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INTERNATIONAL COMMERCIAL ARBITRATION

Draft Notes on Organizing Arbitral Proceedings

Report of the Secretary-General

The decision by the Commission to commence work on this project was taken at its twenty-sixth session in 1993 (report of the session: document A/48/17, paras. 291-296). Pursuant to that decision, the Secretariat prepared "Draft Guidelines for Preparatory Conferences in Arbitral Proceedings" (document A/CN.9/396/Add.1), which the Commission discussed at its twenty-seventh session in 1994 (document A/49/17, paras. 111-195). That draft was also discussed at several national and international meetings of arbitration practitioners, among which the most prominent was the XIIth International Arbitration Congress, organized by the International Council for Commercial Arbitration (ICCA) at Vienna from 3 to 6 November 1994.1/ On the basis of those discussions in the Commission and elsewhere, the Secretariat has prepared a revised draft, which appears in the annex.

1/ Working Group I of the Congress considered the UNCITRAL project. The reports of the Congress will be published in the International Council for Commercial Arbitration Congress Series No. 7.

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Annex

DRAFT NOTES ON ORGANIZING ARBITRAL PROCEEDINGS

Contents

PURPOSE AND ORIGIN OF THE NOTES

1. The purpose of the Notes on Organizing Arbitral Proceedings, prepared by the United Nations Commission on International Trade Law (UNCITRAL),1/ is to assist arbitration practitioners by listing and briefly describing questions on which appropriately timed procedural decisions may be useful.

Non-binding character of the Notes

2. The Notes are merely suggestions for consideration that do not affect the procedural prerogatives of the arbitral tribunal in conducting the arbitration. The arbitral tribunal remains free to use the suggestions as it sees fit and is not required to give reasons for disregarding them.

3. The Notes are not suitable to be used as arbitration rules, since they do not establish any obligation of the arbitral tribunal or the parties to act in a particular way. Accordingly, the use of the Notes cannot imply any modification of the arbitration rules that the parties may have agreed upon.

1/ The Commission finalized the Notes at its [twenty-eighth session (Vienna, 2-26 May 1995).] In addition to the 36 member States of the Commission, representatives of many other States and of a number of international organizations participated in the deliberations. In preparing the draft materials, the Secretariat consulted with experts from various legal systems, national arbitration bodies, as well as international professional associations.

The first draft, entitled "Draft Guidelines for Preparatory Conferences in Arbitral Proceedings" (A/CN.9/396/Add.1), was considered by the Commission at its twenty-seventh session in 1994. That draft was also discussed at several meetings of arbitration practitioners, including the XIIth International Arbitration Congress, held by the International Council for Commercial Arbitration (ICCA) at Vienna from 3 to 6 November 1994 [citation to the Congress Proceedings].

The considerations in the Commission are reflected in the reports on the work of its twenty-sixth, twenty-seventh and twenty-eighth sessions (United Nations documents A/48/17 (UNCITRAL Yearbook, vol. XXIV: 1993, part one), paras. 291-296; A/49/17 (UNCITRAL Yearbook, vol. XXV: 1994, part one), paras. 111-195; and A/50/17 (UNCITRAL Yearbook, vol. XXVI: 1995, ___), paras.___).

Discretion in conduct of proceedings and usefulness of timely procedural decisions

4. Arbitration rules agreed upon by parties typically allow the arbitral tribunal broad discretion and flexibility in the conduct of arbitral proceedings.2/ This is useful in that it enables the arbitral tribunal to take procedural decisions that best meet the circumstances of the case such as the type and complexity of issues of fact and law, the expectations of the parties and the members of the arbitral tribunal as to the best way to proceed, and the need for a cost-efficient resolution of the dispute.

5. Such discretion may make it desirable for the arbitral tribunal to give the parties a timely indication as to the manner in which the tribunal intends to proceed. This is particularly desirable in international arbitrations, where the participants may be accustomed to differing procedural styles. Without such guidance, a party may find aspects of the proceedings unpredictable and difficult to prepare for. That may lead to misunderstandings, delays and increased costs of proceedings.

Process of making procedural decisions

6. While some decisions are taken by the presiding arbitrator or sole arbitrator alone, others are taken pursuant to consultations; consultations may be limited to the members of the arbitral tribunal or may involve also the parties. Limiting consultations to the arbitrators might generally be more time efficient and easier to organize than when the parties are also involved. However, consulting with the parties may offer advantages, including that the arbitral tribunal can better ascertain the expectations of the parties, assess whether it is appropriate to invite the parties to enter into a procedural agreement, and that decisions formulated with the benefit of the parties' views are likely to favour increased predictability of the proceedings and an improved procedural atmosphere.

7. The consultations, whether they involve only the arbitrators or also the parties, can be held in a meeting at the place of arbitration or at some other appropriate place, or can be carried out by correspondence or telecommunications such as telefax or conference telephone calls.

8. If a meeting is held for consultations, it can be devoted only to procedure; alternatively, the meeting can be held in conjunction with a hearing on the substance of the dispute. Special procedural meetings of the arbitrators and the parties separate from hearings are in practice referred to by expressions such as "preliminary meeting", "pre-hearing conference", "preparatory conference", "pre-hearing review", or terms of similar meaning. The terms used partly depend on the stage of the proceedings at which the meeting is taking place.

