Czech (& Central European) Yearbook of Arbitration®

Czech (& Central European) Yearbook of Arbitration®

Volume VII

2017

Conduct of Arbitration

Editors

Alexander J. Bělohlávek
Professor
at the VŠB TU
in Ostrava
Czech Republic

Naděžda Rozehnalová
Professor
at the Masaryk University
in Brno
Czech Republic

Questions About This Publication

www.czechyearbook.org; yearbook@ablegal.cz

LEX LATA

COPYRIGHT © 2017

By Lex Lata BV

All rights reserved. No part of this publication may be reproduced in any form or by any electronic or mechanical means including information storage and retrieval systems without permission in writing from the publisher.

Printed in the EU.
ISBN/EAN: 978-90-824603-6-0
ISSN: 2157-9490

Lex Lata BV
Mauritskade 45-B
2514 HG – THE HAGUE
The Netherlands

The title Czech (& Central European) Yearbook of Arbitration® as well as the logo appearing on the cover are protected by EU trademark law.

Typeset by Lex Lata BV.

Advisory Board

Anton Baier
Vienna, Austria

Silvy Chernev
Sofia, Bulgaria

Sir Anthony Colman
London, United Kingdom

Bohuslav Klein
Prague, Czech Republic

Andrzej Kubas
Warsaw and Krakow, Poland

Nikolay Natov
Sofia, Bulgaria

Piotr Nowaczyk
Warsaw, Poland

Stanislaw Soltysiński
Warsaw, Poland

Jozef Suchoža
Košice, Slovak Republic

Vladimír Týč
Brno, Czech Republic

Evangelos Vassilakakis
Thessaloniki, Greece

Editorial Board

Alena Bányaiová
Prague, Czech Republic

Radu Bogdan Bobei
Bucharest, Romania

Viorel Mihai Ciobanu
Bucharest, Romania

Marcin Czepelak
Krakow, Poland

Filip Černý
Prague, Czech Republic

Ian I. Funk
Minsk, Belarus

Marek Furtek
Warsaw, Poland

Aldo Frignani
Torino, Italy

Wolfgang Hahnkamper
Vienna, Austria

Vít Horáček
Prague, Czech Republic

Miluše Hrnčiříková
Olomouc, Czech Republic

Lászlo Kecskes
Budapest, Hungary

Vladimir Khvalei
Moscow, Russia

Asko Pohla
Talinn, Estonia

Květoslav Růžička
Pilsen/Prague, Czech Republic

Matthias Scherer
Geneva, Switzerland

Thomas Schultz
Geneva, Switzerland

Jiří Valdhans
Brno, Czech Republic

Kamil Zawicki
Warsaw and Krakow, Poland

Address for correspondence & manuscripts

Czech (& *Central European) Yearbook of Arbitration®*

Jana Zajíce 32, Praha 7, 170 00, Czech Republic
yearbook@ablegal.cz

Editorial support:

Tereza Tolarová, Klára Djemel, Lenka Němečková, Karel Nohava

Impressum

Institutions Participating in the CYArb® Project

Academic Institutions

University of West Bohemia in Pilsen, Czech Republic
Faculty of Law, Department of International Law & Department of Constitutional Law
Západočeská univerzita v Plzni, Právnická fakulta
Katedra mezinárodního práva & Katedra ústavního práva

Masaryk University in Brno, Czech Republic
Faculty of Law, Department of International and European Law
Masarykova univerzita v Brně, Právnická fakulta
Katedra mezinárodního a evropského práva

Pavol Jozef Šafárik University in Košice, Slovak Republic
Faculty of Law, Department of Commercial Law and Business Law
Právnická fakulta UPJŠ, Košice, Slovensko
Katedra obchodného a hospodárskeho práva

VŠB – TU Ostrava, Czech Republic
Faculty of Economics, Department of Law
VŠB – TU Ostrava, Ekonomická fakulta
Katedra práva

Institute of State and Law of the Academy of Sciences of the Czech Republic, v.v.i.
Ústav státu a práva Akademie věd ČR, v.v.i.

Non-academic Institutions Participating in the CYArb® Project

International Arbitral Centre of the Austrian Federal Economic Chamber
Wiener Internationaler Schiedsgericht (VIAC), Vienna

Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania
Curtea de Arbitraj Comercial Internațional de pe lângă Camera de Comerț și Industrie a României, Bucharest

Arbitration Court attached to the Hungarian Chamber of Commerce and Industry
A Magyar Kereskedelmi és Iparkamara mellett szervezett Választottbíróság, Budapest

Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic
Rozhodčí soud při Hospodářské komoře České republiky a Agrární komoře České republiky, Prague

Arbitration Court attached to the Czech-Moravian Commodity Exchange Kladno
Rozhodčí soud při Českomoravské komoditní burze Kladno (Czech Republic)

ICC National Committee Czech Republic
ICC Národní výbor Česká republika

The Court of Arbitration at the Polish Chamber of Commerce in Warsaw
Sąd Arbitrażowy przy Krajowej Izbie Gospodarczej w Warszawie

Slovak Academy of Sciences, Institute of State and Law, Slovak Republic
Slovenská akadémia vied, Ústav štátu a práva. Bratislava, Slovensko

Proofreading and translation support provided by: Agentura SPĚVÁČEK, s.r.o., Prague, Czech Republic, and Pamela Lewis, USA.

Contents

CASE LAW

NEWS & REPORTS

BIBLIOGRAPHY, CURRENT EVENTS, CYIL & CYArb® PRESENTATIONS, IMPORTANT WEB SITES

All contributions in this book are subject to academic review.

