

Chapter 6

THE ROLE OF THE CHAIR IN INTERNATIONAL COMMERCIAL ARBITRATION

Neil Kaplan, CBE QC SBS FCI Arb and Karen Mills, JD FCI Arb

There can be no doubt that the role of the Chair is pivotal in ensuring a smooth-running and fair arbitration.¹ An Appendix to this chapter will refer to the various institutional and statutory provisions relating to the role of Chair.

The Chair of an arbitration is, in a sense, the glue that holds the whole process together.² He must oversee all administrative matters as well as all procedural and substantive matters; be the key liaison among the parties and the other arbitrators, between the tribunal and any administering institution, if any, and sometimes must even mediate between the other arbitrators where not everyone sees eye to eye. One might like to consider the Chair as the conductor of the arbitral orchestra.

¹ We are grateful to Doctor Robert Briner for his permission to refer to the material contained in his chapter 4 on the role of the Chairman contained in *The Leading Arbitrators Guide to International Arbitration*, ed. Newman & Hill, Juris Publishing (2004). We agree with and adopt his statement at page 49 where he says “*in this paper the term ‘Chairman’ designates a function, irrespective of the gender of the person exercising it. In keeping with the terminology used in the English Arbitration Act 1996 (e.g. section 20) and the ICC Arbitration rules of 1998 (e.g. Article 8 (4)), the presiding arbitrator in a three-member arbitral tribunal will be referred to throughout as ‘Chairman’. Like the term ‘Chairman’, that of ‘Arbitrator’ and its pronominal form ‘he’/‘him’ should be understood in this article to refer to a function, which may be fulfilled by a man or a woman. As a matter of fact, there have already been ICC cases where all three members of the tribunal were women, not to mention those in which women act as sole arbitrators or chair tribunals in which the party-appointed arbitrators are men...*”

² For other works on this topic see (i). ‘Le Président du tribunal arbitral’ in *Etudes offertes a Pierre Bellet* (Paris: Litec, 1991, 467; (ii). ‘The President of the Arbitral Tribunal’ (1994) 9 *ICSID Review* 1; (iii) Christian Gavaldà, ‘Le Président du Tribunal Arbitral International’ *Les Petites Affiches*, No. 76, May 25, 1990, 13.

The role of the Chair can conveniently be considered at the following stages of an arbitration;

- (a) Getting the arbitration on track
- (b) Sorting out administrative and financial details
- (c) Fashioning the first Procedural Order or Terms of Reference
- (d) Supervising submissions
- (e) Planning the hearings
- (f) Conducting the hearings
- (g) Planning the stages subsequent to the hearings
- (h) Drafting the award
- (i) Completing the mandate

Let us consider some of the duties of the Chair and issues that arise in each of these stages.

I. GETTING THE ARBITRATION ON TRACK

A. Concordance

In international arbitration one of the key functions of the Chair is to ensure that any cultural and legal differences between or among all concerned are fully understood. Nothing is worse than, for example, a common law Chair conducting an arbitration between, say, a Thai company and a Korean company and acting as if the only way to proceed was as if he were conducting an arbitration in London or New York. Conversely, a civil law Chair with common law parties or counsel appearing should likewise be sensitive to alternative ways of proceeding and differing expectations. Cultural differences can be found at all stages of an international arbitration. These can be summarised as follows;

- (a) Cultural and legal differences between or among the parties. These may be partly responsible for the dispute itself;
- (b) Cultural and legal differences between or among counsel representing the parties;

- (c) Cultural and legal differences between or among counsel and some or all of the Tribunal; and
- (d) Cultural and legal differences between or among members of the Tribunal itself.

A good Chair will be attuned to these differences at all stages of the arbitration and will attempt to accommodate them. The most important aspect of this is to ensure that everyone understands the procedure which the Tribunal intends to adopt. This applies just as much between members of the Tribunal from different jurisdictions. A good example is questions from the Tribunal. Some arbitrators will wait until all questioning has finished and will then ask some questions. Others may want to ask questions as issues arise. In the latter case it helps if it is explained to counsel (and perhaps other members of the Tribunal) that this might happen and that these questions should not be taken as evidencing any concluded view. If this is done it makes subsequent complaints sound hollow. As there is another chapter in this book devoted to cultural considerations only, we shall not elaborate further on this matter here.³

B. Appointment

Normally the Chair is appointed by the mutual agreement of the two party-appointed arbitrators. In this situation he will invariably be someone that both of the other arbitrators already respect, which should make for a smooth, amicable relationship among the members of the Tribunal, making the Chair's job relatively pleasant and not overly difficult. If two of the three arbitrators know each other (which is frequently the case) they should make a real effort to welcome the third and make him feel part of the team.

There are instances, however, where either the two party appointed arbitrators are unable to agree upon a Chair or the rules of an administering institution call for the institution itself to appoint

³ Chapter 3, The Importance of Recognising Cultural Differences in International Dispute Resolution by Karen Mills.

the Chair. In such circumstances the arbitrators may not know each other, nor their respective capabilities, or be unfamiliar with their respective personalities and cultural background. Then the Chair has an added role, requiring some tact and charm, in trying to meld the procedural style of each of the other arbitrators, understand their intentions, their personalities, and how to neutralise any animosity which might lie behind their demonstrated persona.

C. Jurisdiction

In either case, the first responsibility of the Chair must be to ascertain that the Tribunal, as constituted, does have at least apparent jurisdiction to hear and decide the dispute; that the dispute is arbitrable and that each of the arbitrators is properly appointed, all in accordance with the contract under dispute, the *lex arbitri* (law governing the arbitral reference), and the rules that will govern the procedure. For this purpose it will be assumed that all three arbitrators have checked the arbitration clause which governs and have dealt with conflicts. Normally a look at the arbitration clause in the contract, the law and rules should satisfy the former point.

II. SORTING OUT ADMINISTRATIVE DETAILS ⁴

A. Finances

The Chair must ensure that the financial arrangements for the Tribunal are in place. He should check to see whether the co-arbitrators have already agreed, either with the administering institution or the party that appointed each of them, upon the terms

⁴ A useful reference point is The UNCITRAL Notes on Organising Proceedings, published in 1996 which was aimed at assisting practitioners “*by listing and briefly describing questions on which the appropriately timed decisions on organising arbitral proceedings may be useful*”. See also “Organising an international Arbitration” a chapter by professor A. J. van der Berg- *The Leading Arbitrator's Guide to International Arbitration*, edited by Newman and Hill, Juris Publishing (2004). For ICC cases see “Techniques for Controlling Time and Cost in Arbitration”, 8 *March 2007 ICC Doc. 420/535 E*

of their engagement. If not it might be better for this to be done by the Chair on behalf of the Tribunal. If the co-arbitrators have agreed upon their fees then the Chair should also do so before commencing. In most cases the Chair will have submitted his terms and conditions which will be accepted upon joint appointment.

It must be recognised that different arbitrators may charge different rates, or bill on a different basis. This is not at all uncommon with *ad hoc* arbitrations, and it is not unheard of for one arbitrator to bill on a flat rate while others charge by the hour or day, or for each arbitrator to charge different billing rates. Sometimes the Chair's rate may even be less than one of the party-appointed arbitrators. As long as each of the arbitrators has negotiated and agreed upon his or her own terms and is satisfied with them, the arrangement should not be subject to dispute. In cases where an arbitrator has agreed on his own fees with the party that appointed him, it is wise for the arbitrators to share this information among themselves. It is also advisable for the parties to be aware of the fee structure of the Tribunal because one of them will almost invariably be responsible to cover such costs.

