

INAUGURAL ADDRESS BY HON'BLE MR.JUSTICE AJIT PRAKASH SHAH, CHIEF JUSTICE, DELHI HIGH COURT, AT THE INTERNATIONAL INFRASTRUCTURE & CONSTRUCTION LAW ARBITRATION MOOT ON 14TH NOVEMBER, 2009 AT NATIONAL LAW UNIVERSITY, DELHI.

Dr. Ranbir Singh, Shri Hemant Batra, Smt. Sabiha Shiraz, Shri Ankit Goyal, Prof. Ghanshyam Singh, faculty and students of the National Law University, Delhi, participants and ladies and gentlemen

Let me first thank the organizers for inviting me for the inaugural of the 3rd International Infrastructure & Construction Law Arbitration Moot Court Competition.

Mooting and mock trial are necessary to inculcate in the future lawyers the art of being articulate, developing fluency and clear enunciation of thought, learning the art of persuasion and making a succinct intelligible putting up of a case. Moot competitions serve a great bridge between law as a science and its practice as an art.

On this occasion I would like to place before you a few aspects of the litigation and trial lawyering skills in arbitration.

Handling of an arbitration raises unique questions of procedure and requires the use of some skills that differ from those used in litigation or at trial. But many skills and procedures overlap with those used in litigation and at trial.

Simply put, arbitration is the process by which a neutral third party, not a court, adjudicates and renders a legally binding decision. Although arbitration is one of the types of Alternative Dispute Resolution, it is fundamentally an adjudicatory process and typically more informal than the actual court trial.

There are distinct advantages of arbitration. Court proceedings do not offer a satisfactory method of settlement of commercial disputes as they involve inevitable delays, costs and technicalities. On the other hand, arbitration provides economic, expeditious and informal remedy for the settlement of commercial disputes. Proceedings in court also involve notoriety and expose the internal and private affairs of the parties to the public. But arbitration proceedings are conducted in privacy and the awards are kept confidential. The arbitrator is usually an expert in the subject matter of dispute. Therefore, arbitration is the most suitable way for settlement of commercial disputes and it must invariably be used by the businessmen in their commercial dealings.

In ancient India, disputes were settled by autonomous bodies like 'Kulas', 'Shrenis' and 'Parishads'. The judgment passed by these bodies possessed all the characteristics of finality and were binding on the parties, just like the modern system of justice. Merchants used commercial arbitration as early as the 18th century. In India, the first Arbitration Act was enacted in 1899 based on the English Arbitration Act. Then came the Indian Arbitration Act of 1940. Finally came the enactment of the Arbitration and Conciliation

Act of 1996 based on the UNCITRAL Laws establishing a clearly defined statute giving a more defined platform to arbitration and conciliation. In recent years, the use of arbitration has taken on staggering proportions in international arena. Today, arbitration is commonly used in: international commercial disputes, consumer disputes, construction industry disputes, employer-employee disputes, and professional sports contract disputes.

Although arbitration is normally more formal than mediation and less formal than litigation, it involves extensive preparation, including limited discovery, and a hearing that resembles a trial in some stages, with some variation from a typical trial. Lawyering skills and best practices for arbitration are ably enumerated by an American writer A.R. Levinson.

The advocates preparing for the arbitration must familiarize themselves with the relevant contract provisions, researching the law and relevant cases, procuring relevant documents, preparing the witnesses and visiting relevant sites, such as a construction site. The advocate must prepare for arbitration exactly in the manner he would prepare for litigation, leaving no stone unturned. It is not correct that because arbitration is supposed to be cheaper and more informal than litigation it does not require much preparation. The advocates must present their cases well so that the arbitrator has a sound basis upon which to decide the disputes. This is all the more necessary because only a limited review of an arbitrator's binding decision will be available.

Sometimes the lawyers adopt the same demeanor in arbitration that they adopt in litigation and trial proceedings. They are very formally dressed and theatrical in presentation and miss no opportunity to argue a point on behalf of their clients, no matter how small. However, one should not forget that the nature of arbitration is different than litigation. Credibility in oral advocacy lies in dressing appropriately, using formal language, respecting the arbitrator and opposing counsel and not overstating the case. These aspects of presentation might be termed "silent arguments". Silent arguments are not made explicitly by the lawyers but rather are covered implicitly by demeanor.

There are some basic rules as to how an advocate in arbitration should present himself or herself in a manner that impresses the arbitrator in order to enable him to focus on the substance of the case. The advocate must conduct. The advocate must conduct himself or herself in a manner generally expected by the arbitrator. To do otherwise will cause the advocate to be viewed as an 'outsider', someone 'unfamiliar' with the mores of arbitration and thus less credible. The advocate should thus avoid theatrical presentation, nitpicking objections, and an adversarial tone with the opposing advocate. Instead, the advocate should adopt a tone more appropriate to a small conference room, but still treat the process as an important one, worthy of respect.

The advocate should use proper grammar and style, treat the arbitrator with the respect of someone who will render a decision in an important matter.

Next, the advocate should express sincerity in the belief that the client's interests are important and the client's case is a good one. This is even more crucial than at trial because arbitrators have freedom to consider equities to a greater extent than a Judge or Jury. The arbitrator may draw on experience in the field or industry, rather than simply deciding the case on a legal basis. Therefore, even if the client may not have the strong case on a legal basis, it is crucial for the advocate to convey an attitude that the client's interests are important and the client's position is more reasonable than that of the other party.

Then one must be proficient in art of forensic oratory. Quintilian says that forensic oratory has one main task - "to persuade the judge and lead his mind to the conclusions desired by the speaker." No doubt advocacy is composed of so many diverse elements. Judge Parry, in his book 'The seven Lamps of Advocacy' listed these seven virtues of advocacy. Honesty, courage, industry, wit, eloquence, judgment and fellowship. But persuasive speech perhaps is the most important single element in advocacy. Perhaps when Judge Parry referred to eloquence he had 'persuasive speech' in mind.

But how does one gain proficiency in the art of persuasive speech? First and foremost, one must seek to cultivate command of language. Lord Denning in his book 'The Discipline of Law' brought out the importance of language. He says that words are the lawyer's tools of trade. When you are called upon to address a judge, it is your words which count most. When you have to interpret a section in a statute or a regulation, you have to discover the meaning by

analyzing the words. When you have to draw up a will or a contract, you have to choose your words carefully. On the words you use your client's future may depend. As a pianist practices the piano, so the lawyer should practice the use of words, both in writing and by word of mouth.

There are some primary rules to gain mastery over a persuasive speech. The crux is to seek simplicity, to avoid verbiage, to use familiar words of plain meaning and to be natural. I may quote what is still regarded in England as the finest opening by the counsel for the defence in a murder case. It was John Inglis, when he appeared in the trial of Madeleine Smith, "Gentlemen, the charge against the prisoner is murder and the punishment of murder is death, and that simple statement is sufficient to suggest to you the awful nature of the occasion, which brings you and me face to face.'

Let me finish by citing what Lewis Carroll said in 'Alice in Wonderland' about the lawyers' capacity to argue:

*"In my youth", said his father, "I took to the law,
And argued each case with my wife;
And the muscular strength which it gave to my jaw
Has lasted the rest of my life."*

I sincerely thank the organizers for inviting me today. I wish success to all the participants, and declare this competition inaugurated.