List of Abbreviations

AAA	American Arbitration Association
AAA International Arbitration Rules	American Arbitration Association Arbitration Rules
ACICA Rules	2016 Australian Centre of International Commercial Arbitration Rules
ADR	Alternate Dispute Resolution
AIA	(Italian Arbitration Association -Associazione italiana per l'arbitrato)
ArbAct	Act (of the Czech Republic) No. 216/1994 Coll., on Arbitration and the Enforcement of Arbitral Awards, as amended.
Australian Arbitration Act	International Arbitration Act 1974, Act No. 136 of 1974 as amended in 2011
CC	Act (of the Czech Republic) No. 89/2012 Coll., the Civil Code
CC (1964)	Act (of the Czech Republic) No. 40/1964 Coll., the Civil Code, as amended
CCP	Act (of the Czech Republic) No. 99/1963 Coll., the Code of Civil Procedure, as amended
CIETAC Rules	2015 China International Economic and Trade Arbitration Commission Arbitration Rules
Commercial Code	Act (of the Czech Republic) No. 513/1991 Coll., the Commercial Code, as amended
DIS Rules	1998 German Institute of Arbitration Rules
HKIAC	Hong Kong International Arbitration

	Centre
IBA	International Bar Association
ICAC Rules	Arbitration Rules of the International Commercial Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, adopted on 18 October 2005, as amended on 23 June 2010
ICC	International Chamber of Commerce.
ICC Rules	ICC Rules of Arbitration of the ICC International Court of Arbitration, in force as from 1 January 2012
ICT	Information and communication technologies
IP	Intellectual Property
LCIA	London Court of International Arbitration
LCIA Rules	Arbitration Rules of the London Court of International Arbitration, in force from 1 October 2014
Milan Rules	Rules of the Chamber of Arbitration of Milan
New York Convention	Convention in the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958
New Zealand Arbitration Act	Arbitration Act 1996, Public Act 1996 No 99, reprint 1 January 2011
OECD	Organisation for Economic Co-operation and Development
RAA Online Rules	Online Arbitration Rules of the Russian Arbitration Association, in force as from 1 October 2015
Rome I Regulation	Regulation (EC) No. 593/2008 of the European Parliament and of the Council of June 17, 2008, on the law applicable to contractual obligations.
SC	Supreme Court of the Czech Republic.
SCC	Stockholm Chamber of Commerce
SCC Rules	Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, in force as from 1 January 2010
SIAC	Singapore International Arbitration Centre
SIAC Rules	Arbitration Rules of the Singapore International Arbitration Centre, in force from 1 April 2013

Swiss Rules	2012 Swiss Rules of International Arbitration
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Arbitration Rules	Arbitration Rules of the United Nations Commission on International Trade Law
UNCITRAL Model law	the Model law on International Commercial Arbitration as adopted by the United Nations Commission on International Trade Law on 21 June 1985, with amendments on 7 July 2006
UNCITRAL Rules	UNCITRAL Arbitration Rules, revised in 2010, adopted in 2013
WIPO	World Intellectual Property Organization

Articles

Roman Prekop | Peter Petho

Opening Statements at Evidentiary Hearings

Key words:
opening statement | hearing | rule against argument | closing argument | case theme | storytelling | presentation techniques.

Abstract | *This article addresses opening statements at evidentiary hearings in international arbitration. The authors consider opening statements to be crucial in helping arbitrators understand the case and in establishing the credibility of counsel. They argue that despite the lack of comprehensive regulation at an international level, counsel should bear in mind potential restrictions on the content of opening statements under rules governing the counsels' profession and the law governing the arbitral proceedings, such as the US trial system restrictions. In addition, and irrespective of the applicability of these potential restrictions, the authors claim that the opening statement should not create improper expectations in the tribunal. On this basis, the authors recommend how to structure and present an effective and fair opening statement. The authors acknowledge that counsel's failure to follow mandatory restrictions – let alone recommendations – would unlikely undermine the award. Nonetheless, the authors conclude that counsels may severely damage their credibility and, as a result, the entire case, by presenting the opening statement inappropriately.*

| | |

Roman Prekop is a founding partner at Barger Prekop Attorneys admitted to practice in the Slovak Republic and New York. He is a member of the Slovak Bar Association, New York State Bar Association, International Bar Association, American Bar Association and Austrian Arbitration Association, and a co-chair of the Slovak chapter of New York State Bar Association's International Section. Roman Prekop focuses his practice on litigation and international arbitration, energy sector regulation, competition and projects, M&A, corporate and banking.
E-mail: rprekop@bargerprekop.com

Peter Petho is a senior associate at Barger Prekop Attorneys admitted to practice in the Slovak Republic. He is a member of the Slovak Bar Association, Chartered Institute of Arbitrators, UK, International Bar Association, and 'below 40' platforms of the ICC, LCIA, ICCA, Austrian Arbitration Association and Swiss Arbitration Association. Peter Petho focuses his practice on litigation and arbitration, construction law, real estate transactions, EU law, and general commercial matters.
E-mail: ppetho@bargerprekop.com

I. Introduction

7.01. 'You never get a second chance to make a first impression.'[1]

7.02. The opening statement is usually counsel's first oral argument presenting relevant facts and applicable law.[2] In international arbitration, the primary purpose of an opening statement is to help arbitrators understand the core issues and leave them with the impression that the party has a strong case.

7.03. At the beginning of an evidentiary hearing, the arbitral tribunal and the arbitrators are mentally fresh and eager to understand the case.[3] Therefore, opening statements are of critical importance for the outcome of the case. In particular, the following three basic goals can be achieved by an effective opening statement: (i) provide a roadmap of the case so that the tribunal understands the core issues, (ii) provide key background information to enable the tribunal to understand the case specifics, such as technical matters, and (iii) engage and persuade the tribunal by a convincing story.[4]

7.04. In addition, through providing an effective opening statement, counsel allows the arbitral tribunal to better understand expected witness testimonies and other evidence. After opening statements, the case usually unfolds by calling witnesses and presenting other evidence - not necessarily in an organized manner. Therefore, without having outlined the party's case, counsel runs the risk that the arbitral tribunal may overlook important evidentiary information provided in piecemeal.

