The Conduct of the Proceedings

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I.- Introduction

- Legal framework applicable to arbitration
- Principle of autonomy of the arbitral proceedings

"(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence"

Article 19 UNCITRAL Model Law

- Autonomy of the parties and autonomy of arbitrators
- Reference to arbitration rules of arbitral institutions
- Reference to other private rules (e.g. the IBA Rules on the Taking of Evidence (IBA Rules))
II.- Fundamental principles of procedure (due process)

"The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case"

Article 18 UNCITRAL Model law

"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 an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties’ dispute"

Article 17 (1) UNCITRAL arbitration rules 2010

- Terminology

- Right to be heard and *iura novit curia*
III.- Initiation of the arbitration

"A party wishing to commence an arbitration (the "Claimant") shall file with the Registrar a Notice of Arbitration which shall comprise:

a. a demand that the dispute be referred to arbitration;

b. the names, address(es), telephone number(s), facsimile number(s) and electronic mail address(es), if known, of the parties to the arbitration and their representatives, if any;

c. a reference to the arbitration clause or the separate arbitration agreement that is invoked and a copy of it;

d. a reference to the contract (or other instrument [e.g., investment treaty]) out of or in relation to which the dispute arises and where possible, a copy of it;

e. a brief statement describing the nature and circumstances of the dispute, specifying the relief claimed and, where possible, an initial quantification of the claim amount;

f. a statement of any matters which the parties have previously agreed as to the conduct of the arbitration or with respect to which the Claimant wishes to make a proposal;

g. a proposal for the number of arbitrator(s) if this is not specified in the arbitration agreement;

h. unless the parties have agreed otherwise, the nomination of an arbitrator if the arbitration agreement provides for three arbitrators, or a proposal for a sole arbitrator if the arbitration agreement provides for a sole arbitrator;

i. any comment as to the applicable rules of law;

j. any comment as to the language of the arbitration; and

k. payment of the requisite filing fee"

Article 3.1 SIAC Rules
IV.- Constitution of the Arbitral Tribunal

▪ Number of arbitrators

▪ Default Rules

"A sole arbitrator shall be appointed unless the parties have agreed otherwise or unless it appears to the Registrar, giving due regard to any proposals by the parties, the complexity, the quantum involved or other relevant circumstances of the dispute, that the dispute warrants the appointment of three arbitrators"

Article 6.1 SIAC Rules

▪ Selection of arbitrators

▪ Selection of the chairman by party-appointed arbitrators (or by the arbitral institution (Art. 12 (5) ICC; Art. 8.3 SIAC Rules)

▪ Confirmation of arbitrators

"In all cases, the arbitrators nominated by the parties, or by any third person including the arbitrators already appointed, shall be subject to appointment by the President in his discretion"

Article 6.3 SIAC Rules
IV.- Constitution of the Arbitral Tribunal cont’d

- Constitution of the Arbitral Tribunal in case of multi-party arbitration

- The Dutco situation

"6 Where there are multiple claimants or multiple respondents, and where the dispute is to be referred to three arbitrators, the multiple claimants, jointly, and the multiple respondents, jointly, shall nominate an arbitrator for confirmation pursuant to Article 13.

(…) 8 In the absence of a joint nomination pursuant to Articles 12(6) or 12(7) and where all parties are unable to agree to a method for the constitution of the arbitral tribunal, the Court may appoint each member of the arbitral tribunal and shall designate one of them to act as president. In such case, the Court shall be at liberty to choose any person it regards as suitable to act as arbitrator, applying Article 13 when it considers this appropriate"

Article 12 (6) and (8) ICC Rules

"Where there are more than two parties in the arbitration, and three arbitrators are to be appointed, the Claimant(s) shall jointly nominate one arbitrator and the Respondent(s) shall jointly nominate one arbitrator. In the absence of both such joint nominations having been made within 28 days of receipt by the Registrar of the Notice of Arbitration or within the period agreed by the parties or set by the Registrar, the President shall appoint all three arbitrators and shall designate one of them to act as the presiding arbitrator"

