INTERNATIONAL COMMERCIAL ARBITRATION, AN INTRODUCTION

2010
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INTRODUCTION

A dispute resolution clause is normally found at the very end of a contract, even if the contract is large and complex and was heavily negotiated between international parties. Indeed, one normally finds the dispute resolution clause in between the final and more practical standard clauses, almost as an afterthought.

When negotiating and concluding a contract, none of the parties assume that there will be a conflict. However, should a conflict arise, the dispute resolution clause will be the first clause that the parties will refer to. It will be the dispute resolution clause which will determine which court or tribunal will consider the effectiveness of the contractual rights and duties.

This booklet deals with the considerations that should be made when including dispute resolution clauses in international commercial contracts. More specifically, this booklet focuses on the considerations to be made when the parties contemplate to solve possible disputes through arbitration.

In this booklet the focus will be on international arbitration, as international arbitration is subject to different rules and customs than domestic arbitration. It is beyond the scope of this booklet to deal with the complexities of the conduct and proceedings of the arbitration itself, with the technicalities of the various arbitration rules and with the interpretation of the case law which has been developed by various courts and arbitration institutes.

Dirk Knottenbelt
THIS GUIDE ON INTERNATIONAL ARBITRATION WILL HELP YOU:

1. decide between arbitration or litigation;
2. decide on a suitable form of arbitration;
3. draft litigation clauses;
4. find your way among procedural rules; and
5. avoid making mistakes in your arbitration clause.
ARBITRATION V. LITIGATION

When drafting a dispute resolution clause, the parties first have to choose between arbitration and litigation.

In domestic contracts, i.e. in contracts between parties in the same state, it is generally expected that the local courts have jurisdiction. Indeed, if the parties do not make a different choice, this will be the case.

Parties to international contracts will have to agree on what will happen if a dispute arises or if there is already a dispute which cannot be resolved.

Generally, and apart from negotiating a solution or submitting the dispute to some form of alternative dispute resolution method, such as mediation, the parties to a contract can choose between either litigation before national courts or arbitration to settle any possible disputes.

The concept of arbitration is simple. Parties agree to submit their dispute to a person or a number of persons whose expertise or judgement they trust. The parties also agree that the decision of this person or these persons is final and binding. That person - or these persons - will listen to the parties, will consider the facts and arguments and make a decision. In short, arbitration is therefore an effective way of obtaining a final and binding decision in a dispute, without submitting it to a court of law.

Why would parties choose for arbitration, rather than for a national court of law?
ARBITRATION - PROS

Neutrality
Parties to an international contract usually come from different countries. Although such parties sometimes agree on the jurisdiction of a national court, it is often difficult to agree on the competence of the court of either party’s country or of a court of a third, neutral country.

A national court has its own formalities, its own rules and procedures. Most likely such rules and procedures are developed to only deal with domestic matters and not with international commercial or investment disputes. The national court of one party will therefore be a foreign court to the other party. A court of a third country will even be foreign to both parties. Any national court will be “foreign” to either one or both of the parties.

Therefore, if a party to an international contract does not insist on an agreement to arbitrate, that party may find that, when a dispute arises, it will be obliged to submit a claim in a foreign court, to employ foreign lawyers and – in many cases - to translate the contract, the correspondence between the parties, and other relevant documents into the language of the foreign court.

Furthermore, chances are that if the case proceeds to a hearing, the language of the hearing will be difficult for one party to understand without the aid of interpreters. Consequently, that party may feel disadvantaged in presenting its case to the court.

In arbitration, a dispute is normally determined in a neutral forum rather than in the country of one party. Moreover, each party will be able to participate in the selection of the tribunal, whether the tribunal consists of a sole arbitrator or of three arbitrators. The arbitrator or arbitrators will be required to be strictly independent and impartial.

If the parties have agreed on one arbitrator, he or she will be chosen by agreement of the parties, or by some independent institution to which the parties have agreed.

If the parties have agreed on three arbitrators, two of them are normally chosen by the parties themselves. The third arbitrator is normally selected by the first two arbitrators or by the outside institution.

In any case, whether the tribunal consists of one arbitrator or of three, it will be a strictly “neutral” tribunal and neither party should feel to be at a disadvantage in presenting its case.

Expert arbitrators
Another reason for preferring arbitration to litigation is that the arbitrators can be selected for their specific expertise, for example in cases where specific technical knowledge, qualifications and experience are required.

Confidentiality
A further reason which makes arbitration an attractive alternative to litigation is confidentiality. Contrary to litigation, which is open to the public, arbitration is private. The privacy and confidentiality of arbitral proceedings is very attractive to companies and institutions which are involved in international transactions and who do not wish for disputes or the details of such transactions to become public.

Procedural flexibility - Speed and costs
In arbitration, the parties can determine the procedure which best suits the case. They are not bound by the procedural rules of national courts. This flexibility can lead to saving time and costs.

Language
The parties can determine the language of the arbitration, which will not only apply to the language in which the oral hearings will be conducted, but also in which the briefs and supporting documents must be submitted.

Place of arbitration
Rather than having to submit to a court in the country of the other party, the parties can agree to a neutral or a convenient place (or a combination thereof) to conduct the arbitration.

Finality of the award
Subject to certain provisions of national law or a specific agreement between the parties, an arbitral award is final: it will not, as is the case with court judgments, be the first step on an expensive ladder of appeals.
Enforcement

The judgments of a local court can only be enforced in that country. In some instances, if that country is party to a treaty for the reciprocal enforcement of court judgments, the judgment can be enforced in other countries. Most countries are, however, party to only a limited number of such treaties. For instance, the Netherlands is part of the European Union, on the basis of which a Dutch judgment can be enforced in 27 European countries. Enforcing a Dutch judgment in any other country will be much more difficult, time consuming and costly.

An arbitration award, rendered in the Netherlands, however, can be enforced in over 140 countries, under the provisions of international treaties such as the New York Convention of 1958 to which the Netherlands is a party.

“An arbitration award, rendered in the Netherlands, can be enforced in over 140 countries.”
ARBITRATION - CONS

**Speed and costs**
Parties increasingly complain about delays, particularly at the beginning and at the end of the arbitration. At the beginning, the complaint is that it takes too long to constitute an arbitral tribunal and, thus, to commence with the arbitration. At the end of the arbitration, the complaint is that some arbitral tribunals take too much time to make their award.

For various reasons, international arbitration no longer is a relatively inexpensive method of dispute resolution. First, the fees and expenses of the arbitrator (unlike the salary of a judge) must be paid by the parties and these charges may be substantial in international arbitrations of any significance.

Second, it may be necessary to pay administrative fees and expenses of an arbitral institution, and these too can be substantial especially if a secretary or registrar is appointed to administer the proceedings.

Finally, it will be necessary to hire rooms for meetings and hearings, rather than making use of the public facilities of the courts of law. Further costs will be made for court reporters and translators. On top of that, the parties will have to bear the costs for the fees and expenses of their legal advisors and expert witnesses. In major arbitration, these may easily run into millions of dollars.

As such, international arbitration is unlikely to be cheaper than proceedings in a court of first instance. However, arbitration is a form of “one-stop shopping”. Although the initial costs are not likely to be less than those of proceedings in court, the costs of an international arbitration may well compare favorably to the costs of pursuing a claim through costly appeals to superior national courts.

**Limited power of arbitrators**
In general, arbitrators have less power than a court of law. For example, the power to demand the attendance of witnesses under penalty of a fine or imprisonment, or to order the attachment of a bank account or of assets, are powers which only state courts have. They are not powers that any state is likely to delegate to a private arbitral tribunal, however imminent and well respected that arbitral tribunal may be.

**Multi-party disputes**
Arbitration works most easily when there are only two parties involved – one as the claimant and the other as the respondent. An arbitral tribunal has no power to join third parties (i.e. persons who are not a party to the arbitration agreement) into arbitration against their will.

“The one-stop-shop of international arbitration is often less costly than pursuing a claim through appeals in national courts.”
THE PLACE OF ARBITRATION

Assuming that the choice has been made to arbitrate, the second choice to be made when drafting an arbitration clause, is to determine the place of arbitration.

The legal place or “seat” of the arbitration determines the law which will govern the arbitration (lex arbitri). Since international arbitrations usually take place in countries that are “neutral”, the law which governs the arbitrations normally is different from the law that governs the contract, i.e. the merits of the dispute.

The lex arbitri, thus, will cover issues such as:
– the definition and form of an arbitration agreement;
– whether a dispute can be arbitrated (arbitrability);
– the constitution of a tribunal and the grounds to challenge the tribunal;
– equal treatment of the parties;
– interim measures;
– the right to a hearing;
– court assistance, if required;
– the validity of an award and the right to challenge an award.

The choice for the place of arbitration can have serious consequences and care should be taken that local courts will enforce the award and not unduly interfere with the arbitration. As such, parties should avoid locating an arbitration in countries which are not signatories to the New York Convention (1958).3

New York Convention of 1958

The New York Convention of 1958 is the most important international treaty relating to international commercial arbitration. It is one of the cornerstones of international arbitration, and it is no doubt because of the New York Convention that international arbitration has become the established method of resolving international trade disputes.

All major trading nations of the world have become party to the New York Convention. At this moment, the Convention has more than 140 parties.

