

Workshop :

**Drafting a Request for Arbitration /
Notice of Arbitration**

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Scheme of Workshop

- The **technical and strategic functions** of a Request for Arbitration / Notice of Arbitration
- **Useful headings** – a checklist you can use
- **Some important considerations** when drafting a Request for Arbitration / Notice of Arbitration
- **Practical tips** when drafting
- Putting these ideas into practice
 - **Instructions and pointers**
 - **Breakout** into groups / Actual drafting of a Request for Arbitration
 - **Review** of each group's draft Request for Arbitration
- Final Questions & Answers

Technical & Strategic Functions

- Technical functions :
 - To commence the arbitration, pursuant to the chosen rules.
 - Fixes date of commencement of the arbitration – impt. for time-bar.
 - To give notice of the referral to arbitration to the opposing party.
 - **(In investment arbitration : To *accept* the State's *offer* to arbitrate.)**
 - Election not to go to court.
 - To trigger the arbitral institute's / centre's administration of the case.
- Strategic functions :
 - Increases the pressure to resolve the dispute (“shock & awe”).
 - Timing is often intentional.
 - Crystallizes the issues in dispute, and relief / remedies claimed.
 - Framing of case : First chance of persuading the arbitrator / opponent.
 - Teasing out the other side's position in the Response / Answer (if applicable).
 - For **non-confidential** disputes – may form the basis of a press release.

Useful Headings (1)

(A) DEMAND THAT THE DISPUTE BE REFERRED TO ARBITRATION

(B) THE PARTIES & THEIR REPRESENTATIVES (*See also* Institution Rules, below)

- Names, registered address(es), place of incorporation (if a company) or residence, telephone number(s), facsimile number(s) and electronic mail address(es), if known, of each of the parties to the arbitration and their representatives, if any.
- For State-Respondents, identify (if any) the relevant department / governmental body.

(C) THE ARBITRATION AGREEMENT

- Reference to the arbitration clause or the separate arbitration agreement that is invoked (and a copy of it).
- **If necessary, show how the Claimant can avail itself of the arbitration clause / agreement.**
- **If necessary, show how any pre-conditions to arbitration have been duly met.**

Useful Headings (2)

(D) THE CONTRACT / TREATY / OTHER INSTRUMENTS

Reference to the contract (or other instrument [e.g., investment treaty]) out of or in relation to which the dispute arises and where possible, attach a copy of it.

(E) THE DISPUTE BETWEEN THE PARTIES

- Brief statement describing the nature and circumstances of the dispute.
- Applicable rules of law?
- Spell out the Respondent's respective breaches / violations.
- Link to relief / remedy claimed – see below.

(F) CONDUCT OF THE ARBITRATION

- **State choice of rules, unless earlier agreed. Propose, if none.**
- State any procedures which the parties have previously agreed.
- State any procedures which the Claimant wishes to propose.
- Consider suggesting e.g. language of arbitration and location of hearings.

Useful Headings (3)

(G) TRIBUNAL

- Proposal for the **number** of arbitrator(s), if this is not earlier agreed.
- Unless the parties have agreed otherwise, the **nomination of an arbitrator** – either sole, or one out of three.

(H) RELIEF / REMEDY CLAIMED

- Specify the relief claimed – damages, declaration, injunction, costs?
- Add : *“Such further or other relief / remedies as the Tribunal may deem appropriate in the circumstances of this case.”*
- Where possible, give an initial / general quantification of the claim amount.

(I) NOT STATEMENT OF CLAIM OR CASE

- May wish to state that the Request / Notice is not the Claimant’s full Statement of Claim or Case.
- Reserve right to expand on and/or amend relief / remedies claimed.

Some important considerations (1)

- Comply strictly with the applicable rules – tick *all* the boxes.
- Clear, concise, readable – first attempt at persuasion.
- Length / thickness of document – a question of style and intended impact.
- Nature and basis of claim should be clearly spelt out.
- Relief claimed must be clear (and not inconsistent, later on).
- ***Do you include Statement of Claim / Statement of Case?***
- ***Do you state the amount of damages / compensation claimed?***
- Enclose the contract & arbitration agreement?

