[H]WRITTEN ADVOCACY: SUBMISSIONS UNDER THE ICC RULES OF ARBITRATION

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1. Introduction

The International Chamber of Commerce ("ICC") arbitration has a long history[1]. The first ICC arbitration rules, 1922 ICC Rules of Arbitration constitutes the mother of modern arbitration rules and, throughout the history, the ICC Rules of Arbitration has affected drafting rules and laws on international as well as domestic arbitration.

The ICC arbitration is one of the most referred dispute resolution mechanism referred to by Turkish parties in international business and investment transactions[2]. However, Turkish parties and legal practitioners are not very familiar with the ICC Rules and its practice. Indeed, one of the not very well-known aspects of the Rules is the issue of written submissions in ICC arbitration.

Written submissions are essential tools for presenting or defending a case in international arbitration. In broad terms written submissions cover all submissions made by the parties in writing. For ICC arbitration, written submissions may contain request for arbitration and answer to it as well as

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1 See Ali **Yeşilırmak**, Provisional Measures in International Commercial Arbitration (Kluwer 2005), pp. 19 etc.

2 In 2011, for instance, 41 cases involving Turkish parties registered with the ICC Secretariat. See ICC International Court of Arbitration Bulletin, v. 24, no. 1 (2012).

further statements of parties referring to factual and legal analysis of the case referred to arbitration. Strictly speaking, submissions refer to statements of claim/response, and joinders to those statements. The submissions may also be referred to as pleadings, briefs, memorials etc.

The contents of the written submissions are not well-explored subject and may vary in each legal culture. In addition there is a growing practice that would constitute a norm for international arbitration practice.

This article examines rules, principles, and guides regarding written submissions in ICC arbitration and provides some recommendations for practitioners for preparation of such submissions.

2. Request for Arbitration and Answer to it

ICC arbitration is initiated with the request for arbitration. Then the respondent files an answer to it.

Before initiating a case or responding to a request for arbitration, the party representative should

a) request from its client all facts (agreements, correspondence meetings minutes etc.) relating to the case;
b) ask its client whether the counter may have any document or information not possessed by it;
c) ask about potential party witnesses (for and against it) supporting the written evidence and pinpoint essential points regarding the potential statement of the witnesses;
d) analyze these facts and applicable substantive law, and thus prepare a case strategy in light of them.

What should the request for arbitration and answer to it contain is set out in Articles 4 and 5 of the ICC Rules of Arbitration. These Articles provide essential elements for the request and the answer.

Both in request for arbitration and answer to it, the parties may not have to state their defenses and claims in full[3]. A brief statement with essential documentation attached to it (agreements etc.) is generally sufficient. The most important issue to take into account at this stage is to fully explain the "request for relief" in the request and the answer. In some occasions however when a party has a strong case it may consider preparing a detailed request with all evidence attached to it in order to push the counter party to settlement and/or speed up the arbitration process.

3. Statement of Claim, Statement of Response and Joinders to them

3.1. In general

After the request for arbitration and answer to it have been submitted and the arbitral tribunal is appointed, the tribunal prepares, the Terms of Reference ("ToR"), procedural timetable and its first procedural order ("PO1"). It is generally within this order, the tribunal sets out the rules and principles regarding the submissions. That is because there is hardly

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[3] The Guide for party representatives entitled "Effective Management of Arbitration" ("Guide") explains the options of the parties:

"A. File a short Request that satisfies the Rules without providing any more content or evidence than is strictly required by the Rules.

B. File a comprehensive Request that constitutes a full statement of the case, including exhibits.

The above options represent two ends of a spectrum. However, there is also the option of filing a Request that provides a level of content and evidence anywhere between those two ends."

Guide, p. 17. The Guide further explains the pros and cons of the above options:

"A shorter and less comprehensive Request can be prepared more economically and more quickly than a more comprehensive document.

On the other hand, a more comprehensive Request may avoid the need for multiple rounds of subsequent submissions and thereby help to expedite the arbitration. In addition, providing more information may increase the impact of the Request on the respondent. Additional detail may also enable the parties and the arbitral tribunal to focus on the key issues in the case as early as possible and thereby facilitate the drawing up of the Terms of Reference and the conduct of the case management conference."

