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CENTRE OF CONSTRUCTION LAW AND MANAGEMENT
PART D

PRINCIPLES AND PRACTICE OF PLEADING

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A: INTRODUCTION

1. These notes consider the preparation of statements of case in civil proceedings in court, where they are commonly referred to as pleadings, and in arbitration where they may be referred to as case statements (Contrast the ICC “Terms of Reference”).
2. While there is debate about the extent to which the principles of pleading in court are relevant to or appropriate in arbitration, the purpose of case statements is similar whatever the forum. Furthermore, at least in complex matters, there is a greater similarity of approach now that most of the technicalities of pleading in court have been swept away with the introduction of the Civil Procedure Rules (CPR).
3. The rules of pleading in court may also be applied by order in arbitration, in which case the pleadings are usually referred to as Particulars of Claim, Defence, Reply rather than Statement of Claim, Statement of Defence etc. But in arbitral proceedings the parties are generally referred to as claimant and respondent rather than, as in court proceedings, claimant and defendant (Contrast adjudication where the usual practice is to identify the parties as “referring party” and “other party” and both submit written statements.)

4. Purpose of case statements.

Case statements have a number of important functions in arbitral proceedings.

- 4.1 To identify the matters to be argued before and determined by the tribunal.
- 4.2 To identify the limits of interlocutory orders such as discovery and interrogatories.
- 4.3 To limit the manner in which the parties can present their case at the hearing.¹
- 4.4 To provide a permanent record of the matters raised in the action.²

¹ It is important to keep the case statements up to date by amendment where appropriate.

4.5 To record those matters that cannot be re-litigated between the parties.³

5. Causes of action, positive defences and material facts.

An understanding of the legal basis of any claims advanced and positive defences relied upon is essential in the preparation of case statements.

- 5.1 Irrespective of the degree of formality required, a case statement should state all material facts relied upon by that party.
- 5.2 The material facts are those that, if denied, must be proved by a party if it is to succeed in obtaining the relief claimed or in establishing a positive defence (an avoidance or, if it concerns a legal defect in the claimant's case a demurrer). A defence that goes beyond a mere denial (a traverse) of a fact alleged by the other party).⁴
- 5.3 The law only recognises certain factual situations as giving rise, if proved, to a relief or remedy or to a positive defence. In the case of claims these factual situations are known as "causes of action," each cause of action consisting of a number of separate elements, each in turn governed by its own legal principles.
- 5.4 There are numerous potential causes of action but, in the context of arbitral proceedings, the most frequently encountered causes of action are claims in debt and for breach of contract.
- 5.5 For each cause of action there are a number of positive defences that can be relied on to defeat or reduce the claimant's entitlement, even if its case is otherwise

² Court can look at these to seek if the award has completely disposed of the reference.

³ An arbitral award gives rise to an issue estoppel. Parties cannot in subsequent proceedings make allegations contrary to any precise point that was distinctly put in issue in the arbitration and decided against it, even if the object of the new proceedings is different from the arbitration. Consider Henderson v. Henderson (1843) 3 Hare 1000. Court can strike out as frivolous and vexatious any claim or defence which has clearly been decided in previous proceedings against the party raising it, or which might have been raised in previous proceedings in which the facts necessary to raise it have been decided against that party.

Consider also Res Judicata (cause of action estoppel). The whole legal rights/obligations are concluded by a Judgment - both as to questions of fact and law - (actual merger). The question is, was it open to the claimant to recover in the first action what it seeks to recover in the second. To decide, look at the pleadings.

⁴ Material facts relate to the cause of action or elements of the substantive defence on which reliance is placed. For example, the case of action in contract (contract, terms, breach, damage, causation, (also defences) misrepresentation, statement of fact, inducing contract, false, causation and damage or other relief. These are also important in award writing.

proved or admitted, and each of these in turn requires a number of material facts to be established.

