International Arbitration Procedures

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A. Overview

- General Principles
- Procedural Law of the Arbitration
- Principle of Judicial Non-Interference
- Parties’ Procedural Autonomy
- Arbitral Tribunal’s Procedural Discretion
- Mandatory Procedural Requirements
- No General Code of International Arbitration Procedure
- Institutional Arbitration Rules
- Significant Procedural Events in International Arbitration
B. General Principles

- The arbitral process – the arbitration procedures and arbitral proceedings – lead businesses to arbitrate as much as anything else
  - Party autonomy
  - Procedural flexibility
  - Efficiency
  - Expertise
  - Neutrality
B. General Principles

- Legal and practical issues arising from the conduct of the arbitration
  - Procedural law of the arbitration
  - Judicial non-interference
  - Parties’ procedural autonomy
  - Arbitral tribunal’s procedural discretion
B. General Principles

- Key Procedural Events

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Key Procedural Events in Many International Arbitrations

Request for Arbitration → Answer (and) Counterclaims → Reply Counterclaims

Initial Procedural Conference and Procedural Directions (Terms of Reference) → Language of Arbitration → Constitution of Arbitral Tribunal

Jurisdictional Objection → Advance on Costs → Statement of Case/Opening Memorial (with Witness Statements)
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B. General Principles

- The procedural law of arbitration is a critically important aspect of the legal framework for international arbitration.

- Procedural law of the arbitration is distinguished from: (a) law governing the arbitration agreement; and (b) law governing the underlying contract.

- The procedural law of the arbitration is virtually always the law of the arbitral seat – arbitration legislation of arbitral seat.

- Although parties theoretically have the autonomy to agree upon a foreign procedural law (other than that of the arbitral seat), they virtually never do so.
C. Procedural Law of the Arbitration: Definition

- The procedural law of the arbitration is not the local code of civil procedure in the arbitral seat.

- Instead, the procedural law of the arbitration is the arbitration legislation and related judicial decisions of the arbitral seat.

  - For example, in an arbitration seated in Austria, the procedural law of the arbitration will be the Austrian version of the UNCITRAL Model Law (and Austrian court decisions interpreting the Model Law), at Sections 577-618 of the Austrian Code of Civil Procedure.

  - The procedural law will not be the local rules of civil procedure applicable in Austrian courts.

- Terminology: “curial law” or “lex arbitri”
C. Procedural Law of the Arbitration: Definition

- Arbitration legislation of arbitral seat provides legal framework for the arbitration

- Like other national arbitration legislation, the UNCITRAL Model Law is territorial in scope and structure
  - UNCITRAL Model Law, Article 1(2): “The provisions of this Law, except articles 8, 9, 17 H, 17 I, 17 J, 35 and 36, apply only if the place of arbitration is in the territory of this State”
C. Procedural Law of the Arbitration: Definition

- Definition of the Procedural Law of the Arbitration
  - *Cargill Int’l SA v. Peabody Australia Mining Ltd*, [2010] NSWSC 887, ¶66 (N.S.W. Supreme Court): “[T]he *lex arbitri* … is the law chosen by the parties to govern arbitral procedure that is, the procedural law of arbitration”

- *Am. Diagnostica Inc. v. Grapidore Ltd*, XXIV Y.B. Comm. Arb. 574, 580-581, ¶16 (N.S.W. Supreme Court 1998) (1999): “Although the law governing the conduct of the arbitration (the *lex arbitri*) is said to be concerned only with procedural matters, it goes beyond, for example, the production of documents or the order of witnesses. The appointment, removal, and replacement of arbitrators, time-limits, interim relief, consolidation of arbitrations, representation before the arbitrator, the form and validity of the award, and the finality of the award, are amongst the matters which can fall within the *lex arbitri*.”
C. Procedural Law of the Arbitration: Definition

- In general, the “internal procedural” issues governed by the law of the arbitral seat include: (a) procedural steps and timetable of an arbitration; (b) oaths for witnesses; (c) conduct of hearings, including opportunity to be heard and examination of witnesses; (d) arbitrators’ disclosure and “discovery” powers; (e) lawyers’ right to appear and their ethical obligations; (f) parties’ autonomy to agree on substantive and procedural issues in the arbitration; (g) arbitrators’ procedural discretion; (h) arbitrators’ relations with the parties; (i) arbitrators’ remedial powers, including to order provisional relief; and (j) form, making and publication of the award.
C. Procedural Law of the Arbitration: Scope

- The procedural law of the arbitration governs the “internal procedures” of the arbitration and the “external relationship” between the arbitrator and national courts
  - Internal procedures (e.g., parties’ procedural autonomy; equality of treatment)
  - External relationship (e.g., annulment of awards, removal of arbitrators)
C. Procedural Law of the Arbitration: Scope

- Many contemporary national arbitration statutes are broadly similar in their treatment of arbitral procedures:
  - Broad party autonomy over the arbitral procedures
  - Broad procedural discretion for the arbitral tribunal in the absence of party agreement on arbitral procedures
  - The parties’ procedural autonomy and arbitrators’ procedural discretion is generally subject to only limited mandatory procedural requirements
C. Procedural Law of the Arbitration: Scope

- UNCITRAL Model Law: Internal Procedures
  - UNCITRAL Model Law, Article 18: “The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case”
  - UNCITRAL Model Law, Article 19: “(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.”
C. Procedural Law of the Arbitration: Scope

- Austrian Code of Civil Procedure
  - ACCP, Section 594: “(1) Subject to the mandatory requirements of this Part, the parties are free to agree on the procedure to be followed in conducting the proceedings. In doing so, they may refer to rules of procedure. Failing such agreement, the arbitral tribunal may, subject to the provisions of this Part, conduct the arbitration in such a manner as it considers appropriate. (2) The parties shall be treated fairly. Each party shall have the right to be heard.”