Guide, pp. 17-18.

anything provided in the ICC Rules regarding the written submissions. This is tenable as each case is different from the other; actors, parties, their representatives and arbitrators may come from different legal cultures. Thus, in this sense, each arbitration is unique and differs from the other. It is therefore left to the arbitrators and the parties to set out their own rules of submissions (in broad terms, procedure). It is apparently subject to mandatory rules provided in the ICC Rules of Arbitration and in the law applicable to arbitration (unless chosen by the parties, the law of the place of arbitration).

For finding the principles in respect of the submissions, the ICC arbitration Rules, their annexes, and the Guide will be examined.

3.2. Principles set out in the ICC Rules, its annexes and in the Guide for Effective Management of Arbitration

The main rule in the ICC Rules of Arbitration dealing with the submissions is Article 25 (1-2). This Article provides:

Establishing the Facts of the Case

1 The arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means.

*2 After studying the **written submissions** of the parties and all documents relied upon, the arbitral tribunal shall hear the parties together in person if any of them so requests or, failing such a request, it may of its own motion decide to hear them. (Emphasis added.)*

There are three other rules that may be helpful. There are three relevant articles:

"Article 19

Rules Governing the Proceedings

The proceedings before the arbitral tribunal shall be governed by the Rules and, where the Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration."

"Article 22

Conduct of the Arbitration

1 The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute.

2 ***In order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties.***

3 Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.

4 In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.

5 The parties undertake to comply with any order made by the arbitral tribunal. (Emphasis added.)"

"Article 24

Case Management Conference and Procedural timetable

1 When drawing up the Terms of Reference or as soon as possible thereafter, the arbitral tribunal shall convene a case management conference to consult the parties on procedural measures that may be adopted pursuant to Article 22(2). Such measures may include one or more of the case management techniques described in Appendix IV.

2 During or following such conference, the arbitral tribunal shall establish the procedural timetable that it intends to follow for the conduct of the arbitration. The procedural timetable and any modifications thereto shall be communicated to the Court and the parties. ,

3 ***To ensure continued effective case management, the arbitral tribunal, after consulting the parties by means of a further case***

management conference or otherwise, may adopt further procedural measures or modify the procedural timetable.

4 Case management conferences may be conducted through a meeting in person, by video-conference, telephone or similar means of communication. In the absence of an agreement of the parties, the arbitral tribunal shall determine the means by which the conference will be conducted. The arbitral tribunal may request the parties to submit case management proposals in advance of a case management conference and may request the attendance at any case management conference of the parties in person or through an internal representative. (Emphasis added.)"

In addition to the above articles Appendix IV of the Rules contain certain principles for case management. This Appendix is prepared to assist both the parties and the arbitrators for case management. The relevant part of Appendix IV provides:

"ICC Arbitration Rules

Appendix IV – Case Management Techniques

The following are examples of case management techniques that can be used by the arbitral tribunal and the parties for controlling time and cost. Appropriate control of time and cost is important in all cases. In cases of low complexity and low value, it is particularly important to ensure that time and costs are proportionate to what is at stake in the dispute.

a) Bifurcating the proceedings or rendering one or more partial awards on key issues, when doing so may genuinely be expected to result in a more efficient resolution of the case.

b) Identifying issues that can be resolved by agreement between the parties or their experts.

c) Identifying issues to be decided solely on the basis of documents rather than through oral evidence or legal argument at a hearing.

d) ***Production of documentary evidence:***

(i) requiring the parties to produce with their submissions the documents on which they rely*;*

(ii) avoiding requests for document production when appropriate in order to control time and cost;

(iii) in those cases where requests for document production are considered appropriate, limiting such requests to documents or categories of documents that are relevant and material to the outcome of the case;

(iv) establishing reasonable time limits for the production of documents;

(v) using a schedule of document production to facilitate the resolution of issues in relation to the production of documents.

e) ***Limiting the length and scope of written submissions and written and oral witness evidence (both fact witnesses and experts) so as to avoid repetition and maintain a focus on key issues.*** *(Emphasis added.)"*

In sum, none of the rules and/or principles referred to above does contain detailed principles for the submissions. The rules indeed confirm that how submissions should be made to the parties and the arbitrators. I have not seen any arbitration agreement dealing with in detail the issue of written submissions. In practice, the parties generally do not object to the principles prepared by the arbitrators and circulated before the case management conference. Some suggestions could apparently be made and the arbitrators generally take into consideration the reasonable amendment requests made by the parties.