In cases where the Chair is in charge of the financial arrangements he should set up a dedicated bank account into which deposits can be paid in and third-party expenses and re-imbusement or periodic interim payments to the Tribunal paid out. Some arbitral organisations such as the Hong Kong International Arbitration Centre ("HKIAC") will provide this service to arbitrators at minimal cost. This is often attended to by an arbitrator's firm, or for arbitrators with chambers this can be done by the clerk. It is obviously crucial that monies deposited by the parties should not be co-mingled with other monies belonging to the Chair. A clean and case-specific account is essential. Some rules impose quite onerous duties on the Chair with regard to financial matters.⁵

If the arbitration is administered by an institution the Tribunal will probably not have to worry about terms, conditions and collections, as most institutions handle these matters. But even in

⁵ See for example the January 2004 Swiss Rules of International Arbitration, particularly rules 38-41.

such cases it is the responsibility of the Chair to monitor the way the case is being funded. If it appears that the deposits are going to be insufficient to cover the case as being conducted by the parties then the Chair should take the matter up promptly with the institution.

B. Communications

Once the Tribunal has been fully constituted and compensation terms settled, the Chair should write to everyone acknowledging the appointment, confirming his and his co-arbitrators' co-ordinates and inviting confirmation of theirs from all concerned. He might at this point wish to set the parameters for how communications should be made: the most commonly used system being email and/or fax, followed up with hard copy by post or courier. If using email he should create 2 groups, one for writing to everyone and one for private communications among the arbitrators only. There have been occasions when an arbitrator pushed the wrong button and sent a private communication to the parties. In one case this led to an application to remove. Where an institution is involved, the Chair must ensure that the institution is copied on all communications between the parties and the Tribunal. This is important in cases where the institution needs to know the amount of work involved and the complexity of the case in order to fix fair remuneration for the Tribunal at the conclusion of the case. Sometimes this information is required in order for the institution to consider going above or below its published scale.

C. Time Limits

One matter that needs careful consideration by the Chair is that of time limits. The rules of the International Chamber of Commerce ("ICC"), and even the *lex arbitri* in some jurisdictions such as India, Taiwan and Indonesia, for example, impose time limits for the publication of the award. These limits need to be carefully watched by the Chair. In ICC cases, the ICC Court will automatically extend

the time for rendering the award. Nevertheless the Chair should see that time never runs out as administrative errors cannot be ruled out.

Another aspect that needs careful handling is that of contractual time limits. Some contracts actually specify a time limit for hearings and/or that the award shall be completed within, say, thirty days of the completion of the evidentiary hearing. Unless the Tribunal has agreed to a fast track arbitration and willingly takes on this additional responsibility, the Tribunal should be wary of committing itself to such a straitjacket.

The danger is that if the time limit, for whatever reason, runs out, one party may not agree to an extension and later the award may be arguably unenforceable. Or, if no extension is agreed upon the Tribunal may just issue its award quickly to meet the limit, without affording sufficient time to consider the issues fully, and justice may not be served. It is submitted that the Chair should attempt to get the parties to extend the time in advance and also allow for the possibility of a further extension at the request of the Tribunal. Another way to mitigate around the matter is to get the parties to agree that the period of time does not begin to run immediately after the hearings but only after all written submissions have been filed, including any request from the Tribunal for clarification of the written submissions to date. That will effectively put the time limit back in the control of the Tribunal. As written closing submissions, sometimes two rounds of them, are not uncommon, the initial time limit will otherwise expire before they have been completed. This would be most unsatisfactory. It is advisable to raise the issue of the contractual time limit at the time of the appointment or at latest in the initial procedural meeting/hearing, at which stage the parties may be more amenable to agree. A thirty day, or similar, time limit may be inserted by a contract drafter, usually a transactional lawyer unfamiliar with the arbitral process, but it can be quite unworkable for the trial advocate or arbitration practitioner. Here is another reason why the Chair in particular should scrutinize the arbitration clause most carefully before taking the matter on.

D. Administrative Secretaries

In a large case the Chair may well be assisted by an administrative secretary. This will usually be a young lawyer in the Chair's law firm or chambers or it may be a young arbitrator keen for more experience. The administrative secretary will usually deal with collecting and collating, and possibly distributing, the documents and liaising with the parties with regard to scheduling. It is invariably more cost-effective for such administrative tasks to be done by a junior lawyer with modest billing rates than for the arbitrators themselves to deal with such matters. In document-heavy cases such assistance is most beneficial. If it is thought necessary to engage such services the Chair should raise it with the parties and get their agreement in principle on the identity of the individual and the hourly rate. The parties should then advance such fees. The ICC takes a rather strange view of the use of administrative secretaries.⁶ They seem to think it reasonable for the fees of the secretary to be borne by the Tribunal even though the use of a secretary can actually help to reduce the time spent by the Tribunal. However, even in ICC cases the parties are usually prepared to pay for this convenience. But it is wise to keep the institution informed.

E. Record of Proceedings

Except in very simple and straightforward cases, both the Tribunal and the parties, or their counsel, will usually wish to have a record of the hearings to refer to: counsel for further presentation of their case and the Tribunal for preparation of the award. One of the matters that should be decided at the outset is how such record is to be made. As the parties will have to bear the cost, consideration should be given to their preferences. The proceedings may be tape-recorded or a secretary or court reporter or transcript service utilised, and today's technology offers excellent simultaneous transcript services such as "*live note*" or similar. The latter can be of tremendous

⁶ See the ICC note on this subject dated October 1, 1995.

service to the Chair, as well as to everyone else involved. The text of all testimony and other proceedings appears almost simultaneously on a computer set in front of each participant. This will assist not only in ensuring that the Tribunal understands what a witness has said, but it also allows counsel to refer to the witness's exact words and it also facilitates the job of any translator or interpreter. Other features allow the user to highlight and make notes on portions of his or her copy of the transcript, and it also enables the Tribunal to send notes on screen to each other during the hearings, which only the Tribunal will see, thereby avoiding the necessity to whisper comments among the Tribunal, which the parties may find discomforting.

III. FASHIONING THE FIRST PROCEDURAL ORDER OR TERMS OF REFERENCE

Having established how to correspond with all concerned and sorted out the financial arrangements the Chair must now turn to the procedure to be adopted to lead to a fair, just, expeditious and economical resolution of the dispute.

A. Initial Procedural Hearing

In most cases a smooth run arbitration can best be achieved by an initial procedural hearing or meeting.⁷ Whether to hold such a meeting will depend upon a number of factors, including geographical location and schedules of the members of the Tribunal and the parties or their counsel, quantum and /or complexity of the claim, desire of the parties, and others. It may be more time and cost-efficient to hold such a meeting by teleconference or conference call or simply by correspondence. This should be discussed with the arbitrators and then with the parties to set up the most sensible arrangement, always keeping in mind costs. However, the experience of most arbitrators is that an early meeting with parties has enormous

⁷ See the Hunter Questionnaire referred to by David Williams QC in his paper at IBA International Arbitration day in Madrid, 2 March 2007.

advantages and should not be avoided save in exceptional circumstances.

Where the parties are both, or all, represented by experienced arbitration counsel, one often finds that counsel have been, or will themselves be, able to reach agreement on many of the factors involved. These may include such matters as preferred scheduling for submissions and hearings, nature and quantity of submissions, discovery, if any, method of examination of witnesses, both factual and expert, transcript or other record of proceedings, location for hearings, and similar. Certainly, any such agreement of the parties must be subject to approval of the Tribunal. But, normally where the parties have been able to agree on some or all of these matters, the Chair should encourage the Tribunal to endeavour to assent, subject of course to its own schedules, as anything the parties can agree upon lessens the burden of the Tribunal and encourages an amicable atmosphere for the proceedings. To the extent that the parties and the Tribunal can agree, the Chair may wish to prepare, or allow the parties to prepare for the issuance of the Tribunal, a Consent Order to cover same.

