Global Arbitration Review

The Guide to Advocacy

General Editors
Stephen Jagusch QC, Philippe Pinsolle and Timothy L Foden

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Contents

4

Opening Submissions

Franz T Schwarz[1]

This chapter provides an overview of topics and techniques to consider in the preparation and delivery of opening submissions in international arbitration. It covers both some rhetorical approaches and pitfalls; examines the content and structure of such presentations, including how to address weaknesses in one's case; and closes with thoughts on specialised presentations on technical matters or on quantum. A word of warning, though: good advocacy is inherently subjective, and what works well for one counsel will not work for another. Each advocate needs to find their own authentic voice. In that sense, the thoughts expressed below are not hard and fast rules, but mere invitations of what you might consider as you prepare for your next opening speech.

Preparation

Whether it is an axiom or a cliché does not matter: preparation is everything. This is particularly true for the opening presentation, which is almost entirely in your hands: you decide what to present and how to present it, and so you have no excuse not to prepare. Indeed, meticulous preparation will also allow you to convincingly respond to questions from the tribunal and a rebuttal from your opposition.

Preparation will also increase your confidence as an advocate, which is important because measured confidence translates into credibility and persuasion. This is equally so for novices as it is for veterans of the trade: too many experienced counsel become lazy over time, thinking they can 'wing it' – it usually shows. Experience can take you far, but preparation will take you further.

Some of the most experienced advocates still prepare by drafting a full verbatim text of their opening submission. As they prepare for the hearing, and as they rehearse and work

1 Franz T Schwarz is a partner at Wilmer Cutler Pickering Hale and Dorr LLP. The information contained in this chapter is accurate as of September 2016.

Opening submissions – some tips

Be timely. If you are filing a pre-hearing brief, don't file it the evening before the hearing starts – what you might gain in perfecting your submissions will be lost because the tribunal will have had no time to properly read and digest it.

Focus on the key issues. Don't use pejorative language in an attempt to win the sympathy vote – it is too late, you should have framed the case by this stage. The tribunal is now focused on the key legal issues.

Don't read your opening submissions. You should aim to create eye contact with each member of the tribunal – you are seeking to develop a rapport with the tribunal. Don't keep all your folders on the desk top between you and the tribunal – it creates a barrier between you and the tribunal and makes it harder for you to read the tribunal.

It's okay to summarise. Most tribunals will have spent considerable time preparing for a hearing and will have read all the submissions and key documents. Where that's the case, it's sufficient to summarise succinctly the factual background and legal arguments. Listen to the questions from the tribunal and be ready to change your proposed order of submissions and be flexible – you should engage in an interactive discussion, not a soliloquy.

Be disciplined in deciding which documents should be included in the hearing bundles and particularly what should be included in a core bundle. Work with your counterparty to ensure there is no duplication and have an agreed index.

– Juliet Blanch, Arbitration Chambers

on the text, their need to rely on the manuscript is continuously reduced. A PowerPoint presentation, prepared to go along with the opening submission, can also serve as a useful guide to ensure that no important point is inadvertently left out.

Do not be shy about rehearsing the opening out loud, including in front of your colleagues. You will see that some sentence or turn of phrase, which looked beautiful on paper, works less well when spoken. Indeed, although you should write down your opening submission, it should be written as one speaks: with short, concise sentences that are easy to follow.

Rhetorical approaches

Credibility

Credibility is your currency. It should determine the content and tone of your presentation: it is a matter of both substance and form. You should never mislead the tribunal; be truthful to the facts and accurate on the law. When arguing a difficult point, there is a great difference between asking the tribunal, on the basis of the particular facts, to go further than established case law may suggest, and misrepresenting what the case law says. Be precise.

Credibility is also a function of form. It is expressed through your posture, your demeanor, your tone and even your personality. Be authentic and sincere. Someone bestowed with charisma and charm can use these gifts to great effect because they come naturally to them, and so appear sincere. A shy person – say, an introverted and somewhat dry, but highly cerebral intellectual – can be an equally effective advocate, however, because they too appear at home in their style. A good advocate is authentic, and by extension, credible.

Hearing etiquette

A sure sign of inexperienced presiding arbitrators is that they tolerate lawyers' repeatedly addressing each other in the hearings. Everything that is said in a hearing by advocates should be addressed to the tribunal, or with the tribunal's permission ('you may now question the witness'). Anyone who doesn't know why should stay in the back row. This is yet another matter that should not have to be established in advance, but unfortunately sometimes does.

– Jan Paulsson, Three Crowns

Knowing your tribunal

If credibility is your currency, the tribunal is where you spend it. Knowing your tribunal will help you spend it effectively.

You will have made great effort getting to know your tribunal when it was constituted. Appointing an arbitrator is the most important decision a party makes. Now, with the hearing on the merits approaching, you will already have seen the tribunal in action, as it will have decided issues of procedure, document production, and possibly jurisdiction. You will therefore have a sense of their particular style and perhaps the dynamic between its members: is the presiding arbitrator leading with a firm hand, or is she inclusive? Has the tribunal decided procedural disputes by compromising between the parties' positions, or taken decisions that are more black or white in nature? Has the tribunal in its decisions been guided by the parties' positions or has it displayed a strong independent streak? All of this will guide your opening submission.