- Swiss Law on Private International Law
  - SLPIL, Article 182: “(1) The parties may, directly or by reference to rules of arbitration, determine the arbitral procedure; they may also submit the arbitral procedure to a procedural law of their choice. (2) If the parties have not determined the procedure, the arbitral tribunal shall determine it to the extent necessary, either directly or by reference to a statute or to rules of arbitration. (3) Regardless of the procedure chosen, the arbitral tribunal shall ensure equal treatment of the parties and the right of the parties to be heard in adversarial proceedings.”
C. Procedural Law of the Arbitration: Scope

- The arbitral seat also provides the law defining the “external relationship” between the arbitration and national courts
  - Judicial non-intervention
  - Constitution of arbitral tribunal
  - Jurisdictional rulings
  - Annulment

- Most states recognize the parties’ autonomy to choose a “foreign” procedural law

  - *Union of India v. McDonnell Douglas Corp.* [1993] 2 Lloyd’s Rep. 48, 50 (English High Court): “[I]t is, subject to one proviso [concerning the English court’s supervisory jurisdiction], open to the parties to agree that their agreement to arbitrate disputes will be governed by one law, but that the procedures to be adopted in any arbitration under that agreement will be governed by another law”

  - *Infowaves Ltd v. Equinox Corp.*, (2009) 7 SCC 220, ¶15 (Indian Supreme Court): Parties have “the freedom to choose the … substantive law of [the] arbitration agreement as well as the procedural law governing the conduct of the arbitration”

- In practice, parties virtually never agree to choose a “foreign” procedural law

  - *Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 291 (5th Cir. 2004): “Authorities on international arbitration describe an agreement providing that one country will be the site of the arbitration but the proceedings will be held under the arbitration law of another country by terms such as ‘exceptional;’ ‘almost unknown;’ a ‘purely academic invention;’ ‘almost never used in practice;’ a possibility ‘more theoretical than real;’ and a ‘once-in-a-blue-moon set of circumstances’”
D. Principle of Judicial Non-Interference

- The principle of judicial non-interference is a key element of the international arbitral process.

- There is no express reference to judicial non-interference in the New York Convention, but it is implied in Article II(3).
  
  - New York Convention, Article II(3): “The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”

  - New York Convention, Article II(3): National court required to “refer the parties to arbitration,” but not otherwise intervene in arbitral process until annulment and/or recognition of award.”
D. Principle of Judicial Non-Interference

- National arbitration legislation provides expressly for the principle of judicial non-interference in the arbitral process
  - UNCITRAL Model Law, Article 5: “In matters governed by this Law, no court shall intervene except where so provided in this Law”
  - ACCP, Section 578: “In matters governed by this Part, no court shall intervene except where so provided in this Part.”
  - English Arbitration Act, §1(c): “[I]n matters governed by this Part the court should not intervene except as provided by this Part”

- Compare the UNCITRAL Model Law and ACCP (mandatory) with the English Arbitration Act (precatory)
D. Principle of Judicial Non-Interference

– *Corporacion Transnacional de Inversiones, SA de CV v. STET Int’l, SpA*, (1999) OJ No 3573, 190 (Ontario Super. Ct.): “Article 5 of the Model Law expressly limits the scope for judicial intervention except by application to set aside the award or to resist enforcement of an award under one or more of the limited grounds specified in Articles 34 or 36”

– *Judgment of 4 December 1994*, XXII Y.B. Comm. Arb. 263, ¶4 (1997) (Austrian Oberster Gerichtshof): Vacating injunction requiring arbitrators to conduct arbitration in German and English, rather than only in English (as the tribunal had ordered): “Court review of orders for directions … by the arbitral tribunal is not provided for; this would also be in contradiction with the sense and purpose of arbitral proceedings”
D. Principle of Judicial Non-Interference

- National court decisions recognize the principle of judicial non-interference in the arbitral process, even absent express statutory basis

  - *Compagnie Nationale Air France v. Libyan Arab Airlines*, [2000] R.J.Q. 717 (Québec Superior Court): “It is premature, in effect, at this stage of proceedings, to ask the Superior Court of Quebec to intervene on questions that can eventually, and only, be remitted to it after a final arbitral award has been made … The Quebec Superior Court is not entitled to examine this question at this moment, but only once the final arbitration decision has been rendered.”

D. Principle of Judicial Non-Interference

  
  “[I]t was well established under the old [English legislation for international arbitration (the Arbitration Act, 1975)] that the court did not have a general supervisory role over arbitrations at their interlocutory stage beyond that granted by the Arbitration Acts … [See Bremer Vulcan [1981] AC 909, 979] Therefore there was no scope to invoke the court’s jurisdiction to grant injunctions to compel arbitrators to take a particular course in the reference. That rule must remain the case under the 1996 Act. The position is emphasized by the provisions of §1(c) of the Act, which stipulates that ‘in matters governed by this Part the court should not intervene except as provided by this Part.’”
D. Principle of Judicial Non-Interference

- *Bancol etc. v. Bancolombia etc.*, 123 F.Supp.2d 771, 771 (S.D.N.Y. 2000): “[T]he court’s authority to direct or oversee [an] arbitration is narrowly confined … In particular, it has little or no power to afford interlocutory review of procedural matters, let alone to determine at the outset what procedural rules are to be applied … ‘[P]rocedural’ questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.”
D. Principle of Judicial Non-Interference

- Limited Grounds for Judicial Intervention in Arbitral Process
  - Judicial intervention is permitted only in limited, specified circumstances where judicial support is essential to the arbitral process
  - UNCITRAL Model Law, Article 5: “In matters governed by this Law, no court shall intervene except where so provided in this Law”
  - UNCITRAL Model Law, Article 6: “The functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) shall be performed by … (Each State enacting this model law specifies the court or, where referred to therein, other authority competent to perform these functions)”
  - Note exceptions to the principle of judicial non-intervention contemplated in Article 6
D. Principle of Judicial Non-Interference

- **Appointment and Removal of Arbitrators**

  - UNCITRAL Model Law, Article 11(3): “Failing such agreement, (a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6; (b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court of other authority specified in article 6”
D. Principle of Judicial Non-Interference

- UNCITRAL Model Law, Article 11(4): “Where, under an appointment procedure agreed upon by the parties, (a) a party fails to act as required under such procedure, or (b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or (c) a third party, including an institution, fails to perform any function entrusted to it under such procedure, any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment”
D. Principle of Judicial Non-Interference

– UNCITRAL Model Law, Article 13(3): “If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.”