- 5.6 In identifying the material facts, consideration also should be given to any presumptions of law relevant to that claim or defence. A material fact that is presumed in law need not be alleged unless and until its non-occurrence is put in issue by the other party.
- 5.7 Material facts can be distinguished from the evidence to be relied on to prove those facts. Nevertheless, sufficient details (particulars) should be included about each material fact to enable the other party to know and prepare for the case it has to deal with (see AA1996, s. 33). In deciding the degree of detail to provide, the place of the case statement in the context of the proceedings as a whole, should also be considered.
- 5.8 The material facts can also be distinguished from the legal consequences that flow from them. It is sometimes helpful, but seldom sufficient to identify to legal consequences on which reliance is placed.
- 5.9 The principal skill in preparing a case statement is to identify, on the basis of the information provided, the appropriate causes of action to the relief sought or, in the case of a respondent, the appropriate defences and to allege those facts that are material to those causes of action or defences.
- 5.10 An arbitrator must be able to interpret the parties' case statements to identify the causes of action and positive defences on which reliance is placed and, in due course, to determine which of those material facts have been proved and to structure the award accordingly. Consider The Jurgami [1989] 2 Lloyd's Rep. 1, John Hay v. London Brick Co [1989] 2 Lloyd's Rep. 7.

6. Ordering case statements.

Consideration should be given to the tribunal's power to order case statements.

- 6.1 The arbitrator's power to order the parties to submit case statements was formerly contained in s. 12(1) of the Arbitration Act 1950 but is now found in S. 34 of the 1996 Act, see s. 34(2)(c) and also s. 34(2)(e), contrast Article 23 of the Model Law.⁵ But this power may be modified by agreement between the parties. See for example CIMAR.
- 6.2 Further particularisation of a material fact alleged in a case statement may need to be ordered where this is necessary in the interests of natural justice (see AA1996,

⁵ **s. 34(2)(c)** Whether and in what circumstances statements of case are to be issued, when supplied, when amended. **s. 34(2)(e)** whether and in what form questions to be put to either party. **Article 23** Claimant to state facts supporting claim, points in issue and relief or remedy sought. Respondent to state defence. Can add documents, or refer to them and other evidence. Can amend, unless arbitrator considers it inappropriate.

s. 33 (see the notes to the former RSC Order 18 rule 12).⁶ For instance:

- 6.2.1 To inform the other side of the nature of the case to be met as opposed to the mode of proof;
 - 6.2.2 To enable the other side to prepare for trial and to know what evidence it should adduce;
 - 6.2.3 To limit the generality of the case statements;
 - 6.2.4 To limit and define the issues to be tried and as to which discovery is required;
 - 6.2.5 To tie the hands of the parties as to the matters that can be raised at trial.
- 6.3 Provided, however, that the basis of the case is clear, it is not generally appropriate to use requests for particulars to seek to force a party into a particular straightjacket, or to request particulars that are disproportionate to the matters in dispute. Consider Naru Phosphates v. Matthew Hall [1993] 2 ADRLJ 223 (Australia), see also British Airways v. McAlpine (1994) 72 Build LR 26.⁷

B: PLEADING IN CIVIL PROCEEDINGS

7. Order of Pleadings.

- 7.1 The order of pleadings reflects the rules of evidence concerning burden of proof and the principle that material allegations in a points of claim or counterclaim are deemed to be admitted unless denied (traversed) while matters raised in subsequent pleadings are deemed to be denied unless admitted (Now embodied in CPR, Rules 16.4, 16.5, 16.7).
- 7.2 The claimant's claim comes first. It sets out the relief sought from the respondent and the factual basis giving an entitlement to that relief.
- 7.3 The defendant responds to the claimant's pleading in its defence. If the defendant is seeking relief from the claimant this should be done by way of counterclaim.
- 7.4 Occasionally, it is necessary for the claimant to respond to the defendant's

⁶ For instance, so as not to be taken by surprise by the way the case is subsequently advanced in evidence. This may be less important if written witness statements are exchanged

⁷ British Airways The approach of seeking to force a party to individualise occurrence and damage was rejected. A global claim can be advanced. The problem is also discussed in Merton v. Leach (1985) 32 Build LR 51. What is alleged in a global claim is that it ought reasonably to have cost fx. In fact it cost fy. The only explanation for the difference is the occurrences relied on by the Claimant. Such a claim can be attached by showing that the premises are not correct or that there were other occurrences which could have resulted in the cost overrun.

defence. This is done by a reply. If there is a counterclaim the claimant should respond to it by a defence to counterclaim.