Some important considerations (2)

- **Who are the appropriate parties to the arbitration? (See e.g. Art 25, ICSID Conv.)**
 - *PT First Media v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372 (CA, Singapore) **[Commercial case : Non-signatory?]**
 - *Sanum Investments Limited v The Government of the Lao People's Democratic Republic* [2016] SGCA 57 (CA, Singapore) **[Investment case : PRC-Laos BIT]**
- **Have you fulfilled the requirements to bring the case to arbitration? (e.g. attempts to mediate, etc.)**
 - *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another* [2014] 1 SLR 130 (CA, Singapore) **[Multi-tier dispute resolution clause]**
- **Do you serve it on the other side, or the institute / centre? Provide copies?**
 - SIAC Rules 2016, Rules 3.3, 3.4 --- 1 to Registrar, SIAC and 1 to Respondent (all at the same time).
 - ICC Rules 2012, Art 4 --- 1 + **(1 x no of arb.)** + 1 copies to ICC Secretariat.
 - ICSID Conv., Art 36; Inst. Rules, Rule 4 --- 1 + 5 signed copies to Secretary-General.

SIAC Rules 2016, Rule 3

3.3 The date of receipt of the complete Notice of Arbitration by the Registrar shall be deemed to be the date of commencement of the arbitration. For the avoidance of doubt, the Notice of Arbitration is deemed to be complete when all the requirements of Rule 3.1 and Rule 6.1(b) (if applicable) are fulfilled or when the Registrar determines that there has been **substantial compliance** with such requirements. SIAC shall notify the parties of the commencement of the arbitration.

3.4 The Claimant shall, at the same time as it files the Notice of Arbitration with the Registrar, send a copy of the Notice of Arbitration to the Respondent, and shall notify the Registrar that it has done so, specifying the mode of service employed and the date of service.

ICC Rules 2012, Article 4

- (1) A party wishing to have recourse to arbitration under the Rules shall submit its Request for Arbitration (the “Request”) **to the Secretariat at any of the offices specified in the Internal Rules. The Secretariat shall notify the claimant and respondent of the receipt of the Request and the date of such receipt.**
- 2) The date on which the Request is received by the Secretariat shall, for all purposes, be deemed to be the date of the commencement of the arbitration. ...
- 4) Together with the Request, the claimant shall: a) **submit the number of copies** thereof required by Article 3(1); and b) **make payment of the filing fee** required by Appendix III (“Arbitration Costs and Fees”) in force on the date the Request is submitted.

In the event that the claimant **fails to comply with either of these requirements, the Secretariat may fix a time limit** within which the claimant must comply, failing which the **file shall be closed** without prejudice to the claimant’s right to submit the same claims at a later date in another Request.

- 5) **The Secretariat shall transmit a copy of the Request and the documents annexed thereto to the respondent** for its Answer to the Request **once the Secretariat has sufficient copies of the Request and the required filing fee.**

ICSID Convention, Article 36

(1) Any Contracting State or any national of a Contracting State wishing to institute arbitration proceedings shall address a **request** to that effect **in writing to the Secretary-General** who shall send a copy of the request to the other party.

(2) The request shall contain information concerning the **issues in dispute**, the **identity of the parties** and their **consent to arbitration** in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings.

(3) The Secretary-General **shall register the request unless** he finds, on the basis of the information contained in the request, that the **dispute is manifestly outside the jurisdiction of the Centre**. He shall forthwith notify the parties of registration or refusal to register.

ICSID Institution Rules (1)

Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules)

Rule 1 : The Request

- (1) Any Contracting State or any national of a Contracting State wishing to institute conciliation or arbitration proceedings under the Convention shall address a request to that effect in writing to **the Secretary-General at the seat of the Centre**. *The request shall indicate whether it relates to a conciliation or an arbitration proceeding.* It shall be drawn up in an official **language** of the Centre, shall be **dated**, and shall be **signed** by the requesting party or its duly authorized representative.
- (2) The request may be made jointly by the parties to the dispute.

