
Getting Savvy about Arbitration Research & Advocacy Writing

Kiran Nasir Gore

Yael Hollander de Groot

11 May 2023

Meet the Speakers



Yael Hollander de Groot is a seasoned corporate lawyer, who turned to product development, with over a decade of experience in the legal industry. After practicing as a lawyer in one of Israel's leading law firms and as an in-house counsel for a Nasdaq-listed company, Yael pivoted into product development, with a mission to empower fellow lawyers to work smarter and more efficiently. This passion led Yael to a UK-based scaling startup focused on automated contract review using AI. Currently, Yael is the Senior Product Manager for Kluwer Arbitration, where she is responsible for driving its strategic vision.



Kiran Nasir Gore is an arbitrator, dispute resolution consultant, and counsel with fifteen years of experience in international dispute resolution. Kiran draws on her professional experiences as an educator at the George Washington University Law School and New York University's Global Study Center in Washington, DC. Among other topics, she teaches oral and written advocacy to JD and LLM students.

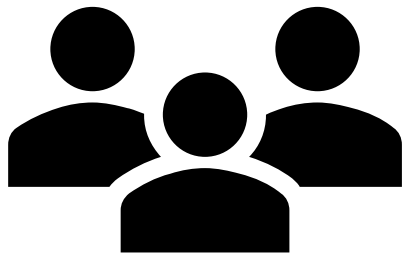
Agenda

- Diving into your first arbitration cases
- Introduction to practical research tools
- Getting started: defining the contours of your case
 - Terms of reference
 - Mapping your case
- Drafting key legal submissions
 - Statement of claim/defence
 - Witness statements
 - Know your audience
- Concluding remarks / Q&A

Introduction to practical research tools



Profile Navigator & Relationship Indicator



- Access 17,000+ data-driven profiles of arbitrators, expert witnesses, and counsels.
- Assess relationships of arbitration stakeholders to uncover potential conflicts of interest.
- Review publications and arbitration cases associated with an arbitrator, expert witness, or counsel to gain an overview of their views and approach.
- Find the right arbitrator for your case
- Mitigate the risk of arbitrator challenges
- Back up your decisions with reliable, objective data

Wolters Kluwer Kluwer Arbitration

Home > Profile navigator > Profile

Albert Jan van den Berg
Nationality: Belgium, Netherlands

Participated as: Presiding Arbitrator, Co-Arbitrator, LCIA Court Challenge Division Member, Sole Arbitrator, ICSID Ad Hoc Committee Presiding Member

Language of proceedings: English, Spanish, Dutch, French, German, Russian

Within Kluwer database:

76 Cases 70 Awards 61 Publications

Current position(s)

Partner, Hanotiau & van den Berg, Brussels
Former Vice-President, London Court of International Arbitration
Arbitrator, Arbitral Tribunal concerning the Bank for International Settlements (Hague Treaty of 20 January 1930)

Additional background

Domicile: Belgium
Bar admission / professional license: Amsterdam, Brussels

Former position(s)

President, International Council for Commercial Arbitration (ICCA)
President, Netherlands Arbitration Institute (NAI)
Partner, Freshfields Bruckhaus Deringer, Amsterdam

Arbitral insights

All (76 cases) Arbitrator (71 cases) Counsel (0 cases) Expert witness (0 cases) Other (5 cases)

Sectors

| | |
|-------------------------------|------|
| Other* | 100% |
| Other* | 9% |
| Transportation and storage | 12% |
| Information and communication | 17% |
| Mining and quarrying | 17% |

Applicable rules

| | |
|--|-----|
| UNCITRAL Arbitration Rules (1996) | 28% |
| UNCITRAL Arbitration Rules (2010) | 20% |
| ICSID Arbitration Rules (1966) | 11% |
| ICSID Arbitration Rules (2006) | 8% |
| UNCITRAL Arbitration Rules (unspecified) | 34% |

Applicable treaties and laws

| | |
|---|-----|
| Other* | 71% |
| North American Free Trade Agreement (NAFTA, 1994) | 8% |
| Energy Charter Treaty (1994) | 7% |
| Singapore - United States of America BIT (1997) | 7% |
| Contract | 8% |

Sectors

Aerospace & Defence
Construction
Energy
Financial Services & Banking
Insurance & Reinsurance

Specialization

Business law (or commercial law)
Business organizations law (or companies law)
Contract law
Corporate Law (or company law)
Insurance law

Legal experience (with applicable law)