- 7.5 Finally, the defendant may, in turn, wish to respond to a defence to counterclaim. This is done by reply to defence to counterclaim. The use of further pleadings following a reply, such as a rejoinder, has virtually died out.⁸

8. The formal requirements of pleadings.

- 8.1 The heading: State the forum in which proceedings are being conducted and, if not a court identify the relevant statutory framework. Identify the parties by full name and status. Describe the pleading.
- 8.2 The body: You are telling a story. Tell it logically and precisely, in short numbered paragraphs and sub-paragraphs, without waffle and repetition, using clear, contemporary language where possible.
- 8.3 It is not necessary to allege facts that are presumed in law until and unless the other party has sought to rebut the presumption.
- 8.4 It is generally unnecessary and undesirable to second guess your opponent. Use your next pleading if a positive response to the other party's material allegations is necessary.
- 8.5 Pleading inconsistent and alternative material facts and remedies is, in principle, unobjectionable provided it is done within the same pleading.⁹
- 8.6 Any relief or remedy sought should be identified, for instance payment, damages, a declaration, interest.
- 8.7 The Prayer: This is a summary of the relief or remedies claimed added at the end of a claim or counterclaim.
- 8.8 The postscript: The pleader's name should appear at the end along with the name and business address of those serving the pleading. In court proceedings, a statement of truth must be added.
- 8.9 The backsheet: A sheet added to the end of the pleading identifying the parties, the pleading and the address of the serving party.
- 8.10 Be generous with your use of paper. Double spacing is preferred.

⁸ Replies may be necessary to deal with condition precedents or estoppels raised by a defendant. It used to be considered necessary to include such pleadings where issues such as the UCTA 77 arose in a reply, to deal with questions of reasonableness, but it is now considered better practice to anticipate and deal with such issues at an earlier stage. (Claim for breach of contract; Defence raising exclusion clauses; Reply, UCTA applies; Rejoinder, clause reasonable.)

⁹ It may weaken your case to plead inconstant facts.

9. **Formal requirements of a claim.**

- 9.1 All material facts necessary for the remedy or remedies claimed must be pleaded.¹⁰
- 9.2 Set out each material fact and relief sought succinctly and separately in a numbered paragraph or sub-paragraph.
- 9.3 If interest is sought, it must be claimed. The costs of the proceedings need not be expressly claimed.
- 9.4 The Prayer. Summarise the relief sought.

10. **Formal requirements of a defence (and counterclaim).**

- 10.1 Each material allegation in the claim should be responded to either by way of denial (traverse) admission or non admission. Non admission is only appropriate in respect of allegations that the defendant is unable to admit or deny (ie not just because your client wishes to hedge its bets!) (see CPR, Rule 16.5(1)).
- 10.2 When denying an allegation in the other party's pleading deal with the root and substance of each and every part of the allegation.¹¹ Matters of which your client has no knowledge should be dealt with by way of non admission. Reasons should be given for denials, and if an alternative version of events is to be put forward, this should be stated (CPR, Rules 16.5(2),(3)).
- 10.3 Prior to the introduction of the Civil Procedure Rules, allegations of breach and of loss and damage were often dealt with by a single denial or non admission, unless a positive case was to be made in respect of a particular allegation or a Scott Schedule was ordered. It is unclear whether it is now necessary to deal separately with each allegation of breach or item of loss and damage.
- 10.4 Material facts relied upon by way of avoidance should be pleaded in a similar manner to that considered above under points of claim.
- 10.5 A point of law may also be relied upon by way of avoidance (a demurrer).
- 10.6 The general traverse: If drafting a defence or reply it is common practice to include a general traverse.
- 10.7 Linking a defence with a counterclaim. Where material facts necessary for a counterclaim are pleaded by way of defence these must be incorporated into the counterclaim by reference. If the counterclaim is relied upon by way of set off, this must be alleged in the defence (see CPR, Rule 16.6).