It should always be kept in mind that once the order is rendered in respect of the submissions the parties should comply with its terms. What happens in case of non-compliance? The tribunal may not take into account the whole or part of the submissions. The parties should always keep in mind that they undertake, by referring their dispute to ICC arbitration, to comply with any order made by the arbitral tribunal (Article 22(5)).

3.3. Principles set out in under the law applicable to arbitration

National laws on arbitration do not provide detail rules on submissions too. For instance article 10E of the Turkish International Arbitration Law provides:

> *"Unless otherwise agreed by the parties, the arbitral tribunal,* ***following the submissions*** *as to the claim and defence shall draw up its terms of reference.*
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> *The terms of reference may contain such particulars as the parties' names and titles, their addresses for notification during the arbitration, a summary of their claims or defences, their requests, explanations on the dispute in question, the names, surnames, titles, and addresses of the arbitrators, the place of arbitration, the term of arbitration, the commencement of the term, explanations as to the procedural law or rules applicable to the dispute, and whether or not the arbitrators are competent to act as amiable compositeur. (Emphasis added.)"*

Thus, the TIAL leaves it to the parties and the tribunal to determine the principles applicable to the submissions. To this end, the general rule on the procedure shall be applicable:

> *"**Article 8***
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> *A)* ***Subject to the mandatory provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.*** *They may, in the determination of such procedure, make a reference to any law or international or institutional arbitration rules. If there is no such agreement between the parties, the arbitral tribunal shall conduct the proceedings in accordance with the provisions of this Law.*
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> *B) The parties shall have the same rights and powers. Each party shall be given a [full] opportunity to assert his petitions and defences." (Emphasis added.)*

3.4. Sample principles set out in PO1 regarding the submissions

As indicated above, the principles regarding the written submissions (and indeed hearings) are generally set out in the PO1 in ICC arbitration. The relevant parts of a sample first procedural order are:

1. SUBMISSIONS ON THE MERITS

1.1. The Parties shall file comprehensive submissions on the merits: (i) a Statement of Claim, (ii) a Statement of Response and Counterclaim, (iii) a Reply on Main Claim and Response on Counterclaim, (iv) a Rejoinder on Main Claim and Reply on Counterclaim, and (v) a Rejoinder on Counterclaim. The Statement of Claim, Statement of Response, Reply and Rejoinder shall set out full statements of the case, including a statement of the relief sought, a full presentation of the factual and contractual and/or legal basis for each claim and defense, as well as the evidence relied upon, in accordance with the rules set out in the present Procedural Order and/or subsequently decided by the Arbitral Tribunal.

1.2. There will be two rounds of written exchanges. The Parties shall endeavor to produce all documents on which they rely during the first round of exchanges.

1.3. Each submission will have the following format:

- *titles and subtitles shall be inserted whenever appropriate;*
- *pages shall be numbered;*
- *paragraphs shall be numbered in the left-hand side margin in a sequential and uninterrupted manner throughout the brief.*

1.4. Each Party shall attach the documentary evidence in support of the allegations set forth in each submission by way of exhibits.

1.5. Any time a reference to evidence is made in a submission, the Parties shall clearly identify the corresponding exhibit/witness statement/expert report. If a piece of evidence consists of more

than one page, the Parties must refer to the specific page or pages on which they rely.

1.6. Each Party shall include copies of all witness statement(s) and/or expert report(s) with the submission in which those witness statement(s) and/or expert report(s) are relied upon.

2. DOCUMENTARY EVIDENCE

2.1. Any time a document is referred to in a written submission, Witness Statement or Expert Report, it shall be identified by its exhibit number, as well as by sufficient additional information when it is mentioned for the first time.

