BOOK REVIEWS

The Art of Advocacy in International Arbitration By R DOAK BISHOP (ed) [Juris Publishing, Inc 2004 xix + 490pp ISBN 1-929446-42-X $US125 (H/bk)]

The skills of the advocate, practised daily before countless courts and tribunals the world over, receive little systematic study. The practice of advocacy differs substantially from jurisdiction to jurisdiction, so what form does it take in international dispute resolution where practitioners from so many jurisdictions come together? International arbitration has successfully adapted or harmonized many concepts and practices from different legal traditions such as, for example, discovery (where the current consensus is expressed in the *IBA Rules on the Taking of Evidence in International Commercial Arbitration)*. What form does advocacy take before international courts and tribunals? What traditions does it draw upon? How uniform is the practice of advocacy at this level? What unique features does it have? What special problems does it raise? This book addresses an important subject, the recognition of which is overdue and to be welcomed.

The methodology adopted in this book is to explore the procedures and styles of advocacy from 'the standpoint of advocacy before certain international tribunals, in certain types of arbitrations, and from a regional standpoint' (introduction, 7). This is achieved in the form of a series of essays, beginning with advocacy before the International Court of Justice and in other State-to-State proceedings (James Crawford), private disputes before international claims resolution bodies (James L Loftis), and the WTO Dispute Resolution Panels (Duane Layton and Jorge Miranda) followed by ten chapters of 'cross-cultural advocacy by region' dealing with individual jurisdictions, and two concluding chapters by the editor. The geographical emphasis results in a comparative study of advocacy, and has the effect of placing in sharp focus how different the starting points might be for practitioners who appear before the same international tribunals.

In the common law world, 'advocacy' has a relatively clear historical meaning, more or less synonymous with the work of the advocate (in England, the barrister) during oral proceedings of a trial. There is little in the historical English conception of advocacy that does not directly bear on what counsel did on their feet before the Bench and/or jury, in what was said, how it was said and, very often, what was left unsaid. This English conception of advocacy, like the classical tradition of rhetoric, was fundamentally concerned with persuasive oral presentation.

The special characteristics and problems of persuasive oral presentation in international arbitration are canvassed well by a number of the contributors. These include the problems raised by the lack of a common language of all participants, sensitivity to the cultural expectations of the members of the arbitral tribunal, different common law and civilian approaches to the questioning of witnesses, the effect on oral presentation of remaining seated (Michael Hwang 421), and (for common lawyers at least) learning to be brief ('The distillation of often-voluminous written submissions into a speech of no more than 45 minutes' or one hour's duration has become a new "art form"' per John Beechey 248). However, the authors also are unanimous in their agreement that advocacy in international arbitration is now primarily written rather than oral. The consequences of this development for traditional Anglo-American conceptions of the role of the advocate are particularly well brought out in the essay on England by John Beechey. While some authors do address the qualities of effective written advocacy (eg Pierre-Yves Tschanz 216–17; R Doak Bishop 468–73) the comparative lack of discussion of this theme is noteworthy; written advocacy seems to lack the established framework of commonplaces or practical guidelines that are so familiar in, for example, the common law manuals on cross-examination.

The most striking feature of the contributions of the experienced and in many cases highly distinguished arbitral practitioners in this book is their failure to agree on any common conception of advocacy. The civilian lawyers, in particular, present a broad range of interpretations of advocacy. Pierre-Yves Tschanz in the chapter on the Swiss perspectives adopts a definition of

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advocacy that emphasizes its traditional function of persuasion ('Advocacy usually refers to the preparation and presentation of a party's case, in order to convince the arbitrators of the merits of the case' 195), while Emmanuel Gaillard and Philippe Pinsolle conceive international arbitration as a process, presenting multiple choices to counsel and 'advocacy is all about making these choices in a manner consistent with the strengths and weaknesses of the case at issue' (136). Carlos Lorperena in the Mexican chapter sees the subject broadly, encompassing the work of a series of legal practitioners: the in-house counsel, the trial lawyer, the arbitrator, the judge called on to support an arbitration, and the enforcement lawyer, and Iñigo Quintana and Alberto Fortún question whether it is meaningful to speak about 'advocacy in Spain' because of the degree of variation between individual practitioners (152).

The essays do, however, agree that a fundamental feature of international arbitration is its procedural flexibility, and that this has significant implications for advocacy. The flexibility and party autonomy in the choice of the rules of procedure, evidence and the selection of the members of tribunal distinguishes international arbitration from proceedings before domestic courts and tribunals. This flexibility creates a series of risks and opportunities for a party's legal advisers which must be managed and used to advantage. There is clearly a continuum between decisions made at the outset of the arbitration (such as selection of the members of the tribunal, or deciding whether discovery would on balance be advantageous) and the successful presentation of the case and a favourable award, but are they for that reason alone to be described as 'advocacy'? Is everything that a lawyer does during an arbitration with a view to its success to be described as 'advocacy'? The majority of the contributors take a broad view, but an alternative perspective would draw a clear distinction between what might be called the strategic management of a case and the advocacy of a case. They share a common goal (ie a favourable award), should be guided by a consistent theory of the case and should always be complementary, but they are not the same thing, with the scope of advocacy going no further than the persuasive presentation of a client's case to the arbitral tribunal.