Arbitrator experience

| | |
|--------|------|
| ad hoc | AAA |
| CRICA | DIAC |
| ICC | ICDR |
| ICSID | LCIA |
| NAFTA | NAI |

Counsel experience

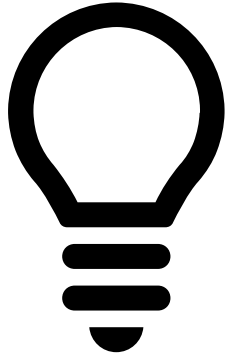
Education

Doctor of Law, Erasmus University, Rotterdam
Docteur en droit, University of Aix-en-Provence
Master of Comparative Jurisprudence, New York University Institute of Foreign Law
Post-doctorate course in Comparative, European and International Law, University of Aix-en-Provence Faculty of Law
Master of Laws, University of Amsterdam Faculty of Law

Cases

| Commencement | Case type | Institution | Case no. | Role | Appointed by | Tribunal Composition |
|--------------|------------|-------------|---|----------------------|---|---|
| 01 Mar 2021 | Commercial | ICC | ICC Case ID No. 01706 Link to source: ICC | Presiding Arbitrator | Co-Arbitrators | Albert Jan van den Berg Presiding Arbitrator Duncan Matthews Co-Arbitrator Rosmary Barkers Co-Arbitrator |
| 17 Feb 2021 | Investment | ICSID | ICSID Case No. ARB/21/8 Link to source: ICSID, UNCTAD, ITA LAW | Co-Arbitrator | Respondent(s) - Mongolia | Albert Jan van den Berg Co-Arbitrator Eduardo Zúñiga Jaramillo Presiding Arbitrator Stephen L. Drymer Co-Arbitrator |
| 10 Dec 2019 | Investment | ICSID | ICSID Case No. ARB/19/15 Link to source: ICSID, UNCTAD | Co-Arbitrator | Claimant(s) - Alata Investments (UK)... | Albert Jan van den Berg Co-Arbitrator Joongi Kim Presiding Arbitrator Paul D. Friedland Co-Arbitrator |

Practical Insights



Practical Insights provide guidance to the most pressing and challenging issues in the international arbitration process, from interim measures to enforcement of awards, presented in a concise, step-by-step format.

Each practical insight consists of a topic page, comparative jurisdictional and institutional notes, and links to suggested reading to research further.

Save time in performing your research and ensure that you don't miss out relevant information.





Wolters Kluwer Kluwer Arbitration

Home Books & Publications Our Tools Our Partners

Practical insights by topic

These Practical Insight modules (each consisting of a topic page, comparative jurisdictional and institutional notes, and any other associated guides) deliver actionable guidance and insights for key decisions in the arbitration process, to drive efficiency, mitigate risk and optimize case strategy.

Editorial team

| | | | |
|--|--|--|---|
|  Joshua Karton Queen's University Canada |  Simon Greenberg Clifford Chance Paris |  Fan Yang China Harbour Engineering Company Limited |  Kiran Nasir Gore GW Law Washington, DC |
|--|--|--|---|

Our topics

- Interim Measures (6)
 - Anti-Arbitration Injunctions
Crina Baltag
Stockholm University
 - Emergency Arbitrator Proceedings
Andrew de Lotbinière McDougall
Poorvi Satija & Salma Selim, White & Case
 - Interim and Conservatory Measures
Ali Yesilirmak, Ibn Haldun Universit.
Dogan Gultutan, Baker & McKenzie LLP
 - Anti-Suit Injunctions
Crina Baltag
Stockholm University
 - Enforcement of Interim Measures
James McKenzie & Wilson Antoon
King & Wood Mallesons
 - Security for costs
Cameron Ford
Squire Patton Boggs
- Multi Party Arbitration (4)
- Early Stage of the Proceedings (6)
- Organizations of the Proceedings (4)
- Conduct of the Proceedings (4)
- Evidence (4)
- Damages (1)
- Awards (3)
- Costs (2)
- Enforcement of Awards (6)
- Enforcement of Arbitration Agreements (2)
- Fraud & Corruption (1)

The editorial team consists of experienced and highly respected arbitration experts who oversee all the content uploaded

Quick Answers



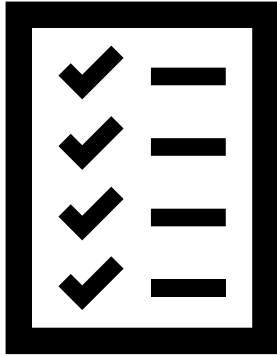
Over 400 answers to most common questions in the arbitration process divided into 5 categories:

- Appointment and challenge of arbitrators
- Drafting arbitration agreements
- Privacy and confidentiality
- Sovereign immunity
- Arbitral institutions

Allows to quickly examine and compare specific content by topic across selected jurisdictions or arbitral institutions.