2.2. Each of the written submissions referred to in paragraph 1.1 above shall be accompanied by a cumulative index of the documents filed by the submitting Party during the proceedings. The cumulative index shall indicate to which written submission each exhibit/legal authority/witness statement/expert report is attached. The Arbitral Tribunal may ask the Parties to submit a joint chronological list of the documentary evidence produced during the proceedings.

2.3. Each piece of documentary evidence produced in the present proceedings shall be "stamped" with the corresponding exhibit/legal authority/witness statement/expert report number. As to hard copies, each piece of documentary evidence shall have a divider with the Exhibit number on the corresponding tab.

2.4. The Parties shall number documentary evidence in a consecutive manner throughout the proceedings. Claimant shall number its factual exhibits as C-1, C-2 and so on, its legal authorities as CL-1, CL-2 and so on, its witness statements as CW-1, CW-2 and so on, and its expert reports as CE-1, CE-2 and so on. Respondent shall number its factual exhibits as R-1, R-2 and so on, its legal authorities as RL-1, RL-2 and so on, its witness statements as RW-1, RW-2 and so on, and its expert reports as RE-1, RE-2 and so on.

2.5. The exhibits filed by the Parties with the Request for Arbitration of _____, the Answer and Counterclaim of _____ and the Reply to Answer and Answer to Counterclaim of _____, respectively, shall not be considered on record and may be submitted by the Parties with their upcoming written submissions, in accordance with the rules set out in the present Procedural Order.

2.6. In the situation where a Party submits corrections to its pleadings and/or the documents attached thereto (witness statements, experts reports, factual or legal exhibits), this Party shall provide hard copies and electronic copies of any document that was amended.

2.7. All evidence written in a language other than English shall be accompanied by translations, unless otherwise agreed by the Parties and the Arbitral Tribunal. Translations of voluminous documents shall be limited to the relevant extracts (including those specifically relied upon and/or those that are relevant to understanding those relied upon). In case of disagreement, the Arbitral Tribunal shall determine the extent of the translation required.

2.8. Where Parties refer to legal materials (legal texts, commentaries, judgments and awards, etc.), the corresponding exhibit shall include the first page of the relevant book or journal in which the text appears. The materials exhibited should allow the Arbitral Tribunal to read and understand any cited passages in their context. The Arbitral Tribunal may refer to legal materials not referred to nor produced by the Parties during the proceedings.

2.9. Neither Party shall be permitted to submit additional or responsive documents after the filing of its respective last written submission save under exceptional circumstances and at the discretion of the Arbitral Tribunal, upon a motivated written request followed by comments from the other Party. Should a Party request leave to submit additional or responsive

documents that Party may not annex the documents that it seeks to introduce to its request.

2.10. The use of demonstrative exhibits (such as charts, tabulations, etc.) is allowed at the hearing provided that (1) copies of such demonstrative exhibits are provided to the opposing Party and to the Arbitral Tribunal during the hearing, and (2) the demonstrative exhibits refer only to evidence already on the record and not to new evidence. The Arbitral Tribunal may allow the inclusion of any or all of such demonstrative exhibits into the record.

3. PRODUCTION OF DOCUMENTS

3.1. Upon notice by either Party that documents within the possession, custody or control of the other Party are relevant to prove a fact in dispute and material to the outcome of the case, they shall be produced by the other Party according to the provisions of the present section.

3.2. This section 3 applies only to Requests for Production of Documents made by the Parties. The Arbitral Tribunal may order the Production of Documents at any time, provided, however, that reasonable notice is given to the Party requested to produce such documents.

3.3. The requesting Party shall address its Request to the other Party with the observance of the time-limits set forth in the Provisional Timetable ("Request for Production of Documents"). The Request for Production of Documents shall be presented in the form of a "Redfern Schedule", a model of which is herein attached as Appendix 1. The Parties shall not address copies of their Requests for Production of Documents to the Arbitral Tribunal.