ICSID Institution Rules (2)

Rule 2 : Contents of the Request

- (1) The request shall:
 - (a) **designate precisely each party** to the dispute and state the **address** of each;
 - (b) **state, if one of the parties is a constituent subdivision or agency of a Contracting State**, that it has been **designated** to the Centre by that State pursuant to Article 25(1) of the Convention;
 - (c) **indicate the date of consent and the instruments in which it is recorded**, including, if one party is a constituent subdivision or agency of a Contracting State, similar data on the approval of such consent by that State unless it had notified the Centre that no such approval is required;

ICSID Institution Rules (3)

Rule 2 : Contents of the Request (continued) ...

- (d) **indicate** with respect to the party that is a **national of a Contracting State**:
 - (i) its nationality on the **date of consent**; and
 - (ii) **if the party is a natural person** :
 - (A) his **nationality on the date of the request**; and
 - (B) that he **did not have the nationality of the Contracting State party** to the dispute either on the date of consent or on the date of the request; or
 - (iii) **if the party is a juridical person** which on the date of consent had the nationality of the Contracting State party to the dispute, the **agreement of the parties that it should be treated as a national** of another Contracting State for the purposes of the Convention;

ICSID Institution Rules (4)

Rule 2 : Contents of the Request (continued) ...

- (e) contain **information concerning the issues in dispute** indicating that there is, between the parties, **a legal dispute arising directly out of an investment**; **and**
 - (f) state, **if the requesting party is a juridical person**, that it has taken **all necessary internal actions to authorize the request**.
- (2) **The information required by subparagraphs (1)(c), (1)(d)(iii) and (1)(f) shall be supported by documentation**.
- (3) **"Date of consent"** means the date on which the parties to the dispute consented in writing to submit it to the Centre; if both parties did not act on the same day, it means the date on which the second party acted.

ICSID Institution Rules (5)

- **Optional Information in Request – Rule 3**

Agreed number of arbitrators, agreed method of appointment, other agreed provisions.

- **Copies – Rule 4**

1 + 5 (or more), signed. See also Administrative and Financial Regulation 30.

- **Acknowledgment / Transmission – Rule 5**

Acknowledgement issued once Request received. Transmission to respondent only after fee is paid.

- **Registration / Commencement – Rule 6**

Registered / Not registered (with reasons).

Date of registration = Start date of proceedings.

If you have done it correctly ...

ICSID > Cases

Cases

Refine By:

Case Status

Pending

Concluded

Case Type

Arbitration

Conciliation

Applicable Rules

ICSID Convention - Arbitration Rules

ICSID Convention - Conciliation Rules

ICSID Additional Facility - Arbitration Rules

ICSID Additional Facility - Conciliation Rules

UNCITRAL

Ad Hoc

Stage of Proceeding

Annulment

Consolidation

Correction

Interpretation

Original

Rectification

Resubmission

Revision

Supplementary Decision

Claimant:

Respondent:

Claimant(s) Nationality(ies): Australian Austrian Bahamian Barbadian

Respondent(s) Nationality(ies): Albanian Algerian Argentine

Case No.:

SEARCH **RESET**

Pending Cases with Details **Concluded Cases with Details** **Case Count : 598**

Case No.	Claimant(s)	Respondent(s)	Status
ARB/16/33	APM Terminals Callao S.A.	Republic of Peru	Pending
ARB(AF)/16/5	América Móvil S.A.B. de C.V.	Republic of Colombia	Pending
ARB/16/32	Thomas Gosling and others	Republic of Mauritius	Pending
ARB/16/31	UniCredit Bank Austria AG and Zagrebačka Banka d.d.	Republic of Croatia	Pending
ARB(AF)/16/4	JSC Tashkent Mechanical Plant and others	Kyrgyz Republic	Pending
ARB/16/30	Görkem İnşaat Sanayi ve Ticaret Limited Şirketi	Turkmenistan	Pending
ARB/16/29	J&P-AVAX S.A.	Lebanese Republic	Pending
ARB/16/28	Amlyn Holding B.V.	Republic of Croatia	Pending
ARB/16/27	Sevilla Beheer B.V. and others	Kingdom of Spain	Pending
ARB(AF)/16/3	B-Mex, LLC and others	United Mexican States	Pending
ARB/16/26	Oleovest Pte. Ltd.	Republic of Indonesia	Pending
ARB/16/25	Raymond Charles Eyre and Montrose Developments (Private) Limited	Democratic Socialist Republic of Sri Lanka	Pending
ARB/16/24	ČEZ, a.s.	Republic of Bulgaria	Pending
ARB/16/23	Agroinsumos Ibero-Americanos, S.L. and others	Bolivarian Republic of Venezuela	Pending
ARB/16/22	Shell Philippines Exploration B.V.	Republic of the Philippines	Pending

If you have done it correctly ...



