



## Imposing Sanctions in Arbitration: Just How Far Can You Go?

October 20, 2015 – 1:00 p.m. – 2:00 pm. ET

### PROGRAM SUMMARY

**Speakers:** Stanley P. Sklar, Esq. and J. Timothy Eaton, Esq.

Traditionally, the matter of sanctions in arbitration has been a murky one. While the courts have wielded largely unrestricted power to enforce rules and orders, the authority of arbitrators to impose sanctions has usually been circumscribed by the terms of the contract or arbitration agreement, or remains unaddressed by institutional rules. Recently, however, the “rules of engagement” insofar as sanctions are concerned have undergone a significant shift about which neutrals and advocates must be fully informed.

### AGENDA

<b>1:00 p.m.</b>	<b>Welcome and Introduction of Speakers</b>	(5 minutes)
<b>1:05 p.m.</b>	<b>Sanctions in Arbitration</b> <ul style="list-style-type: none"><li>• As an arbitrator, how and to what extent am I permitted to impose sanctions on parties?</li><li>• Are we limited by the rules or the arbitration clause?</li><li>• Are there inherent powers?</li><li>• How have reviewing courts responded to sanctions imposed during an arbitration?</li><li>• As an advocate, what are the limits on representing a client before exposure to sanctions by the Panel?</li></ul>	(50 minutes)
<b>1:55 p.m.</b>	<b>Conclusion and Questions</b>	(5 minutes)
<b>2:00 p.m.</b>	<b>Evaluation</b>	(5 minutes)
<b>2:05 p.m.</b>	<b>Adjourn</b>	

## J. Timothy Eaton

Partner

**Office:** Chicago

**Address:** 111 East Wacker, Suite 2800 / Chicago, IL 60601

**Email:** [teaton@taftlaw.com](mailto:teaton@taftlaw.com)

**Telephone:** (312) 836-4071

**Fax:** (312) 527-4011

J. TIMOTHY EATON is a seasoned veteran in commercial litigation, appellate litigation and arbitration.

Tim is a past president of the Appellate Lawyers Association, a member of the ABA Standing Committee of Amicus Briefs and a Fellow of the American Academy of Appellate Lawyers. He serves on the American Arbitration Association Commercial Panel for Large Complex Cases and the IICPR Distinguished Panel of Neutrals and also is a Fellow of the National Academy of Distinguished Neutrals. He is a past chair of the Illinois State Bar Association Section on Civil Practice and Procedure and a member of the Chicago Bar Association Commercial Litigation Committee.

He has authored over 50 law review articles and bar publications focusing on commercial litigation, appellate and arbitration issues. He was the first Editor-in-Chief of the *Appellate Law Review* and also is the co-author of a civil appellate practice handbook that is in its fifth edition. He is a frequent lecturer on appellate and arbitration practice.

Tim has been awarded an AV® Peer Review Rating from Martindale-Hubbell, its highest rating for ethical standards and legal ability and was named a 7th Circuit Litigation Star in the 2012 *Benchmark Appellate* publication. Tim has been designated by his peers as a Leading Lawyer in Civil Appellate Law and Commercial Litigation from 2005-2012. He has been named to *The Best Lawyer in America* list for Appellate Law for 2007-2013 and was named *Best Lawyers'* 2010 Chicago Appellate Lawyer of the Year. Tim has also been named to the Illinois *Super Lawyers* list every year from 2005-2013.



### Practice Groups:

Educational Institutions, Litigation, Appellate, Sustainability

### Bar/Court Admissions:

#### Federal

U.S. Supreme Court, 7th Circuit Court of Appeals, Central District of Illinois, Northern District of Illinois, Southern District of Illinois

#### State

Illinois

### Education:

Washington University School of Law (LL.M.) (1979), Southern Illinois University School of Law (1977), Miami University of Ohio (1973)

### Professional Affiliations / Recognitions:

Chicago Bar Association, Illinois State Bar Association, Appellate Lawyers Association, Federal Bar Association, Seventh Circuit Bar Association, Illinois Lawyers Trust Fund, American Bar Association, American Academy of Appellate Lawyers

Tim received his B.A. from Miami University of Ohio and his LL.M. from Washington University School of Law. He earned his J.D., *cum laude*, from Southern Illinois University School of Law.