3.4. A request for Production of Documents shall contain the following:

a) a description of the document, the production of which is requested, sufficient to identify such document or the

description in sufficient detail, including the subject matter, of a narrow and specific category of documents;

b) a brief explanation of the reasons why such documents are relevant to the outcome of the case;

c) a statement whereby the documents are not in the possession, custody or control of the requesting Party, and the reasons why such Party assumes that such documents or objects are in the possession or custody or under the control of the other Party.

3.5. The Party to whom the Request for Production of Documents is addressed shall produce the requested documents to the extent it has no objection. In case of objections, the requested Party shall file an Answer to the opposite Party's Request for Production of Documents, by filling in the "Redfern Schedule" pursuant to the Provisional Timetable.

3.6. In case of objections, the requesting Party will have the possibility, pursuant to the Provisional Timetable, to comment on the other Party's objections in the "Redfern Schedule", and to submit this "Redfern Schedule" to the Arbitral Tribunal seeking an order for the production of the relevant documents ("Application for Production of Documents").

3.7. The Arbitral Tribunal shall rule as soon as feasible on the Applications for Production of Documents, taking into account, but not being bound by the IBA Rules on the Taking of Evidence in International Arbitration (2010 version).

3.8. When the relevance of a document can be determined only upon a perusal of the document itself, the Arbitral Tribunal may order the production of this document to the members of the Arbitral Tribunal only, in order for them to decide on the production to the requesting Party.

3.9. Documents produced pursuant to a Request and/or Application for Production of Documents shall not be considered on record unless and until the requesting Party submits them to the Arbitral Tribunal as regular exhibits complying with the

presentation and indexing requirements set forth in section 2 above.

3.10. If a Party fails without satisfactory explanation to comply with an order for production of documents issued by the Arbitral Tribunal, the Arbitral Tribunal may infer that such evidence would be adverse to the interests of that Party.

4. WITNESS EVIDENCE

Witnesses

4.1. If a Party wishes to adduce witness evidence, Witness Statements shall be provided with and cited in that Party's submissions, filed in accordance with the Provisional Timetable.

4.2. Any person may present evidence as witness, including a Party's officer, employee or other representative.

4.3. This section 4 applies only to witnesses called by either Party; the Arbitral Tribunal may order the appearance of any witness who has produced a Witness Statement at any time, subject to reasonable notice.

4.4. It shall not be improper for a Party, its officers, employees, legal advisors or other representatives to meet and interview its witnesses or potential witnesses, to establish facts, prepare the witness(es) for examination, provided, however, that the effect of such interviews is not the exercise of undue influence on the prospective witness (no coaching).

Witness Statements

4.5. As provided in section 4.1 each Party shall file written Witness Statements for all witnesses presented by that Party.

4.6. Each Witness Statement shall contain:

a) the name and address (whether private or professional) of the witness;

b) indications as to the relationship (past and current) of the witness or expert with any of the Parties or Counsel (in

particular whether the witness is or was an employee or other representative of a Party or a consultant to such Party);

c) *a description of the background, qualifications, training, professional experience and present position of the witness (curriculum vitae with a photograph), provided that such description is relevant to the dispute or to the contents of the statement;*

d) *indications as to whether the witness is regarded as a witness of fact or an expert witness by the Party calling such witness;*

e) *a full description of the facts, and the source of the information provided by the witness in relation to those facts, sufficient to serve as that witness's evidence in the matter in dispute; a "full" description for the purposes of this provision means that the Witness Statement must be sufficiently detailed so as to stand in lieu of examination in chief of the witness in question;*

f) *the signature of the witness as well as the date and place of signature;*

g) *the indication of the translator's name and address, if applicable;*

h) *a statement by the witness that he/she believes the matters stated are true.*

4.7. Each Witness Statement shall comply with the following requirements:

a) *it shall be as concise as the circumstances of the dispute allow without omitting any significant matters;*

b) *it shall not contain lengthy quotations from documents;*

c) *it shall not engage in any legal argument, except if the witness is a legal expert;*

d) *it shall indicate which of the statements made in it are made from the witness' own knowledge and which are made on the basis of information or belief, giving the source for any statement made on information or belief;*

e) it shall use the witness's own words as its function is to set out in writing the evidence in chief of the witness.

