

themselves to lawyers in light of tactical objectives – which preferences are, moreover, likely to be attenuated when adjustments are made for the different origins of the participants? There is certainly something to be said for this startling proposition. Nearly three decades of successive editions of the IBA Rules on the Taking of Evidence in International Commercial Arbitration have led to the emergence of a remarkable series of effective *compromises* with respect to important issues of due process which had once seemed intractable. Similarly, successive editions of rules of leading arbitral institutions have incorporated refinements that reflect steady *convergence*. And of course, the UNCITRAL Model Law on International Commercial Arbitration has been embraced by legislatures in countries of all stages of development in all regions of the world—impressive testimony to the emergence of *harmonious conceptions* of the international arbitral process.

Yet to conclude that we can cease to worry about clashes of culture would be premature and exaggerated. In relation to the theme of this book, it would be perilous for the advocate to ignore the potential for misunderstanding, and indeed occasionally mistrust, that still lies under the surface of cosmopolitan good manners. To get a proper sense of the prevalence of such disaffection, one would have to know what parties say internally, behind closed doors, reacting to a disappointing ruling; and what arbitrators whisper to each other in deliberations as they reflect on the behavior of the parties and their counsel.

The effect of cultural differences on perceptions of the legitimacy of the international arbitral process as a whole is, of course, a matter of fundamental importance. In these pages, however, the focus is narrower. In seeking to master the art of advocacy, we need to consider *the value to advocates of sensitivity to the attitudes of both their opponents and the arbitrators*.

That skilled advocates need to be attuned to the culture of the arbitrators they face is self-evident; it is an obvious and essential element of the internationally active advocate's credibility and persuasiveness.

But it is also of capital importance to understand the opponent, lest one make false assessments of the latter's degree of attachment to given features of the process. Why expend precious political capital, fighting tooth and nail in written submissions for an important point which in all likelihood the opponent would readily concede anyway? Why waste ammunition to secure fleeting satisfaction with respect to a secondary issue to which the opponent turns out to be attached with passionate intensity? Above all, why run the risk of creating needless resentment by operating in ignorance of opposing counsel's conceptions of fairness and ethics? After all, loyalty between opponents is the first step toward mutual respect—the precondition for the kind of constructive dialogue that may lead to amicable settlement. It needs hardly be said that since good advocacy aims to contribute to the attainment of this client's concrete objectives, so much the better if it is achieved without fighting to the end.

Let us begin with the consequences of misreading the cultural predispositions of *arbitrators*. We are here naturally dealing with the types of tension which are likely to be latent; written and oral exchanges with the tribunal are unlikely to be confrontational. Yet situations may emerge that raise the tribunal's ire, as indeed happened in one case when a traditionalist European arbitrator entered the room on the first day of witness hearings to see that one party's American counsel had already invaded the scene to display an elaborate panoply of screens and demonstrative exhibits, or when a sole arbitrator from the Middle East was handed a "draft judgment" by another American lawyer. In the first example, the lawyer had innocently but ignorantly assumed that it was understood and expected that his expert witnesses would be able to put on a forensic show of the kind routinely seen in U.S. courtrooms. The European arbitrator, on the other hand, considered that it was for the tribunal to direct the course of the testimony, and therefore presumptuous—if not suggestive of an untoward degree of collusion between advocate and expert—for counsel to set the stage without as much as a by-your-leave. In the second example, the lawyer had innocently but ignorantly assumed that the sole arbitrator would be assisted by a

formal statement of the relief requested as matters stood at the end of the case, quite normal in his home courts, whereas the arbitrator, perhaps a fortiori because he was sitting alone and because the respondent had refused to participate in the proceedings and to contribute to his fees, rejected the text with distaste, as an unacceptable attempt to excise undue *ex parte* influence.

Not all advocates will go so far as to procure and study the available prior ruling of every arbitrator. But surely it is irresponsible for an advocate who comes from a different legal environment not to seek to determine the procedural do's and don'ts that are likely to be part of the tribunal's expectations, if not requirements. (It is not impermissible simply to ask the tribunal) This consideration permeates the pages of this volume, in the many different ways reflected in the titles of the contributions of various authors.

Before shifting our focus away from the arbitrators, we may well ask whether in some environments arbitrators do not in fact perceive and adhere to a higher standard in international cases than in domestic ones. This may seem an odd and somewhat disturbing supposition, because arbitral propriety should not be variable. Yet one may well perceive in some countries that the community of prominent lawyers is quite small, and characterized by a density of interrelations which in turn gives rise to a rather singular culture of influence and tacit expectation. It seems humanly impossible in such an environment to constitute a collegium whose members are unaffected by the identity of their fellows and of those who appear before them, and all that goes with it: personality and status, past encounters and future prospects, reputation and influence in the community. In such a context an unadulterated objective assessment of the merits of the case may seem unattainable. Understanding this to be so, arbitrators in the local setting may make adjust their behavior, consciously and subconsciously, to account or compensate for myriad contextual factors. The result may be deemed fair, or at least tolerable but the path less than straight-forward in the view of outsiders, and therefore unacceptable to them. Yet when individuals ventures forth to act in a transnational setting, unencumbered by the density of local factors and thus free to concentrate on doing the

ablest and fairest job possible in the particular case, they may well give a far better account of themselves. To bring the point home concretely, consider the more extreme but still analogous situation of very capable arbitrators who live under oppressive political regimes; it may be wholly unrealistic to expect them to deal impartially with a dispute between a national and a foreigner although they would perform very well in a dispute between foreigners only.

We turn now to issues that may trouble relations between *advocates*. They are not limited to matters of arbitral procedure strictly speaking, but also extend to more general behavioral patterns. Indeed, true cultural clashes are more likely to occur outside the arbitral hearings, and relate to such important matters of culture as relations among members of the bar; or between lawyers, on the one hand, and clients, witnesses, and judges or arbitrators on the other. Members of different bars may, for example, have a clear understanding of the rules pertaining to professional privilege; yet fail to understand that the accuracy of that understanding is geographically limited.

Similarly, in some places the confidentiality of lawyer-to-lawyer communications is presumed; in others, it depends on an explicit notice of confidentiality. In some places, the confidentiality of attorney-client communications may be waived; in others not—for fear that the powerful would otherwise routinely obtain waivers by coercion. In some places, advocates can act on the assumption that clients will understand that their lawyer may have a duty to the court to bring relevant information to its attention even if it is unfavorable; in others, an advocate who expresses such ideas is likely to be summarily fired. In some places, a lawyer who calls witnesses to the stand without attempting to determine the tenor of their testimony would be guilty of professional negligence; in others it is said that no advocate may even *meet with* a witness beforehand.

Incidentally, in France the members of the bar seem to be in unison in believing that it is improper for an *avocat* to discuss the case with a *témoin* in advance of the hearing. Yet it seems impossible to find such a rule in any code of deontology. It is likely that French advocates, unused to the appearance of witnesses in *any* court case,

and alarmed at the comprehensive and well-written witness statements put forth by Anglo-American lawyers, have transformed the proscription of *suborning* witnesses into an illusory blanket rule against even making the effort to determine what a witness may know. This example illustrates one of the paradoxes of international arbitration; in a domain characterized by much sophistication about many things—e.g. the law of treaties; rules pertaining to conflicts of laws and conflicts of jurisdiction; and the mechanics of trans-border finance and industry it is often possible to get away with all manner of shaky approximations when making allegations about the way things are done under one's own national regime, because others in the room are not able or inclined to verify them.

Those who would deny the persistence of cultural differences in international arbitration must bear the burden of explaining why the hearing of the same case, if it took place in Paris, would notwithstanding the applicability of the same international rules likely require but a fraction of the time one would expect to be devoted to it if it conducted just across the Channel in London (on the assumption that that the affair in each place is conducted under the direction of French and English presidents, respectively.) This does not, of course, denote different objectives: fairness, efficiency, and reliable awards are equally prized by all good arbitrators. And we can certainly observe that the international arbitral process has gone a long way toward evolving something of a culture of its own when we consider that although these hearings will be conducted in quite different ways, each of them will also look very different, and *more like each other*, than cases before the High Court or the *Tribunal de grande instance*. Still, it is obvious that there is a French conception of priorities in the proper presentation of a case that is different from the English one. The essence of this difference simply cannot be distilled into a single sentence. Even at the level of detail, it remains elusive to anyone who would want to impart the lessons of experience to a neophyte anxious to get his or her hands on a reliable instruction manual. We are of course talking about culture.