– UNCITRAL Model Law, Article 14(1): “If an arbitrator becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in Article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.”
D. Principle of Judicial Non-Interference

- Interlocutory Jurisdictional Challenges

  - UNCITRAL Model Law, Article 8(1): “A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed”

  - UNCITRAL Model Law, Article 16(3): “The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.”
D. Principle of Judicial Non-Interference

- Annulment
  - UNCITRAL Model Law, Article 34(1): “Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article”
  - UNCITRAL Model Law, Article 34(2): “An arbitral award may be set aside by the court specified in article 6 only if: (a) the party making the application furnishes proof that …”
D. Principle of Judicial Non-Interference

- Provisional Measures

  - UNCITRAL Model Law, Article 9: “It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure”
D. Principle of Judicial Non-Interference

- **Taking of Evidence**

  - UNCITRAL Model Law, Article 27: “The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.”
D. Principle of Judicial Non-Interference

- Other national arbitration statutes parallel the UNCITRAL Model Law

- ACCP, Section 589(3): “If a challenge under any procedure agreed upon by the parties or under the procedure of subsection (2) is not successful, the challenging party may apply, within four weeks after having received notice of the decision rejecting the challenge, to the court to decide on the challenge. The decision of the court shall be subject to no appeal”

- ACCP, Section 611: “An arbitral award shall be set aside if 1. a valid arbitration agreement does not exist…; 2. a party was not given proper notice… or was otherwise unable to present his case; 3. the arbitral award deals with a dispute not falling within the terms of the arbitration agreement…; 4. the constitution or composition of the arbitral tribunal is not in accordance with… a valid agreement of the parties; 5. the arbitration proceedings were conducted in a way so as to violate Austrian public policy;… 7. the matter in dispute is not arbitrable…; the arbitral award violates Austrian public policy.”
D. Principle of Judicial Non-Interference

– ACCP, Section 593(3): “At the request of a party, the interim or protective measure shall be enforced by the district court [Bezirksgericht]”

– ACCP, Section 602: “The arbitral tribunal, arbitrators authorized for this purpose by the arbitral tribunal, or any party with the approval of the arbitral tribunal, may request from a court the performance of judicial acts for which the arbitral tribunal does not have authority.”
D. Principle of Judicial Non-Interference

- **Anti-Arbitration Injunctions**
  - In a few instances, national courts have issued so-called “anti-arbitration” injunctions or orders, forbidding the conduct of international arbitral proceedings
  - Anti-arbitration injunctions have been issued against both parties and arbitrators (and/or arbitral institutions)
  - Anti-arbitration injunctions contravene the principle of judicial non-interference and there is substantial doubt whether they are consistent with the New York Convention or most national arbitration regimes
D. Principle of Judicial Non-Interference: Conclusion

- Most contemporary national arbitration statutes provide expressly for judicial non-interference in the arbitral process
- Even absent statutory language national courts recognize the principle of judicial non-interference
- Principle of judicial non-interference is subject to only limited, specific exceptions
  - Appointment/challenge of arbitrators
  - Interlocutory jurisdictional dispute
  - Annulment of award
  - Taking of evidence
  - Provisional measures
E. Parties’ Procedural Autonomy

- The parties’ procedural autonomy is one of the defining characteristics of international arbitration: fundamental feature of the arbitral process
- The parties’ procedural autonomy allows arbitral procedures to be tailored to the nature and needs of particular parties and disputes
- The parties’ procedural autonomy is subject to only limited mandatory procedural requirements
E. Parties’ Procedural Autonomy

- Virtually all international arbitration instruments recognize the parties’ broad procedural autonomy with regard to the procedures in “their” arbitration

  - New York Convention, Article II(1): “Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration”

  - New York Convention, Article V(1)(d): Permits non-recognition of an award if “[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place”
E. Parties’ Procedural Autonomy

- Most national arbitration statutes expressly recognize the parties’ broad procedural autonomy
  - UNCITRAL Model Law, Article 19(1): “Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings”
  - UNCITRAL Model Law, Articles 13(2), 21 and 24(1): Multiple provisions providing default rules subject to the parties’ contrary agreement
E. Parties’ Procedural Autonomy

- **UNCITRAL Model Law, Article 21**: “Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.”

- **UNCITRAL Model Law, Article 24(1)**: “Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.”
E. Parties’ Procedural Autonomy

- UNCITRAL Model Law, Article 13(2): “Failing such agreement [on a procedure for challenging an arbitrator], within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.”
E. Parties’ Procedural Autonomy

- Other national arbitration legislation also expressly recognizes parties’ procedural autonomy
- ACCP, Section 594: “(1) Subject to the mandatory requirements of this Part, the parties are free to agree on the procedure to be followed in conducting the proceedings”
- Hong Kong Arbitration Ordinance, §47(1): “Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings”
- French Code of Civil Procedure, Article 1509: “An arbitration agreement may define the procedure to be followed in the arbitral proceedings, directly or by reference to arbitration rules or to procedural rules”
E. Parties’ Procedural Autonomy

- National court decisions also uniformly recognize the parties’ procedural autonomy
  - *UHC Mgt Co. v. Computer Sciences Corp.*, 148 F.3d 992, 995 (8th Cir. 1998): “Parties may choose to be governed by whatever rules they wish regarding how an arbitration itself will be conducted”
  - *Team Design v. Gottlieb*, 104 S.W.3d 512 (Tenn. Ct. App. 2002): Even arbitral procedures such as “flipping a coin, or, for that matter, arm wrestling” are enforceable
  - *Re Shaw & Sims* (1851) 17 LTOS 160 (English Bail Court): English authorities have upheld *sui generis* procedural mechanisms, such as selecting arbitrators by drawing names by lot
E. Parties’ Procedural Autonomy

– *Judgment of 17 May 2001, 7 Ob 67/01f* (Austrian Oberster Gerichtshof): “Pursuant to the ZPO, the conduct of the arbitral proceedings forms to a large extent part of the parties’ autonomy. The parties may determine the procedural rules to be applied by the arbitrators in their arbitration agreement or in a separate written agreement. If the parties have not provided for such an agreement concerning the procedural rules, the arbitrators can determine the proceedings.”
E. Parties’ Procedural Autonomy

- *Bhatia Int’l v. Bulk Trading SA*, (2002) 4 SCC 105, ¶25 (Indian Supreme Court): “[I]n international commercial arbitrations parties are at liberty to choose, expressly or by necessary implication, the law and the procedure to be made applicable”

- *Dell Computer Corp. v. Union des Consommateurs*, 2007 SCC 34, ¶52 (Canadian S. Ct.): “[T]he parties to an arbitration agreement are free, subject to any mandatory provision by which they are bound, to choose any place, form and procedures they consider appropriate. They can choose cyberspace and establish their own rules.”
E. Parties’ Procedural Autonomy

- Parties’ Agreement on Institutional Arbitration Rules
  - The parties’ procedural autonomy extends to agreements to arbitrate pursuant to institutional arbitration rules, which permit the arbitral institution to make various decisions, absent direct agreements between the parties on such issues (e.g., arbitral seat, selection of arbitrators)
  - UNCITRAL Model Law, Article 2(d): The Model Law provides that “where a provision of this Law, except article 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination”
  - Institutional rules frequently provide for arbitral institution to select arbitral seat and arbitrators, if parties are unable to agree
E. Parties’ Procedural Autonomy