You will also consider the individual members and their background. Do you find yourself before (one or more) common law arbitrators in a case substantively governed by a civil law system? The opening presentation will be your chance to engage these arbitrators more directly than would have been possible in your written submissions, and explore any differences in approach that you wish to highlight. What about the tribunal members' expectations of style: are they, as a result of their background or practice, more familiar with the presentations prevalent in a particular court system, or are they internationalists accustomed to any manner of presentational style? This, too, will influence your presentation:

Speak to your target arbitrator as if one to one

Advocacy, good advocacy, is, for me, the *raison d'être* of arbitration. When I am treated to excellent advocacy (alas, not often enough), I recall my days as a busy advocate in Canada. There was nothing more challenging for me than standing before a judge or a panel of three or even nine judges or arbitrators and knowing that I had to convince one of those swing adjudicators whom I suspected was not sympathetic to my client. And then, having spoken mainly to my targeted judge or arbitrator as if this was a one-to-one conversation, seeing in the adjudicator's eyes or facial expression that he or she was now going to find in favour of my client. What satisfaction! What feeling of accomplishment! I am not boasting that it always worked, but it often did.

– Yves Fortier QC, 20 Essex Street Chambers and Cabinet Yves Fortier

Speak slowly

Remember always, in oral advocacy, to speak more slowly than you would in ordinary conversation. This is not just a courtesy to the court reporter and to the arbitrators struggling to take notes; it is also the best way to command attention and to persuade. As Mark Kantor used to say to our Georgetown Law School students, the 'beat' of advocacy is not rock and roll, it is the waltz. If you speak too fast, you lose the ability to employ cadence and volume to create emphasis.

– Jean Kalicki, Kalicki Arbitration

depending on the circumstances, there may be value in familiarity or in rattling them with the unexpected.

And, of course, you will consider their likely approach on the merits. Are they very commercially minded, or inclined to follow the black letter of the law? Are they driven by a persuasive narrative, or likely to view a case within the formal parameters of the applicable law? Being familiar with the members of the tribunal and their proclivities will allow you to strike the right balance between law and equity, and between flourish and analysis.

Tone

As form follows function, the tone follows the purpose of your presentation. The overarching purpose of your oral submission, of course, is to be persuasive. As a general rule, therefore, your tone should be serious, focused and measured, so as to carry your argument with maximum credibility.

Avoid bombast

The tone of an opening statement sets the stage for the arguments throughout the entire hearing. It is best to be respectful, not just of the tribunal (which should be a given), but also of the opposing party and their arguments. Shrill protestations, accusatory rants and overheated rhetoric will not impress a tribunal. It is best to make one's case using facts, logic and accurate application of the law. Stringing together strong adverbs and adjectives – 'grossly','outrageous', 'shocking', etc. – typically obscures, rather than strengthens, arguments.

– Stanimir Alexandrov, Stanimir A Alexandrov PLLC

Don't exaggerate the facts or the law. A knowledgeable tribunal will be unimpressed by bombast and overstatement, and your opponents may use your overstatements to undercut the effectiveness of your core points. Exaggerating or overstating a point puts the advocate out at the far end of a thin ledge, with little support underneath and a long fall to the bottom of the cliff if that support is chipped away by a critical arbitrator or a diligent opponent. The adverse consequences of exaggeration often seriously outweigh the rhetorical benefits.

– Jean Kalicki, Kalicki Arbitration

'A short, well-constructed, written skeleton, delivered a week before the hearing is a magnificent chance to provide the distilled essence of your case'

In most cases of significance, a tribunal will have had the advantage of two rounds of pleadings and multiple witness statements and expert reports. Good tribunals will always have read in to the case before the hearing. So why do we need skeletons, and why are counsel inclined to extensive openings? The answer is that they can't be sure that the arbitrators have done their job. But experienced counsel who know their tribunal will understand that time can easily be wasted by lengthy oral openings.

Even when a tribunal can be expected to have read the pleadings and the testamentary statements, a short, well-constructed, written skeleton, delivered a week before the hearing (don't give it to the tribunal the weekend before – this is too late, and if a tribunal is travelling, it may not even be received before the arbitrator turns up at the hearing) is a magnificent chance to provide the tribunal with the distilled essence of your case and your answers to your opponent's.

Where it is essential that the tribunal be shown important exhibits, they should be quoted, if they are short. But whatever you do, given today's technology, be sure to provide your decision makers with an electronic version of your skeleton (or opening), which is hyperlinked to every important factual exhibit and legal authority - for ease of reference, highlight in yellow the relevant parts of those exhibits.

A good skeleton or opening should be a reliable roadmap to the tribunal's drafting of an award in your client's favour.