## Professional and Civic Affiliations

- Chicago Bar Association, President
- Illinois State Bar Association, Past President
- Appellate Lawyers Association of Illinois, Past President
- Seventh Circuit Bar Association, Member, Board of Governors
- Federal Bar Association, Member, Board of Directors
- Illinois Lawyers Trust Fund, Past President
- Illinois Coalition for Equal Justice, Past Chair of Executive Committee
- American Bar Association

- House of Delegates (1999–2002)
- Past Chair, Appellate Advocacy Committee, Tort and Insurance Practice

## Section

- Member, Standing Committee on Amicus Curiae Briefs (2012-2013)
- Appointed in 2012 by the Illinois Supreme Court as a member of the Judicial Advisory Council's Strategic Planning Committee
- Co-Chair of the Illinois Supreme Court's 2013 Conference on Shaping the Future of the Courts: Vision, Values and Strategies
- National Academy of Distinguished Neutrals
- American Academy of Appellate Lawyers, Fellow

## Recent Publications

- Author, "Substituting Judges Upon Remand," *CBA Record* (April/May 2013).
- Co-author, "The Too-Expansive Illinois General Verdict Rule," *Illinois Bar Journal*, Vol. 101, No. 3 (March 2013).
- "Application of Arbitration Agreements in Tort Law Limited to the Contractual Parties," *ISBA In the Alternative* (May 2013, vol. 51, no. 3)

- "What Proceedings in State Court are Permitted When the Dispute is Governed by a Valid Arbitration Clause: Recent Illinois Cases Say Hands Off until the Arbitration Award is Final," *ISBA Trial Briefs* (April 2013) Vol. 58, No. 10.
- "Young Lawyers: Motion Practice in Arbitrations," *Alternative Dispute Resolution* (Spring 2013) Vol. 17 No. 3.
- "FAA's 'National Policy Favoring Arbitration' Trumps State Courts from Courts Ruling on Validity of Underlying Contract Where there is a Valid Arbitration Clause," *ISBA In The Alternative* (February 2013) Vol. 19, No. 3.
- Chapter author, *Business and Commercial Litigation*, 2012 Edition (IICLE).
- Co-author, *Civil Appellate Practice: State and Federal (Illinois)*, 2012 Edition (IICLE).
- Introduction, *Attorneys' Legal Liability*, 2012 Edition (IICLE).

## **Significant Commercial Litigation Representations**

- A telecommunications company in a contract dispute before the International Centre for Dispute Resolution;
- An ESOP in an multi-million dollar ERISA claim in the Northern District of Illinois based upon breaches of fiduciary duties by a former owner and trustee;
- A Fortune 500 company in a \$40 million claim in the Commercial Division of Cook County arising from claims of a quasi-joint venture in Poland;
- A Fortune 500 company in a \$250 million breach of contract claim arising from a quasi-joint venture;
- A Fortune 500 company in a \$7 million claim over the termination of a vendor;
- A securities brokerage firm in claims involving breach of fiduciary duty and tortious interference with contract;
- A distributor in claims by a manufacturer involving the Lanham Act and breach of contract;
- A Fortune 500 company in mediation of claims involving vendor disputes;
- A major investment house in litigation of alleged breaches of trust indenture agreements, contracts, and securities documents;
- A Fortune 100 company in matters in federal district court in Boston involving the discharge of a \$6 million claim in bankruptcy;
- A major health care institution in a declaratory judgment regarding scope and

applicability of federal healthcare regulations; and

- A Fortune 500 company at trial and in appeal involving environmental claims under CERCLA and RCRA.