– *Judgment of Société, Philipp Bros. v. Société Icco*, 1990 Rev. arb. 880, 883 (Paris Cour d’appel): “The choice of a professional arbitral institution of this kind implies that the parties intended to submit their disputes to the judgment of those members of that profession chosen by the arbitral institution”

– *Diemaco v. Colt’s Mfg Co.*, 11 F.Supp.2d 228, 232 (D. Conn. 1998): “When parties agree to arbitrate before the AAA and incorporate the Commercial Arbitration Rules into their agreement, they are bound by those rules and by the AAA’s interpretation”

– *NCC Int’l AB v. Alliance Concrete Singapore Pte Ltd*, [2008] SGCA 5, ¶52 (Singapore Court of Appeal): “[T]he parties can expressly opt to have the IAA apply by either agreeing in writing to this effect or adopting institutional rules which expressly stipulate that the IAA shall apply”
F. Arbitral Tribunal’s Procedural Discretion

- Where parties do not reach agreement on arbitral procedures, the arbitral tribunal possesses broad procedural discretion

- Arbitral tribunal’s procedural discretion is almost uniformly recognized by national arbitration legislation and court decisions

- Arbitral tribunal’s procedural discretion is subject to only limited mandatory procedural requirements
F. Arbitral Tribunal’s Procedural Discretion: New York Convention

- International Arbitration Conventions

  - New York Convention does not expressly address arbitrators’ procedural discretion

  - Compare: European Convention, Article IV(4)(d): Where the parties have not agreed upon arbitral procedures, the tribunal may “establish directly or by reference to the rules and statutes of a permanent arbitral institution the rules of procedure to be followed by the arbitrator(s)”

  - Consider cases where parties agree to institutional arbitration rules granting arbitral tribunal broad procedural discretion: Article II(1) and V(1)(d) of the New York Convention require recognition of such agreements
F. Arbitral Tribunal’s Procedural Discretion: National Arbitration Legislation

- National arbitration legislation confirms arbitrators’ broad procedural discretion
  - UNCITRAL Model Law, Article 19(1): “Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings”
  - UNCITRAL Model Law, Article 19(2): “Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such a manner it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.”
F. Arbitral Tribunal’s Procedural Discretion: National Arbitration Legislation

- ACCP, Section 594(1): “Failing such agreement, the arbitral tribunal may, subject to the provisions of this Part, conduct the arbitration in such a manner as it considers appropriate.”

- SLPIL, Article 182(2): “If the parties have not determined the procedure, the arbitral tribunal shall determine it to the extent necessary, either directly or by reference to a statute or to rules of arbitration”

- Japanese Arbitration Law, Article 26(2): “Failing such agreement [between the parties on the procedure] as prescribed in the preceding paragraph, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitral proceedings in such manner as it considers appropriate”
F. Arbitral Tribunal’s Procedural Discretion: National Court Decisions

- National court decisions also confirm arbitrators’ broad procedural discretion
  - *Nat’l Post Office Mailhandlers v. U.S. Postal Serv*, 751 F.2d 834, 841 (6th Cir. 1985): “Arbitrators are not bound by formal rules of procedure and evidence, and the standard for judicial review of arbitration procedures is merely whether a party to arbitration has been denied a fundamentally fair hearing”
  - *Éditions Chouette (1987) Inc. v. Desputeaux*, [2003] 1 S.C.R. 178, 220 (Canadian Supreme Court): “Articles 2643 C.C.Q. and 944.1 C.C.P. … affirm the principle of procedural flexibility in arbitration proceedings, by leaving it to the parties to determine the arbitration procedure or, failing that, leaving it up to the arbitrator to determine the applicable rules of procedure”
F. Arbitral Tribunal’s Procedural Discretion: National Court Decisions

– *In re Arbitration Between U.S. Turnkey Exploration, Inc. & PSL, Inc.*, 577 So.2d 1131 (La. Ct. App.1991): “Unless a mode of conducting the proceedings has been prescribed by the arbitration agreement … arbitrators have a general discretion as to the mode of conducting the proceedings and are not bound by formal rules of procedure and evidence, and the standard of review of arbitration procedures is merely whether a party to an arbitration has been denied a fundamentally fair hearing”

– *ADG v. ADI*, [2014] SGHC 73, ¶111 (Singapore High Court): “Parties who choose to arbitrate in Singapore or under the SIAC Rules therefore and thereby agree to give the Tribunal a wide and flexible discretion to determine its own procedures and processes”
F. Arbitral Tribunal’s Procedural Discretion: Institutional Rules

- Institutional arbitration rules confirm arbitrators’ broad procedural discretion

  - UNCITRAL Rules, Article 17(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 an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case”

  - LCIA Rules, Article 14.5: “The Arbitral Tribunal shall have the widest discretion to discharge [its] general duties, subject to such mandatory law(s) or rules of law as the Arbitral Tribunal may decide to be applicable”

  - Vienna Rules, Article 28: “(1) The arbitral tribunal shall conduct the arbitration in accordance with the Vienna Rules and the agreement of the parties in an efficient and cost-effective manner, but otherwise according to its own discretion. The arbitral tribunal shall treat the parties fairly. The parties shall be granted the right to be heard at every stage of the proceedings.”
F. Arbitral Tribunal’s Procedural Discretion

- Relationship between arbitrators’ procedural discretion and parties’ procedural autonomy: institutional arbitration rules
  - “Whose arbitration is this?”
  - What happens if arbitral tribunal does not accept parties’ (joint) procedural agreement?
  - UNCITRAL Model Law, Article 19(1): “Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings”
F. Arbitral Tribunal’s Procedural Discretion

- Carter, *The Rights and Duties of the Arbitrator: Six Aspects of the Rule of Reasonableness*, in ICC IC Arb. Bull. Spec. Supp. 1995, 24, 31: “I would advocate the existence of ... a right for the arbitrator to lead – even lead firmly, when necessary – in establishing the arbitral procedures over the heads of counsel on both sides. The arbitrator does not have a judge’s power to regulate procedures unilaterally, nor should he or she forget that party autonomy may be the most important arbitral principle of all. The scope for persuasion by the arbitrator before making a ruling is large, and the need to impose procedures thus should be rare. But it is possible – at least for one with a common law background – to imagine situations in which counsel for both sides may slide toward extended and acrimonious evidentiary procedures that could be shortened or avoided by an arbitrator who was prepared to ‘just say no.’”
F. Arbitral Tribunal’s Procedural Discretion

- Mandatory Procedural Requirements

  - UNCITRAL Model Law, Article 19(2): “Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.”