– J William Rowley QC, 20 Essex Street Chambers

There are exceptions to this rule. If the subject matter so demands, it can be right to show emotion. A fraud perpetrated on your client may, when you recount the facts, allow for a measure of anger: for emphasis, not for show. Again, this will be a matter of personal style, and how you can express yourself authentically. It will also depend on the tribunal's disposition whether an injection of emotion is effective. It certainly can be a powerful rhetorical tool to place a marker on an important aspect of the facts – but you must stay in control at all times and you must not overuse it, lest you appear overexcited and hence less credible.

What about humour? It should be used sparingly, if at all. This does not mean that you have to be overly serious either: be pleasant and by all means likeable. But seeking to persuade another is no laughing matter, and one joke too many may seriously undermine your credibility. Some advocates (in particular in arbitration circles, with no shortage of big egos) view their sharp tongue and quick wit as an expression of their superior intellect and fast thinking. I have always wondered if this is a good strategy in the long run. But here too, there are obvious exceptions. Not showing any sign of good humour where the situation, or social convention, clearly demands it may alienate you from the tribunal. Such situations call for your best judgement.

'Consider the roadmap to be your "elevator speech"'

Roadmaps can be extremely effective in oral submissions, but often they are not used to best advantage. Simply listing the sequence of topics you intend to cover may help your arbitrators organize their notes, but it does little to sell your case. The most powerful roadmaps also set forth for each topic the important 'take away' point – the conclusion you wish the arbitrators to reach and the key reasoning underlying each conclusion. This can be done in a sentence or two per point. Consider the roadmap to be your 'elevator speech': if you had to summarise your case in the time it takes to rise from the lobby to the penthouse, how would you boil it down to its essence? Try to give the tribunal a concise summary of what you wish it to remember about your case, and the building blocks you think it needs to write the award you wish to receive. Then, having introduced the key elements, make sure to return to each as you address it in more depth – and revert to them again in your conclusion, to help fix the critical steps even more securely in the arbitrators' minds.

– Jean Kalicki, Kalicki Arbitration

Pacing

It would be pretentious to say that only inexperienced lawyers try to pack too much information into the time they are given. Everyone struggles with this: in a twisted variation of Parkinson's Law, the desired information expands to exceed available time. The easiest, but least effective, way to deal with the shortage of time is to accelerate the pace of your speech.

Consider how human attention tends to drift during any frontal lecture. Consider then how speaking fast makes it even less possible, let alone desirable, for the audience to follow with interest. You can re-read a written sentence, unwieldy as it may be, to extract some meaning, but you cannot rewind the spoken word on the spot. True, there may well be a written transcript, and while this can be revisited by the tribunal at a later stage, your opening statement needs to take immediate effect, to open the tribunal's mind for the evidence to follow. Add to all of this the particulars of the tribunal: their age, perhaps, or the fact that English is not their native language. Keep your language simple, and your pace measured. Your pace should also be varied. Monotony loses attention; variation attracts it.

Do not forget the rhetorical effect of the pause.

A pause, well placed, serves as a reminder, a bookmark. It interrupts the flow; contrasts the monotony of legal language; and gives the audience the opportunity to catch their breath and think. In fact, it forces the audience to catch their breath and think about what you just said at a moment of your choosing. This makes the pause a powerful instrument of emphasis.

Understatement and overstatement

If you follow the overarching goal of presenting a credible and persuasive argument, you will rarely understate or overstate your case. You will minimise weaknesses, but not deliberately misrepresent their import. You will project confidence in your case, without overstating the merits of your evidence or your authorities. Yet understatement and overstatement can be legitimate rhetorical figures. By postulating extremes, you may be able to show the fallacy of an argument.

'You cannot over-prepare'

As in every human encounter, the first impression in an arbitral hearing is a defining moment. You cannot over-prepare for the initial hearing with members of your tribunal, your judges.

You will have mastered the factual matrix of the dispute as well as all legal issues which will need to be resolved. You are calm, you are poised, you know the file inside out and it shows in your demeanour; you project confidence and assurance. Invite questions; you know you can answer any question put to you.

You look at the arbitrators. You speak to each one of them in turn, preferably without reading, which, of course, prevents you from making eye contact with your judges. And remember, members of the tribunal will have read your written submissions. Be thorough but be succinct. If you refer to opposing counsel, be polite and respectful.

And finally, even if you have been allocated, say two hours for your opening statement, do not feel obliged to use the two hours. If you can complete your opening in one-and-a-half hours, then do so. Your judges will welcome and appreciate your confidence. The first impression must be a positive lasting impression.

– Yves Fortier QC, 20 Essex Street Chambers and Cabinet Yves Fortier

Analogies

A picture is worth a thousand words, or so the saying goes. Comparisons, analogies and metaphors can be effective tools in your arsenal because they create images in your audience's mind. Many of these images are effective also because they are part of the cultural fabric of your audience: 'pulling yourself up by your bootstraps'; 'having your cake and eating it too'; 'heads, I win; tails, you lose.'

The use of analogies, figures of speech and the like is not without risk, however. Some of those images are peculiar to one language or culture and may have no, or a different, meaning elsewhere. The danger of analogies is also that there is always a better one: if the analogy is slightly off the mark, it can be used against you or turned around.