If and to the extent that the parties cannot agree on these preliminary matters, the Chair may invite submissions from the parties on how they wish these things to be handled and the Tribunal, having considered these against its own schedules and preferred methods of hearing a dispute, will issue its own procedural orders. Prior to the first hearing it is often helpful if the Chair writes to the parties more or less along the following lines;

“In preparation for the preliminary procedural hearing the Arbitral Tribunal will send you in due course an agenda as well as draft Terms of Procedure and Appointment. Furthermore, for the Tribunal to have some understanding of the dispute prior to the procedural hearing the Claimant is invited to file a brief submission (not more than 10 pages) setting forth its main allegations of fact and legal argument by (insert a date) and the Respondent is invited to file a brief response (again no longer than 10 pages) by (insert date).

These brief submissions are without prejudice to any later or different submissions”⁸

Often the arbitrators will agree among themselves, or at the suggestion of the Chair, that the Chair shall have jurisdiction to decide upon procedural matters on behalf of the whole Tribunal, and to issue procedural orders under his sole signature. This should be raised at the earliest opportunity and reduced to writing. In ICC cases this should appear in the Terms of Reference (TOR) or at the latest in the First Procedural Order.

Article 29 of The Model Law is relevant here.⁹ It states;

“In arbitral proceedings with more than one arbitrator, any decision of the arbitral Tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by the presiding arbitrator, if so authorised by the parties or all members of the Tribunal.”

There are a variety of clauses that are used in practice to achieve this end.¹⁰ One suggested clause is as follows:

“The Chair may make procedural (interlocutory) orders unless either side requests that the same shall be considered by the whole Tribunal. Any procedural (interlocutory) order signed by the Chair shall be deemed to be that of the whole

⁸ This wording is used by Professor Gabrielle Kaufmann-Kohler who kindly permitted David Williams QC to quote it in his paper “*Appointment, Organisation and Powers- organising the proceedings with reference to the UNCITRAL Notes?*” delivered at IBA International Arbitration Day in Madrid on the 2nd of March 2007.

⁹ The Model Law on International Commercial Arbitration prepared by UNCITRAL and recommended to member states by the General Assembly of the United Nations in June 1985.

¹⁰ See also ICC Rule 25 (1) which deals with awards and permits the Chair to make the decision if there is no majority.

Tribunal if it states that the matter has been considered by the whole Tribunal, whether face to face or on the telephone or in writing or in any combination thereof.”

The term ‘*interlocutory*’ is understood by common-law lawyers but ‘*procedural*’ may be a more appropriate term to use where not all parties are from common law jurisdictions. The above clause clearly covers scheduling issues but will not cover any matter relating to the substance. Applications for interim measures of relief will, save in cases of utmost urgency, be required to be dealt with by the whole Tribunal. “*Writing*” clearly encompasses email, through which most communication now takes place.

B. Terms of Reference (“TOR”)

In an ICC (International Chamber of Commerce) administered arbitration, many of the initial procedural matters are required to be codified in a written document, known as the Terms of Reference (“TOR”) and the first duty of the Tribunal is to draft the TOR and get it signed by the parties and the Tribunal. The TOR is a convenient place to set out all the essential features of the arbitration such as the parties, their representatives and co-ordinates, the governing law (if agreed) and the place and language of the arbitration. Further, it is necessary for each party’s case to be summarised in the TOR. The best practice is for the Chair to invite each party to provide a short summary of their case for insertion into the TOR.

At the same time as signing the TOR at a face to face meeting it is usual for the Chair to prepare a draft of the First Procedural Order unless the parties have been able mutually to do so. This can then be discussed with the Tribunal and finalised at the same meeting. The Procedural Order should be in a separate document and not included in the TOR.

In this regard, Article 18 (4) of the ICC rules should be noted as it provides for the schedule to be established in a separate document, either at the same time as the TOR or as soon thereafter as possible. This document might be in the nature of a direction or order of the

Tribunal, or even a consent order which can be altered at a later date as and when necessary.

Normally the most contentious point to be included in the TOR is identifying the issues to be determined. In relatively simple cases this will be evident from the submissions. However, in practice, few arbitrations are so simple and it may be difficult for the arbitrators to determine at this initial stage everything that is in issue, or for the parties to agree thereon. Often, as the reference progresses, issues not initially anticipated may emerge. Or whether or not a point may be in issue may depend upon determination of another substantive, or even procedural, issue. Thus, it is not always feasible to agree upon an exhaustive list of issues. Furthermore, it is possible that having agreed upon a set list of issues to be decided, subsequent events in the conduct of the reference may make determination of one or more of those listed unnecessary. This will put the Tribunal in a dilemma if the issues have been defined in the TOR. It will have agreed to determine one set of issues but, as a result of the progress of the reference, the award will not cover all of these, and/or will determine others not agreed upon in the TOR. Such a divergence could jeopardise the enforceability of the award if an objection were to be made pursuant to Article V of the New York Convention or Article 36 of the Model Law (where applicable) or an equivalent provision in the law of the place in which the award is sought to be enforced. These allow a court to refuse enforcement of an award where the Tribunal exceeds its mandate or fails to decide a matter which has been put before it.

In order to avoid the above situation, it may be more prudent, and certainly less contentious at that early stage, to mention only the very major issues that are certain to be at the heart of the controversy, with a notation allowing others to emerge, such as: “ . . . and such other issues as are raised by the parties in the course of the proceedings”. Or, in exceptionally complicated cases, the Tribunal may opt not to specify any issues at all, but simply to state that the Tribunal shall decide “*such issues as may arise in the course of the dispute as shall be set out in the submissions of the parties.*” Article 18 (1) (d) of the ICC Rules would seem to allow for such language, as its

requirement is stated: “. . . *unless the Arbitral Tribunal considers it inappropriate, a list of issues to be determined.*”

The parties should be invited at an early stage of an ICC Arbitration to provide the Chair with succinct synopses of their case for insertion into the TOR.

IV. SUPERVISING SUBMISSIONS

A. Pleadings

It must be remembered that in some cases such as those administered by the ICC and certain other institutions, there will have been some form of pleadings even before the Tribunal has been appointed. These would normally include the Request for Arbitration, and the Answer and Counterclaims, if any. In those circumstances the need for further pleadings may be limited. But in other cases there may only be a brief Notice of Arbitration and fuller pleadings may be required. This is something the Chair should be monitoring from the beginning.

B. Scheduling

The Chair should keep track of any time limits laid down by the Tribunal and whether they are met, and take appropriate action (either adjusting onward schedule or barring a submission) where they are late or not submitted at all. He ought also to create a method to ascertain and ensure that all such submissions are copied to everyone to whom they should be: the other party and/or its counsel, each of the arbitrators and the institution, where applicable. Invariably if a party does not receive what it is expecting on time it will take advantage of the opportunity to complain against the other party. But, an institution, and sometimes the arbitrators themselves, will not always keep track of the schedule for such submissions, so a system for ensuring that everyone receives all that they should might be in order.

The advent of email, of course, makes this less of a burden. But, note that there are still some senior arbitrators and counsel who do not use email, in which case other arrangements must be made to ensure that they do receive everything and in good time.

C. Matters Relating to Expert Witnesses

Parties often will wish to call expert witnesses, either on matters of governing law, particularly when such law is foreign to the arbitrators, or technical matters, including engineering matters, calculation of quantum of damages and similar things not within the competence of the Tribunal itself.

There are several methods that may be applied for this and it is best to discuss and decide upon this at the outset so that the parties may proceed accordingly. Left to their own devices, parties' counsel will normally each wish to call their own experts, who will each seek to persuade the Tribunal of the correctness of their view. But this can be costly and does not always achieve the most beneficial result to the Tribunal.