7.05. Also, opening statements create a first impression that counts disproportionately. According to the primacy principle, most people develop first impressions within a few minutes of speaking or listening to someone.[5] For example, a US study found that 80% of lay jurors form opinions based on opening statements and do not change those opinions after hearing the evidence.[6] The primacy principle also applies in arbitration, albeit arguably to a lesser extent, because arbitrators often are seasoned attorneys who are more likely to reach conclusions

1 Advertising slogan. Author is not known.

2 2 Gary Born, International Commercial Arbitration, the Netherlands: Kluwer Law International 2294 (2014).

3 Doak Bishop, Advocacy in International Commercial Arbitration from the U.S. Perspective, available at: http://www.kslaw.com/library/pdf/bishop1.pdf (accessed on 31 March 2016).

4 *Ibid*.

5 Douglass Noland, Ten Points in Making an Effective Opening Statement, available at: https://www.justice.org/sections/newsletters/articles/ten-points-making-effective-opening-statement (accessed on 31 March 2016).

6 *Ibid*.

only after having listened to all of the evidence.[7] Nevertheless, first impressions count.[8]

7.06. Finally, counsel should seek to establish credibility with the tribunal through the opening statement.

7.07. Having in mind these introductory remarks, the following Sections focus on the regulatory framework of opening statements (Section II) and recommend how to structure and present an effective opening statement (Sections III and IV).

II. Regulatory framework

II.1. International Level

7.08. **Arbitration rules.** The procedure of an international arbitration is regulated by rules of the arbitration institutions such as HKIAC,[9] ICC,[10] LCIA,[11] SCC[12] or SIAC.[13] However, these rules typically do not address the issue of opening statements.

7.09. **Soft-Law instruments.** There are also soft-law instruments providing guidance regarding the conduct of an international arbitration such as the IBA Guidelines on Party Representation in International Arbitration. However, there is no soft-law addressing the permitted (or recommended) content of opening statements. For instance, the UNCITRAL Notes on Organizing Arbitral Proceedings merely acknowledge that the arbitral tribunal may use its discretion to determine whether opening statements are heard, the level of their detail and the sequence of their presentation.[14]

7.10. **Procedural orders.** In practice, arbitral tribunals address opening statements in procedural orders. The procedural order typically covers basic issues such as the length and sequence of the opening statements and use of demonstrative exhibits. However, it is not common for tribunals to instruct the parties on the content of an opening statement.

7.11. **Professional rules.** Opening statements may be subject to rules governing the counsel's profession. For example, in the United States, under Rule 3.4(e) of the Model Rules of Professional

7 Doak Bishop, *supra* note 3.

8 *Ibid*.

9 Hong Kong International Arbitration Centre Administered Arbitration Rules effective from 1 November 2013.

10 Rules of Arbitration of the International Chamber of Commerce effective from 1 January 2012.

11 Arbitration Rules of the London Court of International Arbitration effective from 1 October 2014.

12 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce effective from 1 January 2010.

13 Arbitration Rules of the Singapore International Arbitration Centre effective from 1 April 2013.

14 Paragraph 80 of the UNCITRAL Notes on Organizing Arbitral Proceedings.

Conduct, a lawyer shall not 'in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused […].'

7.12. Similarly, under Rules 19 and 21(d) of the Malaysian Legal Profession Practice and Etiquette Rules 1976: '[i]n opening a case, an advocate and solicitor shall not refer to any facts in the case which he is not in a position to prove' and '[i]t is improper for an advocate and solicitor to mislead his opponent by concealing or withholding in his opening speech positions upon which he intends to rely.'

7.13. **Lex arbitri.** The content of opening statements may also be restricted by the law governing the arbitral proceedings (*lex arbitri*). We address some of these restrictions under one of the most developed court systems famous for treating advocacy as an art, the US trial system.

II.2. The United States Trial System

7.14. **Golden rule.** In the US trial system, opening statements are subject to numerous restrictions, the violation of which may even lead to a mistrial.[15] The majority of these restrictions are legally based in the 'Golden Rule' governing the counsels' profession provided in Rule 3.4(e) of the Model Rules of Professional Conduct (cited above) and applicable case law.

7.15. **Examples of the Golden Rule restrictions on opening statements.** On the basis of the Golden Rule, US courts have held that trial counsel is prevented from, for example, (i) discussing facts which will not be called into evidence, (ii) presenting counsel's personal opinion, (iii) putting counsel's integrity in issue by making promises that cannot be honored or by attempting to put the credibility of opposing counsel into consideration, (iv) discussing trial strategy, for instance, by disclosing reasons for counsel's own tactics or commenting on the opposing counsel's tactics, (v) blaming the respondent for not admitting liability even though the facts may seem to be straightforward, (vi) appealing to emotions and irrelevant considerations, (vii) commenting on the law in too much detail (although speaking of relevant legal issues is permitted), (viii)

[15] James Fireman, Avoiding a Mistrial in Opening and Closing Statements, available at: http://www.firemanlawyers.com/Articles/articles_james_a1.pdf (accessed on 31 March 2016).

mentioning insurance coverage, or (ix) mentioning a previous trial.[16]

7.16. **Rule against argument.** US courts have also held that restrictions on opening statements in trials also include the 'rule against argument'. The rule against argument requires that counsel limits opening statement to addressing what the evidence will show and, at the same time, prevents counsel from arguing in opening statement.[17]

7.17. The US Supreme Court described the rule against argument as follows:

> '[a]n opening statement has a narrow purpose and scope. It is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; it is not an occasion for argument. To make statements which will not or cannot be supported by proof is, if it relates to significant elements of the case, professional misconduct. Moreover, it is fundamentally unfair to an opposing party to allow an attorney, with the standing and prestige inherent in being an officer of the court, to present to the jury statements not susceptible of proof but intended to influence the jury in reaching its verdict.'[18]

7.18. Put simply, the rule against argument serves to avoid the negative impact of leaving the jurors with improper, unfair first impressions.