Less 'we believe'

Always choose confident, direct language to present your points, not passive or hesitant language. For example, saying that 'our submission is' or 'we contend' simply reminds the tribunal that there is a counterargument, and you are just an advocate presenting a position; it does not add anything to the persuasiveness of your presentation. So instead of 'we believe X' – which suggests equal room for an opposing belief or argument – simply state 'X' as an assertion, and then explain the basis for the assertion. Present your argument not as an 'argument', but as the logical and necessary conclusion from the evidence and legal authorities you invoke.

– Jean Kalicki, Kalicki Arbitration

'A submission must be a submission, not an encyclopedia'

I find that a lot of submissions are unsatisfactory. They are much too long, not well structured, not presented in a logical order, too repetitive, with a lot of factual information or legal developments which are unnecessary. In other words, they are confusing. The parties should first determine what are the issues to be decided and structure their submissions accordingly, in a logical order. For each section and subsection, they should devote one paragraph to the presentation of their position (and the other party's position if it is a reply or rejoinder), and explain how they will argue it in a sequential order: a, b, c, d. And so on. They should also remember that a submission must remain a submission and should not become an encyclopedia. In other words, parties should avoid any unnecessary factual elements and legal developments or case law. They unnecessarily complexify the issues and often generate confusion. Parties should try to be as short and focused as possible. They should avoid repetition, in particular in the reply and rejoinder. In most cases, a good memorial should not exceed 100 to 150 pages. The longer, the weaker, the shorter, the better. If the tribunal has two submissions in front of it, the one that is better structured and more pleasant to read will carry a greater weight.

I am also much in favour of skeleton arguments. They force the parties to go to the essence of their case, and to present it in a logical order and in a concise way. They are very helpful for the arbitral tribunal.

– Bernard Hanotiau, Hanotiau & van den Berg

Organisation

On the most basic level, the structure of your presentation will be a function of the merits of the case: after an introduction to set the scene, you will invariably have to deal with the facts, the law, the quantum, the relief you are seeking. From there, you will build your presentation around the strengths in your case; that provides a robust foundation and allows you to put real or perceived weaknesses into a less harmful context.

You will also consider, though, whether to follow the same structure that you used in your written submissions (which has the advantage of familiarity to the tribunal) or whether to try something different and fresh (which may heighten the tribunal's attention and interest).

Importantly, you will organise your presentation in the manner that best befits your case. Representing the claimant, and thus going first, you naturally have great freedom in this regard. But you should exercise considerable freedom as the respondent's representative as well. Sometimes, it makes sense for a respondent to follow the same structure as the claimant: rebutting, step by step, what has been said. But often, the claimant's structure is not helpful to your case, as it emphasises different strengths and belittles precisely those aspects of the case that you will wish to explore. Mirroring the claimant's organisation and approach means accepting how the case is framed. Instead, reorganise the argument to highlight the strengths in your case and to attack with maximum effect the opposition's weaknesses.

In longer opening submissions, consider using different speakers on your team to address, for example, facts, law and quantum separately. This can have several advantages. First, it provides the tribunal with a welcome change in tone and style. Listening to the

Address weaknesses before you reach the hearing

Every case has its weaknesses; if the matter were open and shut on one side, it likely would not proceed to dispute settlement. It is always much better if counsel addresses those weaknesses up front rather than trying to gloss over them. From my experience, it is particularly harmful to a party when the weaknesses in its case are aired for the first time at the hearing. In such cases, the tribunal may begin to doubt that party's credibility. Thus, it is advisable to address one's case weaknesses directly in the written submissions, and then to follow up on them in opening and closing arguments as well.

– Stanimir Alexandrov, Stanimir A Alexandrov PLLC

same person for two hours is a challenge for any audience; listening to three speakers over the same period helps the audience to maintain focus. Second, you can choose speakers that have mastered the particular subject matter they are asked to address and so lend extra credibility to your presentation. Legal submissions and presentations on quantum are particularly well suited to be handled by someone with specific expertise.

Timing and logistics

There is never enough time, as far as counsel is concerned. The tribunal often has a different view. It will say that it has read all the submissions, lengthy as they were, so that long opening submissions are not needed. But is that true? Even having prepared well for the hearing, arbitrators may benefit significantly from a well-structured opening presentation that focuses on the decisive points; readjusts the emphasis; and prepares the tribunal for the evidence to follow.

As counsel, I typically resist an effort to unduly restrict the time for the opening. How much time is needed depends, of course, on the case and its complexities, but I think it is important that parties get the time they say they need. It is their day in court, after all.

It is helpful to also think about the staffing for the hearing. Of course, there is the main advocate, or the main advocates if multiple subject matters or topics are divided; but there should also be a properly assigned and rehearsed choreography of supporting cast to hand out written materials or demonstratives, or to operate a PowerPoint presentation.

Content

What to cover?

A good starting point in thinking about the content of your presentation will usually include the following: (1) an introduction that sets the stage, provides some overarching themes and exposes the main strengths of your case as well as the opposition's weaknesses; (2) an account of the factual narrative that makes best use of the evidence, particularly in fact and document-heavy cases; (3) an exposition of the law as applied to the facts of the case; (4) a rebuttal of arguments already raised by the other side or anticipated to be raised at the hearing; (5) an examination of the quantum; and (6) a conclusion.