Knowing that what is sought under all decent methodologies is *insight*, does it help to refer to the French admiration for synthesis and

the English desire to get to the bottom of things? That one approach is that of the surgeon, interested only in what is decisive for the particular problem that has arisen, seeing no need to learn *everything* about the anatomy and history of the patient indeed would view it as noise and distraction? That the other believes that the ability to determine what is truly relevant, if not decisive, requires a complete understanding of the facts? That the French broadly view witnesses as unreliable and are rather certain that it is pointless to hear their self-serving statements? That the English advocate, without having any particular illusions about human nature, believes that a skilled professional can derive much evidence of value from witnesses by confronting them with facts and propositions that reveal self-serving declarations to be significant indicators of untruth? Of course, the premise of this belief is that the skilled professional is given all the time he needs to build the foundation for his cross-examination. To this the French reply might be that their courts have never been given the luxury of such limitless investigations, that the litigants want a quicker answer, that at any rate there are other litigants awaiting their turn, and finally that the Ministry of Justice does not have a budget adequate to fill the courtrooms that would be needed if one were to give advocates *carte blanche*—and why should we assume anyway, that justice is served by a contest between the forensic “development” of facts after the dispute has arisen rather than the intelligent application of legal analysis to a written record as it stood, frozen (as it were) in the hands of the parties at the moment they began to fight?

Of course, there is no way to answer these questions with any degree of certainty or finality. We cannot even be sure that we learn all that much from experience. No culture is a mechanical “system”; the variables are infinite; experiments are not reproducible. Even if they were monolithic, cultures evolve. International arbitration involves innumerable constellations of different cultures, as reflected in the assumptions of behavior of all participants. We go to work not knowing exactly what to expect. This is part of the exhilaration of the *métier*. Who is complaining?

More specifically, what triggers which decision-making processes in the mind of international arbitrators? What persuades an international tribunal and why? Thus we stepped into the 'twilight zone' of the human dimension of arbitration.

We initiated a pilot study based firstly on *qualitative evaluation research*, a method designed to improve professional qualifications in various areas.<sup>3</sup> We explain our approach below. We are now seeking to refine this method by applying research findings in modern neuroscience and cognitive psychology concerning the decision-making process generally. Our aim is to find out whether these findings can be applied to arbitration in practice and if so, how they assist arbitrators and counsel engaged in the process. At the time of writing, this is a work in progress,<sup>4</sup> with a view to eliciting further scholarship, as well as a series of practical workshops on how psychological insight assists the international arbitration process on both sides of the 'bench'. Although this project presents undeniable academic interest, we feel that it is important to emphasise its practical perspective, and to stress that its primary purpose is to provide a set of tools for the use of arbitration practitioners.

This chapter therefore looks at the art of persuasion in international arbitration from the psychological angle, on the basis of

Psychologists: Insights for Interviewing and Counseling Clients' (2008) *Ohio State Journal on Dispute Resolution*, Vol.23:3, 437, available at <http://ssrn.com/abstract=1127724>; David J Arkush, 'Situating Emotion: A Critical Realist View of Emotion and Nonconscious Cognitive Processes for the Law', available at <http://ssrn.com/abstract=1003562>; C R Drahozal, 'A Behavioral Analysis of Private Judging' (2004) 67 *Law and Contemporary Problems* 105, available at <http://transnational-dispute-management.com>.

<sup>3</sup> House, E.R./Howe, K.R. (1999): *Values in evaluation and social research*, Sage Communications Inc.: "We want to cast the core fact-value distinction [fact as objective, value as subjective] another way. We want to contend that fact and value statements are not dichotomous; rather, the two blend together. Evaluative statements consist of fact and value claims intertwined, melded together, and so do most claims in evaluation. Furthermore, we want to contend that evaluators can draw objective value conclusions by collecting and analyzing evidence and following the procedure of their professional discipline. (...) The concept of IQ is a good example: it has both fact and value elements to it."

<sup>4</sup> On which the authors welcome feedback and comments.

what our project has yielded so far, and examines issues for the continuation of our work.

## II. What are We Hoping to Achieve? Why does this Matter?

What is the value of a better awareness of the psychological factors at play in the arbitral process? What can be achieved with psychological self-awareness that cannot be achieved without? On a basic level, one might posit that self-awareness through psychological insight is in itself valuable to make international arbitration a more enlightened process overall. These authors, however, would go further. We argue that some of the very core features of international arbitration are such as to make psychological insight essential to the maintenance of the quality and integrity of the arbitral process. Psychological insight also has the potential to provide arbitration professionals with a powerful tool to assess *from within* concerns about and criticisms of the process, and of arbitral decision-making, and address them.<sup>5</sup> Psychological research findings on human decision-making as an everyday occurrence, based on neuroscience,<sup>6</sup> provide the following helpful elements.

<sup>5</sup> An area where calls are increasingly being made for some measure of qualitative evaluation: see, by way of example, Susan D Franck, 'The Role of International Arbitrators' (2006) *ILSA Journal of International & Comparative Law*, available at <http://ssrn.com/abstract=885381>; Franck, 'The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity' (2000) *New York Law School Journal of International and Comparative Law*, Vol.20 No.1, available at <http://ssrn.com/abstract=821104>; Catherine A Rogers, 'The Ethics of International Arbitrators' in L W Newman and R D Hill, eds., *The Leading Arbitrators' Guide to International Arbitration*, 2<sup>nd</sup> ed., Juris Publishing, 2008; Rogers, 'The Vocation of International Arbitrators' (2005) *American University International Law Review*, Vol.20, available at <http://ssrn.com/abstract=691470>; Rogers, 'Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct' (2004) *Stanford Journal of International Law*, Vol.40, available at <http://ssrn.com/abstract=622482>.

<sup>6</sup> Klein (1999). *Sources of Power. How People Make Decisions*, Cambridge, MA, MIT Press.

### A. *The Autopilot*

The limbic system (the centre of emotion) in the human brain continuously classifies incoming information as 'important' or 'unimportant'. The same information is then evaluated again as being 'positive' or 'negative', on the basis of past experience and connection with pleasant or unpleasant emotions. The limbic system thus stores and evaluates a large amount of information, strongly associated with memories of emotion. It sifts through and computes this information unconsciously, using heuristics (initial impressions, educated guesses or intuitive judgments based on past experience), to find its way through the complexity of impressions and information. We will call this process the 'autopilot'.

The autopilot works like an automatic system of information management and control of attendant activities. Its primary use is to 'unburden' the brain. A good everyday example is the routine of driving a car. Once the routine is mastered, the driver need not concentrate constantly on driving technique, perception of information and traffic rules. These are managed automatically so that the driver's mind is, so to speak, 'free' to do something else: speaking to a passenger, say, or thinking about the day ahead.

The autopilot is particularly well-developed in trained professionals, whereas beginners use the different strategy of 'switching on' conscious analytical thinking more frequently when presented with information they need to process. The coexistence of these two separate systems of reasoning in the human brain is well-recognised, and in the context of other research on decision-making the 'autopilot' is referred to as 'intuitive' judgment and conscious analytical thinking as 'cognitive reflection' or 'the ability or disposition to resist reporting the response that first comes to mind'.<sup>7</sup>

Let us take an example connected with the environment of a law firm: that of junior lawyers following a training seminar aimed at

<sup>7</sup> Chris Guthrie, Jeffrey J Rachlinski and Andrew J Wistrich, 'Blinking on the Bench: How Judges Decide Cases' (2007) 93 *Cornell Law Review* 101, 109, at footnote 49.

teaching them client interviewing techniques. The purpose is to develop communication skills that will elicit from the client the elements of information necessary to identify the applicable legal issues. The junior lawyers learn that they cannot simply rely on the clients' characterisation of the problem. As a further step, the junior lawyers should also be taught that it is not sufficient to identify the legal issues. In addition, various possible solutions should be outlined. Experienced lawyers know that this further step is a crucial one, which must be practised early and honed on, so that clients are not only given a statement of their problem, but ways in which it may be solved.