The Quick Answers are edited by Clifford Chance LLP.

Document Guides & Examples



Extensive collection of forms used in international commercial arbitration covering the different steps of an arbitration proceeding from a Request for Arbitration to the final Award.

Document guides & examples allow you to:

- Download the form in MS Word
- Make edits to suit the circumstances of your case
- Use as a check list when considering other templates

On the roadmap for 2023

- Expand coverage of institution rules (e.g., SCC, LCIA, UNCITRAL)
- Expand coverage of topics and examples

Getting started:
defining the
contours of
your case



What are Terms of Reference?

- Document providing a framework for the entire arbitration.
- In cases where established, sets the boundaries within which the parties shall present their cases and the arbitral tribunal shall issue its decision.
- Serves as a continuous reference point for the parties and the arbitral tribunal.
- Makes proceedings more efficient (and possibly more cost-effective) by eliminating any uncertainties or disputes on the arbitrator's powers or basic procedural issues relevant to the conduct of proceedings.
- Important: Only amended in exceptional circumstances and with the agreement of all of the parties and the arbitral tribunal. Check the rules!

Quick Answers - Terms of Reference

Workflow

Our tools → Quick answers → Quick answers on arbitral Institutions → The Arbitral Proceedings → Terms of Reference

Or just type in the main search bar 'Quick answers AND terms of reference'

- | - Terms of Reference
 - Do the procedural rules provide for Terms of Reference?
 - If the procedural rules provide for Terms of Reference, what do they contain?
 - If the procedural rules provide for Terms of Reference, how long does the Arbitral Tribunal have to compile them?

Step 1: Select the questions in interest

Arbitration Centre of Mexico
Contributors: Claus von Wobeser, Montserrat Manzano, Von Wobeser y Sierra

Reviewed December 2022

Australian Centre for International Commercial Arbitration
Contributors: Dr Sam Luttrell, Vlada Lemaic & Siew Mei Yong Clifford Chance LLP

Reviewed December 2022

The Arbitral Proceedings - Terms of Reference - **If the procedural rules provide for Terms of Reference, what do they contain?**

The Terms of Reference must include at least the following (CAM Rules Article 24(1)):

- (a) the full names and descriptions of the parties;
- (b) the addresses in full and if possible the email address, telephone and fax number of the parties to which notifications arising in the course of the arbitration may be made;
- (c) a summary of the parties' respective claims, including an indication, to the extent possible, of the amounts claimed;
- (d) a list of the issues to be determined;
- (e) the full names and addresses of the arbitrators and their capacity;
- (f) the place of arbitration; and
- (g) particulars of the applicable procedural rules and, if such is the case, reference to the powers of amiable compositeur of the arbitrator.

The ACICA Rules do not expressly provide for Terms of Reference.

Step 2: Select jurisdictions/ institutions and click on 'View comparison'

Document guides & examples - Terms of Reference

Workflow

Our tools → Document guides & examples → Organization of the proceedings → [Terms of Reference](#)

Wolters Kluwer Kluwer Arbitration

Home Books & Publications Our Tools Our Partners

Terms of Reference

This page aims to guide you through the typical steps required to create the terms of reference with examples in various formats that can be worked with in order to suit the circumstances of your particular case.

Authored and edited by [Sigvard Hakan Ludvig Jarvin](#) & [Corinne Nguyen](#)

II.1.1 Authors' Introductory Comments

The arbitral tribunal, preferably in cooperation with the parties, will set out the details of the procedure in a document which takes the form of a 'procedural order' or 'procedural instructions' or a 'framework document'. In ICC arbitrations this document is known as the 'Terms of Reference'. Terms of Reference are assumed to have the following advantages:

- parties and arbitrators identify at an early stage of the proceedings the terms of the dispute and the issues to be resolved based on the parties' submission (i.e., the request for arbitration and the answer);
- the scope of the arbitrators' mandate is defined which will help the ICC Court to verify that all of the parties' claims have been decided when scrutinizing the arbitrators' draft award;
- having a framework for the conduct of the proceedings contributes to the predictability of the process. The participants know what to expect.