2/ A prominent example of such rules are the UNCITRAL Arbitration Rules, which provide in article 15(1): "Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case."

List of procedural matters in the Notes

9. The Notes discuss matters on which the arbitral tribunal may wish to formulate procedural decisions. The discussion does not provide comprehensive guidance on possible procedural decisions; practice in international arbitration is so varied that it would be impossible to reflect all its aspects.

10. The list of procedural matters is quite complete so as to provide a reminder for a broad range of circumstances; however, in many arbitrations only a limited number of the issues mentioned in the list will need to be considered. Yet, the list is not exhaustive.

11. If, prior to formulating procedural orders, the arbitral tribunal decides to meet and consult with the parties, it is useful that the parties be given advance notice of the topics to be discussed. This will help them to participate efficiently in the consultations. The following listing of issues may serve as a checklist in preparing such an agenda.

PROCEDURAL MATTERS FOR POSSIBLE CONSIDERATION

1. **Deposits for costs**

(a) Amount to be deposited

12. It is customary for the arbitral tribunal, soon after its establishment, to assess the amounts to be disbursed by the arbitral tribunal and to request a deposit to cover the disbursements. The assessed amount typically includes travel and other expenses incurred by the arbitrators, expenditures for administrative assistance required by the arbitral tribunal and the fees for the arbitrators. Many arbitration rules have provisions on this matter, including on whether both parties or only the claimant should be requested to make a deposit.

(b) Management of deposits

13. In administered arbitration, the assessment of the amounts to be deposited as well as related administrative tasks are usually the responsibility of the arbitral institution. In non-administered arbitration, it may be useful to clarify matters such as the type and location of the account in which the money will be kept and how the deposits will be managed.

(c) Supplementary deposits

14. If during the course of proceedings it emerges that the costs will be higher than anticipated (e.g., because of a decision of the arbitral tribunal to appoint an expert), the arbitral tribunal will require supplementary deposits.

2. Set of arbitration rules

Would the parties wish to agree on a set of arbitration rules

15. Sometimes parties do not include in the arbitration agreement a stipulation that a set of arbitration rules will govern the arbitral proceedings (e.g., the UNCITRAL Arbitration Rules or another set of rules). In such a case, the arbitral tribunal might consider it appropriate to enquire whether the parties now wish to enter into such a stipulation. However, caution is advisable in raising this question, as the consideration of a set of arbitration rules might unduly delay the proceedings or give rise to an unnecessary controversy.

3. Language of proceedings

16. Many rules and laws on arbitral procedure empower the arbitral tribunal to determine the language or languages to be used in the proceedings, if the parties have not reached an agreement thereon.

(a) Will translation of documents, in full or in part, be needed

17. When documents annexed to the statements of claim and defence or submitted later are not in the language of the proceedings, it may be considered whether, in the interest of economy, some of those documents or parts thereof need not be translated into the language of the proceedings. Such documents may be, for example, business records (e.g., invoices, transport documents, construction records) or texts concerning the law applicable to the substance of the dispute (e.g., statutes, court decisions or commentaries).

(b) Will interpretation of oral presentations be needed

18. If interpretation will be necessary during oral hearings, it is advisable to consider whether the arrangements should be the responsibility of a party or the arbitral tribunal. In administered arbitration, interpretation as well as translation services are often arranged by the arbitral institution.

(c) Cost of translation and interpretation

19. In taking decisions about translation or interpretation, it is advisable to decide whether the costs will be paid out of the deposits and apportioned between the parties along with the other arbitration costs or whether they are to be paid directly by a party.

4. **Place of arbitration**

(a) Determination of the place of arbitration

20. Arbitration rules usually allow the parties to agree on the place of arbitration, with possible limitations in arbitrations administered by some arbitral institutions. If the place has not been so agreed upon, it is typically in the power of the arbitral tribunal to determine the place of arbitration.

21. Among the more prominent factors influencing the choice of the place of arbitration, whose relative importance varies from case to case, are: (a) convenience of the parties and the arbitrators, including the travel distances; (b) availability and cost of support services needed; (c) suitability of the law on arbitral procedure of the place of arbitration; (d) whether there is a multilateral or bilateral treaty on enforcement of arbitral awards between the State where the arbitration takes place and the State or States where the award may have to be enforced; (e) location of the subject-matter in dispute and proximity of evidence; (f) perception of a place as being neutral.

(b) Possibility of meetings outside the place of arbitration

22. Many sets of arbitration rules and laws on arbitral procedure allow the arbitral tribunal to hold meetings elsewhere than at the place of arbitration. For example, the arbitral tribunal may, subject to any contrary agreement of the parties, decide to meet at any place it considers appropriate for consultations among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents. The purpose of this discretion is to permit arbitral proceedings to be carried out in a manner that is most efficient and economical.

