



Revised IBA Rules on the Taking of Evidence and new Guidelines and new Recommendations - do we need all of this?

It is probably good practise to review rules from time to time. The IBA did so more than 10 years after its Rules on the "Taking of Evidence in International Commercial Arbitration" ("the IBA Rules") came into effect. The revised IBA Rules - no longer restricted to commercial arbitration - were adopted by resolution of the IBA Council on May 29, 2010.

In its more than 10 years of existence the IBA Rules "had gained wide acceptance within the international arbitral community" as stated, for good cause, in the foreword of the revised IBA Rules. Indeed, of the many rules and, moreover, guidelines and recommendations, the IBA Rules are, at least in my view, by far the most relevant ones. The other tool of the IBA, its "Guidelines on Conflicts of Interest in International Arbitration", has achieved less of a general acceptance; in particular the ICC has explicitly declined to apply those guidelines for its decisions on conflict of interest. The prime achievement of the IBA Rules lies, in essence, in its Article 3(3), regulating requests for production of documents. With its corner-stones - materiality and relevance - the IBA Rules have successfully bridged one of the last and most important conflicts between common and civil law. What was envisaged as a nightmare by civil law practitioners - the story of the truck unloading tones of documents has been told at numerous occasions - has through the IBA Rules turned into a very efficient tool to access information on relevant issues material to the outcome of the case. Production of documents under the IBA Rules has in the past years become an almost indispensable tool in international arbitration also under any civil law *lex arbitri*.

The members of the IBA Review Subcommittee were therefore well advised to follow the old

saying "if it's not broke, do not fix it" and focused their work on closing some lacunae only.

The most important changes are in my view the following ones:

- A new Article 2 has been introduced (Article 1 on definitions has been put to the foreword, thus maintaining the previous structure and numbering of the IBA Rules), which deals with two very important issues so far not addressed in the IBA Rules at all, namely that the Arbitral Tribunal
 - (i) "shall consult the Parties at the earliest appropriate time in the proceedings and invite them to consult each other with a view to agreeing on an efficient, economical and fair process for taking of the evidence."

and, furthermore, that the Arbitral Tribunal

- (ii) "is encouraged to identify to the Parties, as soon as it considers it to be appropriate, any issues:

- (a) that the Arbitral Tribunal may regard as relevant to the case and material to its outcome

and/or

- (b) for which a preliminary determination may be appropriate."

Both provisions are geared to increase the efficiency of arbitral proceedings. It does indeed not serve efficiency of those proceedings if written submissions are exchanged without a previously agreed upon under-



standing as to how and when evidence is to be produced and such understanding must indeed be reached "at the earliest appropriate time". This is generally before the first full submissions are filed. The same applies to early indications by the Arbitral Tribunal which issues they would like in particular to be covered by the submissions of the parties. Too often Arbitral Tribunals are reluctant to do so, being afraid that such indications may tamper their impartiality. The new provision of Article 2(3) serves now as a legitimate platform for the Arbitral Tribunal to address the issues they are concerned with in an early stage of the proceedings.

- Article 3 (3)(a) includes now a new provision for requests for production of documents in electronic form. But be assured: the flood gates remain closed: each such request must again be sufficiently detailed and the Arbitral Tribunal may also order that the requesting party "shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner".

The previous, restrictive interpretation for the rules for production of documents continues therefore to be applicable for production of documents in electronic form as well - which is certainly to be welcomed!

- Article 5 and 6, dealing with party respectively tribunal - appointed experts have been amended by a useful list of formal items to be covered in such reports.
- Article 8 proposes now some helpful guidelines for the evidentiary hearing, in particular confirming that Claimant's witnesses and experts come generally first.
- Article 9(3)(a-e) proposes a list the Arbitral Tribunal may consider for issues of privileges and legal impediments standing against production of documents requested. In addition to adverse inference, as provided for already previously in Article 9(5) against a party refusing to produce documents without a satisfactory explanation, the Arbitral Tribunal may now under Article 9(6) also

take into account a failure of a party to participate in good faith in the evidentiary proceedings also in its allocation of the costs of the arbitration.

As indicated in the beginning, changes and adaptations of existing rules need to be made on a regularly basis - so far so good - but what about all the new guidelines and new recommendations published just recently, notably:

- CI Arb Guidelines on E-disclosure in Arbitration;
- IBA Guidelines for drafting International Arbitration Clauses;
- CI Arb Guidelines on the Interviewing of prospective Arbitrators;
- ILA Recommendations on Ascertaining the Contents of the Applicable Law in International Commercial Arbitration;

to name - probably - just a few? The good will of all participants in any of those projects is not to be questioned at all, but the real question is rather: do these numerous guidelines and recommendations really pave the way to more efficient and economical arbitration proceedings?