Let us now assume that a junior lawyer who, improperly or insufficiently supervised, fails properly to assimilate the last step of offering solutions. After some time in practice, the junior lawyer will come to master the client interviewing technique, but keeps coming short of outlining proper solutions. The incomplete technique becomes the autopilot, without the junior lawyer realising its shortcomings.

Here lies the problem: the autopilot lets us down. It provides a false sense of familiarity and security, even where some of the information presented to us (the clients' information for the junior lawyer in the above example; evidence, in the case of arbitrators) would not be classified in the same way as the autopilot process suggests were it analysed by conscious thought. Thus in excluding important information *ab initio*, or classifying it as unimportant, or underrating its complexity, the decision-making process is hampered from the start.

Linking this to the task of persuasion, the advocate facing an international arbitration tribunal will want to 'play to' the autopilot to advance the best arguments of his or her case. For complex or novel issues, the advocate will ensure that the tribunal collectively does not underrate or dismiss certain important elements that may stand in the way of a neat, simple outcome. The arbitrator who is aware of these psychological processes will 'switch on' the analytical thinking process more systematically, and compare the outcome of his/her analytical thinking with his/her initial impressions (the autopilot).

### III. Relevant Elements of International Arbitration

The arbitral process, with its specific components and features, presents several elements which lend themselves to psychological probing. The following areas are just a sample.

#### A. Choice of Decision-makers

One distinguishing feature of arbitration as a means of dispute resolution is that the parties can choose to have a say in the composition of the tribunal. This feature comprises several built-in psychological elements.

First, in a privately paid-for process where party appointments are valued or seen as a 'fundamental right',<sup>8</sup> parties may feel empowered with an element of control over, if not the entire tribunal, at least their nominee. The fine line walked by the party-appointed arbitrator in terms of impartiality, integrity and loyalty has long been the subject of criticism and comment.<sup>9</sup> In ensuring that their appointing party's case is properly understood by the tribunal (to use the oft-heard description of the role of the party-appointed arbitrator),<sup>10</sup> the party-appointed arbitrators may tend to discount the more complex, or weaker, aspects of the nominating party's case.

Second, arbitrators are free agents. Unlike judges, they have no tenure, and operate in a competitive market for services. The quest for future appointments may colour the arbitrators' behaviour, and impact on their decision-making. They may be reticent to render difficult, or unpopular, decisions and prefer to split cases down the middle. In a three-member tribunal, they may tend to rely on dissents rather than look for consensus in deliberations, which could imply a degree of compromise that they consider would affect their eligibility for reappointment. They may have a perception of their own

<sup>8</sup> Jan Paulsson, 'Are Unilateral Appointments Defensible?' 2 April 2009, at <http://kluwerarbitrationblog.com>.

<sup>9</sup> Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter, *Redfern & Hunter on International Arbitration*, OUP, 5th ed. 2009.

<sup>10</sup> *Ibid.*

impartiality and independence in a given case, or their ability to keep hermetically separate their role as counsel in one case, arbitrator in another, that is at odds with that which an outsider would consider acceptable.

Third, arbitrators operate within a (restricted) peer group of fellow arbitrators and counsel, whose overall view of each other's performance essentially dictates the potential success and longevity of an arbitrator's career. At the same time, there are few, if any, instances in which arbitrators individually obtain specific, reliable feedback on their skills and performance. Likewise there are few, if any, fora where arbitrators can freely exchange views on difficult ethical questions or disclose their uncertainty of approach in certain situations without being concerned about affecting their reputation and future appointments. Arbitrators therefore need to develop, and maintain, a strong internal compass of values, which they are prepared to defend and stand by, whilst at the same time constantly auto-evaluate the accuracy and soundness of their performance and measure it in terms of their 'marketability'.

#### B. Impartiality (and Contrast with Personal Preferences)

Impartiality is a *sine qua non* feature of the function of an arbitrator. Individual arbitrators may "translate" this requirement into different attitudes. Some will stick to a regimented, detached manner before the parties, giving no indication of their reaction to what is unfolding before them. It is very difficult for these arbitrators to engage with the case, and reliance on the autopilot becomes harder to gauge. Also, lack of communication with counsel prevents the clarification of the more difficult points, and thus the 'switching on' of the analytical thought process occurs less systematically than perhaps it should be.

Yet these same arbitrators inevitably have personal preferences as to a style of case or presentation. This jars with the detached attitude they adopt, creating a tension that remains unresolved. Hence in a sense they may be more prone to be persuaded by the advocate whose style or approach they happen to favour. In deliberations with

their fellow arbitrators they may adopt the same detached, apparently inscrutable manner, giving off the impression that their mind has been made up from an early stage, without being willing consciously to verify the premises on which their decision rests, relying, they say, on their judgment and experience.

Other arbitrators, unfettered by the outward attitude of perfect control, are more readily prepared to engage with counsel on both sides in equal measure. Thereafter in deliberation they reflect upon the experience and consciously assess the elements of the case on each side before making their decision.

### C. *Privacy Versus Public Scrutiny and Precedent*

The international commercial arbitration process has historically been private. Only the parties were privy to the arbitrators' behaviour, exercise of judgment, values and thought process. In issuing an award in a given case, arbitrators did not look to make pronouncements beyond the four corners of that particular case. In a system in which awards were not publicly disseminated, they did not look to make legal history. Similarly, the desirability or marketability of a given arbitrator was not primarily measured by the contents of his/her awards. Rather it may have been his/her contribution to a process perceived by the parties as inherently fair as a whole, and where they had an opportunity to air their grievances to a tribunal willing to listen.<sup>11</sup> Or his/her standing as a scholar in the community, or retired judge, or business person of high repute.

Lack of precedent, historically a staple of arbitration, is less prevalent in the current age of corporate governance and transparency of process. In certain areas of international arbitration dealing with issues of public interest (namely investor-to-State arbitration), many disputes are in the public domain from the start. The vulnerability of arbitrators is correspondingly exacerbated, for

<sup>11</sup> Donna Shestowsky, 'Misjudging: Implications for Dispute Resolution' (2007) *Nevada Law Journal* 487 (arguing that disputants are not primarily guided by outcome accuracy considerations when evaluating dispute resolution procedures, and that they focus more on how they were treated).

whilst the arbitration process has been forced to become more public, no corresponding protection has been afforded to the decision-makers, whose every utterance in an award is pored over and dissected by the investment arbitration community with exacting standards. The investment arbitration awards that have been branded poorly reasoned, unpredictable, and downright irreconcilable in this field may to an extent be a symptom of this phenomenon. Calls are being made for the implementation of a review or appeal system that, assuming it is feasible, may provide as much of a safety net for arbitrators as it would assist consistency in development of this nascent legal field.

Until this phenomenon is addressed, there is room for argument that it can present a real threat to the integrity of the international arbitration process, both investor-to-State and commercial, as the same arbitrators often straddle both disciplines.

### D. *Lack of Appeal or Review*

In a process that allows limited or no review of decisions, it is hard to resist the thought that there is little room for error. This is a tall order for any human decision-maker, hence perhaps the criticism that certain arbitrators tend to 'split the baby' – a Solomonic outcome with which arbitration as a process is regrettably associated, to a greater or lesser degree.<sup>12</sup> A review or appeal system in investment arbitration could also, arguably, bring the case-by-case decision-making process of arbitrators closer to that of State judges. Psychological studies have aimed to show that one factor setting apart judicial decision-making from a layperson's, or even a lawyer's, is what is termed 'second-order reasoning'<sup>13</sup>: the 'higher-order decisions trumping reasons that would otherwise provide a valid basis for a decision',<sup>14</sup> such as, for example, precedent.

<sup>12</sup> Gary B Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*, Kluwer Law International, 2<sup>nd</sup> edition, 2006.

<sup>13</sup> Schauer, *supra*, note 1.

<sup>14</sup> Simon, *supra*, note 1.

