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INTERNATIONAL COMMERCIAL ARBITRATION

Draft Guidelines for Preparatory Conferences in Arbitral Proceedings

Report of the Secretary-General

Addendum

Contents

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Note to the Commission

It is suggested that the Introduction to the Guidelines contain a short history of the work on the Guidelines and a resolution which the Commission may wish to adopt in finalizing the Guidelines. A draft Introduction will be before the twenty-seventh session in 1994 in the form of a conference-room paper.

Portions of the draft Guidelines have been placed between square brackets; this has been done to indicate that the purpose of the Guidelines may also be fulfilled without the bracketed portions.

Draft Guidelines for Preparatory Conferences in Arbitral Proceedings

INTRODUCTION

[...]

I. GENERAL CONSIDERATIONS

A. Background

1. Arbitration rules agreed upon by parties typically allow the arbitral tribunal quite broad discretion and flexibility in the conduct of arbitral proceedings. This is true in particular for the proceedings after the constitution of the arbitral tribunal and before the making of the award, that is when various documents are exchanged, hearings held and evidence taken. A prominent example of such rules are the UNCITRAL Arbitration Rules, which provide in article 15(1):

> "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. The principle of flexibility and discretion has two kinds of limits. First, the arbitral tribunal does not have discretion to the extent the rules themselves restrict it by providing a specific solution. In the case of the UNCITRAL Rules, this is indicated in the introductory phrase of article 15(1) "Subject to these Rules". Second, the arbitral tribunal must observe the provisions of the procedural law applicable to the arbitration that are mandatory for the arbitral tribunal.

3. It is generally considered that the principle of discretion and flexibility is useful and that it constitutes one of the reasons for the attractiveness of arbitration as a method of settling commercial disputes. The principle is useful because it allows the arbitral tribunal to adapt the manner of proceeding to the circumstances of the dispute, to conduct the case in the procedural style preferred by the parties and the arbitrators, and to plan the proceedings.

4. If the arbitral tribunal does not plan the proceedings or if planning is too limited, it is possible, in particular in international arbitration, that a party, a legal counsel or a member of the arbitral tribunal will find the proceedings unpredictable, surprising and difficult to prepare for. This is likely to lead to misunderstandings, delays and increased costs of proceedings.

5. Planning of arbitral proceedings is particularly useful in international arbitration, in which arbitrators or parties may have differing expectations as to the manner of proceeding. Differences in procedural traditions to which the arbitrators, parties or counsel are accustomed are typical reasons for such differing expectations. Differing expectations may be anticipated also when the legal backgrounds of the participants in the arbitration do not appear dissimilar. This is because arbitrators and other arbitration practitioners in international trade are increasingly exposed to diverse procedural practices and because many practitioners have developed individual and eclectic procedural methods.

6. In order to plan the conduct of arbitral proceedings, some arbitrators consider it useful to hold, at an early stage of proceedings, a conference among the participants in the arbitration. At such a conference, referred to herein as "preparatory conference", appropriate procedural decisions are considered and details of procedure clarified so as to make the subsequent proceedings more predictable as well as more time efficient and less costly.

7. Many widely used sets of international arbitration rules make no reference to such preparatory conferences, and those conferences are in practice convened irrespective of whether there is provision for that in the agreed set of arbitration rules. This indicates that arbitral tribunals consider the decision to convene such a conference to be within the general procedural authority of the arbitral tribunal to conduct arbitral proceedings in the manner it considers appropriate.

8. The confidential nature of arbitration makes it difficult to assess the extent of the practice of holding preparatory conferences. According to reports of practitioners, it seems that in a good number of international arbitrations such conferences are held. It appears that the practice of preparatory conferences is particularly widespread in procedural traditions that tend to see the role of the arbitral tribunal more as one of a moderator of the proceedings as opposed to an active investigator, and which, in accordance with this procedural tendency, expect the parties to assume a considerable degree of procedural initiative. Nevertheless, in view of the potential benefits resulting from planning arbitral proceedings, in particular when the expectations of the parties or the arbitrators as to the manner of conducting the proceedings are likely to differ, a preparatory conference might be useful in any arbitral setting.

9. It may be concluded that, since there appear to be no reports of objections in principle to the practice of holding preparatory conferences, and since many commentators praise the usefulness of the practice, it may be expected that preparatory conferences in arbitration are likely to become more frequent even where they have not been customary.

B. Term "preparatory conference"

10. A single term for preparatory meetings in arbitration has not developed. Meetings of this kind are referred to in practice by expressions such as "pre-hearing conference", "preliminary meeting", "pre-trial review", "administrative conference" or terms of similar import. Which of those terms will be used may partly depend upon the stage of the proceedings at which the meeting is to take place. For example, a meeting referred to as "preliminary" meeting usually takes place shortly after the initial request for arbitration has been presented, at which time not all elements of the claim and defence may have been stated to the arbitral tribunal; the term "administrative" meeting is used in arbitrations under the auspices of some arbitral institutions. Expressions such as "pre-hearing" conference, on the other hand, may be used more frequently for a preparatory meeting taking place at a time when the claims and defences have been fully stated and the main focus of the meeting is to prepare hearings. A "pre-hearing review" might have as its main focus the review of the preparations by the parties for the hearings pursuant to procedural decisions taken earlier.

11. The Guidelines use the expression "preparatory conference" as a general term intended to reflect the purpose of the conference, irrespective of the stage at which it is held or whether or not it is administered by an arbitral institution. Expressions usual in the practice of some arbitral institutions or at traditional arbitration venues are not employed, since they are not in universal use and could be understood as giving undue emphasis to particular practice.

C. Purpose and nature of the Guidelines

12. The preparation of the Guidelines was motivated by the consideration that, in appropriate circumstances, a preparatory conference in arbitration is a useful exercise and that internationally harmonized guidelines would assist practitioners in deciding whether to hold a preparatory conference and, if one is to be held, to help them prepare it and carry it out.

13. The Guidelines explain the objectives of a preparatory conference and serve as a reminder of topics that could usefully be considered at such a conference. The Guidelines are not a comprehensive guide on the substance of the decisions that could be taken as a result of a preparatory conference. While with respect to some types of decisions some of the possible options have been mentioned for illustrative purposes, the Guidelines do not have the ambition to present the whole spectrum of possible solutions. The practice in international arbitration is too varied for the Guidelines to be able to reflect the possible solutions and all aspects of arbitral practice. Thus, for the proper conduct of an arbitration, the arbitrators and the parties will require knowledge of the law and practice of arbitration beyond the information contained in these Guidelines.

14. As preparatory conferences are not used with equal frequency in all regions and arbitration venues, the Guidelines would contribute to the dissemination of practical knowledge about arbitration. By doing so, the Guidelines may gradually foster improvement, better understanding and harmonization of international arbitration procedures.

D. Relationship between the Guidelines and arbitration rules

15. The Guidelines are not rules suitable to be agreed upon. A decision to refer to the Guidelines in connection with a preparatory conference does not establish any obligation for the arbitral tribunal or the parties as to the selection of topics to be considered or as to decisions to be taken as a result of the conference. Thus, a preparatory conference is to be carried out within the limits of the arbitration rules that the parties may have agreed upon.

16. The decision to use the Guidelines does not imply any modification of the arbitration rules that the parties may have agreed upon. Nevertheless, at a preparatory conference decisions may be taken that add more detail or new requirements to the arbitration rules agreed upon by the parties. Decisions may also be taken to modify the agreed arbitration rules.

[17. Since the arbitral process is based on the freedom of parties to agree on rules of procedure or to empower the arbitrators to determine those rules, nothing is in principle to be held against adding to or modifying the agreed upon rules. Nevertheless, two reservations should be expressed. Firstly, when the arbitration is administered by an arbitral institution, the institution may reserve the right not to approve a modification of the rules. In fact, some institutions are reluctant to agree to modifications of their rules. Secondly, it is advisable that a modification of a standard set of arbitration rules be well considered. The parties should be mindful that standard sets of rules are designed to function as a system of rules, and that a modification of a rule may affect the system in an unintended or inappropriate manner. Moreover, as arbitration rules determine the duties and prerogatives of the arbitral tribunal, the arbitrators have an interest in any modification of those rules. It is therefore recommendable that a modification of arbitration rules be made in consultation with the arbitral tribunal.]

18. It should be borne in mind that, whatever decisions are taken as a result of the preparatory conference, they should not violate provisions of the law applicable to the arbitration that cannot be derogated from.

II. CONVENING AND CONDUCTING PREPARATORY CONFERENCE

19. It is stressed at the outset that, if a preparatory conference is to be held, its organization, agenda and the manner in which it is conducted should be adapted to the needs of the case, in line with the principle of flexibility and discretion generally governing arbitration. Furthermore, it is for the arbitral tribunal to take care that the holding of a preparatory conference does not add unnecessarily to the costs of the proceedings or prove to be an administrative burden.

