GREG LAUGHTON SC

SYDNEY
Selborne Chambers
174 Phillip Street, Sydney 2000
DX 394 Sydney
Telephone: + 61(0) 29233 8796
Facsimile: + 61(0) 29221 4196
glaughton@selbornechambers.com.au
THIRTEENWENTWORTHSELBORNE

LONDON
Hardwicke Chambers
Hardwicke Building, New Square,
Lincoln's Inn London WC2A 3SB
DX LDE 393
Telephone: + 44(0)20 7242 2523
Facsimile: + 44(0)20 7691 1234
Greg.LaughtonSC@hardwicke.co.uk
Hardwicke

Mobile: +(61)(0)408 602 886
www.greglaughton.com

ADVOCACY IN INTERNATIONAL ARBITRATION

ORAL ADVOCACY

Opening Address

1. The opening address is the first opportunity that advocates have to set out the case theory that, in the advocate's opinion, is likely to persuade the Court to determine the issues in favour of his or her client.
2. It introduces the case and should set out the essential facts on which the case is founded. It should give a little background so the trier(s) of fact begin(s) to see the total picture, otherwise there will be a "disconnect" between the opening and the witnesses.
3. Because the opening address is the first chance to acquaint the Court with the case and the themes that give depth; colour and movement to the allegations between the parties, first impressions are very important.
4. The aim of the opening address is to identify the issues and the extent of the disputes between the parties.
5. It comprises of the following elements:
   - 5.1 introduce your role as advocate in the case and that of your opponent;
   - 5.2 give a clear summary of the facts;
   - 5.3 give a clear statement of the disputed issues;
   - 5.4 briefly outline the evidence of the witnesses so the admissibility of the evidence is not challenged;
   - 5.5 identify the applicable law.

6. This involves speaking clearly and using appropriate language without reading from a prepared script.
7. Above all else, the address should tell a story that weaves in what each witness is going to tell the Court, and how each witness' evidence establishes the particular propositions for which you contend.
8. The persuasion process is assisted by recreating the moments leading up to the matters thaat gave rise to the litigation, as this allows the trier of fact to see what happened.
9. It is important to remember that most cases are decided on their fact not on questions of law, and if the facts can be conveniently woven into a single coherent theory at an early juncture, the more likely it is to be remembered later.
10. If the version first postulated makes sense as a story, it is likely to be persuasive.
11. The persuasion process is detracted from if, in the opening, you:
    - 11.1 argue the case;
    - 11.2 state your personal opinion;
    - 11.3 overstate your case;
    - 11.4 read from a prepared text.
12. The persuasion process is enhanced by:
    - 12.1 an approach that enables the audience to empathise with your client;
    - 12.2 minimising any empathy the Court may have for the opposing party;
    - 12.3 making eye contact.

Closing Address

13. The purpose of the closing address is to persuade the tribunal to determine the facts in your favour. By the time of the closing address, the advocate has:
    - 13.1 put the case theory to the tribunal; and
    - 13.2 told the story and explained the themes.
14. The goal of the closing is to weave together those aspects into a coherent whole.
15. **Your closing address should be prepared before your trial commences because it informs:**
    - 15.1 the opening;
    - 15.2 the evidence in chief;

15.3 the cross-examination; and

15.4 any documents that are to be tendered.

16. Again, structure is the key:

16.1 set out the case theory showing how your evidence establishes that theory; and

16.2 deal with the **relevant** law.

17. The following matters are important for a persuasive closing address:

17.1 use key words or phrases to encapsulate the important points;

17.2 remind the Court of the burden and standard of proof on the contentious issues;

17.3 make any concessions that seem appropriate in light of the evidence

17.4 review the important points in an orderly and structured way;

17.5 refer to the evidence that supports the case;

17.6 if there is evidence that damages the case, deal with it, such as through referring to the reasons why the evidence that undermines the case should not be accepted;

17.7 watch the audience and try to keep its attention;

17.8 decide before you commence what your closing words will be; and

17.9 be brief.

Examination in Chief

18. The aims of examination in chief are:

18.1 to establish a case, or part of it, through evidence obtained from the witness;

18.2 to present the evidence so that it is clear, memorable and persuasive;

18.3 to insulate the evidence insofar as possible from anticipated attack in cross-examination.

19. The basics for an effective examination are:

19.1 to keep it simple;

19.2 to use simple language, with one idea per question;

19.3 to set the scene;

19.4 to establish the context in which the events occurred, and then to determine the "action or event";

19.5 to know your objective:

19.5.1 what are you seeking to establish?

