Arguing across the ether: top tips for virtual advocacy

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Left to right: Anne Hoffmann, Georges Affacki, Nayla Comair-Obeid, Victor Leginsky and Nadine Debbas Achkar

A panel of arbitrators at GAR Live Abu Dhabi had some sage advice for counsel on how best to argue their case in virtual hearings, the dos and don'ts of opening statements and whether oral closings are really necessary.

Moderator **Nayla Comair-Obeid** of Obeid & Partners in Beirut said that "advocacy is an art, not a science," and one of the oldest arts in civilisation. Arbitration lawyers have been confronted during the coronavirus pandemic with how best to apply that art when using Zoom and similar platforms.

Paris-based arbitrator **Georges Affaki** said counsel have "learned gradually" to unmute before they speak, close "embarrassing documents" before sharing their screens, and disconnect from the tribunal chair before calling him or her a "scoundrel that has already pre-judged the case."

The key to successful virtual advocacy is to test the logistics before the hearing, said Affaki.

Counsel may be "exasperated" when tech support companies contact them to run tests in advance but Affaki said that it is "time well spent".

Affaki said that when he has a virtual hearing as arbitrator he looks "much more like a Wall Street trader than an old fashioned lawyer." He has four separate screens: one for the parties, one for the transcript, one for the exhibit and one, "on a separate channel", for contacting his co-arbitrators – and he believes counsel should follow a similar approach.

He said that keeping the "emotion" in virtual advocacy is very important. With the right IT equipment, you can "see the expressions" and "feel the emotions" in the voices of participants "at least as acutely as you would have in person."

He added that emotion should translate into "passion for your case" rather than a "tirade" against your opponent.

Online fatigue: "it's not like you're watching a movie"

Beruit-based arbitrator **Nadine Debbas Achkar**, who was recently appointed as a judge for the Supreme Court of Bahrain, said that when preparing an agenda for a virtual hearing she would advise counsel to allow extra time for breaks to combat "online fatigue".

If counsel are planning a two or three-hour opening statement, she said it is best to have different lawyers presenting on different issues, such as facts, law and quantum.

"It changes the tone, the pace, the voice," she said, and is likely to make the tribunal more engaged. "It may seem basic but it's actually a practical way of retaining our attention, which is the first step towards persuasion."

Affaki suggested it was wrong to expect a tribunal to absorb three hours of submissions and evidence at a time.

"It's not like when you're sitting on your sofa and watching a movie," he said. The tribunal is expected to be constantly "alive" and "ready to intervene at no notice," often responding to procedural objections that can be "poorly articulated".

It is also important to be aware of time zone differences between participants in virtual hearings. Affaki said he is currently sitting on a case with an arbitrator from Hawaii, which is 12 hours behind Paris. While that arbitrator is "extremely graceful" in saying he can wake up at 1am for a hearing, "there's a limit to what you can expect from a person."

Victor Leginsky, an arbitrator at 33 Bedford Row, stressed the importance of having good interpretation services for multilingual hearings.

He also said counsel should speak slower and be more focused because when arguing "across the ether," as sometimes "lengthy speeches and rhetorical flourishes" don't come across as well as they would in person.

Openings statements: know your tribunal and don't exaggerate

UAE-based independent arbitrator **Anne K Hoffmann** said that opening statements in hearings are often too long and with "no logical structure".

The tribunal will read the brief before the hearing so does not need a complete recitation of the facts, she said. The opening statement is counsel's opportunity to "highlight the important points" they want the tribunal to remember rather than "bombarding" it with unnecessary information.

It is also important to "know the audience", said Hoffmann. It does make a difference, for example, whether the tribunal consists of three QCs or German and Swiss arbitrators.

She added that, when in doubt, "less is more," and that counsel should not use "overloaded" PowerPoints.

Debbas Achkar said it was important for counsel to know in advance if arbitrators have a reputation for being "overprepared" – and therefore won't need an extensive recitation of facts – or "underprepared," in which case it is best to develop points more fully.

She said it was also important to address each tribunal member individually and not to read from documents, which will make your tone "monotonous".

She warned against "exaggerating" points in the opening statement. A prepared arbitrator will spot this immediately and counsel will lose credibility instead of making a "wonderful first impression."

Leginsky suggested that a "disorganised and messy" opening statement by counsel could be the tribunal's fault, if it has failed to sort out the issues in dispute early enough in the case.

Oral closings: worth the fuss?

Hoffmann said that while post-hearing briefs are helpful in applying witness evidence, she was "not convinced" of the utility of oral closings in most cases. The bigger the case, the more difficult Hoffmann said it is to deliver an oral closing that is "well-prepared and well-delivered right at the end of a hearing."

In two decades of practice, Hoffmann said she was yet to see an oral closing that "put a thought in the heads of the tribunal that wasn't there before".

Affaki pointed out that oral closings do not always close the main hearing. In two recent cases of his, oral closings were delivered several weeks after the hearing and after the post-hearing briefs. This allowed the tribunal to question counsel on issues that had arisen in deliberations.

Affaki said arbitrators sometimes "hesitate" to interrupt during opening statements because they know "how stressful, how important" it is for counsel. Meanwhile the arbitrators' questions continue "accumulating" throughout the case.

Leginsky said that if you have the "luxury" of scheduling oral closings several weeks later then that's great – but getting everyone together again can be difficult.

Hoffmann said it may still be “less stressful” to have responses to any questions the tribunal has after the hearing in writing.

GAR Live Abu Dhabi took place on 9 February and was hosted by the Abu Dhabi Global Market. Its sponsors were Ghaffari Partners, Kroll, Norton Rose Fulbright, Obeid & Partners, Ashurst, Masin Projects and Reed Smith. Shearman & Sterling hosted a speakers’ dinner.

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