The New York Convention provides for a more simple and effective method of obtaining recognition and enforcement of foreign arbitral awards. Although the full title of the Convention suggests that it is concerned only with the enforcement of foreign awards, this is misleading: the Convention is also concerned with the recognition of arbitration agreements. In order to enforce arbitration agreements, the New York Convention requires the courts of contracting states to refuse to allow a dispute that is subject to an arbitration agreement to be litigated before its courts, if an objection to such litigation is raised by any party to the arbitration agreement.

Serious consideration should be given to whether or not there is a right of appeal to local courts, permitting such courts to interfere with the merits of the award. If such right of appeal exists, it should be considered if such right can be excluded by agreement between the parties.

Jurisdictions which require that the parties’ counsel or the arbitrators should be of local nationality or admitted to the local bar should also be avoided.

One way to determine whether a particular jurisdiction is arbitrator friendly, is to check if that country has adopted the UNCITRAL Model Law on International Commercial Arbitration (1985).4

UNCITRAL Model Law (1985)

The Model Law was adopted by the United Nations in 1985 and was aimed at the harmonization of the arbitration laws of the different countries of the world. The Model Law has been a major success. The text goes through the arbitral process from beginning to end from a simple and readily understandable form. It is a text that many states have adopted, either as it stands or with minor changes, as their own law of arbitration. So far, over 60 states have adopted legislation based on the Model Law.

The UNCITRAL Model Law is based upon the principle that the local courts in the place of arbitration should support, but not interfere with, the arbitral process. Once the legal issues relating to the place of arbitration have been contemplated, practical issues should be considered, such as geographical convenience, availability of suitable arbitrators, location of witnesses and evidence and the availability of support services, such as hearing rooms, court reporters and so forth.

Finally, once the place of arbitration has been agreed upon, the parties are free to have meetings and hearings elsewhere. This will not affect the choice for the place of arbitration and, thus, of the lex arbitri.
PRACTICAL ISSUES

In the choice of the place of the arbitration, there are a number of countries with specific issues. It is beyond the scope of this paper to give an exhaustive overview, but below the more important issues are addressed which have arisen when selecting an arbitral venue in certain countries outside the mainstream.

Russia

Russian courts are sometimes reluctant to recognize and enforce international commercial arbitration awards. Since the grounds for refusing enforcement is limited by the New York Convention, contravention of public policy often serves as the reason for rejecting enforcement. In some instances, courts interpret the notion “public policy” too vaguely. Some courts tend to consider the contravention of mandatory Russian law as a contravention of Russian public policy.

Where the subject of the contract is located in Russia, it may sometimes be preferable to choose a place of arbitration in Russia itself. Although it may not be easy the enforce the award outside Russia, arbitration in Russia under the rules of the International Commercial Arbitration Court at the Chamber of Commerce of the Russian Federation (“ICAC”) may be considered as an alternative to institutional arbitration elsewhere for Russian-related disputes. Due to the unpredictability of rulings of the local courts and the uncertain prospects of enforcement, specialist advice should always be obtained.

India

Until 1996, when India adopted the Arbitration and Conciliation Act, Indian courts had wide ranging powers to intervene in arbitration proceedings. Although the 1996 Act aims to reduce court intervention, the Indian Supreme Court has rendered a number of decisions in which the grounds for challenging an award have been expanded.

China

All arbitrations in China are institutional. The parties must choose an arbitration institute to conduct the arbitration. The institute then appoints the arbitrators.

Parties arbitrating international disputes within China almost always do so according to the rules of the China International Economic Trade Commission (“CIETAC”), which has a virtual monopoly over arbitrations conducted in China.

The latest version of the CIETAC rules came into effect on 10 May 1998. The hearings tend to be short and informal, with emphasis being placed upon discovery of the facts rather than legal analysis. Lengthy hearings involving multiple sessions over a period of months are almost unheard of.

Some Chinese domestic arbitration commissions are authorized to accept international arbitrations, but their rules are less sophisticated than those of CIETAC. It is uncertain whether foreign lawyers may appear before domestic arbitration commissions, and the choice of arbitrators is limited. More importantly, it is not clear if an award made by a domestic tribunal in an international case can be enforced in a New York Convention country. In transactions with Chinese counterparties where the place of arbitration is to be within China, it is therefore advisable that arbitration clauses refer to CIETAC arbitration.

Awards made outside China in a country which is party to the New York Convention will be recognized and enforced in China, subject, however, to review of both the local court and the Supreme Court.

Hong Kong

Hong Kong is recognized as a popular venue for international arbitrations in South-East Asia, mainly due to a modern UNCITRAL-based law, the applicability of the New York Convention and the availability of high-skilled local professionals and excellent facilities.

Until 1997, when the sovereignty over Hong Kong was transferred from the UK to China, awards made in Hong Kong were enforceable in China as foreign awards under the New York Convention with its limited grounds for refusal of recognition and enforcement. Since 1997, however, there have been concerns that a Hong Kong award would be treated as a domestic award in China, thus enabling the party against whom enforcement is sought, to invoke a much wider range of grounds on which to challenge enforcement.

In November 1998, the authorities in China and Hong Kong reached agreement regarding the reciprocal enforcement of arbitral awards. Until recently it was uncertain what the actual effect of the agreement was. In November 2009, China’s Supreme People’s Court published the “Notice Concerning Questions Related to the Enforcement of Hong Kong Arbitral Awards in the Mainland”, which clarifies that ad hoc and institutional arbitration awards made in Hong Kong are enforceable in mainland China, subject to certain specific grounds for refusal.
Singapore

Until the amendment of the Singapore Legal Profession Act in 1992, foreign lawyers were not allowed to appear as counsel in arbitrations taking place in Singapore. That has now changed and foreign lawyers may now appear in arbitration proceedings in Singapore provided either that the law applicable to the dispute is not Singapore law, or, if Singapore law does apply, that a Singapore lawyer appears jointly with the foreign lawyer. This has pushed Singapore’s popularity and acceptability as an international arbitration venue, especially for arbitrations where China is a party.

Mexico

Mexico adopted the UNCITRAL model law some years ago and has a core of experts in the field. Mexico is the Latin American jurisdiction of choice for the ICC.
THE LANGUAGE OF THE ARBITRATION

If no choice for the language of the arbitration is made, it will be up to the tribunal or the arbitration institute to make that choice. To avoid the inevitable uncertainties of translations and interpretations and, thus, to avoid misunderstanding, the language of the arbitration should be seriously considered.

When choosing the language, consideration should be given to the applicable law of the contract, the place of arbitration, the language of the contract, the language of the principal documents, the mother tongue of the principal witnesses and the language of the arbitrators.

“The language of the arbitration should be seriously considered.”
AD HOC V. INSTITUTIONAL

The next decision to be made is on the rules which will apply to the arbitration.

As stated above, any arbitration, wherever it is conducted, is subject to the law of the place of arbitration (lex arbitri). Generally, however, these rules will be broad and non-specific. They will say, for example, that the parties must be treated with equality, but they will not go into detail of how this is achieved in terms of the exchange of statements of case and defense, witness statements, documents, and so forth.

Therefore, more specific procedural rules are required for which the parties have the choice between an arbitration ad hoc, without the involvement of an arbitral institution, or an institutional arbitration, according to the rules of one of the established arbitral institutions.

Ad hoc

An ad hoc arbitration is conducted pursuant to rules agreed by the parties themselves or laid down by the arbitral tribunal. Parties to an ad hoc arbitration may establish their own rules of procedure, provided that the rules they agree upon treat the parties with equality and allow each party a reasonable opportunity of presenting its case. Drafting own rules of procedure is a major task and should not be undertaken without specialist advice. As such, it can be time-consuming and expensive and far-reaching mistakes can be made if the rules do not anticipate certain case related problems.

Alternatively, the parties may agree that the arbitration will be conducted according to an established set of rules, such as the UNCITRAL Arbitration Rules (1976). The UNCITRAL Arbitration Rules are intended to be used by parties who wish to avoid involving an arbitral institution but wish to use a set of generally accepted rules. This ensures a framework within which the tribunal and the parties can devise detailed rules, and it saves spending time and money in drafting a special set of rules.

“An arbitral institute can effectively deal with an obstructing party.”

Properly structured, ad hoc arbitration should be less expensive than institutional arbitration and, thus, better suits smaller claims and less affluent parties. Ad hoc arbitration places more of a burden on the arbitrator(s), and to a lesser extent upon the parties, to organize and administer the arbitration in an effective manner.

A distinct disadvantage of the ad hoc approach is that its effectiveness may be dependent upon the willingness of the parties to agree upon procedures at a time when they are already in dispute. Failure of one or both of the parties to cooperate in facilitating the arbitration can result in an undue expenditure of time in resolving the issues. It is not difficult to delay arbitral proceedings, for instance by refusing to appoint an arbitrator; so that from the beginning of the proceedings there is no arbitral tribunal in existence, and no rules available to deal with the situation. In that case, a party may seek court intervention and the litigation costs negate not only the cost advantage of ad hoc arbitration but also the parties’ intention to arbitrate.

Institutional

An institutional arbitration is one in which a specialized institution with a permanent character intervenes and assumes the functions of aiding and administering the arbitral process, as provided by the rules of that institution. It is pertinent to note that these institutions do not arbitrate the dispute, it is the arbitrators who arbitrate, and so the term arbitration institution is somewhat inappropriate as only the rules of the institution apply.

The advantages of institutional arbitration are apparent. Foremost are: (i) availability of pre-established rules and procedures which assure that arbitration will get off the ground and proceed to conclusion with dispatch; (ii) administrative assistance from institutions providing a secretariat or court of arbitration; (iii) lists of qualified arbitrators, often split up in fields of expertise; (iv) appointment of arbitrators by the institution should the parties request it; (v) physical facilities and support services for arbitrations; (vi) assistance in encouraging reluctant parties to proceed with arbitration and (vii) an established format with a proven record.