Tim has represented the following in the Appellate area:

- A group of companies in the Seventh Circuit Court of Appeals on a plaintiff's anti-trust claim;
- A *Fortune* 500 company in the Seventh Circuit Court of Appeals in multiple class action appeals arising from an MDL;
- A plaintiff's class in the Seventh Circuit Court of Appeals from the denial of class certification;
- A *Fortune* 500 company in the Seventh Circuit Court of Appeals in an appeal from a \$70 million breach of contract jury verdict;
- A plaintiff's class in the Seventh Circuit Court of Appeals on a forum issue in a class action products liability case;
- A major oil company in the Illinois Supreme Court involving an environmental cleanup issue;
- A plaintiff in the Illinois Supreme Court in a products liability case;
- All Illinois law schools in the Illinois Supreme Court on the issue of a *cy pres* award in class action litigation;
- A Chicago university before the Illinois Supreme Court over the issue of donor intent in creating a trust;
- A major Chicago utility before the Illinois Supreme Court in a mass tort procedural issue;
- A major Chicago law firm before the Illinois Supreme Court over the issue of jurisdiction of a multimillion dollar attorneys' lien petition in the tobacco litigation settlement;
- A lawyer before the Illinois Supreme Court on a Statute of Limitations issue in a legal malpractice case;
- A midsized company before the Illinois Supreme Court in the applicability of an exception to Rule 216;
- A *Fortune* 100 Company in an appeal before the Delaware Supreme Court on a Patent License Agreement; and
- A major state university in the Seventh Circuit in cases involving employment-

related claims under Title VII and Section 1983.

## **STANLEY P. SKLAR, ESQ.**

**WORK HISTORY:** Executive Director for Arbitration Studies, DePaul University College of Law, Center for Dispute Resolution, 2009-; Partner, Bell, Boyd & Lloyd LLP, 1995-2008; Partner, Schain, Firsel & Burney, 1994-95; Partner, Pretzel & Stouffer, Chtd., 1982-94; Partner, Mann, Cogan, Sklar & Lerman, 1970-82; Associate, Fein & Pesmen, 1964-70.

**EXPERIENCE:** Over 35 years' experience specializing in commercial real estate and construction representing owners, design professionals, lenders, contractors, subcontractors, and title insurance companies; contract negotiations, construction claims, commercial lease disputes and commercial loan workout, commercial contract disputes, land use and zoning disputes,; expert witness regarding professional malpractice and contract claims. Adjunct Professor, Graduate Real Estate Program, John Marshall School of Law teaching Construction Law (1995-2009). Instructor, Oakton Community College, Architectural Technology Program teaching Construction Law. (1991-19995). Master Teacher, Illinois Institute for Continuing Legal Education. Attorney, Northbrook Park District (1971-80); Northbrook Zoning Board of Appeals (Chair, 1973-99).

**ALTERNATIVE DISPUTE RESOLUTION EXPERIENCE:** Chaired panels concerning claims in excess of \$10 million on several Large Complex Case panel matters and sole arbitrator in several Large Complex Cases. Arbitrator and mediator in construction contract disputes, payment disputes, delay claims, and failure claims; design defects; change order disputes; insurance coverage disputes and surety claims; common area maintenance contributions under multiple shopping center leases; international shopping center disputes; underground tunneling project involving trenchless technology; concrete defects in high rise office building; concrete defects in parking deck and garage structures; alkali silica deterioration for commercial pavers in office complex, concrete failures, curtain wall water intrusion, structural steel failures; HUD financed retirement facilities; marine structures including breakwater construction for lake erosion protection; delay claims relating to processing plant; energy supply contract disputes involving coal mines and public utility; supply contracts for coal forced steam generating plant; energy savings performance contracts; circulating fluidized bed steam generators for power plant, floating casinos, hospital and health center retro-fitting and new construction, lease workletter disputes and workouts, demolition and disposal of nuclear waste; claims relating to auto dealership facility construction; multi-party mediations regarding insurance coverage for construction defects; and title insurance coverage disputes.

Member of the AAA Large Complex Case Panel for Commercial and Construction Disputes; AAA National Commercial/Construction Arbitrator Training Faculty; and instructor for ACE courses on Ethics, Chairing the Arbitration Panel. Arbitrator, Circuit Court of Cook County Mechanics Lien Section. Mediator, Circuit Court of Cook County Court Annexed Mediation. . AAA Construction Arbitrator II: Advanced Case Management Issues, 2005; Arbitrator Ethics and Disclosure, 2004, 2005; Member, AAA National Construction Dispute Resolution Committee. Speaker AAA 2009 Annual Construction Conferences. Panel member, International Centre for Dispute Resolution. (CPR); Certified Mediator by International Mediation Institute.