I believe not and I will follow with great interest the debate on "the Homogenisation of IA Procedures" at the GAR Conference of late October 2010 in London.

In my view those guidelines lure the consumers (our clients) in to the misleading belief that everything is clearly regulated and their counsels need just to push the right button. But those being more familiar with international arbitration understand that each case has its own particularities, calling for an tailor made, adequate structuring of the proceedings of such individual case. Just pushing the right button on a provision of a guideline or recommendation will not do the trick - except as to lead us to the "arbitre singe", as provocatively but also eloquently developed by Serge Lazareff in the *liber amicorum* for the late Robert Briner. Fortunately, we are not there yet, but if the number of those guidelines and recommendations continue to increase



we are approaching the monkey cage rapidly -
get your peanuts ready!

September 20, 2010

Hansjörg Stutzer

Attachments:
- Revised Rules

For further information please contact:
Hansjörg Stutzer (h.stutzer@thouvenin.com)

IBA Rules on the Taking of Evidence in International Arbitration

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International Bar Association*



the global voice of
the legal profession

International Bar Association
10th Floor, 1 Stephen Street
London W1T 1AT
United Kingdom
Tel: +44 (0)20 7691 6868
Fax: +44 (0)20 7691 6544
www.ibanet.org

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*Former Chair, SBL Committee D
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Düsseldorf, Germany*

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Caldwell Ltd, Hong Kong

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*B Cremades y Asociados,
Madrid, Spain*

Emmanuel Gaillard
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Gélinas & Co,
Paris, France

Hans van Houtte
Katholieke Universiteit Leuven,
Leuven, Belgium

Pierre A Karrer
Zurich, Switzerland

Jan Paulsson
Freshfields Bruckhaus Deringer LLP,
Paris, France

Hilmar Raeschke-Kessler
Rechtsanwalt beim Bundesgerichtshof,
Karlsruhe-Ettlingen, Germany

V V Veeder, QC
Essex Court Chambers,
London, England

O L O de Witt Wijnen
Nauta Dutilh,
Rotterdam, Netherlands

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Chair

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Frankfurt, Germany

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Pérez-Llorca,

Madrid, Spain

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*Nishimura & Asahi,
Tokyo, Japan*

Ariel Ye
*King & Wood,
Beijing, China*

About the Arbitration Committee

Established as the Committee in the International Bar Association's Legal Practice Division which focuses on the laws, practice and procedures relating to the arbitration of transnational disputes, the Arbitration Committee currently has over 2,300 members from over 90 countries, and membership is increasing steadily.

Through its publications and conferences, the Committee seeks to share information about international arbitration, promote its use and improve its effectiveness. The Committee maintains standing subcommittees and, as appropriate, establishes Task Forces to address specific issues. At the time of issuance of these revised Rules, the Committee has four subcommittees, namely the Rules of Evidence Subcommittee, the Investment Treaty Arbitration Subcommittee, the Conflicts of Interest Subcommittee, and the Recognition and Enforcement of Arbitral Awards Subcommittee; and two task forces: the Task Force on Attorney Ethics in Arbitration and the Task Force on Arbitration Agreements.

Foreword

These IBA Rules on the Taking of Evidence in International Arbitration ('IBA Rules of Evidence') are a revised version of the IBA Rules on the Taking of Evidence in International Commercial Arbitration, prepared by a Working Party of the Arbitration Committee whose members are listed on pages i and ii.

The IBA issued these Rules as a resource to parties and to arbitrators to provide an efficient, economical and fair process for the taking of evidence in international arbitration. The Rules provide mechanisms for the presentation of documents, witnesses of fact and expert witnesses, inspections, as well as the conduct of evidentiary hearings. The Rules are designed to be used in conjunction with, and adopted together with, institutional, ad hoc or other rules or procedures governing international arbitrations. The IBA Rules of Evidence reflect procedures in use in many different legal systems, and they may be particularly useful when the parties come from different legal cultures.