20. A preparatory conference is often convened on the initiative of the arbitral tribunal or the presiding arbitrator, frequently after consulting the parties. The question of whether

the arbitral tribunal has the right to convene a preparatory conference depends on the procedural prerogatives of the arbitral tribunal as specified in the governing procedural law and any agreed upon rules. Arbitration rules and laws typically give the arbitral tribunal such procedural latitude that the right to convene a preparatory conference falls within the tribunal's authority. Some arbitration rules contain specific provisions concerning the preparatory meetings of the type discussed in these Guidelines.

21. It is possible that a party has doubts about the usefulness of, or objects to, holding a preparatory conference. Such an attitude will be taken into account by the arbitral tribunal in considering whether it is worthwhile to convene the conference. A negative attitude might indicate that a preparatory conference should not be held since it may not fully meet its objectives.

22. There might, however, be cases where the arbitral tribunal would conclude that a preparatory conference should be held despite reservations or objections of a party. Such may be the conclusion when the tribunal procedural wishes to take certain procedural decisions only after giving the parties the opportunity to express their views. If a party should fail to participate in the preparatory conference, the arbitral tribunal may consider it appropriate to hold the conference and take the procedural decisions without having heard the views of that party. For a preparatory conference to be held in the absence of a party, it is necessary, in accordance with general principles of arbitral procedure, that the party was given due notice and has not shown sufficient cause for its failure to appear. What is sufficient cause is a matter to be judged in the light of the circumstances of the case and the standards of fairness and equality. If a party who was duly notified fails to appear without having indicated its intention not to appear, it is normally wise not to proceed until after first enquiring about the reasons for the party's absence.

[23. Usually, the participants in the preparatory conference will be the parties themselves, their legal counsel and any other representatives of the parties. Sometimes, however, the arbitral tribunal may indicate in the invitation to the conference that, in view of the types of questions to be discussed, it would satisfy the objectives of the conference if only the legal counsel are present. For example, when the matters to be discussed are limited to the rules governing the arbitral procedure, practical arrangements concerning written statements or administrative support, the presence of the legal counsel may be sufficient.]

24. Often, a decision to plan arbitral proceedings means that the participants will hold a meeting at the place of arbitration or at some other appropriate place. Sometimes, however, in particular if a limited number of procedural issues is to be considered, it may be sufficient if under the coordination of the presiding arbitrator consultations are carried out by telecommunications.

A. Cases in which preparatory conference may be useful

25. While planning of the proceedings is a necessary and usual activity in any arbitration, convening a preparatory conference for that purpose is not a necessity. Indeed, in many arbitrations, planning is carried out by procedural decisions of the arbitral tribunal without calling a special meeting. It may be decided not to convene a preparatory

conference in particular when the participants have a good idea as to how the proceedings will be conducted, when the participants are not likely to have disparate expectations as to the arbitral procedure, or when the case is relatively simple. In such cases, the Guidelines may be of assistance by reminding the arbitral tribunal about the issues on which early decisions might be worthwhile.

26. The usefulness of convening a preparatory conference depends on whether the time and expense needed for it are justified by the expected benefits, such as increased predictability of the subsequent proceedings, better understanding by the participants of the procedures, increased efficiency of hearings and an improved procedural atmosphere. In addition to the time and expenses, two types of considerations are likely to be important in deciding whether a preparatory conference should be held.

27. One consideration may be a belief that the parties do not have a sufficiently clear idea as to the manner of proceeding and that a personal exchange of views is needed to provide early guidance to the parties. A related consideration is the likelihood that the arbitrators, parties, and legal counsel are not used to the same procedural style, and therefore have divergent expectations as to the manner in which arbitral proceedings will be carried out (see also above, paragraph 5).

28. Another consideration is the degree of procedural complexity of the case in terms of, for example, the expected length of hearings, the number of witnesses to be heard, the extent and kind of expert evidence that may be needed, the probability that hearings will have to be held outside the venue of arbitration, the number of items of evidence to be assessed, the volume of documentation to be managed, or linguistic problems to be overcome. The more complex the case, the more useful it may be to convene a preparatory conference in order to coordinate and plan procedural actions, and to tailor the procedures to the circumstances of the case.

B. Stage at which preparatory conference may be held

29. No generally applicable guidelines can be expressed as to the stage of arbitral proceedings at which it is most appropriate to hold a preparatory conference. When the claimant's initial request for arbitration does not cover all factual and legal aspects of the claim, the question is whether the arbitral tribunal should schedule the preparatory conference to follow that initial request or whether the conference should be held later, most likely shortly after the parties have stated their claims and defences. In some cases, it is considered useful to hold the conference before the claims and defences have been fully stated. In other cases, it is considered appropriate to convene a preparatory conference shortly after the submission of the statements of claim and defence.

30. The stage at which the preparatory conference is held influences the scope of the agenda of the preparatory conference. When the conference is held before the claims and defences have been fully stated, the agenda will typically be more limited and will probably not cover, or will cover to a limited extent, questions such as defining points at issue, various arrangements concerning evidence, statements of undisputed facts or undisputed

issues, or preparations for hearings. One likely topic of such an early preparatory conference will be the preparation of documents completing the statements of claim and defence.

31. In exceptional cases, which appear to be limited to most complex arbitrations, more than one preparatory conference might be held. As the expenditures and time needed for a preparatory conference are major limitations, the opportuneness of more than one conference may be increased if the participants reside near the place of arbitration. More than one conference may be planned at the outset of the proceedings, or the development of the proceedings may prompt the arbitral tribunal to convene an additional conference. In some of those cases, the main purpose of a subsequent conference may be to review how the parties were able to implement procedural decisions taken earlier and to take corrective measures if necessary.

32. Often the decisions taken as a result of a preparatory conference imply that there should be an interval between the conference and the next stage of the arbitral proceedings. During the interval, the parties are to implement the decisions and prepare for the proceedings. Nevertheless, it is often acceptable to plan and prepare procedural actions at a conference held shortly or immediately before hearings on the substance of the dispute. It should be noted, however, that such preparatory activities carried out close to the hearings would have a limited scope in that they cannot address procedural questions that imply time for preparations.

C. Decisions taken at preparatory conference

[33. The purpose of a preparatory conference is to facilitate making decisions as to the manner of proceeding during the subsequent arbitral proceedings. Most of those decisions will be of a procedural nature. Some decisions, however, may concern or touch upon the substance of the dispute (e.g., determination of points at issue, or agreement of the parties that certain facts or issues are undisputed).]

34. Different approaches are possible concerning the way in which decisions are arrived at and recorded. Under one approach, the arbitral tribunal takes decisions after consulting with the parties and issues the decisions in the form of a procedural order. Another approach, which may be taken when the parties are ready to agree on one or more issues, is to record the substance of the agreement. When this approach is used, the parties' agreement may be incorporated into a document signed by the parties or into a document drawn up and issued by the arbitral tribunal reflecting the agreement of the parties.

35. One difference between the two approaches is that it is usually more expeditious for the arbitral tribunal to take decisions itself instead of engaging in discussions with the parties in order to reach agreement on the wording of the decisions. Another difference is in the manner in which a decision emanating from the preparatory conference can later be modified: while a procedural decision by the arbitral tribunal can be modified by the tribunal itself, a procedural agreement by the parties can only be modified if the parties so agree.

36. The degree of detail in formulating procedural decisions varies. Some practitioners tend to formulate a detailed and comprehensive set of decisions, while others prefer more general decisions, leaving details to be decided upon by the arbitral tribunal as appropriate during the subsequent arbitral proceedings. In deciding on the level of detail of a decision, it is advisable to take into account that, with a detailed and specific decision, the possibility is greater that the decision would have to be modified as a result of a change in circumstances.

III. ANNOTATED CHECKLIST OF POSSIBLE TOPICS FOR PREPARATORY CONFERENCE

37. In order to enable the parties to prepare for and efficiently participate in a preparatory conference, it is useful that they be given advance notice of the agenda for the conference. Usually, the agenda is prepared by the arbitral tribunal or the presiding arbitrator. Sometimes, views of the parties are sought as to the topics to be included in the agenda.

38. It is generally useful for the arbitral tribunal in conducting the preparatory conference to adhere to the agenda announced in advance. By avoiding matters that participants may not have prepared for, expeditiousness will be fostered. Nevertheless, it is also useful to maintain a degree of flexibility and allow, if the arbitral tribunal considers it appropriate, that an unannounced topic be considered.