The best known international arbitration institutes are the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), the International Centre for Settlement of Investment Dispute (ICSID), and the American Arbitration Association (AAA). There are also regional arbitral institutions and there are Chambers of Commerce with an established reputation, such as in Stockholm, Switzerland and Vienna.

“The UNCITRAL Arbitration Rules can be used by parties who wish to avoid involving an arbitral institution.”
By incorporating the applicability of the rules of such institutions into a contract, the parties incorporate a detailed book of rules, which will govern any arbitration that may take place in the future. If, at some future stage, an arbitrator is challenged on the grounds of lack of independence or impartiality or if one party proves reluctant to go ahead with arbitration proceedings and refuses to appoint an arbitrator, it will nevertheless be possible for the party or parties who wish to file a claim to do so effectively. There will be a set of rules to regulate both the way in which the arbitral tribunal is to be appointed and the way in which the arbitration is to be conducted and carried through to its conclusion.

The clause recommended by the ICC, for instance, states:

All disputes arising in connection with the present contract shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the set of rules.

Rules laid down by the established arbitral institutions will generally have proved to work well. The rules will have undergone periodic revision in consultation with experienced practitioners, taking into account new developments in the law and the practice of international arbitration.

Some institutions, such as the ICC, review the arbitral tribunal’s award in draft form, before it is sent to the parties. Such a review serves as a measure of “quality control”. The institution does not comment on the substance of the award, or does not interfere with the decisions of the arbitral tribunal, but it does ensure that the tribunal has dealt with all the issues before it and that its award also covers such matters as interest and cost.

Institutional arbitration has some disadvantages. Under most institutional rules, the parties not only pay the arbitrators, but also the institution, which increases the costs of the arbitration. Further, certain rules provide for certain steps to be taken in the arbitration before being able to proceed, which may lead to a delay of the arbitration.

Given the great number of arbitral institutions or centres in the world and the fact that new ones continue to come into existence, it is not practical to list them all. There are, however, certain considerations which the parties should have in mind when choosing an arbitral institution. The basic requirements for an arbitral institution are the following.

Permanency
Disputes between parties to an agreement frequently arise many years after the agreement was made, particularly in major project agreements and in long-term contracts. It is important that the institution which the parties agree should administer the arbitration is still in existence when the dispute arises. Otherwise the arbitration agreement may prove to be “inoperative or incapable of being performed”, as stated in the New York Convention.

Modern rules of arbitration
The practice of international arbitration changes and develops, as new laws, rules, and procedures come into existence. It is important that the rules of the arbitral institution should be up-to-date to reflect these changes.

Qualified staff
One of the important merits of institutional arbitration is that the parties and the arbitrators can seek assistance and advice from the institutional staff, responsible for administrating international commercial arbitrations under the institutional rules. This assistance may extend not only to explaining the rules, but also to make sure that time limits are observed, fees are collected, visas arranged and accommodation reserved.

Reasonable charges
Some arbitral institutions assess their own administrative fees and expenses and the fees payable to the arbitrator by referring to a sliding scale based on the amounts in dispute. Other institutions, such as the LCIA, assess their administrative costs and expenses and the fees of the arbitrators by referring to the time spent on the case.

“An arbitral institute bases its fees on either the amount in dispute or the time spent.”
SOME WELL KNOWN INSTITUTIONS

The International Chamber of Commerce\(^5\)

The International Court of Arbitration of the International Chamber of Commerce was established in Paris in 1923. The ICC Court does not decide matters but appoints arbitral tribunals to deal with such matters. The ICC is known for two specific features, namely the Terms of Reference and the scrutiny of awards.

The Terms of Reference are drawn up at an early stage of the arbitration and sets out, *inter alia*, the names and addresses of the parties and their representatives, a summary of their claims, the place of arbitration, and a list of issues to be determined. This helps to focus the attention of both the parties and the arbitrators on what is really at stake.

When the arbitral tribunal is ready to deliver its award, the tribunal is required to submit it in draft form for “scrutiny” by the ICC Court. The Court does not interfere with the arbitrator’s decision but checks the formal correctness of the award, to ensure that it deals with all the matters with which it is required to deal and that there are no obvious misprints or arithmetical errors.

The fees and expenses of the ICC and the arbitrators are calculated on the basis of the amount in dispute.

The London Court of International Arbitration\(^7\)

The LCIA was founded in 1892. The LCIA, like the ICC, does not decide matters but appoints arbitral tribunals.

The fees of the LCIA and the arbitrators are calculated on the basis of time spent.

The American Arbitration Association and the International Centre for Dispute Resolution\(^8\)

The AAA was established in 1926. In order to deal with the dramatic expansion in the number of disputes being referred to international arbitration, the AAA established a separate international division: the ICDR. It has a central location in New York with offices in Dublin and Mexico City.

AAA arbitrations address a variety of industry-specific situations through general commercial and industry-specific rules.

The administrative fees of the AAA are calculated on the basis of the amount in dispute. AAA arbitrators are compensated on the basis of time spent.

Singapore International Arbitration Centre\(^9\)

As discussed above, international arbitration in Singapore used to be less favored due to restrictions on the appearance of foreign counsel. Since such restrictions have been removed the SIAC has increased in popularity, also as an alternative to Hong Kong arbitration.

The fees and expenses of the SIAC and the arbitrators are calculated on the basis of the amount in dispute.

International Centre for Settlement of Investment Disputes\(^10\)

Since its inception 60 years ago, the principal aim of the World Bank has been to stimulate the economic growth and social development of developing countries through the provision of financial resources and the stimulation of private investment.

As a result, the World Bank has over time been increasingly required to facilitate the amicable settlement of disagreements that arose between private investors and states. On that basis, in 1965, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States was drafted, thereby creating ICSID.

ICSID is an autonomous intergovernmental organ, with its own governing body, the Administrative Council, and a Secretariat. ICSID does not arbitrate disputes. Rather, these responsibilities are carried out by arbitration tribunals, which are created on an ‘ad-hoc’ basis by the parties for each individual proceeding. As such, the functions of ICSID are basically those of a secretariat providing support to the tasks of the arbitral tribunals.

In the past 50 years, ICSID has become the leading arbitral forum on an international level for the resolution of disputes between investors and states. This is due in large part to the six main characteristics of the Centre.

First, the universality of ICSID’s system. ICSID currently comprises 142 member states. The vast majority of bilateral investment treaties (BITs) contain dispute settlement provisions with consents from the state party to arbitration administered by ICSID.
Second, the unique and autonomous legal framework of the institution. ICSID is based exclusively on its own constituting treaty, the ICSID Convention, and is subject to its own rules, the ICSID Rules of Procedure. ICSID is one of the few international forums to which international investors have direct access. That is to say that in order to access ICSID, an investor does not need to go through governmental channels, but can do so directly.

The third characteristic of ICSID is that it is a specialized forum, limited to investment related disputes of a legal nature.

The fourth characteristic of ICSID is its consensual nature. The ICSID Convention does not impose any obligation on contracting states to submit to arbitral or conciliatory mechanisms of ICSID. These obligations only arise once a state has expressly accepted, in writing, that a certain type of dispute is the subject of arbitration. Such is often the case within the context of bilateral investment treaties (BITs).

The fifth characteristic of ICSID arbitration is its independence from the judicial mechanisms of contracting states. In addition, Arbitral Awards dictated by Tribunals constituted in accordance with ICSID procedures are binding and cannot be reviewed by local courts. The revision, rectification, interpretation and annulment of Decisions and Awards are the only viable avenues to pursue, and they must be carried out in accordance with ICSID norms and regulations.

Finally, the sixth characteristic of ICSID is its effectiveness. The Convention has granted ICSID the tools necessary to deal with the potential lack of cooperation by a party, which could disrupt or delay the arbitration process. The contracting states have come to realize the binding nature of ICSID Awards and Decisions, giving them equal authority as definitive sentences emanating from local courts.

These six characteristics: universality, its legal framework, specialization, consensual nature, independence, and effectiveness, are the internal factors that have turned ICSID into the main arbitration forum worldwide for the settlement of disputes between foreign investors and states.
THE ARBITRATORS

Once the formal legal requirements have been agreed upon, the arbitral tribunal must be chosen. As the quality of the arbitral tribunal makes or breaks the arbitration, this is an important choice for the parties.

In choosing the right arbitrator, not only an appropriate knowledge of the relevant area of law is important, but also an established experience in arbitration, particularly for a sole arbitrator or the presiding arbitrator, who must effectively take control of the proceedings. The rights of the parties, and in particular the right to a fair hearing, must be meticulously observed. Procedural rules must be drafted as well as a timetable for the various steps to be taken during the arbitration. They are all tasks that call for skill and, above all, experience in the practice of international arbitration.

The establishment of an arbitral tribunal involves many considerations. There is, first, the question of numbers. Should there be one arbitrator or more? Is there any general rule as to the number of arbitrators that should be appointed or does this depend upon the circumstances of the particular dispute?

The laws of some countries sensibly provide that the number of arbitrators must be uneven. In commercial cases, the choice in practice is between one and three. Modern preference is for international disputes to be referred to an arbitral tribunal of three arbitrators, unless the amount in dispute is small. Each of the parties will usually have the right to nominate at least one arbitrator, leaving the third arbitrator to be chosen by agreement, by the appointed arbitrators or by the arbitration institution.