Since their issuance in 1999, the IBA Rules on the Taking of Evidence in International Commercial Arbitration have gained wide acceptance within the international arbitral community. In 2008, a review process was initiated at the instance of Sally Harpole and Pierre Bienvenu, the then Co-Chairs of the Arbitration Committee. The revised version of the IBA Rules of Evidence was developed by the members of the IBA Rules of Evidence Review Subcommittee, assisted by members of the 1999 Working Party. These revised Rules replace the IBA Rules on the Taking of Evidence in International Commercial Arbitration, which themselves replaced the IBA Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration, issued in 1983.

If parties wish to adopt the IBA Rules of Evidence in their arbitration clause, it is recommended that they add the following language to the clause, selecting one of the alternatives therein provided:

‘[In addition to the institutional, ad hoc or other rules chosen by the parties,] [t]he parties agree that the arbitration shall be conducted according to the IBA Rules of Evidence as current on the date of [this agreement/the commencement of the arbitration].’

In addition, parties and Arbitral Tribunals may adopt the IBA Rules of Evidence, in whole or in part, at the commencement of the arbitration, or at any time thereafter. They may also vary them or use them as guidelines in developing their own procedures.

The IBA Rules of Evidence were adopted by resolution of the IBA Council on 29 May 2010. The IBA Rules of Evidence are available in English, and translations in other languages are planned. Copies of the IBA Rules of Evidence may be ordered from the IBA, and the Rules are available to download at <http://tinyurl.com/iba-Arbitration-Guidelines>.

Guido S Tawil

Judith Gill, QC

Co-Chairs, Arbitration Committee

29 May 2010

The Rules

Preamble

1. These IBA Rules on the Taking of Evidence in International Arbitration are intended to provide an efficient, economical and fair process for the taking of evidence in international arbitrations, particularly those between Parties from different legal traditions. They are designed to supplement the legal provisions and the institutional, ad hoc or other rules that apply to the conduct of the arbitration.
2. Parties and Arbitral Tribunals may adopt the IBA Rules of Evidence, in whole or in part, to govern arbitration proceedings, or they may vary them or use them as guidelines in developing their own procedures. The Rules are not intended to limit the flexibility that is inherent in, and an advantage of, international arbitration, and Parties and Arbitral Tribunals are free to adapt them to the particular circumstances of each arbitration.
3. The taking of evidence shall be conducted on the principles that each Party shall act in good faith and be entitled to know, reasonably in advance of any Evidentiary Hearing or any fact or merits determination, the evidence on which the other Parties rely.

Definitions

In the IBA Rules of Evidence:

'Arbitral Tribunal' means a sole arbitrator or a panel of arbitrators;

'Claimant' means the Party or Parties who commenced the arbitration and any Party who, through joinder or otherwise, becomes aligned with such Party or Parties;

'Document' means a writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means;

'Evidentiary Hearing' means any hearing, whether or not held on consecutive days, at which the Arbitral Tribunal, whether in person, by teleconference, videoconference or other method, receives oral or other evidence;

Expert Report’ means a written statement by a Tribunal-Appointed Expert or a Party-Appointed Expert;

General Rules’ mean the institutional, ad hoc or other rules that apply to the conduct of the arbitration;

IBA Rules of Evidence’ or *Rules*’ means these IBA Rules on the Taking of Evidence in International Arbitration, as they may be revised or amended from time to time;

Party’ means a party to the arbitration;

Party-Appointed Expert’ means a person or organisation appointed by a Party in order to report on specific issues determined by the Party;

Request to Produce’ means a written request by a Party that another Party produce Documents;

Respondent’ means the Party or Parties against whom the Claimant made its claim, and any Party who, through joinder or otherwise, becomes aligned with such Party or Parties, and includes a Respondent making a counter-claim;

Tribunal-Appointed Expert’ means a person or organisation appointed by the Arbitral Tribunal in order to report to it on specific issues determined by the Arbitral Tribunal; and

Witness Statement’ means a written statement of testimony by a witness of fact.

Article 1 Scope of Application

1. Whenever the Parties have agreed or the Arbitral Tribunal has determined to apply the IBA Rules of Evidence, the Rules shall govern the taking of evidence, except to the extent that any specific provision of them may be found to be in conflict with any mandatory provision of law determined to be applicable to the case by the Parties or by the Arbitral Tribunal.
2. Where the Parties have agreed to apply the IBA Rules of Evidence, they shall be deemed to have agreed, in the absence of a contrary indication, to the version as current on the date of such agreement.
3. In case of conflict between any provisions of the IBA Rules of Evidence and the General Rules, the Arbitral Tribunal shall apply the IBA Rules of

Evidence in the manner that it determines best in order to accomplish the purposes of both the General Rules and the IBA Rules of Evidence, unless the Parties agree to the contrary.