The role and function of an expert witness is to assist the Tribunal in making an informed analysis of either the applicable law or technical aspects of the dispute in order to allow it to make the legally and factually correct decision on the points in question and render a right and just award. Unfortunately there are also some so-called "*experts*" that see their role as reinforcement of the advocacy role of counsel: to try to persuade the Tribunal to find in favour of the party that appointed them rather than to arrive at the independent impartial truth.

Thus, it is not always very helpful to the Tribunal to have each party call its own expert witnesses, particularly where the issue upon which they will opine is outside of the scope of knowledge of the Tribunal. Sometimes a Tribunal will engage its own expert witness, either to clarify for its sake the discrepancies between the testimony of the experts appointed by the parties, or as an alternative to having opposing experts at all. Particularly in a case of modest quantum, the Chair should discuss with the other arbitrators and the parties

whether it might be more efficacious to have one expert, acceptable to both parties but engaged by the Tribunal, rather than two opposing ones, or sometimes three where the Tribunal has difficulty in deciding between the evidence provided by the two party-appointed experts and has to engage its own expert anyway.

Other matters that will need to be decided at an early stage regarding expert witnesses will be the nature of the expertise as well as the number of expert witnesses. Where there are two, consideration should also be given as to whether it would be better for experts to exchange their unsigned reports on a 'without prejudice' basis and thereafter meet again on a 'without prejudice' basis and see if differences can be limited. The experts could be asked to prepare a joint report setting out the matters upon which they are agreed and then stating their differences and the reasons for such differences. After this procedure they can sign and then exchange their reports. This procedure makes it easier for experts to vary their initial views in the light of discussion with their opposite number and perhaps in the light of evidence about which they were initially unaware.¹¹

V. PLANNING THE HEARING

Having fixed the hearing dates, the Chair should carefully check and monitor the following issues:

- (i) Is the hearing room appropriate in terms of size, location and available facilities? The Chair should ascertain the likely number of participants to ensure there is room for all. The Chair should also check the configuration of the room, and ensure there is some secure facility for document storage.
- (ii) Is there sufficient space for the Tribunal and its papers? Is the witness to be seated in the correct position? Is there sufficient room for interpreters (if any) as well as transcribers? In one

¹¹ See article by Wolfgang Peter on witness conferencing in *Arbitration International* Vol. 18, No. 1, pp 47 ff

case recently, the parties could not agree on the venue because one side said that the venue was too far away from their offices and so much nearer to the other side's offices. In the event, the arbitrator located in that city had to visit the premises and rule on the appropriate venue. This is a very unusual occurrence. On the other hand, the parties may be sufficiently cooperative to agree to use the conference room of one of them or their counsel, which can result in considerable savings for the losing party.

- (iii) The Chair should ensure that arrangements for appropriate refreshment are in hand as there tend to be frequent breaks in arbitral proceedings and some refreshment is needed; this also helps to break the ice and defuse tense situations.
- (iv) It is suggested that in all cases today there should be a simultaneous live transcription service. This speeds up the hearing and assists greatly in preparing submissions as well as writing the award. After the hearing a mini-script finalized transcript with index facilities should be provided to the Tribunal in hard and soft copies. It is also possible to have hyper-linking from the transcripts to the exhibits referred to in the transcripts. This is a very useful tool.
- (v) It is advisable for the Chair to determine in advance what hours the Tribunal should sit and what breaks are to be taken. Consideration should be given to local customs. In some cities, lunch is taken at noon whereas in others lunch is taken later and the Chair should be sensitive to such matters. In Moslem countries, for example, the scheduling must allow for prayer times, particularly on a Friday.
- (vi) Prior to the hearing, the Chair should confirm precisely which witnesses will be required for cross examination. Not all witnesses may be needed. The Chair should invite the parties to provide a schedule of the witnesses, the dates they will be called and the amount of time that is to be set aside for the examination. This schedule can then be used to track

the progress of the actual hearing and facilitates the making of any reasonable adjustments.

- (vii) In document heavy cases, the Chair may require the parties to have additional copies of some of the documents provided for the Tribunal at the hearing so that members of the Tribunal only have to travel with the submissions, statements and certain core documents.
- (viii) The question of whether there ought to be written post hearing submissions is best left until towards the end of the evidentiary hearing. Sometimes the Tribunal may benefit from a brief oral discussion of key issues with the parties which could then be supplemented by written submissions later. Sometimes in large and complex cases, there is need for full lengthy closing submissions. Sometimes two rounds.

VI. CONDUCTING THE HEARING

The most visible aspect of the Chair's role is, of course, during the hearing stage. Here he is "on parade", no longer working in the background. Here he must be alert to all nuances of the interchange between the parties and among the arbitrators and the parties, while keeping control over the proceedings in a non-intrusive manner. In short, this is where the Chair must perform a multi-faceted balancing act.

A. Affording Parties Opportunity to Present their Case

Of course, every Chair has a particular style, some of which will be discussed below. But, the most important thing that must be kept in mind at all times is that natural justice (or due process) requires that each of the parties be allowed a reasonable and more or less equal opportunity to present its case. This requirement is normally provided for in most rules of procedure and the language may vary, but the intention is the same, and undue curtailment of the ability of a party to present its case is probably the most common ground for

annulment of, or refusal of a court to enforce, an award. This does not, and should not, mean that one must allow each party to carry on interminably on every issue and run up the costs of the arbitration unnecessarily. One of the most difficult tasks of the Chair is maintaining the delicate balance between not impeding the presentation of the parties' cases and not allowing the parties' counsel to get carried away with repetitions and/or irrelevancies, thereby causing legal, and arbitrators', fees to skyrocket, sometimes approximating or even exceeding the quantum of the claim.

The Chair has various options in running the hearings. Where the parties have been cooperating well, generally it is best to allow them to set the tone, decide how to divide up the time allotted (usually in such cases, they themselves have indicated how much time they will need), and so on. But, some control is usually in order. Left to their own devices, counsel, particularly those in common law jurisdictions with litigation background, are likely to seek to waste a great deal of time on unnecessary applications and objections.

Another delicate balance that the Chair needs to maintain is that between his fellow arbitrators and among them and himself.

B. Dealing with Witnesses

A well constituted arbitral Tribunal should consist of professionals, be they lawyers or technical experts, who know or can understand and analyse the law and can understand and evaluate factual materials and testimony put before them. Thus, not only are strict rules of evidence unnecessary and inappropriate in an arbitration, but far less explanatory introduction will be required. A written witness statement is a much better way to put before a Tribunal the testimony of the witness than a direct examination, and a written memorial is more efficient and perhaps more efficient than an impassioned address by counsel.

Parameters for handling evidence in chief should be set at the outset by the Tribunal, or normally by the Chair on its behalf. Where a witness has provided a written statement, no factual direct examination should be necessary, and thus the direct testimony may

be limited to a summary of the witness's qualifications to opine or testify on the matters he or she will address. Sometimes the witness will be permitted to comment on issues that have arisen since the witness's statement was submitted. On the other hand, a party may deem it necessary for a factual witness to tell in his own words what he has undergone or witnessed, and it may be helpful for the Tribunal to observe his or her demeanour to evaluate his or her veracity. Determining how witnesses will be examined is another task encompassed in the Chair's balancing act, and the system established should, or course, be the same for all parties.

Cross-examination is usual where the opposing party wishes to question the content of such witness's testimony, or even the veracity of the witness. Cross-examination should usually be limited to matters expressed in the written statement or direct testimony, if any, of the witness, and in most cultures should not be done in a threatening or aggressive manner. It should be forceful but polite. The Chair will need to control this, keeping both direct and cross-examination within the guidelines set. The Chair should also try to discourage aggressive attempts to discredit witnesses, in particular expert witnesses. It is, of course, difficult if not impossible to control this in written submissions, but a Chair can certainly admonish counsel who engage in what seems unnecessary harassing or manipulation of witnesses on the stand. In the writers' view unnecessary and seemingly unconscionable discrediting of the qualifications of a credible expert witness, as opposed to his or her testimony, can be counter-productive. An experienced arbitrator will certainly question the strength of a party's case if all they can do is attack the witness rather than the witness's testimony. But, actually controlling this is not always an easy matter, as counsel that do not understand this may claim they are being prevented from presenting their case, while in fact what the Chair may be seeking to prevent is their despoiling the other party's case as well as their own.