If there might be genuine disagreement over the extent to which the management of arbitral flexibility might be considered 'advocacy', there is no doubt that advocacy is quite distinct from the substantive rules of evidence and procedure. The rules of procedure and evidence form a framework within which advocacy occurs, but they are not part of advocacy (any more than the contractual choice of law, or the contract itself, are part of advocacy). The essays in this book contain considerable discussion of subjects such as the rules of pleading, discovery, evidence and the like, which in some cases is presented as an end in itself, without any explanation of the implications of that framework for the persuasive presentation of argument. This failure of many of the authors to disentangle advocacy from the rules of procedure and evidence confirms the lack of a common conception of advocacy amongst arbitral practitioners.

A further feature of international arbitration is that counsel and the tribunal do not share the same degree of uniform professional and cultural experience as in a domestic setting, and the implications of this cultural factor for the advocate are addressed in a number of essays (and particularly well in the chapter by Michael Hwang). The ethics of advocacy is a cultural aspect of international arbitration addressed by some authors, and well justifies a fuller treatment. Routine practices in one jurisdiction might be considered a serious breach of professional ethics in another. The practice in the United States of coaching witnesses, objectionable according to the ethical canons of some European jurisdictions, is referred to on more than one occasion. The potential pitfalls of following local practices in the international context are perceptively illustrated in Carlos Loperena's discussion of the idiosyncrasies of Mexican trial proceedings, particularly the practices of reviewing the tribunal file, and seeking *ex parte* meetings with the tribunal.

A feature of advocacy largely overlooked in this work is the sources of persuasive legal and factual argument. Where do advocates find their arguments? What techniques of reasoning do they employ? This aspect of persuasion was highly developed in classical rhetoric (*inventio*) but is largely ignored in common law writing on advocacy. It is a subject that has perhaps migrated from the courtroom to the university where it appears in a different guise in jurisprudential discussions of the nature of precedent or inductive reasoning. However, the sources of arguments are

particularly significant in international arbitration where advocates are often presented with novel legal problems within rapidly developing conceptual frameworks (the reader may choose her own example from contemporary problems in investment arbitration). To make a persuasive argument, when is it best to appeal to precedent? To distinguished academic writers? To international trade practice rather than technical arguments based on the applicable law? What is the role (particularly in investment arbitration) for arguments based on trade and economic policy, and international public policy, as opposed to a semantic approach to a treaty or concession contract? What type of arguments do advocates in international arbitration prefer to use, and international arbitrators find persuasive? In international arbitration there is an unusually equal relationship between counsel and 'judge': the arbitrators and counsel are drawn from the same pool of practitioners, and within this pool there is a great deal of interaction and intercommunication. Ideas circulate quickly and forcefully. In these circumstances, professional opinion – the common understanding of leading practitioners—becomes a potent source of persuasive argument (this idea of professional opinion operating through advocacy as an influence on legal development is discussed in the context of English adversary procedure in my *Advocacy and the Making of the Adversarial Criminal Trial, 1800–1865* (OUP Oxford 1999) 176–80). The final chapter by R Doak Bishop touches on some of these questions, but it is a limitation of the methodology of this book, moving across many jurisdictions in a descriptive way, that some complex and profound questions are not addressed.

The individual contributions in this book are informative and thought provoking. Unfortunately, the book suffers from the failing, so common in international arbitration, of believing that by bringing together a representative geographical spread of distinguished practitioners, and asking them to deal with an important and timely theme, will of itself produce a valuable book. The result in this case is a whole that is less than the sum of its parts. The book could have begun with some baseline description of what advocacy might involve, and common set of questions from which each contributor could approach the subject. The book also lacks any bibliography or index, and is not well bound. It is to be hoped that this book will be followed by others by lawyers of the same calibre, but which place insight and individual analysis on a more careful and orderly foundation.

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Droit des immunités et exigencies du procès équitable ISABELLE PINGEL (ed) [Editions PEDONE Paris 2004. 162 pp ISBN 2–233–00462–0.]

Published with impeccable timing just as the United Nations after 27 years of travail has adopted a Convention on Jurisdictional Immunities of States and Their Property, this book records the proceedings of a Round Table held in Paris in April 2004 under the auspices of the Centre de Recherches Communautaires and the Law Faculty of the University of Paris Saint Maur. The participants—a mix of academic and practising international—focused on two central questions—the clash between State immunities and the individual's right of access to justice, and the enforcement of judgments given against sovereign States.

Gerhard Hafner, the International Law Commission Member who presided over the Working Group on Immunities, gives a fascinating account of the work leading up to the new UN Convention. His contribution appears at the beginning of the second part of the book on immunity from execution, but fortunately for the reader it is entirely general in character. He explains that when the work on codification began in the International Law Commission, the Communist States and many developing States remained committed to absolute sovereign immunity (a situation not fully understood by European countries in the 1970s). There was therefore little chance of securing consensus on the restrictive rules drawn up by the ILC in 1991. Only in 1998 did the General Assembly decide to set up a new Working Group charged with seeking accommodation between the work of the ILC and the views expressed by governments in the Sixth Committee.

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