

The Request and the Answer: Laying the groundwork

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& KARRER

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Scope of request and answer

- First stage constitution of the arbitral tribunal (vs. second stage actual conduct of arbitration before the arbitral tribunal)
- Scope of the request for arbitration and of the answer
 - Formation of the arbitral tribunal
 - Determine seat and language of the arbitration
 - Determine whether expedited procedure shall apply
 - Determine amount of the advance on costs
- Provide general framework of the arbitration and indication of the overall complexity
- Respondent shall be able to decide whether or not to submit to arbitration

Minimum vs. discretionary content

- Institutional arbitration rules set out the minimum content
Art. 4-5 ICC; Art. 1-2 LCIA; Art. 6 and 9 SCC; Art. 3 Swiss Rules
- Most institutional rules do not provide for a standard form
- Filing may contain further discretionary content
 - Art. 4 (3) ICC *"The claimant may submit such other documents or information with the Request as it considers appropriate or as may contribute to the efficient resolution of the dispute."*
 - Art. 10 SCC *"The Board may request further details from either party regarding any of their written submissions to the SCC".*
- How binding are the statements made at this stage?
 - Identity of the parties
 - Prayers for relief
 - Art. 23(4) ICC: after ToR amendment only upon authorization by arbitral tribunal
 - Art. 20 Swiss Rules: amendments possible at any stage unless the arbitral tribunal considers it inappropriate

Request for arbitration

Minimum content

	Swiss Rules	ICC	LCIA	SCC
Contact details parties	✓	✓	✓	✓
Contact details counsel	✓	✓	✓	✓
Summary of the dispute	✓	✓	✓	✓
Relief sought	✓	✓	✓	✓
Monetary value claims	✓	✓	✓	✓
Arbitration agreement	✓	✓	✓	✓
Comments on number and choice arbitrators	✓	✓	✓	✓
Comments on language	✓	✓	✓	✓
Place of arbitration	✓	✓	✓	✓
Applicable rules of law		✓		
Relevant agreements	✓	✓		

Request for arbitration

Typical content

- Goals: setting the framework
 - Core arguments
 - Explain who are the relevant players
- Identification of the parties
 - Description of activity
 - Structure of group of companies
- Summary of the facts and the dispute
 - Contractual framework
 - Dispute
 - Damages suffered by claimant
 - Alternative legal claim: torts

Request for arbitration

Summary of facts – minimum content under institutional rules

	Swiss Rules	ICC	LCIA	SCC
Request	<p>Art. 3(3)</p> <p>(d) A reference to the contract or other legal instrument(s) out of, or in relation to, which the dispute arises;</p> <p>(e) the general nature of the claim and an indication of the amount involved, if any</p>	<p>Art. 4(3)</p> <p>(c) a description of the nature and circumstances of the dispute giving rise to the claims and of the basis upon which the claims are made;</p> <p>(d) a statement of the relief sought, together with the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of any other claims;</p>	<p>Art. 1.1 (iii)</p> <p>a statement briefly summarising the nature and circumstances of the dispute, its estimated monetary amount or value, the transaction(s) at issue and the claim advanced by the Claimant against any other party to the arbitration (each such other party being here separately described as a "Respondent");</p>	<p>Art. 6 (iii)</p> <p>a preliminary statement of the relief sought by the Claimant, including an estimate of the monetary value of the claims;</p>

Request for arbitration

Summary of facts – how detailed?

Short summary

- Time pressure
 - statute of limitation
 - contractual guarantee is about to expire
 - following emergency arbitration
- Facts not clear yet
- Cost saving
- Further settlement negotiations

Long and detailed statement

- Full statement of claim (Art. 3(4)(b) Swiss Rules; Art. 15.2 LCIA)
- Complex nature of the dispute (multiple parties and multiple agreements)
- One vs. three arbitrators
- Direct focus on certain issues (with view to ToR / case management conference)
- Elicit respondent to file a detailed response?
- Put time pressure on arbitral tribunal
- Further settlement negotiations by showing strengths of the case
- Avoid the need for multiple rounds of subsequent submissions?

Request for arbitration

Where strategy might play a role

- **Quantum of the damage**
 - If too high: it has an impact on the costs of the arbitration proceedings
 - If too low: surplus claim might become time barred
- **Address procedural issues?** (e.g. scope of production of documents)
- **Choice of arbitrators**
 - Disclose what qualifications may be critical to a party?
 - Nominate co-arbitrator if panel of three
- **Summary of the relevant facts and basis for claims**
 - Anticipate arguments that are likely to be raised by respondent?
 - Filing of key documents
- **Prayers for relief**
- **Request filed with the sole purpose of interrupting the limitation period?**

Answer to the request for arbitration

Where strategy might play a role

- **Deadline** [30 days]
- **Lack of jurisdiction:**
 - Not filing any answer?
 - Save costs and fight only at stage of recognition and enforcement of the award under [Art. V\(1\) NYC](#)
 - File concurrent court proceedings on same dispute?
 - Waiving chance to comment on arbitrators / place of arbitration / language / nominate co-arbitrator
 - Filing an answer with focus on jurisdiction?
 - When to raise the defence?
 - As early as possible ([Art. 3\(7\)\(b\)](#); [Art. 21\(3\) Swiss Rules](#); [Art. 9 \(1\)\(i\) SCC](#))
 - ICC: advisable to raise defence before prima facie review of [Art. 6\(4\) ICC](#)
 - Lex arbitri: [Art. 186 para. 2 PILA](#) (plea of lack of jurisdiction before pleading in the merits)
- **Summary of the relevant facts:** depends on the request

Answer to request for arbitration

Where strategy might play a role

- **Defences:** surprise effect vs. risk of forfeiture
 - Claimant failed to comply with pre-arbitral (settlement) procedure
 - Notice of default did not meet contractual requirements
- **Counterclaim and set-off defence:** timing constraints by the applicable arbitration rules
 - **Art. 3(10) Swiss Rules:** shall in principle be raised with the answer to the notice of arbitration
 - **Art. 9(1)(iii) SCC:** preliminary statement of any counterclaims or set-offs in the answer (may still be raised up until statement of defence)
 - **Art. 5(5) ICC:** any counterclaim shall be submitted with the answer (after ToR: **Art. 23 ICC**)
- **Joinder:** timing constraints by the applicable arbitration rules
 - **Art. 7(1) ICC:** request for joinder shall be made before appointment of the arbitrators (afterwards only where all parties agree)
 - **Art. 13 (2) SCC:** request for joinder shall be made as soon as early as possible, no later than with the submission of the answer (afterwards only with consent of the Board)
 - **Art. 5 Swiss Rules:** Joinder possible at any time upon decision of the arbitral tribunal

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