39. The following sections A to T are a checklist of topics that an arbitral tribunal might include in the agenda for a preparatory conference. The list is intended to be quite complete so as to provide a reminder for as many different circumstances as possible. It is emphasized, however, that in drawing up the agenda the individual circumstances of the case should be borne in mind, and that, indeed, in many arbitrations only a limited number of the matters mentioned in the checklist will need to be considered. On the other hand, the checklist is not presented as exhaustive. There may be other issues that the participants may wish to address at a conference of the type covered by these Guidelines.

[A. Rules governing arbitral procedure

Agenda: If the parties have not agreed on arbitration rules, enquire whether they now wish to do so.

Remarks

1. Sometimes parties forgo including in the arbitration agreement a stipulation as to a set of arbitration rules that is to govern the arbitral proceedings. Reasons may be, for example, that at the time of the conclusion of the arbitration agreement the parties did not pay attention to that aspect of the arbitration agreement, did not want to prolong the

negotiations, or intended to leave the manner of conducting the proceedings to the arbitral tribunal and the applicable procedural law.

2. It is advisable to ascertain whether both parties wish to consider the possibility of agreeing on a set of arbitration rules. Otherwise, an initiative of the arbitral tribunal for the parties to adopt a set of arbitration rules might give rise to unnecessary discussions, to an undesirable impression that the arbitral tribunal is unsatisfied with the substance of the arbitration agreement or that the arbitrators have a difficulty with their task. If after bringing up the question it emerges that agreement is not easily attainable, the arbitral tribunal may wish to discontinue the discussion on the matter and proceed on the basis of the arbitration agreement and the applicable procedural law.]

[B. Jurisdiction and composition of arbitral tribunal

Agenda: Enquire whether a party has an objection as to the jurisdiction or the composition of the arbitral tribunal.

Remarks

Raising the matter of jurisdiction or the composition of the arbitral tribunal may not always be desirable. A possible disadvantage might be that thereby the arbitral tribunal creates a possibly incorrect impression that the jurisdiction or the composition of the arbitral tribunal is in doubt, which a party might try to use to stall the proceedings. An advantage, however, may be that any question, doubt or objection that a party may have can be addressed and dispelled at an early stage of the proceedings. Furthermore, by putting on record that an issue concerning jurisdiction or composition of the tribunal has been settled or that no such issue has been raised, a party may rely on that record should the other party have an objection at a later time.]

C. Possibility of settlement

Agenda: Enquire whether the parties are willing to inform the arbitral tribunal about the status of any settlement discussions and whether those discussions should affect the scheduling of the arbitral proceedings.

Remarks

[1. Parties may have different attitudes as to whether the arbitral tribunal should be aware of any settlement discussions that might have taken place or are intended to take place. Often, a party or both parties wish to keep any settlement discussions completely separate from the arbitration and may also wish that the arbitral tribunal should not be informed about the fact that such discussions have taken place or about the substance of the discussions. In other cases, the parties may wish the arbitral tribunal to be aware of the fact that settlement discussions are taking place or will take place. A reason for informing the arbitral tribunal may be for it to take that into account in scheduling the arbitral proceedings. Sometimes, the parties might even wish the arbitrators to be involved in an appropriate manner in settlement discussions in order to facilitate reaching a settlement.]

[2. When an arbitrator is involved in an attempt to settle a dispute, views differ as to whether such an involvement in an unsuccessful attempt to settle the dispute affects the arbitrator's ability to continue performing its function. Under one view, the roles of a conciliator and an arbitrator are not incompatible, provided that the manner in which the person participated in settlement negotiations does not compromise the person's ability to act in an impartial manner. According to another view, the fact that a person has acted as a conciliator calls into question its ability to act as an impartial arbitrator in the same dispute and, according to some, such a person is automatically disqualified from acting as an arbitrator.]

3. If the parties wish to inform the arbitral tribunal of the status of settlement discussions, they may wish to limit the consultations, in the interest of brevity and effectiveness of the preparatory conference, to the following:

(a) whether settlement discussions have taken place or are likely to take place, without entering into a discussion of possible terms of a settlement, and whether the possibility of settlement discussions should affect the scheduling of the arbitral proceedings; and

(b) if it appears appropriate, whether the parties have considered, or are willing to consider, engaging in conciliation, a procedure in which an independent and impartial conciliator assists the parties in their attempt to settle the dispute. Should the parties so wish, it may be useful to discuss available conciliation methods (for example, the method provided by the UNCITRAL Conciliation Rules).

D. Defining issues and order of deciding them

Agenda: (i) Define the points that are at issue between the parties;
(ii) define more precisely, if necessary, the relief or remedy sought;
(iii) consider the order in which the issues should be decided.

Remarks

Item (i)

1. It is useful for the points at issue to be identified as early as practicable in the proceedings. This will help the parties and their advisers to identify undisputed facts, concentrate on the essential matters and possibly settle some of the claims. Moreover, this will assist the participants in determining the best procedures for resolving the issues. For example, if the most difficult issues are ones of fact, a party might take steps to secure relevant evidence and engage expert witnesses; if, however, the facts are largely undisputed and the issues concern law, it might be possible to request that the proceedings be conducted on the basis of documents only.

2. One approach to identifying the points at issue may be for the arbitral tribunal to do so on the basis of the written statements of the parties. However, whether the arbitral

tribunal will be able to do so with reasonable dispatch depends on how the parties have stated their cases. Practices differ as to the matters that parties include in their statements, the style and length of presentation, and the stage of proceedings at which the parties are expected to present the facts, evidence and legal arguments supporting their claims. Under some procedural traditions, the initial statements are largely limited to facts, whereas legal arguments and even evidence are brought up later, sometimes as late as during the hearings. Under other traditions, a more comprehensive approach is expected already at the initial stage of the arbitration in that a statement of claim should include facts, references to evidence and legal arguments. Differences exist also as regards the level of detail at which facts, evidence and arguments are set forth in writing. In order to facilitate the identification of the issues by the arbitral tribunal, it is worthwhile sufficiently early to give to the parties guidance and suggestions for preparing the submissions, indicating, for example, the desired structure, scope and the level of detail of the submissions (see below, J, "Arrangements concerning written submissions", item (iv)).

3. Another approach to identifying the points at issue may be for the arbitral tribunal to request the parties to draw up a list of those points. If it appears unlikely that the parties are in a position to prepare a joint list, each party may be requested to prepare a list of points that in its view are at issue.

4. For ease of reference, it is often helpful if the issues, with short indications as to opposing positions, are systematically summarized in a list or a schedule. In a complex dispute, different lists may be prepared, for example, one concerning issues of liability, and another one, which might be drawn up later, concerning various items of the claim for damages.

5. When the case is particularly complex, and the statements of claim and defence have not yet been submitted, the advisability of early consultations as to a common approach to preparing the statements of claim and defence and identifying the issues may make it worthwhile to convene a preparatory conference promptly after the arbitral tribunal has been formed. (As to the time of convening a preparatory conference, see above, II, "Convening and conducting a preparatory conference", paragraphs 29-32.)

Item (ii)

[6. The relief or remedy sought by a claimant or counter-claimant must be sufficiently definite for the arbitral tribunal to be able to decide on it. Criteria are not uniform as to how specific the claimant must be in formulating a relief or remedy. A possible reason for an insufficiently precise formulation may be the fact that the claimant is uncertain as to the extent of its rights under the applicable law and a resulting desire to leave to the arbitral tribunal the decision on the extent or even the type of the relief or remedy due to the claimant.]

[7. It is advisable that the claimant assure itself that, should its arguments be accepted, the formulation of the claim will not be an obstacle to granting the full relief or remedy. If the claim is not formulated according to the criteria of the arbitral tribunal, it is possible that the claim will be decided on only in so far as it is definite.]

8. If the arbitral tribunal considers that the relief or remedy sought is insufficiently definite, the preparatory conference may be an appropriate time to explain to the parties the degree of definiteness with which their claims are to be formulated.

Item (iii)

9. Having clarified the points at issue, the arbitral tribunal may wish to determine the order in which the issues are to be taken up. The order may be determined by the fact that one of the issues is preliminary with respect to another issue. For example, a decision on the disputed jurisdiction of the arbitral tribunal is preliminary to the other issues, or the resolution of questions concerning the existence of the contract and the responsibility for its non-performance is preliminary to the question of damages arising from the non-performance. When various items of damages are claimed or if the breach of different contracts is in dispute, the order of considering and deciding the issues may depend on considerations such as the time thought to be needed for each item, the amounts in question, prospect of success of the claim, and the interests of the parties.

[10. After deciding on the order of deciding the issues, the arbitral tribunal might consider it appropriate to incorporate the decision on one of the issues into an award and leave the award on the other issues to be issued subsequently. "Partial", "interim", or "interlocutory" award are terms used in contractual and statutory rules for such awards addressing one of the several issues submitted to the arbitral tribunal. The use of one or the other term depends on the type of issue dealt with in the award and on whether the award is final with respect to the issue it resolves.]

