

ORAL ADVOCACY AND TIME CONTROL IN INTERNATIONAL ARBITRATION

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Time control is a contemporary imperative of the international arbitration community. Effective time management is essential for the containment of costs and the minimization of the period between the request for arbitration and the award. The duration and costs of arbitration are in turn critical to maintaining the confidence of the commercial users of arbitration, as well as to attracting new users, and therefore to the competitive success of arbitration in the commercial dispute resolution market. The time and cost management imperatives coexist in a dynamic tension with the complexity of modern commercial and investment disputes and the legal sophistication required for their resolution. The challenge is to reduce time and costs and at the same time to maintain high standards in factual and legal decision making, due process and award enforceability.

All phases of the arbitral process have been scrutinised from a time and cost perspective. The hearing is no exception, and has not emerged favourably when examined from this perspective. The judgment of the ICC Commission on Arbitration in its *Techniques for Controlling Time and Costs in Arbitration* is representative:¹

“Hearings are expensive and time-consuming. If the length and number of hearings requiring the physical attendance of the arbitral tribunal and the parties are minimized, this will significantly reduce the time and cost of the proceedings.”

The oral hearing, and particularly the lengthy oral hearing, is a characteristic of common law procedure. However, the flexibility of arbitral procedure together with the impulse towards harmonization of different legal traditions in international arbitration has substantially reduced the length of arbitral hearings in comparison with similar disputes in domestic courts in common law jurisdictions. Two common features of international arbitration procedure have

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¹ Report from the ICC Commission on Arbitration *Techniques for Controlling Time and Costs in Arbitration* (ICC Publication N° 843, 2007) paragraph 72 (available at: http://www.iccwbo.org/uploadedFiles/TimeCost_E.pdf).

already successfully reduced the length of hearings. Firstly, the preference of written over oral presentations where this is possible, including the preference for the written statements of witnesses, written legal submissions, and post-hearing briefs over their oral equivalents at a hearing. Secondly, the displacement of potential functions of an oral hearing to other parts of the arbitral process. The common requirement in international arbitration that documentary exhibits, witness statements and expert reports are attached to the pleadings at an early stage of the arbitration exemplifies this technique.

A particular feature of international arbitration that strongly favours written communication is the involvement of multiple languages. Simultaneous translation at an arbitration hearing is not only time consuming and an added expense, but also has a detrimental effect on the rhythm and effectiveness of communications at a hearing. If a witness does not speak the arbitral language then it makes sense to use a written statement in the witnesses' native language with a translation, and to limit the laborious process of the oral questioning by means of the translation of questions and answers. Similarly, written expression provides greater security of precision and mutual understanding than oral exchanges involving either non-native speakers or the explanation of legal doctrine and jurisprudence in a foreign language.

The justification of time control over oral advocacy is therefore to save time and costs, or in other words, procedural efficiency. This has been successfully pursued by maximising the use of written communications including, where necessary, re-ordering arbitral procedure to enable the presentation of evidence and submissions in writing instead of orally. The result is that written advocacy today is far more significant than oral advocacy in international arbitration.²

The ultimate form of time control of oral advocacy is to eliminate the oral hearing entirely, and so save all the costs and delays associated with a hearing. An arbitration can and sometimes is completed without an oral hearing, but this is not the normal practice in cases of any substance. The reason for the resilience of the oral hearing is that there are limitations on the time controls that can be placed on oral advocacy. This paper considers three limitations on time control of oral advocacy. Firstly, oral advocacy offers some advantages not capable of substitution by a written procedure; in other words, in some circumstances oral advocacy is the more efficient procedural choice. Secondly mandatory rules may in some circumstances require a minimum level of oral advocacy. Thirdly, party agreement may place limits on the time controls on oral advocacy.

The next three sections of this paper consider the advantages of oral advocacy and the limitations of time control. Taking into account these advantages and limitations, the final section sets out various suggestions for the effective time control of oral advocacy in international arbitration.

² See review of *'The Art of Advocacy in International Arbitration'* edited by R. Doak Bishop, 54 *International and Comparative Law Quarterly* 801-803 (July 2005; David JA Cairns);

A. The Limits of Time Control I: Advocacy Skills and Procedural Efficiency:

The essence of advocacy is the persuasive communication of a party's case to the arbitral tribunal.³ The skills of the modern advocate in international arbitration are six-fold: expertise in law; powers of logical reasoning; mastery of questioning and answering techniques; skills of expression; understanding the ethics of advocacy and tactical dexterity.⁴ These skills apply to written or oral advocacy, with one exception. The questioning and answering techniques are a specifically oral skill. They are the skills applied by the advocate in questioning witnesses on the one hand, and in dialogue with the arbitral tribunal, on the other.

When we look at the modern arbitral hearing it is this specifically oral skill of the advocate that has best survived the pressures to minimise the length of the hearing. Many years ago Sir Michael Kerr noted that the primary function of the arbitral hearing had become the cross-examination of witnesses by reason of the pressures in international arbitration to reduce the length of hearings as much as possible:⁵

"It is a cliché that the objective of the users of arbitration is to achieve speedy finality with fairness and economy of costs. But, like all clichés, it is true. The essence of the emerging common procedural pattern in international arbitration is designed to achieve these objectives by a system of checks and balances in the form of mainly written proceedings which concentrate on the important issues... and curtail oral hearings as much as possible...Pleadings should be replaced by full written submissions covering both fact and law, with each side referring to, and exhibiting, all documents relied upon... All witness statements should be supplied in writing and refer to and exhibit any documents relied upon. ... Finally, since the arbitrators are likely to be busy professional people and often from different countries, the oral hearings will usually be remarkably short by English standards. Their main purpose is to hear the cross-examination of the witnesses, bracketed by short opening and closing remarks from both sides, which are then often supplemented by written post-hearing submissions."

In certain circumstances oral advocacy may simply be 'the quickest way to get things done'; in other words, the most efficient procedural option. The clearest example of an efficiency advantage of oral advocacy is in the questioning of witnesses where doubts and conflicts in the documentary record and the written testimony can be tested and clarified by counsel and the arbitral tribunal.

³ See DAVID JA CAIRNS *Advocacy and the Functions of Lawyers in International Arbitration* (Liber Amicorum Bernardo M. Cremades, publication pending) where four distinct functions of the lawyer in international arbitration are distinguished and defined, namely: strategy, case investigation, advocacy and management. Advocacy includes all communication, whether written or oral, with or for the benefit of the arbitral tribunal. This is the only legal function properly described as advocacy.

⁴ DAVID JA CAIRNS *Advocacy and the Functions of Lawyers in International Arbitration* (Liber Amicorum Bernardo M. Cremades, publication pending) where the content of these six skills is described in detail.

⁵ SIR MICHAEL KERR *Concord and Conflict in International Arbitration*, Arbitration International, (Kluwer Law International 1997 Volume 13 Issue 2) pp. 121-144 at 125-6.