  - UNCITRAL Model Law, Article 18: “The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case”

- Tribunal can (and should) refuse to adopt agreed arbitral procedures that violate Article 18
F. Arbitral Tribunal’s Procedural Discretion

- Institutional Arbitration Rules: Arbitrators’ Procedural Authority
  - Under the UNCITRAL, LCIA, ICDR, Vienna and SIAC Rules, the arbitral tribunal has the authority to prescribe the arbitral procedures, including (1) to ensure the parties’ equal treatment and an opportunity to be heard and (2) to provide a fair and efficient arbitral procedure
  - This procedural authority is broader than that available to arbitrators under most national arbitration legislations, which only allow a tribunal to override the parties’ agreed procedures when they would produce unequal treatment or a denial of an opportunity to be heard
F. Arbitral Tribunal’s Procedural Discretion

– Instead, the UNCITRAL, LCIA and ICDR Rules all permit the arbitrators to prescribe procedures necessary for a fair and efficient arbitration, even over the parties’ contrary agreement

– UNCITRAL Rules, Article 17(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 an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case”
F. Arbitral Tribunal’s Procedural Discretion

– LCIA Rules, Article 14.2: “The parties may agree on joint proposals for the conduct of their arbitration for consideration by the Arbitral Tribunal. They are encouraged to do so in consultation with the Arbitral Tribunal and consistent with the Arbitral Tribunal’s general duties under the Arbitration Agreement.”

– LCIA Rules, Article 14.5: “The Arbitral Tribunal shall have the widest discretion to discharge [its] general duties, subject to such mandatory law(s) or rules of law as the Arbitral Tribunal may decide to be applicable”
F. Arbitral Tribunal’s Procedural Discretion

- ICDR Rules, Article 20(1): “Subject to these Rules, the arbitral tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case”

- SIAC Rules, Rule 19(4): “The Tribunal may, in its discretion, direct the order of proceedings, bifurcate proceedings, exclude cumulative or irrelevant testimony or other evidence and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case”
G. Mandatory Procedural Requirements

- The parties’ procedural autonomy and arbitrators’ procedural discretion are subject to limited mandatory procedural requirements.

- These mandatory requirements safeguard due process and fairness of the arbitral process.

- Mandatory procedural requirements recognized by the New York Convention and national arbitration legislation.
G. Mandatory Procedural Requirements

- New York Convention recognizes mandatory procedural requirements
  - New York Convention, Article V(1): “Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: … (b) [t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case”
G. Mandatory Procedural Requirements

- National arbitration legislation imposes mandatory procedural requirements
  - UNCITRAL Model Law, Article 18: “The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case”
  - ACCP, Section 594(2): “The parties shall be treated fairly. Each party shall have the right to be heard”
  - SLPIL, Article 182(3): “Regardless of the procedure chosen, the arbitral tribunal shall ensure equal treatment of the parties and the right of the parties to be heard in adversarial proceedings”
G. Mandatory Procedural Requirements

- English Arbitration Act, §33(1): “The tribunal shall – (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined”

- Hong Kong Arbitration Ordinance, §46(3): “[A]rbitral tribunal is required … (b) to act fairly and impartially as between the parties, giving them a reasonable opportunity to present their cases and to deal with the cases of their opponents”

- Chinese Arbitration Law, Article 7: “In arbitration, disputes shall be resolved on the basis of facts, in compliance with the law and in an equitable and reasonable manner”
G. Mandatory Procedural Requirements

- Additional Mandatory Requirements of the UNCITRAL Model Law

  - UNCITRAL Model Law, Article 13(1): “The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article”

  - UNCITRAL Model Law, Article 13(3): “If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award”
G. Mandatory Procedural Requirements

- English Arbitration Act, §4(1): “The mandatory provisions of this Part are listed in Schedule 1 and have effect notwithstanding any agreement to the contrary”

- Schedule 1: Mandatory provisions of Part I (selection):
  - §9: Stay of legal proceedings
  - §24: Power of court to remove arbitrator
  - §§31-32: Objection to substantive jurisdiction of tribunal; Determination of preliminary point of jurisdiction
  - §§66-68: Enforcement of the award; Challenging the award: substantive jurisdiction; Challenging the award: serious irregularity
  - §§70-71 Challenge or appeal: supplementary provisions; Challenge or appeal: effect of order of court
G. Mandatory Procedural Requirements

- No obligation for arbitrators to apply local rules of civil procedure.

- Although the law of the arbitral seat generally applies to procedural issues, this does not mean that the civil procedure rules of the seat apply to the arbitration.

- The law of the arbitral seat that applies to an international arbitration is the arbitration legislation of the seat, not the local civil procedure rules.

- Historically, some authorities held that international arbitrators were required to apply the civil procedure rules applicable in local courts.
G. Mandatory Procedural Requirements

- Contemporary authorities reject the view that local procedural rules apply in international arbitrations
  - *Himpurna Cal. Energy Ltd v. PT (Persero) Perusahaan Listruik Negara*, Final Ad Hoc Award of 4 May 1999, XXV Y.B. Comm. Arb. 13, ¶44 (2000): “The Arbitral Tribunal is not required to apply any national rules of procedure unless a Party has shown that the application of such a rule is mandatory”
  - *Award in ICC Case No. 12073*, XXXIII Y.B. Comm. Arb. 63, ¶24 (2008): “[I]nternational arbitrators do not have a *lex fori* in the manner of a national court judge. In particular, the international arbitrator sitting in Switzerland is not required to apply either Swiss civil procedure rules or conflict of law rules … In any event, Swiss civil procedure law (whether cantonal or federal) does not gain relevance on the mere fact that the arbitral tribunal is situated in Geneva.”
G. Mandatory Procedural Requirements

- ICC Rules, Article 19: The tribunal may determine procedural rules “whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration”

- This proviso affirms the meaning implicit in other institutional rules and *ad hoc* arbitration agreements: arbitrators are free, but not obliged, to adopt procedural rules used in domestic litigations in national legal systems.
G. Mandatory Procedural Requirements

- Content of Mandatory Procedural Guarantees
  - UNCITRAL Model Law, Article 18: “The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case”
    - “Equality of treatment”
    - “Full opportunity to present case”
  - Related, but different, guarantees
G. Mandatory Procedural Requirements