4. In the event of any dispute regarding the meaning of the IBA Rules of Evidence, the Arbitral Tribunal shall interpret them according to their purpose and in the manner most appropriate for the particular arbitration.
5. Insofar as the IBA Rules of Evidence and the General Rules are silent on any matter concerning the taking of evidence and the Parties have not agreed otherwise, the Arbitral Tribunal shall conduct the taking of evidence as it deems appropriate, in accordance with the general principles of the IBA Rules of Evidence.

Article 2 Consultation on Evidentiary Issues

1. The Arbitral Tribunal shall consult the Parties at the earliest appropriate time in the proceedings and invite them to consult each other with a view to agreeing on an efficient, economical and fair process for the taking of evidence.
2. The consultation on evidentiary issues may address the scope, timing and manner of the taking of evidence, including:
 - (a) the preparation and submission of Witness Statements and Expert Reports;
 - (b) the taking of oral testimony at any Evidentiary Hearing;
 - (c) the requirements, procedure and format applicable to the production of Documents;
 - (d) the level of confidentiality protection to be afforded to evidence in the arbitration; and
 - (e) the promotion of efficiency, economy and conservation of resources in connection with the taking of evidence.
3. The Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, any issues:
 - (a) that the Arbitral Tribunal may regard as relevant to the case and material to its outcome; and/or
 - (b) for which a preliminary determination may be appropriate.

Article 3 Documents

1. Within the time ordered by the Arbitral Tribunal, each Party shall submit to the Arbitral Tribunal and to the other Parties all Documents available to it on which it relies, including public Documents and those in the public domain, except for any Documents that have already been submitted by another Party.
2. Within the time ordered by the Arbitral Tribunal, any Party may submit to the Arbitral Tribunal and to the other Parties a Request to Produce.
3. A Request to Produce shall contain:
 - (a) (i) a description of each requested Document sufficient to identify it, or
(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.
4. Within the time ordered by the Arbitral Tribunal, the Party to whom the Request to Produce is addressed shall produce to the other Parties and, if the Arbitral Tribunal so orders, to it, all the Documents requested in its possession, custody or control as to which it makes no objection.
5. If the Party to whom the Request to Produce is addressed has an objection to some or all of the

Documents requested, it shall state the objection in writing to the Arbitral Tribunal and the other Parties within the time ordered by the Arbitral Tribunal. The reasons for such objection shall be any of those set forth in Article 9.2 or a failure to satisfy any of the requirements of Article 3.3.

6. Upon receipt of any such objection, the Arbitral Tribunal may invite the relevant Parties to consult with each other with a view to resolving the objection.
7. Either Party may, within the time ordered by the Arbitral Tribunal, request the Arbitral Tribunal to rule on the objection. The Arbitral Tribunal shall then, in consultation with the Parties and in timely fashion, consider the Request to Produce and the objection. The Arbitral Tribunal may order the Party to whom such Request is addressed to produce any requested Document in its possession, custody or control as to which the Arbitral Tribunal determines that (i) the issues that the requesting Party wishes to prove are relevant to the case and material to its outcome; (ii) none of the reasons for objection set forth in Article 9.2 applies; and (iii) the requirements of Article 3.3 have been satisfied. Any such Document shall be produced to the other Parties and, if the Arbitral Tribunal so orders, to it.
8. In exceptional circumstances, if the propriety of an objection can be determined only by review of the Document, the Arbitral Tribunal may determine that it should not review the Document. In that event, the Arbitral Tribunal may, after consultation with the Parties, appoint an independent and impartial expert, bound to confidentiality, to review any such Document and to report on the objection. To the extent that the objection is upheld by the Arbitral Tribunal, the expert shall not disclose to the Arbitral Tribunal and to the other Parties the contents of the Document reviewed.
9. If a Party wishes to obtain the production of Documents from a person or organisation who is not a Party to the arbitration and from whom the Party cannot obtain the Documents on its own, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps are legally available to obtain the requested Documents, or seek leave from the Arbitral Tribunal to take such

steps itself. The Party shall submit such request to the Arbitral Tribunal and to the other Parties in writing, and the request shall contain the particulars set forth in Article 3.3, as applicable. The Arbitral Tribunal shall decide on this request and shall take, authorize the requesting Party to take, or order any other Party to take, such steps as the Arbitral Tribunal considers appropriate if, in its discretion, it determines that (i) the Documents would be relevant to the case and material to its outcome, (ii) the requirements of Article 3.3, as applicable, have been satisfied and (iii) none of the reasons for objection set forth in Article 9.2 applies.