Article 9.1 SIAC Rules
V. Terms of Reference

- Article 23 ICC Rules
VI.- Advance on costs

- Who fixes the advance on costs?
- Who pays the advance on costs?
- Split of the advance on costs
- Refusal of the respondent to pay the advance on costs; possible remedy
- Security for costs
- Security for costs and right to be heard
VII.- Representation of parties

- Before the arbitral tribunal
- Before courts in arbitration-related proceedings
VIII.- Procedural (or management) hearing

- Article 24 ICC Rules
IX.- Procedural timetable and initial procedural order

Example Procedural Timetable:

<table>
<thead>
<tr>
<th>Date</th>
<th>Procedural Activity</th>
<th>Parties Concerned</th>
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</thead>
<tbody>
<tr>
<td>[..]</td>
<td>Statement of Claim</td>
<td>Claimant</td>
</tr>
<tr>
<td>[..]</td>
<td>Statement of Defence</td>
<td>Respondent</td>
</tr>
<tr>
<td>[..]</td>
<td>Reply</td>
<td>Claimant</td>
</tr>
<tr>
<td>[..]</td>
<td>Rejoinder</td>
<td>Respondent</td>
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<tr>
<td>[..]</td>
<td>Submission of Witness Statements and Expert Reports</td>
<td>Claimant / Respondent</td>
</tr>
<tr>
<td>[..]</td>
<td>Submission of rebuttal Witness Statements and Expert Reports</td>
<td>Claimant / Respondent</td>
</tr>
<tr>
<td>[..]</td>
<td>Time limit for naming witnesses and experts to be cross examined at the witness</td>
<td>Claimant / Respondent</td>
</tr>
<tr>
<td></td>
<td>hearing and “cut off date” for the production of limited amount of additional</td>
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<tr>
<td></td>
<td>documents, if any (with explanations as to why such documents could not be produced</td>
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<td></td>
<td>earlier)</td>
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<tr>
<td>[..]</td>
<td>Pre-hearing telephone conference</td>
<td>Parties / Arbitral Tribunal</td>
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<tr>
<td>[..]</td>
<td>Witness hearing in [..]</td>
<td>Parties / Arbitral Tribunal</td>
</tr>
</tbody>
</table>
Example Procedural Order No. 1:

"PROCEDURAL ORDER N° 1

of [date]

in the arbitration between

[Claimant]

and

[Respondent]

issued by the Arbitral Tribunal

concerning the Specific Procedural Rules to be applied in these proceedings

The Arbitral Tribunal has consulted with the Parties about the procedural rules which shall apply in this arbitration and gives the following directions:

1. Notifications and communications in this arbitration to the Parties shall be validly made at the addresses of counsel to Claimant and Respondents indicated in Section I of the Terms of Reference.
IX.- Procedural timetable and initial procedural order cont’d

Example Procedural Order No. 1 cont’d:

Submissions between the Arbitral Tribunal and the Parties shall be made by e-mail, with subsequent copies by ordinary mail or courier service, or vice versa (i.e., with subsequent copies by email). All other communications may be made by e-mail or by fax. The time limit is met if the electronic copy of the communication or submission is sent by e-mail by 24:00 CET on the day of the deadline. Hard copies and electronic copies may be sent on the next business day by courier service or registered mail.

The Parties shall send their notifications, communications and submissions directly to the Arbitral Tribunal and simultaneously send a full copy to the other Party and to the ICC Secretariat.

2. In the Parties' written submissions to the Arbitral Tribunal, the factual and legal allegations shall be numbered and expressed with appropriate precision.

3. The Parties shall endeavour to indicate in their written submissions the nature of evidence relied upon (exhibit(s), witness testimony, expert opinion, etc.).

4. The exhibits submitted to the Arbitral Tribunal shall be numbered and attached to the Party's written submission, which refers to them. The Claimant’s exhibits will be numbered "C-1, C-2, ..."; the Respondents’ exhibits will be numbered "R-1, R-2, ...".