The Terms of Reference contain information in the following respects, namely:

- the parties' names and contact details, ditto for their counsel and the arbitrators;
- the addresses for notification;
- the summary of the parties' claims and relief sought (see **Forms II.1.2, II.1.3 and II.1.4**);
- a list of issues to be determined, unless the arbitral tribunal considers it as inappropriate at this early stage of the arbitration (see **Forms II.1.2, II.1.3 and II.1.4**);
- the place of arbitration;
- the applicable law(s);
- the language of the proceedings (see **Forms II.1.2 and II.1.4**);
- the particulars of the applicable procedural rules (e.g., a reference to the IBA Rules on the Taking of Evidence) (see **Form II.1.3**) and any power of the arbitrator(s) to act as *amiable compositeur* or to decide *ex aequo et bono*;
- possible confidentiality undertakings by the parties (see **Form II.1.3**).

If some information is straightforward (e.g., details and addresses of the parties, their representatives and the arbitrators), other points require more thought and work when preparing them:

- the parties' summary of claims which are purported to state their position (facts and allegations);
- the parties' respective requests for relief, including, to the extent possible, an indication of the amounts claimed or counterclaimed; and
- a list of issues to be determined by the arbitrator(s) which defines the scope of their mission and ensures that the award will not be rendered *infra* or *ultra petita*.

Parties are sometimes unsure about the effects of the Terms of Reference, and in which way they are bound by them or whether they may be modified. In order to encourage a cooperation between the parties in the drawing up of the document, and to assure the signature by the parties of the Terms of Reference, the arbitrator(s) often include a statement that, by signing the Terms of Reference, none of the parties is accepting the claims asserted by the other party.

Because of time and costs concerns, the arbitral tribunal aims to get the Terms of Reference agreed and signed as soon as possible, that is within the time limit provided in the rules (e.g., two months, renewable, under Article 23(2) of the ICC Rules version 2012). If a party refuses to sign, the ICC Court will need to approve the Terms of Reference in accordance with Article 23(3) before the arbitration can continue. In such a case, the ICC Court gives careful attention to the language of the Terms of Reference which should not contain or suggest any agreement by the non-signing party.

Terms of Reference have certain legal effects. The most important is indicated in Article 23(4) of the ICC Rules: after the parties' and the arbitrators' signature, or the approval of said document by the ICC Court, no new claims which fall outside the limits of the Terms of Reference can be made by a party without the authorization of the arbitral tribunal. In other words, the document cannot be changed without the consent of the arbitral tribunal and the parties (see **Form II.1.5**).

Readers are welcome to send the Authors comments and suggestions, including documents they believe should be included in an updated edition. To do so, please contact arbitrationforms@outlook.com.

Examples

II.1.2 Terms of Reference (Two Arbitration Languages, No List of Issues to be Determined)

ICC (PDF) ICC (Word)

II.1.3 Terms of Reference (Detailed Document Treating Multiple Parties, Jurisdiction, Counterclaim, Conservatory Measures, Parallel Proceedings, Production of Documents, Confidentiality, No List of Issues to be Determined, Procedural Timetable, VAT on Arbitrators' Fees)

ICC (PDF) ICC (Word)

II.1.4 Terms of Reference (Short)

ICC (PDF) ICC (Word)

II.1.5 Admissibility of a Counterclaim Submitted After the Terms of Reference; Request for Joinder of a New Party

ICC (PDF) ICC (Word)

Click on the link to open a word document that can be editable to suit your circumstances

Commentary - Terms of Reference

Workflow

Type 'terms of reference' in the main search bar to gain a wealth of results to support your research



Book
So, Now You are an Arbitrator: The Arbitrator's Toolkit
Author(s) / Editor(s): Kaplan and Bao
Published: 2022



Book
International Arbitration: Law and Practice (Third Edition)
Author(s) / Editor(s): Born
Published: 2021

Homepage > Search results

Search our database

terms of reference × Search within these results ⊗ 🔍 Search

All results **3488** Commentary **2222** Awards **600** Court Decisions **392** Rules **234** Legislation **28** Conventions **7** Models **4** BITs **1**

Chiann Bao and Neil Kaplan book 'So, Now You are an Arbitrator: The Arbitrator's Toolkit'

- Living book – updated annually
- A practical guide for arbitrators based on practice and experience but will also be of interest to counsel who may benefit from seeing things from the tribunal's point of view
- Contains 19 Appendices with model forms, including appendix IV for: **ICC Terms of Reference**

Practical Insights - Terms of Reference

Workflow

Our tools → Practical Insights by topic → Organizations of the Proceedings → [Terms of Reference](#)