From an efficiency perspective, the key questions are to identify the determinants of efficient oral advocacy and to identify the optimum amount of time necessary to realise efficiency advantages. As to the first question, oral advocacy is likely to be more efficient where there are high benefits from contemporaneous preparation of participants, and poor substitutability of oral advocacy by written procedure.

(i) Contemporaneous Preparation: An arbitral hearing brings all the participants together. It forces the parties and their legal advisers to justify the claims and defences of the arbitrations not only before the arbitral tribunal but before each other. Parties, witnesses, experts, counsel and arbitrators must all prepare for the hearing, and the hearing is the only time in the arbitral process where all the participants are fully focussed on the case *at the same time*. An imminent hearing concentrates minds wonderful and this contemporaneous focus is a powerful force. At this time parties may suddenly settle matters that previously proved intractable, and counsel dispense with witnesses and lines of argumentation that were previously deemed indispensable. Arbitrators must be fully familiar with all aspects of the case and identify the key questions around which their award will turn. The arbitral tribunal can harness the force of this preparation and concentration to review efficiently contested points and so shorten the overall procedure. Experts can be brought together to identify points of agreement and sharpen the focus on the real points of difference. Contemporaneous preparation can clarify the parties' positions and reduce the issues in dispute, which in turn can reduce time and costs, and improve quality at the time of drafting the award.

From the perspective of the arbitral tribunal, therefore, it is important to ensure, where possible, that counsel, the parties and their witnesses are well-prepared for the hearing. Some possible means at the tribunal's disposal are considered in the final section.⁶

(ii) Written substitutability: Oral advocacy is advantageous where it has no realistic written substitute or the written substitute is clumsy by comparison. The clearest example of this type of advantage is the oral questioning of witnesses, where witnesses are required to answer questions regarding possible inconsistencies or omissions in their written testimony, or to address facts raised by the documentary record or other witness statements (cross-examination). Witnesses could conceivably be required to answer questions of counsel in writing, but such a procedure would be slow, subject to undue party influence, and pose problems for the type of follow-up clarification questions that are a

⁶ A more difficult problem for the tribunal than lack of preparation is where counsel simply lack the necessary expertise. Advocates that are poorly prepared or trained provide little benefit to a tribunal and may raise additional costs in terms of confusion, irrelevancy, repetition and party dissatisfaction. The optimum length of hearing where the level of advocacy is low is therefore likely to be shorter than where the advocacy is professional. Put another way, poor advocacy quickly makes an oral hearing a waste of time (see Appendix: Example 2).

normal part of an oral exchange. The conferencing of experts and the questioning of counsel by the tribunal⁷ are other occasions where oral procedure enjoys a comparative advantage.

In contrast, there is simply little benefit from taking the evidence of witnesses entirely orally (direct examination) where so much time can be saved by the simple expedient of a written witness statement,⁸ or from a lengthy review by counsel of the documentary evidence where all evidence has already been introduced and fully explained in writing. Where there has been, as is normal in international arbitration, two exchanges of full argumentation, with documentary evidence, expert reports and witness statements attached, then the optimum length of hearing will be much shorter than under a traditional common law procedure. The extent of the written development of the arbitration is therefore a major factor in defining the functions of the arbitral hearing.

(iii) Cost/Benefit Analysis of Oral Advocacy: Once the activities to be dealt with by oral advocacy have been identified, the second and more difficult question is the optimum time to allow for these activities. This requires a cost/benefit analysis of the oral advocacy, as limited to the specific forensic functions already identified by the tribunal.

The returns of oral advocacy are the clarification and testing of evidence, and particularly the evidence of witnesses and experts; the elimination or resolution of uncertain or contested issues of fact or law; identifying the subject matter of further evidence or post-hearing briefs; finalising the parties' position in preparation for the award; meeting the requirements of mandatory law or due process (discussed below); a better informed arbitral tribunal⁹; as well as less tangible or more subjective benefits such as satisfying the expectations of the Parties. In short, a better quality and therefore more just decision-making process. However, it is important to note that oral advocacy suffers from diminishing returns over time. An advocate allowed 15 minutes for argument will only address the most fundamental issues; an advocate allowed an entire day will address many peripheral questions. The same principle applies in cross-examination. The corollary of the diminishing returns of oral advocacy is that the imposition of the discipline of time control over counsel forces counsel to prioritise and allocate time to their arguments and their questioning of witnesses.

⁷ The questioning of counsel by the tribunal can be done in written form, but is probably more efficiently performed at an oral hearing. In this manner the tribunal can identify points of doubt and concern, and counsel can address them in each other's presence. The opposing counsel can respond immediately. Provided counsel are well prepared, the result is a form of Socratic dialogue. In this way, the tribunal can make rapid progress in its preparation to write the award, and counsel can identify the issues to address in their post-hearing briefs. Nevertheless, there is a cultural component to these exchanges, with some arbitrators and counsel more prepared to engage in these dialogues than others.

⁸ Notwithstanding this advantages some limited direct examination may be justified where the credibility of the witness is in issue, or to supplement the written statement to address new issues.

⁹ Cf *International Arbitration 2006: Back to Basics* (ICCA Congress Series N° 13, Kluwer Law International, 2007) at 829-846 where distinguished arbitrators confirm the value of oral argument to arbitral decision-making.

The costs of oral advocacy include firstly and most directly the monetary costs of physically bringing so many people together (airfares, accommodation and related disbursements) and hiring all the facilities for the hearing. Secondly, there are the substantial monetary costs of the preparation of all the participants for the hearing. These costs may be excessive where the case is not ‘ripe’ for the hearing (in terms of the maximisation of the written advocacy) or failure to define the issues sufficiently in advance.

Thirdly, oral advocacy not only generates diminishing returns over time, but also additional indirect costs of forensic excesses such as repetition, confusion, pedantry, speculative questioning and the dissipation of energy in irrelevant or peripheral issues. Repetition is a particular danger of oral advocacy in international arbitration, where so much evidence and argument has already been submitted in written form. The costs of these excesses might go beyond the hearing to post-hearing demands to reply or to submit new evidence, loss of focus in post-hearing briefs, delays in completing the award as the tribunal untangles the confusion, and even possible grounds for annulment or refusal to enforce the award.

The efficient duration of the hearing is the period of time in which the benefits of oral advocacy are maximized.¹⁰ This point of the maximisation of the benefits of oral advocacy is achieved when the marginal costs of oral advocacy equal the marginal returns. After this point, any additional unit of time of hearing will increase the total cost of the hearing more (in terms of the direct costs of facilities, attendance and preparation, and additional costs of forensic excess) than its total returns (in terms of clarification of factual and legal issues, due process, user satisfaction with arbitration, etc) therefore decreasing the total benefits of the advocacy. Any termination of the hearing prior to this point would be premature because the marginal returns of further advocacy would exceed the marginal costs, and therefore further hearing time would increase the benefits of the oral advocacy. In every arbitral hearing there is therefore an optimum level of oral advocacy in terms of time.¹¹

In practical terms of course the difficulty is in making comparative measurements of the costs and returns of oral advocacy, and to determine the marginal costs and rates of return so as to limit the oral advocacy to the optimum time. In practice, this judgment is made intuitively and not mathematically, but it is exactly what an arbitrator means when he or she tells counsel “*I think I have heard enough*”.