The advantage to a party of being able to nominate an arbitrator is that it gives the parties concerned a sense of involvement in the arbitral tribunal. Each party will have at least one ‘judge of its choice’ to hear its case. This is particularly important in an international arbitration where, apart from the merits of the case, there are differences in language, tradition and culture between the parties and, indeed, between the members of the arbitral tribunal themselves. A party nominated arbitrator will be able to make sure that the case of the appointing party is properly understood by the arbitral tribunal. In particular, such an arbitrator should be able to ensure that any misunderstandings that may arise between the arbitrators are clarified and do not lead to injustice. It may appear to be difficult in practice, but it is quite possible for an arbitrator to fulfil a useful role in representing the interest of due process of the party who nominated him or her without stepping outside the bounds of independence and impartiality.

A three-member tribunal is more expensive than an arbitration conducted by a sole arbitrator. Furthermore, it will usually take longer to obtain an award. In general, however, and especially in larger arbitrations, an arbitral tribunal with three arbitrators is likely to prove more satisfactory to the parties. Indeed, since in most arbitrations no effective appeal procedure on the merits exists, the risk of an error of law or fact by a three-member tribunal is far lower than in the case of a sole arbitrator.

“Three party appointed arbitrators instead of one will help bridge cultural and language differences.”
THE ARBITRATION CLAUSE

Once agreement has been reached on all previously mentioned issues, the parties can draft the arbitration clause to be included in the contract.

The arbitration clause will constitute the agreement to arbitrate between the parties. The agreement to arbitrate is the cornerstone of international arbitration. It records the consent of the parties to submit to arbitration which is essential to conduct any process of dispute resolution outside state courts.

There are two basic types of arbitration agreement: the arbitration clause and the submission agreement. An arbitration clause looks to the future, whereas a submission agreement looks to the past. The first, which is most common, is usually included in the contract between the parties and is an agreement to submit future disputes to arbitration. The second is an agreement to submit existing disputes to arbitration.

An arbitration agreement that provides for international arbitration must take into account the international requirements, provided in international conventions. If it fails to do so, the arbitration agreement, and any award made under it, may not qualify for international recognition and enforcement.

An international arbitration agreement must take into account international conventions in order to be recognised.

The international requirements are stipulated in the New York Convention. Under the Convention each contracting state undertakes to recognize and give effect to an arbitration agreement when the following requirements are fulfilled:

1. The agreement is in writing;
2. It deals with existing or future disputes;
3. These disputes arise in respect of a defined legal relationship, whether contractual or not;
4. They concern a subject matter capable of settlement by arbitration.

All major arbitration institutes provide for their own model clauses. As a general purpose model clause for institutional arbitration may serve:

Any dispute, controversy, or claim arising out of or in connection with this contract, including any question regarding its existence, validity, or termination, shall be finally resolved by arbitration under the Rules of [name institute] in force at [the date hereof / the date of the request for arbitration], which Rules are deemed to be incorporated by reference into this clause.

The tribunal shall consist of [a sole / three] arbitrator[s].

The place of arbitration shall be [city].

The language of the arbitration shall be [language].

As a general purpose clause for ad hoc arbitration can serve:

1. Any dispute, difference, controversy or claim arising out of or in connection with this agreement shall be referred to and determined by arbitration in [place].
2. The arbitral tribunal shall be composed of three arbitrators appointed as follows:
   – each party shall appoint an arbitrator, and the two arbitrators so appointed shall appoint a third arbitrator who shall act as president of the tribunal;
   – if either party fails to appoint an arbitrator within 30 days of receiving notice of the appointment of an arbitrator by the other party, such arbitrator shall at the request of that party be appointed by [the appointing authority];
   – if the two arbitrators to be appointed by the parties fail to agree upon a third arbitrator within 30 days of the appointment of the second arbitrator, the third arbitrator shall be appointed by [the appointing authority] at the written request of either party;
   – should a vacancy arise because any arbitrator dies, resigns, refuses to act, or becomes incapable of performing his functions, the vacancy shall be filled by the method by which that arbitrator was originally appointed. When a vacancy is filled the newly established tribunal shall exercise its discretion to determine whether any hearing shall be repeated.
3. As soon as practicable after the appointment of the arbitrator to be appointed by him, and in any event no later than 30 days after the tribunal has been constituted, the claimant shall deliver to the respondent (with copies to each arbitrator) a statement of case, containing particulars of his claims and written submissions in support thereof, together with any document relied on.
4. Within 30 days of receipt of the claimant’s statement of case, the respondent shall deliver to the claimant (with copies to each arbitrator) a statement of case in answer, together with any counterclaim and any document relied upon.
5. Within 30 days of the receipt by the claimant of any statement of counterclaim by the respondent, the claimant may deliver to the respondent (with copies to each arbitrator) a reply to counterclaim together with any additional document relied upon.

6. As soon as practicable after its constitution, the tribunal shall convene a meeting with the parties or their representatives to determine the procedure to be followed in the arbitration.

7. The procedure shall be as agreed by the parties or, in default of agreement, as has been determined by the tribunal. However, the following procedural matters shall in any event be taken as agreed:
   – the language of the arbitration shall be [language];
   – the tribunal may in its discretion hold a hearing and make an award in relation to any preliminary issue at the request of either party and shall do so at the joint request of both parties;
   – the tribunal shall hold a hearing, or hearings, relating to substantive issues unless the parties agree otherwise in writing;
   – the tribunal shall issue its final award within 60 days of the last hearing of the substantive issues in dispute between the parties.

8. In the event of default by either party in respect of any procedural order made by the tribunal, the tribunal shall have power to proceed with the arbitration and to make its award.

9. If an arbitrator reported by one of the parties fails or refuses to participate in the arbitration at any time after the hearings on the substance of the dispute have started, the remaining two arbitrators may continue the arbitration and make an award without vacancy being deemed to arise if, in their discretion, they determine that the failure or refusal of the other arbitrator to participate is without reasonable excuse.

10. Any award or procedural decision of the tribunal shall, if necessary be made by a majority and, in the event that no majority may be formed, the presiding arbitrator shall proceed as if he were a sole arbitrator.

Mistakes can easily be made, rendering an arbitration clause invalid. Examples are:
   – The Parties shall seek to amicably resolve any dispute arising out of this agreement as soon as possible after such dispute occurs.
   – If the Parties fail to reach an amicable settlement pursuant to (1) above, either Party may refer the dispute to a neutral adviser to resolve the dispute.
   – If the Parties fail to resolve the disputes pursuant to the mechanisms provided for in (1) or (2), either party may refer the dispute to the ICC London.

“Mistakes in your arbitration clause can render it invalid.”
THE ARBITRAL AWARD

The powers of an arbitral tribunal are not necessarily the same as those of a state court. A tribunal cannot imprison anyone, nor does it have the power to impose penalties in the form of payment of fines to the state. These are sovereign powers constitutionally reserved to judges appointed by, and operating under, the authority of the state itself.

A few issues may arise in international arbitration which should be brought to the attention of European parties agreeing on arbitration.

Punitive damages
In European civil law countries, the American concept of punitive damage is always observed somewhat critically. Indeed, under French, German and Dutch law, punitive damages are not recoverable. Under English law, punitive damages may be awarded only in certain limited actions in tort.

The issue of punitive damages raises two issues. The first concerns the power of the arbitral tribunal to impose punitive damages. The second relates to enforceability.

The question on whether an arbitral tribunal has the power to impose punitive damages depends on the law of the place of arbitration (the lex arbitri - for instance, claims for punitive damages are permissible in the US) and the terms of the arbitration agreement.

When agreeing to arbitration with a US party, it may, therefore, be advisable to explicitly exclude the possibility to claim punitive damages.

With regard to enforcement, the question is whether an award of punitive damages would be enforceable under the New York Convention in a country that does not itself recognize such a remedy. The ground for refusal of enforcement would be article V.2 of the Convention, which allows for refusal of recognition or enforcement of an award if recognition or enforcement would be contrary to public policy.

Discovery
The availability of discovery depends on the law of the jurisdiction in which the arbitration is held and the applicable rules. Most international arbitration rules provide that the arbitrators may order the parties to submit or exchange documents in advance of the hearing. For example, the UNCITRAL Rules provide that:

 “[a]t any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine.”

The ICC Rules state:

 “At any time during the proceedings, the Arbitral Tribunal may summon any party to provide additional evidence.”

The AAA International Arbitration Rules state:

 “At any time during the proceedings, the Tribunal may order parties to produce other documents, exhibits or other evidence it deems necessary or appropriate.”

The LCIA Rules list among the powers of the arbitrators the ability

 “to order any party to produce to the Arbitral Tribunal, and to the other parties... any documents or classes of documents in their possession, custody or power which the Arbitral Tribunal determines to be relevant.”

These rules reflect the common practice in international arbitration with respect to discovery. In short, some document discovery is generally permitted, even in arbitrations in Latin America where discovery is rarely permitted in litigation. The difficulty in every case is for the arbitrators to determine how much discovery is appropriate.

An arbitral tribunal in the US or the UK may have the power to impose punitive damages.

“It is up to the arbitrators to determine, on a case-by-case basis, how much discovery is appropriate.”
Tribunals now frequently apply the principles of the IBA Rules of Evidence, which generally permit the parties to obtain documents necessary for them to prove their case, but to avoid the possibility of fishing expeditions. The IBA Rules of Evidence provide that the parties shall first submit to each other and the Arbitral Tribunal the documents on which they intend to rely. Following such an exchange, any party may submit to the Arbitral Tribunal a request that the other side produce additional documents. The request to produce must be more detailed than an American litigation document request.