¹⁰ If this is not done, the pleading may be struck out as failing to disclose a cause of action. Summary dismissal of a claim is also possible.

¹¹ On the 15th December a contract was concluded - it is denied that a contract was concluded on the 15th December!!!

10.8 A counterclaim is pleaded in the same manner as a claim.

11. Formal requirements of a reply (and defence to counterclaim).

11.1 In the absence of a counterclaim, a reply is only necessary if the defence relies on positive defences that, in turn, require a positive response.

11.2 There is no need to deal separately with every paragraph of the defence. A general joinder of issue is sufficient.

11.3 If there is a counterclaim then each allegation on which it is founded must be dealt with in the same manner as in a defence.¹²

12. Deciding the degree of detail to provide.

12.1 Only material facts should be pleaded. Pleading immaterial facts creates hostages to fortune. It can be confusing and is wasteful of time and cost.

12.2 In general, avoid pleading evidence. It creates hostages to fortune and can obscure the facts in issue both for the pleader and the recipient. It also is wasteful of time and cost. See Practice Direction (Civil Litigation: Case Management [1995] 1 WLR 262, paragraph 4 (now superseded).

12.3 In complex cases necessary particularisation the material facts can be included in schedules while bearing in mind that it is possible to say too much as well as too little. Material facts must, however, be alleged on the face of the pleading.

12.4 Occasionally, particularly in a defence or a reply, it is appropriate to plead propositions of law. These can define an issue or question in dispute or provide a knock out blow to the other party's case.¹³

13. Uses and abuses of pleadings.

13.1 Pleadings often give little indication of the contentions of law to be advanced and, even if particularised, provide only a limited indication of the evidence to be advanced. This is particularly so in the case of defences, but under the CPR, defendants must now be more forthcoming (CPR, Rule 16.5(1), (2), (3)).

13.2 Nevertheless, properly drafted pleadings can achieve both precision and economy of time and cost and can avoid unnecessary duplication with material provided later during the preparatory stages of the proceedings.

¹² This is so even if the allegations are set out in the defence, not the counterclaim.

¹³ For instance, reference is often made to the Limitation Act 1980, where appropriate, although such a reference is no substitute for pleading the material facts.

C: CASE STATEMENTS IN ARBITRAL PROCEEDINGS

14. The form of case statements.

The form of case statements used in arbitral proceedings depends principally on whether the parties are legally represented, but also on the nature and complexity of the dispute.

- 14.1 At one extreme are documents only consumer arbitrations, often between unrepresented parties. Case statements in such cases usually consist of a written narrative, or letter, to which is attached all the material, such as documents, letters and photographs on which reliance is placed. Case statements in this form may not focus on the material facts or on the legal basis for the relief or remedy claimed.
- 14.2 At the other extreme are proceedings where there will be a hearing of oral evidence. Case statements are the first step in a process during which each party progressively reveals its case and learns more of its opponent's case through disclosure of documents, witness statements, expert reports, and oral evidence and submissions, each step providing increasing amounts of detail. In order to provide a clear agenda for the later procedural stages and the hearing a more formalised structure is necessary for the parties' case statements.
- 14.3 Between these two extremes lie any number of possibilities where the tribunal, in the light of representations from the parties, might consider truncating certain stages. For instance, documents and witness statements can be exchanged with case statements, but consider Lovell Partnerships (Northern) Ltd v. AW Construction Plc (1996) 81 Build LR 83. If there is to be a hearing, but case statements are poorly prepared, the tribunal can prepare or require the parties to prepare a list of issues which then becomes the agenda for the subsequent procedural stages, the hearing and the award.

15. Exchanging case statements in arbitral proceedings.

In all but the simplest cases, case statements are generally exchanged sequentially as in civil proceedings. Simultaneous exchange of case statements, followed by the exchange of case statements in reply can be effective in simple disputes involving one or two issues which are already well understood by the parties.

16. Deciding the form of a case statement in arbitral proceedings.

There are no established rules for the content of case statements in arbitral proceedings. But, generally, they often give a fuller and more discursive exposition of a party's case than would, at least prior to the CPR, be normal in pleadings served in court proceedings.