[11. The arbitral tribunal may, for example, decide to limit the award to an issue such as its jurisdiction, interim measures of protection, existence of the contract out of which the claim arises, liability of the defendant, or a segment of the damages claimed. Such awards addressing only some issues might be used, for example, when it is considered fair to advance deciding on a discrete part of a claim; if it is expected that after certain issues have been decided the parties might be more inclined to settle the remaining ones; or in order to give a party an early opportunity to raise a recourse against the decision on a preliminary issue.]

E. Undisputed facts or issues

Agenda: Enquire whether the parties are willing to agree that certain facts and issues are undisputed.

Remarks

1. If facts or issues relevant in the dispute are agreed by the parties to be undisputed, there is no need to prove those facts or to argue those issues. Thus, by such agreement the parties will reduce the time and expense for taking evidence and for arguments.

2. Different approaches may be used for arriving at a statement of undisputed facts and issues. One may be that the arbitral tribunal gives the parties a period of time for preparing a joint statement of undisputed facts and issues. Another approach may be for the presiding arbitrator or the arbitral tribunal to draw up, on the basis of written submissions and consultations with the parties, a statement of facts and issues, which is to be presented to the parties for agreement.

[3. The arbitral tribunal may clarify at the preparatory conference that, should a party refuse to admit a fact advanced by the opponent and it becomes clear that the party had no reason to doubt the fact, the tribunal may take that into account, together with other circumstances, in apportioning the costs of the arbitration. This may be an effective stimulus to reduce the time and costs for the taking of evidence.]

F. Arrangements concerning documentary evidence

Agenda: The following may be considered regarding documentary evidence:

(i) a time schedule for submitting documentary evidence;
(ii) whether, unless a party contests a document within a specified period of time: (a) the document is accepted as having originated from the source indicated in the document, (b) a copy of a communication (e.g., letter, telex, telefax) is accepted without further proof as having been received by the addressee and (c) a photocopy is accepted as correct;
(iii) whether the parties agree to submit jointly a single set of documentary evidence whose authenticity is not disputed;
(iv) whether voluminous or complicated documentary evidence should be presented by reports by qualified persons which may contain summaries, tabulations, charts, extracts or samples;
(v) whether a party intends to seek, or request the arbitral tribunal to seek, production of documentary evidence from the other party.

Remarks

Item (i)

1. Many arbitration rules empower the arbitral tribunal to fix periods of time for submitting documentary and other evidence. A discussion of those periods at the preparatory conference will be conducive to deciding realistic and fair time-limits.

2. In some cases it may not be possible or advisable to establish at an early stage of the proceedings a final and comprehensive time schedule. For such cases it may be decided that the established time schedule will be reviewed and supplemented as appropriate.

3. The arbitral tribunal may clarify to the parties that the tribunal will not admit late submissions of evidence. In the interest of fairness of the proceedings, exceptions may have to be made, in particular when new evidence is submitted in order to rebut other

evidence, when a piece of evidence has been discovered after the deadline, or when the arbitral tribunal for another reason considers that a late submission should be allowed.

Item (ii)

4. It may be decided that the presumption as to the origin and receipt of a document and as to correctness of a copy applies to all documents or only to specified categories of documents. Such a decision may be useful to simplify the introduction of documentary evidence or to discourage making unfounded and dilatory objections at a late stage of the proceedings concerning the probative value of documents.

5. In order to allow each party to review the documents before the presumption would apply, it should be provided that the presumption applies unless the document is contested within a specified time period. It may be added that, even if a document is contested late, the presumption does not apply if the arbitral tribunal considers the delay justified.

Item (iii)

6. The parties may wish to agree to submit jointly a single set of documents whose authenticity is not disputed. It should be made clear to the parties that the purpose of this procedure is to avoid duplicate submissions and discussions concerning the authenticity of documents, and that the procedure does not prejudice the position of the parties concerning the significance of the content of the documents. When in large cases the single set of documents is too voluminous to be easily manageable, it might be practical to select a number of frequently used documents and establish a set of "working" documents.

Item (iv)

7. When documentary evidence is technical or voluminous, examination of all underlying data may be disproportionately time consuming. In such cases, savings may be achieved if a source such as a public accountant or consulting engineer is appointed to analyse the documentation and present a report. The report may present findings in the form of summaries, tabulations, charts, extracts or samples. It is advisable to discuss the terms of reference to be observed in preparing the report and a time schedule.

8. Such a decision should be combined with arrangements that give the parties the opportunity to review the underlying data and the methodology of preparing the report based on that data.

Item (v)

9. Many arbitration rules expressly empower the arbitral tribunal to require the parties to produce documentary and other evidence. In addition to that power, at some arbitration venues specific procedures are in use on various forms of "discovery" of evidence, whereby a party has a right to obtain from the other party pieces of evidence. Those procedures, as specified in arbitration rules and national laws and as applied by arbitrators, vary widely.

10. Unless the agreed arbitration rules provide specific solutions, the arbitral tribunal might consider it appropriate to discuss at the preparatory conference to what extent a party should have a right to seek production of documents from the other party. Such a discussion may be useful in particular where, due to different legal backgrounds, the arbitrators and the parties have different notions as to how that right is to be exercised.

11. One possible set of conditions for requesting a document from the opponent may be formulated along the following lines: the document must be described with reasonable particularity; the document must be such that it would likely contribute to the clarification of the case; the document must be within the control of the party from whom production is sought; and the seeking party must have made reasonable but unsuccessful efforts to obtain the document. A further condition that might be included, either unqualified or subject to discretion by the arbitral tribunal, is that the document must have passed between the requested party and a third party who is not a party to the arbitration, a condition that would exclude requests for purely internal documents. It might be appropriate to clarify that, if the requested party refuses to comply with a proper request, the question as to whether the refusal was justified is to be decided by the arbitral tribunal.

12. As an alternative to setting out specific conditions such as the ones mentioned in the preceding paragraph, the parties might make a generally worded stipulation to the effect that they will make available to each other documents relevant to the dispute and that the arbitral tribunal should exercise discretion in deciding whether a request for documents should be complied with.

13. In deciding disagreements as to whether a request for a document should be complied with, the arbitral tribunal will take into account, among other circumstances, the principles in national laws concerning situations in which the party is entitled to refuse to surrender a document. Grounds for refusal may concern, for instance, national defence, diplomatic relations between countries, certain governmental actions, certain communications between a client and its legal counsel, or the right of a person to refuse to take a self-incriminating action.

14. It may be useful to establish a time-frame for submission of a request for documents, for production of documents or other response to the request. The parties should be reminded that the arbitral tribunal would be free to draw its conclusions from the failure of a party to produce a properly requested document.

G. Arrangements concerning physical evidence

Agenda: (i) Consider whether physical evidence other than documents will be presented;

(ii) enquire whether it will be necessary for the arbitral tribunal to carry out an on-site inspection of property or goods.

Remarks

Item (i)

1. It may be necessary for a complete understanding of facts to assess physical evidence other than documents (e.g., by inspecting samples of goods or other materials, viewing a film or a model or demonstrating the functioning of a machine). It may be useful to enquire whether a party intends to submit such evidence so that appropriate arrangements may be taken, such as fixing the time schedules for presenting the exhibits, ensuring that the other party has suitable opportunity to prepare itself for the presentation of the evidence, and possibly taking measures for safekeeping the exhibits.

Item (ii)

2. If a party intends to request, or the arbitral tribunal expects to order, an on-site inspection of property or goods, it may be useful to consider arrangements therefor and time schedules.

3. The site to be inspected is often under the control of one of the parties, which typically means that employees of that party will be present to give guidance and explanations. In order to avoid communications between arbitrators and a representative or employee of a party without the presence of the opposing party, particular attention has to be paid to the invitations, timing and meeting places. Furthermore, it should be borne in mind that, unless those employees are heard as witnesses, replies to questions asked of such employees at the site are not testimonies and should not be treated as evidence in the proceedings.

H. Arrangements concerning evidence of witnesses

Agenda: The following may be considered:

(i) written communications concerning evidence of witnesses;
(ii) manner of taking oral evidence by witnesses;
(iii) manner of taking evidence from persons affiliated with a party.

Remarks

Item (i)

1. Unless the agreed upon rules contain procedures for announcing and taking evidence of witnesses, it may be considered whether the party presenting witnesses should be required to submit to the arbitral tribunal and the other party, in advance of the hearing, a written communication concerning the evidence of witnesses. Such a communication may be required to contain some or all of the following elements:

(a) the names and addresses of the witnesses and the language or languages to be used in case of oral testimony;

(b) the subject on which the witness will give oral testimony; instead of requiring merely the subject of the testimony, the parties may be required to submit a summary of the statements to be made by the witness; another possibility may be to require a full statement signed by the witness;

(c) particulars concerning the relationship with any of the parties, qualifications and experience of the witnesses, and how did the witness learn about the facts to which the testimony will relate.