7.19. Therefore, opening statements of US trial lawyers usually include phrases such as 'Ms. Smith will testify that […]' or 'the evidence will show that […].'[19]

7.20. The rule against argument does not, however, prevent counsel from presenting facts persuasively. Rather, the opening statement should present the facts as persuasively as possible.[20] This, however, may lead to problems in distinguishing arguments from factual statements.

7.21. As a general principle, impermissible argument occurs when counsel explicitly suggests the conclusion that should be drawn

---

16 *Ibid*.

17 John Cooley & Steven Lubet, Arbitration Advocacy, the United States of America: National Institute for Trial Advocacy 114 (2003).

18 James Fireman, *supra* note 15.

19 United States Courts: Differences Between Opening Statements & Closing Arguments, available at: http://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/differences (accessed on 31 March 2016).

20 *Ibid*.

from the facts.[21] The US Supreme Court held that '[a]n opening address has the purpose of providing an outline for jurors to understand what is going to be presented to them so that they can make decisions. It is not a time to put a spin on the evidence telling the jurors how they should interpret the evidence.'[22]

7.22. Plainly stated, while a remark that 'Ms. Smith will testify that […]' would be permissible, a statement to the jury that 'after you have heard Ms. Smith's convincing testimony, you will inevitably conclude that […]' would constitute impermissible argument.

7.23. Arguments are only permitted in closing arguments.[23] Closing arguments are, however, also subject to certain restrictions, the violation of which may also result in mistrial or reversal of a jury verdict by a trial or appellate court. For instance, in *Baptist Hospital* v. *Rawson*, the District Court of Appeal of the State of Florida held that the respondent's counsel made several 'egregious' comments which required the court to reverse the judgment and remand for a new trial.[24] Such comments included, in particular, a comment that the claimant's personnel were 'idiots' and that the claimant's case was insulting to the jury's intelligence.

7.24. In practice, there is usually no 'bright line' for distinguishing 'arguments' from 'persuasive presentation of facts'. In addition, most judges reportedly allow counsel to state the position or a compelling theme as a short argument before they start sustaining objections of the opposing counsel.[25] In any event, 'argument' is a relative concept and its interpretation always depends on the judge's discretion.[26]

7.25. **Implications for international arbitration.** Arguably, even if not expressly provided for in any institutional arbitration rules, soft-law, professional conduct rules or lex arbitri, the opening statement should not be unfair. We argue that for counsels not to lose credibility in international arbitration procedure, they should not engage in creating improper expectations and leaving the tribunal with an unfair and unfounded first impression.

7.26. In particular, by presenting the case inappropriately, counsel may severely damage their or their client's credibility and, as a result, the entire case. The international arbitration counsel should carefully prepare their opening statements so that they do not

[21] John Cooley & Steven Lubet, *supra* note 17, at 114.
[22] James Fireman, *supra* note 15.
[23] United States Courts, *supra* note 19.
[24] *Baptist Hospital v. Rawson*, 674 So.2d 777 (Fla. 1st DCA 1996).
[25] Mark Drummond, Is It Opening Statement or Opening Argument? available at: https://apps.americanbar.org/litigation/litigationnews/2007/november/1107_article_opening.html (accessed on 31 March 2016).
[26] John Cooley & Steven Lubet, *supra* note 17, at 114.

(i) 'over-argue' the opening statement, (ii) discuss disputed facts which will not be called into evidence, (iii) present personal opinions, (iv) put their or the opposing counsel's integrity in issue nor (v) appeal to emotions and irrelevant considerations.

7.27. On the other hand, it is difficult to imagine that a counsel's failure to follow any mandatorily applicable or recommendable restrictions on opening statements could leave the tribunal's award open to a setting aside procedure. The arbitrators are not, typically, akin to a lay jury. The risk that an improper oral presentation will unduly influence the arbitrator when deliberating over an award is rather moot. Therefore, in general, an award rendered in arbitration involving an improper opening statement will be hardly viewed as a fundamental breach of due process necessitating a court's set-aside decision.

III. Structure of an Opening Statement

7.28. An opening statement may be structured in several ways. The proper structure depends on the case specifics. Nonetheless, practitioners seem to agree that an effective opening statement should include: (i) a brief introduction of the counsel and parties, (ii) the case theme, (iii) a summary of the case and identification of the most critical issues, (iv) a detailed presentation of the facts with a brief statement of the applicable law, (v) comments on the opposing party's case, and (vi) a summary of the case and relief sought.

III.1. Introduction

7.29. Although there is no universally applicable recommendation, counsels should first greet the arbitral tribunal and briefly introduce themselves in one sentence.[27] It is not necessary for counsels to state their position in a law firm or expand on experience. Counsel should then introduce the client and party-representatives attending the hearing (if any). Finally, counsel should briefly introduce the opposing party to allow the tribunal to understand the parties' positions and backgrounds.

[27] Certain practitioners recommend that counsel start with a case theme in order to grab the decision-makers' attention immediately (See for instance, Elliott Wilcox, Punch Your Jurors in the Mouth During Opening Statement, available at: http://www.trialtheater.com/opening-statement/opening-statement-punch-your-jurors.htm (accessed on 31 March 2016).