**ALTERNATIVE DISPUTE RESOLUTION TRAINING:** ALI ABA Course on Special Masters in Federal Courts, 12/05; ACE004 - Practical Tips for Dealing with Delay Tactics of Parties and Advocates, Chicago, 4/05; AAA International Arbitration Symposium, San Francisco, 9/03; Attended AAA Neutrals Conference and satisfied 2003 ACE requirements, Providence, 8/03; faculty, AAA Neutrals Conference, Scottsdale, 1/03; AAA Arbitrator Update 2001; AAA Construction Train the Trainer Course, Phoenix, 12/00; attended AAA Mediator Conference Workshop, Chicago, 9/00; AAA Continuing Education, "Concrete Deterioration," Chicago, 9/00; AAA Continuing Education, "Sticks and Stones and Managing the Process of Arbitration," Chicago, 7/00; AAA Continuing Education, "Scheduling Damages and Discovery Management in Arbitration," Chicago, 5/00; presenter, AAA National Mediator Conference, Denver, 3/00; Harvard Law School Advanced Mediation Workshop, 2000; faculty, AAA Commercial Arbitrator Training, Atlanta, 11/98; AAA Construction Law Seminar, Chicago, 11/98; faculty, AAA Construction Industry Arbitrator Training, Chicago, 6/97; faculty, AAA Construction Mediator Workshop, Chicago, 5/97; Constructive Resolutions, Inc., Mediation Training, 1991; faculty, Chicago Region Arbitrator Training Programs; various other ADR training.

**PROFESSIONAL LICENSES:** Illinois Bar, 1964; U.S. District Court, Northern District of Illinois, 1965; Trial Bar of U.S. District Court, Northern District of Illinois, 1972; U.S. Court of Appeals, 7th Circuit, 1965; U.S. Supreme Court, 1968;

**PROFESSIONAL ASSOCIATIONS:** College of Commercial Arbitrators, President (2010-11); American College of Real Estate Lawyers, Fellow; American College of Construction Lawyers, Past President); Society of Illinois Construction Attorneys (Past President); Member CPR Panel of Distinguished Neutrals. International Mediation Institute (IMI) Certified Mediator; Association of Attorney Mediators, Member; Chicago Bar Association (Real Property Committee, Past Chair; Alternative Dispute Resolution Committee, Past Chair); Construction and Mechanic's Lien Subcommittee Past Chair); American Bar Association (Forum on Construction, Board of Governors); Builders Association of Greater Chicago (Board of Directors 1993-1996); American Subcontractors Association (Board of Directors; Governmental Relations Committee, Chair (1990-2000); Construction Financial Management Association (Chicago Chapter, Legal Counsel (1990-1994).

**HONORS:** Recipient of ABA Forum on Construction Industry Cornerstone Award for Lifetime Achievement in the field of Construction Law (2004); Chambers USA, America's Leading Lawyers for Business stated "rivals extol Stanley Sklar as "one of the preeminent construction law practitioners in the country." Member of Lambda Alpha Honorary Land Economics Society and Leading Lawyer Network – Construction consisting of top 5% of lawyers in Illinois; Leading Lawyer Network of Lawyer Neutrals.

**EDUCATION:** University of Illinois, B.S. Industrial Administration, 1960; Northwestern University School of Law, J.D., 1964