The use of electronic communication has made dealing with these discovery issues substantially more difficult. Even when discovery requests are narrowly and properly framed, they may still require a party to review and to produce thousands of email exchanges. This has complicated the arbitrators’ task of determining, generally at a relatively early stage of the case, what discovery should be permitted and what should be denied as being irrelevant, excessive or improper for other reasons. The challenge for arbitrators now will be to exercise this control and to develop innovative techniques - for example, potentially by ruling that only documents fitting certain electronic search terms shall be produced - in order to allow discovery of relevant material without overwhelming the arbitration process.

**Costs**

An award may include an award of costs. Costs may be divided into two broad categories: the cost of the arbitration and the costs of the parties.

The cost of the arbitration usually include the fees, travelling and other expenses payable to the individual members of the arbitral tribunal themselves, and related expenses including - for instance - the fees and expenses of any administrative institution or of experts appointed by the tribunal. Also included in the costs are the fees and expenses of any administrative secretary or registrar and any other incidental expenses incurred by the tribunal for the account of the case.

The costs of the parties include not only the fees and expenses of the lawyers engaged to represent the parties in the arbitral proceedings, but also money spent in the preparation and presentation of the case. There will be other professional fees and expenses such as those of accountants or expert witnesses, as well as the hotel and travelling expenses of the lawyers, witnesses and others concerned. Copying charges and the expenses of telephone, fax, email and so on will also form part of the parties’ so-called legal costs and expenses.

In some countries, such as the US, the usual practice is for each party to bear its own costs, including the costs of calling witnesses and to share the administrative costs equally.

In general, however, the procedure in international commercial arbitration is for the arbitral tribunal to have power to require the losing party to pay or contribute towards the legal costs of the winning party.
CHALLENGE OF ARBITRAL AWARDS

What if an arbitration is lost? Is appeal or any other review possible? It depends.

First, it depends on whether the relevant rules of arbitration establish an internal appeal procedure, as is the case in many maritime and commodity arbitration systems.

Second, it depends on whether the law of the seat of the arbitration contains any provisions for challenging an arbitral award; and, if so, on what basis.

Even where the relevant rules of arbitration provide that an award is to be final and binding on the parties and that the parties agree to carry it out without delay, the law of the seat of the arbitration usually provides some way of challenging an arbitral award.

The purpose of challenging an award is to have it modified in some way by the state court, or more usually to have the court declare that the award is to be disregarded (annulled, or set aside) in whole or in part. If an award is set aside or annulled by the relevant court, it will usually be treated as invalid and accordingly unenforceable, not only by the courts of the seat of arbitration but also by national courts elsewhere. This is because, under both the New York Convention and the Uncitral Model Law, the competent court may refuse to grant recognition and enforcement of an award that has been set aside by a court of the seat of arbitration.

Most challenges will be made before courts. Although each country which has a law governing arbitration will have its own concept for challenging arbitral awards, three general grounds for such challenges can be identified.

First, an award may be challenged on jurisdictional grounds, i.e. the non-existence of a valid and binding arbitration clause.

Second, an award may be challenged on what may be broadly described as “procedural” grounds, such as the failure to give proper notice of the appointment of an arbitrator.

Third, an award may be challenged on substantive grounds, on the basis that the arbitral tribunal made a mistake of law or on the grounds of a mistake of fact.

Some arbitration rules provide for “internal” challenges. The most extensive provision for the challenge of arbitral awards by means of an internal review procedure is to be found in the ICSID arbitration rules. In case of an application for the annulment of the award, an ad hoc committee of three members is constituted by ICSID to determine the application. If the award is annulled, in whole or in part, either party may ask for the dispute to be submitted to a new tribunal, which tribunal will consider the dispute again and then deliver a new (and final) award.

“The national law of the seat of the arbitration may allow a party to challenge the arbitral award.”
RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS

The vast majority of the awards are performed voluntarily. However, if the losing party fails to carry out an award, the winning party needs to take steps to enforce performance of it.

To use the award to take action against assets of the losing party, the award must be recognized by a national court and subsequently be enforced against the losing party. Internationally, it is generally much easier to obtain recognition and enforcement of an international arbitral award than of a foreign court judgment. This is because the network of international and regional treaties providing for the recognition and enforcement of international arbitral awards is more wide-spread and better developed than corresponding provisions for the recognition and enforcement of foreign judgments. Indeed, this is one of the principal advantages of arbitration as method of resolving international commercial disputes.

The enforcement of an arbitral award in the country that is the seat of arbitration is usually a relatively easy process. It generally involves the same processes as are required for the enforcement of an award in a domestic arbitration. Enforcement of an award that is regarded by the place of enforcement as a "foreign" or "international" award is a more complex matter.

Court proceedings are generally necessary to obtain a title on the basis of which steps can be taken against the defaulting party.

Of course, within the European Union, the European Counsel Regulation 44/2001 provides for the enforcement of European National Court Judgments within Europe. Outside Europe, no general convention dealing with jurisdiction and the recognition and enforcement of foreign judgments yet exists.

The New York Convention facilitates the recognition and enforcement of foreign arbitral awards in the territory of its more than 140 signatory states, irrespective of the arbitration rules under which the proceedings were conducted.

The formalities required for obtaining recognition and enforcement of awards to which the New York Convention applies are simple. The party seeking such recognition and enforcement is merely required to submit to the relevant court:

– the duly authenticated original award or a duly certified copy thereof; and
– the original agreement referred to in Article II or a duly certified copy thereof.

If the award and the arbitration agreement are not in the official language of the country in which recognition and enforcement is sought, certified translations are needed. Once the necessary documents have been supplied, the court will grant recognition and enforcement unless one or more of the grounds for refusal, listed in Article V of the New York Convention, are present. The grounds for refusal are:

– the arbitration agreement is not valid under the law to which the parties have subjected it;
– the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings;
– the award deals with matters beyond the scope of the submission to arbitration;
– The composition of the tribunal or the arbitral procedure was not in accordance with the agreement of the parties;
– the award has not yet become binding on the parties.

If the New York Convention does not apply, the recognition procedure as provided by the national law of the country in which enforcement is sought, must be followed. This could result in a lengthy and costly procedure with no guarantee on a favorable outcome, since the defending party may be able to challenge every aspect of the award.

“It is easier to obtain enforcement of an international arbitral award than of a foreign court judgment.”
1 This booklet is an adaptation of a paper which was presented at the 5th German Commercial and Corporate Conference (Deutscher Handels- und Gesellschaftsrechtstag) in Berlin on 17 September 2010.


6 For more information and for the text of the ICC Arbitration Rules, see: http://www.iccwbo.org/policy/arbitration/id2882/index.html

7 For more information and for the text of the LCIA Arbitration Rules, see: http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration.aspx

8 For more information and for the text of the AAA and ICDR Arbitration Rules, see: http://www.adr.org/arb_med> and <http://www.adr.org/sp.asp?id=28819

9 For more information and for the text of the SIAC Arbitration Rules, see: www.siac.org.sg/cms>.

10 For more information and for the text of the ICSID Arbitration Rules, see: http://icsid.worldbank.org/ICSID/Index.jsp

ANNEX 1 - PARTIES TO NEW YORK CONVENTION

(October 2010)

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a. Declarations and reservations. This state will apply the Convention only to recognition and enforcement of awards made in the territory of another contracting state.

b. Declarations and reservations. This state will apply the Convention only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law.

c. On 10 February 1976, Denmark declared that the Convention shall apply to the Faeroe Islands and Greenland.

d. On 24 April 1964, the Netherlands declared that the Convention shall apply to the Netherlands Antilles.

e. Declarations and reservations. With regard to awards made in the territory of non-contracting states, this state will apply the Convention only to the extent to which those states grant reciprocal treatment.

f. Declarations and reservations. This state will apply the Convention only to those arbitral awards which were adopted after the entry into effect of the Convention.

g. The United Kingdom extended the territorial application of the Convention, for the case of awards made only in the territory of another contracting state, to the following territories: Gibraltar (24 September 1975), Isle of Man (22 February 1979), Bermuda (14 November 1979), Cayman Islands (26 November 1980), Guernsey (19 April 1985), Jersey (28 May 2002).

h. Declarations and reservations. Canada declared that it would apply the Convention only to differences arising out of legal relationships, whether contractual or not, that were considered commercial under the laws of Canada, except in the case of the Province of Quebec, where the law did not provide for such limitation.

i. This state will not apply the Convention to differences where the subject matter of the proceedings is immovable property situated in the state, or a right in or to such property.
ANNEX 2 - LEGISLATION BASED ON THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

Legislation based on the UNCITRAL Model Law on International Commercial Arbitration as adopted in 1985 has been enacted (as of October 2010):

Armenia (2006),
Australia (1989, 2010*),
Austria (2005),
Azerbaijan (1999),
Bahrain (1994),
Bangladesh (2001),
Belarus (1999),
Bulgaria (2002),
Cambodia (2006),
Canada (1986),
Chile (2004),
China (the Hong Kong Special Administrative Region (1996) and the Macao Special Administrative Region (1998)),
Croatia (2001),
Cyprus, (2005),
Dominican Republic (2008),
Egypt (1994),
Estonia (2006),
Georgia (2009*),
Germany (1998),
Greece (1999),
Guatemala (1995),
Honduras (2000),
Hungary (1994),
India (1996),
Iran (Islamic Republic of) (1997),
Ireland (1998, 2010*),
Japan (2003),
Jordan (2001),
Kenya (1995),
Lithuania (1996),
Madagascar (1998),
Malta (1995),
Mauritius (2008*),
Mexico (1993),
New Zealand (1996, 2007*),
Nicaragua (2005),
Nigeria (1990),
Norway (2004),
Oman (1997),
Paraguay (2002),
Peru (1996, 2008*),
the Philippines (2004),
Poland (2005),
the Republic of Korea (1999),
the Russian Federation (1993),
Rwanda (2008*),
Serbia (2006),
Singapore (2001),
Slovenia (2008*),
Spain (2003),
Sri Lanka (1995),
Thailand (2002),
the former Yugoslav Republic of Macedonia (2006),
Tunisia (1993),
Turkey (2001),
Uganda (2000),
Ukraine (1994),
Venezuela (Bolivarian Republic of) (1998),
Zambia (2000)

ANNEX 3 - INSTITUTIONAL ARBITRATION CLAUSES

American Arbitration Association (AAA)
Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the American Arbitration Association in accordance with its International Arbitration Rules.