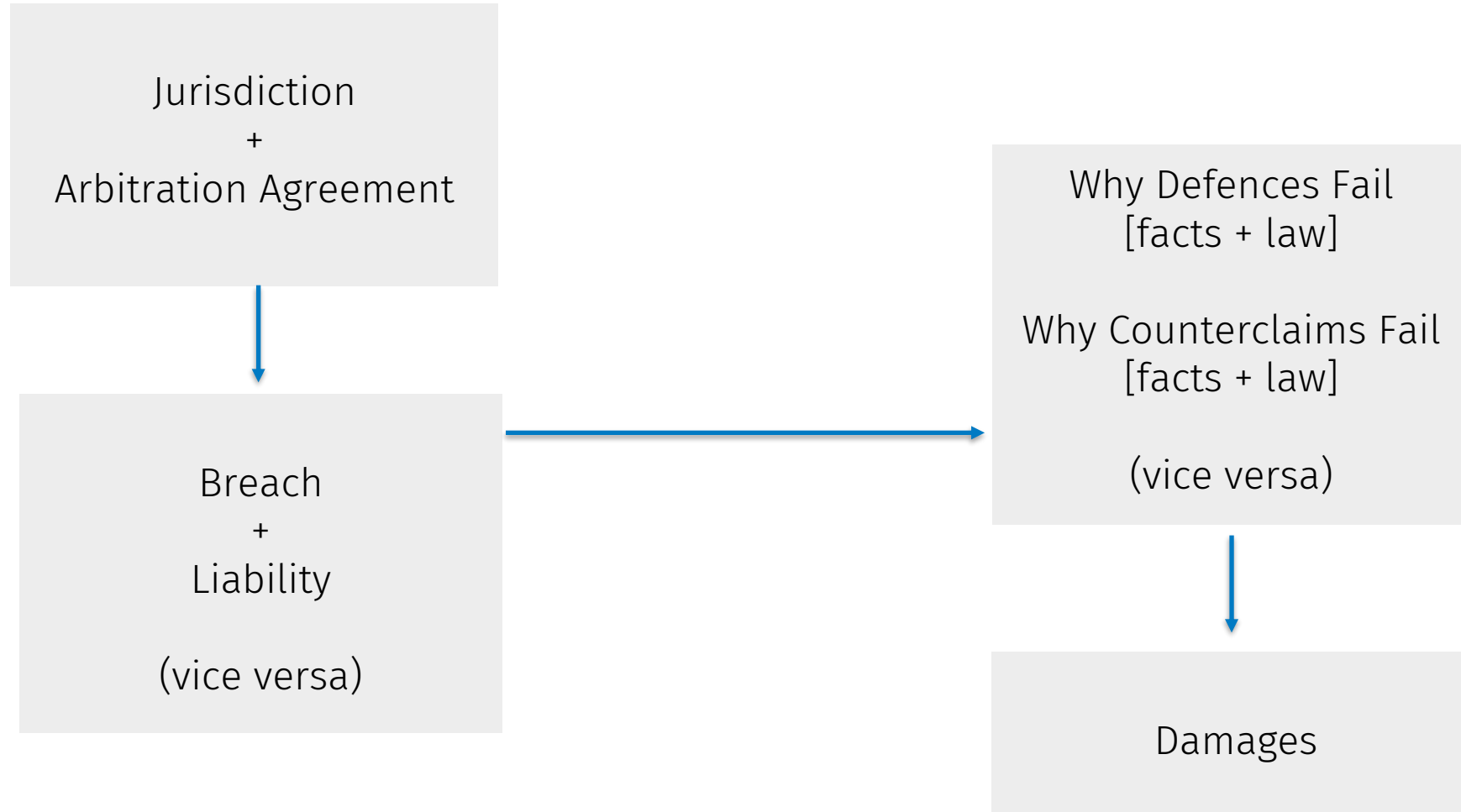
Or just type in the main search bar 'Practical Insights AND Terms of reference'

Each note includes Introduction, Important Considerations, Practical Guidance and Suggested Reading.

Use the Countries & Institutions comparison tool to get a comparative view at a jurisdiction and/or institution level

The screenshot displays the 'Practical Insights on Terms of Reference' page on the Wolters Kluwer Kluwer Arbitration website. The page features a navigation menu at the top with options like 'Home', 'Books & Publications', 'Our Tools', and 'Our Partners'. The main content area is titled 'Practical Insights on Terms of Reference' and is authored by Gustavo Scheffer da Silveira, Taui & Chequer Advogados. The page is divided into several sections: 'Navigate this page' with links to 'I. Introduction', 'II. Important Considerations', 'III. Practical Guidance', and 'IV. Suggested Reading'; 'Comparison tools' with a link to 'Countries & institutions'; and 'Recommended publications' featuring a book by Born titled 'Chapter 15: Procedures in International Arbitration (Updated August 2022)'. The main text discusses the definition and purpose of Terms of Reference (ToR) in arbitration proceedings, highlighting their role in providing a framework for the entire arbitration and their use by parties and arbitrators.