One of the primary differences between common law and civil law procedures is the system of witness examination. The civil law leans more towards the inquisitorial system, whereby the arbitrators themselves do most of the questioning of the witnesses whose

testimony otherwise stands primarily on its own. The common law practice is adversarial, where each party tends to provide as little factual material as possible in its submissions, including witness statements, both written and oral, and leave it up to the opposing party to adduce the facts and theories through cross-examination and requests for discovery. As international arbitration spans both systems, a balance is normally required, and this is also part of the Chair's balancing act. The parties' counsel, particularly if from common law jurisdictions, will want to do most of the questioning of witnesses themselves. But, those from civil law jurisdictions will expect the Tribunal to examine the witnesses as well. Thus, the Chair needs to evaluate the legal system to which each of the parties is accustomed and, if counsel for one party does not adequately question a witness called by the other party, decide whether or not it is incumbent upon the Tribunal to adduce the answers that are clearly missing.

Where there are clearly open and unaddressed questions which the Chair, or the other arbitrators for that matter, deem it necessary to clarify, or where the Chair or other arbitrators are more accustomed to civil law practice, the Tribunal may wish to examine the witnesses itself. Here the Chair must decide on the best way to proceed. Shall he go ahead and ask the questions on his mind? Shall he allow his fellow arbitrators to ask the ones they wish first? Or should he call for a short deliberation among the Tribunal members first to decide how they should proceed? This is very much a matter of individual practice style, but the writers of this Chapter are both of the view that it is best to allow the parties to present their case and keep actual participation of the Tribunal to a minimum, and even then to allow the party-appointed arbitrators to question if they wish, but for the Chair to take as passive a role as possible in the hearings if the situation allows.

After the cross-examination of a witness, counsel presenting such witness will often wish to re-examine the witness on matters that arose in the cross, particularly if they were not covered in the original witness statement. The Chair will need to keep some control on this.

VII. PLANNING AND SUPERVISING STAGES SUBSEQUENT TO HEARINGS

A. Closing Submissions

After hearings are completed, the parties normally will wish to submit further memorials or other documents to complete their case. The Chair will need to supervise the arrangements for such submissions, either at the close of hearings or in subsequent correspondence.

In cases where written closing submissions are provided, the Chair should ensure that these are served as provided for. The Chair should check that such submissions do not contain materials not referred to in the hearing. Most importantly, the Chair should ensure that these submissions do deal with the main points in issue. If the submissions are shooting at different targets, the Tribunal will not be assisted and further submissions may need to be ordered.

B. Costs

The issue of costs is an important post hearing issue. If the case has been bifurcated (the matter of liability argued and decided first and that of quantum dealt with only if the Tribunal has found liability), then costs may be left over until after the quantum stage. In other cases, costs will need to be addressed. Experience has shown that it is best to request both parties to itemize their costs before they know the result of the arbitration. This also enables the Tribunal to compare the two set of costs. It does make it harder to challenge an item of costs where the same or similar sum does appear as well in the challenging parties' schedule of costs.

Where the arbitration is administered by an institution, the Tribunal may opt to leave evaluation, or "taxing" of the parties' costs to the institution.

Whatever is decided to be done about costs, it is something which the Chair must keep a very careful eye on. Parties should not be allowed to run up costs beyond reason, but the Tribunal should

not impede their presenting the relevant part of their case. A respondent who argues interminably that there is no jurisdiction of the Tribunal, or no valid contract, when they must be well aware that there is, is only running up costs, both its own and that of the claimant, all of which will ultimately have to be borne by him, or his client. In whose interests is such conduct?

C. Deliberations

During the course of the hearing it is normal for the Tribunal to discuss the case and even form provisional views. The Chair should guide the discussion emphasising at all times that such discussion is preliminary only.

In complex cases, it is often wise for the Chair to reserve time immediately after the hearing or shortly after receipt of the closing submissions for a detailed discussion with the whole Tribunal. If such time is not reserved at an early stage, it often becomes difficult to reconvene. Practice has shown that there are many arbitration conferences throughout the world which provide good interim meeting places.

But whether immediately after the hearings or at a later date, one of the most delicate balancing acts the Chair must perform is chairing deliberations and mediating between the views of the other arbitrators. It is submitted that the Chair should initially listen to the views of the co-arbitrators before stating a view. If they seem hesitant, then the Chair should lead the discussion, perhaps issue by issue.

The task of trying to achieve accord among the members of the Tribunal can be made much more difficult if one arbitrator fails or refuses even to discuss the matter with the others, who are at odds with his position. This issue has been expressed so elegantly by Dr. Robert Briner in his chapter in an earlier edition of this book that we include his words here rather than our own:

“Even when the arbitrator who wants to frustrate the deliberation process has made this intention clear, he should still be given the opportunity to participate in all further steps

of the deliberations. Dissenting opinions, not infrequently, state that the (Chair) had discussions with one arbitrator alone, without the dissenting arbitrator being present, or that the (Chair) did not give the dissenting arbitrator enough time to participate properly in the deliberations and submit his views to the other arbitrators. It is on the basis of such allegations that many challenges and setting-aside actions are brought. It should, however, be noted that what is important is that each arbitrator has the possibility to participate in the deliberations. If he chooses not to participate, this will not in itself affect the validity of the award. He must, however, be given the opportunity to make his position known to the other members of the arbitral Tribunal at every stage of the deliberations. He therefore has to be invited to all physical meetings and he must receive all drafts prepared by the (Chair) and the other arbitrator when the third arbitrator has chosen not to participate. Even if he has made it clear that he will not participate, he should continue to receive the drafts and be given adequate time to make his comments. The (Chair), once the necessary opportunity has been given to the two other arbitrators to express their views, should then not hesitate to close the deliberations, noting that all issues have been discussed and decided and that certain or all decisions are only carried by a majority or, possibly, by the (Chair) alone.”¹²

VIII. DRAFTING THE AWARD

There are many ways in which this can be done but the most common is for the Chair to write a first draft and submit it for consideration to the co-arbitrators. In some cases the Tribunal might agree to split the task with members of the Tribunal writing different sections, or the Tribunal may agree on the basic points first and delegate one of the party-appointed arbitrators to prepare a draft.

¹² Briner, *op cit*, at pg 65.

It should be noted here that the drafting of the award is a responsibility of the arbitrators themselves. It is neither appropriate nor ethical for the Tribunal, or any arbitrator, to delegate this task to an assistant, associate or clerk, or to the administering institution, if any. Of course, an assistant or secretary may be asked to draft the introductory portions, such as identification of the parties and, where required, procedural history. But, the discussion of the issues and, most importantly, decisions on such issues, should be drafted by the arbitrators themselves, as this is the ultimate “deliverable” for which they have been personally appointed and are remunerated.

The Chair must be careful to ensure that one arbitrator does not push unnecessarily hard for the party who appointed that arbitrator as such attitude can often result in the other two reacting against this.

One problem that has been seen in practice is where one arbitrator insists on many changes to a draft award, it not being unreasonable for the others to assume that if these changes are made that arbitrator will sign the award. But, after all the changes have been incorporated that arbitrator refuses to sign and indicates that a dissent will be forthcoming. What does the Chair do about all the changes that were made in order to achieve unanimity? It is submitted that in this scenario the Chair should make clear at the very beginning that these changes will only be adopted on the basis that the requesting arbitrator signs the award and does not dissent. If not, then these changes may be deleted. Changes should be tracked so that they can be reviewed.