4.8. Witness Statements may be drafted in a language other than English provided, however, that such other language is the witness' mother tongue. In such a case, the Witness Statement shall be filed together with a translation into English.

4.9. The Parties may not annex documents that are not otherwise on record to Witness Statements of factual witnesses. If necessary, documents that are part of the record, and which have been filed in accordance with section 2 above, may be referred to in the Witness Statement.

4.10. The Parties may, to the extent necessary, annex documents to Expert Reports. Such evidence should be limited to the documents used by the Expert to reach its conclusion(s) and/or demonstrative documents that illustrate its Report.

Witness Oral Testimony

4.11. Either Party may call witnesses at the hearing. The Arbitral Tribunal may also call, upon the motivated request of either Party or on its own motion, a witness whose Witness Statement has been filed in the proceedings but who is not called for cross examination.

4.12. Counsel shall be in charge of ensuring that the witnesses are present at the time and place indicated by the Arbitral Tribunal for their examination.

4.13. If a witness fails to appear at the hearing, the Witness Statement filed on behalf of such witness shall be disregarded, unless a Party expressly waives its right to cross-examine the witness or, in exceptional circumstances, if the Arbitral Tribunal has decided otherwise after having heard the Parties.

4.14. If a witness is unable to attend the hearing, the Arbitral Tribunal may exceptionally and in its discretion decide that such witness is to be examined by video conference, upon receipt of a short statement setting out the reasons why the witness is unavailable

to appear in person. The logistics and procedure for the examination by video conference shall be decided by the Arbitral Tribunal, after consultation with the Parties.

4.15. Each witness shall be invited to confirm the content of his or her Witness Statement at the hearing.

4.16. Witnesses shall in principle be examined separately, in the order determined by the Arbitral Tribunal upon a proposal which the Parties are encouraged to submit jointly to the Tribunal. However, the Arbitral Tribunal may decide to hear two or more witnesses together, upon a request made by either Party or on its own motion, and after consultation with the Parties.

4.17. Witnesses who are Party representatives shall in principle be examined first, in particular if they wish to remain in the hearing room following their examination.

4.18. A Party whose witness or expert intends to present oral evidence in a language other than English, and therefore requires interpretation, shall procure an independent professional interpreter to be approved by the Arbitral Tribunal. The interpreter's CV and declaration of independence shall be submitted to the Arbitral Tribunal two weeks before the hearing at the latest.

4.19. Each Party shall advance the costs related to the evidence of its own witnesses, without prejudice to the decision of the Arbitral Tribunal as to which Party shall ultimately bear those costs.

5. EXPERT WITNESSES

5.1. Each Party shall have the opportunity to file reports or statements by expert witnesses. The provisions applicable to Witness Evidence shall apply to expert evidence (see section 2 above).

5.2. The expert will indicate the documents that he or she relies on.

5.3. If the Arbitral Tribunal is of the opinion that a tribunal-appointed expert is required, such matter shall first be raised with the Parties. If the Arbitral Tribunal decides to appoint an

expert after hearing the Parties, a Procedural Order relating to the determination sought from the expert shall be submitted to the Parties in draft prior to the appointment of the expert.

5.4. If either Party seeks the appointment of a tribunal-appointed expert, a motivated request shall be addressed to the Arbitral Tribunal, setting forth the issues to be determined by the tribunal-appointed expert.

4. Conclusions: Pitfalls in respect of Written Submissions

There are a number of issues that should be taken into consideration in preparing the submissions[4]:

a) Follow the instructions (PO1) of the arbitrators. In accordance with Article 22(5) if the instructions are not followed, the sanctions could