In giving instructions to the parties, it may be useful to provide guidance also as to the expected level of detail of the statements and summaries.

2. As such procedures in taking evidence of witnesses are not known in all legal systems, it is advisable that an arbitral tribunal that directs such procedures take care that the parties understand what the tribunal desires.

3. Such written communications submitted ahead of hearings may facilitate and expedite the proceedings by making it easier for the opposing party to prepare for the hearings and for both parties to identify uncontested matters. If the communication sets out the full statement of the witness, the parties will sometimes agree to forgo oral testimony and rely on the written statement only.

4. A question to be decided is whether the communications will be exchanged simultaneously or consecutively. In certain circumstances, it may be felt that the party who is the first one to present a written statement of a witness is giving an advantage to the opponent in that the opponent, in preparing written statements of its witnesses, might be able to adapt them to the received written testimony. As a result of such considerations, it is sometimes preferred that the statements of witnesses be exchanged simultaneously. (See also below, J, "Arrangements concerning written submissions", item (iii), concerning the order of submitting written submissions.)

5. The tribunal may make it clear that it reserves the right to refuse to hear a witness at a hearing if the required communication has not been submitted in time.

6. Practices and laws differ as to whether written statements of witnesses are to be made under oath. If an oath is to be used, it may be unclear how and by whom the oath is to be administered. It is thus advisable to adopt a solution that is workable and acceptable for both parties. Among the possible solutions, one is to avoid a traditional oath and require the witness to sign a written declaration to the effect that the statement is true to the best of knowledge and belief of the witness.

Item (ii)

7. National arbitration laws usually neither prescribe detailed rules for hearing witnesses nor require adherence to rules used in court proceedings. Thus, as long as the principles of fairness and equality of parties are observed, procedures considered

appropriate for the case may be adopted. It is advisable that the manner of hearing witnesses be clarified as much as possible before the hearing so as to avoid surprise and allow the parties to prepare for the hearings.

8. The preferred method of taking evidence by witnesses is usually a result of the experience of the participants with traditional approaches developed in court litigation. Those traditional approaches are in varying degrees influenced by one of the two major systems of procedural law. According to one system, it is in principle left to the parties to gather and present evidence at oral hearings. Thus it is for the party presenting a witness to ask questions of that witness, and for the opponent to test the veracity of the answers by cross-examining the witness. Under that system, the role of the judge is limited to the procedural control over the examination and cross-examination of the witnesses. According to the other system, the judges tend to participate more actively in the questioning of witnesses. An important element of this system is the expectation that the judge is as much as possible informed about the factual issues considered at the hearings, which is achieved by submitting to the judge written allegations and evidence before the hearings.

9. The method to be adopted for questioning witnesses may be inspired by one of the two following approaches:

- a witness may first be questioned by the arbitral tribunal, whereupon the party who called the witness is given the opportunity to examine the witness and the other party to cross-examine it under the control of the arbitral tribunal;
- a witness is questioned by each party in the appropriate order, while the arbitral tribunal retains control over the process and the possibility to pose questions during or after the questioning by the parties.

10. Arbitral practices vary as to the degree of control of the arbitral tribunal over the hearing. For example, some arbitrators prefer to permit the parties to pose questions freely and directly to the witness, subject to procedural control of the arbitral tribunal, including the right to disallow a question; other arbitrators consider that questions by a party to a witness should be put through the arbitral tribunal. An early clarification is likely to be appreciated.

11. When several witnesses are to be heard over a period of more than a day or two, it is likely to reduce costs if the order in which the witnesses are to be heard is known in advance, and the presence of witnesses can be scheduled accordingly. Each party may be invited to suggest the order in which it intends to present the witnesses, while it would be up to the arbitral tribunal to approve the order and to authorize departures from it.

12. Some arbitrators favour the rule that, except if the circumstances require otherwise, the presence of a witness in the hearing-room is limited to the time when that witness is testifying; the purpose is not to let the witnesses to be influenced by what they hear during the hearings. Other arbitrators, on the other hand, consider that the presence of a witness during the testimony of other witnesses may be beneficial in that possible contradictions may be immediately clarified or that their presence may act as a deterrent against untrue statements. Another possible approach may be that witnesses, who are ordinarily not

present in the hearing-room before their testimony, stay in the room after they have testified.

13. Sometimes stenographic transcripts are made of the testimonies. Alternatively, summaries of the testimonies are dictated by an arbitrator, usually the presiding arbitrator. In other cases, the participants take only personal notes and no summary or transcript of the testimonies is made part of the written record of the proceedings. (See also below, L, "Hearings", item (vi).)

Item (iii)

14. The person from whom factual information is to be obtained may be affiliated with one of the parties in dispute, for example, as an agent, executive or employee. Differences exist among legal systems as to whether such persons interested in the outcome of the dispute can be heard as witnesses. Under some legal systems, such persons cannot be witnesses, in which case it may be necessary to consider criteria for determining the persons or categories of persons who are to be excluded. If some persons will not be accepted as witnesses, it may be useful to consider how the arbitral tribunal will receive information from them.

15. Where interested persons can be heard as witnesses, it is widely held that hearing statements of fact by those persons should in some respects be treated differently from the taking of evidence of other witnesses. Typical differences are the following: while the arbitral tribunal may have discretion as to whether evidence of a particular witness is to be taken, the tribunal does not have such a discretion as to whether an agent of a party is to be heard; unlike an agent, who should be permitted to be present in the room throughout the hearings, the arbitral tribunal may decide that a witness should not be present when other witnesses testify or other evidence is taken; in addition, if witnesses are to give evidence under oath, this may not be appropriate for an agent.

I. Arrangements concerning evidence of experts

Agenda: (i) If the arbitral tribunal intends to appoint an expert, or more than one if necessary, consider relevant procedures;
(ii) enquire whether either party intends to present expert witnesses and, if so, consider procedures in that regard.

Remarks

1. Often, a number of matters concerning evidence of experts are addressed in the agreed upon arbitration rules and the applicable procedural law. As to the appointment of an expert, in many cases the arbitral tribunal as well as the parties may engage an expert to give evidence. In other cases, it is up to the parties to present expert testimony. In the latter case, the consideration at the preparatory conference would be limited to item (ii).

2. If, at the stage when the preparatory conference is held, the arbitral tribunal cannot yet judge whether it should appoint an expert, the consideration of this item may be postponed.

Item (i)

3. Discussing the question of possible engagement of a tribunal-appointed expert may be particularly useful when the parties, despite the fact that the arbitral tribunal is empowered to engage an expert, may be uneasy about the possibility that the opinion of a person unknown to them could influence the outcome of the dispute. Raising this question may also be useful when the arbitral tribunal is of the view that no expert is needed or, even if needed, the tribunal prefers not to appoint one, as such a view may influence the way in which the parties will present their evidence.

4. If an expert is to be appointed by the arbitral tribunal, the following matters may be discussed: (a) the appointment procedure, (b) the expert's terms of reference, (c) the manner in which the parties are to participate in the evaluation of the expert's report, including by presenting party-appointed experts, and (d) the costs.

5. Different ways are possible for the arbitral tribunal to appoint an expert. For example, the tribunal may appoint a person enjoying the confidence of the arbitrators. Another possibility may be for the tribunal to seek the views of the parties; this may be done without mentioning a candidate, by presenting a list of possible candidates, or by soliciting from each party a list with a view to identifying a mutually agreed candidate. The arbitral tribunal may wish to bear in mind all circumstances of the case in selecting the method of appointment and in determining the degree to which it is desirable to strive to appoint an expert agreed to by the parties.

6. The purpose of the terms of reference of the expert is to specify the questions on which the expert is to provide clarification and to avoid opinions on points that are not for the expert to assess. Even if the terms of reference are for the arbitral tribunal to determine, it may wish to consult the parties before finalizing them. In order to facilitate the evaluation of the expert's report, it is advisable to require the expert to include in its report information on the method used in arriving at the conclusions and the evidence and information used in preparing the report. Since matters to be covered by the report are ordinarily technical and detailed, it is usual that the expert is required to present a written report. For the case that oral hearings will be held, it is normal to require the expert to be ready to testify on the report at a hearing.

7. As the parties, in accordance with general principles of arbitral procedure, are entitled to be able to contradict or comment upon the expert's report, it may be useful to consider at the preparatory conference the procedures and time periods for doing so. If the expert is to present a written report, the parties should be given an opportunity to comment on it in writing. If, in addition to a written report, or in exceptional cases instead of a written report, hearings are to be held for the purpose of explaining the expert's conclusions, it would be in line with general principles of arbitral procedure to give each party an opportunity to interrogate the expert at the hearing, and to present an expert witness to testify on the points covered in the report of the tribunal-appointed expert.