**PUBLICATIONS:** Contributing author, "CONSTRUCTION LIENS," and "ARBITRATION," chapters, CONSTRUCTION LAW, Matthew Bender, 2001; EFFECTIVE USE OF ADR IN REAL ESTATE DISPUTES, ALTERNATE DISPUTE RESOLUTION FOR LAWYERS, Illinois Institute for Continuing Legal Education, 2001; THE ALLOCATION OF RISK IN THE NEW MILLENNIUM, Aspen Law Publishers, 2000; lead editor, ILLINOIS CONSTRUCTION LAW, Illinois Institute Continuing Legal Education, 1997; THE FIFTY STATE PUBLIC CONSTRUCTION CONTRACTING, 1996; contributing author, "Illinois," THE FIFTY STATE CONSTRUCTION LIEN AND BOND LAWS; contributing author, "Illinois," THE TROUBLED CONSTRUCTION LOAN, Wiley Law Publishers, 1991; "SELECTING THE CORRECT CONSTRUCTION DELIVERY SYSTEM," Construction Law Handbook, Aspen Publications,; "SPECIAL PROBLEMS IN THE CONSTRUCTION LOAN WORKOUT", American College of Real Estate Lawyers American Bar Association Papers; GUIDE TO BEST PRACTICES IN COMMERCIAL ARBITRATION, College of Commercial Arbitrators, Juris Publications; DISCOVERY ISSUES IN ARBITRATION; ALI-ABA Practice Checklist Manual on Alternative Dispute Resolution, HOW TO PRESENT YOUR CASE IN ARBITRATION, ALI-ABA ; MEDIATION ADVOCACY, DePaul University, Center for Dispute Resolution.

**COMPENSATION:** Please contact for compensation arrangements.

**Stanley P. Sklar, Esq.**  
**Dispute Resolution Services**  
**707 Skokie Blvd.**  
**Suite 600**  
**Northbrook, Illinois 60062**

**847-509-2750 (Direct)**  
**847-291-8492 (Fax)**  
[ssklaradr@comcast.net](mailto:ssklaradr@comcast.net)

**Website:** [www.stanlevsklar.com](http://www.stanlevsklar.com)



## Representative Cases

### Imposing Sanctions in Arbitration: Just How Far Can You Go?

Webinar – April 29, 2015 – 1:00 p.m. ET

**Reliastar Life Insurance v EMC, 564 F.3d 81 (2d Cir. 2009).** See Arbitrator Power to Sanction Bad Faith Conduct, Margaret Moses, and Loyola University Chicago School of Law. Reliastar referred to certain “inherent authority” that a panel possesses absent a specific contractual limitation on that power due to the bad faith conduct of a party as an exception to the American rule.

**Marshall & Co. v Duke, 114 F.3d 188 (11<sup>th</sup> Circuit. 1997)** court upheld award of attorneys fees and costs even though the underlying agreement did not address the issue. Court held that “...every judicial and quasi judicial body has the right to award attorney’s fees under the common law bad faith exception to the American Rule that each party bears its own attorneys fees exception.

**Synergy Gas Co. vSasso, 853 F2d 59 (2<sup>nd</sup> Cir. 1988)** – granted attorneys fees for acting in bad faith in violating the contract provisions and in bringing a spurious claim of arbitrator misconduct. Court held the award was not punitive in nature but compensatory.

**Hamstein Cumberland Music Group v Estate of Williams, 2013 WL 3227536 (5<sup>th</sup> Cir. 2013)** arbitrator imposed a fine against a party who failed to comply with discovery orders and barred the “miscreant” – Court term...from offering evidence on certain issues.

**Seagate Technology LLC v Western Digital Corp, 834 N.W. 2d 555 (Minn. Ct. App. 2013) Minn.** Supreme Court finds AAA Rules Give Arbitrator Power to Issue Sanctions over \$600 Million in punitive sanctions based upon the respondents fabricating of evidence barring them from offering evidence or a defense on certain issues. The Court found that AAA rules permitted the sanctions.

**Superradio Ltd. Partnership v. Winstar Radio Productions LLC, 2006 WL 762593 (Mass.\2006)** regarding sanctions for violating discovery orders. Court held that under old 45(a), which is now 47(a), panel was granted the authority to issues any remedy or relief that the arbitrator deems just and equitable and cited 23(d) which gave the panel the authority to issue monetary sanctions for violating discovery orders.

**Halim v Great Gatsby’s Auction Gallery, 2007 WL 773286 (B.D. Ill. March 12, 2007, and Digitelcom LTD. V Tele2 Sver AB (NY),** dealt with frivolous challenge to arbitration Award which triggered sanctions.