III.2. Case Theme

7.30. The case theme is a short, simple concept capturing the entire case.[28] A powerful case theme should not exceed two or three sentences and should be stated in simple language, easy to remember, favorable to the client and consistent with universal concepts of fairness.[29]

7.31. The case theme is claimed to be crucial in jury trials. It is extremely important because it aims to give the jurors a 'lens' through which they will view the evidence.[30] It can be said that '[a]ny information that is consistent with the adopted theme is easily remembered and information not consistent with the theme is forgotten or disregarded.'[31]

7.32. Case themes are also important in international arbitration. As Doak Bishop, a US arbitration practitioner, notes, although arbitrators are detail-oriented professionals who are more likely to be persuaded by specific facts than generalized statements, the case themes may be significant for linking the case to values and, as such, case themes should not be neglected.[32]

7.33. In practice, creating a powerful case theme may be difficult. Yet, counsel should not hesitate to invest time in developing a case theme as it could provide an advantage over the opposing counsel who fails to develop a compelling theme.[33] Case theme inspiration can be found in well-known quotations, movies, or advertisings, but also through ordinary concepts that involve life's values, such as fairness, hard work, good over evil, weak over strong, justice, etc.[34] Counsel may be rewarded for developing a strong case theme in the event an tribunal adopts the case theme and assesses the entire case in that light.

III.3. Summary and Critical Issues

7.34. After presenting the case theme, counsel should briefly describe the overall theory of the case and identify the most critical issues that the tribunal must decide.

7.35. Counsel must be absolutely clear in presenting the theory of the case.[35] To do so, counsel should briefly answer the following

[28] John Cooley & Steven Lubet, *supra* note 17, at 116 and 117.
[29] Douglass Noland, *supra* note 5.
[30] Eliott Wilcox, Million Dollar Case Themes That You Can Steal, available at: http://trialtheater.com/general-trial-strategies/million-dollar-jury-trial-case-themes-you-can-steal/ (accessed on 31 March 2016).
[31] Douglass Noland, *supra* note 5.
[32] Doak Bishop, *supra* note 3.
[33] Eliott Wilcox, *supra* note 30.
[34] Douglass Noland, *supra* note 5.
[35] Antonin Scalia & Bryan Garner, Making Your Case: The Art of Persuading Judges, the United States of America: Thomson/West 155 (2008).

fundamental questions: What happened? Why did it happen? Why does all this make sense?[36]

7.36. A clear case theory will enable counsel to identify key factual and legal issues. In general, written submissions submitted before evidentiary hearings are not limited only to the most critical issues of the case. Therefore, the opening statement should be limited only to those key issues because an effective summary of the case and identification of most critical issues enables the tribunal to understand the core dispute and focus on the most important facts and legal issues during the evidentiary hearing.

III.4. Facts and Applicable Law

7.37. After summarizing the case and outlining the most crucial issues, counsel should proceed to outlining the relevant facts. If necessary, counsel should also briefly point out the applicable law but only to the extent necessary for the tribunal to understand the importance of facts.[37]

7.38. In general, counsels should only state facts that they will support with evidence and which they believe to be true and admissible.[38] For example, under Clause 9 of the IBA Guidelines on Party Representation in International Arbitration, counsel 'should not make any knowingly false submission of fact to the Arbitral Tribunal.'

7.39. Similarly, counsels should not submit legal arguments which they do not believe to be plausible. For instance, Rule 3.3 of the US Model Rules of Professional Conduct provides that a lawyer shall not 'make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.'

III.4.1 Presenting a Convincing Story

7.40. Counsel should present the facts as a compelling story fitting into the case theme (see above). Explaining and arguing is not as persuasive as effective storytelling.[39]

7.41. The story should be brief and interesting and normally follow events in chronological order rather than describing the testimony of each witness.[40] As Douglass Noland, a US trial lawyer, notes, '[a] cold listing of facts to which each witness

[36] John Cooley & Steven Lubet, *supra* note 17, at 116.
[37] *Ibid.*, at 116 and 117.
[38] *Ibid.*, at 116.
[39] Douglass Noland, *supra* note 5.
[40] Bryan Garner, The Winning Oral Argument, the United States of America: Thomson West 30 and 32 (2009).

will testify fails to persuade.' In addition, the witness-by-witness approach is not only unpersuasive but also boring.[41] Noland claims that '[i]t is common that when people receive unconnected facts or information, they become anxious and soon stop listening.'[42] Chronological organization helps keep the story dynamic.[43]

7.42. The story must be to the point – counsel should not discuss irrelevant or non-essential facts.[44] Irrelevant or non-essential facts may not only distract the arbitrators' attention from crucial issues, but also imply that the case is weak and that counsel is attempting to hide this by expanding on irrelevant matters.[45]

7.43. It is held that the story should start strong - reiterating that the principle of primacy is of key importance in effective advocacy.[46] Therefore, counsel should start with facts that are critical for the story and have the largest impact on the tribunal.[47]

7.44. In the middle, counsel should expand on the party's story. In order to make the story more convincing, counsel should support the facts by quoting the precise language of key documents and testimony. For instance, when dealing with a contractual claim, counsel should specifically refer to the relevant provision, quote it and explain why it supports the party's position. According to Bishop, '[t]he more specific and concrete the evidence, the more persuasive it will be.'[48] To be persuasive, counsel should show, not only tell.[49] Also, if there are undisputed facts or evidence in the party's favor, counsel should clearly communicate this to the tribunal.[50]

7.45. Counsel should also bear in mind that good storytelling is often accompanied by visual aids, such as pictures, charts, diagrams, power-point presentations, etc.[51] The saying 'a picture is worth a thousand words' also applies in opening statements. Visual aids may also be extremely useful when discussing complex technical issues.[52]

7.46. On the other hand, counsel should be careful not to use too many aids as this may confuse the tribunal. In addition, if counsel decides to use a visual aid, they must pay special attention to

41 John Cooley & Steven Lubet, *supra* note 17, at 117.
42 Douglass Noland, *supra* note 5.
43 John Cooley & Steven Lubet, *supra* note 17, at 117.
44 *Ibid.*, at 117.
45 *Ibid.*, at 117.
46 Douglass Noland, *supra* note 5.
47 John Cooley & Steven Lubet, *supra* note 17, at 116.
48 Doak Bishop, *supra* note 3.
49 *Ibid.*
50 John Cooley & Steven Lubet, *supra* note 17, at 117.
51 2 Gary Born, International Commercial Arbitration, *supra* note 1, at 2295.
52 Doak Bishop, *supra* note 3.

potential typographical errors to avoid undue embarrassment. In any event, using visual aids should be consulted with the arbitral tribunal and opposing party before the evidentiary hearing in order to avoid objections and the resulting delays.