In addition, the exhibits submitted to the Arbitral Tribunal shall be accompanied by an updated list specifying at a minimum their respective date and author.
IX.- Procedural timetable and initial procedural order cont’d

Example Procedural Order No. 1 cont’d:

The Arbitral Tribunal will decide if the Parties shall, in addition, submit a joint chronological bundle or a joint chronological index.

The Arbitral Tribunal may authorise the use of information technology for the organisation and presentation of documents and evidence after hearing the Parties on the issue.

All documents submitted to the Arbitral Tribunal are deemed to be authentic and complete, including those submitted in copy form, unless the other Party disputes their authenticity and/or completeness.

5. All exhibits and other evidence written in a language other than English shall be supplied together with an English translation, unless otherwise agreed by the Parties and the Arbitral Tribunal. In the case of a voluminous document and of documents of a technical nature and in the case of documents in large numbers, the Party producing them may translate only the relevant parts.

The Parties shall seek to reach agreement on the accuracy of translations. When a translation remains disputed despite the Parties’ efforts to reach agreement, the Arbitral Tribunal may require that the translation be made by a sworn translator or by a translator appointed by the Arbitral Tribunal itself.

Relevant parts of legal exhibits (case law, legal scholar writings) on which the Parties rely shall be translated into English.
IX.- Procedural timetable and initial procedural order cont’d

Example Procedural Order No. 1 cont’d:

6. As far as these Specific Procedural Rules or the Arbitral Tribunal do not hold otherwise, the Arbitral Tribunal will apply the IBA Rules on the taking of Evidence in International Commercial Arbitration in its version of 2010 (“IBA Rules of Evidence”) as guidelines for the purpose of taking evidence.

If any of the Parties refuses to produce documents upon a simple request by the other Party, the Arbitral Tribunal is empowered, upon specific and precise request of one of the Parties, to order the Parties to produce document(s) in their possession or under their control.

Any such request shall identify the document(s) with a reasonable degree of specificity and shall establish the relevance of the document(s) for the settlement of the present dispute. The Arbitral Tribunal shall, at its discretion, decide on the issue taking into account in particular the legitimate interests of the other Party.

Any document(s) produced pursuant to this rule can only be relied upon after it/they has/have been introduced as exhibit(s) into the procedure.

7. Any individual, including Parties and their officers, may be a witness. It shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview witnesses or potential witnesses.

8. To the extent possible, the Parties shall file written witness statements of each witness relied upon. If a witness refuses to cooperate, the Party which intends to rely upon his/her testimony shall name the witness and the purpose and scope of the requested testimony.
IX.- Procedural timetable and initial procedural order cont’d

Example Procedural Order No. 1 cont’d:

9. The Arbitral Tribunal will decide issues such as possible filing of rebuttal witness statements or the consequences deriving from the refusal of witnesses to cooperate.

10. Should a witness ultimately not be able to attend the hearing, even for a valid reason, the Arbitral Tribunal shall in principle not be entitled to consider his/her written statement, except if extraordinary circumstances justify the taking into consideration of the written statement. In such event, the Arbitral Tribunal shall hear the Parties and decide whether to consider or not the witness statement by taking into account all relevant circumstances, including the Parties' legitimate interests.

11. The Parties shall name the opposing Party’s witnesses whom they intend to cross-examine at the hearing. Where a Party does not intend to cross-examine a specific witness of the opposing Party, the Arbitral Tribunal shall freely assess the witness’ written statement and the witness need not be summoned to appear at the hearing, unless his/her hearing is requested by the Arbitral Tribunal.

12. The Parties shall be responsible for summoning and for ensuring the presence at the hearing of the witnesses relied upon. Upon request, the Arbitral Tribunal will assist the Parties with respect to witnesses who are not under their control.