The parties may wish to add:
The number of arbitrators shall be [one or three];
The place of arbitration shall be [city and/or country];
The language(s) of the arbitration shall be [ … ].

China International Economic and Trade Arbitration Commission (CIETAC)
Any dispute arising from or in connection with this Contract shall be submitted to the China International Economic and Trade Arbitration Commission for arbitration which shall be conducted in accordance with the Commission's arbitration rules in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties.

The parties may also stipulate the following matters in the arbitration clause:
the place of arbitration and/or hearing;
the language of the arbitration;
the number of arbitrators;
the nationality of the arbitrators;
the method of selection of the arbitrators;
the applicable law of the contract; and/or
the application of general procedure or summary procedure.

International Chamber of Commerce (ICC)
All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.

London Court of International Arbitration (LCIA)
Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.

The number of arbitrators shall be [one/three].
The seat, or legal place, of arbitration shall be [City and/or Country].
The language to be used in the arbitral proceedings shall be [ … ].
The governing law of the contract shall be the substantive law of [ … ].

Netherlands Arbitration Institute (NAI)
All disputes arising in connection with the present contract, or further contracts resulting therefrom, shall be finally settled in accordance with the Arbitration Rules of the Netherlands Arbitration Institute.

Additionally, various matters may be provided for:
The arbitral tribunal shall be composed of one arbitrator/three arbitrators.
The place of arbitration shall be [city].
The arbitral procedure shall be conducted in the [ … ] language.
Consolidation of the arbitral proceedings with other arbitral proceedings pending in the Netherlands, as provided in Section 1046 of the Netherlands Code of Civil Procedure, is excluded.
**Singapore International Arbitration Centre (SIAC)**

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") for the time being in force, which rules are deemed to be incorporated by reference in this clause.

The Tribunal shall consist of [...] arbitrator(s).

The language of the arbitration shall be [...].

**Stockholm Chamber of Commerce (SCC)**

Any dispute, controversy or claim arising out of or in connection with this contract, or the breach, termination or invalidity thereof, shall be finally settled by arbitration in accordance with the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.

Recommended additions:

The arbitral tribunal shall be composed of three arbitrators/a sole arbitrator.

The seat of arbitration shall be [...].

The language to be used in the arbitral proceedings shall be [...].

This contract shall be governed by the substantive law of [...].

**UNCITRAL**

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules.

Parties should consider adding:

The appointing authority shall be [name of institution or person].

The number of arbitrators shall be [one or three].

The place of arbitration shall be [town and country].

The language to be used in the arbitral proceedings shall be [...].
ANNEX 4 - IBA RULES ON TAKING EVIDENCE

Preamble
1. These IBA Rules on the Taking of Evidence in International Arbitration are intended to provide an efficient, economical and fair process for the taking of evidence in international arbitrations, particularly those between Parties from different legal traditions.

They are designed to supplement the legal provisions and the institutional, ad hoc or other rules that apply to the conduct of the arbitration.

2. Parties and Arbitral Tribunals may adopt the IBA Rules of Evidence, in whole or in part, to govern arbitration proceedings, or they may vary them or use them as guidelines in developing their own procedures. The Rules are not intended to limit the flexibility that is inherent in, and an advantage of, international arbitration, and Parties and Arbitral Tribunals are free to adapt them to the particular circumstances of each arbitration.

3. The taking of evidence shall be conducted on the principles that each Party shall act in good faith and be entitled to know, reasonably in advance of any Evidentiary Hearing or any fact or merits determination, the evidence on which the other Parties rely.

Definitions
In the IBA Rules of Evidence:
‘Arbitral Tribunal’ means a sole arbitrator or a panel of arbitrators;
‘Claimant’ means the Party or Parties who commenced the arbitration and any Party who, through joinder or otherwise, becomes aligned with such Party or Parties;
‘Document’ means a writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means;
‘Evidentiary Hearing’ means any hearing, whether or not held on consecutive days, at which the Arbitral Tribunal, whether in person, by teleconference, videoconference or other method, receives oral or other evidence;
‘Expert Report’ means a written statement by a Tribunal-Appointed Expert or a Party-Appointed Expert;
‘General Rules’ mean the institutional, ad hoc or other rules that apply to the conduct of the arbitration;
IBA Rules of Evidence’ or ‘Rules’ mean these IBA Rules on the Taking of Evidence in International Arbitration, as they may be revised or amended from time to time;
‘Party’ means a party to the arbitration;
‘Party-Appointed Expert’ means a person or organization appointed by a Party in order to report on specific issues determined by the Party;
‘Request to Produce’ means a written request by a Party that another Party produce Documents;
‘Respondent’ means the Party or Parties against whom the Claimant made its claim, and any Party who, through joinder or otherwise, becomes aligned with such Party or Parties, and includes a Respondent making a counterclaim;
‘Tribunal-Appointed Expert’ means a person or organization appointed by the Arbitral Tribunal in order to report to it on specific issues determined by the Arbitral Tribunal; and
‘Witness Statement’ means a written statement of testimony by a witness of fact.

Article 1 Scope of Application
1. Whenever the Parties have agreed or the Arbitral Tribunal has determined to apply the IBA Rules of Evidence, the Rules shall govern the taking of evidence, except to the extent that any specific provision of them may be found to be in conflict with any mandatory provision of law determined to be applicable to the case by the Parties or by the Arbitral Tribunal.

2. Where the Parties have agreed to apply the IBA Rules of Evidence, they shall be deemed to have agreed, in the absence of a contrary indication, to the version as current on the date of such agreement.

3. In case of conflict between any provisions of the IBA Rules of Evidence and the General Rules, the Arbitral Tribunal shall apply the IBA Rules of Evidence in the manner that it determines best in order to accomplish the purposes of both the General Rules and the IBA Rules of Evidence, unless the Parties agree to the contrary.

4. In the event of any dispute regarding the meaning of the IBA Rules of Evidence, the Arbitral Tribunal shall interpret them according to their purpose and in the manner most appropriate for the particular arbitration.

5. Insofar as the IBA Rules of Evidence and the General Rules are silent on any matter concerning the taking of evidence and the Parties have not agreed otherwise, the Arbitral Tribunal shall conduct the taking of evidence as it deems appropriate, in accordance with the general principles of the IBA Rules of Evidence.

Article 2 Consultation on Evidentiary Issues
1. The Arbitral Tribunal shall consult with the Parties at the earliest appropriate time in the proceedings and invite them to consult each other with a view to agreeing on an efficient, economical and fair process for the taking of evidence.

2. The consultation on evidentiary issues may address the scope, timing and manner of the taking of evidence, including:
(a) the preparation and submission of Witness Statements and Expert Reports;
(b) the taking of oral testimony at any Evidentiary Hearing;
(c) the requirements, procedure and format applicable to the production of Documents;
1. Within the time ordered by the Arbitral Tribunal, each Party shall submit to the Arbitral Tribunal and to the other Parties all Documents available to it on which it relies, including public Documents and those in the public domain, except for any Documents that have already been submitted by another Party.

2. Within the time ordered by the Arbitral Tribunal, any Party may submit to the Arbitral Tribunal and to the other Parties a Request to Produce.

3. A Request to Produce shall contain:
   (a) (i) a description of each requested Document sufficient to identify it, or a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist; in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner;
   (b) a statement as to how the Documents requested are relevant to the case and material to its outcome; and
   (c) (i) a statement that the Documents requested are not in the possession, custody or control of the requesting Party or a statement of the reasons why it would be unreasonably burdensome for the requesting Party to produce such Documents, and
   (ii) a statement of the reasons why the requesting Party assumes the Documents requested are in the possession, custody or control of another Party.

4. Within the time ordered by the Arbitral Tribunal, the Party to whom the Request to Produce is addressed shall produce to the other Parties and, if the Arbitral Tribunal so orders, to it, all the Documents requested in its possession, custody or control as to which it makes no objection.

5. If the Party to whom the Request to Produce is addressed has an objection to some or all of the Documents requested, it shall state the objection in writing to the Arbitral Tribunal and the other Parties within the time ordered by the Arbitral Tribunal.

The reasons for such objection shall be any of those set forth in Article 9.2 or a failure to satisfy any of the requirements of Article 3.3.