7.47. In the middle of the opening statement, counsel should also address 'bad facts' and weaknesses of the case.[53] It is naïve to expect the arbitrators to believe the case does not have any weaknesses. As David Robbins, a US arbitration practitioner, notes, '[e]very case has weaknesses because every case is a reflection of life and […] [s]lam dunks are usually reserved for basketball courts, not arbitration hearings.'[54]

7.48. Therefore, when preparing an opening statement, counsel should answer the following two questions: What do I hate about this case? What scares me the most about this case?[55]

7.49. If counsel does not address the weaknesses of the case, opposing counsel certainly will. Additionally, failing to address case weakness affords opposing counsel the opportunity to not only exaggerate the weaknesses, but also to present the weakness in such a way so as to suggest the opposing counsel is hiding important information from the tribunal.[56] However, if counsels honestly reveal the unfavorable facts upfront; yet counters by explaining why there are more compelling facts in the clients' favor (a process sometimes referred to as 'drawing the sting'), counsels may not only enhance their credibility, but might also mitigate the potential excess damage resulting from opposing counsel's persuasive (initial) presentation of the case's weaknesses.

7.50. Finally, the story should end as it began – powerfully, by hitting the case theme and stressing the case highlights. The purpose is to make the tribunal accept the case theme and remember the most important facts in the party's favor.[57] In this respect, counsel cannot avoid being repetitive. However, when effective, there is a good reason for doing so.

---

53 Bryan Garner, *supra* note 40, at 143.

54 David Robbins, *The Opening Statements and Summations That Arbitrators Want to Hear*, Summer 2002 PIABAR Journal 3 (2002).

55 Eliott Wilcox, Why Should You Win This Jury Trial?, available at: http://trialtheater.com/general-trial-strategies/strengths/ (accessed on 31 March 2016).

56 *Ibid*.

57 Douglass Noland, *supra* note 5.

III.4.2.Risks of Overselling the Case

7.51. Counsel should strike a fair balance between presenting a convincing story and overselling the case.

7.52. Counsel should particularly avoid overselling the case by giving promises they may have difficulty honoring.[58] In general, there is nothing wrong with making promises in an opening statement.[59] However, if counsels make promise during opening statement, they need to keep their word.[60] Otherwise, counsel runs the risk of losing credibility in the tribunal's eyes.[61]

7.53. In addition, failing to honor promises made in the opening statement may result in the unnecessary losing of the case. In particular, counsel may create an image of a bulletproof case when trying to persuade the tribunal during the opening statement, yet fail to substantiate such assertions during the evidentiary hearing. In such case, there is a risk that the tribunal will assess the case under the higher standard set by the counsel. As a result, counsels may (unnecessarily) lose the case by failing to satisfy the 'bulletproof' bar that counsels set for themselves.[62]

7.54. Counsel should keep in mind the golden rule that less is sometimes more. For instance, remaining silent about an important fact during the opening statement may make the arbitrators feel that they revealed such fact during the hearing themselves and, therefore, it is more likely that they will remember that very specific fact.[63] Accordingly, it is usually recommended to undersell the case in an opening statement and, during the evidentiary hearing. Let the tribunal find out that the case is stronger than it thought it would be during the opening statement.[64]

III.5. Comments on the Opposing Party's Case

7.55. After having presented her own case, counsel should rebut the opposing party's case. The rebuttal must be brief – counsel should particularly avoid discussing details of the opposing party's case.[65] The rebuttal must also be firm and straightforward.[66]

---

58 *Ibid*.

59 Eliott Wilcox, Keeping your opening statement promises, available at: http://trialtheater.com/trial-skills/opening-statement/keeping-your-opening-statement-promises/ (accessed on 31 March 2016).

60 *Ibid*.

61 Douglass Noland, *supra* note 5.

62 Eliott Wilcox, Are you promising too much in your opening statement?, available at: http://www.trialtheater.com/articles/promise.htm (accessed on 31 March 2016).

63 David Robbins, *supra* note 54, at 4.

64 Eliott Wilcox, *supra* note 62.

65 John Cooley & Steven Lubet, *supra* note 17, at 118 and 119.

66 *Ibid.*, at 118 and 119.

However, counsel must not mock the opposing party's case. This may severely undermine the counsel's credibility.

7.56. The claimant's counsel should anticipate the respondent's opening statement. Usually, the claimant's counsel will rely on the respondent's written submissions. Subject to the tribunal's approval, the claimant's counsel may also reserve some time for a reply to address unexpected statements of the respondent's opening.

7.57. The respondent's counsels have the advantage of hearing the claimant's opening statement before delivering their own opening. In particular, the respondent's counsel may refer the tribunal to specific facts and stress that the claimant's counsel omitted them. On the other hand, this requires that the respondent's counsels carefully listen to the claimant's opening statement and be sufficiently flexible to adjust their own statement, if necessary.

III.6. Summary and Relief Sought

7.58. After having rebutted the opposing party's case, counsels should summarize the reasons their case should succeed. This includes a brief summary of the most important facts and applicable law. Counsel should also note the standard of proof and the required burden of proof.[67] Opening statement should be concluded with a clear and comprehensive statement of the relief sought.[68]

IV. General Presentation Techniques for Opening Statements

7.59. We have addressed some of the specific presentation techniques above, for instance, those relating to creating a convincing story. In this Section, we outline presentation techniques that apply throughout the entire opening statement.