¹⁰ ‘Benefits’ is used to refer to the difference between the total returns and total costs of oral advocacy.

¹¹ The discipline of law-and-economics addresses the efficiency of legal rules. The Appendix to this paper expresses the optimum level of advocacy graphically, and develops two simple examples to demonstrate the different optimum hearing durations depending on the degree of development of the written procedure (Example 1) of the quality of the oral advocacy (Example 2).

It is hoped that this analysis of forensic efficiency will serve as a correction to any suggestion that arbitrators should always seek to shorten an arbitral hearing as far as possible in order to save time and minimise costs. If this implication is drawn from the current focus on saving time and costs then there is a danger of false economy. *An efficient hearing requires an effort to identify the optimum length rather than the minimum practical hearing.*¹²

(iv) Conclusions: Procedural Efficiency: In conclusion, there are certain aspects of arbitral procedure that are most efficiently dealt with orally, and the arbitral tribunal should identify these features and reserve them for oral advocacy. These features are distinguished by an absence of good substitutes in written procedure and the need for contemporaneous preparation, and include questioning of witnesses by opposing counsel and the tribunal, questioning and confrontation of experts, and tribunal/counsel dialogue. The optimum amount of time required for these forms of oral advocacy requires an informed but ultimately intuitive cost/benefit calculation by the arbitral tribunal.

B. The Limits of Time Control II: Due Process:

Mandatory procedural rules can be derived from the applicable law at the seat and the place of enforcement, as well as from the principles of international public policy. Fundamental rules of procedure are normally reinforced by institutional rules. These sources point to certain internationally recognised principles of due process, and raise the question as to their possible influence over time controls on oral advocacy. Any possible breach of the principles of due process in an effort to reduce the length of a hearing is likely to jeopardise the enforceability of the award under the New York Convention,¹³ and to provide grounds for annulment at the seat.¹⁴

From an international perspective, due process consists of three distinct guarantees: the right to be heard (or the principle of contradiction), the right to equality and the right to an independent and impartial tribunal.¹⁵ The formulation preferred in international arbitration for the right to be heard is ‘the right of each party to a reasonable opportunity to present its case’.¹⁶ The essence of the right

¹² The opposite error to seeking to minimise hearing time and costs, is to set the hearing length so as to maximise the total returns of oral advocacy, notwithstanding the marginal costs are exceeding marginal returns. Where marginal costs exceed marginal returns then the total returns may go on increasing but the actual benefit of oral advocacy (that is, total returns less total costs) is decreasing.

¹³ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) Article V.1(b) and V.II(b) (due process) and V.1(d) (arbitral procedure in accordance with the agreement of the parties).

¹⁴ For example, UNCITRAL Model Law on International Commercial Arbitration, Article 34(2)(a)(ii) and (iv), and 34(2)(b)(ii).

¹⁵ Article 10 of the Universal Declaration of Human Rights (“*Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations....*”); Article 6(1) European Convention for the Protection of Human Rights and Fundamental Freedoms. It is assumed that any decision relating to time control is reached by an independent and impartial tribunal so that this aspect of due process will not be further considered.

¹⁶ See Article 18 of the UNCITRAL Model Law on International Commercial Arbitration and Article 15 of the UNCITRAL Arbitral Rules (‘a full opportunity of presenting his case’); Section 33(1) of the

to be heard is the right to know the allegations and proof of the other party and to have a real opportunity to respond to them within the legal (or arbitral) process.¹⁷ These three guarantees are confirmed in domestic arbitration legislation and institutional rules, with minor variations (such as the substitution of ‘fairness’ for ‘equality’).¹⁸

Equality requires that the parties enjoy substantially equal or equivalent opportunities in the arbitration to state their positions. There must be a just balance between the parties so that each has a reasonable opportunity of presenting its case in circumstances that do not place it at a clear disadvantage in relation to the other party.¹⁹ The principle of equality is therefore intimately related to the right to be heard, as neither party ought to be at a clear disadvantage in the exercise of its right to present its case.²⁰ The parties are not identical and nor are their circumstances, and so the right to equality requires substantially equal opportunities, rather than a formal or mechanistic equality in

English Arbitration Act 1996 and Article 14.1 of the LCIA Arbitration Rules (‘a reasonable opportunity of putting its case and dealing with that of its opponent’); Article 15.2 of the ICC Rules of Arbitration (‘a reasonable opportunity to present its case’). The name of ‘the right to be heard’ suggests oral communication and therefore the right to a hearing and the same implication exists in the Latin expression *audi alteram partem*, commonly used by English lawyers. This semantic endorsement of orality is an anachronism, and it is clear today that the right to be heard does not necessarily require an oral hearing.

¹⁷ Cf *Kanda v. Government of Federation of Malaya* [1962] AC 322 (Privy Council) “...If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.”, per Lord Denning (at 337); FOUCHARD, GAILLARD & GOLDMAN *International Commercial Arbitration* (Kluwer Law International. The Hague. 1999) §§1638-1644.

¹⁸ E.g. Article 18(1) of the UNCITRAL Model Law on International Commercial Arbitration; (“the Parties shall be treated with equality and each party shall be given a full opportunity of presenting his case”); Article 15(1) of the UNCITRAL Arbitration Rules (requirements of equality and that “at any stage of the proceedings each party is given a full opportunity of presenting his case”); Article 15.2 of the ICC Rules (“In all cases, the Arbitral Tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case”); Article 33(i) of the English Arbitration Act 1996 and Article 14.1 of the LCIA Arbitration Rules (fairness, impartiality and that each party has ‘a reasonable opportunity of putting its case and dealing with that of its opponent’); Article 16(i) of the ICDR International Arbitration Rules (equality and that each party has “the right to be heard” and “a fair opportunity to present its case”).

¹⁹ The European Court of Human Rights has considered ‘equality of arms’ in the context of the right to a fair hearing pursuant to Article 6.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; eg in *Dombo Beheer B.V. v. The Netherlands*, 27 October 1993, the Court stated that “as regards litigation involving opposing private interests, ‘equality of arms’ implies that each party must be afforded a reasonable opportunity to present his case - including his evidence - under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.” In *Yvon v France* (Judgment 24, April 2003) the Court stated that “this principle [of equality of arms] is one element of the broader concept of fair trial, within the meaning of Article 6 §1 of the Convention. It requires ‘a fair balance between the parties’: each party must be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent (see, among other authorities, the following judgments: *Ankerl v. Switzerland*, 23 October 1996, *Reports of Judgments and Decisions* 1996-V, pp. 1567-68, § 38; *Nideröst-Huber v. Switzerland*, 18 February 1997, *Reports* 1997-I, pp. 107-08, § 23; and *Kress v. France* [GC], no. 39594/98, § 72, *ECHR* 2001-VI)”.