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Case Details



Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya (ICSID Case No. ARB/15/29)

Proceeding

Materials

Procedural Details

Original Proceeding

Date	Development
July 7, 2015	The Secretary-General registers a request for the institution of arbitration proceedings.
September 4, 2015	Following appointment by the Claimants, Kanaga Dharmananda (Australian) accepts his appointment as arbitrator.
September 29, 2015	Following appointment by the Respondent, Brigitte Stern (French) accepts her appointment as arbitrator.
November 10, 2015	Following appointment by his co-arbitrators, Ian Binnie (Canadian) accepts his appointment as presiding arbitrator.
November 12, 2015	The Tribunal is constituted in accordance with Article 37(2)(a) of the ICSID Convention. Its members are: Ian Binnie (Canadian), President, appointed by his co-arbitrators; Kanaga Dharmananda (Australian), appointed by the Claimants; and Brigitte Stern (French), appointed by the Respondent.

<https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx>

Practical tips

- **Before you begin drafting, identify the applicable rules (if there are any).** See provisions on Request / Notice. **Comply strictly.**
- You may want to use a cover letter enclosing Request / Notice. Looks neater.
- Use **NUMBERED HEADINGS / SECTIONS.**
- Use **RUNNING NUMBERED PARAGRAPHS** throughout - easier to cross-refer; avoids repetition.
- ***Readability, readability, readability.*** (= effectiveness, persuasive power)
- You can be as general / wide as possible in setting out the basis for your claim, but you should be **specific** about what you want (relief / remedy).
- **Sign and date the document.**
- **Pay the prescribed fee! (No fee = no commencement.)**

Drafting exercise : Instructions

- We will be using “The Dispute” © SIAA 2016.
- Today’s date is **31 Oct 2012**. We are using ‘actual time’.
- You represent Nordic Gas Company (NGC).
- The facts are found up to (and including) para 58 but excluding para 50 and 51. Do not go beyond para 58 for the facts.
- You may choose to use the same ‘breaches’ as found in para 59, or choose a different approach – it is up to you.
- In drafting, you can (if you wish) use the **soft / electronic copy** template provided to you, as well as the soft copy of “The Dispute” e.g. to cut and paste.

From :	Iyam.DaMann@nordicgas.com
To :	[You]
Cc :	[Your colleagues]
Date :	31 October 2012
Time :	10:00 (GMT+8)
Priority :	Immediate
Subject :	Commence arbitration immediately!!!

Dear [You] and team,

Attorney - client privilege claimed

Our “consultations” with those crazy Anchurians have been gong on since June 2012, and there are no results to speak of, to-date. *They are just giving us the run-around.* Do they think we are fools? CEO was not kidding - he said if nothing was sorted out by 29 October, we would sue. It is now two days after his deadline, and there is nothing from them, at all. **We now have to show them we mean business!! The Board has spoken : SUE THEM NOW.**

I am getting on a charter flight to Bora Bora at 11:30 am (SG time) with Alexxa (you met her at the club - that exotic 22-year-old dancer) and won't be contactable for at least 72 hours. I need you to draft whatever we need **to initiate arbitration on 1 November 2012** and send me those drafts **not later than 10:50 am today,** for my approval. You can surely meet that deadline, right?

CNN / BBC / Fox / SKY have been told that NGC will launch its claim on 1 November 2012, so it has to happen. **Don't mess this up or we will both be out of a job. *Have a Happy Halloween!***

Iyam DaMann, Head Chief General Counsel, NGC

Speaker Information

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