5. **Administrative services**

(a) Which administrative services need to be procured

23. Depending on the circumstances, various of the following may need to be arranged: travel and hotel bookings; a hearing room and possibly ancillary space (e.g., for deliberations of the arbitral tribunal and for persons appearing on behalf of a party to be able to consult in private or have documents typed); facilities for photocopying, word-processing, telecommunication, tape-recording or displaying images; a secure place to keep files.

(b) Sources of administrative services

24. When the parties have submitted the case to an arbitral institution, the institution will usually provide all or a good part of the required administrative support. When an arbitration administered by an arbitral institution takes place away from the seat of the institution, the institution may be able to arrange for administrative services to be obtained from another source,

often an arbitral institution; some arbitral institutions have entered into cooperation agreements with a view to providing mutual assistance in servicing arbitral proceedings.

25. When the case is not administered by an institution, or the involvement of the institution does not include providing administrative support, usually the administrative arrangements for the proceedings will be made by the arbitral tribunal or the presiding arbitrator; it may also be acceptable to leave some of the arrangements to the parties, or to one of the parties subject to agreement of the other. Even in such cases, a convenient source of administrative support might be found in arbitral institutions, which often offer their facilities to arbitrations not governed by the rules of the institution. Otherwise, some services could be procured from entities such as chambers of commerce, hotels or specialized firms providing secretarial services.

26. Administrative services might be secured by engaging a secretary of the arbitral tribunal (also referred to as registrar, clerk, administrator or rapporteur), who carries out the tasks under the direction of the arbitral tribunal. Some arbitral institutions routinely assign such persons to the cases administered by them. In non-administered arbitrations, some arbitrators frequently engage such persons, at least in certain types of cases, whereas many others normally conduct the proceedings without them.

27. To the extent the tasks of the secretary are purely organizational (such as those mentioned above in paragraph 23), this is usually not controversial. Differences in views, however, may arise if the tasks include legal research and other professional assistance to the arbitral tribunal (e.g., collecting case law or published commentaries on legal issues defined by the arbitral tribunal, preparing summaries from case law and publications, and sometimes also preparing drafts of procedural decisions or drafts of certain parts of the award, in particular those concerning the facts of the case). Views or expectations may differ especially where a task of the secretary is not distinguishable from tasks incumbent on the arbitrators, or if the secretary's tasks imply the presence of the secretary during the deliberations of the arbitral tribunal. Such a role of the secretary is in the view of some commentators inadmissible or is admissible only under certain restrictions, such as that both parties agree thereto.

6. **Confidentiality**

28. While arbitration rules seldom contain detailed provisions on confidentiality, the parties may have common expectations in this regard. It may be useful for the arbitral tribunal to record any agreed principles on confidentiality of information relating to the proceedings (e.g., that the arbitration is taking place, the identity of the arbitrators, use in other proceedings of evidence presented in the arbitration, content of the award).

(a) Confidentiality afforded by electronic means of communication

29. In considering the use of electronic means of communication such as telefax and electronic mail, confidentiality may be a factor. For example, the equipment from which or to which

messages are sent may be shared by several users, or electronic mail over public networks may not be sufficiently protected against other users of the network gaining access to the messages. (For general remarks on electronic means of communication, see below, paragraphs 33-36.)

(b) Confidentiality of documents handed over by a party to the other party

30. When a party is entitled to request that the other party hand over a document, the requested party may have a particular interest in maintaining confidentiality of the document. If so, the arbitral tribunal might make the duty to produce the document subject to an express commitment by the recipient to keep the document confidential or to allow access to it only to specified persons or categories of persons. (The right of a party to request a document from the other party is commented on below in paragraphs 50-54.)

(c) Confidentiality of hearings

31. Many arbitration rules provide, or it is typically assumed by the parties and the arbitrators, that hearings are to be confidential. The arbitral tribunal may wish to discuss with the parties measures to be taken to protect the confidentiality of the hearings. (On hearings generally, see below, paragraphs 75-86.)

7. Routing of writings among the parties and the arbitrators

32. To the extent the question how writings should be routed among the parties and the arbitrators is not settled by the applicable arbitration rules, the arbitral tribunal may wish to decide the question early so as to avoid misunderstandings and delays. A possibility is that the writings are exchanged directly between the parties, with copies being sent to the arbitrators. Another possibility is that a party transmits the appropriate number of copies to the arbitral tribunal, or to the arbitral institution if one is involved, which then forwards them as appropriate.

8. Telefax and other electronic means of sending writings

(a) Telefax

33. Despite its advantages, telefax may, depending on the type of equipment and safety devices used, still raise some concerns about the possibility to verify the source of a communication or about distorted communications; it might thus be considered appropriate to decide that certain types of documents should not be sent by telefax (e.g., statements of claim and defence and written pieces of evidence). Nevertheless, to avoid rigidity, it may be appropriate for the arbitral tribunal to retain discretion to accept an advance copy of a document by telefax for the purposes of meeting a deadline, provided the document is received within a reasonable time thereafter.

(b) Other electronic means (e.g. electronic mail, magnetic or optical disk)

34. The parties might agree to exchange documents not only in paper-based form, but also in electronic form (e.g., as electronic mail, or on a magnetic or optical disk), or only in electronic form. The purpose of using electronic means may be, for example, to reduce the volume of paper to be handled, to enable a party to use word-processing files prepared by the other party in preparing a reply, or to facilitate searching for particular pieces of information. If both paper-based and electronic means are to be used, it is advisable to decide which one is controlling and, if there is a time-limit for submitting a document, which act constitutes submission.