- “Equality of Treatment”
  - No preferential treatment
  - Equal treatment does not necessarily mean same treatment
  - Equal treatment does not necessarily mean equal time
G. Mandatory Procedural Requirements

- Judgment of 19 February 2009, 27 ASA Bull. 801, ¶4.1 (2009) (Swiss Federal Tribunal): “Equal treatment of the parties … implies that the proceedings must be organized and conducted in such a way that each party has the same possibilities to present its case. Under that principle, which also applies to the time limits within which the briefs must be filed, the arbitral tribunal must treat the parties in the same way at all stages of the proceedings.”
G. Mandatory Procedural Requirements

- “Full Opportunity to Present Case”
  - Right to be heard; due process
  - Does “full” mean “full”? 
G. Mandatory Procedural Requirements

- *Soh Beng Tee & Co. Prop. Ltd v. Fairmount Dev. Prop. Ltd* [2007] SGCA 28, ¶65 (Singapore Ct. App.): “The overriding concern,…is fairness. The best rule of thumb to adopt is to treat the parties equally and allow them reasonable opportunities to present their cases as well as to respond. Fairness, however, is a multidimensional concept and it would also be unfair to the successful party if it were deprived of the fruits of its labour as a result of a dissatisfied party raising a multitude of arid technical challenges after an arbitral award has been made.”
G. Mandatory Procedural Requirements

- Means of Enforcing Mandatory Procedural Guarantees
  - Judicial non-interference: no interlocutory judicial role
  - Annulment
  - Non-recognition
G. Mandatory Procedural Requirements

- UNCITRAL Model Law, Articles 34(2)(a)(ii) and (iv): “An arbitral award may be set aside by the court specified in article 6 only if: (a) the party making the application furnishes proof that: … (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; … or (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law”
G. Mandatory Procedural Requirements

- UNCITRAL Model Law, Articles 36(1)(a)(ii) and (iv): “Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only: (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that: … (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; … or (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place”
H. No General Code of International Arbitration Procedure

- In most international arbitrations, there is no pre-existing or generally-applicable code of procedural rules
  - There is no “international” code of civil procedure applicable generally in international commercial arbitration
  - Further, in *ad hoc* arbitrations, there will often be no procedural rules of any sort incorporated into the parties’ arbitration agreement from international rules or otherwise
H. No General Code of International Arbitration Procedure

- Proposals for general code of civil procedure for international arbitrations
H. No General Code of International Arbitration Procedure

- Carlston, *Procedural Problems in International Arbitration*, 39 Am. J. Int’l L. 426, 448 (1945): “Procedure is no unalterable course of conduct to which all tribunals must adhere. It should always be adapted to facilitate the course of the particular arbitration and to enable the economical accomplishment of its task within the time fixed. In each arbitration the rules of procedure should be designed to reconcile the divergence of national viewpoints concerning procedure, to require of litigants no more procedural steps than are necessary to enable a satisfactory disposal of the particular case, to conserve litigants’ interests from injury by departures from the contemplated course of proceedings, and to bring the arbitration to the speediest possible end compatible with justice. Only through a conscious and careful adaption of procedural rules to the requirements of each arbitration as it arises will the procedural ills of international arbitration be minimized and its utility as a means for the settlement of disputes between states be fostered.”
H. No General Code of International Arbitration Procedure

- These factors can produce procedures ranging from:
  - Extensive discovery, oral depositions and witness testimony with broad cross-examination by parties’ counsel, to
  - Limited disclosure, written witness statements and targeted cross-examination, to
  - No disclosure and written witness statements with limited (or no) cross-examination, to
  - “Documents only” arbitrations, with no oral proceedings
H. No General Code of International Arbitration Procedure

- One of the benefits of international arbitration is its ability to permit procedures to be tailored to the needs of each specific case.
- In simpler, or smaller, matters, expeditious and fast-track procedures can be adopted.
- Conversely, in matters involving substantial amounts in dispute, with complex factual issues, extensive disclosure and witness examination will often be appropriate.
- Similarly, in cases where one party is in possession of evidence required by its counterparty (e.g., fraud claims), disclosure and extensive witness examination will be more appropriate than in other matters.
H. No General Code of International Arbitration Procedure

- Although the procedures may differ radically, each is capable of being fair and efficient in the circumstances of particular cases

- In a matter involving modest amounts in dispute, where defined legal issues predominate, limited (or no) disclosure and limited witness testimony may be appropriate
H. No General Code of International Arbitration Procedure

- Civil Law versus Common Law
  - Inquisitorial versus Adversarial

- Other factors relevant to arbitrators’ exercise of procedural discretion
  - Expectations and desires of parties
  - Experience and background of arbitrators and counsel
  - Character of case
H. No General Code of International Arbitration Procedure

- No “Average” or “Typical” International Arbitration
  - *Yukos*: $50 billion award in investor-state dispute
  - Multi-million commercial arbitration in gas and oil industry; exceptionally complex technical issues
  - Court of Arbitration for Sport: one-hour Olympics arbitration

- As a practical matter, the tribunal and the parties will ordinarily have extremely broad discretion to establish the arbitral procedures on a case-by-case basis (subject only to very limited restrictions of mandatory law in the arbitral seat)
H. No General Code of International Arbitration Procedure

- IBA Rules on the Taking of Evidence in International Arbitration
- IBA Guidelines on Party Representation in International Arbitration
- IBA Guidelines on Conflicts of Interest in International Arbitration
- UNCITRAL Notes on Organizing Arbitral Proceedings
H. No General Code of International Arbitration Procedure


  “Litigators from the United States are accustomed to having appellate courts establish strict time-limits for oral argument, but expect trial courts and arbitral tribunals to allow whatever amount of time is reasonably needed by the parties to present their evidence and arguments, without regard to pre-set timetable. Appellate courts are seen as being able to limit the length of oral argument because they have the relatively narrow task of deciding only issues of law based on the written record of the trial in the court below. This contrasts with trial courts which are perceived as being unable to establish schedules in advance because of the difficulty in predicting the number of witnesses that may be presented, the time required for examination and cross-examination or the strategies counsel may choose to adopt as the case proceeds.”
H. No General Code of International Arbitration Procedure


– “One Day Hearing: Normal Timing

- Introduction by Chairman 9:30
- Claimant’s first round presentation 1½ hr. maximum
- break
- Respondent’s first round presentation 1½ hr. maximum
- lunch
- Questions by arbitrators 15:00
- Rebuttal presentation by Claimant 45 minutes max.
- Rebuttal presentation by Respondent 45 minutes max.
- Further questions by Arbitrators, if any”
H. No General Code of International Arbitration Procedure