- 16.1 In addition to alleging material facts a case statement is likely to include contentions of law and references to oral and documentary evidence to be relied upon in support of the material facts alleged. Sometimes a more argumentative style of language is used.

- 16.2 An order for pleading by way of case statements is often accompanied by an order that the documents on which the party relies are to be served with its pleading.
- 16.3 When preparing a case statement it is usually good practice to set out the evidential/documentary case and arguments in schedules and appendices rather than on the face of the core document. This will create a manageable hierarchy of information from the schematic to the detailed.
- 16.4 The core document should allege only material facts and, possibly, propositions of law, with references to the supporting documentation as necessary. If documents are annexed, the significance of these should be explained by supporting schedules and/or highlighting.
- 16.5 In preparing the core document it is often useful to bear in mind the rules of pleading used in court proceedings.

17. Uses and abuses of case statements.

- 17.1 If case statements are ordered it must be made clear either by reference to the applicable rules or by order what it to be produced and its status as an agenda for the hearing.
- 17.2 The production of a case statement will involve significantly greater expenditure of cost and time than the equivalent pleading.
- 17.3 A badly produced case statement can, in all but the simplest disputes, be hopelessly confusing and embarrassing.
- 17.4 Properly drafted a case statement may give both the parties and the arbitrator a clearer indication of the substance and the merits of the parties' contentions. This can encourage early resolution either through direct negotiations or mediation/conciliation, making the greater expense worthwhile.

D: WRITTEN CASES IN ADJUDICATION

18. The form of written cases

The general structure of a Referral in adjudication is a core document setting out, in narrative form, the background to the dispute and the claims made, to which is annexed supporting material, schedules, contemporaneous documents and witness statements. It is more usual in adjudication proceedings than in litigation or arbitration, to anticipate the responding party's case. Subsequent written cases tend to be similarly structured.

- 18.1 While the core document may be more discursive than in arbitration or litigation, it must still allege all the elements of the causes of action or substantive defences on which reliance is placed. It is best to prepare the Referral before finalising and serving the Notice of Adjudication. It this way the way the dispute is characterised

in the latter will be consistent with the Referral.

- 18.2 Given the different procedural styles adopted by adjudicators, and the difficulties associated with the late introduction of material, it is important to ensure that any material that is considered relevant and helpful to a party's case is included in the first written statement it provides.
- 18.3 Good cross-referencing between the core document and the supporting material is essential and, ideally, parts of supporting documents that are relied on should be highlighted. The objective of a good cross-referencing system is that adjudicator can readily find all the supporting material relied on in respect of a particular issue or claim and see why it is relevant. If cross-referencing is poor or non-existent, the adjudicator may overlook key documents, may read more than intended into the marginally relevant, and may expend many futile hours (for which the parties have to pay) seeking out material that does or does not support a party's case.
- 18.4 Most adjudicators will accept all material included with a case statement, including the core narrative, as having evidential value. But witness statements can serve to particularise matters alleged in the core narrative, or to highlight matters of particular evidential significance. In practice if the Referral includes witness statements, the Response often does, but not otherwise.

19. Exchanging written cases in adjudication.

The minimum provided for in most rules is sequential exchange, with a Referral and a Response to Referral. Some Adjudicators will allow a Reply. Further written cases following the Reply are seldom appropriate, and may be a recipe for frustration, annoyance, and wasted costs.

E: DRAFTING A CASE STATEMENT

20. Precedents.

20.1 Refer to precedents. This saves time, cost and, occasionally, sleepless nights. Precedents should not be followed slavishly. They are an aid memoir, not a substitute for thought. The following sources of information are invaluable:

20.1.1 Atkin's Court Forms;

20.1.2 Bullen & Leake, Precedents of Pleadings.

21. Getting down to it.

21.1 Read your instructions and the documents provided and identify what your client wants.

21.2 Keep to your instructions.

- 21.3 Identify the legal principles (the necessary elements of the cause of action) that entitle your client to the relief sought or defence relied upon.
 - 21.4 Think and plan what you want to say, and why you want to say it.
 - 21.5 Sketch out the structure of your case statement.
 - 21.6 Prepare a first draft.
 - 21.7 Do something else and come back to revise it later.
 - 21.8 Read through the final draft carefully.
 - 21.9 Is it clear what you want and why you are entitled to it? Have you missed out any material facts? Are they sufficiently particularised?¹⁴
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¹⁴ Do you show that you have a complete cause of action, an entitlement to the remedy.