7.60. **Focus on the case.** Successful opening statements focus the tribunal's attention on the party's case, not on counsel's performance. According to Piero Calamandrei, '[i]f a judge forgets a lawyer's face and his name, his voice and his gestures, and still remembers the arguments which, coming forth from that nameless toga, won the case – that man is a great lawyer.'[69]

7.61. **Subtle presentation.** Opening statements should be presented subtly, although with confidence. Calamandrei explains that

[67] *Ibid.*, at 120.

[68] Antonin Scalia & Bryan Garner, *supra* note 35, at 156.

[69] Piero Calamandrei, Eulogy of Judges, the United States of America: The Lawbook Exchange 15 (2008).

'[a] lawyer should be able to suggest the arguments which will win his case so subtly to the judge that the latter believes he has thought of them himself.'[70]

7.62. **Reading.** Counsels should not read the opening statement.[71] They should look the arbitrators in their eyes and, if necessary, occasionally look into a bullet-point outline of the opening statement. Looking in the arbitrators' eyes creates the desired connection with counsel.[72]

7.63. **Speaking style.** Counsel should speak naturally and comfortably. Not too fast, not too slow, not too loudly, or too quietly.[73] The counsels' speaking style must demonstrate that they are calm and trustworthy.[74]

7.64. **Mastering the use of the pause.** Although usually undervalued, a pause serves many purposes. In particular, a pause can emphasize an immediately following sentence.[75]

7.65. **Voice development.** It is ideal to develop a clear, strong, pleasant and low-range voice.[76] High pitched voices, although natural, may not only imply stress, but also irritate a listener.[77]

7.66. **Avoiding speech tics.** Counsel should practice to purge their speech of 'ums', 'ers', and 'ahs'.[78]

7.67. **Avoiding distracting gestures.** Counsel should stand (or sit) straight. A tribunal may be distracted or even annoyed by counsel who is swaying, putting her glasses on and off or using hand gestures.[79]

V. Conclusion

7.68. Opening statements are an important feature of evidentiary hearing. They not only provide arbitrators a roadmap to the case, but also give counsel the opportunity to present a convincing case and establish credibility with the arbitral tribunal. This opportunity should not be wasted.

7.69. In practice, arbitral tribunals deal with opening statements in procedural orders on a case by case basis. However, the tribunal's instructions are normally limited to whether the opening statements are heard or submitted in writing, their length and sequence of their presentation, including whether

[70] *Ibid*., at 16.
[71] Antonin Scalia & Bryan Garner, *supra* note 35, at 181.
[72] Antonin Scalia & Bryan Garner, *supra* note 35, at 178.
[73] Bryan Garner, *supra* note 40, at 25.
[74] Bryan Garner, *supra* note 40, at 101.
[75] Antonin Scalia & Bryan Garner, *supra* note 35, at 146.
[76] Bryan Garner, *supra* note 40, at 17 and 20.
[77] Bryan Garner, *supra* note 40, at 20.
[78] Bryan Garner, *supra* note 40, at 23.
[79] Antonin Scalia & Bryan Garner, *supra* note 35, at 183.

the claimant is entitled to present a reply statement to the respondent's opening. Procedural orders, arbitration rules and soft-law instruments usually provide no or very little guidance on opening statements.

7.70. Certain restrictions on the content of opening statements may result from rules governing the counsel's profession and the law governing the arbitral proceedings. For example, the United States trial system, a system with a highly developed art of advocacy, includes numerous restrictions, the violation of which may even lead to a mistrial. These US court trial system restrictions are based on generally applicable requirements of fair and due process. In this light, we recommend to respect certain due process aspects of the US court trial practice also in international arbitration outside of the US. In particular, counsels should exercise caution to not 'over-argue' the opening statement, discuss disputed facts which will not be called into evidence, present counsel's personal opinion, put their own or the opposing counsel's integrity in issue and appeal to emotions and irrelevant considerations. We argue that although it is difficult to imagine that a counsels' failure to follow these restrictions could undermine the tribunal's award, counsels may severely damage their credibility and, as a result, the entire case, by presenting it inappropriately.

7.71. In practice, there is no universally applicable opening statement structure. Nonetheless, practitioners seem to agree that an effective opening statement should include (i) a brief introduction of the counsel and parties, (ii) case theme, i.e. a short, simple, easy to remember and client-favorable embodiment of the case consistent with universal concepts of fairness, (iii) summary of the case and identification of most critical issues, (iv) detailed presentation of facts formulated as a compelling (but not overstated), to the point and interesting story in chronological order, and, if necessary, a brief statement of applicable law, (v) comments on the opposing party's case and (vi) clear and comprehensive summary and relief sought.

7.72. International arbitration counsel should also be mindful of general presentation techniques of oral advocacy and give particular care to case focus. In particular, counsel should not read the statement but should look into the arbitrators' eyes, while presenting opening statement subtly, yet confidently. Delivering an effective opening statement is a true art and its mastery requires hard work and experience. Those that work hard in developing the opening statement may be rewarded not only by an eagerly listening tribunal, but also by the satisfaction

of having contributed towards seeking to convince the tribunal to rule in their client's favor.