²⁰ “Indeed, in the practice of international tribunals, the issue of equality has mainly arisen as a question concerning the right to present one’s case, most particularly in connection with orders and other decisions on written submissions” CARON, CAPLAN & PELLONPÄÄ *The UNCITRAL Arbitration Rules: A Commentary* (OUP, 2006) page 29 (footnote omitted).

all procedural matters. It might be infringed, for example, when a party is not permitted to call its only witness on the existence of an oral contract when a witness has testified for the other party on this issue, but not where one of its two witnesses is not heard under the same conditions as the witness for the other party,²¹ or when one party is permitted to file an extensive Memorial with additional exhibits but the other party is not permitted to reply.²²

There is no doubt that the principles of equality and the right to be heard might be satisfied in a written procedure without any oral hearing. Modern international arbitral procedure provides for the full written exchange of allegations and proof, so that the substantive content of the right to be heard might be satisfied before the hearing is reached, particularly where there was little or no factual dispute between the witnesses presented by the parties. Indeed, the very fact that an oral hearing can be waived by the Parties suggests an oral hearing is not a fundamental right but merely an optional element inside a larger process. If the right to be heard does not necessarily require an oral hearing, it follows that nor is any particular element of an oral hearing *ipso facto* indispensable to the right to be heard. Accordingly, the right to be heard does not necessarily mean that a party has the right to present all the evidence or argument they wish to present at a hearing, or to demand direct examination of its own witnesses or cross-examination of opposing witnesses at the hearing.²³ The rights to be heard and to a fair hearing do not consecrate a right of reply and the last word to be party with the burden of proof, even in common law jurisdictions where this is the normal practice.²⁴

Due process objections have been raised in international arbitration in the context of the refusal of an arbitral tribunal to extend a deadline to submit evidence or submissions. *“The arbitral tribunal will only be obliged to accept the belated submission of documents or evidence where the party submitting them has a valid excuse for its delay. In the absence of a legitimate reason, the tribunal can take a firm position and simply reject the memorials or evidence*

²¹ Compare *Ankerl v. Switzerland* (ECHR, 23 October 1996), and *Dombo Beheer B.V. v. The Netherlands* (ECHR 27 October 1993).

²² CARON, CAPLAN & PELLONPÄÄ *The UNCITRAL Arbitration Rules: A Commentary* (OUP, 2006) page 28.

²³ Audiencia Provincial de Madrid, Sección 10ª, Sentencia de 6 de julio de 2002, rec. 316/2001: “...[el derecho a utilizar los medios de prueba pertinentes para la defensa] no comprende un hipotético derecho a llevar a cabo una actividad probatoria ilimitada en virtud de la cual las partes estén facultadas para exigir cualesquiera pruebas que tengan a bien proponer, sino que atribuye sólo el derecho a la recepción y práctica de las que sean ‘necesarias para acreditar los hechos que sirven de base a sus pretensiones’...”. *British Insurance Co. of Cayman v. Water Street Insurance Co. Ltd.*, 93 F.Supp.2d 506, United States District Court, Southern District of New York, 28th April 2000. *Griffin Industries, Inc. and Ocean Logistics Corporation v. Petrojam, Ltd.*, 58 F. Supp. 2d. 212, United States District Court, Southern District of New York, July 21st 1999. *InterCarbon Bermuda, Ltd., v. Caltex Trading and Transport Corporation*, 146 F.R.D. 64, United States District Court, Southern District of New York, Jan. 12th 1993.

²⁴ *Margulead Ltd. v Exide Technologies* [2005] 1 Lloyds Rep 324; [2004] EWHC 1019 (Comm); [2004] 2 All ER (Comm) 727 (Court of Appeal); NIGEL BLACKABY & CONSTANTINE PARTASIDES *Redfern and Hunter on International Arbitration* (OUP, 5th edition, 2009), para. 6.231.

submitted late....The requirements of due process are in fact satisfied if the initial deadline was sufficient to enable the party in question to present its arguments and evidence."²⁵ The same principle would apply in an oral hearing: where a tribunal has set a sufficient period of time for a party to, for example, question witnesses, the tribunal is not obliged to give extra time where counsel for that party has failed to comply with the prescribed time-limit. Further, where the questioning or submissions of counsel are in the tribunal's opinion, irrelevant, repetitive or abusive the tribunal can interrupt and stop counsel, and direct counsel to continue in another manner or move to a relevant topic.²⁶

The standard practice in both institutional rules and domestic legislation is that unless the parties have agreed that no hearings shall be held, then the arbitral tribunal must hold a hearing if requested by either party.²⁷ Certain rules confer a right of the parties to question tribunal appointed experts at a hearing.²⁸ Institutional rules do not normally impose any further mandatory requirements for the conduct of hearings that may limit the tribunal's discretion in matters and time control and efficiency. In contrast, the right of the parties to question fact witnesses, including to cross-examine a witness on the contents of a written declaration submitted by the other party, is normally subject to the overriding discretion of the arbitral tribunal.²⁹

C. The Limits of Time Control III: Party Agreement:

Party autonomy is the foundation of international arbitration, and the arbitral tribunal may find itself limited in its powers of control over oral advocacy at the hearing by the parties' agreement.

Parties sometimes reach a detailed agreement on the conduct of the arbitral hearing, including the provision for direct oral testimony of witnesses, and

²⁵ FOUCHARD, GAILLARD & GOLDMAN *International Commercial Arbitration* (Kluwer Law International. The Hague. 1999) §1270.

²⁶ See Article 8(1) of the *IBA Rules on the Taking of Evidence in International Commercial Arbitration*; REZA MOHTASHAMI *The Requirements of Equal Treatment with Respect to the Conduct of Hearings and Hearing Preparation in International Arbitration* (2009) *Dispute Resolution International*, vol 3, pp124-133 at 129-130; DE LA OLIVA SANTOS, A; DíEZ-PICAZO JIMÉNEZ, I; VEGAS TORRES, J; *Derecho Procesal Civil* (Editorial universitaria Ramón Areces, 3ª ed) pp. 327 ("... que la admisión de la prueba no puede ser desafortunada e injusta, porque... en materia de prueba 'lo que abunda no daña' [es errónea].... La verdad es...que la admisión de una prueba que sea inútil o impertinente sí puede dañar, porque no siempre se refiere a la *cantidad* de pruebas sino que cabe que atañe a la *calidad* de las mismas; en especial las pruebas *impertinentes* -no así las simplemente inútiles- pueden introducir en el proceso hechos irrelevantes, que confunden y complican muy perjudicialmente el desarrollo del proceso y la emisión de la correspondiente sentencia").