The costs of a witness appearance shall be borne by the Party proposing his/her testimony until the Arbitral Tribunal shall decide, in its final award, on the allocation of such costs.
IX.- Procedural timetable and initial procedural order cont’d

Example Procedural Order No. 1 cont’d:

13. After consultation with the Parties, and subject to both Parties agreeing, the Arbitral Tribunal may decide to hear the witnesses and experts in the form of witness conferencing. Otherwise, the procedure for the witness hearings shall be as follows:

Every witness called shall first of all be invited to confirm or amend, as the case may be, his/her witness statement.

His or her written statement shall, in principle, be considered his/her direct testimony. The witness shall then be cross-examined by opposing counsel, followed by re-direct examination limited to the issues addressed during the cross-examination. The re-direct examination may be followed by questions of the Arbitral Tribunal and by final questions of the Parties.

Subject to the above paragraph, the written witness statement shall be the basis for the oral examination of the witness. However, neither Party may use a written witness statement as an instrument to limit the scope of examination of the witness. Nor may the written witness statement be used to deprive the other Party and/or the Arbitral Tribunal from the possibility to ask questions on issues and matters not covered by the written witness statement, if and to the extent these issues and matters relate to the dispute and are (or may be) of relevance. On the other hand, the oral examination of the witness by a Party may not be used as a means to take the other Party or the Arbitral Tribunal by surprise by confronting the witness with issues that go beyond the scope of those which the other Party and the Arbitral Tribunal reasonably had to expect in view of the written witness statement produced and by taking into account the subject matter of the dispute.
IX.- Procedural timetable and initial procedural order cont’d

Example Procedural Order No. 1 cont’d:

The Arbitral Tribunal may examine the witnesses at any time, either before, during or after their examination or cross-examination by the counsel of the Parties.

The witness examinations shall be in English, with the exception that witness testimony may be made in another language if the Arbitral Tribunal is satisfied that the witness cannot give testimony in English. If oral testimonies are thus made in a language other than English they shall, in principle, be translated during the hearing.

The Arbitral Tribunal will appoint court reporters to take verbatim transcripts of witness hearings.

14. Until the final decision on costs, the Claimant and the Respondents shall bear half of the costs related to the hearings, including the costs of court reporting services and hearing rooms. Such costs shall be advanced by the Parties, also in equal shares. Costs related to interpretation services shall be paid and advanced by the Party requesting the appearance of a witness unable to testify in English, until final decision on costs.

15. The Arbitral Tribunal shall, at all times, have a complete right of control over the procedure in relation to the examination of a witness, including the right to limit or refuse the right of a Party to examine a witness when it considers that the factual allegation(s) on which the witness is intended to testify is sufficiently proven by exhibits or other witnesses or that the particular witness testimony as such is irrelevant.
IX.- Procedural timetable and initial procedural order cont’d

Example Procedural Order No. 1 cont’d:

16. The Parties may submit expert opinions and offer the testimony of their expert witnesses. Where appropriate, Clauses 8-13 above are applicable to expert witnesses.

17. The Arbitral Tribunal may appoint one or more experts on its own initiative, or at the request of a Party. Before appointing an expert, the Arbitral Tribunal shall allow the Parties to be heard on the issue.

The Arbitral Tribunal shall cooperate with the Parties in respect of defining the expert's mission and of drafting the questions to the expert.

The expert appointed by the Arbitral Tribunal shall in principle submit a written report and, at the request of one of the Parties or of the Arbitral Tribunal, may be asked to appear at a hearing to be heard in person.

Until the final decision on costs, the Claimant and the Respondents shall bear half of the costs of any expert appointed by the Arbitral Tribunal.

18. The Arbitral Tribunal may grant extension of deadlines. Absent an agreement between the Parties, the extension of deadlines shall only be granted provided that (1) the request is submitted expeditiously after the event preventing the Party from complying with the deadline and (2) good cause is shown.
IX.- Procedural timetable and initial procedural order cont’d

Example Procedural Order No. 1 cont’d:

19. The Arbitral Tribunal shall, after consultation with the Parties, determine in due course at which stage in the proceedings the Parties shall no longer be entitled to present any new factual allegations or evidence (“cut off date”).