6. Upon receipt of any such objection, the Arbitral Tribunal may invite the relevant Parties to consult with each other with a view to resolving the objection.

7. Either Party may, within the time ordered by the Arbitral Tribunal, request the Arbitral Tribunal to rule on the objection. The Arbitral Tribunal shall then, in consultation with the Parties and in timely fashion, consider the Request to Produce and the objection. The Arbitral Tribunal may order the Party to whom such Request is addressed to produce any requested Document in its possession, custody or control as to which the Arbitral Tribunal determines that (i) the issues that the requesting Party wishes to prove are relevant to the case and material to its outcome; (ii) none of the reasons for objection set forth in Article 9.2 applies; and (iii) the requirements of Article 3.3 have been satisfied.

Any such Document shall be produced to the other Parties and, if the Arbitral Tribunal so orders, to it.

8. In exceptional circumstances, if the propriety of an objection can be determined only by review of the Document, the Arbitral Tribunal may determine that it should not review the Document. In that event, the Arbitral Tribunal may, after consultation with the Parties, appoint an independent and impartial expert, bound to confidentiality, to review any such Document and to report on the objection. To the extent that the objection is upheld by the Arbitral Tribunal, the expert shall not disclose to the Arbitral Tribunal and to the other Parties the contents of the Document reviewed.

9. If a Party wishes to obtain the production of Documents from a person or organisation who is not a Party to the arbitration and from whom the Party cannot obtain the Documents on its own, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps are legally available to obtain the requested Documents, or seek leave from the Arbitral Tribunal to take such steps itself. The Party shall submit such request to the Arbitral Tribunal and to the other Parties in writing, and the request shall contain the particulars set forth in Article 3.3, as applicable. The Arbitral Tribunal shall decide on this request and shall take, authorize the requesting Party to take, or order any other Party to take, such steps as the Arbitral Tribunal considers appropriate if, in its discretion, it determines that (i) the Documents would be relevant to the case and material to its outcome, (ii) the requirements of Article 3.3, as applicable, have been satisfied and (iii) none of the reasons for objection set forth in Article 9.2 applies.

10. At any time before the arbitration is concluded, the Arbitral Tribunal may (i) request any Party to produce Documents, (ii) request any Party to use its best efforts to take or (iii) itself take, any step that it considers appropriate to obtain Documents from any person or organisation. A Party to whom such a request for Documents is addressed may object to the request for any of the
reasons set forth in Article 9.2. In such cases, Article 3.4 to Article 3.8 shall apply correspondingly.

11. Within the time ordered by the Arbitral Tribunal, the Parties may submit to the Arbitral Tribunal and to the other Parties any additional Documents on which they intend to rely or which they believe have become relevant to the case and material to its outcome as a consequence of the issues raised in Documents, Witness Statements or Expert Reports submitted or produced, or in other submissions of the Parties.

12. With respect to the form of submission or production of Documents:
   (a) copies of Documents shall conform to the originals and, at the request of the Arbitral Tribunal, any original shall be presented for inspection;
   (b) Documents that a Party maintains in electronic form shall be submitted or produced in the form most convenient or economical to it that is reasonably usable by the recipients, unless the Parties agree otherwise or, in the absence of such agreement, the Arbitral Tribunal decides otherwise;
   (c) a Party is not obligated to produce multiple copies of Documents which are essentially identical unless the Arbitral Tribunal decides otherwise; and
   (d) translations of Documents shall be submitted together with the originals and marked as translations with the original language identified.

13. Any Document submitted or produced by a Party or non-Party in the arbitration and not otherwise in the public domain shall be kept confidential by the Arbitral Tribunal and the other Parties, and shall be used only in connection with the arbitration. This requirement shall apply except and to the extent that disclosure may be required of a Party to fulfill a legal duty, protect or pursue a legal right, or enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority. The Arbitral Tribunal may issue orders to set forth the terms of this confidentiality. This requirement shall be without prejudice to all other obligations of confidentiality in the arbitration.

14. If the arbitration is organised into separate issues or phases (such as jurisdiction, preliminary determinations, liability or damages), the Arbitral Tribunal may, after consultation with the Parties, schedule the submission of Documents and Requests to Produce separately for each issue or phase.

**Article 4 Witnesses of Fact**

1. Within the time ordered by the Arbitral Tribunal, each Party shall identify the witnesses on whose testimony it intends to rely and the subject matter of that testimony.

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

3. It shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses and to discuss their prospective testimony with them.

4. The Arbitral Tribunal may order each Party to submit within a specified time to the Arbitral Tribunal and to the other Parties Witness Statements by each witness on whose testimony it intends to rely, except for those witnesses whose testimony is sought pursuant to Articles 4.9 or 4.10. If Evidentiary Hearings are organised into separate issues or phases (such as jurisdiction, preliminary determinations, liability or damages), the Arbitral Tribunal or the Parties by agreement may schedule the submission of Witness Statements separately for each issue or phase.

5. Each Witness Statement shall contain:
   (a) the full name and address of the witness, a statement regarding his or her present and past relationship (if any) with any of the Parties, and a description of his or her background, qualifications, training and experience, if such a description may be relevant to the dispute or to the contents of the statement;
   (b) a full and detailed description of the facts, and the source of the witness’s information as to those facts, sufficient to serve as that witness’s evidence in the matter in dispute. Documents on which the witness relies that have not already been submitted shall be provided;
   (c) a statement as to the language in which the Witness Statement was originally prepared and the language in which the witness anticipates giving testimony at the Evidentiary Hearing;
   (d) an affirmation of the truth of the Witness Statement; and
   (e) the signature of the witness and its date and place.

6. If Witness Statements are submitted, any Party may, within the time ordered by the Arbitral Tribunal, submit to the Arbitral Tribunal and to the other Parties revised or additional Witness Statements, including statements from persons not previously named as witnesses, so long as any such revisions or additions respond only to matters contained in another Party’s Witness Statements, Expert Reports or other submissions that have not been previously presented in the arbitration.

7. If a witness whose appearance has been requested pursuant to Article 8.1 fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Witness Statement related to that Evidentiary Hearing by that witness unless, in exceptional circumstances, the Arbitral Tribunal decides otherwise.

8. If the appearance of a witness has not been requested pursuant to Article 8.1, none of the other Parties shall be deemed to have agreed to the correctness of the content of the Witness Statement.

9. If a Party wishes to present evidence from a person who will not appear voluntarily at its request, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps
are legally available to obtain the testimony of that person, or seek leave from the Arbitral Tribunal to take such steps itself. In the case of a request to the Arbitral Tribunal, the Party shall identify the intended witness, shall describe the subjects on which the witness’s testimony is sought and shall state why such subjects are relevant to the case and material to its outcome. The Arbitral Tribunal shall decide on this request and shall take, authorize the requesting Party to take or order any other Party to take, such steps as the Arbitral Tribunal considers appropriate if, in its discretion, it determines that the testimony of that witness would be relevant to the case and material to its outcome.

10. At any time before the arbitration is concluded, the Arbitral Tribunal may order any Party to provide for, or to use its best efforts to provide for, the appearance for testimony at an Evidentiary Hearing of any person, including one whose testimony has not yet been offered. A Party to whom such a request is addressed may object for any of the reasons set forth in Article 9.2.

**Article 5 Party-Appointed Experts**

1. A Party may rely on a Party-Appointed Expert as a means of evidence on specific issues. Within the time ordered by the Arbitral Tribunal, (i) each Party shall identify any Party-Appointed Expert on whose testimony it intends to rely and the subject-matter of such testimony; and (ii) the Party-Appointed Expert shall submit an Expert Report.

2. The Expert Report shall contain:
   (a) the full name and address of the Party-Appointed Expert, a statement regarding his or her present and past relationship (if any) with any of the Parties, their legal advisors and the Arbitral Tribunal, and a description of his or her background, qualifications, training and experience;
   (b) a description of the instructions pursuant to which he or she is providing his or her opinions and conclusions;
   (c) a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal;
   (d) a statement of the facts on which he or she is basing his or her expert opinions and conclusions;
   (e) his or her expert opinions and conclusions, including a description of the methods, evidence and information used in arriving at the conclusions. Documents on which the Party-Appointed Expert relies that have not already been submitted shall be provided;
   (f) if the Expert Report has been translated, a statement as to the language in which it was originally prepared, and the language in which the Party-Appointed Expert anticipates giving testimony at the Evidentiary Hearing;
   (g) an affirmation of his or her genuine belief in the opinions expressed in the Expert Report;
   (h) the signature of the Party-Appointed Expert and its date and place; and

(i) if the Expert Report has been signed by more than one person, an attribution of the entirety or specific parts of the Expert Report to each author.

3. If Expert Reports are submitted, any Party may, within the time ordered by the Arbitral Tribunal, submit to the Arbitral Tribunal and to the other Parties revised or additional Expert Reports, including reports or statements from persons not previously identified as Party-Appointed Experts, so long as any such revisions or additions respond only to matters contained in another Party’s Witness Statements, Expert Reports or other submissions that have not been previously presented in the arbitration.

4. The Arbitral Tribunal in its discretion may order that any Party-Appointed Experts who will submit or who have submitted Expert Reports on the same or related issues meet and confer on such issues. At such meeting, the Party-Appointed Experts shall attempt to reach agreement on the issues within the scope of their Expert Reports, and they shall record in writing any such issues on which they reach agreement, any remaining areas of disagreement and the reasons therefore.