### E. *Global Aspects of International Arbitration*

To the practitioners of international arbitration, both counsel and arbitrators, the multi-cultural nature of the process is a reality they encounter under many guises in their daily practice. Many experienced international arbitration practitioners do not give it a second thought. In order to reflect this practical reality, international arbitration practice has developed guidelines on procedure and arbitrators' conflicts of interest,<sup>15</sup> to name but two, that seek to provide a common ground between common law and civil law traditions, with a view to accommodating practitioners hailing from different legal cultures. Such is the truly international character of the international arbitration process that there are proponents of the application of a self-standing transnational 'arbitral legal order' as overarching applicable law in international arbitration.<sup>16</sup>

A closer look at some of the ramifications of the global nature of international arbitration highlights the specific challenge that it presents to arbitrators and counsel, which offers fertile ground for psychological insight. This challenge can be summed up as one of communication which arises not only between counsel and arbitrators from different legal and cultural backgrounds, but also between arbitrators on the same panel, and the perception by arbitrators of the witness evidence presented to them. Because the processes involved in communication have deep roots in culture, emotion and education, the autopilot may prove especially influential.

The multi-layered process of putting across a message in the international arbitration procedure, and ensuring it is understood, calls for the development of particular skills. Reliance on 'instinct' and one's own perceived 'open-mindedness' is likely to prove

<sup>15</sup> The IBA Rules on the Taking of Evidence in International Commercial Arbitration; the IBA Guidelines on Conflicts of Interest in International Arbitration, both available at [http://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx](http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx).

<sup>16</sup> Most recently, and vigorously, defended by Prof Emmanuel Gaillard, *Aspects philosophiques du droit de l'arbitrage international*, (2008) Les Livres de Poche de l'Académie de droit international de la Haye, Martinus Nijhoff Publishers.

insufficient in the face of calls for measurable standards of arbitrator behaviour. For counsel, the awareness of the psychological factors at play is bound to enhance the persuasive quality of their case. For arbitrators, it will help chart a course in what can be a minefield of potential misunderstandings and misperceptions.

### F. *Overall Picture*

In a confidential process, operating under the gaze of a restricted and demanding peer group, with few external means of testing the soundness of one's skills and judgment, how vulnerable are arbitrators to persuasion? Either overly vulnerable, or so unwilling to step out of their comfort zone as to resist persuasion completely. Hence the need for a measure of psychological insight to restore the balance.

The above features provide a good example of the workings of our research method. How helpful to arbitral decision-making is the maintenance of a regimented, detached manner before the parties? It may be deliberately adopted by an arbitrator as a strategy to fulfil the requirement of impartiality. The arbitrator may believe that the strategy can be dropped as soon as he or she becomes aware that it does not work. However, applied persistently, this manner can culminate into a permanent outward attitude of perfect control and become a 'value-based' attitude, learned in the course of practice as an arbitrator, or even as early as in law school.

How helpful to arbitral decision-making is the belief that the arbitrator must master all details and materials of the case 'first off' not to endanger the perception of his/her authority, and to ensure that no important part of the case is misunderstood? Where these attitudes are routinely adopted, we would expect to see them reflected in the replies to the questionnaire, which constitute the 'data' used in the first step of our evaluation.

In the next step of our evaluation, we confront these attitudes with other requirements of the arbitration process: for example, the requirement to ensure that the arbitrator obtains missing information, or a clearer understanding of certain issues, necessary to draft the award. The arbitrator could turn to the parties for assistance, 'There

is an uncertainty on my side on issue XY. Please help me get a better understanding of this issue.' This scenario, however, may be perceived as incompatible with the permanent outward attitude of perfect control, or mastery of the evidence or issues. Therefore the 'perfect control' demeanour may be considered unhelpful to the performance of the arbitrator's role, as it prevents the arbitrator from communicating frankly the reality of uncertainty.

For arbitration counsel, knowledge of these likely reactions will provide insight into the most effective persuasion strategy for a given tribunal, and in developing criteria for choosing arbitrators in the first place. It places a few objective points of analysis on that trigger point that makes one think, "This is the right arbitrator for us", or "This tribunal will follow our argument on this".

The multi-cultural nature of international arbitration in turn provokes the following thoughts. Advocates (and parties) hailing from countries with a strongly-established litigious culture tend to perceive arbitration as a competition to be won. The evidence and legal arguments presented to the tribunal are determined by the question: will it help me to win the case?

With this basic criterion of evaluation, these advocates and parties have a deeply-embedded tradition of competition amongst individuals. This is true of many fields of human activity: sports, politics, and business. (We call this a 'value-based attitude', a concept further explained below). In the international arbitration context, the advocate holding this value-based attitude may well misread the impact of a certain style of presentation of evidence on arbitrators holding different value-based attitudes – a well-known occurrence is the reluctance of arbitrators hailing from a civil law background towards the aggressive, or prolonged, cross-examination of witnesses. Similar situations occur in cases where one party and its advocate come from a less litigious legal tradition, or a country with little or no tradition of arbitration. Arbitrators may misread the advocate's presentation as lacking a certain conviction or 'fighting spirit'. The advocate may view the attitude of strong individual competition as superficial. Our project aims at examining ways in which arbitrators and counsel in these situations can be aware of the influence of the autopilot and find workable, and effective, channels of communication.

#### IV. Challenges and Methodology

In order to probe areas such as persuasiveness, the brain's approach to and handling of complex facts and concepts, cultural bias, emotion, and collegial and isolated decision-making in international arbitration, we face three main challenges: first gathering data, second analysing it, and third identifying objective criteria to be used by practitioners in evaluating the psychological dimension of persuasion in the arbitral process.

Before we delve further into methodology, it is also important that we emphasise what our method of research is not. Studies on arbitration-related decision-making carried out on domestic arbitrators and juries in the US (for example, Professor Donald Wittman's study)<sup>17</sup> generally proceed along the following lines: they focus on a limited number of pre-determined parameters to the exclusion of others (in the Wittman research: are arbitrators and juries likely to make higher awards where the Respondent has deep pockets?) and aim to provide a statistical overview of the outcome of decision-making within these limited parameters (Wittman: yes, both arbitrators and juries in 383 cases will award higher compensation where the Respondent has deep pockets).

These studies, whilst they isolate one possible factor of decision-making, shed no light on other possible intervening factors (e.g. emotion) or triggers. In the words of John Dewey, this method "sets forth the *results* of thinking, it has nothing to do with the *operation* of thinking."<sup>18</sup> As such, therefore, these studies shed little light on the theory of persuasion in decision-making.

In contrast, our study – at this stage a pilot study – is focused on international arbitration. It seeks to identify precisely that which is

<sup>17</sup> Donald Wittman, 'Arbitration in the Shadow of a Jury Trial: Comparing Arbitrator and Jury Verdicts', *Dispute Resolution Journal*, Nov 2003-Jan 2004, available at <[http://findarticles.com/p/articles/mi\\_qa3923/is\\_200311/ai\\_n9463732/?tag=content;col1](http://findarticles.com/p/articles/mi_qa3923/is_200311/ai_n9463732/?tag=content;col1)>. See also Drahozal, *supra* note 2.

<sup>18</sup> John Dewey, 'Logical Method and the Law', (1924) 10 *Cornell LQ* 17, 22, cited in Dan Simon, 'A Third View of the Black Box: Cognitive Coherence in Legal Decision Making', (2004) 71 *Univ. of Chicago Law Rev.* 511, 514.

less developed in the statistical approach used in other studies: what persuades and triggers decision-making in international arbitrators, who operate in a process characterised by several unique features, each carrying psychological components (we do not single out only a few parameters). In Dewey's words, we seek to focus on the 'operation' of decision-making. In order meaningfully to focus on the 'operative' part of decision-making, we need a methodology that provides heightened 'explanatory strength', by which we mean that it explains possible motivations, rather than stop at observing these motivations. The 'explanatory strength' of the statistical methodology is comparatively low.

Consider, again, Professor Wittman's study on arbitrators and juries as an example. Arbitrators and juries are likely to make higher awards where the respondent has deep pockets. This leaves unanswered the question why this is the case. Why are these arbitrators and juries guided in the decisions by the Respondents' financial means? In the terms of our study: what underlying values are guiding – as an unstated, implicit knowledge of this professional group – their decision-making with regard to the financial means of the Respondents?

Our first step is to identify the psychological issues faced by arbitrators, and to find the appropriate categories for them. To this end, qualitative evaluation research is more effective than other research methods, statistical or experimental, because it proceeds, not from an outcome-orientated, statistical mode of research (where data is slotted into pre-determined parameters and categories), but 'from the inside', using anecdotal information from a cross-section of the arbitrators themselves.