8. For the case that the paid deposits for costs will not be sufficient to cover the costs of the tribunal-appointed expert, it may be necessary to clarify at the preparatory

conference that, as soon as the estimated costs of the expert are ascertained, additional deposits are to be paid.

Item (ii)

9. If a party intends to present one or more expert witnesses, it may be decided that each expert must be announced, and that the expert should be available to participate in hearings and be called upon to answer questions, similarly as other witnesses (see above, H, "Arrangements concerning evidence of witnesses", items (i) and (ii)).

J. Arrangements concerning written submissions

Agenda: It may be useful to consider the following:

(i) whether the parties will be requested, or whether they intend, to present written submissions, in addition to the statements of claim and defence;
(ii) the stage at which written submissions are to be made;
(iii) whether the arbitral tribunal expects the submissions on a particular issue to be made consecutively or simultaneously;
(iv) the structure of a submission;
(v) a time schedule for presenting the submissions;
(vi) routing the submissions.

Remarks

Item (i)

1. After the parties have presented to the arbitral tribunal their claims and defences, they may wish, or the arbitral tribunal may request them, to submit further writings in which they provide explanations of evidence or law, analyse facts, admit or deny allegations, or make proposals and react to proposals. Such written submissions are in practice referred to by expressions such as memorial, counter-memorial, brief, counter-brief, réplique, duplique, rebuttal, rejoinder. The expressions reflect either a particular linguistic usage ("memorial" as opposed to "brief") or a sequence of submissions.

2. Further kinds of documents that might be included in the submissions of the parties may include the following:

- list of points that are at issue between the parties (see above, D, "Defining issues and order of deciding them", item (i), remark 4);
- materials concerning the law applicable to the substance of the dispute such as texts of statutory provisions, texts of court decisions or other precedents, or legal opinions;

- lists of court cases or other precedents referred to in the submissions of the parties;
- chronology of events (in complex cases, a list of events relevant to the case, arranged in a sequential order, is sometimes prepared so as to facilitate discussions and references to individual events; the list may include both undisputed and disputed facts);

- list of persons (among the persons whose names may be mentioned in the proceedings, a number of them may not be known to every participant in the proceedings; for ease of reference, it may be useful to have available a list of those persons. An entry in the list might include the name and present function of the person and perhaps such additional particulars as the function during the events leading to the dispute, subsequent functions, address or nationality).

Item (ii)

3. Written submissions are often submitted before the hearings so as to clarify the issues and prepare the participants for the hearings, or, if no hearings are to be held, for deciding the case. If at the hearings new issues emerge, submissions after the hearings may be requested or allowed. Since such post-hearing submissions are typically limited to clarifying the remaining issues, they are usually subject to shorter time periods than pre-hearing submissions.

4. Some arbitral tribunals, however, follow the procedures according to which the parties are not required to present written evidence and legal arguments to the arbitral tribunal before the hearing. In such a case, the arbitral tribunal may consider it appropriate that written submissions be made after the hearings.

Item (iii)

5. Submissions on a particular issue may be made consecutively, i.e., the party who receives a submission is given a time period to react with its submission. This approach, which allows the reacting party to concentrate its arguments on points at issue, has the advantage of being an expeditious method for obtaining the views of the parties on a matter. A possible disadvantage, however, might be a perception that the party who is preparing a submission in response to arguments and proposals of the other party is advantaged by being able to tailor it better to its benefit. Such a perception is avoided when the parties are given the same time period for transmitting to the arbitral tribunal a statement on an issue; if both parties comply with the request, the submissions are transmitted simultaneously to the respective parties. (For a related consideration concerning the preparation of statements of witnesses, see above, H, "Arrangements concerning evidence of witnesses", remark 4).

Item (iv)

6. It is usually appropriate if a submission is structured so that it sets out the facts, states the law, and expresses a view or a proposal; the response may be arranged to present an admission or denial of the facts stated in the submission of the opponent, state any additional facts, make observations concerning the law as stated or interpreted in the submission replied to, possibly provide a different statement of law, and express a view or a proposal.

Item (v)

7. It is advisable that the arbitral tribunal set time-limits for written submissions. In enforcing the time-limits, the arbitral tribunal may, on the one hand, wish to make sure that the case is not unduly protracted, but, on the other hand, it may wish to preserve a degree of flexibility and accept late submissions if this appears appropriate in light of the circumstances of the case. Considerations that may prompt the arbitral tribunal to accept a late submission may be, for example, fairness, the content of the late document, and the desirability for each party to have the feeling that it had a full opportunity of presenting its case. In any event, it may be useful to make each late submission subject to an explanation and a special ruling as to whether it is permitted. (See also above, F, "Arrangements for documentary evidence", item (i)).

Item (vi)

8. Different routes are possible for the exchange of written statements in arbitral proceedings. One possibility is that a party transmits the statements to the arbitral tribunal with the understanding that the arbitral tribunal will transmit a copy to the other party. When an institution is administering the case, another possibility is for the statements to be filed with the institution, which then transmits them to the arbitral tribunal and the other party. A further possibility is that the statements are exchanged directly between the parties, with copies being sent to the arbitral tribunal. When a secretary or a registrar of the arbitral tribunal has been appointed (see below, section O), one of its duties may be to organize the routing of statements between the parties and the arbitral tribunal.

K. Practical details concerning exhibits and writings

Agenda: Consider some practical details concerning writings and exhibits, such as the number of copies in which each writing is to be submitted; a uniform system for numbering of exhibits; a method for identifying exhibits, including tabs; the requirement that when a party refers to a submitted document, the document must be identified by its heading and document number assigned to it; the requirement that paragraphs in documents prepared for the proceedings be numbered in order to facilitate precise references to parts of a text; the determination as to whether translations will be included in the same volume as the original text or will be submitted in a separate volume; the desirable size of paper used for written submissions so as to facilitate an orderly maintenance of files.

Remark

It might be helpful to establish practical arrangements such as those mentioned, in particular when extensive documentation is to be managed.

L. Hearings

Agenda: Consider whether hearings will be held and, if so, it may be useful to discuss the following:

(i) the expected length of hearings, whether the hearings will be held on consecutive days or will be separated, and a time schedule for the hearings;
(ii) whether any time-limit should be imposed by the arbitral tribunal on the length of oral arguments or testimonies;
(iii)the order in which the parties will make their oral presentations and whether opening statements or closing statements will be heard;
(iv) whether the parties may submit a written summary of the arguments made orally; if so, whether summaries should be submitted at the hearing or could be submitted shortly thereafter;
(v) whether witnesses will be required to make an oath or affirmation and, if so, its form, taking into account any laws of the place of arbitration governing the administration of oaths;
(vi) notetaking at the hearings.

Remarks

1. National laws often have provisions, some of them mandatory, as to when oral hearings must be held and as to when the arbitral tribunal is free to decide whether to hold hearings. Many arbitration rules also deal with the matter.

[2. Advantages of holding hearings include the following: when pieces of evidence are in conflict, when the accuracy of a written statement of fact is in doubt, or when arguments in documents need to be clarified, it is usually quicker and easier to deal with those questions in oral contradictory proceedings than by correspondence, which both parties must receive and have a possibility of commenting upon. Furthermore, a hearing offers a good opportunity for the arbitral tribunal to indicate to the parties, in a fair and impartial manner, what in the view of the tribunal are the strengths and weaknesses of their cases, which is likely to lead to a more effective presentation of cases. Disadvantages of oral hearings may include: high travel costs; presentation of a case at hearings requires experience and skill, which often makes expert representation necessary; in cases involving specialized professionals, whose calendars are frequently booked for months in advance, it may be difficult to agree on an expeditious schedule of hearings.]

Item (i)

3. When hearings are to be held, attitudes differ as to the appropriate length of hearings and how a hearing is to be organized. Some practitioners expect that most if not all evidence and arguments should be presented orally at the hearings, while others tend to rely more on documents and prefer to limit the hearings to issues that have not been clarified by the exchange of written submissions. A preparatory conference provides a useful opportunity to clarify such points.

4. When hearings are expected to last over a number of days, different approaches are followed in scheduling them. In some arbitration venues, hearings are usually planned to continue day by day until they are concluded. Some practitioners recommend that, after three or four days, hearings be interrupted for a day to review notes, analyse the progress and consider actions for the next block of hearings. In other arbitration venues, the tendency is to have, instead of a single long hearing, separate periods of hearings, for instance of two or three days, dealing with segments of the case; for example, the initial hearings may be devoted to hearing witnesses and later hearings to oral argument.