5. If a Party-Appointed Expert whose appearance has been requested pursuant to Article 8.1 fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Expert Report by that Party-Appointed Expert related to that Evidentiary Hearing unless, in exceptional circumstances, the Arbitral Tribunal decides otherwise.

6. If the appearance of a Party-Appointed Expert has not been requested pursuant to Article 8.1, none of the other Parties shall be deemed to have agreed to the correctness of the content of the Expert Report.

**Article 6 Tribunal-Appointed Experts**

1. The Arbitral Tribunal, after consulting with the Parties, may appoint one or more independent Tribunal-Appointed Experts to report to it on specific issues designated by the Arbitral Tribunal. The Arbitral Tribunal shall establish the terms of reference for any Tribunal-Appointed Expert Report after consulting with the Parties. A copy of the final terms of reference shall be sent by the Arbitral Tribunal to the Parties.

2. The Tribunal-Appointed Expert shall, before accepting appointment, submit to the Arbitral Tribunal and to the Parties a description of his or her qualifications and a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal. Within the time ordered by the Arbitral Tribunal, the Parties shall inform the Arbitral Tribunal whether they have any objections as to the Tribunal-Appointed Expert’s qualifications and independence. The Arbitral Tribunal shall decide promptly whether to accept any such objection. After the appointment of a Tribunal-Appointed Expert, a Party may object to the expert’s qualifications or independence only
if the objection is for reasons of which the Party becomes aware after the appointment has been made. The Arbitral Tribunal shall decide promptly what, if any, action to take.

3. Subject to the provisions of Article 9.2, the Tribunal-Appointed Expert may request a Party to provide any information or to provide access to any Documents, goods, samples, property, machinery, systems, processes or site for inspection, to the extent relevant to the case and material to its outcome. The authority of a Tribunal-Appointed Expert to request such information or access shall be the same as the authority of the Arbitral Tribunal. The Parties and their representatives shall have the right to receive any such information and to attend any such inspection. Any disagreement between a Tribunal-Appointed Expert and a Party as to the relevance, materiality or appropriateness of such a request shall be decided by the Arbitral Tribunal, in the manner provided in Articles 3.5 through 3.8. The Tribunal-Appointed Expert shall record in the Expert Report any non-compliance by a Party with an appropriate request or decision by the Arbitral Tribunal and shall describe its effects on the determination of the specific issue.


(a) the full name and address of the Tribunal-Appointed Expert, and a description of his or her background, qualifications, training and experience;
(b) a statement of the facts on which he or she is basing his or her expert opinions and conclusions;
(c) his or her expert opinions and conclusions, including a description of the methods, evidence and information used in arriving at the conclusions. Documents on which the Tribunal-Appointed Expert relies that have not already been submitted shall be provided;
(d) if the Expert Report has been translated, a statement as to the language in which it was originally prepared, and the language in which the Tribunal-Appointed Expert anticipates giving testimony at the Evidentiary Hearing;
(e) an affirmation of his or her genuine belief in the opinions expressed in the Expert Report;
(f) the signature of the Tribunal-Appointed Expert and its date and place; and
(g) if the Expert Report has been signed by more than one person, an attribution of the entirety or specific parts of the Expert Report to each author.

5. The Arbitral Tribunal shall send a copy of such Expert Report to the Parties. The Parties may examine any information, Documents, goods, samples, property, machinery, systems, processes or site for inspection that the Tribunal-Appointed Expert has examined and any correspondence between the Arbitral Tribunal and the Tribunal-Appointed Expert. Within the time ordered by the Arbitral Tribunal, any Party shall have the opportunity to respond to the Expert Report in a submission by the Party or through a Witness Statement or an Expert Report by a Party-Appointed Expert. The Arbitral Tribunal shall send the submission, Witness Statement or Expert Report to the Tribunal-Appointed Expert and to the other Parties.

6. At the request of a Party or of the Arbitral Tribunal, the Tribunal-Appointed Expert shall be present at an Evidentiary Hearing. The Arbitral Tribunal may question the Tribunal-Appointed Expert, and he or she may be questioned by the Parties or by any Party-Appointed Expert on issues raised in his or her Expert Report, the Parties’ submissions or Witness Statement or the Expert Reports made by the Party-Appointed Experts pursuant to Article 6.5.

7. Any Expert Report made by a Tribunal-Appointed Expert and its conclusions shall be assessed by the Arbitral Tribunal with due regard to all circumstances of the case.

8. The fees and expenses of a Tribunal-Appointed Expert, to be funded in a manner determined by the Arbitral Tribunal, shall form part of the costs of the arbitration.

Article 7 Inspection
Subject to the provisions of Article 9.2, the Arbitral Tribunal may, at the request of a Party or on its own motion, inspect or require the inspection by a Tribunal-Appointed Expert or a Party-Appointed Expert of any site, property, machinery or any other goods, samples, systems, processes or Documents, as it deems appropriate. The Arbitral Tribunal shall, in consultation with the Parties, determine the timing and arrangement for the inspection. The Parties and their representatives shall have the right to attend any such inspection.

Article 8 Evidentiary Hearing
1. Within the time ordered by the Arbitral Tribunal, each Party shall inform the Arbitral Tribunal and the other Parties of the witnesses whose appearance it requests. Each witness (which term includes, for the purposes of this Article, witnesses of fact and any experts) shall, subject to Article 8.2, appear for testimony at the Evidentiary Hearing if such person’s appearance has been requested by any Party or by the Arbitral Tribunal. Each witness shall appear in person unless the Arbitral Tribunal allows the use of videoconference or similar technology with respect to a particular witness.

2. The Arbitral Tribunal shall at all times have complete control over the Evidentiary Hearing. The Arbitral Tribunal may limit or exclude any question to, answer by or appearance of a witness, if it considers such question, answer or appearance to be irrelevant, immaterial, unreasonably burdensome, duplicative or otherwise covered by a reason for objection set forth in Article 9.2. Questions to a witness during direct and re-direct testimony may not be unreasonably leading.

3. With respect to oral testimony at an Evidentiary Hearing:
(a) the Claimant shall ordinarily first present the testimony of its witnesses, followed by the Respondent presenting the testimony of its witnesses;
(b) following direct testimony, any other Party may question such witness, in an order to be determined by the Arbitral Tribunal. The Party who initially presented the witness shall subsequently have the opportunity to ask additional questions on the matters raised in the other Parties’ questioning.

(c) thereafter, the Claimant shall ordinarily first present the testimony of its Party-Appointed Experts, followed by the Respondent presenting the testimony of its Party-Appointed Experts. The Party who initially presented the Party-Appointed Expert shall subsequently have the opportunity to ask additional questions on the matters raised in the other Parties’ questioning;

(d) the Arbitral Tribunal may question a Tribunal-Appointed Expert, and he or she may be questioned by the Parties or by any Party-Appointed Expert, on issues raised in the Tribunal-Appointed Expert Report, in the Parties’ submissions or in the Expert Reports made by the Party-Appointed Experts;

(e) if the arbitration is organised into separate issues or phases (such as jurisdiction, preliminary determinations, liability and damages), the Parties may agree or the Arbitral Tribunal may order the scheduling of testimony separately for each issue or phase;

(f) the Arbitral Tribunal, upon request of a Party or on its own motion, may vary this order of proceeding, including the arrangement of testimony by particular issues or in such a manner that witnesses be questioned at the same time and in confrontation with each other (witness conferencing);

(g) the Arbitral Tribunal may ask questions to a witness at any time.

4. A witness of fact providing testimony shall first affirm, in a manner determined appropriate by the Arbitral Tribunal, that he or she commits to tell the truth or, in the case of an expert witness, his or her genuine belief in the opinions to be expressed at the Evidentiary Hearing. If the witness has submitted a Witness Statement or an Expert Report, the witness shall confirm it. The Parties may agree or the Arbitral Tribunal may order that the Witness Statement or Expert Report shall serve as that witness’s direct testimony.

5. Subject to the provisions of Article 9.2, the Arbitral Tribunal may request any person to give oral or written evidence on any issue that the Arbitral Tribunal considers to be relevant to the case and material to its outcome. Any witness called and questioned by the Arbitral Tribunal may also be questioned by the Parties.

Article 9 Admissibility and Assessment of Evidence
1. The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.

2. The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons:

(a) lack of sufficient relevance to the case or materiality to its outcome;

(b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;

(c) unreasonable burden to produce the requested evidence;

(d) loss or destruction of the Document that has been shown with reasonable likelihood to have occurred;

(e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling;

(f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling;

(g) considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.

3. In considering issues of legal impediment or privilege under Article 9.2(b), and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal may take into account:

(a) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice;

(b) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice;

(c) the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen;

(d) any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the Document, statement, oral communication or advice contained therein, or otherwise;

(e) the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules.

4. The Arbitral Tribunal may, where appropriate, make necessary arrangements to permit evidence to be presented or considered subject to suitable confidentiality protection.

5. If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party.
6. If a Party fails without satisfactory explanation to make available any other relevant evidence, including testimony, sought by one Party to which the Party to whom the request was addressed has not objected in due time or fails to make available any evidence, including testimony, ordered by the Arbitral Tribunal to be produced, the Arbitral Tribunal may infer that such evidence would be adverse to the interests of that Party.

7. If the Arbitral Tribunal determines that a Party has failed to conduct itself in good faith in the taking of evidence, the Arbitral Tribunal may, in addition to any other measures available under these Rules, take such failure into account in its assignment of the costs of the arbitration, including costs arising out of or in connection with the taking of evidence.
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**PROFILE**

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