²⁷ Article 24(1) UNCITRAL Model Law on International Commercial Arbitration; Article 15(2) of the UNCITRAL Arbitration Rules Article 20.6 ICC Rules of Arbitration; Article 19.1 LCIA Arbitration Rules.

²⁸ E.g. Article 27(4) of the UNCITRAL Arbitration Rules ("At the request of either party the expert, after delivery of the report, may be heard at a hearing where the parties shall have the opportunity to be present and to interrogate the expert. AT this hearing either party may present expert witnesses in order to testify on the points at issue..."); Article 21.2 of the LCIA Arbitration Rules; Article 32.2 of the Spanish Arbitration Act 2003.

²⁹ E.g. Article 20.4 LCIA Arbitration Rules.

generous time for cross-examination, opening and closing statements and legal submissions. This is particularly likely to occur where both parties are represented by lawyers from common law jurisdictions who agree on an extended oral hearing on the common law model.

The arbitral tribunal will offer its comments on the nature and length of a hearing procedure agreed by the parties. Where the tribunal considers the level of oral advocacy agreed by the parties is excessive, then it has the duty to exercise its authority and powers of persuasion. The result is likely to be some accommodation so as to reach a mutually acceptable procedure.³⁰

There are dangers from a time and cost perspective in the parties (or in practice their counsel) deciding by agreement on the parameters for oral advocacy at the hearing. Counsel are likely to over-estimate the time required for oral advocacy. There are many possible reasons for this: a misplaced zeal to maximise the opportunities of communication with the tribunal, inexperience, or a desire to create and exploit tactical advantages through oral advocacy.³¹ From an efficiency perspective the oral phase of the procedure should be compatible with the written phase, and the tribunal should not allow counsel to impose a more elaborate hearing procedure than is necessary. If the written phase has been modelled on the standard of international arbitral procedure and then the hearing is conducted on a common law model, there will be wasted duplication as the advantages of the written substitution inherent in the international arbitral procedure are lost. If the Parties wish to have a hearing on the common law model then it is more efficient to decide at the outset of the arbitration to follow common law pleading practice without extensive written argumentation.³²

³⁰ On the interaction of tribunal discretion and party agreement in fixing the procedure for the arbitration, see YVES FORTIER, *The Minimum Requirements of Due Process in Taking Measures Against Dilatory Tactics: Arbitral Discretion in International Commercial Arbitration – A Few Plain Rules and A Few Strong Instincts* in A. J. VAN DEN BERG, ED *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of the Application of the New York Convention* (ICCA Congress Series no. 9, The Hague, 1999) 396-409 at 401 (“*In practice, arbitrators faced with a procedural issue in respect of which the parties have not specifically agreed do not simply note the lack of such agreement and then pronounce their decision ‘from on high’. The experienced—and I dare say, effective—arbitrator will consult with the parties and counsel, and solicit their views and suggestions, going so far as to encourage settlement between them, prior to rendering a decision. Conversely, when faced with party consensus regarding a particular procedural matter, such an arbitrator might still choose to engage in discussion with all concerned*”).

³¹ DAVID W. RIVKIN *21st Century Arbitration Worthy of its Name* in *Law of International Business and Dispute Settlement in the 21st Century* (Liber Amicorum Karl-Heinz Böckstiegel, Carl Heymanns Verlag KG, Köln, 2001) 661-669, at 662 (“*Counsel representing parties, and the parties themselves, frequently wish to present to the arbitrators everything they know about the case or feel the need to rebut all the arguments made by the other side, for fear that anything left unsaid could hurt them. In addition, they frequently have less experience with international arbitration than the arbitrators, so they seek to rely upon the procedures to which they are accustomed in their own domestic litigation. Arbitrators have the power and the authority to set the rules by which the arbitration will be conducted, and they have the ability to persuade the parties of the advantages of those procedures*”).

³² See Appendix, Example 1. The written substitution in international arbitral procedure means the returns from oral advocacy are likely to be lower and decline more quickly than under the conventional common law model. if notwithstanding the extensive written procedure the length of hearing is set on the common law model, then the result is much more time than is necessary for efficient advocacy.

D. Conclusions: The Limits of Time Control:

There is a hierarchical relationship between the principles of due process, party agreement and arbitral efficiency. The arbitration must always be conducted in accordance with the principles of due process, which take priority over the agreement of the parties and procedural efficiency. Further, provided the requirements of due process are met then the parties can agree to an inefficient procedure for the hearing of their dispute.

The practice of international arbitration today is to give the parties reasonable and equal opportunities to present their cases in writing before an oral hearing is reached. A full and fair written process preceding the hearing will reduce the mandatory requirements of due process relating to the content or time allowed for the advocacy of counsel at the hearing. The parties may agree and insist on an extended oral procedure, but in practice the arbitral tribunal has the decisive voice in setting the content and time-limits for oral advocacy at the hearing. The arbitral tribunal should try to set the procedure to ensure that advocacy at the hearing is conducted efficiently and an optimum duration is established for the hearing.

E. Effective Time Control of Arbitral Advocacy:

The above analysis provides the basis for a number of guidelines for an arbitral tribunal to consider in seeking to optimise the use of time at the oral hearing:

(i) Take Full Advantage of the Potential of Written Advocacy: The presentation of evidence, expertise and arguments in writing reduces the functions of the oral hearing, with substantial savings in time and costs. The most effective technique for time control of oral advocacy is to take maximum advantage of the potential of written advocacy.

(ii) Identify the Oral Advocacy Minimum Required by Applicable Mandatory Rules: Mandatory rules, in the form of due process, applicable procedural law and institutional rules, may require the tribunal to hold a hearing where requested by one party, but normally impose few prescriptive requirements on the nature of oral advocacy at the hearing. Nevertheless, the tribunal obviously should always be aware of the minimum requirements of the hearing imposed by mandatory rules.

(iii) Assess the Costs and Returns of Oral Advocacy in Order to Determine the Objectives and Time Required for the Hearing: At the conclusion of the written phase of the arbitration, the tribunal should be able to identify, in consultation with the parties, the matters that should be dealt with at the hearing. The arbitral tribunal can classify the objectives of the hearing by function (for example, questioning of witnesses, conferencing experts, short opening statements, etc) or by questions or issue, or both (for example, 'at the hearing the parties will be able to question witnesses, with questioning confined to the issues of XYZ

etc’).³³ Where appropriate, the tribunal should consider the possibility of summary adjudication.³⁴ The selection of the objectives of the oral hearing will require an intuitive assessment of the likely returns of oral advocacy, and the time necessary to achieve these returns.

The arbitral tribunal must then address the costs of these hearing objectives, including how much preparation will be required and how effective counsel are likely to be in their advocacy; and whether there are any more efficient alternative means to achieve the same objectives. *The proper enquiry, as explained above, is the optimum length of the hearing and not the minimum length.*

The tribunal should then consult with the parties regarding the conduct for the hearing. The starting point for the consultation should be the tribunal’s own preliminary assessment of the appropriate procedure and timeframes for the hearing.