35. Even if the parties have agreed to exchange documents related to the arbitration in electronic form, the arbitral tribunal may decide to receive them only in paper-based form; alternatively, it may decide that the information exchanged between the parties in electronic form should be given in that form also to the arbitral tribunal, either in addition or instead of paper documents.

36. When the exchange of documents in electronic form is planned, it might be useful to address the following questions: the types of documents that will be transmitted by such means (e.g., statements of claim and defence and subsequent submissions); data carriers to be used (e.g., computer disks or electronic mail) and their technical characteristics; type of electronic files to be transmitted (e.g., word-processing files or data bases); computer software used in preparing the files and any other features relevant to retrieving them; procedures when a message is lost or the communication system otherwise fails; measures to avoid problems (e.g., logs and back-up copies of communications sent and received; indicating on the labels of disks information such as the originator, recipient, computer program, and titles of files; sending together with the disks print-outs of directory-listings; indicating back-up methods used; and identifying persons who can be contacted if a problem occurs).

9. **Timing of written submissions**

37. After the parties have initially stated their claims and defences, they may wish, or the arbitral tribunal might request them, to present further written submissions so as to prepare the hearings or to provide the basis for a decision without hearings. In such submissions, the parties, for example, make claims, present or comment on allegations and evidence, cite or explain law, or make or react to proposals. Often, such submissions are not planned in advance, but are a consequence of the developments in the proceedings. In practice they are referred to variously as, for example, statement, memorial, counter-memorial, brief, counter-brief, reply, réplique, duplique, rebuttal, rejoinder; the terminology is a matter of linguistic usage and the scope or sequence of the submission.

Time-limits for presenting written submissions; consecutive or simultaneous submissions

38. It is advisable that the arbitral tribunal set time-limits for written submissions. In enforcing the time-limits, the arbitral tribunal may wish, on the one hand, to make sure that the case is not unduly protracted; on the other hand, it may wish to reserve a degree of discretion and allow late submissions if appropriate under the circumstances. The arbitral tribunal may decide that a late submission would only be allowed if an explanation is given for the delay.

39. Written submissions on a particular issue may be made consecutively, i.e., the party who receives a submission is given a period of time to react with its counter submission. Another possibility is to give the parties the same time-limit for transmitting to the arbitral tribunal a submission on the issue; the submission of each party is then forwarded to the respective other party simultaneously. The approach used may depend on the type of issues to be commented upon and the time in which the views should be clarified. With consecutive submissions, it may take longer than with simultaneous ones to obtain views of the parties on a given issue. Consecutive submissions, however, allow the reacting party to comment on all points raised by the other party, which simultaneous submissions do not; thus, simultaneous submissions might possibly necessitate further submissions.

10. Practical details concerning written submissions and evidence (e.g., copies, numbering of items of evidence, references to documents, numbering of paragraphs)

40. It may be helpful to establish practical arrangements on details such as the following:

- number of copies in which each writing is to be submitted;
- a system for numbering items of evidence, and a method for marking them, including by tabs;
- form for references to documents (e.g., by the heading and the number assigned to the document or its date);
- paragraph numbering in written submissions, in order to facilitate precise references to parts of a text;
- inclusion of translations in the same volume as original texts or in separate volumes;
- desirable paper size for written submissions so as to facilitate orderly maintenance of files.

11. Defining points at issue

(a) Should a list of points at issue be prepared

41. In the process of identifying the parties' allegations and arguments that are disputed, as opposed to the ones that are undisputed, it may be useful to prepare a list of the points at issue. Such a list, which may be drawn up by the arbitral tribunal or by the parties, might help to

concentrate on the essential matters, to reduce by agreement of the parties the number of points at issue, and to select the best and most economical process for resolving the points at issue.

(b) In which order should the points at issue be decided

42. While it is often appropriate to deal with all the points at issue collectively, the arbitral tribunal might decide to take them up in a particular order. The order may be due to a point being preliminary relative to another (e.g., a decision on the jurisdiction of the arbitral tribunal is preliminary to consideration of substantive issues, or the issue of responsibility for a breach of contract is preliminary to the issue of the resulting damages). A particular order may be decided also when the breach of various contracts is in dispute or when damages arising from various events are claimed.

43. If the arbitral tribunal has adopted a particular order of deciding points at issue, it might consider it appropriate to issue a decision on one of the points earlier than on the other ones. This might be done, for example, when a discrete part of a claim is ready for decision while the other parts require extensive consideration, or when it is expected that after deciding certain issues the parties might be more inclined to settle the remaining ones. Such earlier decisions are referred to by expressions such as "partial", "interlocutory" or "interim" awards or decisions, depending on the type of issue dealt with and on whether the decision is final with respect to the issue it resolves. Questions that might be the subject of such decisions are, for example, liability of the defendant, segment of the damages claimed, jurisdiction of the arbitral tribunal, or interim measures of protection.