The opening submission serves to set the stage for the evidentiary hearing, and so should, in general, revolve around the existing evidence: providing context for what the

tribunal will hear from the witnesses and the experts. How much detail is too much detail? That is a judgement call. A detailed exposition of a factual aspect of the case can be powerful, as long as it is relevant and not tedious.

What to emphasise?

You will typically build your presentation around the strengths in your case. These strengths provide the fortified hilltop from which to venture into more uncertain territory. Do not cede the hilltop and get lost in a battle that your opponent wants to fight on ground more favourable to him: always return to the strengths in your case. As a result, emphasise the strong supporting evidence, the testimony, the documents, the concessions from the other side's written submissions. This is the easy part, however. It is much more difficult, and at least equally important, to effectively deal with the weaknesses in your case.

Dealing with case weaknesses

As you prepare for the hearing, there are three questions you need to ask in regard to weaknesses in your case: whether to address them yourself; and if so, when and how.

It typically makes no sense to try to hide the weak spots in one's case. Can you safely assume that no one on the other side or the tribunal has identified the weaknesses in your case? This is a high-risk assumption, akin to refusing to go to the doctor if you are ill. The illness is not going to go away by being ignored. It is far better to find a way to address the weaknesses in your case on your own terms.

At the bare minimum, have an answer at the ready. It would only magnify any real or perceived weakness in your case if the tribunal asked you about it, whether prompted by the other side or of its own volition, and you failed to give a clear or concise answer.

The more difficult question is when to address a weakness. This is particularly so if you are representing the claimant. You are going first; you are acting not reacting – but you don't know if and how the respondent will address the weakness in its own opening statement. If it the weakness relates to an important issue, there are significant advantages in addressing it first. It is a golden rule of soldiering as much as advocacy that the party that defines the battlefield has made a huge step towards victory. By working the weakness into your submission, you frame the discussion: you provide context and explanation instead of allowing the other side to present the weakness in the most unfavourable and unbalanced manner.

What if there is no answer to your weakness? Try harder. There is always an answer, at least there ought to be if you have made it this far in the arbitration. The world is not black or white, and any strength or weakness has shades and nuances that you can exploit to soften the blow. The answer may in fact be acknowledging the weakness, and explaining why, nonetheless, this weakness does not affect the ultimate outcome of the case, or, better still, is actually a factor in your favour. Acknowledging weak points, where this can be done without harming the very basis for your case, can be a powerful tool: by showing that you are not wasting the tribunal's time by arguing, against common sense, a host of weak points, you cement your standing as a reasonable and, importantly, credible advocate.

If there really is no answer to a fundamental weakness that threatens to destroy the very basis of your claim or your defence, you may have to ask yourself and your client if you

You can postpone answering a tribunal's question – but not indefinitely

Counsel may feel like she is just getting into the flow of a good opening argument when an arbitrator interrupts to ask a question. As jarring as it may be, it is best to focus on those questions and specifically respond to each one because they are an indication of the tribunal's own focus in its analysis of the case. Ideally, counsel will respond to the arbitrators' questions as they are posed. But if counsel prefers to continue with the opening statement uninterrupted, she should acknowledge the questions, request time to continue the opening statement, and indicate that she will answer the questions later in the statement (or at some other point during the hearing). If counsel chooses to postpone answering the tribunal's questions, however, she should make sure that she (or a colleague) does eventually address the arbitrators' questions at some point during the hearing, and when doing so, ideally signal expressly that she is now answering the question posed earlier. The arbitrator will not forget that he asked the question, and will be waiting for the answer.

– Stanimir Alexandrov, Stanimir A Alexandrov PLLC

really want to expose your client to the hearing. There may be reasons to do so, but this final analysis, before the evidence is taken, may also be a good time to consider a settlement.

Anticipating opposition arguments in the opening submission

You not only need to address weaknesses in your own case, you also need to anticipate the other side's arguments. This is somewhat different for a claimant (who goes first) than it is for a respondent (whose opening submission is by definition more responsive).

As a claimant, you will distinguish between at least two categories of opposition arguments: (1) those that the other side have already made and will likely repeat in their opening submissions; and (2) new arguments that the opponent is either likely to raise for the first time; or that it seems to have overlooked so far but may still raise. The analysis of whether and how to anticipate these arguments in your own opening submission is similar to our discussion of weaknesses.

Arguments that you are fairly certain the other side side will raise, if they are of any import to the case, should be anticipated and addressed. This will allow you to put them into their proper context and define the framework in which they are discussed. It also gives you the opportunity to display confidence: you are not shying away from engaging with the other side's arguments directly and decisively.

Much more difficult is the decision about whether to anticipate and address arguments that the other side has not really made, but that you think could expose a weakness in your case. Can you be certain that the opponent has overlooked the point, or have they held it back in order to move in for the kill at the hearing? There may be an indication in the pre-hearing correspondence that things are starting to move in a new direction. In this case, it may be wise to address this in your own opening. Otherwise, it will seem counter-intuitive in many cases to raise an unhelpful argument that the opposing side has not even made. This does not mean, however, that this issue can simply be ignored: the other side may still jump on it, or the tribunal may raise it of its own volition. As a result, you need to be be prepared in two important ways. First, you need to have a response if it comes up after all.