Mapping your case



If something in a submission does not support one of these elements – you probably don't need it!

Drafting key legal submissions



Statement of Claim/ Statement of Defence

Document guides & examples - Statement of Claim

Workflow

Our tools → Document guides & examples → Written Pleadings → [Statement of Claim](#)

Statement of Claim

This page aims to guide you through the typical steps required to create a statement of claim with examples in various formats that can be worked with in order to suit the circumstances of your particular case.

Authored and edited by [Sigvard Hakan Ludvig Jarvin & Corinne Nguyen](#)

III.1.1 Authors' Introductory Comments

Typically, the written submissions in any case of some importance and/or complexity comprise:

- -Request for arbitration and answer;
- -Statement of claim and statement of defence;
- -Reply and rejoinder;
- -Skeleton arguments (sometimes);
- -Post-hearing briefs (not always);
- -Cost claims.

General Thoughts About the Importance of Written Submissions

The importance of written submissions is high in international commercial arbitration. These documents need to be adapted to the diversity that characterizes international arbitration. As the present collection of documents shows, one finds a variety in drafting styles drawn from a great number of national judicial systems, foremost from common and civil law countries.

Just as international arbitration counsel come from different legal systems and cultures so do the arbitrators. Before drafting a submission, the lawyer needs to figure out, not only who the arbitrators are he or she will address, but what legal system they come from and whether they expect submission to follow a certain pattern. The arbitrators' duty is to decide the dispute after having analysed the issues that arise and draft an award that justifies their decision. Written submissions must thus be crafted to assist the arbitrators to do their job. The better a statement of claim and a statement of defence tells the party's story and the better a memorandum explains the legal rules and consequences, the easier it will be for



Examples


III.1.2 Statement of Claim (Detailed Document)

ICC 
(PDF)

ICC 
(Word)

III.1.3 Statement of Claim (Detailed Document, Involving Multiple Parties)

UNCITRAL 
(PDF)

UNCITRAL 
(Word)

Document guides & examples - Statement of Defence

Workflow

Our tools → Document guides & examples → Written Pleadings → [Statement of Defence](#)

Statement of Defence

This page aims to guide you through the typical steps required to create a statement of defence with examples in various formats that can be worked with in order to suit the circumstances of your particular case.

Authored and edited by [Sigvard Hakan Ludvig Jarvin & Corinne Nguyen](#)

III.2.1 Authors' Introductory Comments

As regards general comments on the importance of written submissions in international arbitration we refer to our comments in the introduction to the section on statement of claim above.

The reader finds two examples of a statement of defence. The first, **Form III.2.2**, was drafted by civil law lawyers. The second, **Form III.2.3**, by common law lawyers.


When it comes to the second phase of written pleadings, the reply and rejoinder, one commentator indicates, that 'nothing is more disheartening for a tribunal than the unnecessary repetition that often finds its way into the reply/rejoinder round.' Do not respond to each allegation made against your party, but 'distil down to what it is that is really being said against you that really matters and focus on that.'


Readers are welcome to send the Authors comments and suggestions, including documents they believe should be included in an updated edition. To do so, please contact arbitrationforms@outlook.com.




Examples


III.2.2 Statement of Defence (Issues of Applicable Law and Adjudicator's Powers)

[Ad hoc](#) 
(PDF)

[Ad hoc](#) 
(Word)

III.2.3 Statement of Defence (Respondent Making Alternative and Subsidiary Defences)

[Ad hoc](#) 
(PDF)

[Ad hoc](#) 
(Word)

Advocacy drafting tips

- Goal: getting your reader to agree with the legal conclusions that benefit your client.
- Need two things:
 - Perspective
 - Knowledge of your audience

Advocacy drafting tips

- Best formula for an argument on a discrete legal question:
 - CREAC
 - C: Conclusion/Thesis
 - R: Rule
 - E: Explanation
 - A: Analysis
 - C: Conclusion

Advocacy drafting tips

C: Conclusion/Thesis

- Readers absorb information best if they understand its significance right away
- At the beginning, state the conclusion you want the decisionmaker to reach on the issue and summarize the grounds for that conclusion
- Should be a combination of legal and factual reasons

Advocacy drafting tips

R: Rule – persuasively articulated!