19.5.2 what part does the witness play?

19.5.3 in what order do I want to cover things;

19.6 know the answer before asking the question;

19.7 to not lead. Ask questions relating to how, what, when, where, why and who;

19.8 to structure, structure, structure. Progress logically, preferably chronologically;

19.9 to allow the witness to tell the story in his or her own words;

19.10 to watch and listen to the witness;

19.11 to control the witness and keep the evidence relevant; and

19.12 to stop the witness if the evidence is going off the point, so that the evidence is relevant.

20. It is a good tactic to bring out any weak points rather than risk a damaging impact in cross-examination, for instance, when the evidence of an accused in a criminal trial is different from the account given to the police.

The Order of the Witnesses

21. Start and finish the case with a witness who makes a strong impression.
22. It is usual to start with the witness whose evidence is first in time. But it may preferable to call as the first witness the one who gives the greatest overview of the case. It is likely to be the main defendant, or its representative.
23. The main defendant or its representative should be called either first or last;.
24. Corroborative witnesses should be called as close as possible to the evidence they are corroborating.
25. Fewer witnesses are better. Too many witnesses to establish the same fact can lead to inconsistencies and interfere with the persuasion process.

26. Expert witnesses should be called at the end of the case as they allow the case to finish on a strong note and provide the advocate with an opportunity to recap or emphasis the evidence.

Cross-examination

27. In examination in chief, the focus is on the witness. In cross-examination, the focus is on the cross-examiner.
28. The first question to ask is "is it necessary to cross-examine at all?"
29. Every question that does not advance your case injures it.
30. The main aims of cross-examination are:
    - 30.1 to advance your own case; and
    - 30.2 to reduce the evidence in chief of the witness:
        - 30.2.1 by destroying the evidence;
        - 30.2.2 by weakening the evidence; and
        - 30.2.3 by undermining the credibility of the witness.

The Ten Commandments of Cross Examination

1. be brief;
2. use short questions in plain and simple language;
3. use only leading questions;
4. do not ask the question if you are unsure of the answer
5. listen to the answer;
6. do not argue with the witness;
7. do not allow the witness to repeat the evidence in chief;
8. never allow the witness to explain;
9. do not ask one question too many
10. save the final point for address

31. Cross-examination must be relevant to some issue in the case.
32. The basics of cross-examination are:
    - 32.1 to consider the rule of fairness that requires a witness to be cross-examined on every material fact in dispute;

32.2 to take note of the body language of the witness as this can be a telling sign;

32.3 in order to control the witness, questions that force an answer of "yes", "no" or "I don't know" are best.

32.4 do not ask a question you do not know the answer to or do not ask a question on a central issue where you cannot anticipate what the witness will say; and

32.5 use short questions and simple language.

Main Aim and Basic Rules

33. As a matter of fairness, the cross-examiner is usually required to cross-examine a witness on every material fact in dispute and, more particularly, to put to the witness being cross-examined the case for the cross-examiner's claim so that the witness has an opportunity to respond.

Method and Style in Cross-examination

34. For an effective cross examination, various methods can be used:

34.1 confrontation. You can only confront a witness when you have real material to work with, e.g. statements or evidence of other people, or contradictory statements from the same witness;

34.2 drawing out every damaging detail. Evidence may imply that the witness is in doubt from memory, observation or truth. The skill is to draw out every damaging detail. Even if the witness admits to telling a lie, there is no need to leave it to just that;

34.3 undermining your witness. Undermining one witness against another may lead to confrontation. For example, an identification may be doubtful because the sighting was quick and done at a time when the witness was frightened, or the witness may not have heard things correctly because of background noise or other reasons.

Re-examination

35. The main purpose of re-examination is to remove; explain away or qualify the damage done to the evidence in cross-examination. If an inconsistency is not explained, prejudice will discredit to the party's case or witness. Re-examination repairs any distortion or incomplete accounts the cross-examination has produced.
36. The aim of the re-examination is to:
    - 36.1 remove ambiguities and uncertainties;
    - 36.2 instill facts; and
    - 36.3 revive the credit of the witness.
37. The decision on whether re-examination is necessary needs to be taken on the basis of questioning:
    - 37.1 whether the cross-examination damaged the case either on the facts or on the credit of the witness; and

    if the case is damaged, can it be defused.
38. If you do not know how, then re-examining can cause more damage.
39. Re-examination:
    - 39.1 must arise from cross-examination;
    - 39.2 like evidence in chief, allows no leading questions;
    - 39.3 can explain the reason for the action of the witness;
    - 39.4 can rebut situations where it has been suggested in cross-examination that the witness has recently invented his or her views.