**B. L. Harbert Intl LLC v Hercules Steel, 2006 WL 462368 (11<sup>th</sup> Cir. (Ala) Feb. 28, 2006,** Court denied motion to vacate an arbitration award using the case that noted the FAA’s goals will be achieved only if the courts “ensure arbitration is an alternative to litigation, not an additional layer in a protracted contest. The court also expressed its grave concern that the arbitration process is undermined when a party “...who loses an arbitration award assumes a never-say-die attitude and drags the dispute through the Court system without an objectively reasonable belief it will prevail.

**Polin v. Kellwood, 103 F. Supp. 2d 238 (2000)** Court upheld sanctions against attorney and not party based upon attorney’s egregious behavior during proceeding.



International Centre  
for Dispute Resolution

## **ICDR GUIDELINES FOR ARBITRATORS CONCERNING EXCHANGES OF INFORMATION**

### ***Introduction***

The American Arbitration Association (AAA) and its international arm, the International Centre for Dispute Resolution<sup>®</sup> (ICDR) are committed to the principle that commercial arbitration, and particularly international commercial arbitration, should provide a simpler, less expensive and more expeditious form of dispute resolution than resort to national courts.

While arbitration must be a fair process, care must also be taken to prevent the importation of procedural measures and devices from different court systems, which may be considered conducive to fairness within those systems, but which are not appropriate to the conduct of arbitrations in an international context and which are inconsistent with an alternative form of dispute resolution that is simpler, less expensive and more expeditious. One of the factors contributing to complexity, expense and delay in recent years has been the migration from court systems into arbitration of procedural devices that allow one party to a court proceeding access to information in the possession of the other, without full consideration of the differences between arbitration and litigation.

The purpose of these guidelines is to make it clear to arbitrators that they have the authority, the responsibility and, in certain jurisdictions, the mandatory duty to manage arbitration proceedings so as to achieve the goal of providing a simpler, less expensive, and more expeditious process. Unless the parties agree otherwise in writing, these guidelines will become effective in all international cases administered by the ICDR commenced after May 31, 2008, and may be adopted at the discretion of the tribunal in pending cases. They will be reflected in amendments incorporated into the next revision of the International Arbitration Rules. They may be adopted in arbitration clauses or by agreement at any time in any other arbitration administered by the AAA.

#### **1. In General**

- a. The tribunal shall manage the exchange of information among the parties in advance of the hearings with a view to maintaining efficiency and economy. The tribunal and the parties should endeavor to avoid unnecessary delay and expense while at the same time balancing the goals of avoiding surprise, promoting equality of treatment, and safeguarding each party's opportunity to present its claims and defenses fairly.

- b. The parties may provide the tribunal with their views on the appropriate level of information exchange for each case, but the tribunal retains final authority to apply the above standard. To the extent that the Parties wish to depart from this standard, they may do so only on the basis of an express agreement among all of them in writing and in consultation with the tribunal.
2. **Documents on which a Party Relies.**

Parties shall exchange, in advance of the hearing, all documents upon which each intends to rely.
3. **Documents in the Possession of Another Party.**
  - a. In addition to any disclosure pursuant to paragraph 2, the tribunal may, upon application, require one party to make available to another party documents in the party's possession, not otherwise available to the party seeking the documents, that are reasonably believed to exist and to be relevant and material to the outcome of the case. Requests for documents shall contain a description of specific documents or classes of documents, along with an explanation of their relevance and materiality to the outcome of the case.
  - b. The tribunal may condition any exchange of documents subject to claims of commercial or technical confidentiality on appropriate measures to protect such confidentiality.
4. **Electronic Documents.**

When documents to be exchanged are maintained in electronic form, the party in possession of such documents may make them available in the form (which may be paper copies) most convenient and economical for it, unless the Tribunal determines, on application and for good cause, that there is a compelling need for access to the documents in a different form. Requests for documents maintained in electronic form should be narrowly focused and structured to make searching for them as economical as possible. The Tribunal may direct testing or other means of focusing and limiting any search.
5. **Inspections.**

The tribunal may, on application and for good cause, require a party to permit inspection on reasonable notice of relevant premises or objects.
6. **Other Procedures.**
  - a. Arbitrators should be receptive to creative solutions for achieving exchanges of information in ways that avoid costs and delay, consistent with the principles of due process expressed in these Guidelines.

- b. Depositions, interrogatories, and requests to admit, as developed in American court procedures, are generally not appropriate procedures for obtaining information in international arbitration.