APPENDIX A: BASIC STRUCTURE FOR A CLAIM IN CONTRACT

IN THE MATTER OF THE ARBITRATION ACT 1996

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N:

UNLUCKY CLIENT

Claimant

- and -

UNHAPPY CONSULTANT

Respondent

STATEMENT OF CLAIM

The Parties

1. The Claimant is and was at all material times ...

[Identify the parties and other relevant persons. If appropriate include a brief description of the project.]

Pre contractual negotiations

2. On or about the ...

[If pre-contractual negotiations are material, say to a claim for misrepresentation, include them here.]

The contract

3. By written agreement entered into for value on or about ... (hereinafter referred to as "the "consultancy agreement") ...

[Identify the agreement and any documents/conversations in which it is contained. Include, if appropriate, a general description of the scope of the works.]

The terms

4. The consultancy agreement included the following express terms:

4.1 ...

[Set out in summary material express and implied terms.]

Execution

5. Pursuant to the consultancy agreement ...

[Set out briefly any relevant acts done in performance of the agreement.]

The Breach/other default

6. In breach of the consultancy agreement the Respondent:

6.1 ...

[Set out the allegations of default relevant to each of the remedies sought. Include any necessary particularisation, in Appendices if extensive.]

The Damage

7. In the premises (Because of the facts and matters set out above) the Claimant has suffered loss and damage:

7.1 ...

[Set out and quantify as far as possible the various heads of loss and damage. It may be appropriate to particularise the physical consequences of the alleged defaults in a separate paragraph, before dealing with the financial consequences.]

Interest

8. Further the Claimant is entitled to and claims interest on ...

[If you want interest claim it.]

The Prayer

AND the Claimant Claims:

(1) ...

(2) ...

[List the various remedies and relief sought.]

SERVED, etc

YOUR NAME

APPENDIX B: BASIC STRUCTURE FOR A DEFENCE

IN THE MATTER OF THE ARBITRATION ACT 1996

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N:

UNLUCKY CLIENT

Claimant

- and -

UNHAPPY CONSULTANT

Respondent

STATEMENT OF DEFENCE

The Parties

1. Paragraph 1 of the Points of Claim is admitted (not admitted/denied).

Pre contractual negotiations

2. Save that it is admitted (denied) that ... Paragraph ... of the Points of Claim is denied (admitted).
3. The Respondent pleads to Paragraph ... of the Points of Claim as follows:
 - 3.1 It is admitted (denied) that ...
 - 3.2 ...

[This method of pleading may be appropriate where a particular paragraph of the points of claim contains several allegations, or if an alternative case is to be advanced by the Respondent, or a bare denial is insufficient.]

The contract

4. Save that the Respondent avers that the contract was also contained in and/or evidenced by ... Paragraph ... of the Points of Claim is admitted.

The terms

5. The terms alleged in Paragraph ... of the Points of Claim are admitted.

Execution

6. ...

[Set out briefly any relevant acts done in performance of the agreement on which the Respondent relies to advance a defence by way of avoidance.]

The alleged breach/other default

7. It is denied that the Respondent was in breach of contract whether as alleged in Paragraph ... of the Points of Claim or at all.

[Set out any material facts and matters on which the Respondent relies by way of avoidance, eg. reliance on exemption clauses, non-compliance with conditions precedent, estoppels, as well any alternative versions of events relied on by the Respondent.]

The alleged damage

8. It is not admitted that the Claimant has suffered loss or damage whether as alleged in Paragraph ... of the Points of Claim or at all. Causation is denied.

9. ...

10. Save as expressly admitted or not admitted above the Respondent joins issue with each and every allegation in the Statement of Claim as if the same were set out separately and individually traversed. The Respondent denies that the Claimant is entitled to the relief claimed against it or to any relief.

Served, etc

YOUR NAME