### A. *Gathering Data: Getting Arbitrators to Open Up*

The first challenge is that the application of a psychological angle to international arbitration is uncharted territory in many respects,<sup>19</sup> not least of which the fact that there is no representative empirical data regarding international arbitrators and practitioners of international arbitration. In addition, unlike court trials, the vast majority of arbitration hearings are not open to the public, ruling out field work. So we set about finding a way to obtain relevant data.

We started with the arbitrators, a fairly contained group which is well-suited to our methodology. *Qualitative evaluation methodology*, rather than placing statistical emphasis on a large number of case studies, proceeds from the basis of a limited sample of 'information-rich', and illuminative, participants. Qualitative data is especially useful where different participants are expected to manifest varying outcomes based on their own individual experience and circumstances. For our target group of arbitrators, this data is obtained by circulating questionnaires<sup>20</sup> and conducting interviews.<sup>21</sup>

The data documents the existing practical knowledge of arbitrators about the arbitral process. There are various components to this knowledge. Some of the components are explicit, and easily reflected on. Others are implicit, and never reflected on. Yet all these components of professional knowledge are used by arbitrators to guide the way in which they conduct themselves and communicate in professional situations.

<sup>19</sup> With the exception of studies carried out comparing arbitral decision-making to decision-making by jurors in the domestic American context. See, e.g., Drahozal, *supra* note 2; also Wittman, *supra* note 17. The methodology in these studies is, as we explain above, the polar opposite of that which we are adopting for this project.

<sup>20</sup> An initial round of questionnaires was circulated on the OGEMID and Arbitral Women online discussion groups, between July and September 2009. OGEMID: <http://www.transnational-dispute-management.com>. Arbitral Women: <http://www.arbitralwomen.com>.

<sup>21</sup> Forthcoming.

of the counsel and arbitral tribunal concerned. For example, in US and English court proceedings, the customary role of the opening statement is to tell the judge / jury what the trial lawyer expects to prove during the course of the trial, and many US and English practitioners automatically assume that the same will apply in an international arbitration. But this assumption is without any foundation. For example, in US / English court proceedings, the parties may not have produced or deployed any evidence at the time of the opening statement, whereas in an international arbitration, the parties would typically already have submitted lengthy memorials, supporting documents, witness statements, and expert reports to the tribunal, and would have already "made" their basic cases in advance of the hearing, so the opening statement would serve no useful purpose if it is merely an introduction to the case.

Ultimately, in international arbitration there are no set rules on this issue, and so there should be no set preconceptions. But in deciding how to deploy an opening statement, the potential value of this component of the process in the overall presentation of one's case should not be underestimated. This is so for a number of related reasons.

*Oral v Written Advocacy:* The opening statement is often the first opportunity for the advocate orally and directly to address the tribunal, face-to-face; to make a direct impression; and to gauge the tribunal's reaction. As such, it can be an extremely valuable chance to clarify the facts and the law by correcting any misunderstandings created by the written pleadings; to answer questions from the arbitrators; to understand and dispel particular concerns; and, overall, to persuade the tribunal. To this, one may add that the opening statement allows the advocate to emphasize the "equities" of the case. The equities of the case refer to the key facts that implicate our human sense of right and wrong, of fairness and unfairness, and of suffering and injury. The "equities" go to the very heart of our sense of justice. By properly organizing and highlighting the key evidence and arguments, the advocate can communicate what is most important about the facts. This is more than just an intellectual exercise in reasoning; it can also convey a *feeling* that the client's case

is *right* — that the equities of the case strongly support the client's position. When supported by the advocate's body language and voice tone, a message of conviction and credibility can be conveyed, and life can be breathed into otherwise sterile (and often dense) written submissions.

Clearly, the value of this opportunity increases in proportion to the volume of written material that may also be filed. Tribunals, like anyone else, have a finite capacity to absorb and distill lengthy and detailed written submissions and evidence, and whilst written advocacy obviously has its place, it can often be the face-to-face oral presentation that provides the essential path through the mass of written material. Once a theory and structure of the case has been conveyed, this may well guide the way in which the tribunal then addresses all other materials. Further, an oral presentation frequently allows a "connection" to be made between counsel and arbitrator that simply has no equivalent in terms of unsupervised reading.

*Timing:* Second, the opening statement has a special significance in terms of its timing in the overall arbitral process. Conceptions about cases are often formed early on, and once a particular theory has taken shape in the minds of the tribunal, it may well last, or at the very least "anchor" the tribunal in a particular perspective. And once a party has "anchored" a tribunal in a particular view, the burden passes to the other side to persuade it otherwise.

In this regard, one must consider the way in which people tend to receive and compute information. At this early stage of an arbitration, the tribunal is usually trying to understand the facts and organize them in their own minds into a narrative story that reconciles and makes sense of the evidence. Studies (described in other Chapters of this work) have demonstrated that people naturally think in terms of a narrative story, because this allows them an efficient mechanism to arrange, connect, store and remember facts — and because of the difficulty for most people to organize, remember or make sense of random information, or even a long list of connected facts. The opening statement provides the first in-person opportunity to supply the narrative story, and to structure how the arbitrators think about the case. This can be vital. Once the arbitrators have developed a

strong first impression, and a mental structure of the evidence, it becomes more difficult later to change their minds (given the significant mental effort of discarding an entire structure of the evidence and constructing a new one). It is noteworthy that psychologists who study US juries have found that jurors start forming impressions of cases right after opening statements are concluded, and in 80% of the cases those impressions never change. Similarly, as observed by Waites and Lawrence in their study of the psychology of oral advocacy in international arbitration (*The Psychological Dynamics in International Arbitration Advocacy*), Chapter 4 of this work):

"A typical arbitrator concludes the initial stage of the decision making process with a single dominant story in mind. In fact, researchers have determined that a sizable percentage of arbitrators and other legal decision makers have established a clear leaning in the case by the end of the opening statement (prior to any exposure to witnesses or evidence). ...".<sup>1</sup>

And so the opening statement may in fact have a disproportionately important place in the overall task of persuasion.

*Documentary v Witness Evidence:* Third, the opening statement may well be the best and most direct means to take the tribunal through contemporaneous documentary evidence, which in turn may well be of far more probative value than the statements of witnesses. We have all become accustomed to highly polished witness statements drafted by lawyers on behalf of witnesses, often long after the events in question. The huge investment by lawyers in the process of witness testimony has, sadly, converted most witnesses of fact into advocates, and most witness statements into submissions. The notion of actual,

<sup>1</sup> Much of the advice discussed in this chapter is premised on some understanding of the psychology of persuasion. The reader is referred generally to the chapters addressing this topic by Dr. Richard Waites, James Lawrence, Sophie Nappert, and Prof. Dieter Flader. In those chapters the reader will find a basic primer addressing some of the psychological principles underlying the art of persuasion. This chapter applies those principles to the practice of advocacy.

untainted "recall" by witnesses of fact has long been lost. Witness testimony now depends upon a complex process of "production" by the party calling the witness, and "unraveling" by the opposing party, through cross-examination. The two procedures are closely aligned, and as witness preparation becomes more sophisticated, so the process of cross-examination must be correspondingly more rigorous. The result, in many cases, is increased costs; a relatively cumbersome process of limited evidential value, an increasing skepticism on the part of arbitrators, and a greater reliance upon contemporaneous documentary evidence. As one well-known practitioner put it in an opening statement in a recent international arbitration in which one of the authors was involved:

"... What we're going to do is look at the documentary record and look at it in detail, look at it document by document, and there's a reason for that. ... Contemporaneous documents give us a real view of what happened at the time. Documents cannot be coordinated and prepared the way that we know witnesses can be. Documents can't change their stories the way we know witnesses can. Instead, documents take us back to the question that people really understood at the time. They take us back to what the parties' intentions were, their subjective intentions were at the time. It's easy for people today to remember things the way they'd like them to have been. Documents don't let them do that."