10. At any time before the arbitration is concluded, the Arbitral Tribunal may (i) request any Party to produce Documents, (ii) request any Party to use its best efforts to take or (iii) itself take, any step that it considers appropriate to obtain Documents from any person or organisation. A Party to whom such a request for Documents is addressed may object to the request for any of the reasons set forth in Article 9.2. In such cases, Article 3.4 to Article 3.8 shall apply correspondingly.
11. Within the time ordered by the Arbitral Tribunal, the Parties may submit to the Arbitral Tribunal and to the other Parties any additional Documents on which they intend to rely or which they believe have become relevant to the case and material to its outcome as a consequence of the issues raised in Documents, Witness Statements or Expert Reports submitted or produced, or in other submissions of the Parties.
12. With respect to the form of submission or production of Documents:
 - (a) copies of Documents shall conform to the originals and, at the request of the Arbitral Tribunal, any original shall be presented for inspection;
 - (b) Documents that a Party maintains in electronic form shall be submitted or produced in the form most convenient or economical to it that is reasonably usable by the recipients, unless the Parties agree otherwise or, in the absence of such agreement, the Arbitral Tribunal decides otherwise;

- (c) a Party is not obligated to produce multiple copies of Documents which are essentially identical unless the Arbitral Tribunal decides otherwise; and
 - (d) translations of Documents shall be submitted together with the originals and marked as translations with the original language identified.
13. Any Document submitted or produced by a Party or non-Party in the arbitration and not otherwise in the public domain shall be kept confidential by the Arbitral Tribunal and the other Parties, and shall be used only in connection with the arbitration. This requirement shall apply except and to the extent that disclosure may be required of a Party to fulfil a legal duty, protect or pursue a legal right, or enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority. The Arbitral Tribunal may issue orders to set forth the terms of this confidentiality. This requirement shall be without prejudice to all other obligations of confidentiality in the arbitration.
14. If the arbitration is organised into separate issues or phases (such as jurisdiction, preliminary determinations, liability or damages), the Arbitral Tribunal may, after consultation with the Parties, schedule the submission of Documents and Requests to Produce separately for each issue or phase.

Article 4 Witnesses of Fact

1. Within the time ordered by the Arbitral Tribunal, each Party shall identify the witnesses on whose testimony it intends to rely and the subject matter of that testimony.
2. Any person may present evidence as a witness, including a Party or a Party's officer, employee or other representative.
3. It shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses and to discuss their prospective testimony with them.
4. The Arbitral Tribunal may order each Party to submit within a specified time to the Arbitral Tribunal and to the other Parties Witness Statements by each witness on whose testimony it intends to rely, except for

- those witnesses whose testimony is sought pursuant to Articles 4.9 or 4.10. If Evidentiary Hearings are organised into separate issues or phases (such as jurisdiction, preliminary determinations, liability or damages), the Arbitral Tribunal or the Parties by agreement may schedule the submission of Witness Statements separately for each issue or phase.
5. Each Witness Statement shall contain:
 - (a) the full name and address of the witness, a statement regarding his or her present and past relationship (if any) with any of the Parties, and a description of his or her background, qualifications, training and experience, if such a description may be relevant to the dispute or to the contents of the statement;
 - (b) a full and detailed description of the facts, and the source of the witness's information as to those facts, sufficient to serve as that witness's evidence in the matter in dispute. Documents on which the witness relies that have not already been submitted shall be provided;
 - (c) a statement as to the language in which the Witness Statement was originally prepared and the language in which the witness anticipates giving testimony at the Evidentiary Hearing;
 - (d) an affirmation of the truth of the Witness Statement; and
 - (e) the signature of the witness and its date and place.
 6. If Witness Statements are submitted, any Party may, within the time ordered by the Arbitral Tribunal, submit to the Arbitral Tribunal and to the other Parties revised or additional Witness Statements, including statements from persons not previously named as witnesses, so long as any such revisions or additions respond only to matters contained in another Party's Witness Statements, Expert Reports or other submissions that have not been previously presented in the arbitration.
 7. If a witness whose appearance has been requested pursuant to Article 8.1 fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Witness Statement related to that Evidentiary Hearing by

that witness unless, in exceptional circumstances, the Arbitral Tribunal decides otherwise.