- Mustill, *Arbitral Proceedings*, Paper delivered at the ICC Arbitration Seminar in Malbun, 6 (24 November 1976), quoted in W. Craig, W. Park & J. Paulsson, *International Chamber of Commerce Arbitration ¶23.04* (3d ed. 2000): “[T]he arbitrators should not confuse flexibility with compromise. **Having chosen one system, the arbitrators may modify it in the interest of efficiency, but should not try to marry it to the other system.** Tribunals sometimes try to operate both systems at once, either out of mutual courtesy between the members of the tribunal, or because of the misplaced feeling that this will be more fair in cases where the parties come from countries with widely differing concepts of procedure. Experience shows that this attempt to amalgamate the two systems invariably produces a solution which embodies the weakest features of each systems; and it almost always guarantees misunderstandings and confusion.”
I. Institutional Arbitration Rules

- Most arbitral institutions have promulgated procedural rules, which apply to arbitrations where the parties have adopted those rules in their arbitration agreement
  - International Chamber of Commerce
  - London Court of International Arbitration
  - International Centre for Dispute Resolution/American Arbitration Association
  - Singapore International Arbitration Centre
  - International Center for Settlement of International Disputes
  - World Intellectual Property Organization
I. Institutional Arbitration Rules

- Institutional rules give structure and predictability to the arbitral process by providing a general procedural framework for the arbitration.

- However, institutional rules leave the overwhelming bulk of issues relating to the arbitral process for resolution by the parties and arbitral tribunal.
I. Institutional Arbitration Rules

- Most institutional rules do not provide a detailed procedural timetable for the arbitral procedure (e.g., timing and nature of written submissions, presentation of evidence, organization of hearings)

- Rather, institutional rules establish the broad outline of a procedural framework, with only key events identified (e.g., the request for arbitration, the hearing, the award)

- Within that framework, the parties and tribunal are left to work out the details of arbitral procedures in particular cases as they see fit
I. Institutional Arbitration Rules

- UNCITRAL Rules are available to parties who desire an essentially *ad hoc* arbitration, but supplemented by a skeletal procedural framework and a default mechanism for selecting an appointing authority.

- UNCITRAL Arbitration Rules:
  - Introductory rules
  - Composition of the arbitral tribunal
  - Arbitral proceedings
  - The award
I. Significant Procedural Events in International Arbitration

- Key Procedural Events

![Diagram of Key Procedural Events in Many International Arbitrations](image)
I. Significant Procedural Events in International Arbitration
I. Significant Procedural Events in International Arbitration

- Initiation of Arbitration
  - Notice of arbitration or request for arbitration
  - Reply and counterclaims
  - Answer to counterclaims
  - Constitution of arbitral tribunal
  - Presiding arbitrator’s procedural authority
  - Communications with arbitral tribunal; no *ex parte* communications
  - Language of arbitration
I. Significant Procedural Events in International Arbitration

- Preliminary Matters
  - Early dismissal of claims and defences
  - Jurisdictional objections
  - Initial procedural conference
  - Procedural timetable and time limits
  - Bifurcation and other segmentation of arbitral proceedings
  - ICC terms of reference
  - Advance on costs/deposit
  - Introduction of new claims or amendments/defenses
I. Significant Procedural Events in International Arbitration

- Written Submissions
  - Statement of claim and statement of defense
  - Further written submissions
  - Documentary evidence
  - Written witness statements
  - Expert reports
I. Significant Procedural Events in International Arbitration

- Parties’ Memorials
I. Significant Procedural Events in International Arbitration

- Parties’ Memorials

IN THE MATTER OF AN ARBITRATION
PENDING UNDER THE ARBITRATION AGREEMENT
IN THE HAGUE, THE NETHERLANDS

BETWEEN

THE GOVERNMENT OF SUDAN

AND

THE SUDAN PEOPLE’S LIBERATION MOVEMENT/ARMY

THE SUDAN PEOPLE’S LIBERATION MOVEMENT/ARMY
REPLY MEMORIAL

13 February 2009

WILMER CUTLER PICKERING
HALE and DORR LLP

IPA

of improper motivations to include oil fields within the Abyei Area. In fact, the government’s advisors hosted to examine after the parties’ positions before the ABC the location of the 1956 provisional borders, they would have seen that the

boundaries established by the ABC were entirely replicable on grounds having

nothing to do with oil wells. Similarly, the purported “smoking gun” statements by

ABC members are at fact exactly the opposite — they are nothing more than

unexceptional explanations of what the ABC Experts did in defining the Abyei Area.

56. There is, accordingly, no basis for the government’s various “mandatory criteria”

claims (even if they did fall within an area of mandate, which they do not). Even if there

was a legal foundation for such claims, which there is not, they simply are not supported by

the terms of the ABC Report or the ABC Experts’ actions.

3. The Government Waived Any Objections to the ABC Report

57. Finally, the government has in any event waived its objections to the validity of the

ABC Experts’ decision. The GoS did so both as its agreements relating to the ABC

proceedings in the Comprehensive Peace Agreement and then in its conduct during those

proceedings.

58. There is no need to repeat the analysis set forth in the SPLM/A’s Memorial (at paragraphs 92 to 926). Nothing in the Government’s Memorial addresses in any fashion the

Government’s repeated and explicit warnings of any right to challenge the ABC Experts’

decision.

59. Here, the GoS raised no jurisdictional, procedural or other objections at any time

during the ABC’s work — in which it actively participated. Instead, the GoS repeatedly and

explicitly affirmed that the Commission’s decision would be final and binding. As

Ambassador Dorey put it, “When a decision is agreed and accepted beforehand to be final

and binding, it is not acceptable by anybody to deny the right of that committee or body to

issue that decision. And, it’s unsound of any person not to accept that decision and respect

it” (see Ambassador Dorey, Taped Recording of GoS Final Presentation, dated June 10,

2003, File 2). Indeed, even after the ABC Report was published, the GoS provided no

comprehensible articulation of any excess of mandate claims. In these circumstances, the

GoS has either waived or is stopped from asserting excess of mandate (or any other) claims

in these proceedings.