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[4] On these pitfalls see for instance Jacop Grierson/Annet van Hooft, Arbitrating under the 2012 ICC Rules (Kluwer Law International 2012), pp. 163-172; Jason **Fry**/Simon **Greenberg**/Franceska **Mazza**, The Secretariat's Guide to ICC Arbitration (ICC Publishing 2012), p. 19 etc; Guide, pp. 17-61; W. Lawrence **Craig**/William W. **Park**/Jan **Paulsson**, International Chamber of Commerce Arbitration, 3rd edition (Oceana/ICC Publishing 2000), pp. 427-434; Eric **Schafer**/Herman **Verbist**/Christophe **Imhoos**, ICC Arbitration Practice (Staempfli 2005), pp. 98-106. See also Julian D. M. **Lew**/Loukas **Mistelis**/Stefan M. **Kröll**, Comparative International Commercial Arbitration (Kluwer Law International 2003), pp. 527-584; Emmanuel Gaillard/John Savage (eds.), Fouchard Gaillard Goldman on International Commercial Arbitration (Kluwer 1999), pp. 688-709; Gary B. **Born**, International Commercial Arbitration, 2nd ed. (Wolters Kluwer 2013); pp. 2196 etc; Pierre **Karrer** (ed.), Introduction to International Arbitration Practice (Kluwer Law International 2014), pp. 99-146; Lawrence W. **Newman**/Richard D. **Hill** (eds.), The Leading Arbitrators' Guide to International Arbitration, 2nd ed. (Juris 2008); Jeff **Waincymer**, Procedure and Evidence in International Arbitration (Kluwer Law International 2012), pp. 217-254; Peter V. **Eijsvoogel**, Evidence in International Arbitration (Graham **Trotman**/Martinus **Nijhoff** 1994); Elliott **Geisinger**/Guillaume **Tattevin**, Advocacy in International Arbitration (Juris 2013). In Turkish language the following sources can also be consulted with: Cemile **Demir-Gökyayla**, Milletlerarası Tahkimde Belge İbrazı, Vedat Kitapçılık (İstanbul 2014); Musa **Aygül**, Milletlerarası Ticarî Tahkimde Tahkim Usulüne Uygulanacak Hukuk ve Deliller (Konya 2013); Ekin **Hacıbekiroğlu**, Milletlerarası Tahkim Hukukunda Deliller ve Delillerin Değerlendirilmesi (On İki Levha Yayıncılık 2012).

be severe; in the form of not accepting in part or whole of the submissions.

b) Make and cost/benefit analysis[5] and prepare your arbitration strategy in accordance with the facts you gathered and act accordingly in providing your submissions. Prepare to develop your strategy in light of the submissions made by the counterparty and particularly of the evidence provided by it.

c) Request for arbitration and answer to it are in principle not the submission where the parties provide their full statements.

d) In statements, unless otherwise agreed or stated by the arbitrators, make your full statement.[6] Make sure that the ToR is written as broad terms as possible to cover your possible request for relief at the end of your future submission. Advance planning and preparation of strategy are required. The parties should be aware of the fact that in accordance with Article 23(4) of the Rules, no new claims could in principle be made after the ToR is signed.

e) Round of submissions. Traditionally there are two rounds of submissions in ICC arbitration. I suggest avoiding single round of submissions.[7] That may later be a reason for a challenge to an award on the basis of due process. If the case is too complicated three rounds of submissions may also be considered.

f) Who starts the submissions? Apparently the Claimant. However in some cases the Respondent may also have a substantial claim. In

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5 See Guide, pp 18, 22-23.

6 This is considered as "increasingly the norm in international arbitration". **Lew/Mistelis/ Kröll**, p. 537. See also generally Julian **Lew**/Laurence **Shore**, "International Commercial Arbitration: Harmonising Cultural Differences", Dispute Resolution Journal, v. 54 August 1999.

7 Guide explains pros and cons of additional submissions as:
"Additional rounds of written submissions enable the parties to articulate their positions more extensively and respond to the developing arguments on each side.
However, additional rounds of briefs may lead to unnecessary repetition, excessive detail or dilatory tactics."

such case, it may be wise to have separate rounds of submissions for the case and the counter claim.

g) Separation the facts from legal arguments. Each case is generally based on the facts. Thus establishing facts are very important. Legal arguments are generally based on the facts. So focus on facts. If however arbitrators are not familiar with the applicable substantive law make sure to sufficiently inform them of the law.

h) Clarity and coherence. Be clear and coherent in your submissions. Easier to read better to understand.

i) Refer to supporting evidence and legal authority within the submissions.

j) Respond to the counter party's statements and arguments.