- Persuasive rule presents the rule in the light most favorable to your client or cause
- Start with researching & evaluating
- Then be strategic in drafting a rule favorable to you
- Still must be 100% accurate, but its phrasing needs to help your analysis e.g., whose burden of proof?

Advocacy drafting tips

E: Explanation

- Precedent, commentaries & other authorities
- Carefully selected
- Analysis should likely turn out in your favor
- Use parentheticals to show why this authority helps you

Advocacy drafting tips

A: Analysis

- Show that applying the facts achieves the results you want
- Show how your case is similar to the precedent & the same result applies
- Distinguish precedent facts to show how a rule helps even if its outcome in a prior scenario was different
- Address counterarguments throughout

Advocacy drafting tips

C: Conclusion

- Persuasively restates the conclusion in a final sentence

Advocacy drafting tips

Additional considerations

- Persuasive facts section – tone, add story elements
- Develop a theme
- Topic prioritization
- Sentence structure
- Active v. passive voice

Witness statements



Document guides & examples - Witness Statements

Workflow

Our tools → Document guides & examples → Written Pleadings → [Witness Statements](#)

Witness Statements

This page aims to guide you through the typical steps required to create witness statements with examples in various formats that can be worked with in order to suit the circumstances of your particular case.

Authored and edited by Sigvard Hakan Ludvig Jarvin & Corinne Nguyen

III.3.1 Authors' Introductory Comments

It is admitted in international arbitration practice that witnesses provide written statements as to their testimony prior to the hearing. It is not only admitted, over the years written witness statements have become the norm. They now replace the witnesses' oral direct evidence. At the hearing, the witness(es) is/are cross examined, and examined in redirect. As such, the written witness statements are – together with documentary evidence – the evidentiary foundation of a party's case.

Advantages and Drawbacks

The exchange of witness statements prior to the hearing saves hearing time by eliminating the need for direct oral examination. It also avoids surprises in the testimony that the party offers. The system is said to take the best from the common law and the civil law systems in order to allow parties from different cultural and legal backgrounds to present evidence to international arbitral tribunals. Written witness statements prompt advocates to prepare their witnesses well in advance of the hearing, making them better prepared overall.

But there are drawbacks with the written witness evidence. A written statement, prepared together with the lawyer, is not equivalent to direct oral testimony at the hearing and the written statement is often not that of the witness, but of his lawyer putting words in his mouth. The risk is that the written witness statement becomes an act of pleading.


Preparation of the Witness Statement


A witness should have direct knowledge of facts and information relevant to the issues at stake in the case. He/she must tell the truth with a concise and reliable description of the facts and events which are within his direct knowledge. He/she is not requested – and it is not appropriate – to provide an opinion on a matter which is to be decided by the arbitral tribunal.

Counsel will need to determine what to include in the witness statement and how much or how little of the facts need to be included, having regard to the other evidence. It is therefore accepted that counsel may assist with the preparation of the witness' statement as this ensures that the statement will be focused on the issues together with an accurate description of the pertinent facts of the case.

Examples

III.3.2 Witness Statement (Succinct Document in Simple Language)

Ad hoc 
(PDF)

Ad hoc 
(Word)

III.3.3 Witness Statement (Long Declaration by Vice-President in Large Corporation)

LCIA 
(PDF)

LCIA 
(Word)

Witness statement drafting tips

- Goal: getting your audience (the tribunal) to trust and agree with your witness's view of the facts and documents.
- Elements:
 - Provide some context for credibility
 - Tell a story
 - Explain why your witness has the best perspective on the topic
 - Be careful to not draw legal conclusions (or conclusions in general)

Practical Insights - Witness Examination

Workflow

Our tools → Practical Insights by topic → Evidence → [Witness Examination](#)


Or just type in the main search bar 'Practical Insights AND Witness examination'

Navigate this page

- [I. Introduction](#)
- [II. Important Considerations](#)
- [III. Practical Guidance](#)
- [IV. Suggested Reading](#)


Recommended publications

Born



Chapter 8: Procedural Issues in International Arbitration
Born (2021)

Books



The International Arbitration Rulebook: A Guide to Arbitral Regimes
Ali, Wessel, de Gramont, et al. (2019)

Practical Insights on Witness Examination

Timothy Cooke, Reed Smith LLP (last updated July 2021)