Is there any obligation on the Chair to achieve a unanimous result? It is submitted that the Chair should make a best effort to achieve unanimity. An award signed by all three members of the Tribunal may be able to be more easily accepted by the losing party and may assist in enforcement. On the other hand the Chair should not bully his colleagues, recognising that different views are not unusual and can reasonably be held.

However, one very experienced arbitrator has expressed the private view that all three members of the Tribunal have a mission to produce an unanimous award. When differences do occur they

should not lead to a dissent unless the decision of the majority displayed some lack of due process which requires to be recorded.

Dissents are technically irrelevant.¹³ They should not be considered by an enforcing court unless they established a due process violation by the majority.¹⁴

It is always possible that the full Tribunal will see most matters the same way, in which case the task of reaching accord will not be a difficult one. But, even the most professional of arbitrators may take different views on some points and, in the worst case, one or both party-appointed arbitrators may lean heavily towards the side of the party that appointed them, allowing that position to colour their impartiality. In such cases it is incumbent upon the Chair to try to bring them into line and impress upon them that their role is to act independently and confine their analysis to the applicable law and the facts as presented, as though each were appointed jointly by both parties.

There has been a great deal of discussion, both written in articles published in a variety of professional journals, and verbally at various conferences, on how a Chair, or other arbitrators, might handle the most grievous of this worst case scenario, where it appears that one of the arbitrators is not in fact acting independently, and may even be communicating clandestinely with one of the parties or its counsel or, worse, has been offered some financial interest in the outcome. Of course, it is virtually impossible to obtain proof of such misconduct, and the erring arbitrator will invariably deny it if confronted. But, for the Chair and the other arbitrator to simply sit by and allow such attitude to jeopardise the integrity, and possibly the enforceability, of the award cannot be justified. Of course, if both the Chair and the other party-appointed arbitrator are in full agreement contrary to the views of the erring arbitrator, they may render a proper award based upon their majority view and the misconduct of the erring arbitrator

¹³ See Wagoner "U.S. Court demonstrates pro-enforcement bias in a comprehensive review of a CIETAC award under the New York Convention" in *ASA bulletin* 2, 1998 pp. 289-310.

¹⁴ See also Alan Redfern's 2003 Freshfields lecture, "Dissenting Opinion – The Good, The Bad and The Ugly", *Arbitration International*, Volume 20, No. 3, 2004, pp. 223 et seq.

may not affect the award itself nor result in a miscarriage of justice. However, where the erring arbitrator has been able to influence one of the other arbitrators, so that the award is coloured by his “corruption”, or is able in some other manner to throw the deliberations out of balance, the Chair, or the third arbitrator, is sadly confronted by a most unpleasant and difficult situation, to which there is no easy solution. An arbitrator who believes there has been corruption by one or more of the others, and that corruption has resulted in an unjust award, may indeed write a dissenting opinion, stating his perception therein, or he may also step down from the Tribunal, making his reasons clear. This latter may or may not rectify the damage in the instant case, but it would at least bring the offender to the public view and perhaps prevent further such damage.

If the reference is administered by an institution, the matter should be brought to the attention of its supervisory board. If it is an *ad hoc* arbitration and no guidance is provided in the governing law or rules, the situation may be reported to the law society with jurisdiction over the offending arbitrator. Unfortunately, many arbitrators are not lawyers and there may be no professional organisation to which they are answerable.

There is no easy answer to this question, and as a result it is probable that such conduct normally passes un-remedied and un-sanctioned. However, such a situation should still not be tolerated as it can besmirch the good name of arbitration in general and undermine the high regard international arbitrators hold within the legal and business sectors worldwide. As arbitral awards are not appealable and, absent serious procedural defects, not subject to effective review, arbitrators should hold a higher degree of integrity and professionalism even than the highest court judges. It is the responsibility of every Chair, every arbitrator in fact, to do everything he or she can to uphold this position and the respect it holds in the international arena.

Fortunately, such incidences of serious misconduct are rare. More common is simple lack of consensus among the Tribunal, whether it be on sincere professional grounds, or the misperception that a party-appointed arbitrator should view questionable matters favourable to the party that appointed him.

IX. CONCLUSIONS

It is clear that the role of the Chair is crucial to the success of the arbitral process. From the very beginning the Chair should stamp his authority on the proceedings. The role needs to be carried out with courtesy and firmness as well as with sensitivity to different cultures and legal systems. Most importantly, the Chair should be careful not to import all the bag and baggage of his own legal system into an international arbitration with parties, colleagues and counsel from different systems and cultures.

Although a lightness of touch is needed on occasions to reduce the temperature, it should be noted that humour does not travel well cross-culturally, nor does it read well in a transcript in the cold light of a distant courtroom.

Not everyone can win an arbitration. But the role of the Chair is to ensure that the losing party knows precisely why it has lost and is satisfied that it had every reasonable opportunity of presenting its case to a Tribunal which had fully understood it even though disagreeing with it.

Appendix:

Provisions on the Role of Chairman

1. UNCITRAL Model Law

Article 29: Decision-Making by Panel of Arbitrators

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal.

2. UNCITRAL Rules of 1976

Article 7

1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the tribunal.
2. If within thirty days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator he has appointed:
 - (a) The first party may request the appointing authority previously designated by the parties to appoint the second arbitrator; or
 - (b) If no such authority has been previously designated by the parties, or if the appointing authority previously designated refuses to act or fails to appoint the arbitrator within thirty days after receipt of a party's request therefor, the first party may request the Secretary-General

of the Permanent Court of Arbitration at The Hague to designate the appointing authority. The first party may then request the appointing authority so designated to appoint the second arbitrator. In either case, the appointing authority may exercise its discretion in appointing the arbitrator.

3. If within thirty days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by an appointing authority in the same way as a sole arbitrator would be appointed under article 6.

Article 14

If under articles 11 to 13 the sole or presiding arbitrator is replaced, any hearings held previously shall be repeated; if any other arbitrator is replaced, such prior hearings may be repeated at the discretion of the arbitral tribunal.

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.
2. If either party so requests at any stage of the proceedings, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.

3. All documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to the other party.

Article 31: Decisions

1. When there are three arbitrators, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators.
2. In the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorizes, the presiding arbitrator may decide on his own, subject to revision, if any, by the arbitral tribunal.

3. ICC Rules**Article 9: Appointment and Confirmation of the Arbitrators**

1. In confirming or appointing arbitrators, the Court shall consider the prospective arbitrator's nationality, residence and other relationships with the countries of which the parties or the other arbitrators are nationals and the prospective arbitrator's availability and ability to conduct the arbitration in accordance with these Rules. The same shall apply where the Secretary General confirms arbitrators pursuant to Article 9(2).
2. The Secretary General may confirm as co-arbitrators, sole arbitrators and chairmen of Arbitral Tribunals persons nominated by the parties or pursuant to their particular agreements, provided they have filed a statement of independence without qualification or a qualified statement of independence has not given rise to objections. Such confirmation shall be reported to the Court at its next session. If the Secretary General considers that a co-arbitrator, sole arbitrator or chairman of an Arbitral Tribunal should not be confirmed, the matter shall be submitted to the Court.