If in any given case special reliance is to be placed upon contemporaneous documentary evidence, the opening statement can be the prime opportunity for this. Indeed, it can be much more effective than the common process of taking witnesses through documents in cross-examination. Many advocates wish to show their tribunal the contemporaneous record, but do so by putting documents to witnesses. But this invariably ends up in a fruitless exercise by which the witness is asked to "confirm" what one can readily glean in any event from the document itself. The simpler approach is to take the tribunal directly to the documents, and to explain the relevance of each. This is effectively done in the course

of an opening statement – and indeed this may be the only chance to do so. In many cases, there is no closing argument or the closing is effectively consigned to post-hearing written briefs or memorials, which may be served many weeks later, without the benefit of oral exposition, and at a time when hearts and minds may no longer be as open to persuasion.

In the end, the precise deployment of an opening statement is a question of strategy in each instance. Certain considerations, however, apply throughout, in terms of preparation, style and delivery, and it is these issues to which this chapter is devoted.

## II. Preparation and Materials

Contrary to the impression seasoned advocates may seek to convey, a good opening statement is not the product of extemporaneous brilliance, but rather of meticulous and careful planning, preparation and organization. In the words of Thomas Edison, “Genius is one percent inspiration, and ninety-nine percent perspiration.” The more thought, planning and (figurative) sweat, the better the opening statement is likely to be.

*Written Notes:* Most advocates prepare some form of written notes to assist them in presenting the opening statement, and thereby to ensure a structured and well-ordered presentation. This product can take the form of an outline (from the very simple, to the very detailed), notes, or even a script. The more incomplete the outline, the greater the danger of drifting “off-piste” mid-submission, or missing key points. The more detailed the outline, the greater the danger of reading aloud, and thereby losing all the benefits of oral advocacy (and most likely the tribunal’s attention). A happy medium must be struck, which allows the advocate some flexibility, and in particular the ability to look away from his<sup>2</sup> notes, to secure eye-contact with the arbitrators, and to “connect” with his audience. One tip in this regard is to prepare one’s notes with an extra-large

<sup>2</sup> The terms “he,” “him” and “his” are used in this chapter for economy of style, and in the gender neutral sense, meaning any advocate of either gender.

font size and over-generous line spacing. The larger the font, the more the advocate will be able to keep a distance between himself and his script, and to look up, and then down, and find his place on the page. A 12pt font and single line spacing will deter the best of advocates from leaving his script.

*Written Outlines:* In addition to one’s own written notes, another useful approach is to hand out to the tribunal at the beginning of the oral presentation a skeletal outline of the argument (or in the case of PowerPoint presentation, a print-out of slides). This serves several important purposes. Firstly, it can be the organizational vehicle for the oral presentation. It allows the tribunal to see the overall structure of the submission; where every point that is being made fits in terms of the scheme of the case; and where the advocate is in the argument, at any particular time. The ability to place each point in context in this way, and to follow the precise structure of the presentation, is essential for any audience’s purposes. Second, the outline can be a useful means to provide citations to the tribunal, whether to documentary evidence, statements, or authorities, as well as quotations, excerpts, and diagrams, maps or schematics. Third, depending upon its length and detail, the outline can obviate the need for the tribunal to take extensive written notes. Fourth, a piece of paper in front of a tribunal allows it to look elsewhere than just at the advocate during the presentation itself, which may well improve the tribunal’s concentration, and ease its overall task of listening.

Some advocates need only the barest of outlines of one or two pages, while others prefer a very detailed outline that can run in some cases to 20 pages or more. What is best for a particular advocate will depend upon his experience, skill and level of comfort. An advocate should use the vehicle that allows the presentation to be the most effective and persuasive – which invariably means the vehicle that allows the advocate to be the most comfortable while making the presentation. One word of warning, however: There is a tendency to over-burden written outlines, skeleton arguments, or PowerPoint slides, for fear of omitting important points. Once an outline starts to replicate a written submission, however, its utility has been lost, and one might as well simply refer to a full written brief. In so far as

possible, the outline should be restricted to key points only, thereby leaving the detail for oral elaboration and exposition. The fuller the outline itself, the less need there is for any oral elaboration. Also, the fuller the outline, the greater the burden that may be placed upon the tribunal. In this regard, one might bear in mind a very recent admonition of counsel by the English Court of Appeal (albeit in the context of English litigation, in particular a challenge to jurisdiction in an arbitration matter):

“71. It would not be right to end this judgment without expressing strong disapproval of the volume of papers with which the court was presented by Midgulf. There were 15 lever arch files. These included 5 volumes of authorities (totalling well over 100 authorities) and 3 files of documents (to which almost no reference was made) in addition to the core bundle. Midgulf’s first ‘skeleton argument’ ran to 132 pages. Longmore LJ, as the supervising Lord Justice, ordered Midgulf to produce a proper summary of its argument. It produced a 15 page summary in which it complained that it was unable to develop its argument in proper detail and referred the court instead to the detailed argument contained in its previous document. The respondent’s skeleton ran to 23 pages, about which I make no complaint in the circumstances. Midgulf served a supplementary skeleton argument running to 30 pages, in which it repeated many of its previous arguments and complained that GCT had failed to address in its skeleton argument a number of the arguments advanced by Midgulf in its original skeleton argument. In that respect Mr Nolan had shown good judgment because the matters either did not arise on the appeal or were of peripheral relevance.

72. I am afraid that the case is a grotesque example of a tendency to burden the court with documents of grossly disproportionate quantity and length. It is a practice which must stop. Far from assisting the court, it makes the work of the court infinitely harder. Hours had to be spent reading through Midgulf’s voluminous skeleton arguments, and they were largely wasted hours. It will no doubt also have added greatly and unnecessarily to the costs of the appeal.

73. The central issue in this case was a very short one. As I said at the outset of the judgment, it turned on the effect of a small number of communications between the parties. All that the court needed in relation to that issue was to have the documents and a summary of each party’s argument, which could have been provided in far less than 10 pages. The ordinary principles of contract law in this area are so well known there was no need for reference to authorities, let alone well over 100 authorities.

74. In *Tombstone Limited v Raja* [2008] EWCA Civ 1444; [2009] 1 WLR 1143 Mummery LJ said:

“125. Practitioners who ignore practice directions on skeleton arguments (see CPR 52PD paras 5.10 “Each point should be stated as concisely as the nature of the case allows”) and do so without the imposition of any formal penalty are well advised to note the risk of the court’s negative reaction to unnecessarily long written submissions. The skeleton argument procedure was introduced to assist the court, as well as the parties, by improving preparations for, and the efficiency of, adversarial oral hearings, which remain central to this court’s public role.

126. We remind practitioners that skeleton arguments should not be prepared as verbatim scripts to be read out in public or as footnoted theses to be read in private. Good skeleton arguments are tools with practical uses: an agenda for the hearing, a summary of the main points, propositions and arguments to be developed orally, a useful way of noting citations and references, a convenient place for making cross references, a time-saving means of avoiding unnecessary dictation to the court and laborious and pointless note-taking by the court.

127. Skeleton arguments are aids to oral advocacy. They are not written briefs which are used in some jurisdictions as substitutes for oral advocacy. An unintended and unfortunate side effect of the growth in written advocacy (written opening and closing submissions and “speaking notes”, as well as skeleton arguments) has been that too many practitioners, at

increased cost to their clients and diminishing assistance to the court, burden their opponents and the court with written briefs. They are anything but brief. The result is that there is no real saving of legal costs, or of precious hearing, reading and writing time. As has happened in this case, the opponent's skeleton argument becomes longer and the judgment reflecting the lengthy written submissions tends to be longer than is really necessary to explain to the parties why they have won or lost an appeal.

128. The skeletal nature of written advocacy is in danger of being overlooked. In some cases we are weighed down by the skeleton arguments and when we dare to complain about the time they take up, we are sometimes told that we can read them "in our own time" after the hearing. In our judgment, this is not what appellate advocacy is about, or ought to be about, in this court."

75. The problem has not lessened, and the present is a particularly egregious example. When [Counsel] was asked to explain why the court had been burdened with so many documents and such long skeleton arguments, he explained that it was his intention to provide it with all the written materials which might bear on any point which might arise during the appeal and to provide a full statement of his argument in order that his oral argument could be brief. That may accord with the practice in other jurisdictions, where it is customary for appellate courts to limit the time allowed for oral argument to a short period, but it is emphatically not the proper practice in this jurisdiction."<sup>3</sup>

The lessons for international arbitration, it is suggested, are clear.