B. The Government’s Discussion of the Historical Locations of the Ngok Dinka

and Mursiya/Pattern of the Abyei Area Are Demonstrably Wrong

60. The final section of the Government’s Memorial — Chapter 6 — purports to provide an

historical analysis of the locations of the Ngok Dinka and Mursiya in 1945 and to define the

boundaries of the Abyei Area. The GoS attempts to do so by addressing: (a) very briefly, the

alleged location of the Ngok Dinka (and the Mursi) in 1945; (b) at greatest length, the

alleged location of the Kerobina-Bah and Ghadal boundary in 1909; and (c) virtually not at all, the

Government’s interpretation of the Abyei Area, as defined in Article 1.1.2 of the Abyei

Protocol.

61. There is no need for this Tribunal to revisit the factual conclusions of the ABC

Experts, particularly given their specialized expertise and detailed investigations and
I. Significant Procedural Events in International Arbitration

- Documentary Evidence
I. Significant Procedural Events in International Arbitration

- Written Witness Statements

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IN THE MATTER OF AN ARBITRATION UNDER THE RULES OF ARBITRATION OF THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, THE CENTRAL AMERICA - UNITED STATES - DOMINICAN REPUBLIC FREE TRADE AGREEMENT AND THE FOREIGN INVESTMENT LAW OF EL SALVADOR

PAC RIM CAYMAN LLC,
Claimant,
v.
REPUBLIC OF EL SALVADOR,
Respondent

ICSID Case No. ARB/09/12

WITNESS STATEMENT OF STEVEN K. KRAUSE

1. My name is Steven K. Krause. I currently serve, on a part-time, contract basis, as the Chief Financial Officer (“CFO”) for Pacific Rim Mining Corp. In that capacity, my duties include overseeing the consolidated financial statements of Pacific Rim Mining Corp. and its subsidiaries (the “Pacific Rim Companies” or the “Companies”). I have full access to the books and records of Pacific Rim Mining Corp. and am responsible for ensuring that the Pacific Rim Companies comply with all regulatory and tax filings in the various jurisdictions where such filings are required of them.

2. I submit this Witness Statement in support of Claimant’s Countermemorial in opposition to the Objections to Jurisdiction submitted by the Government of El Salvador (“El Salvador” or “the Government”). I understand that those objections have been made in the context of an arbitration that has been brought at the International Centre for Settlement of

Being in full agreement with the statements contained in this document, I hereby sign it and acknowledge its contents on this 5th day of December 2010.

Steven K. Krause
I. Significant Procedural Events in International Arbitration

- Written Witness Statements

ARBITRATION UNDER THE SWEDISH ARBITRATION ACT 1999

Claimant

Respondent

FIRST WITNESS STATEMENT OF [Redacted]

30 July 2014

25. Owing to our customers’ new procurement strategy, we had replaced our long-term volumes by prices for partial volumes. Often we purchased these volumes at prices that were lower than those normally charged to industrial customers.

26. In [Redacted], our competitors calculated their offers—what we had come to expect. In respect of the price level, a distinction between high and low was made. This meant that our high-margin business, in particular contracts with municipal utilities, came under attack.

27. With [Redacted] (i.e., sales staff directly in touch with customers) we were now facing very different types of competition. Until now, our traditional competitors were predominantly other large import companies such as [Redacted], which, in the past, had dominated the market for many years. New competitors burst onto the market. Suppliers that had previously been active only on a regional basis (e.g., distributors of municipal utilities) were now operating in the market across the country. Foreign import companies, such as [Redacted], appeared more often. The local retailers, who had always supplied the original sales areas, such as [Redacted], were also selling new products from us.

As a result, we had to adapt our strategy. We had to restructure our sales force and adjust our pricing policies to remain competitive. We had to find new strategies to maintain our market share.
I. Significant Procedural Events in International Arbitration

- **Expert Reports**

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<table>
<thead>
<tr>
<th>Area of work</th>
<th>Overview of work performed</th>
</tr>
</thead>
<tbody>
<tr>
<td>1) Methodology</td>
<td>We obtained an overview of the methodology.</td>
</tr>
<tr>
<td>2) Data analysis</td>
<td>We used a data analysis tool in Excel.</td>
</tr>
<tr>
<td>3) Calculations</td>
<td>We conducted calculations to determine the outcome.</td>
</tr>
</tbody>
</table>

### Table 1: Overview of work performed

1. Methodology
2. Data analysis
3. Calculations

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Report on [Insert Details]

for the calendar year 2014

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22nd July 2014

Strictly private and confidential
I. Significant Procedural Events in International Arbitration

- Disclosure
  - Requests to produce
  - Objections
  - Arbitral tribunal’s order
  - Production
  - Privilege log; privilege “master”
I. Significant Procedural Events in International Arbitration

- Evidentiary Hearing
  - Pre-hearing conference
  - Time allocations
  - Openings
  - Procedural rulings
  - Transcripts or Minutes
  - Witness examination
  - Fact witnesses
  - Expert witnesses
  - Witness conferencing
  - Post-hearing written submissions
I. Significant Procedural Events in International Arbitration
I. Significant Procedural Events in International Arbitration

- Hearing Rooms
I. Significant Procedural Events in International Arbitration

- Hearing Rooms
1. Significant Procedural Events in International Arbitration

- Hearing Rooms
I. Significant Procedural Events in International Arbitration

- ICC Floorplans
I. Significant Procedural Events in International Arbitration

- Parties’ Presentations
I. Significant Procedural Events in International Arbitration

- Transcript of the Hearing
I. Significant Procedural Events in International Arbitration

- Transcript of the Hearing
I. Significant Procedural Events in International Arbitration

- Transcript of the Hearing

Day 3

14 December 2013

A. Thank you, Mr. [Name].

B. Transcript of the Hearing.

C. The arbitral tribunal.

D. The arbitral tribunal.

E. The arbitral tribunal.

F. The arbitral tribunal.

G. The arbitral tribunal.

H. The arbitral tribunal.

I. The arbitral tribunal.

J. The arbitral tribunal.

K. The arbitral tribunal.

L. The arbitral tribunal.

M. The arbitral tribunal.

N. The arbitral tribunal.

O. The arbitral tribunal.

P. The arbitral tribunal.

Q. The arbitral tribunal.

R. The arbitral tribunal.

S. The arbitral tribunal.

T. The arbitral tribunal.

U. The arbitral tribunal.

V. The arbitral tribunal.

W. The arbitral tribunal.

X. The arbitral tribunal.

Y. The arbitral tribunal.

Z. The arbitral tribunal.

Page 1

Page 2

Page 3

Page 4

Page 5
I. Significant Procedural Events in International Arbitration

- Concluding Stages
  - Close of arbitral proceedings
  - Deliberations
  - Making and notification of award

- Default Proceedings