3. Where the Court is to appoint a sole arbitrator or the chairman of an Arbitral Tribunal, it shall make the appointment upon a proposal of a National Committee of the ICC that it considers to be appropriate. If the Court does not accept the proposal made, or if the National Committee fails to make the proposal requested within the time limit fixed by the Court, the Court may repeat its request or may request a proposal from another National Committee that it considers to be appropriate.
4. Where the Court considers that the circumstances so demand, it may choose the sole arbitrator or the chairman of the Arbitral Tribunal from a country where there is no National Committee, provided that neither of the parties objects within the time limit fixed by the Court.
5. The sole arbitrator or the chairman of the Arbitral Tribunal shall be of a nationality other than those of the parties. However, in suitable circumstances and provided that neither of the parties objects within the time limit fixed by the Court, the sole arbitrator or the chairman of the Arbitral Tribunal may be chosen from a country of which any of the parties is a national.
6. Where the Court is to appoint an arbitrator on behalf of a party which has failed to nominate one, it shall make the appointment upon a proposal of the National Committee of the country of which that party is a national. If the Court does not accept the proposal made, or if the National Committee fails to make the proposal requested within the time limit fixed by the Court, or if the country of which the said party is a national has no National Committee, the Court shall be at liberty to choose any person whom it regards as suitable. The Secretariat shall inform the National Committee, if one exists, of the country of which such person is a national.

Article 25: Making of the Award

1. When the Arbitral Tribunal is composed of more than one arbitrator, an Award is given by a majority decision. If there be no majority, the Award shall be made by the chairman of the Arbitral Tribunal alone.
2. The Award shall state the reasons upon which it is based.
3. The Award shall be deemed to be made at the place of the arbitration and on the date stated therein

4. 1996 Arbitration Act

- 20.** -(1) Where the parties have agreed that there is to be a chairman, they are free to agree what the functions of the chairman are to be in relation to the making of decisions, orders and awards.
- (2) If or to the extent that there is no such agreement, the following provisions apply.
 - (3) Decisions, orders and awards shall be made by all or a majority of the arbitrators (including the chairman).
 - (4) The view of the chairman shall prevail in relation to a decision, order or award in respect of which there is neither unanimity nor a majority under subsection (3).
- 33.** (1) The tribunal shall-
- (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
 - (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

- (2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.
- 34.** -(1) It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter
- (2) Procedural and evidential matters include-
 - (a) when and where any part of the proceedings is to be held;
 - (b) the language or languages to be used in the proceedings and whether translations of any relevant documents are to be supplied;
 - (c) whether any and if so what form of written statements of claim and defence are to be used, when these should be supplied and the extent to which such statements can be later amended;
 - (d) whether any and if so which documents or classes of documents should be disclosed between and produced by the parties and at what stage;
 - (e) whether any and if so what questions should be put to and answered by the respective parties and when and in what form this should be done;
 - (f) whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material (oral, written or other) sought to be tendered on any matters of fact or opinion, and the time, manner and form in which such material should be exchanged and presented;
 - (g) whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law;

- (h) whether and to what extent there should be oral or written evidence or submissions.
 - (3) The tribunal may fix the time within which any directions given by it are to be complied with, and may if it thinks fit extend the time so fixed (whether or not it has expired).
- 37.** (1) Unless otherwise agreed by the parties-
- (a) the tribunal may-
 - (i) appoint experts or legal advisers to report to it and the parties, or
 - (ii) appoint assessors to assist it on technical matters, and may allow any such expert, legal adviser or assessor to attend the proceedings; and
 - (b) the parties shall be given a reasonable opportunity to comment on any information, opinion or advice offered by any such person.
- (2) The fees and expenses of an expert, legal adviser or assessor appointed by the tribunal for which the arbitrators are liable are expenses of the arbitrators for the purposes of this Part.

5. Singapore International Arbitration Centre Rules of 1997

Rule 8: Appointment of Three Arbitrators

8.1 If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the Tribunal.

8.2 If within twenty-one (21) days after the receipt of a party's notification of the appointment of an arbitrator, the other party has not notified the first party of the arbitrator he has appointed:

- (a) the first party may request the appointing authority previously designated by the parties to appoint the arbitrator; or

- (b) if no such authority has been previously designated by the parties, or if the appointing authority previously designated refuses to act or fails to appoint the arbitrator within twenty-one (21) days after receipt of a party's request thereof, the first party may request the Chairman to appoint the second arbitrator.

8.3 If within twenty-one (21) days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by an appointing authority or by the Chairman if no appointing authority has been previously designated by the parties or, if the appointing authority previously designated refuses to act within the prescribed time, in the same way as a sole arbitrator would be appointed under Rule 7.

8.4 A decision on a matter entrusted by Rule 8.2 or 8.3 to the Chairman shall not be subject to appeal.

Rule 17: Conduct of the Proceedings

17.1 The parties may agree on the arbitral procedure, and are encouraged to do so.

17.2 In the absence of procedural rules agreed by the parties or contained herein, the Tribunal shall have the widest discretion allowed under such law as may be applicable to ensure the just, expeditious, economical, and final determination of the dispute.

17.3 In the case of a three-member Tribunal, the presiding arbitrator may, after consulting the other arbitrators, make procedural rulings alone.

Rule 28: The Award

28.1. Unless all parties agree otherwise, the Tribunal shall make its award in writing within forty-five (45) days from the date on which the hearings are closed and shall state the reasons upon which

its award is based. The award shall state its date and shall be signed by the arbitrator or arbitrators.

28.2. If any arbitrator refuses or fails to comply with the mandatory provisions of any applicable law relating to the making of the award, having been given a reasonable opportunity to do so, the remaining arbitrators shall proceed in his absence.

28.3. Where there is more than one arbitrator and they fail to agree on any issue, they shall decide by a majority. Failing a majority decision on any issue, the presiding arbitrator of the Tribunal shall make the award alone as if he were a sole arbitrator. If an arbitrator refuses or fails to sign the award, the signatures of the majority shall be sufficient, provided that the reasons for the omitted signature is stated.

28.4. The sole arbitrator or presiding arbitrator shall be responsible for delivering the award to the Registrar, who shall transmit certified copies to the parties provided that the costs of the arbitration have been paid to the Centre in accordance with Rule 30.

6. Arbitration Rules of Korean Arbitration Commercial Board of 2000

Article 33: Decisions of Tribunal

Whenever there is more than one arbitrator, simple majority rule shall apply for all decisions, including that of the arbitral awards, unless parties agree otherwise. However, if no majority rule is reached with regard to a procedural matter, then the presiding arbitrator shall decide.

7. Rules of the Arbitration Institute of the Stockholm Chamber of Commerce of 1999

Article 20: Procedures of the Arbitral Tribunal

- (1) The manner of conducting the proceedings is to be determined by the Arbitral Tribunal in compliance with the

conditions set down in the arbitration agreement and these Rules, with due account taken to the wishes of the parties.

- (2) The Arbitral Tribunal may decide that the Chairman alone may make procedural rulings.
- (3) The Arbitral Tribunal shall maintain the confidentiality of the arbitration and conduct each case in an impartial, practical and expeditious manner, giving each party sufficient opportunity to present its case.
- (4) The Arbitral Tribunal may, after consultation with the parties, decide to conduct hearings at a location other than the Place of Arbitration.
- (5) Article 12 shall apply with respect to communications from the Arbitral Tribunal.

Article 30: Voting

When a vote is taken, that opinion shall prevail which has received more votes than any other opinion. If such majority is not attained, the opinion of the Chairman shall prevail, unless otherwise agreed by the parties

Article 32: Award

- (1) The Award shall be deemed to have been rendered at the Place of Arbitration. It shall state the date on which it was rendered, contain an order or a declaration, as well as the reasons for it, and shall be signed by the arbitrators. In absence of the signature of an arbitrator, an Award may be rendered provided that the Award has been signed by a majority of the arbitrators with a verification to the effect that the arbitrator whose signature is missing participated in deciding the dispute.