Time Limits

40. Often an arbitral tribunal will limit the time allowed for cross-examination, either by setting:
    - 40.1 a time for each witness; or
    - 40.2 a fixed time to each party for all of its witness examinations during the whole hearing;
41. The tribunal will often set a timetable for openings and closings, and divide the remaining time in particular proportions to each party to the arbitration.
42. The parties are then able to allocate their respective time among the examination in chief; cross-examination and re-examination of witnesses.

43. The chess click timing described above is often flexible. If a party is running short of time, if it has not been perceived by the tribunal that it is wasted time, on application it would usually receive an extension of time.
44. Alternatively, the tribunal may make time for each individual witness, usually dependent upon the importance of the witness to the issue.
45. The tribunal may set time in the procedural order before the arbitration commences, usually after asking the parties to estimate the time they need for each witness.
46. Occasionally, a tribunal will not set time limits in advance, but may do so during the hearing. The tribunal is more likely to do so if time becomes tight.
47. Most arbitrations have a fixed length. Time is often tight and it is important to have thought about and made a reasonable estimate of how long each cross-examination will take. The cross-examiner should be prepared to reduce the cross-examination to focus on only the most important point if time begins to run out or if the tribunal imposes a tight time limit with little advance notice.

Questioning by the Tribunal

48. As described above, in the civil law system, judges are usually responsible for the gathering of evidence. Accordingly, arbitrators with a civil law background will often question a witness directly. The extent to which the questioning occurs differs between tribunals and often depends on the personalities of the tribunal members.
49. Many tribunals allow a cross-examination to conclude before asking its own questions of the witness.
50. Other tribunals may be very active and interrupt the cross-examination to ask questions of the witness.
51. Often an arbitrator will ask a question central to a cross-examination before the cross-examiner has established the ground work leading up to the question.
52. Particularly if the answer does not assist the cross-examiner, it may be difficult for the cross-examiner to take the witness back to where his or she needs to be in order to overcome the "damage" caused by the tribunal's question.

53. Nevertheless, and often in the face of opposition from your opponent and the tribunal, it is necessary to stand your ground in order to do so.
54. Questions from the tribunal provide an indication as to their thoughts either about the evidence of the witness or more generally the case of one party or another.
55. It is therefore important that the questions asked by the arbitrator are carefully considered and the conclusions drawn by the advocate as to the arbitrator's thoughts are followed up either in cross-examination or in other evidence adduced by the advocate.

Questioning Witnesses using Interpreters

56. Often witnesses need or wish to give evidence in a language other than the language of the arbitration.

57. If a witness requires an interpreter, the advocate may have a choice of either:
    - 57.1 simultaneous; or
    - 57.2 consecutive interpretation.
58. Simultaneous interpretation is where the interpreter translates the words of the witness as they are spoken and transmits them to the lawyers and arbitrators through headphones.
59. Consecutive interpretation is where the witness gives a full answer and the interpreter gives a full translation of the answer.
60. Simultaneous interpretation has the advantage that everyone in the arbitration hears both the questions and the answers in the language of the arbitration.
61. It is also easy to transcribe the evidence.
62. Further, if there are any disputes about the translation or confusion about a question or answer it can be resolved immediately.
63. Consecutive interpretation generally takes much longer than simultaneous interpretation.
64. It is especially important when a witness gives evidence using an interpreter that a cross-examiner:
    - 64.1 uses clear words to describe content;
    - 64.2 ensures that the witnesses understood the question;

64.3 ensures that the cross-examiner and the tribunal understands the answers.

65. One way of achieving that is to ask some critical questions two different ways or use a different central term so that the witness later cannot claim to have not understood the question.

66. The difficulty arises when the witness provides inconsistent answers between two questions asked.

Objections from the Opposing Advocate

67. Generally, there are fewer objections to the opposing advocate during cross-examination in international arbitration than in common law proceedings.

68. The lack of formal rules of evidence means that there are fewer grounds on which to object.

69. Tribunals generally try to create an atmosphere of mutual respect, and advocates are generally reluctant to object for fear of the tribunal perceiving that the advocate has disrupted the atmosphere of the arbitration.

70. The tribunal will often allow a question or ask that it be rephrased. The cross-examiner needs to remain flexible and be prepared to rephrase questions as needed. In those circumstances, objections will not usually disrupt the cross-examination or its flow to any great extent.