'Every question is a window into the arbitrator's thinking'

Welcome tribunal questions. You may find yourself baffled as to why an arbitrator would ask a particular question and you will almost certainly be irritated that he chose to ask it at precisely the moment when you were about to make an entirely different point. But welcome the question. If you are lucky enough to have an able second chair, trust her to remember what point you were about to make, and pivot as smoothly as you can to the arbitrator's unaccountable interest in what colour the machinery was painted. Every question is a window into what the arbitrator is thinking, and a clue to whether he is receiving on the same frequency on which you are broadcasting. A really skilful advocate will find a way to work from the answer to the arbitrator's question to the point that he intended to make in the first place, but it is better to suffer an awkward transition than to brush away an irritating question because you would rather deal with something else. Arbitrators very quickly conclude that advocates who squarely address the questions on their minds are the ones worth listening to.

– John Townsend, Hughes Hubbard & Reed LLP

Second, and this is sometimes overlooked, you need to articulate all your existing arguments, and your presentation as a whole, in a way that is consistent with your potential response on the new point. In other words, you need to think through how this argument, if it were raised, affects your case – and then present your case accordingly so that, when it comes up, it 'fits' into your overall presentation.

Your job is both easier and more difficult if you represent the respondent. It is easier because you do not have to make a decision in advance of whether to address every single argument; it is more difficult because you will have to make that decision on the spot, immediately after the claimant has presented its opening submission.

This is best dealt with through detailed preparation. Like the claimant, you will start out by preparing your opening through the lens of presenting your case in the best possible way. In fact, it will be important not to become too distracted by what the claimant is going to do. Your job is not simply to respond to what the claimant will say, but to set out a case that is entirely your own: a different narrative of what happened, and issues that the claimant has conveniently left out. It is not enough to say that the claimant is wrong, you also need to persuade the tribunal that your client is right. This will often require a different structure. Assume the claimant has a strong case on the facts, but faces serious issues on the legal issues such as the statute of limitations and liability restrictions. The claimant has done a wonderful job of laying out the facts of the case, but has struggled with the statute of limitation. Do you want to play the claimant's game, or invite the tribunal to join you on a different playing field?

Having established the best way to present your case, you will then start to think how the claimant's arguments fit into your narrative and at what point to address them. You will prepare a response to every argument, but you will not necessarily advance all these responses at the hearing. Instead, you will react to what the claimant has done in its opening. Having prepared for every eventuality, you now have room to manoeuvre. The claimant makes exactly the argument you anticipated? You are prepared and will respond. The claimant places more emphasis than in the written submissions on a particular argument?

You are prepared and will respond. The claimant places less emphasis on a particular argument than in the written submissions? You are prepared and can respond in multiple ways: you can compliment the claimant on having effectively dropped what was an unavailing argument in the first place, and then shorten your substantive response as well; or you can hit back all the harder and spend extra time with this point. Within the framework you have prepared in advance, you now have flexibility.

Responding to the opposition's opening submission

In some cases, although this seems to happen less and less, the parties are given the opportunity to make rebuttal statements in a second round of opening submissions. These are often severely restricted in terms of available time. Here, you will be short and to the point; and address the major points you need to rebut one by one. It is therefore advisable to take good notes during the other side's presentation; and you will typically be permitted a short recess to prepare your rebuttal.

Dealing with tribunal questions

Questions asked by the tribunal are of particular importance, as they can offer a view into the tribunal's thinking. It is vital to view these questions as opportunities to emphasise a point or correct a misconception on the tribunal's part – they may be the last and only chance to do so.

Tribunal questions carry the highest potential to be surprising. You will have carefully studied the opposition's papers, and so should be able to anticipate their positions at the hearing. Not so with the tribunal: the hearing may well be the first time you are engaging the merits with the tribunal. You don't know with any certainty what is on their minds, and their minds may be wandering into uncharted territory. Something that appears minor to you, or indeed to both parties, may have particular significance in the tribunal's view.

This is where all the hard work and effort spent on your preparation will pay off. Knowing the file will enable you to nimbly navigate the record and react to any unforeseen question from the panel. Without preparation, you will struggle. Even with the best preparation, however, you may encounter a question to which you have no obvious answer. It is dangerous to improvise in such cases, as too much may depend on a correct and persuasive response. It may, therefore, be better to ask for leave to address this question subsequently. Indeed, questions from the tribunal deserve particular attention when you prepare your post-hearing submissions.

Be not afraid to disagree. This is not to encourage you to be argumentative, let alone disrespectful. But if an arbitrator asks you a question that is based on a flawed premise, whether factual or legal, you must correct it. If an arbitrator pounds on a weakness, you must put this point into a more helpful context. Always with respect, but firmly, you must not cede ground (unless the weakness is obvious and you gain credibility by admitting it). Even if you do not persuade the arbitrator who asked the question, you may still be able to reach the two other members of the tribunal.

