have the opportunity to expand on the more complex aspects of the case at the hearing, rather than spending the majority of their allotted time providing the tribunal with a summary of the case. Any concern common law lawyers have regarding the deemphasis of the oral hearing would be misplaced, as the hearing would still remain an undoubtedly critical part of the process. Rather than merely summarizing, counsel actually may have a greater opportunity to impress the tribunal at the hearing by clarifying the most complex portions of the case.

As Ohara suggested, such an approach requires not only a well-prepared tribunal, but one that is actively involved in managing the case. Experts in the field have also highlighted the advantages of such approach, remarking that holding case review conferences to discuss preliminary issues would enable the tribunal to "focus on those issues and evidence that will be material to the outcome of the case" at the evidentiary hearing.[3]

III. TENSION BETWEEN CLIENT EXPECTATIONS AND PRESENTATION STRATEGY

The need to weigh the expectations of the client against the most effective oral argument strategy was another recurring theme of the panel discussion. One of the reasons given to explain why common law lawyers focus so heavily on oral argument is because clients expect to see an impressive "pro-client" performance at the hearing. Again, I was a bit surprised by the panelists' comments as I would have assumed these dual goals were more easily and often aligned. However, the potential ways in which they can diverge became clear.

Gunning outlined two potential strategies that he has seen employed by counsel during the opening of the oral argument. He referred to the first as "grandstanding" and described it as a presentation of the case in a completely lopsided fashion that is delivered with a heavy pro-client bias. This strategy may include presenting the tribunal with the evidence most damaging to the other side during the opening statement. In Gunning's view, such an approach was neither particularly effective

[3] NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 6.64 (6th ed. 2016).

nor persuasive but instead, could easily backfire. While it is true that a client would undoubtedly enjoy hearing an impassioned opening statement that presents their case in the light most positive to them, Gunning clarified that the role of counsel is not to be nakedly biased, but rather to persuade the tribunal that their client's position is the most reasonable. Persuasion is not best achieved via grandstanding, as the lopsided version of the case presented during the opening statement is vulnerable to being dismantled over the remainder of the hearing, rendering the opening statement ineffective.

Instead, Gunning recommended an alternative approach which he referred to as an "instructional method." According to this approach, counsel focuses on providing assistance to the tribunal to help them better understand the more complex and nuanced issues in the case. They do so by taking advantage of the deep knowledge that they have gained over the course of preparing the written submissions. Gunning recommended that while preparing, counsel should take note of any issues they found particularly hard to understand so they can be ready to clarify these points in a way that the tribunal can most easily grasp. Rather than adopting an obviously pro-client bias, counsel who pursues this strategy adopts a more neutral tone that is focused on creating a favorable context in which the tribunal can best understand the case and the evidence presented to them.

While I can understand from a client's perspective why the grandstanding approach may seem more immediately appealing, the pragmatic quality of the instructional method ultimately does seem like the more effective approach. As Gunning pointed out, there is not much evidence to support the assertion that clients demand a more performative, lop-sided presentation of their case. Even if they were to make such a demand, it clearly seems like the job of counsel to steer clients toward the most effective strategy to achieve a satisfactory outcome. Others have also advocated for a strategy similar to the one Gunning described. They emphasize the importance of using the hearing as an opportunity to persuade the tribunal to view the case through a specific framework, while neither understating nor overstating

the merits of the case.[4]

Assuming the role of a guide through the complexities of the case allows counsel the ability to direct the tribunal in the way most favorable to their client without neglecting their duty of helping the tribunal understand the critical issues of the case. By adopting such a strategy, perhaps the dual goals of fulfilling client expectations and effectively presenting the case would be more perfectly aligned.

IV. NIMBLE USE OF VISUAL AIDS

The panel also suggested that counsel should take advantage of visual aids when presenting their case to the tribunal, both in written submissions and during the hearing. Given the main purpose of the oral argument is persuading the tribunal, Fagbohunlu reminded attendees that visual aids can often be used as psychological tools to help achieve this goal. He highlighted that while it is challenging to quantify the degree to which non-rational factors, like an arbitrator's intuition, ultimately affect the outcome of the final decision, visual tools can be very helpful in the development of an arbitrator's impressions of the case.

Graphs, timelines, charts, and diagrams, among other visual aids, can be used to effectively simplify and convey complex sets of facts. Points that the arbitrators may have struggled to grasp in written form can be brought to life through compelling visuals that are tailored to the type of information that needs to be expressed. The effectiveness of visual aids in terms of increased recall, understanding, and persuasion is widely accepted in other realms of the legal world.[5] The panel suggested that the same general principles apply in the international arbitration context when visual aids are used appropriately.

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[4] *See generally* Franz Schwarz, *Opening Submissions*, The Guide to Advocacy, GLOBAL ARBITRATION REV. 51, 51–68 (2019); Simon Batifort et al., *Psychology in Oral Advocacy: Using Science to Persuade International Tribunals*, KLUWER ARBITRATION BLOG (Sept. 6, 2021), http://arbitrationblog.kluwerarbitration.com/2021/09/06/psychology-in-oral-advocacy-using-science-to-persuade-international-tribunals/.

[5] *See* David Errickson et al., *The Effect of Different Imaging Techniques for the Visualization of Evidence in Court on Jury Comprehension*, 134 INT'L. J. LEGAL MED., 1451, 1451 (2020) (finding that the format in which evidence is presented improves a jury's understanding of the technical importance of that evidence as well as the language used to describe the evidence during trial); *see also* Neil Feigenson & Jaihyun Park, *Effect of a Visual Technology on Mock Juror Decision Making*, 27 APPLIED COGNITIVE PSYCH., 235, 243–46 (2013) (finding that PowerPoint presentations increased mock jurors' recall of evidence, enhanced persuasion, and influenced their judgment).

However, Fagbohunlu was quick to caution overly zealous advocates against the use of too many demonstratives, as some arbitrators may have a cultural bias against the use of such devices if they are uncommon in their home jurisdictions. Too many visuals or the ineffective use of visuals could hinder a case rather than advance it forward.

Schlaepfer also cautioned against an overreliance on visual aids. While PowerPoint presentations may be useful in some circumstances, she noted they may also inhibit counsel from being nimble and flexible enough to respond to the tribunal's questions as they arise. Being held captive by the order of the slides in a PowerPoint presentation is sure to disappoint the tribunal, especially if they are told that their immediate concern will be addressed in 20 minutes.

If counsel were to adopt the instructional method described by Gunning, it seems the purpose of any visual aid must be to assist the tribunal in understanding the complexities of the case. With this ultimate goal in mind, incorporating visual aids into the oral argument presentation may help limit the length of presentations, especially if they were used as a tool to help simplify the most critical issues, rather than a visual summary of the entirety of the case. Ohara also pointed out that visual aids can be very usefully incorporated into the written submissions as well and then further emphasized during the hearing as necessary.

V. CONCLUSION

Reichert's characterization of the panel discussion as a masterclass on the hearing proved true. The panelists highlighted a number of strategic challenges regarding the hearing that are likely not immediately apparent unless one has sat both before and on a tribunal.

Common to all three of the themes that the panelists addressed is the overarching concept of balance—balancing the emphasis placed on written submissions with the oral argument, balancing client expectations with the most effective case presentation strategy and balancing the use of visual aids throughout the written submissions and the hearing. While not explicitly stated, all the panelists seemed to be encouraging counsel to strive for a balanced approach, not only at the hearing, but

throughout the entire arbitration process in order to assist the tribunal most effectively in understanding the case and achieving favorable outcomes for clients.

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INSTITUTE FOR TRANSNATIONAL ARBITRATION
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