(iv) Early Definition of the Objectives and the Available Time for Advocacy at the Hearing: The conduct of the hearing is normally addressed in a procedural order made after consultation with the parties and issued before the hearing. It is usual at this stage to confirm that written statements from witnesses shall serve as direct evidence, and to require the parties to identify the witnesses proposed by the opposing party that will be required for cross-examination. This common practice eliminates oral examination-in-chief and the attendance of unnecessary witnesses at the hearing, saving time as a result. The tribunal might also propose or advise the parties that witness or expert conferencing will be used at the hearing.³⁵

The procedural order sometimes also identifies the other forms of advocacy that will take place at the hearing and the time permitted for them (‘Each party may make an opening statement, not exceeding 30 minutes in length’).

³³ Cf. SIR MICHAEL KERR *Concord and Conflict in International Arbitration*, Arbitration International, (Kluwer Law International 1997 Volume 13 Issue 2) pp. 121-144 (“*Oral cross-examination of witnesses should be permitted upon request, but only under the control of the tribunal. This may involve advance notice of the issues on which it is desired to cross-examine each witness, whereupon the tribunal may impose limits on the number of witnesses, on the issues which it considers to be relevant, and on the time available for cross-examination.*”); Article 19.3 of the LCIA Rules specifically provide for the tribunal to provide a list of questions for the hearing (“*The Arbitral Tribunal may in advance of any hearing submit to the parties a list of questions which it wishes them to answer with special attention*”).

³⁴ DAVID W. RIVKIN *21st Century Arbitration Worthy of its Name in Law of International Business and Dispute Settlement in the 21st Century* (Liber Amicorum Karl-Heinz Böckstiegel, Carl Heymanns Verlag KG, Köln, 2001) 661-669, at 663-4.

³⁵ Some commentators suggest that witness conferencing clarifies issues quicker than conventional party questioning and therefore saves time at the hearing; see, for example, BERNARD HANOTIAU *The Conduct of the Hearings*, in LAWRENCE W. NEWMAN, RICHARD D. HILL (EDS.) *The Leading Guide to International Arbitration* (Juris Publishing, 2004) 369-389 at 387.

The procedural order may also identify the questions or issues to be dealt with by witnesses or counsel, either in a prescriptive form (that is, the tribunal simply orders that cross-examination, questioning or oral submissions will be limited to defined issues) or a merely advisory manner.

The proper preparation of counsel, experts and witnesses for the hearing, and the efficient use by counsel of time, are imperative if the full benefits of an oral hearing are to be achieved. The procedural order should ensure that all participants are fully informed well in advance of the hearing of the matters to be addressed at the hearing and the time controls that will be respected. The procedural order should establish the tribunal's expectations regarding the use of time, including the expectation that counsel and the parties will co-operate and share the responsibility for ensuring that advocacy does not waste time at the hearing.

Participant preparation is fundamental to effective time control at the hearing, and the procedural order is the tribunal's best opportunity to influence preparation and set the expectations for the oral advocacy of counsel.

(v) Fix a Time Allocation for the Advocacy of Each Party: A now common technique to encourage efficient advocacy is the fixed time allocation for each party (the "chess clock" technique). Each party is allocated a fixed period of time for cross-examination, submissions and other forms of advocacy that will take place at the hearing. Counsel for each party then have the discretion to distribute this time according to their own forensic priorities at the hearing.

This method of time control of advocacy offers numerous advantages. It guarantees the completion of the hearing within a specific period of time. It forces counsel in advance at the hearing to consider how long each forensic interview is likely to take, and to eliminate any unnecessary advocacy from his or her plans in advance, and not to waste any time during the hearing. It is a salutary discipline for counsel to have an eye on the clock at all times.³⁶ It has proved successful in practice and has attracted praise from senior lawyers.³⁷

³⁶ Cf. UNCITRAL *Notes on Organising Arbitral Proceedings* paragraph 79 ("Such planning of time [by limiting the aggregate amount of time of each party], provided it is realistic, fair and subject to judiciously firm control by the arbitral tribunal, will make it easier for the parties to plan the presentation of the various items of evidence and arguments, reduce the likelihood of running out of time towards the end of the hearings and avoid that one party would unfairly use up a disproportionate amount of time").

³⁷ For example, see JOHN FELLAS *A Fair and Efficient International Arbitration Process (2004) Dispute Resolution Journal 74-83 at 82* ("I have always appreciated the discipline of this process of presenting my case within time constraints...placing time limits on presentations is an effective method of getting the parties and their counsel to agree to use their time efficiently."); DAVID W. RIVKIN *21st Century Arbitration Worthy of its Name in Law of International Business and Dispute Settlement in the 21st Century* (Liber Amicorum Karl-Heinz Böckstiegel, Carl Heymanns Verlag KG, Köln, 2001) 661-669, at 668 ("Within the hearing itself...I have used time limits on several cases, and it has been enormously useful...Having a strict time limit forces parties to concentrate on which evidence is necessary from which witness, and it avoids unnecessary and repetitive testimony. In none of the cases in which I have used a time clock have I found that important evidence was not presented.").

This method invariably begins from a premise of equal time to both parties. This might not always be appropriate; for example where there is a significant imbalance between the number of witness statements and expert reports prepared by each side, and therefore the time required for witness questioning. However, it must never be forgotten that the essence of this method is time allocation for each party to present its case orally, and not equality of time. Equality of time is simply the convenient starting point; the fact that one party might have more to do in the set time simply increases the necessity to allocate that time well. Conversely, the tribunal may grant one party additional time during the hearing if it wishes to hear more from that party's counsel. Equality must not be a distraction in a hair splitting search for 'fairness', as when parties try to elevate differences in time allocation into a matter of due process.³⁸ The fairness of this method of time control lies in the fact that counsel are given prior notice of their time allocations and can adjust the presentation of their cases accordingly.

A fixed time allocation is a salutary discipline for the oral advocacy of counsel. Its potential should not be overlooked or underestimated by an arbitral tribunal.

(vi) Consider Other Possible Incentives for Preparation and Effective Advocacy: Another method to encourage efficient advocacy is by advising the parties and counsel prior to the hearing that the tribunal will take the advocacy of the parties into account in its allocation of costs. The ICC Commission on Arbitration in its *Techniques for Controlling Time and Costs in International Arbitration*³⁹ notes that the "allocation of costs can provide a useful tool to encourage efficient behaviour and discourage unreasonable behaviour" and lists 'excessive legal argument', 'excessive cross-examination' and 'dilatory tactics' amongst the examples of unreasonable behaviour. The 2010 draft revision of the *IBA Rules on the Taking of Evidence in International Commercial Arbitration* (Article 9.7) suggests that the Tribunal take into account in the allocation of costs any lack of good faith of a party in respect of the taking of evidence.