- (2) If any arbitrator fails without valid cause to participate in the deliberations of the Arbitral Tribunal on an issue, such failure will not preclude a decision being made by the other arbitrators.
- (3) The parties may agree that the Chairman alone shall sign the Award.
- (4) An arbitrator may attach a dissenting opinion to the Award.
- (5) If a settlement is reached, the Arbitral Tribunal may, at the request of the parties, record the settlement in the form of an Award.
- (6) The Arbitration Costs, in accordance with Article 39, and its apportionment between the parties shall be fixed in the Award or other order by which the arbitral proceedings are terminated. An Award may be rendered solely for costs.
- (7) The Arbitral Tribunal shall immediately send the Award to the parties

8. Saudi Arbitration Regulation of 1983 and its Implementation Rules of 1985

Article (23):

The Chairman of the arbitration panel shall control and manage the hearings, direct questions to the parties or witnesses, and shall have the right to dismiss from the hearing any one in contempt of the hearing. However, if any one present commits a violation, the Chairman of the arbitration panel shall record the incident and transfer it to the concerned authority. Each arbitrator shall have the right to direct questions and examine the parties or witnesses through the Chairman of the arbitration panel

Article (27):

The arbitration panel shall record the facts and proceeding which take place in the hearing, in minutes written by the secretary of the arbitration panel under its supervision. The minutes shall contain the date and place of the hearing, names of arbitrators, the secretary and the parties. It shall also contain statements of the respective parties, the minutes shall be signed by the Chairman of the arbitration panel, arbitrators, and the secretary

Article (41):

Subject to articles 16 and 17 of the arbitration regulations, awards shall be adopted by the opinion of the majority of the arbitrators. The award shall be pronounced by the Chairman of the arbitration panel in the specified hearing. The award shall contain the names of the members of the respective panel, the date, place, and subject matter of the award, first names, surnames, description, domicile, appearance and absence of the parties, a summary of the facts of the claim, requests of the parties, summary of their defenses, substantial defenses, and the reasons and text of the award. The arbitrators and the clerk shall, within seven days from the filing of the draft, sign the original copy of the award which comprises the above contents and which shall kept in the file of the claim.

9. LCIA Rules**Article 26: The Award**

26.1. The Arbitral Tribunal shall make its award in writing and, unless all parties agree in writing otherwise, shall state the reasons upon which its award is based. The award shall also state the date when the award is made and the seat of the arbitration; and it shall be signed by the Arbitral Tribunal or those of its members assenting to it.

26.2. If any arbitrator fails to comply with the mandatory provisions of any applicable law relating to the making of the award,

having been given a reasonable opportunity to do so, the remaining arbitrators may proceed in his absence and state in their award the circumstances of the other arbitrator's failure to participate in the making of the award.

26.3. Where there are three arbitrators and the Arbitral Tribunal fails to agree on any issue, the arbitrators shall decide that issue by a majority. Failing a majority decision on any issue, the chairman of the Arbitral Tribunal shall decide that issue.

26.4. If any arbitrator refuses or fails to sign the award, the signatures of the majority or (failing a majority) of the chairman shall be sufficient, provided that the reason for the omitted signature is stated in the award by the majority or chairman.

26.5. The sole arbitrator or chairman shall be responsible for delivering the award to the LCIA Court, which shall transmit certified copies to the parties provided that the costs of arbitration have been paid to the LCIA in accordance with Article 28.

10. Swiss Rules of International Arbitration (Swiss Rules)

Article 31:

1. When there are three arbitrators, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators. If there is no majority, the award shall be made by the presiding arbitrator alone.
2. In the case of questions of procedure, when the arbitral tribunal so authorises, the presiding arbitrator may decide on his own, subject to revision, if any, by the arbitral tribunal.

Article 38:

The arbitral tribunal shall determine the costs of arbitration in its award. The term "costs" includes only:

- (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be determined by the tribunal itself in accordance with Article 39;
- (b) The travel and other expenses incurred by the arbitrators;
- (c) The costs of expert advice and of other assistance required by the arbitral tribunal;
- (d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
- (e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
- (f) The costs for the administration of the arbitration payable to the Chambers in accordance with Appendix B (Schedule of the Costs of Arbitration).

Article 39:

1. The fees of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case, including, but not limited to, the discontinuation of the arbitral proceedings in case of settlement or other reasons. In the event of such discontinuation, the fees of the arbitral tribunal may be less than the minimum amount resulting from Appendix B (Schedule of the Costs of Arbitration).
2. The fees of the arbitral tribunal shall be determined in conformity with Appendix B (Schedule of the Costs of Arbitration).
3. The arbitral tribunal shall decide on the allocation of the fees among its members. As a rule, the Chairman shall receive

between 40 % and 50 % and each co-arbitrator between 25 % and 30 % of the total fees, in view of the time and efforts spent by each arbitrator.

Article 40:

1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
2. With respect to the costs of legal representation and assistance referred to in Article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.
3. When the arbitral tribunal issues an order for the termination of the arbitral proceedings or makes an award on agreed terms, it shall determine the costs of arbitration referred to in Article 38 and Article 39, paragraph 1, in the text of that order or award.
4. Before rendering the award, the arbitral tribunal shall submit its draft award to the Chambers for consultation on the decision as to the assessment and apportionment of the costs.
5. No additional fees may be charged by an arbitral tribunal for interpretation or correction or completion of its award under Articles 35 to 37.

Article 41:

1. The arbitral tribunal, on its establishment, shall request each party to deposit an equal amount as an advance for the costs referred to in Article 38, paragraphs (a), (b), (c) and (f). The

arbitral tribunal shall provide a copy of such request for information to the Chambers.

2. Where a Respondent submits a counterclaim, or it otherwise appears appropriate in the circumstances, the arbitral tribunal may in its discretion establish separate deposits.
3. During the course of the arbitral proceedings the arbitral tribunal may request supplementary deposits from the parties. The arbitral tribunal shall provide a copy of such request for information to the Chambers.
4. If the required deposits are not paid in full within thirty days after the receipt of the request, the arbitral tribunal shall so inform the parties in order that one or another of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.
5. In its final award, the arbitral tribunal shall render an accounting to the parties of the deposits received. Any unexpended balance shall be returned to the parties.

11. CIETAC

Article 42: Making Award

1. The arbitral tribunal shall independently and impartially makes its arbitral award on the basis of the facts, in accordance with the law and the terms of the contract, with reference to international practice and in compliance with the principle of fairness and reasonableness.
2. The arbitral tribunal shall state in the award the claims, the facts of the dispute, the reasons on which the award is based, the result of the award, the allocation of the arbitration costs and date on which and the place at which the award is made. The facts of the dispute and the reason on which the award is

based may not be stated in the award if the parties have agreed so, or if the award is made in accordance with the terms of settlement agreement between the parties. The arbitral tribunal has the power to determine in the arbitral award the specific time period for the parties to execute the award and the liabilities to be born by a party failing to execute the award within the specified time.

3. The CIETAC's stamp shall be fixed to the award.
4. Where a case is examined by an arbitral tribunal composed of three arbitrators, the award shall be rendered by all three arbitrators or a majority of the arbitrators. A written dissenting opinion shall be docketed into the file and may be attached to the award, but it shall not form a part of the award.
5. Where the arbitral tribunal can not reach a majority opinion, the award shall be rendered in accordance with the presiding arbitrator's opinion. The written opinion of other arbitrators shall be docketed into the file and may be attached to the award, but it shall not form a part of the award.
6. Unless the award is made in accordance with the opinion of the presiding arbitrator or the sole arbitrator, the arbitral award shall be signed by a majority of arbitrators. An arbitrator who has a dissenting opinion may or may not sign his/her name on the award.
7. The date on which the award is made shall be the date on which the award comes into legal effects.
8. The arbitral award is final and binding upon both parties. Neither party may bring a suit before a law court or make a request to any other organization for revising the award.