12. **Possible settlement negotiations and their effect on scheduling**

44. Attitudes differ as to whether it is appropriate for the arbitral tribunal to bring up the possibility of settlement. Having regard to the divergence of practices in this regard, the arbitral tribunal should only suggest, or participate in, settlement negotiations with great caution. However, it may be opportune for the arbitral tribunal to schedule the proceedings in a way that might facilitate the continuation or initiation of settlement negotiations.

13. **Documentary evidence**

(a) Time-limits for submission of documentary evidence; consequences of late submission

45. Often the written submissions of the parties contain sufficient information for the arbitral tribunal to fix the time-limit for submitting evidence. Otherwise, in order to set realistic time periods, the arbitral tribunal may wish to enquire with the parties about the time they would require.

46. The arbitral tribunal may wish to clarify that evidence submitted late will as a rule not be accepted. It may wish not to preclude itself from accepting a late submission of evidence if the party shows sufficient cause for the delay.

(b) Should assertions about the origin and receipt of documents and about the correctness of photocopies be assumed as accurate

47. It may be helpful to conduct the proceedings on the basis that, unless a party protests within a specified period of time: (a) a document is accepted as having originated from the source indicated in the document, (b) a copy of a dispatched communication (e.g., letter, telex, telefax) is accepted without further proof as having been received by the addressee, and (c) a photocopy is accepted as correct. An agreement or decision to that effect can simplify the introduction of documentary evidence and discourage unfounded and dilatory objections, at a late stage of the proceedings, to the probative value of documents. It is advisable to provide that the time-limit for objections will be disregarded if the arbitral tribunal considers the delay justified.

(c) Are the parties willing to submit jointly a single set of documentary evidence

48. The parties may consider submitting jointly a single set of documentary evidence whose authenticity is not disputed. The purpose would be to avoid duplicate submissions and unnecessary discussions concerning the authenticity of documents, without prejudicing the position of the parties concerning the content of the documents. Additional documents may be inserted later if the parties agree. When a single set of documents would be too voluminous to be easily manageable, it might be practical to select a number of frequently used documents and establish a set of "working" documents. A convenient arrangement of documents in the set may be according to chronological order. It is useful to keep a table of contents of the documents, for example by their short headings and dates, and agree that the parties will refer to documents by those headings and dates.

(d) Should voluminous and complicated documentary evidence be presented through summaries, tabulations, charts, extracts or samples

49. When documentary evidence is voluminous and complicated, it may save time and costs if such evidence is presented by a report of a public accountant. The report may present findings in the form of summaries, tabulations, charts, extracts or samples. Such presentation of evidence should be combined with arrangements that give the interested party the opportunity to review the underlying data and the methodology of preparing the report.

(e) How the arbitral tribunal intends to deal with a request of a party that the other party produce documentary evidence

50. Procedures, practices and views differ widely as to the conditions under which a party should have a right to request a document in the possession of the other party. When the agreed arbitration rules do not provide specific conditions, and the arbitral tribunal expects that the

parties have different notions about the right to request documents, the arbitral tribunal might consider it useful to clarify to the parties, in advance of requests for documents, the manner in which it intends to deal with such requests.

51. In considering how requests for documents should be dealt with, the arbitral tribunal may wish to bear in mind circumstances such as the nature of documents that might be requested, the character of the relationship between the parties and the parties' expectations as to the scope of a right to request a document.

52. If formulating a set of conditions is appropriate, this might be done, for example, along the following lines: the document must be described with reasonable particularity; the document must be such that it would likely contribute to the clarification of the case; the document must be within the control of the party from whom production is sought; and the seeking party must have made reasonable but unsuccessful efforts to obtain the document. A further condition that might be included is that the document must have passed between the requested party and a third party who is not a party to the arbitration, a condition that would exclude requests for purely internal documents; if, however, it is considered that there might be situations in which the arbitral tribunal should have the power to order a party to disclose an internal document, the arbitral tribunal might be given discretion to disregard the last condition.

53. Alternatively, instead of laying down specific conditions in advance, the arbitral tribunal may consider it preferable to give only general indications as to the criteria it will use in dealing with any requests for documents.

54. It may be useful to establish a time-limit for requests for documents and for their production. The parties might be reminded that, if the requested party fails to comply with a proper request, the question as to whether the refusal was justified will be decided by the arbitral tribunal and that the arbitral tribunal would be free to draw its conclusions from the failure.

14. **Physical evidence other than documents**

55. For understanding facts it may be necessary to assess physical evidence other than documents, for example, by inspecting samples of goods, viewing a video recording or demonstrating the functioning of a machine.

(a) What arrangements should be made if physical evidence will be submitted

56. If physical evidence will be submitted, the arbitral tribunal may wish to fix the time schedule for presenting the evidence, make arrangements for the other party to have a suitable opportunity to prepare itself for the presentation of the evidence, and possibly take measures for safekeeping the items of evidence.

(b) What arrangements should be made if an on-site inspection is necessary

57. If an on-site inspection of property or goods will take place, the arbitral tribunal may consider matters such as timing, meeting places and the need to avoid communications between arbitrators and a party about points at issue without the presence of the other party.