Given the subjectivity of many of the decisions an advocate must make, it would probably require an egregious case to justify a finding that advocacy has been unreasonable, excessive or lacking in good faith. However, the warning by a tribunal that it may take into account the efficient use of time at the hearing in its assessment of costs will encourage counsel to focus on the effective use of time.

(vii) Curtail Time Wasting Advocacy: It is a counsel of perfection in advocacy to demand that counsel speak only when necessary, and say only what is required.

³⁸See FOUCHARD, GAILLARD & GOLDMAN *International Commercial Arbitration* (Kluwer Law International, The Hague, 1999) §1299 ("The principle of equal treatment of the parties requires that both must have the opportunity to present their case orally, but not, as some parties claim, that they should have exactly the same amount of time to do so").

³⁹ Report from the ICC Commission on Arbitration *Techniques for Controlling Time and Costs in Arbitration* (ICC Publication N° 843, 2007) paragraph 85 (available at: http://www.iccwbo.org/uploadedFiles/TimeCost_E.pdf).

Nevertheless, there are some readily identifiable vices of oral advocacy in international arbitration that could be eliminated relatively easily.

The common law tradition that the development of the case, including the selection, order and mode of the presentation of evidence and argument is the responsibility of counsel and the judge should allow counsel to get on with it is an anachronism in this age of active case management by judges, or strict time limits for argument.⁴⁰ It is not a breach of due process or other mandatory rules in international arbitration that counsel are not permitted to present their client's case in their own manner at the hearing. The power of the tribunal to intervene to curtail a line of questioning, direct evidence or argument to particular issues, or simply to prevent counsel wasting time is clear from institutional rules and other instruments in international arbitration.⁴¹

Some specific types of advocacy that the tribunal might curtail is advocacy that addresses evidence and argument already sufficiently addressed in writing, as well as duplicative advocacy generally,⁴² irrelevant questioning and argumentation, unnecessary aggression, cross-examination directed towards the credibility of witnesses⁴³, and practices derived from inapplicable domestic rules of evidence. This last category includes certain objections to the form of the questioning of witnesses, formalities such as identifying and summarising the contents of documents through witnesses, presenting evidence or argument only 'for the (written) record', and the reading of extracts from authorities. These practices suggest either that counsel is unaccustomed to international arbitration, or lacks confidence in the diligence of the arbitrator in preparing for the hearing and drafting the award. Advocacy should respond exclusively to the demands of

⁴⁰ DAVID W. RIVKIN *21st Century Arbitration Worthy of its Name in Law of International Business and Dispute Settlement in the 21st Century* (Liber Amicorum Karl-Heinz Böckstiegel, Carl Heymanns Verlag KG, Köln, 2001) 661-669, at 664 (“*The time and expense involved in international arbitration now requires arbitrators and parties to give up the former belief that in an arbitration parties should be able to present all of the evidence they wish to present. Such an attitude leads to a greater burden and unnecessary costs for all the parties*”).

⁴¹ See, for example, Article 16.3 of the ICDR International Arbitration Rules (effective June 1, 2009) (“*The tribunal may in its discretion direct the order of proof, ...exclude cumulative or irrelevant testimony or other evidence and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.*”); Article 8(1) of the *IBA Rules on the Taking of Evidence in International Commercial Arbitration*.

⁴² Cf. Report from the ICC Commission on Arbitration *Techniques for Controlling Time and Costs in Arbitration* (ICC Publication N° 843, 2007) paragraph 79: (“*Consideration should be given to whether it is necessary to repeat pre-hearing written submissions in opening oral statements. This is sometimes done because of concern that the arbitral tribunal will not have read or digested the written submissions. If the arbitral tribunal has been provided with the documents it needs to read in advance of the hearing and has prepared properly, this will not be necessary*”).

⁴³ The testing of credibility – a major function of cross-examination in common law jurisdictions – is problematic in international arbitration, complicated by differences in language, culture and the applicable rules of evidence in questioning. On unnecessary aggression and cross-examination as to credibility in international commercial arbitration see BERNARDO M. CREMADES & DAVID J.A. CAIRNS *Cross-Examination and International Arbitration*, in KAJ HOBÉR, ANNETTE MAGNUSSON & MARIE ÖHRSTRÖM EDS. *Between East and West: Essays in Honour of Ulf Franke* (Juris Publishing, 2010) and the references cited therein.

international arbitration, and not to the customs of counsel's domestic jurisdiction.

(viii) Lead by Example: The full preparation of the arbitrators for the hearing mean counsel do not need to spend valuable time in the explanation of facts, arguments and evidence already presented in writing. A tribunal that knows the issues that are important to its decision, and questions witnesses and counsel in a penetrating manner can narrow the matters in dispute, as well as transmit a sense of urgency and confidence to counsel, that has the effect of improving the efficiency of the oral advocacy.

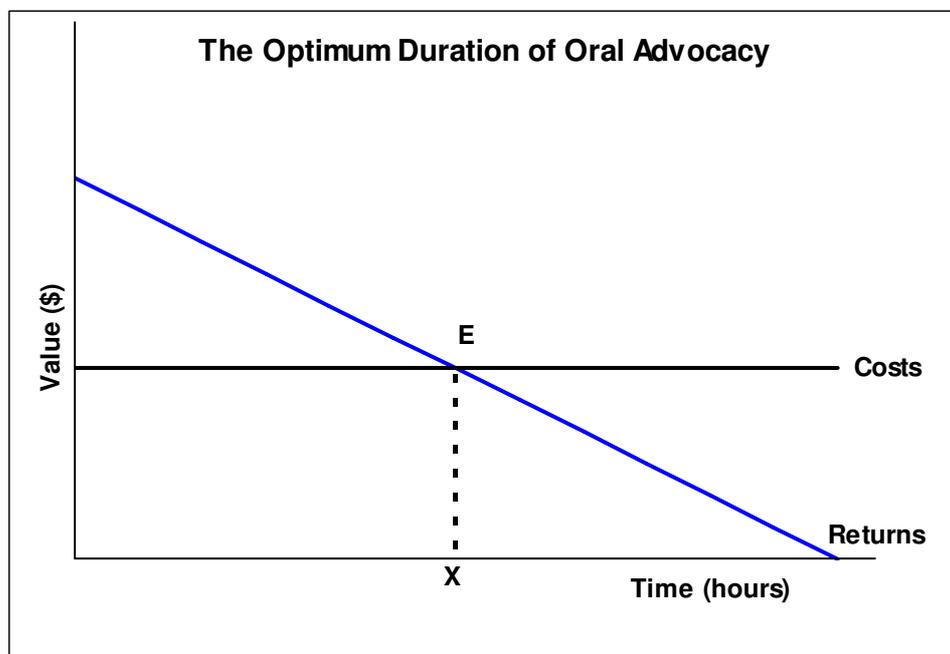
APPENDIX: THE ECONOMICS OF ORAL ADVOCACY AND TIME CONTROL

The following analysis illustrates the explanation in the text of the optimum hearing length for oral advocacy in more explicitly economic terms, using graphical representations of marginal costs and revenue. This analysis therefore assumes that not only the costs but the returns of advocacy can be quantified in monetary terms.