7. **Privileges and Professional Ethics.**

The tribunal should respect applicable rules of privilege or professional ethics and other legal impediments. When the parties, their counsel or their documents would be subject under applicable law to different rules, the tribunal should to the extent possible apply the same rule to both sides, giving preference to the rule that provides the highest level of protection.

8. **Costs and Compliance.**

- a. In resolving any dispute about pre-hearing exchanges of information, the tribunal shall require a requesting party to justify the time and expense that its request may involve, and may condition granting such a request on the payment of part or all of the cost by the party seeking the information. The tribunal may also allocate the costs of providing information among the parties, either in an interim order or in an award.
- b. In the event any party fails to comply with an order for information exchange, the tribunal may draw adverse inferences and may take such failure into account in allocating costs.

# IBA Rules on the Taking of Evidence in International Arbitration

*Adopted by a resolution of  
the IBA Council  
29 May 2010  
International Bar Association*



the global voice of  
the legal profession®

# IBA Rules on the Taking of Evidence in International Arbitration

*Adopted by a resolution of  
the IBA Council  
29 May 2010  
International Bar Association*



the global voice of  
the legal profession®

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

ISBN: 978 0 948711 54X

All Rights Reserved

© International Bar Association 2010

No part of the material protected by this copyright notice may be reproduced or utilized in any form or by any means, electronic or mechanical, including photocopying, recording, or any information storage and retrieval system, without written permission from the copyright owner.

# Contents

Members of the Working Party

i

Members of the IBA Rules of Evidence  
Review Subcommittee

iii

About the Arbitration Committee

1

Foreword

2

THE RULES

4



the global voice of  
the legal profession<sup>®</sup>

# Members of the Working Party

David W Rivkin

*Chair, SBL Committee D  
(Arbitration and ADR)  
Debevoise & Plimpton LLP,  
New York, USA*

Wolfgang Kühn

*Former Chair, SBL Committee D  
Heuking Kühn Lüer Wojtek,  
Düsseldorf, Germany*

Giovanni M Ughi

*Chair  
Ughi e Nunziante Studio Legale,  
Milan, Italy*

Hans Bagner

*Advokatfirman Vinge KB,  
Stockholm, Sweden*

John Beechey

*International Chamber of Commerce,  
Paris, France*

Jacques Buhart

*Herbert Smith LLP,  
Paris, France*

Peter S Caldwell

*Caldwell Ltd, Hong Kong*

Bernardo M Cremades

*B Cremades y Asociados,  
Madrid, Spain*

Emmanuel Gaillard  
*Shearman & Sterling LLP,*  
*Paris, France*

Paul A Gélinas  
*Gélinas & Co,*  
*Paris, France*

Hans van Houtte  
*Katholieke Universiteit Leuven,*  
*Leuven, Belgium*

Pierre A Karrer  
*Zurich, Switzerland*

Jan Paulsson  
*Freshfields Bruckhaus Deringer LLP,*  
*Paris, France*

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

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

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

# Members of the IBA Rules of Evidence Review Subcommittee

Richard H Kreindler

*Chair  
Review Subcommittee  
Shearman & Sterling LLP,  
Frankfurt, Germany*

David Arias

*Pérez-Llorca,  
Madrid, Spain*

C Mark Baker

*Fulbright & Jaworski LLP,  
Houston, Texas, USA*

Pierre Bienvenu

*Co-Chair 2008-2009  
Arbitration Committee  
Ogilvy Renault LLP,  
Montréal, Canada*

Amy Cohen Kläsener

*Review Subcommittee Secretary  
Shearman & Sterling LLP,  
Frankfurt, Germany*

Antonias Dimolitsa

*Antonias Dimolitsa & Associates,  
Athens, Greece*

Paul Friedland

*White & Case LLP,  
New York, USA*

Nicolás Gamboa

*Gamboa & Chalela Abogados,  
Bogotá, Colombia*

Judith Gill, QC

*Co-Chair 2010-2011  
Arbitration Committee  
Allen & Overy LLP  
London, England*