| | |

Summaries

DEU [***Eröffnungsplädoyers in Schiedsverfahren***]
Dieser Beitrag befasst sich mit den Eröffnungsplädoyers, die im Rahmen von internationalen Schiedsverfahren gehalten werden. Laut den Autoren spielen diese eine Schlüsselrolle, wenn es darum geht, den Schiedsrichtern zu einem Verständnis des zur Verhandlung anstehenden Falls zu verhelfen und sich als Rechtsvertreter der jeweiligen Partei Vertrauenswürdigkeit zu verschaffen. Die These der Autoren lautet wie folgt: selbst wenn auf internationaler Ebene keine umfassenden Regelungen in diesem Bereich vorhanden sind, sollten die Parteienvertreter etwaige inhaltliche Beschränkungen im Auge behalten, wie sie gemäß den nationalen Standesvorschriften und dem nationalen Recht zur Schiedsgerichtsbarkeit für das Eröffnungsplädoyer gegeben sind – so z. B. Beschränkungen, die sich aus den Prozessvorschriften in den USA ergeben. Selbst wenn man die Anwendbarkeit derartiger Beschränkungen einmal dahingestellt sein lässt, soll das Eröffnungsplädoyer darüber hinaus, will man den Ratschlägen der Autoren dieses Beitrags folgen, keine unangemessenen Erwartungen auf Seiten des Schiedstribunals wecken. Vor diesem Hintergrund geben die Autoren Empfehlungen ab, wie ein wirkungsvolles und faires Eröffnungsplädoyer gestaltet und vorgetragen werden sollte. Die Autoren konzedieren, dass der Schiedsspruch wahrscheinlich auch dann nicht in Zweifel zu ziehen ist, wenn die vorgeschriebenen Beschränkungen vom Parteienvertreter nicht eingehalten werden sollten – von den o. g. Empfehlungen ganz zu schweigen. Dennoch lautet das Fazit der Autoren dahingehend, dass der Parteienvertreter seiner Glaubwürdigkeit (und damit dem gesamten Fall) grundlegend schaden dürfte, falls er beim Vortrag seines Eröffnungsplädoyers den Grundsatz der Verhältnismäßigkeit außer Acht lässt.

CZE [***Zahajovací přednesy stran při projednávání sporů***]
Tento článek se zabývá zahajovacími přednesy stran při projednávání sporů v mezinárodním rozhodčím řízení. Komentátoři považují zahajovací přednesy za klíčové pro pomoc rozhodcům pochopit spor a důvěryhodnost procesních zástupců. Tito komentátoři tvrdí, že i přes nedostatek komplexní

regulace na mezinárodní úrovni by zástupci měli pamatovat na možná omezení obsahu úvodních přednesů podle pravidel upravujících profesní standardy zástupců a práva vztahující se na rozhodčí řízení, jako například omezení podle soudního systému USA. Navíc a bez ohledu na použitelnost těchto omezení, komentátoři tvrdí, že zahajovací přednes by neměl vytvářet nepřiměřená očekávání na straně rozhodčích senátů. Ve světle toho komentátoři doporučují koncipovat a prezentovat efektivní a férový úvodní přednes. Komentátoři uznávají, že nedodržení povinných omezení ze strany zástupce - nemluvě o doporučeních - pravděpodobně nezpochybní rozhodčí nález. Komentátoři však uzavírají, že zástupce může zásadně poškodit svou důvěryhodnost a v důsledku toho i celou svou prezentaci sporu tím, že povede svůj úvodní přednes nepřiměřeně.

| | |

POL [***Mowy otwierające posiedzenie***]
Autorzy uważają, że mowy otwierające są kluczem do lepszego zrozumienia sprawy przez sędziów arbitrażowych oraz do uwiarygodnienia przedstawicieli stron. Ich zdaniem mowa otwierająca nie powinna stwarzać nieuzasadnionych oczekiwań po stronie trybunału, stąd autorzy zalecają przygotowywanie i wygłaszanie efektywnej, rzetelnej mowy, tak aby przedstawiciele stron nie nadszarpnęli swej wiarygodności i w efekcie – wiarygodności całej sprawy.

FRA [***Les discours introductifs à l'occasion des audiences***]
Le discours introductif est un élément clé de la procédure d'arbitrage, qui aide les arbitres à comprendre l'affaire et les avocats à démontrer leur crédibilité. Ce discours ne devrait pas susciter des attentes démesurées de la part du tribunal. Ainsi, il convient de présenter un discours efficace et juste, ne compromettant pas la crédibilité des avocats, ce qui pourrait avoir un impact négatif sur toute l'affaire.

RUS [***Вступительные речи на заседаниях***]
Авторы рассматривают вступительные речи за ключевые для помощи арбитрам понять дело и получить доверие представителей. Они утверждают, что вступительные речи не должны создавать необоснованные ожидания со стороны Трибунала и при этом рекомендуют создать и предоставить эффективную и справедливую речь, для того,

чтобы представители не повредили свою достоверность и следовательно все дело.

ESP [***Discursos de apertura en las sesiones***]
Los autores consideran los discursos de apertura actos clave para facilitar a los árbitros la comprensión del caso y obtener la credibilidad de los representantes. Sostienen que el discurso de apertura no debería crear expectativas inadecuadas en el tribunal y, por ello, recomiendan redactar y presentar un discurso eficiente y justo, de modo que los representantes no perjudiquen su credibilidad y, por consiguiente, todo el caso.

| | |

Bibliography

2 Gary Born, International Commercial Arbitration, the Netherlands: Kluwer Law Intrnational 2294 (2014).

Piero Calamandrei, Eulogy of Judges, the United States of America: The Lawbook Exchange 15 (2008).

John Cooley & Steven Lubet, Arbitration Advocacy, the United States of America: National Institute for Trial Advocacy 114 (2003).

Bryan Garner, The Winning Oral Argument, the United States of America: Thomson West 30 and 32 (2009).

David Robbins, *The Opening Statements and Summations That Arbitrators Want to Hear*, Summer 2002 PIABAR Journal 3 (2002).

Antonin Scalia & Bryan Garner, Making Your Case: The Art of Persuading Judges, the United States of America: Thomson/West 155 (2008).