58. The site to be inspected is often under the control of one of the parties, which typically means that employees or representatives of that party will be present to give guidance and explanations. It should be borne in mind that statements of those representatives or employees are not testimony and should not be treated as evidence in the proceedings.

15. **Witnesses**

59. While laws and rules on arbitral procedure typically leave broad freedom concerning the manner of taking evidence of witnesses, practices on procedural points are varied. In order to facilitate the preparations of the parties for the hearings, the arbitral tribunal may consider it appropriate to clarify, in advance of the hearings, some or all of the following issues.

(a) Advance notice about a witness whom a party intends to present; written witnesses' statements

60. To the extent the applicable arbitration rules do not deal with the matter, the arbitral tribunal may wish to require that each party give advance notice to the arbitral tribunal and the other party of any witness it intends to present. As to the content of the notice, the following is an example of what might be required, in addition to the names and addresses of the witnesses: (a) the subject upon which the witnesses will testify; (b) the language in which the witnesses will testify; (c) particulars concerning the relationship with any of the parties, qualifications and experience of the witnesses, and how the witnesses learned about the facts on which they will testify.

61. Instead of requiring merely an indication of the subject of the testimony, the parties may be required to submit either the summaries of the statements of the witnesses or the full signed statements. If a signed witness's statement should be made under oath or a similar affirmation of truthfulness, it may be necessary to clarify by whom the oath or affirmation should be administered.

62. The indication of the subject of testimony in the advance notice or the submission of a written witness's statement may expedite the proceedings by making it easier for the opposing party to prepare for the hearings or for both parties to identify uncontested matters. However, it may not be necessary to require such an indication or a written statement, in particular if the thrust of the testimony can be clearly ascertained from the party's allegations; furthermore, the benefits of a written witness's statement might be outweighed by its disadvantages, such as the time and expense involved in obtaining the written statement.

63. The arbitral tribunal may wish to make it clear that it reserves the right to refuse to hear a witness if the required notice has not been given in time.

(b) Manner of taking oral evidence of witnesses

(i) Order in which questions will be asked and the manner in which the hearing of witnesses will be conducted

64. One of the various possibilities is that a witness is first questioned by the arbitral tribunal, whereupon questions are asked by the parties, first by the party who called the witness. Another possibility is for the witness to be questioned by the parties in the appropriate order, while the arbitral tribunal might pose questions after the parties on points that in the tribunal's view have not been sufficiently clarified. Differences exist also as to the degree of control the arbitral tribunal exercises over the hearing of witnesses. For example, some arbitrators prefer to permit the parties to pose questions freely and directly to the witness, but may disallow a question if the other party objects; other arbitrators tend to exercise more control and may, apart from interceding in the process with their own questions, disallow a question on their initiative or even require that questions from the parties be asked through the arbitral tribunal.

(ii) Whether oral testimony will be given under oath or affirmation and, if so, in what form an oath or affirmation should be made

65. Practices and laws differ as to whether oral testimony is to be given under oath or affirmation. In some legal systems, the arbitrators are empowered to put witnesses on oath, but it is usually in their discretion whether they want to do so. In other systems, oral testimony under oath is either unknown or may even be considered improper as only an official such as a judge or notary may have the authority to administer oaths.

(iii) May witnesses be in the hearing room when they are not testifying

66. Some arbitrators favour the rule that, except if the circumstances require otherwise, the presence of a witness in the hearing-room is limited to the time the witness is testifying; the purpose is to prevent the witness from being influenced by what is said in the hearing room, or to prevent that the presence of the witness would influence another witness. Other arbitrators consider that the presence of a witness during the testimony of other witnesses may be beneficial in that possible contradictions may be readily clarified or that their presence may act as a deterrent against untrue statements. Another possible approach may be that witnesses are not present in the hearing-room before their testimony, but stay in the room after they have testified. The arbitral tribunal may prefer to decide the matter ad hoc during the hearings or may give guidance on the question in advance of the hearings.

(c) In which order will the witnesses be called

67. When several witnesses are to be heard and longer testimony is expected, it is likely to reduce costs if the order in which they will be called is known in advance and their presence can be scheduled accordingly. Each party might be invited to suggest the order in which it intends to present the witnesses, while it would be up to the arbitral tribunal to approve the scheduling and to make departures from it.

(d) Interviewing witnesses prior to their appearance at a hearing

68. In some legal systems, parties or their representatives are permitted to interview witnesses, prior to their appearance at the hearing, as to their recollection of the relevant events. In other systems such contacts with witnesses are considered improper. In order to avoid misunderstandings, the arbitral tribunal may consider it useful to clarify what kind of contacts a party is permitted to have with a witness in the preparations for the hearings.

(e) Hearing representatives of a party

69. According to some legal systems, certain persons affiliated with a party in dispute may only be heard as representatives of the party but not as witnesses. In such a case, it may be necessary to consider ground rules for determining which persons may not testify as witnesses (e.g., certain executives, employees or agents) and for hearing statements of those persons.