8. If the appearance of a witness has not been requested pursuant to Article 8.1, none of the other Parties shall be deemed to have agreed to the correctness of the content of the Witness Statement.
9. If a Party wishes to present evidence from a person who will not appear voluntarily at its request, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps are legally available to obtain the testimony of that person, or seek leave from the Arbitral Tribunal to take such steps itself. In the case of a request to the Arbitral Tribunal, the Party shall identify the intended witness, shall describe the subjects on which the witness's testimony is sought and shall state why such subjects are relevant to the case and material to its outcome. The Arbitral Tribunal shall decide on this request and shall take, authorize the requesting Party to take or order any other Party to take, such steps as the Arbitral Tribunal considers appropriate if, in its discretion, it determines that the testimony of that witness would be relevant to the case and material to its outcome.
10. At any time before the arbitration is concluded, the Arbitral Tribunal may order any Party to provide for, or to use its best efforts to provide for, the appearance for testimony at an Evidentiary Hearing of any person, including one whose testimony has not yet been offered. A Party to whom such a request is addressed may object for any of the reasons set forth in Article 9.2.

Article 5 Party-Appointed Experts

1. A Party may rely on a Party-Appointed Expert as a means of evidence on specific issues. Within the time ordered by the Arbitral Tribunal, (i) each Party shall identify any Party-Appointed Expert on whose testimony it intends to rely and the subject-matter of such testimony; and (ii) the Party-Appointed Expert shall submit an Expert Report.
2. The Expert Report shall contain:
 - (a) the full name and address of the Party-Appointed Expert, a statement regarding his or her present and past relationship (if any) with

- any of the Parties, their legal advisors and the Arbitral Tribunal, and a description of his or her background, qualifications, training and experience;
- (b) a description of the instructions pursuant to which he or she is providing his or her opinions and conclusions;
 - (c) a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal;
 - (d) a statement of the facts on which he or she is basing his or her expert opinions and conclusions;
 - (e) his or her expert opinions and conclusions, including a description of the methods, evidence and information used in arriving at the conclusions. Documents on which the Party-Appointed Expert relies that have not already been submitted shall be provided;
 - (f) if the Expert Report has been translated, a statement as to the language in which it was originally prepared, and the language in which the Party-Appointed Expert anticipates giving testimony at the Evidentiary Hearing;
 - (g) an affirmation of his or her genuine belief in the opinions expressed in the Expert Report;
 - (h) the signature of the Party-Appointed Expert and its date and place; and
 - (i) if the Expert Report has been signed by more than one person, an attribution of the entirety or specific parts of the Expert Report to each author.
3. If Expert Reports are submitted, any Party may, within the time ordered by the Arbitral Tribunal, submit to the Arbitral Tribunal and to the other Parties revised or additional Expert Reports, including reports or statements from persons not previously identified as Party-Appointed Experts, so long as any such revisions or additions respond only to matters contained in another Party's Witness Statements, Expert Reports or other submissions that have not been previously presented in the arbitration.
 4. The Arbitral Tribunal in its discretion may order that any Party-Appointed Experts who will submit or who have submitted Expert Reports on the same or

related issues meet and confer on such issues. At such meeting, the Party-Appointed Experts shall attempt to reach agreement on the issues within the scope of their Expert Reports, and they shall record in writing any such issues on which they reach agreement, any remaining areas of disagreement and the reasons therefore.

5. If a Party-Appointed Expert whose appearance has been requested pursuant to Article 8.1 fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Expert Report by that Party-Appointed Expert related to that Evidentiary Hearing unless, in exceptional circumstances, the Arbitral Tribunal decides otherwise.
6. If the appearance of a Party-Appointed Expert has not been requested pursuant to Article 8.1, none of the other Parties shall be deemed to have agreed to the correctness of the content of the Expert Report.

Article 6 Tribunal-Appointed Experts

1. The Arbitral Tribunal, after consulting with the Parties, may appoint one or more independent Tribunal-Appointed Experts to report to it on specific issues designated by the Arbitral Tribunal. The Arbitral Tribunal shall establish the terms of reference for any Tribunal-Appointed Expert Report after consulting with the Parties. A copy of the final terms of reference shall be sent by the Arbitral Tribunal to the Parties.
2. The Tribunal-Appointed Expert shall, before accepting appointment, submit to the Arbitral Tribunal and to the Parties a description of his or her qualifications and a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal. Within the time ordered by the Arbitral Tribunal, the Parties shall inform the Arbitral Tribunal whether they have any objections as to the Tribunal-Appointed Expert's qualifications and independence. The Arbitral Tribunal shall decide promptly whether to accept any such objection. After the appointment of a Tribunal-Appointed Expert, a Party may object to the expert's qualifications or independence only if the objection is for reasons of which the Party becomes aware

after the appointment has been made. The Arbitral Tribunal shall decide promptly what, if any, action to take.