A demonstration minus instructions equals a distraction

Demonstrative exhibits can help simplify abstract concepts or distil voluminous information, but they must be used judiciously to be effective. Also, make sure to explain the exhibit and its relevance; displaying an exhibit without discussing how it should be read or interpreted will be a distraction at best and cause confusion at worst. The tribunal may end up studying the exhibit instead of listening to your remarks, rather than reviewing it along with and in support of your remarks. Think about how to present the information most clearly and succinctly. This may include orally walking the tribunal through the demonstration: 'As you can see in the handout, your analysis should consist of three simple steps.' Alternatively it could mean telling the tribunal to set it aside for now and listen to your remarks: 'For the tribunal's assistance later, we have prepared a short chronology and a decision tree. But in the interest of time, I don't propose to discuss this now; you can set it aside until you consider it useful to study.' The main lesson is to make sure the tribunal understands how and when you wish it to use the exhibit, so the document furthers the objectives of your oral advocacy rather than hampering it.

– Jean Kalicki, Kalicki Arbitration

Particular subject matters

Some subject matters come less naturally to lawyers and present special challenges. As discussed above, these subjects present an opportunity to involve another speaker in the presentation who has particular expertise and experience with this aspect of the case. In any event, much can be done through proper preparation.

Reinforce – don't distract – with PowerPoint

PowerPoint presentations can be a valuable part of an opening statement, but they can also distract arbitrators if used improperly. The key is to make sure the slides track very closely with what counsel is saying. If the slides contain more information than the attorneys convey orally – or if the slides include distracting pictures, charts, or graphs – the tribunal may focus on trying to decipher the slide, at the risk of no longer listening closely to counsel. That is likely not the intended goal. Rather, slides ought to be used to reinforce, not distract from, oral submissions.

Typically I do not find it helpful for counsel deliberately to provide more PowerPoint slides than they intend to cover in their presentation. Counsel may hope that by submitting more slides than are discussed during the oral argument, they are getting an 'extra' submission of material to which the tribunal may refer after the hearing concludes. Even if that were an acceptable practice, however, in my experience, arbitrators focus on the slides that were discussed during the hearing, rather than on slides that were not discussed or explained.

– Stanimir Alexandrov, Stanimir A Alexandrov PLLC

PowerPoint can divide the arbitrator's attention

Never put the words of your argument into a PowerPoint. Slides can provide an effective and persuasive means of conveying the sort of information that can be captured in a photograph, or a map, or a graph, or a diagram. They can be the most efficient way to draw the tribunal's attention to the precise words of an important document. They are essential to helping a tribunal to make sense of numbers. But the advocate who attempts to argue with the words he is saying displayed beside him may as well have put a bag over his head. He has, the moment the slide goes up, surrendered the control he would otherwise exercise over the tribunal's attention, which is thereafter split between him and his slides. Worse, because most tribunals ask for copies of the slides so that they can take notes on them during the argument, the tribunal's attention is divided between what the advocate is saying and what he plans to say next, because arbitrators, and especially bored arbitrators, cannot be restrained from reading ahead.

– John Townsend, Hughes Hubbard & Reed LLP

Legal submissions

In national court proceedings, presenting on the law is a lawyer's central prerogative. This becomes more difficult in international arbitration where the lead advocates, and often the arbitrators, are not trained in the applicable substantive law and so have to apply a law other than their own.

From counsel's perspective, this is a particularly good opportunity to closely involve a local lawyer or expert, certainly in the preparation of the opening submission but perhaps also in its presentation. You want to be able to speak with confidence, and you will need some assistance to do so. If you involve a local expert or counsel, his or her intervention will also have to be meticulously prepared, including when the local lawyer's first language is not the language of the proceedings. It is also conceivable to conduct the legal presentation as a tag-team, where the (foreign) lead counsel makes the big thematic points and the local lawyer fills in the important details.

As always, it is important to consider the tribunal's perspective in this regard, in particular if one or more tribunal members are (also) not qualified in the applicable law. You need to relate the legal submissions to them in a way that is easily accessible. Imagine, for example, that you are presenting a legal argument under a civil law system to a common

Take the rocket science out of quantum

Quantum submissions are often extremely frustrating for the arbitral tribunal. The parties devote hundreds of pages to factual and legal arguments and once they come to quantum, their presentation is often limited to a few pages. They limit themselves to a reference to the expert reports which, in many cases, are too technical and not easily understandable without further explanations by counsel. As they do for their other arguments, the parties should argue their quantum claims in a detailed and easily understandable manner, step by step, making it easy for the arbitral tribunal to understand the logic of their reasoning from A to Z.