16. **Experts and expert witnesses**

70. Many arbitration rules and laws address the participation of experts in arbitral proceedings. A frequent solution is that the arbitral tribunal has the power to appoint an expert to report on issues determined by the tribunal; in addition, the parties may be permitted to present expert witnesses on points at issue. In other cases, it is for the parties to present expert testimony, while the power of the arbitral tribunal to appoint an expert is restricted.

(a) Expert appointed by the arbitral tribunal

71. If the arbitral tribunal is empowered to appoint an expert, one possible approach is for the tribunal to proceed directly to selecting the expert. Another possibility is to consult the parties as to who should be the expert; this may be done without mentioning a candidate, by presenting to the parties a list of candidates, or by soliciting proposals from the parties. For the selection process, the arbitral tribunal may wish to establish the expert's "profile", i.e. the qualifications, experience and abilities the expert should have.

(i) The expert's terms of reference

72. The purpose of the expert's terms of reference is to indicate the questions on which the expert is to provide clarification, to avoid opinions on points that are not for the expert to assess and to commit the expert to a time-schedule. While the discretion to appoint an expert normally includes the determination of the expert's terms of reference, the arbitral tribunal may decide to consult the parties before finalizing the terms. In order to facilitate the evaluation of the expert's report, it is advisable to require the expert to include in the report information on the method used in arriving at the conclusions and the evidence and information used in preparing the report.

(ii) The opportunity of the parties to comment on the expert's report, including by i8presenting expert testimony

73. Arbitration rules that contain provisions on experts usually also have provisions on the right of a party to comment on the report of the expert appointed by the arbitral tribunal. The arbitral tribunal may, in light of those provisions, consider it opportune to determine, for example, the time period for presenting written comments of the parties, or, if hearings are to be held for the purpose of hearing the expert, the procedures for interrogating the expert by the parties or for the participation of any expert witnesses presented by the parties.

(b) Expert opinion presented by a party (expert witness)

74. In the case a party is permitted to present an expert opinion, the arbitral tribunal might consider requiring, for example, that the opinion be in writing, that the expert should be available to answer questions at hearings, and that, if a party will present an expert witness at a hearing, advance notice must be given, as in the case of other witnesses (see above, paragraphs 60-63).

17. **Hearings**

(a) Decision whether to hold hearings

75. National laws often have provisions as to whether oral hearings must be held and as to the cases in which the arbitral tribunal has discretion to decide whether to hold hearings. The right of a party to request a hearing is usually considered a fundamental right which the arbitral tribunal must respect.

76. If it is up to the arbitral tribunal to decide whether to hold hearings, the decision is likely to be influenced by factors such as that it is usually quicker and easier to clarify points at issue in oral proceedings than by correspondence, the travel and other cost of holding hearings, and that the need of finding acceptable dates for the hearings may considerably delay the proceedings.

(b) Whether one period of hearings should be held or separate periods of hearings

77. Attitudes vary as to whether hearings should be held in a single period of hearings or in separate periods, especially when more than a few days are needed to complete the hearings. According to some arbitrators, the entire hearings should normally be held in a single period, even if the hearings are to last for more than a week. Other arbitrators in such cases tend to schedule separate periods of hearings. Advantages of one period of hearings are that it involves less travel costs, memory will not fade, and it is unlikely that people representing a party will change. On the other hand, the longer the hearings, the more difficult it may be to find early dates acceptable to all participants. Separate periods of hearings are easier to schedule and they leave time for analysing the records and for negotiations between the parties aimed at narrowing the points at issue by agreement.

(c) Setting dates for hearings

78. Typically, firm dates will be fixed for hearings. Exceptionally, the arbitral tribunal may wish to set only "target dates" as opposed to definitive dates. This may be done at a stage of proceedings when not all information necessary to schedule hearings is yet available, with the understanding that the target dates will either be confirmed or rescheduled within a reasonably short period. Such provisional planning can be useful to participants who are generally not available on short notice.

(d) Whether there should be a limit on the aggregate amount of time the parties have for oral arguments and questioning witnesses

79. Some arbitrators consider it useful to limit the aggregate amount of time each party has for any of the following: (a) making oral statements, (b) questioning its witnesses, and (c) questioning the witnesses of the other party. In general, the same aggregate amount of time is considered appropriate for each party, unless the arbitral tribunal considers that a different allocation is justified. Before deciding, the arbitral tribunal may wish to consult the parties as to how much time they think they will need.

80. Such planning of time, provided it is realistic, fair and subject to judiciously firm control by the arbitral tribunal, will make it easier for the parties to plan the presentation of the various items of evidence and arguments, reduce the likelihood of running out of time towards the end of the hearings, and avoid that one party would unfairly use up a disproportionate amount of time.

(e) The order in which the parties will present their arguments and evidence

81. Arbitration rules and national laws on arbitral procedure typically give broad latitude to the arbitral tribunal to determine the order of presentations at the hearings. Procedural patterns differ, for example, as to whether opening or closing statements are heard and their level of detail; the sequence in which the claimant and the defendant are to present their opening statements, arguments, witnesses and other evidence; and whether the defendant or the claimant

should have the last word. In view of such differences, it may foster efficiency of the proceedings if the arbitral tribunal clarifies to the parties, in advance of the hearings, the manner of conducting oral hearings, at least in broad lines.