3. Subject to the provisions of Article 9.2, the Tribunal-Appointed Expert may request a Party to provide any information or to provide access to any Documents, goods, samples, property, machinery, systems, processes or site for inspection, to the extent relevant to the case and material to its outcome. The authority of a Tribunal-Appointed Expert to request such information or access shall be the same as the authority of the Arbitral Tribunal. The Parties and their representatives shall have the right to receive any such information and to attend any such inspection. Any disagreement between a Tribunal-Appointed Expert and a Party as to the relevance, materiality or appropriateness of such a request shall be decided by the Arbitral Tribunal, in the manner provided in Articles 3.5 through 3.8. The Tribunal-Appointed Expert shall record in the Expert Report any non-compliance by a Party with an appropriate request or decision by the Arbitral Tribunal and shall describe its effects on the determination of the specific issue.
4. The Tribunal-Appointed Expert shall report in writing to the Arbitral Tribunal in an Expert Report. The Expert Report shall contain:
 - (a) the full name and address of the Tribunal-Appointed Expert, and a description of his or her background, qualifications, training and experience;
 - (b) a statement of the facts on which he or she is basing his or her expert opinions and conclusions;
 - (c) his or her expert opinions and conclusions, including a description of the methods, evidence and information used in arriving at the conclusions. Documents on which the Tribunal-Appointed Expert relies that have not already been submitted shall be provided;
 - (d) if the Expert Report has been translated, a statement as to the language in which it was originally prepared, and the language in which the Tribunal-Appointed Expert anticipates giving testimony at the Evidentiary Hearing;

- (e) an affirmation of his or her genuine belief in the opinions expressed in the Expert Report;
 - (f) the signature of the Tribunal-Appointed Expert and its date and place; and
 - (g) if the Expert Report has been signed by more than one person, an attribution of the entirety or specific parts of the Expert Report to each author.
5. The Arbitral Tribunal shall send a copy of such Expert Report to the Parties. The Parties may examine any information, Documents, goods, samples, property, machinery, systems, processes or site for inspection that the Tribunal-Appointed Expert has examined and any correspondence between the Arbitral Tribunal and the Tribunal-Appointed Expert. Within the time ordered by the Arbitral Tribunal, any Party shall have the opportunity to respond to the Expert Report in a submission by the Party or through a Witness Statement or an Expert Report by a Party-Appointed Expert. The Arbitral Tribunal shall send the submission, Witness Statement or Expert Report to the Tribunal-Appointed Expert and to the other Parties.
 6. At the request of a Party or of the Arbitral Tribunal, the Tribunal-Appointed Expert shall be present at an Evidentiary Hearing. The Arbitral Tribunal may question the Tribunal-Appointed Expert, and he or she may be questioned by the Parties or by any Party-Appointed Expert on issues raised in his or her Expert Report, the Parties' submissions or Witness Statement or the Expert Reports made by the Party-Appointed Experts pursuant to Article 6.5.
 7. Any Expert Report made by a Tribunal-Appointed Expert and its conclusions shall be assessed by the Arbitral Tribunal with due regard to all circumstances of the case.
 8. The fees and expenses of a Tribunal-Appointed Expert, to be funded in a manner determined by the Arbitral Tribunal, shall form part of the costs of the arbitration.

Article 7 Inspection

Subject to the provisions of Article 9.2, the Arbitral Tribunal may, at the request of a Party or on its own motion, inspect or require the inspection by a Tribunal-

Appointed Expert or a Party-Appointed Expert of any site, property, machinery or any other goods, samples, systems, processes or Documents, as it deems appropriate. The Arbitral Tribunal shall, in consultation with the Parties, determine the timing and arrangement for the inspection. The Parties and their representatives shall have the right to attend any such inspection.