For the purposes of analysis a constant relationship between time and hearing cost is assumed. In other words, each additional hour or day of hearing time has the same cost. This means the marginal cost is constant and hence graphically appears as a horizontal line.

As a starting point, let us also assume the returns of advocacy decline at a constant rate for each additional hour of advocacy, i.e; that the marginal returns decrease at a constant rate.

Graphically these assumptions would give the following result:

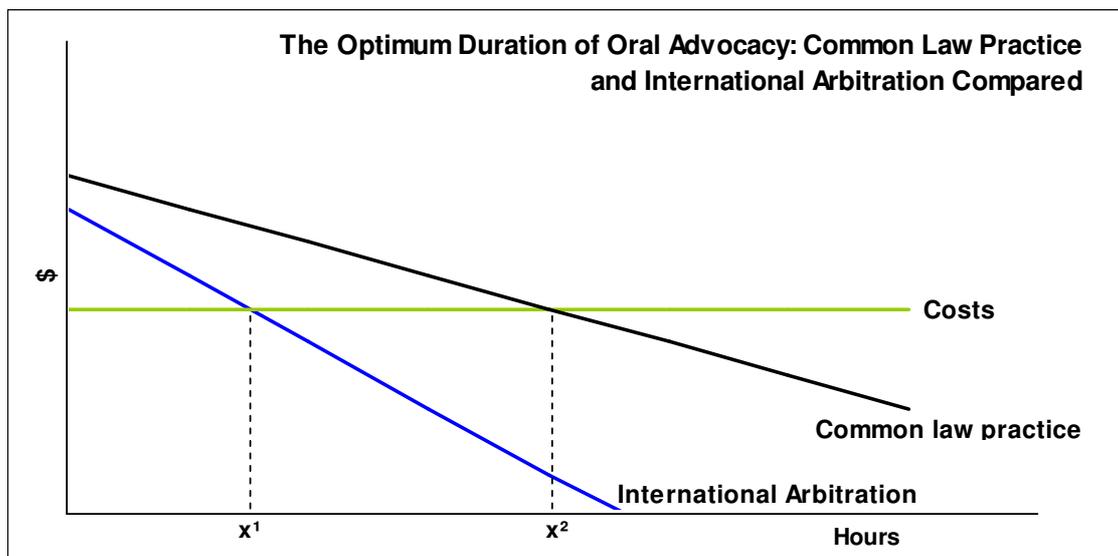


Point E represents the efficient or optimum level of oral advocacy. An efficient hearing will last for X hours, because it is at this point where the marginal cost is equal to the marginal returns and hence where the benefits of the hearing are

maximized. Until point E is reached, each additional unit of time increases the total returns more than it increases the total costs, i.e; each additional unit of time keeps increasing the benefits or efficiency of orality. But from point E onwards each additional unit of time will increase the total costs more than it does the total returns and hence the benefits or efficiency of orality will start decreasing. We still obtain benefits, in other words, the returns of orality are still higher than its costs, but the benefits we obtain are diminishing with each additional unit of time. There is an overall loss of efficiency when we try to maximize the returns without taking into account the costs.

While it may be possible to accurately plot the marginal cost of advocacy curve in a particular arbitration, the position and slope of the returns curve presents insurmountable problems in practice. However, by concentrating on the possible effects of individual variables on the returns curve, the economics of advocacy can still provide certain insights. For example:

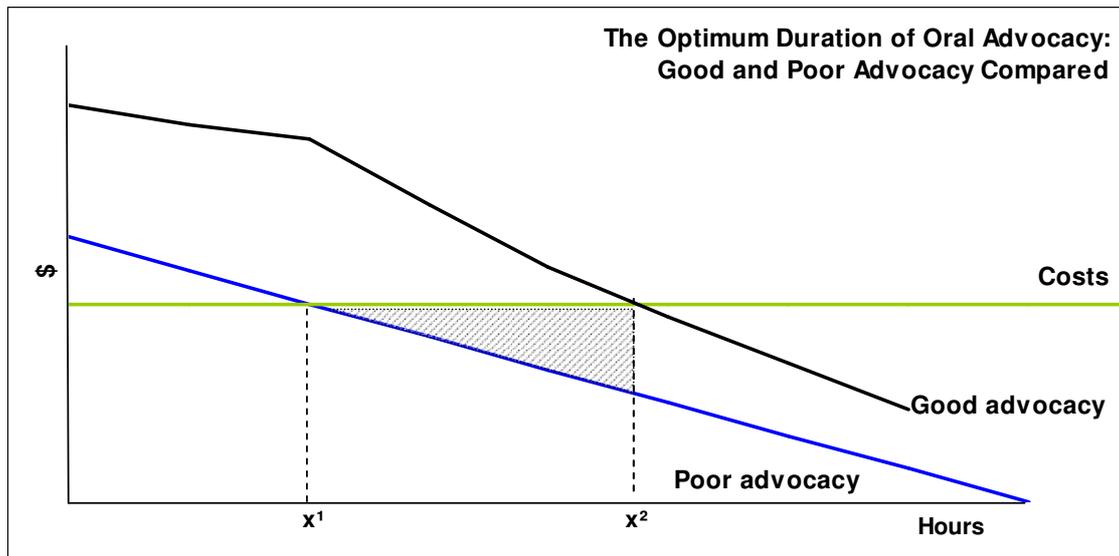
Example 1: The Effects of the Substitution of Written for Oral Proceedings. The existence of a well developed written phase, as in international arbitration, prior to the beginning of the oral hearing is likely to mean that the marginal returns of advocacy begin at a lower level and decline more quickly than at an oral hearing based on conventional common law procedure:



The result is that the optimum level of advocacy will require less time (graphically, the difference in hours between X^1 and X^2) with a well developed written phase as the prior substitution of an extended written procedure lowers the returns of oral advocacy.

Example 2: The Quality of Advocacy: Another variable that affects the optimum length of hearing is the quality of advocacy (which is a function of the training, experience and preparation of the advocate). Highly professional advocacy is

likely to initially produce a high marginal return, and may give high marginal returns for some time, but a point will be reached where the advocate has covered the most important issues, and further advocacy will mean rapidly diminishing marginal returns. Poor advocacy, in contrast, will have a low initial level of marginal return, but marginal returns will decline more gradually as the poor or ill-prepared advocate slowly makes the necessary arguments. Diagrammatically this appears as follows:



The conclusion, not surprisingly, is that good advocacy justifies a longer hearing than poor advocacy.

If the poor or ill-prepared advocate is allowed as much time as the good advocate then the shaded area represents the loss of benefits or wasted efficiency because of the inefficient allocation of time to the level of the forensic skill or preparation of counsel.