(f) Length of hearings

82. The length of a hearing primarily depends on the complexity of the issues to be argued. The length also depends on the procedural style used in the arbitration. Some practitioners prefer to have the issues clarified, as much as possible, in writing before the hearings, which thus can be limited to the issues that remain to be clarified. Those practitioners will generally tend to plan shorter hearings than those practitioners who prefer that most if not all evidence and arguments are presented to the arbitral tribunal orally and in full detail. In order to facilitate the parties' preparations and avoid misunderstandings, the arbitral tribunal may wish to clarify to the parties, in advance of the hearings, the intended use of time and style of work at the hearings.

(g) Arrangements for a record of the hearings

83. The arbitral tribunal should decide, possibly after hearing the views of the parties, on the method of preparing a record of oral statements and testimony during hearings. One possibility is that the members of the arbitral tribunal take personal notes. Another is that the presiding arbitrator during the hearing dictates to a typist a summary of oral statements and testimony. A useful, though costly, method is for professional stenographers to prepare verbatim transcripts, often within the next day or a similarly short time period. A written record may be combined with tape-recording, so as to enable reference to the tape in case of a disagreement over the written record.

84. If transcripts are to be produced, it may be considered how the persons who made the statements will be given an opportunity to check the transcripts. For example, it may be agreed that the changes to the record would be approved by the parties or, failing their agreement, would be referred to one of the arbitrators or to the arbitral tribunal.

(h) Whether and when the parties are permitted to submit notes summarizing their oral arguments

85. Some legal counsel are accustomed to giving notes summarizing their oral arguments to the arbitral tribunal and to the other party. If such notes are presented, this is usually done during the hearings or shortly thereafter; in some cases, the notes are sent already before the hearing. In order to avoid surprise, foster equal treatment of the parties and facilitate preparations for the hearings, advance clarification is advisable as to whether handing over such notes is acceptable and the time for doing so.

86. The decision of the arbitral tribunal to close the hearings will normally be made after it has been told by the parties that they have no further proof to offer or submissions to make. Therefore, when notes are handed over to be read after the closure of the hearings, the arbitral

tribunal may find it worthwhile to stress that the notes should be limited to summarizing what was said orally and in particular should not refer to new evidence or new argument.

18. **Multi-party arbitration**

87. A single arbitration that involves more than two parties ("multi-party" arbitration) may arise from different kinds of situations. Among the many examples of multi-party arbitration, one is a case in which a particular event gives rise to disputes between different pairs of parties. For example, in the construction of a building, one construction defect may give rise to two disputes, one between the purchaser and the designer and another one between the purchaser and the contractor; while both disputes arise from the same event and some of the evidence may be the same, the disputes are separate in the sense that the outcome in one dispute does not necessarily prejudge the outcome in the other one. Another example is an arbitration arising out of a multilateral contract such as a joint venture or consortium.

88. In order to establish a multi-party arbitration, it is generally required that all the participating parties have consented to arbitrate in a single arbitration. However, if specified conditions are met, a few national laws allow a court-ordered multi-party arbitration even if not all the parties have agreed to hold a single arbitration. Some national laws authorize courts to assist the parties in establishing, and laying down the ground rules of, a multi-party arbitration if all parties make the appropriate request.

Types of procedural decisions that may facilitate multi-party proceedings

(i) The order in which issues are to be considered

89. In multi-party disputes it is often possible to identify issues that are interdependent in that a decision on one issue influences the outcome regarding another issue. For example, liability of a party found to exist vis-à-vis one claimant may affect the decision in another dispute in the multi-party setting. When such interdependence exists, it might be useful to divide the multi-party proceedings into stages that will deal with the issues in the appropriate order. It is, however, important to bear in mind that, since a decision on one issue may affect the position of a party in another issue, each interested party must be given an opportunity to present its arguments on the issues affecting that party.

(ii) Other procedural decisions

90. Because of the need to deal with more than two parties, multi-party proceedings can be more complicated to manage than bilateral proceedings. In order to avoid unnecessary delays and costs, it is advisable to consider the anticipated course of the proceedings and take appropriate decisions on matters such as the scheduling of meetings; flow of communications among the parties and the arbitral tribunal; the manner in which the parties will participate in the

taking of evidence of witnesses; appointment of experts and the participation of the parties in considering their reports; the order in which the parties will make statements; and the apportionment of the deposits for costs.

19. **Possible requirements concerning filing or delivering the award**

91. Some national laws require that arbitral awards be filed or registered with a court or similar authority, or that they be delivered in a particular manner or through a particular authority. Those laws differ with respect to, for example, the type of award to which the requirement applies (e.g., to all awards or only to awards not rendered under the auspices of an arbitral institution); time periods for filing, registering or delivering the award (in some cases those time periods may be rather short); or consequences for failing to comply with the requirement (which might be, e.g., invalidity of the award or inability to enforce it in a particular manner).

Who should take steps to fulfil the requirement

92. If such a requirement exists, it is useful, some time before the award is to be issued, to plan who should take the necessary steps to meet the requirement and how the costs are to be borne.

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