Article 8 Evidentiary Hearing

1. Within the time ordered by the Arbitral Tribunal, each Party shall inform the Arbitral Tribunal and the other Parties of the witnesses whose appearance it requests. Each witness (which term includes, for the purposes of this Article, witnesses of fact and any experts) shall, subject to Article 8.2, appear for testimony at the Evidentiary Hearing if such person's appearance has been requested by any Party or by the Arbitral Tribunal. Each witness shall appear in person unless the Arbitral Tribunal allows the use of videoconference or similar technology with respect to a particular witness.
2. The Arbitral Tribunal shall at all times have complete control over the Evidentiary Hearing. The Arbitral Tribunal may limit or exclude any question to, answer by or appearance of a witness, if it considers such question, answer or appearance to be irrelevant, immaterial, unreasonably burdensome, duplicative or otherwise covered by a reason for objection set forth in Article 9.2. Questions to a witness during direct and re-direct testimony may not be unreasonably leading.
3. With respect to oral testimony at an Evidentiary Hearing:
 - (a) the Claimant shall ordinarily first present the testimony of its witnesses, followed by the Respondent presenting the testimony of its witnesses;
 - (b) following direct testimony, any other Party may question such witness, in an order to be determined by the Arbitral Tribunal. The Party who initially presented the witness shall subsequently have the opportunity to ask additional questions on the matters raised in the other Parties' questioning;
 - (c) thereafter, the Claimant shall ordinarily first

- present the testimony of its Party-Appointed Experts, followed by the Respondent presenting the testimony of its Party-Appointed Experts. The Party who initially presented the Party-Appointed Expert shall subsequently have the opportunity to ask additional questions on the matters raised in the other Parties' questioning;
- (d) the Arbitral Tribunal may question a Tribunal-Appointed Expert, and he or she may be questioned by the Parties or by any Party-Appointed Expert, on issues raised in the Tribunal-Appointed Expert Report, in the Parties' submissions or in the Expert Reports made by the Party-Appointed Experts;
 - (e) if the arbitration is organised into separate issues or phases (such as jurisdiction, preliminary determinations, liability and damages), the Parties may agree or the Arbitral Tribunal may order the scheduling of testimony separately for each issue or phase;
 - (f) the Arbitral Tribunal, upon request of a Party or on its own motion, may vary this order of proceeding, including the arrangement of testimony by particular issues or in such a manner that witnesses be questioned at the same time and in confrontation with each other (witness conferencing);
 - (g) the Arbitral Tribunal may ask questions to a witness at any time.
4. A witness of fact providing testimony shall first affirm, in a manner determined appropriate by the Arbitral Tribunal, that he or she commits to tell the truth or, in the case of an expert witness, his or her genuine belief in the opinions to be expressed at the Evidentiary Hearing. If the witness has submitted a Witness Statement or an Expert Report, the witness shall confirm it. The Parties may agree or the Arbitral Tribunal may order that the Witness Statement or Expert Report shall serve as that witness's direct testimony.
5. Subject to the provisions of Article 9.2, the Arbitral Tribunal may request any person to give oral or written evidence on any issue that the Arbitral Tribunal considers to be relevant to the case and material to its outcome. Any witness called and

questioned by the Arbitral Tribunal may also be questioned by the Parties.

Article 9 Admissibility and Assessment of Evidence

1. The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.
2. The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons:
 - (a) lack of sufficient relevance to the case or materiality to its outcome;
 - (b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;
 - (c) unreasonable burden to produce the requested evidence;
 - (d) loss or destruction of the Document that has been shown with reasonable likelihood to have occurred;
 - (e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling;
 - (f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or
 - (g) considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.
3. In considering issues of legal impediment or privilege under Article 9.2(b), and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal may take into account:
 - (a) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice;
 - (b) any need to protect the confidentiality of a Document created or statement or oral

- communication made in connection with and for the purpose of settlement negotiations;
- (c) the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen;
 - (d) any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the Document, statement, oral communication or advice contained therein, or otherwise; and
 - (e) the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules.
4. The Arbitral Tribunal may, where appropriate, make necessary arrangements to permit evidence to be presented or considered subject to suitable confidentiality protection.
 5. If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party.
 6. If a Party fails without satisfactory explanation to make available any other relevant evidence, including testimony, sought by one Party to which the Party to whom the request was addressed has not objected in due time or fails to make available any evidence, including testimony, ordered by the Arbitral Tribunal to be produced, the Arbitral Tribunal may infer that such evidence would be adverse to the interests of that Party.
 7. If the Arbitral Tribunal determines that a Party has failed to conduct itself in good faith in the taking of evidence, the Arbitral Tribunal may, in addition to any other measures available under these Rules, take such failure into account in its assignment of the costs of the arbitration, including costs arising out of or in connection with the taking of evidence.