71. If they are not aimed at significant aspects, multiple objections are likely to alienate the tribunal.

Production of Documents and the Difference in Attitude between Common Law and Civil Systems

Production of Documents Inter-parties and by Third Parties in Common Law Jurisdictions

72. Most common law jurisdictions have extensive procedural rules concerning the production of documents. The rules cover production between parties to a dispute through discovery or a Notice to Produce, and by third parties at the direction of the Court through orders such as a subpoena.

73. Common law jurisdiction rules regarding discovery tend to be fairly broad. In the United States, for example, discovery is generally extensive in scope, and covers any document brought into existence during the events referred to in the pleadings, although some states are moving towards a more limited view of discovery.
74. The production of documents in common law jurisdictions is generally constrained by the requirement that the documents or categories of documents that a party seeks to have the other produce are relevant and have a legitimate forensic purpose. The interpretation of what constitutes a "legitimate forensic purpose", however, may be broad.

Legitimate Forensic Purpose

75. A legitimate forensic purpose will be established if the document gives rise to a line of enquiry relevant to the issues before the trier of fact, including for the purpose of meeting the opposing case by way of cross-examination.[1]
76. The necessity of a document to fairly determine issues may not be apparent before the arbitration or trial. The assessment of whether a document has a legitimate forensic purpose needs to take into account this possibility. A document may be required in cross-examination to refute unforeseen evidence in chief. The evaluation of whether a document is "necessary" to fairly dispose of proceedings therefore must embrace any document with any apparent relevance, even if this document does not appear necessary at the pre-inspection stage. [2]
77. Similarly, a narrow interpretation of the legitimate purpose of a subpoena in terms of its early return should not be taken as this allows the parties to determine the strengths and weaknesses of their case at an early stage.[3]
78. There is no need to avoid "fishing" by requiring the party seeking the documents to have some evidence that these documents are relevant. All documentary

[1] see *Apache Northwest Pty Ltd & Ors v Western Power Corporation* (1998) 19 WAR 350 at 374; *National Employers' Mutual General Insurance Association Ltd v Waind & Anor* [1978] 1 NSWLR 372 at 385*; Maronis Holdings Ltd & Ors v Nippon Credit Australia Ltd & Ors* (2000) 18 ACLC 609 at 613-614.
[2] See *Brand v Digi-Tech* [2001] NSWSC 425.
[3] See *Khanna v Lovell White Durrant* [1995] 1 WLR 121 at 123.

evidence should be available to promote a fair arbitration or trial. [4] Indeed historically, fishing was undesirable as it concerned the prior pleading of issues of which the evidence sought would be relevant, not the prior possession of evidence.[5]

Production of Documents Inter-party and by Third Parties in Civil Law Jurisdictions

79. Civil systems are far more limited in their use of the production of documents inter-party and by third parties. The production of documents can be ordered following the hearing of a petition, and the Court tends to only allow production where the documents sought are:
    79.1 documents referred to in a pleading;
    79.2 documents that prove pleaded facts by reference, as far as possible, to the contents of the document.
80. Discovery as such is virtually unknown in a civil system and is only ordered in very limited circumstances. Usually, parties disclose only those documents they wish to, and are rarely compelled to produce those documents that they wish to keep undisclosed.
81. These conflicting attitudes and customs towards the production of documents can cause issues in the arbitration process. For instance, an arbitral tribunal using the procedural rules of a civil law system may reject the production of documents in cases where the documents are helpful in proving an essential element of the party seeking the document's case.
82. In some circumstances, the refusal by a Court or tribunal to order production of documents can facilitate fraud or unconscionable conduct by the party refusing to produce documents, and unfairly disadvantage the other party.
83. In arbitral proceedings, parties are able to nominate the specific procedural rules they are to follow, including those relating to the production of documents. If this fails, the arbitral tribunal can select the rules in accordance with relevant procedural rules of the seat of the

[4] See *Bailey* (supra) at 143.
[5] See *Bailey & Ors v Beagle Management Pty Ltd & Ors* (2001) 105 FCR 136 at 143-144; *Chapman v Luminis Pty Ltd* [2001] FCA 1580 AT [48].

arbitration and of the arbitral institution, leading to a more hybrid set of procedural rules.[6] These are influenced by the backgrounds of the tribunal member(s). The choice of arbitrator(s) and rules of the proceedings therefore need to be carefully considered by the advocate.

[6] Rolf Trittmann and Boris Kasolowsky, 'Taking Evidence in Arbitration Proceedings between Common Law and Civil Law Traditions – The Development of a European Hybrid Standard for Arbitration Proceedings' (2008) UNSW Law Journal 31(1), 330-340.