– Bernard Hanotiau, Hanotiau & van den Berg

Cartoons, films and non-traditional sources are okay

In the right case, look for opportunities to illustrate your points by references outside the standard legal sources. In one case, the other party contended that the transactions we were trying to enforce were illegal even though its lawyers and bankers had been fully involved in putting them together. To emphasise the hypocrisy, and to take advantage of the professional credibility of those lawyers and bankers, we played a clip from the classic movie *Casablanca*. You'll recall the scene in which, after a rousing rendition of *La Marseillaise* led by the resistance leader Victor Laszlo, the local French administrator Captain Renault announces the closure of Rick's Café Américain on instructions from the German officers present. When Rick, played by Humphrey Bogart, objects, Captain Renault states: 'I'm shocked, shocked to find that gambling is going on in here!' The croupier then emerges from the back room and hands Captain Renault a wad of cash – 'Your winnings, sir.' We waited until the last moment to decide whether to play the clip, but when our adversaries used a *New Yorker* cartoon in their opening, we jumped. We orally set the scene in the movie, and then played the clip. It punctuated our point in Hollywood-dramatic, if untraditional, fashion. We had a complete win.

– Donald Francis Donovan, Debevoise & Plimpton

law tribunal. You need to understand whether the civil law concept on which you are relying has a corresponding feature in common law; or whether there is a real difference in concept or outcome. Depending on the situation, you may then say that what you are proposing is not so different from what the arbitrators know from their own system, or, if there is a difference, explain this difference in terms that make the argument compelling.

In any case, your legal argument ought to be simple and clear: it should both explain the rule (normative theory) and why its application in this case makes sense (persuasive theory). Particularly when operating in foreign legal systems, arbitrators will hesitate to apply a legal rule in a way that creates unfair or inappropriate outcomes. This is not necessarily a matter of applying equities rather than the law as it stands, because most legal systems have a way to avoid unfair outcomes in the first place. As a result, it is rarely persuasive to rely on a (formal) rule without recognising its rationale and applying it to the case at hand.

Technical submissions

It is one of the privileges of international arbitration that it offers you the opportunity to engage with many different industries and businesses around the world. You need to maintain the willingness to learn something new if you are called on to present technical matters. For some lawyers, including those with a background in science, this comes easily; the rest of us just have to work harder – you cannot explain what you do not understand yourself.

This is even harder for the arbitrators. In your preparations, you will have had the opportunity to consult with an expert or your client and ask any question you like to gain a thorough understanding of the issues. The arbitrators' preparation, on the other hand, will have been limited to the written submissions and reports. It is therefore even more important than normal to keep it simple and accessible. Set out the basics; and then take the tribunal step by step through the technical issues until you have set out the decisive

points. In technical matters, it may be a good idea to use examples that illustrate what you are talking about.

Quantum submissions

These considerations hold true for submissions on quantum as well. Perhaps even more so; many lawyers – counsel and arbitrators alike – have a tendency to delegate issues of damage quantification to the experts. For counsel, this is unacceptable. Having ultimate responsibility for the case and its presentation, you cannot leave such an important aspect of the case to an external expert. What good is it to win on the merits if you fail to recover the appropriate amount of damages for your client? As a result, you have to be fully engaged on the issue of quantum, and with your quantum expert, both on substance and presentation.

Here, too, simplicity is key. Most damage calculations proceed according to a 'model' developed for the particular case. You need to break down that model into its constituent parts; explain how these parts relate to each other and which parts have a significant impact on the overall outcome; and, on the basis of the individual parts, address any differences in opinion between your model and the opposition's approach. In other words, you have to provide the tribunal with the tools to make adjustments to your calculation without disregarding the entire model altogether. This is also a good opportunity to use examples and illustrations.

PowerPoint presentations and examples

As explained in several places throughout this chapter, examples and illustrations can be powerful tools helping you to make an impact. They can be used during the opening submissions, as part of a PowerPoint presentation, or as stand-alone posters; and they can resurface during the hearing, for example in the examination of witnesses.

With today's technical possibilities, examples can be much more than an illustration in PowerPoint. From animated movies that show chemical processes unfold to physical objects, like models and equipment, the possibilities are as endless as your imagination and your budget will allow. The overarching objective, of course, is to make difficult aspects of the case easier for the tribunal to grasp.

Separate from such examples, you will consider the use of a PowerPoint presentation to go with your opening submissions. Such presentations are now ubiquitous in international arbitration hearings, and they have considerable value. They allow you to summarise your important messages as bullet points; they provide structure to your presentation (and can be an aide-memoire to guide you along as well); they can contain quotations of important documents or case law (which you then don't have to read into the record in their entirety); and they can contain illustrations and graphs to illustrate your presentation.

Many arbitrators, perhaps overwhelmed by too much material to appreciate another 300-page document, will argue that the presentation should not be too long and should cover only what you are actually presenting at the hearing. One should accept a degree of flexibility, however. You may be spending more time than anticipated on certain issues (including because you have to respond to questions from the panel) and so are unable to cover all your slides. Indeed, you should be allowed to prepare some slides specifically for the contingency that the tribunal has questions on these points, which they may not. It is important, however, to restrict the content of each individual slide. Too much information

that the audience cannot easily follow in addition to listening to you is overwhelming and counterproductive. It is also advisable to hand out a hard copy of your presentation before you commence the opening. This encourages the tribunal to take notes on your PowerPoint presentation while you are presenting, and return to it in deliberations.

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