20. Unless the Parties expressly agree in writing to the contrary, the Parties undertake as a general principle to keep confidential all awards and orders, as well as all materials specifically prepared for the purposes of the arbitral proceedings (such as written submissions or written statements), not otherwise in the public domain, save and to the extent that a disclosure may be required of a Party by a legal duty, to protect or pursue a legal right or to enforce or challenge an award in legal proceedings before a judicial authority.

Place of arbitration: [..], [date]

On behalf of the Arbitral Tribunal:

__________________

Chairman"

- Predictability vs flexibility
- Is the uniformisation of arbitral practise to be favored?
X.- Pre-hearing phase

- Exchange of submissions
- Number and sequence of submissions
- Evidence
- Civil law influence
XI.- Hearing

- Length
- Role of Counsel
- Common law influence
- Sequence of witnesses and experts
- Witness conferencing
XII.- Taking of evidence

- Documents

"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"

Article 3 (1) IBA Rules

"A Request to Produce shall contain:
(a) (i) a description of each requested Document sufficient to identify it, or
(ii) 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"

Article 3 (3) IBA Rules
XII.- Taking of evidence cont’d

Documents cont’d

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

Article 9 (2) IBA Rules
XII.- Taking of evidence cont’d

- Documents cont’d

  - Different cases for objections to produce documents

    - The case of legal privilege
      - Applicable law(s)
      - Different legal culture
      - Risk of unequal treatment

    - The case of confidential information
      - How does it work in practice?

    - Is today’s approach with production of documents appropriate?

    - Is this the right balance?

    - Production of internal documents?

    - Different conception of justice

    - Lack of predictability of the test
XII.- Taking of evidence cont’d

Testimony of witnesses

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

Article 4 (2) IBA Rules

"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"

Article 4 (4) IBA Rules

"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"

Article 8 (3) (b) IBA Rules

"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"

Article 4 (8) IBA Rules
XII.- Taking of evidence cont’d

- Testimony of witnesses cont’d
  - Standard approach
  - Witness Statement is in lieu of direct examination
  - Importance cross-examination
  - Limited questioning by the Arbitral Tribunal
  - Is this the best or the worst of all worlds?
  - Other forms of hearing witnesses (witness conferencing; questioning led by the Arbitral Tribunal)
XII.- Taking of evidence cont’d

- Experts
  - Party-appointed experts

  "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"

  Article 5 (1) IBA Rules

  "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"

  Article 5 (5) IBA Rules

  "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 5 (6) IBA Rules

- Procedure similar to hearing of witnesses
XII.- Taking of evidence cont’d

- Experts cont’d
  - Tribunal-appointed experts

"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"

Article 6 (1) IBA Rules

- What is the most common approach?
- What are the risks of party-appointed experts?
- What are the risks of tribunal-appointed experts?
- Combined approach
- How to deal with ultra-technical issues? (e.g. establishing gas price formulas)
XIII.- Confidentiality of arbitration

Confidentiality of what?

"1. Unless the parties expressly agree in writing to the contrary, the parties undertake to keep confidential all awards and orders as well as all materials submitted by another party in the framework of the arbitral proceedings not already in the public domain, except and to the extent that a disclosure may be required of a party by a legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a judicial authority. This undertaking also applies to the arbitrators, the tribunal-appointed experts, the secretary of the arbitral tribunal, the members of the board of directors of the Swiss Chambers’ Arbitration Institution, the members of the Court and the Secretariat, and the staff of the individual Chambers.

2. The deliberations of the arbitral tribunal are confidential.

3. An award or order may be published, whether in its entirety or in the form of excerpts or a summary, only under the following conditions:
   (a) A request for publication is addressed to the Secretariat;
   (b) All references to the parties’ names are deleted; and
   (c) No party objects to such publication within the time-limit fixed for that purpose by the Secretariat"

Article 44 Swiss Rules
XIV.- Deliberations

- Absence of detailed provisions
- End of the procedure
- Procedure for deliberations
- How to deal with "difficult" arbitrators?
- Dissenting opinions (admissibility, form, nature)
- Remedy in case of defects in the deliberation process