*Other Materials:* In addition to a written outline or skeleton, opening statements are often effective when made by reference to documentary exhibits. This may entail cross-references to a main hearing bundle, and asking the tribunal to take up volumes at the

<sup>3</sup> Per Toulson LJ in *Midgulf v GCT* [2010] EWCA Civ 66 (10 February 2010).

actual hearing, as each cross-reference is made. This has the benefit of familiarizing the tribunal with the documentary record (as well as encouraging some physical movement by each arbitrator, thereby reducing chances of sleep, assisting blood circulation, etc). On the other hand, if there are many references to be made, this can be a slow, cumbersome and disruptive process, as each member of the tribunal tries to locate the correct volume, tab, page and paragraph. One way around this is to produce a specific bundle of documents for the opening presentation, comprising highlighted excerpts or select pages only, tabbed, and in the order in which the advocate intends to address them in the presentation. This can save much time, and allow for a more streamlined presentation. The downside to this is that it entails giving the tribunal more than one version of the relevant documents (the other being in the main hearing bundle). This can be intensely irritating to tribunal members who have marked up or intend to mark up their copies. The answer is to liaise with the tribunal in advance, and ascertain their particular desires and idiosyncrasies in this regard.

*Dry-Runs:* One way to increase an advocate's fluency and comfort, and to test the utility of a planned opening statement, is to practice its delivery. This can be done alone; before other lawyers working on the case; in front of the client; or all of the above as the presentation evolves. Among other benefits, practice can help the advocate tailor and prioritize the presentation to ensure that it can be made within the allotted time, while covering all of the key points. Indeed, it is time allocation that is often the most significant issue, and time is easily misjudged. Advocates who have inadequately prepared will often be cut-off midstream by a tribunal, when allotted time has expired, or face a high speed (and often unproductive) "gallop" through sections of their notes in order to cover important points within the allowed time.

*Perspective:* As the advocate prepares the presentation, it is essential to think of it at all times from the listener's perspective. The statement may have its own therapeutic or cathartic effects for the client, and may be intended to have intimidating effects for the opponent, but none of these points matter: all that matters is that the

tribunal is actually persuaded. And so the only criteria must always be: what does the tribunal actually need to hear, how, and in what order? The advocate must put himself in the position of arbitrator, and determine what facts, evidence and arguments would grab and hold his attention, and how the intended "story" is best conveyed. In many situations, the most important element will be structure. Unstructured presentations are guaranteed to be of little persuasive effect, especially for a tribunal that may have relatively little understanding (as yet) about the case. Equally, much sound and fury about the opponent's bad faith may be nothing but an unhelpful distraction for a tribunal that needs to find an answer to the case, and to draft an award. To this end, and by way of example, the presentation might begin with a list of the issues to be decided by the tribunal, followed by an overview of the presentation's own structure and organization; a statement clearly and simply defining what the case is about; and then an explication of the legal principles to be applied. Such a background sets up the discussion of the facts by letting the tribunal know at the outset what is important to look for in the evidence. The better you anticipate the audience's specific needs and concerns, the more persuasive the presentation will be. And for most tribunals, their immediate need will be a map of the issues, a clear, precise and concise summary of each parties' case on each issue, and a solution to the case.

*Anticipating Weak Points:* A very important part of preparation is to anticipate the weak points of one's own case and the opposing side's likely responses. With this in mind, the advocate should then search for ways — both factually and legally — to bolster his case. This may require legal research into other claims, defenses, or exceptions to legal doctrines. It may require identification of other fields of law, codes or provisions to argue as alternatives. The advocate may identify areas of further factual investigation that are needed, such as additional document review and witness interviews. When done properly and aggressively, further factual and legal research can sometimes turn a weak point into a strong one, or at least neutralize likely opposing arguments. As with any other suggestion, however, there are dangers in excess. A common error in

oral advocacy is to spend too long focused upon the case of one's opponent, rather than that of one's own. Whilst it is essential to be forearmed, the opening statement is the opportunity to present a coherent and compelling position to the tribunal, and it is infrequent that one's own position can be relayed effectively and persuasively by simply hammering and discrediting that of the opponent.

*Responsiveness:* A further essential aspect of oral argument is the ability, and willingness, to answer the questions of the tribunal. In international arbitrations, arbitrators may well ask questions of the advocates at any time. Some tribunals will wait until the conclusion of the prepared presentation, while others will interrupt the presentation as and when a query arises. Accordingly, a critical part of the preparation for any oral presentation is to prepare for this eventuality. This has several aspects. Firstly, and ideally, the structure and mode of presentation should be sufficiently flexible in order to allow the advocate to be interrupted, and to depart from his script, or change his order of issues if need be, in order to address a question. Deferring all questions until the end of a set piece presentation can be irritating to the arbitrator who has raised the issue. It can also appear evasive. Secondly, a list of the most likely and toughest questions concerning the case can usefully form part of the advocate's preparation, together with model answers. This preparation is crucial, and may itself shape the overall presentation. The authors have often modified their basic presentations after anticipating the hardest questions and preparing answers.

*Language:* Finally, in international arbitration, there is the added complication of language. In some cases, more than one language may be used, with simultaneous or consecutive translation. In other cases, one language may be used which is foreign to many participants in the arbitration. Each scenario raises crucial issues for the advocate, of which due account must be taken in preparing the opening statement. Consideration must be given as to how terms and phrases might be translated; what nuances may be lost or misunderstood in the process; and the pace of delivery that may be required. By way of general guidance in such cases, the advocate should use concrete words that translate into the other language as

precisely as possible. Slang or culturally specific expressions should be avoided.<sup>4</sup> Sentences should be short. Where there are translators, they should be extended every reasonable assistance. This may include meeting with them in advance or providing them with a list of any technical terms to be used. In some cases, the translators may be given in advance a copy of the advocate's script, outline, PowerPoint, or skeletal outline to help them provide the most accurate translation. At times, the advocate may even provide his own advance translation. All of this assistance is the product of careful preparation, with due regard to the peculiarities and special needs of the international arbitral process.

### III. Structure and Content

*The Golden Rule – Simplicity:* A fundamental principle of advocacy is to simplify the case and the presentation. The most persuasive presentation is often the most elegant and simplest one. If a position is difficult to follow, or lacks clarity, it is much less likely to stick in the arbitrators' minds. Only the subject matter that needs to be discussed should be addressed, and however complex the facts or the law, the story that is told must be easily and readily comprehensible. As the advocate prepares the case, and inevitably gets enveloped (and worse still, enthralled) by the minutiae, this fundamental principle must always be borne in mind. The authors have, at times, substantially changed a prepared presentation the night before a hearing, in order to simplify it. The process of simplifying usually brings clarity by clearing away unnecessary underbrush, and forcing the advocate to select and distill the points that, in the end, really matter.

*Structure:* The opening statement can be organized in any one of at least three ways: (1) by the topics to be discussed; (2) by the points to be made or propositions to be established during the presentation;

<sup>4</sup> In this regard, no assumptions should be made as to the familiarity of others with technical expressions that are in common usage in one's own legal system. One of the authors will take care in future before using the term "full and frank disclosure" where there is simultaneous translation, after its use in one instance led to the query: "Who is Frank?"

or (3) by themes. In addition, the factual discussion can often be organized into a narrative story. These methods of organization are not exclusive of one another, but may substantially overlap.

A topical organization might order the presentation based on the basic elements of the case: (1) introduction, (2) factual background, (3) the relevant law, (4) liability, and (5) damages. At times, the legal and factual topics may be reversed. Of course, there are many possible variants of this, and the advocate may need to emphasize one of the topics in much more detail than the others.

A presentation organized around the points sought to be made by the advocate may begin with a list of the propositions to be established in the presentation: "Mr. Chairman, I will cover [or establish] five points in my presentation, and they are, first, ... second ...". After initially listing them all, each point is taken up in turn and discussed in detail before moving to the next.

A thematic presentation may be facially similar, but the themes that provide the organizing structure may not necessarily be the same as the points or conclusions sought to be established. One definition of the term "theme" is "an idea, ideal or orienting principle that is dominant or persistent in a popular or tribal culture and often effective in controlling and activating belief and conduct in a specific direction."<sup>5</sup> In this sense, themes state the "principles for which the case stands,"<sup>6</sup> sometimes transcending the facts of the case, evoking powerful images, and establishing a greater significance for the case.<sup>7</sup> In effect, they link the parties' case to the values of the arbitrators. Of course, themes can also be more modest, characterizing "particular pieces of evidence."<sup>8</sup>

The facts of the case are more than just a collection of discrete or disconnected pieces of evidence. Properly conceived, the facts form a mosaic pattern that fits together neatly into a narrative story. In

<sup>5</sup> Webster's Third New International Dictionary (1966).