[5. The advantage of continuous hearings is that they involve less travel costs, the participants can concentrate on and dispose of the whole case, memory will not be faded, procedural momentum can better be maintained, and it is unlikely that people representing a party will have to change. On the other hand, the longer the hearings, the more difficult it is to find dates acceptable to all participants. The advantage of separate periods of hearings is that they are usually easier to schedule and that they leave time for analysing the records and negotiations between the parties on how to narrow the remaining issues by agreement. Narrowing of issues may be assisted if the arbitral tribunal, careful to maintain its impartiality, indicates to the parties its assessment of the argued issues.]

6. Whatever the chosen pattern of hearings, it may occur that new evidence or new issues emerge at the hearings or that the parties are unable during the planned time to present all evidence and complete their arguments. While by careful planning at a preparatory conference such a possibility can be reduced, it may be useful to plan some time to absorb such contingencies.

7. If, by the time the preparatory conference is held, the issues have not been fully defined by the exchange of written submissions, the arbitral tribunal is usually reluctant to fix at the preparatory conference the dates for oral hearings. This has the disadvantage that, when the time comes for fixing the dates, some participants (e.g., specialist advocates or expert witnesses) may not be available on short notice. This disadvantage may be mitigated by agreeing at the preparatory conference on "target dates", with the understanding that those dates will be either confirmed or rescheduled within an agreed reasonable time.

Item (ii)

8. As to the length of oral arguments and any testimonies, the arbitral tribunal may wish to discuss with the parties how much time they think they will need. On the basis of the views of the parties, the arbitral tribunal may allocate to each party an appropriate number of hours to use for arguments and questioning its witnesses or the other party's witnesses. Usually, the same time for each party is appropriate, unless a different allocation appears suitable. The arbitral tribunal may also wish to obtain express commitments from the parties that they will observe the time frame. Such planning of time and judiciously firm control by the arbitral tribunal of its use will allow the parties to prepare their speeches better and avoid that one party would unfairly use a disproportionate amount of time.

9. Furthermore, keeping the time for hearings within desirable limits will be facilitated if attention is paid to the need that the written submissions be appropriately structured and exhaustive, without being unduly copious.

Item (iii)

10. Under many arbitration rules and national laws, the tribunal has, within its authority to conduct the proceedings, broad prerogatives to determine the order of presentations at the hearings. As patterns of organizing a hearing differ, it will foster predictability and fairness of the proceedings, if the order of presentations is, at least in broad lines, clarified before the hearings. [In determining the order, the following two procedural patterns may be taken into consideration.]

[11. When the arbitral tribunal is not expected to be fully familiar with the issues to be argued at the hearing, it is normal that the claimant is given ample time to make an opening statement laying out the facts, the main arguments and what the evidence to be taken at the hearing is intended to demonstrate. After that, the claimant may call and examine its witnesses and the defendant is given the opportunity to test the testimony of the witnesses by cross-examination. Next, the defendant is called upon to make its opening statement and thereafter its witnesses are examined and cross-examined. At the end, the defendant and the claimant are given the opportunity to make closing statements.]

[12. When the arbitral tribunal has been informed before the hearing through the exchange of documentary evidence and written arguments about the points at issue, the opening statements of the parties are likely to be much shorter than in the case referred to in the preceding paragraph or may even not take place. If any witnesses are to be heard, this usually happens after the opening statements, whereupon oral arguments are made. The claimant is often called upon to argue first and the defendant has the right to reply. Following such a symmetrical pattern, possibly with several rounds of arguments, it is often expected that the defendant will argue last, although sometimes the arbitral tribunal allows the claimant, who has the burden of proof on the claim, to have the last word.]

[13. The foregoing procedural patterns are examples that can be adapted to suit the circumstances of the case and inclinations of the arbitrators and the parties.]

Item (iv)

14. Some practitioners are used to submitting to the arbitral tribunal and the other party notes summarizing their oral arguments. When such notes are handed over, this is usually done at the end of hearings or shortly thereafter; in some cases, they are presented already before the hearing.

15. In order to avoid surprise, foster equality of the parties and facilitate preparations for the hearings, it is advisable to discuss at the preparatory conference whether and how notes are to be prepared and exchanged. The arbitral tribunal may find it worthwhile to stress that the notes should be limited to summarizing the speeches and that, therefore, they should not contain or refer to new evidence or new legal texts or arguments.

Item (v)

16. Practices and laws differ as to whether oral testimony by a witness is to be given under oath. In some legal systems, the arbitrators are empowered to put witnesses on oath, but it is usually in their discretion whether they want to do so. In other legal systems, oral testimonies under oath are either unknown or may even be considered improper as only an official such as a judge or notary may have the authority to administer oaths. (See also above, H, "Arrangements concerning evidence of witnesses", remark 6.)

Item (vi)

17. Different approaches may be taken to taking notes at hearings. One possibility is that the members of the arbitral tribunal take personal notes. Another one is that the presiding arbitrator consecutively dictates to a typist a summary of oral statements. A further possibility is that arrangements are made for hearings to be taped or for professional stenographers to take notes and for verbatim transcripts to be prepared within a specified period or sometimes even until the next day. The arbitral tribunal may wish to discuss with the parties the various methods, clarify the arrangements and, if professionals are to be hired, how the costs are to be borne.

18. If transcripts are to be produced, it may be agreed how the persons who made the statements would be able to check the transcript. For example, it may be agreed that the changes to the record would be approved by the parties or, failing their agreement, would be referred to one of the arbitrators or to the arbitral tribunal. If a secretary of the arbitral tribunal is to be appointed, supervision over the changes to the record may be one of its tasks.

M. Language of proceedings

Agenda: If the parties have not agreed on the language or languages of the proceedings, determine the language or languages to be used in the proceedings.

Remarks

1. It is useful for the parties to settle the question of the language or languages to be used in the proceedings as early as possible, preferably already at the time when this could be taken into account in choosing the arbitrators, representatives or legal advisers. If the question has not been settled by the commencement of the arbitral proceedings, many arbitration rules and national procedural laws empower the arbitral tribunal to make the determination.

2. In any case, it may be useful to consider at the preparatory conference the extent to which the agreement of the parties or the determination by the arbitral tribunal is to be applied. The question may be in particular whether certain types of documents that are not in the language of the proceedings may be submitted in their original language or should be accompanied by a translation. For example, the participants may wish to clarify whether and the extent to which translations are needed of possibly long texts concerning the law

applicable to the substance of the dispute such as statutes, court decisions or commentaries.

3. If interpretation is to be used during oral hearings, it is advisable to consider the arrangements therefor; in addition, it may be decided whether the costs will be paid out of the deposits and apportioned between the parties along with the other arbitration costs or whether the costs are to be paid directly by a party.

N. Administrative support

Agenda: Seek opinion from the parties about the type and extent of administrative services needed for the arbitral proceedings, the provider of the services and costs.

Remarks

1. The administrative support required in an arbitration may be, for example, the use of meeting rooms, photocopying, tape recording, transcribing of tapes and handling of financial deposits. When the parties have submitted the case to an arbitral institution, such services are typically arranged by the institution. Otherwise, organizations that may be able to provide those services include chambers of commerce, hotels or specialized firms providing secretarial services.

O. Secretary or registrar of arbitral tribunal

Agenda: Enquire whether it is warranted for the arbitral tribunal to appoint a person who is to carry out administrative tasks under the direction of the arbitral tribunal (secretary, registrar or administrator).

Remarks

1. Different practices and attitudes exist with respect to the appointment of a secretary of an arbitral tribunal (registrar, administrator or similar terms are also used). In some regions or arbitration venues, secretaries of arbitral tribunals are frequently appointed, at least in certain types of cases, whereas elsewhere such appointments are not made.

2. If a secretary is to be appointed, according to the practice of some arbitrators, it is customary for the arbitral tribunal on its own motion to select the secretary, while in the practice of others the appointment is made after consultations between the arbitral tribunal and the parties.

3. As to the tasks that could properly be entrusted to a secretary, the practices and attitudes also differ. The tasks known to be entrusted to secretaries of arbitral tribunals may be grouped in two categories:

(a) organizational arrangements, which may include duties such as handling of financial deposits, reservations of meeting rooms, travel and hotel bookings for the

arbitrators, securing the availability of equipment (e.g., photocopiers, word processors, tape recorders), procurement of office supplies, supervision or coordination of work of support staff (e.g., typists, stenographers, editors of transcripts, archivists, translators, interpreters), and sometimes also contracting support personnel;

(b) legal research and other professional assistance to the arbitral tribunal, which may include assignments such as collecting case law or published materials concerning issues specified by the arbitral tribunal, preparing summaries from case law and publications, and sometimes also preparing drafts of procedural decisions or drafts of certain parts of the award, in particular those concerning the facts of the case.