Edited by Joshua Karton, Queen's University (Canada), Simon Greenberg, Clifford Chance (Paris) & Fan Yang, Stephenson Harwood (London)

I. Introduction

Witness examination is the means by which the evidence of factual and expert witnesses is elicited and tested. The concept is rooted in the common law adversarial tradition, in which the parties take the lead in presenting the evidence. By contrast, under the inquisitorial system associated with civil law traditions, the judge seeks out the facts with a focus on the written documents and, to a lesser extent, questioning of witnesses. Under the civil law approach, the parties play a secondary or supportive role in this fact-finding exercise. One might conclude from this brief description that lawyers from a common law tradition possess some advantage over their civil law counterparts when it comes to witness examination. That conclusion would be misplaced. First, the art of examining a witness is not so arcane as to be unteachable to any lawyer. Second, what might be effective in the common law court room does not necessarily translate to an arbitration hearing.

II. Important Considerations

1. Procedural expectations for witness examination

The varied backgrounds of arbitrators, parties and their representatives can give rise to mismatched expectations or misunderstandings regarding the process of witness examination. Some practitioners import their own experience of domestic litigation, including rules of evidence relating to matters such as admissibility, probative value and credibility, which may not conform to the experience or understanding of other participants in the arbitration. However, rules of evidence as lawyers may understand them in the litigation context do not apply in international arbitration, where rules of evidence are limited, and those that do apply are flexible. It is important in the context of witness examination to understand how that flexibility may affect an advocate's and a tribunal's approach to witness examination. Tribunals and parties should address the procedure for witness examination early in the proceedings to avoid misunderstandings.

Areas that are most likely to give rise to disagreements or misunderstandings are as follows:

- **Presumption as to probative value of evidence.** In civil law traditions, employees or directors of a company which is a party, or other witnesses with an interest in the dispute, are presumed to be partial and their testimony is treated as inadmissible or of limited evidentiary value. Such witnesses are not expected to give evidence in civil law proceedings. By contrast, the common law does not presume the evidence of a witness interested in a dispute to be of lesser probative value by reason only of that interest. Evidence from interested witnesses is not inadmissible in international arbitrations; however, arbitrators from the civil law tradition may inherently approach evidence from such witnesses with greater scepticism than their common law counterparts. It is therefore important that any potential misunderstandings as to the evidence of interested witnesses to be

Know
your audience



Developing knowledge of your audience

- Understand who you are trying to convince
- Move that audience to see the problem the way you do
- Words you choose and format depend on the audience
 - Civil law v. common law background?
 - Previously stated views on a topic?
 - Prior familiarity with the issue?

Profile Navigator – Know your audience

Research the appointed arbitrators to adapt your case drafting and gain competitive advantage. Learn about their experience with languages, legal experience with applicable law, etc.

The screenshot shows the Kluwer Arbitration Profile Navigator interface. At the top, there is a navigation bar with 'Wolters Kluwer Kluwer Arbitration' on the left and 'Favorites', 'Help', and 'User' on the right. Below this is a blue navigation bar with 'Home', 'Books & Publications', 'Our Tools', and 'Our Partners'. The breadcrumb trail reads 'Home > Profile navigator > Profile'. On the right side of the profile page, there are icons for 'Favorites', 'Documents', 'Print', and 'Email', along with a 'Updated: 5 May 2023' timestamp and an 'Explore relationships' button. The profile information for Albert Jan van den Berg includes his nationality (Belgium, Netherlands), his roles (Presiding Arbitrator, Co-Arbitrator, LCIA Court Challenge Division Member, Sole Arbitrator, ICSID Ad Hoc Committee Presiding Member), and his languages (English, Spanish, Dutch, French, German, Russian). At the bottom, three green buttons are highlighted with a red border, showing '76 Cases', '70 Awards', and '61 Publications'.

Wolters Kluwer Kluwer Arbitration

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Home > Profile navigator > Profile

☆ Favorites Help User U

☆ Documents Print Email Updated: 5 May 2023

Albert Jan van den Berg
Nationality: Belgium, Netherlands
Participated as: Presiding Arbitrator, Co-Arbitrator, LCIA Court Challenge Division Member, Sole Arbitrator, ICSID Ad Hoc Committee Presiding Member
Language of proceedings: English, Spanish, Dutch, French, German, Russian
Within Kluwer database:

76 Cases 70 Awards 61 Publications

Explore relationships

Click on the buttons to access all awards and publications associated with the arbitrator within the Kluwer database, to research their view and approach.

Concluding remarks / Q&A

Thank you for
joining us



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