k) Use documentary evidence; written documents (electronic or hard copy) as much as possible for establishing the facts. Use where necessary witness statements and expert reports.

l) In documentary evidence:

- Do not submit unnecessary and/or too many exhibits.
- Review very carefully before submitting any documents.
- Follow the instructions of the tribunal or use a sensible system of identifying the documents.
- No need to resubmit the same exhibits.
- Do not submit the original documents unless requested.
- Make sure to provide the translations and make you planning regarding the preparation of the translations for the deadlines so that the submissions are made on time.
- Redact documents only where necessary for instance for confidential or privileged info etc. only.

m) Witness statements:[8]

- Use reliable witnesses with the first-hand knowledge on the fact endeavored to be established.
- Remind the witness that witnesses should always tell the truth. Assist in preparation of the witness report without distorting it.
- Prepare the witness for cross-examination.
- Keep witness statements short but remind the witnesses that the counterparty and/or the tribunal may ask any question in respect of his/her knowledge on the case regardless of the fact that such knowledge is or is not referred to in the statement.

n) Expert reports:[9]

- Experts should state their true opinion in respect of the issue on which their opinion is sought.
- They should be briefed in respect of the case and what is requested from them. It is not so difficult to understand legal aspects to get a legal opinion but lawyers should also understand the technical details of the case to get an expert opinion.
- Avoid getting a bias or unreliable expert report.
- Guidance could be acquired from the IBA Rules on Taking Evidence in International Arbitration.

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8 See also Guide, pp. 41-43.

9 See also Guide, pp. 45-50.

Bibliography

Aygül, Musa; Milletlerarası Ticarî Tahkimde Tahkim Usulüne Uygulanacak Hukuk ve Deliller (Konya 2013).

Born, Gary B.; International Commercial Arbitration, 2nd d. (Wolters Kluwer 2013).

Craig, W. Lawrence/**Park**, William W./**Paulsson,** Jan; International Chamber of Commerce Arbitration, 3rd edition (Oceana/ICC Publishing 2000).

Demir-Gökyayla, Cemile; Milletlerarası Tahkimde Belge İbrazı, Vedat Kitapçılık (İstanbul 2014).

Eijsvoogel, Peter V.; Evidence in International Arbitration (Graham Trotman/Martinus Nijhoff 1994).

Effective Manegement of Arbitration - A Guide for In-House Counsel and Other Party Representatives, ICC Publication No. 866-1.

Fry, Jason/**Greenberg,** Simon/**Mazza,** Franceska; The Secretariat's Guide to ICC Arbitration (ICC Publishing 2012).

Gaillard, Emmanuel/**Savage,** John (eds.); Fouchard Gaillard Goldman on International Commercial Arbitration (Kluwer 1999).

Geisinger, Elliott /**Tattevin,** Guillaume; Advocacy in International Arbitration (Juris 2013).

Grierson Jacop/**Hooft,** Annet van; Arbitrating under the 2012 ICC Rules (Kluwer Law International 2012).

Hacıbekiroğlu, Ekin; Milletlerarası Tahkim Hukukunda Deliller ve Delillerin Değerlendirilmesi (XII Levha Yayıncılık 2012).

Karrer, Pierre (ed.); Introduction to International Arbitration Practice (Kluwer Law International 2014).

Lew, Julian D. M./**Mistelis,** Loukas/**Kröll,** Stefan M.; Comparative International Commercial Arbitration (Kluwer Law International 2003).

Lew, Julian/**Shore,** Laurence; "International Commercial Arbitration: Harmonising Cultural Differences", Dispute Resolution Journal, v. 54 August 1999.

Newman, Lawrence W./**Hill,** Richard D. (eds.); The Leading Arbitrators' Guide to International Arbitration, 2nd ed. (Juris 2008).

Schafer, Eric/**Verbist,** Herman/**Imhoos,** Christophe; ICC Arbitration Practice (Staempfli 2005)

Waincymer, Jeff; Procedure and Evidence in International Arbitration (Kluwer Law International 2012).

Yeşilırmak, Ali; Provisional Measures in International Commercial Arbitration (Kluwer 2005).