4. The types of tasks mentioned under (a) are usually not controversial. Tasks under (b), however, may be controversial, in particular if a duty is perceived as involving a delegation of a function incumbent on the arbitrators, or if a duty involves the presence of the secretary during consultations of the arbitral tribunal. Such a role of the secretary is in the view of some commentators inadmissible or is admissible under certain restrictions such as that both parties agree thereto and that the secretary's participation does not violate the fundamental principles of arbitral procedure.

P. Place of arbitration

Agenda: (i) Unless it has already been determined, consider determining the place of arbitration, including the particular location where the arbitration is to be conducted;

(ii) consider whether there exists a need for conducting a part of arbitral proceedings outside the location of the arbitration.

Remarks

Item (i)

1. The place of arbitration may be determined by specifying a jurisdiction (e.g., Egypt or British Columbia in Canada), a town or a location within the town (e.g., the offices of a chamber of commerce or a hotel). It is generally accepted that the arbitration is governed by the procedural law governing at the place of arbitration. Some national laws, however, permit parties to subject their arbitration to procedural law of a jurisdiction other than the one where the arbitration takes place.

[2. Various factors may influence the choice of the place of arbitration. Among the most prominent are the following: (a) convenience to the parties and the arbitrators; (b) availability of services needed in the proceedings; (c) costs that depend on the place of arbitration; (d) location of the subject-matter in dispute and access to evidence; (e) suitability of the law of arbitral procedure of the place of arbitration; (f) the extent to which court assistance and supervision are available at the place of arbitration (e.g., concerning the appointment, challenge and replacement of an arbitrator; disputes over the jurisdiction of the arbitral tribunal; requests for setting aside of awards; or recognition or enforcement of awards); (g) whether there is a multilateral or bilateral treaty in force between the State

where the arbitration takes place and the State or States where the award may have to be enforced.]

3. If the parties have not agreed on a place of arbitration, many rules empower the arbitral tribunal to determine that place. Arbitral institutions may have special rules on the determination of the place of arbitration or may even specify the particular location where the arbitration is to be conducted.

Item (ii)

4. The agreed upon arbitration rules or the national law applicable to arbitration may allow the arbitral tribunal to conduct part of the arbitral proceedings away from the place of arbitration. The arbitral tribunal may consider that it will be more effective or cheaper if the arbitral tribunal meets away from the place of arbitration, for example, to inspect a property or documents, hear a witness, take expert evidence, or hold consultations among the members of the tribunal.

Q. Mandatory provisions governing arbitral proceedings

Agenda: [(i) Request the parties to express their view on whether there are any provisions of the law applicable to the arbitration from which the parties cannot derogate that add requirements not expressed in any applicable arbitration rules;]

(ii) enquire from the parties whether it is necessary or advisable to file or register the arbitral award with an authority or to deliver it to the parties in a particular manner.

Remarks

Item (i)

[1. It is a duty of the arbitral tribunal to obtain knowledge of and interpret the applicable procedural law, including mandatory law, and that duty cannot be delegated to the parties. Thus, an enquiry as indicated under (i) of this agenda item can only be one of the means for the arbitral tribunal to obtain knowledge of the procedural law. Such an enquiry may be useful, for instance, when the arbitral tribunal is insufficiently proficient in the language of the law at the place of arbitration, otherwise has limited means to obtain complete information about the law, and it is possible that the law contains mandatory rules not commonly found in legal systems.]

[2. There exists a set of widely accepted mandatory principles and rules found in many national procedural laws, albeit differently formulated and differing in details. Such principles and rules envisage, for example, that the arbitration agreement must be concluded in a particular form; that the parties must be treated with equality and that each party must be given a full opportunity of presenting its case; that an arbitrator must be impartial and independent and that a challenge procedure is available when impartiality and

independence of an arbitrator is in question; that the arbitral tribunal must decide a dispute in accordance with rules of law and that a decision ex aequo et bono or as amiable compositeur requires an express authorization by the parties; that the award must be in writing and signed; that in certain instances a court of the State where the arbitration takes place is competent to intervene in the arbitration, most notably to decide on the jurisdiction of the arbitral tribunal, the mandate of an arbitrator, or to set aside the award.]

[3. The kinds of mandatory principles and rules that are widely considered as acceptable in national legislation are expressed in the UNCITRAL Model Law on International Commercial Arbitration, a text adopted by international consensus. It should be noted, however, that national laws based on the Model Law may contain additional mandatory rules.]

Item (ii)

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

5. If such requirements exist, it may be advisable to clarify details such as time-limits, costs and who among the participants in the arbitration is to take the necessary steps.

R. Multi-party arbitration

Agenda: When the arbitration involves more than two parties, consider the organization of the proceedings.

Remarks

1. A single arbitration that involves more than two parties ("multi-party" arbitration) may arise from different kinds of situations. The following are some of the many examples thereof:

(a) One is a case in which a particular event gives rise to disputes between different pairs of parties. This may occur, for instance, in a construction contract when an arbitration is to decide two disputes arising from one construction defect, one dispute between the purchaser and the designer and another one between the purchaser and the contractor; while both disputes arise form the same event and some of the evidence may be the same, the disputes are separate in the sense that the outcome in one dispute does not necessarily prejudge the outcome in the other one.

(b) Another example is an arbitration between two parties, but where a third party, who, while not being the claimant or the defendant, has an interest in the outcome of the

dispute and who, because of that interest, is invited to join the proceedings in order to submit evidence and make statements in favour of a party to the dispute. Such a participation of a third party (sometimes referred to as "intervention", "joinder" or "impleader") may arise, for instance, in a dispute between buyer A and seller B because of a defect in the goods sold, if party C, who sold the goods to party B, is permitted and willing to join the dispute in order to help achieve a decision exonerating seller B from responsibility for the defect; party C has an interest in assisting party B to be exonerated so as to avert a claim for defective goods by party B against party C.

(c) A further example is an arbitration between parties to a multilateral contract such as a joint venture or consortium in which more than one contracting party act as claimants or defendants.

2. In multi-party arbitration, as in two-party arbitration, it is required that all the participating parties have agreed to arbitrate and that the arbitral tribunal is established pursuant to a procedure agreed by all the parties. However, if specified conditions are met, a few national laws allow a court-ordered multi-party arbitration even if all the parties have not agreed to hold a single arbitration.

3. Because of the need to deal with more than two parties, multi-party proceedings can be more complicated to manage than bilateral proceedings. A preparatory conference presents an opportunity to discuss the anticipated course of multi-party proceedings, to take steps to avoid unnecessary delays and costs, and to ensure the respect of each party's procedural rights.

4. It might be useful at the preparatory conference to identify the main points at issue in the various disputes involved, with a view to ascertaining whether it would be useful to divide the multi-party proceedings into stages. The first stage may be devoted to any objections concerning the jurisdiction of the arbitral tribunal. The following stages may concentrate in appropriate order on reaching decisions that in some way constitute preliminary decisions in another dispute (e.g., facts to be established in one dispute may be relevant in another dispute, or liability found to exist in one dispute may affect the decision in another dispute).

5. It might also be useful to consider at the preparatory conference decisions concerning questions such as the scheduling of meetings, flow of communications among the parties and the arbitral tribunal, the manner in which the parties will participate in the taking of evidence of witnesses, appointment of experts, the participation of the parties in the taking of evidence by experts, the order in which the parties will make statements, and the apportionment of the deposits for costs.

[6. When there are more than one interrelated disputes, it is important to bear in mind that a decision in one dispute may affect the position of a party in another dispute, and that, therefore, each interested party must be given an opportunity to present its arguments on the issues affecting that party. Nevertheless, sometimes issues may have to be decided that do not affect all the parties involved, which may make it possible, for reasons of

economy, to plan the hearings in such a way that some of the hearings would not require the presence of all the parties.]

S. Deposits for costs

Agenda: Review the anticipated costs of the proceedings and consider the deposits for the costs.

Remarks

1. It is customary that the arbitral tribunal upon its establishment requests the parties to deposit an equal amount as an advance for the costs of the arbitration. By the time the preparatory conference is held, it may become necessary, as a result of the matters considered at the conference, to request supplementary deposits from the parties.

2. In complex and expectedly lengthy arbitrations, staggered payments of deposits are occasionally agreed upon so as to spread the payment obligations over a longer period of time. To the extent a substantial part of the costs will be incurred only later in the proceedings, some arbitral tribunals may be ready to accept a suitable independent bank guarantee to cover those costs.

T. Any other procedural matter

The arbitral tribunal might, on its own motion or on a suggestion of a party, decide to consider another procedural matter with a view to facilitating the arbitral procedure.

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