<sup>6</sup> Richard C. Waites, *Courtroom Psychology and Trial Advocacy* (ALM Publishing, 2003), p. 328.

<sup>7</sup> *Id.* at 329.

<sup>8</sup> *Id.* at 328.

fact, to make sense the evidence must form a narrative story because, as already observed, as a matter of psychology that is how people think. In analyzing the evidence, the tribunal members will naturally construct their own story of the case. That story might be somewhat different for each of the arbitrators. In presenting the facts, therefore, the advocate should generally develop the evidence into a storyline. The story gives the arbitrators a way of organizing and remembering the facts. A story is also much more interesting and psychologically powerful than a mere discussion of discrete facts. Of course, the story must be built upon the evidence and be consistent with it. By providing a story into which to fit the facts, the advocate is structuring how the tribunal should think about the case, and this structure is greater psychologically than the sum of its parts.

Whichever organizing principle is used, the advocate should organize it methodically and systematically so that the presentation can be easily followed by the listener, resulting in good comprehension. The presentation should follow a logical and disciplined pattern, not skipping around whimsically in free form fashion. For example, an opening statement might begin with an exposition of the applicable legal standards, followed by a discussion showing logically how the legal standards are satisfied by the evidence. The issue under discussion at a given moment should generally be exhausted before moving to the next issue. Through this issue-by-issue discussion, the case should be slowly built, block by block, as a symphony building to a crescendo.

*Concrete Submissions:* In terms of substance, the authors' experiences suggest that what persuades are concrete facts and logical arguments, not broad generalizations, sound-bites, paraphrasing, platitudes or conclusory statements. The authors have often seen arbitrators with their pens on the table when the advocates were speaking more abstractly about the case, only to pick up their pens and make detailed notes when a concrete fact or a new principle is addressed. When tested from the perspective of the tribunal, a submission is of use if it advances ones' understanding of an issue, and could be included in an Award. This immediately disqualifies broad, unspecific, and unsupported propositions. It also disqualifies

gratuitous abuse, which many advocates spend at least part of their time heaping upon their opponents.

Thus, the advocate should build his presentation around facts, evidence and legal sources that are demonstrated precisely, accurately and concretely. The term "concrete" in this context means tangible, specific and particular, not abstract. In many cases, the presentation should quote — and often show — the basic source material and key evidence. This can be accomplished either by using a PowerPoint with slides that quote the key documents or (as suggested earlier) by handing out to the arbitrators a notebook containing the key documents, separately tabbed, and referring the tribunal to specific excerpts in the documents as they arise during the presentation. Of course, and again as noted above, rather than using a separate notebook for the opening, counsel may refer the tribunal to particular documents in binders that contain the full set of documents for the hearing.

The points to be made in the opening by the advocate should be sharply focused. An advocate should not be content with a presentation that generally discusses the facts and the law but should hone it carefully in order to show clearly the meaning of the law and precisely how the facts satisfy the elements of a legal claim or defense. Sharpening an argument also requires anticipating the opposing side's arguments and crafting one's points to take them into account and meet them. A tightly-reasoned argument is much more persuasive than one that is general in nature.

*Admissions / "Common Ground":* The advocate should also consider emphasizing any "admissions" of the opposing party — as long as they are in reality admissions or (to use the term frequently used by English lawyers) "common ground". "Admissions" means statements of a party that admit or recognize the existence of a significant fact or principle. Identifying and articulating aspects of the dispute that are in truth not in dispute is of significant assistance to tribunals, and may also provide important building blocks for one's case. On the other hand, care must be taken, since the incorrect assertion of "common ground" or the existence of admissions is entirely

counterproductive, inflammatory for the opposing party, and singularly unhelpful for the tribunal.

*Logical Flow:* A compelling opening statement is also one that has a logical flow to it — the presentation flows smoothly from point to point, like a story, with each point giving rise to the next, and the next point building on the ones preceding it. This involves the advance preparation of smooth transitions when moving from the conclusion of one point to the commencement of the next one. Even an argument involving contract or statutory interpretation can be presented with a logical flow to it. Achieving this flow takes meticulous preparation, and often practice. But a submission that flows well is generally far more compelling than one with disruptive stops and starts, whether in terms of presentation or internal logic.

*Points to Avoid:* While in most cases there is much to be addressed in the opening statement, there are certain points that, as a general rule, should be avoided.

First, at this stage — before the witnesses have been cross-examined — the advocate should generally avoid relying upon evidence that could change once tested. For example, a point that relies solely on the statement of a witness and that is not corroborated by other evidence may be an unsafe foundation for the case. The advocate may not want to emphasize such evidence until the danger of cross-examination has passed. Similarly, there is obvious danger in opening one's case "too high" or overstating points that have yet to be proven, and may not ultimately be shown to the threshold one is expecting. Further, the advocate should generally avoid discussing the credibility of the witnesses and experts until they have concluded their oral testimony. Misjudging a witness' credibility may well infect the credibility of the advocate himself.

Finally, the opening statement is the time for the advocate to discuss his client's affirmative case. While the opposing counsel will necessarily be responding to many of the arguments, at this stage the advocate will generally not want to appear too defensive, so at times he may not wish to answer certain arguments put against him. Ultimately, which of the opposing side's arguments are to be addressed in the opening statement is a matter of fine judgment.

#### IV. Oral Presentation Style

There is then the all-important question of style.

*Tone, Pace, Posture, Demeanor:* Ultimately, the only consideration is to adopt the approach that is most likely to persuade in the instant case. There are any number of tones, paces, postures and demeanors from which to choose. Some advocates are aggressive; some are understated; some are indignant; others appear quietly wounded. In making this selection, it is obviously of enormous value to determine in advance (if possible) the expectations and foibles of the arbitrators with respect to oral advocacy; the style of oral advocacy, if any, to which they may be accustomed in their own legal system; and whether there are styles of argument that will strike a discordant tone, or even offend.

Further, even if the advocate can ascertain this information, a presentation must be crafted that will appeal to all of the arbitrators, who may be from different legal systems, with different expectations as to advocacy. Clearly, a single style of advocacy may not be appropriate when tribunal members are from different legal systems. This problem can perhaps best be addressed by a style of advocacy that reduces the subject to a universal common denominator: a presentation that is simple, clear and methodical.

As a guiding principle, the advocate should adopt a posture and attitude that is dignified, disciplined and sincere. But consistent with this attitude, the presentation should also demonstrate a reasonable measure of energy and enthusiasm in order to capture and maintain the attention of the tribunal. Arbitrators, like any other person, have limits to their attention span. In a long presentation, the arbitrators' attention may wax and wane. The arbitrators can "tune out" at times for many different reasons (e.g. because they have the parties' written submissions, and feel that nothing is being added; because they have a transcript of the oral presentations, which they can read later; because they have had a heavy lunch; etc). The advocate must be aware of these dynamics and must address them. A long, dry, and unenergetic presentation will likely ensure that the arbitrators "tune out" at some point. The same is true for a presentation that slowly

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.<sup>1</sup>

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.<sup>2</sup>

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

<sup>1</sup> 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.

<sup>2</sup> 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.<sup>3</sup>

### 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,<sup>4</sup> and will have the deciding vote if the party-appointed arbitrators disagree.<sup>5</sup>

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.<sup>6</sup>

<sup>3</sup> Lord Steyn and Lord Hoffmann, former members of the House of Lords (now the Supreme Court), are from South Africa.

<sup>4</sup> LCIA Rules Article 6.

<sup>5</sup> English Arbitration Act section 20(4); LCIA Rules Article 26.3; ICC Rules Article 25.1.

<sup>6</sup> 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 distracting and less persuasive to

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,<sup>7</sup> 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

<sup>7</sup> *Shell Egypt West Manzala CmbH 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,<sup>8</sup> 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.<sup>9</sup> 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.

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

<sup>9</sup> *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.