Peter Heckel

*Hengeler Mueller Partnerschaft von Rechtsanwälten,  
Frankfurt, Germany*

Stephen Jagusch

*Allen & Overy LLP,  
London, England*

Xiang Ji

*Fangda Partners,  
Beijing & Shanghai, China*

Kap-You (Kevin) Kim

*Bae, Kim & Lee LLC,  
Seoul, South Korea*

Toby T Landau, QC

*Essex Court Chambers,  
London, England*

Alexis Mourre

*Castaldi Mourre & Partners,  
Paris, France*

Hilmar Raeschke-Kessler

*Rechtsanwalt beim Bundesgerichtshof,  
Karlsruhe-Ettlingen, Germany*

David W Rivkin

*Debevoise & Plimpton LLP,  
New York, USA*

Georg von Segesser  
*Schellenberg Wittmer,  
Zurich, Switzerland*

Essam Al Tamimi  
*Al Tamimi & Company,  
Dubai, UAE*

Guido S Tawil  
*Co-Chair 2009-2010  
Arbitration Committee  
M&M Bomchil Abogados,  
Buenos Aires, Argentina*

Hiroyuki Tezuka  
*Nishimura & Asahi,  
Tokyo, Japan*

Ariel Ye  
*King & Wood,  
Beijing, China*

# About the Arbitration Committee

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

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

# Foreword

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

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

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

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

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

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

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

**Guido S Tawil**

**Judith Gill, QC**

*Co-Chairs, Arbitration Committee*

29 May 2010

# The Rules

## **Preamble**

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

## **Definitions**

In the IBA Rules of Evidence:

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

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

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

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

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

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

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

*'Party'* means a party to the arbitration;

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

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

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

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

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

## **Article 1 Scope of Application**

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

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

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

## **Article 2 Consultation on Evidentiary Issues**

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

### **Article 3 Documents**

1. Within the time ordered by the Arbitral Tribunal, each Party shall submit to the Arbitral Tribunal and to the other Parties all Documents available to it on which it relies, including public Documents and those in the public domain, except for any Documents that have already been submitted by another Party.
2. Within the time ordered by the Arbitral Tribunal, any Party may submit to the Arbitral Tribunal and to the other Parties a Request to Produce.
3. A Request to Produce shall contain:
  - (a) (i) a description of each requested Document sufficient to identify it, or  
(ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist; in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner;
  - (b) a statement as to how the Documents requested are relevant to the case and material to its outcome; and
  - (c) (i) a statement that the Documents requested are not in the possession, custody or control of the requesting Party or a statement of the reasons why it would be unreasonably burdensome for the requesting Party to produce such Documents, and  
(ii) a statement of the reasons why the requesting Party assumes the Documents requested are in the possession, custody or control of another Party.
4. Within the time ordered by the Arbitral Tribunal, the Party to whom the Request to Produce is addressed shall produce to the other Parties and, if the Arbitral Tribunal so orders, to it, all the Documents requested in its possession, custody or control as to which it makes no objection.
5. If the Party to whom the Request to Produce is addressed has an objection to some or all of the

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

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

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

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

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

#### **Article 4 Witnesses of Fact**

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

those witnesses whose testimony is sought pursuant to Articles 4.9 or 4.10. If Evidentiary Hearings are organised into separate issues or phases (such as jurisdiction, preliminary determinations, liability or damages), the Arbitral Tribunal or the Parties by agreement may schedule the submission of Witness Statements separately for each issue or phase.

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

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

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

#### **Article 5 Party-Appointed Experts**

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

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

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

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

#### **Article 6 Tribunal-Appointed Experts**

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

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

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

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

## **Article 7 Inspection**

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

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

#### **Article 8 Evidentiary Hearing**

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

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

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

#### **Article 9 Admissibility and Assessment of Evidence**

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

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



the global voice of  
the legal profession®



AMERICAN ARBITRATION ASSOCIATION®

[Click here to go to the Commercial Arbitration Rules](#)

[Click here to go to the Commercial Arbitration Rules](#)  
Effective 10/1/13

[Click here to go to the Construction Arbitration Rules](#)

[Click here to go to the Employment Arbitration Rules](#)

[Click here to go to the Labor Arbitration Rules](#)