

### ■ **III. Selection and Appointment of the Tribunal and Preparatory Organization**

WIPO Arbitration Workshop

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Scott Donahey, WIPO Mediator and Arbitrator, Palo Alto  
Peter Michaelson, WIPO Mediator and Arbitrator, New York

2

## Arbitrator Skills

- In general
- Restrictions imposed by the arbitration agreement
  - E.g. nominated from a list of panelists of an institution or confirmed by that institution
  - E.g. certain professional qualifications
- Restrictions imposed by the applicable law
- Maintaining decorum and compliance in a friendly, but firm manner

## Number of Arbitrators

- The Tribunal shall consist of such number of arbitrators as has been agreed by the parties: Article 14(a) WIPO Arbitration Rules
- Where the parties have not agreed on the number, the Tribunal shall consist of a sole arbitrator except where the Center in its discretion determines that in view of all the circumstances of the case a Tribunal composed of three members is appropriate: Article 14(b)

## Role of the Presiding Arbitrator

### Article 20(b) - Nationality of Arbitrators

- If the parties have not agreed on the nationality of the sole or presiding arbitrator, such arbitrator shall, in the absence of special circumstances such as the need to appoint a person having particular qualifications, be a national of a country other than the countries of the parties.

### Article 37(c) - General Powers of the Tribunal

- The Tribunal shall ensure that the arbitral procedure takes place with due expedition. It may, at the request of a party or on its own motion, extend in exceptional cases a period of time fixed by these Rules, by itself or agreed to by the parties. In urgent cases, such an extension may be granted by the presiding arbitrator alone.

### Article 63 - Decision-Making

- Unless the parties have agreed otherwise, where there is more than one arbitrator, any award, order or other decision of the Tribunal shall be made by a majority. In the absence of a majority, the presiding arbitrator shall make the award, order or other decision as if acting as sole arbitrator.

## Role of the Presiding Arbitrator

- Primary role to control the proceedings and maintain the agreed procedure
- Procedural questions to be determined:
  - Manner of handling objections
  - Preparation of witnesses
  - Should arbitrators question witnesses? When?
  - Should arbitrators discuss case before completion of evidence?
  - If an arbitrator appears to be or is said to be acting in a partial manner, how to handle?

## Appointment Procedures

- Control by parties – if the parties have agreed on a procedure for appointment that procedure shall be followed: Article 15(a)
- If the Tribunal has not been established pursuant to the agreed procedure or, in the absence of such agreed period of time, within 45 days of the commencement of the arbitration the Tribunal shall be established pursuant to the default provisions of Article 19: Article 15(b)
- If the parties have not agreed on the nationality of the sole or presiding arbitrator, such arbitrator shall in the absence of special circumstances be a national of a country other than the countries of the parties.

## Appointment of Sole Arbitrator

- He or she is to be appointed jointly by the parties:  
Article 16(a)
- If the appointment is not made within the agreed period of time or within 30 days of the commencement of the arbitration the Tribunal shall be appointed in accordance with the default provisions of Article 19: Article 16(b)

## Appointment of Three-Member Tribunal (1)

- Where three arbitrators are to be appointed and the parties have not agreed on a procedure to appoint the three arbitrators, they are to be appointed in accordance with Article 17
- The Claimant is to appoint an arbitrator in its Request and the Respondent is to appoint an arbitrator within 30 days of receiving the Request: Article 17(b)
- Within 20 days of the appointment of the second arbitrator, the two party-appointed arbitrators are to appoint the presiding arbitrator: Article 17(b)

## Appointment of Three-Member Tribunal (2)

- Where the Center determines that a three-member panel shall be appointed pursuant to Article 14(b), the Claimant is to nominate an arbitrator within 15 days of receiving notice from the Center and the Respondent is to nominate an arbitrator within 30 days of receiving notice from the Center:  
Article 17(c)
- The two party-appointed arbitrators are then to nominate the presiding arbitrator within 20 days of the appointment of the second arbitrator: Article 17(c)

## Appointment of Three-Member Tribunal (3)

- If the nomination of any arbitrator is not made within the relevant time periods that arbitrator will be appointed in accordance with the default provisions of Article 19:  
Article 17(d)

## Appointment of Three-Member Tribunal in Case of Multiple Claimants (Article 18)

- Where (i) there are multiple Claimants and/or multiple Respondents; and (ii) three arbitrators are to be appointed; the multiple Claimants, jointly, in the Request for Arbitration, shall nominate an arbitrator, and/or the multiple Respondents, jointly, within 30 days after receiving the Request for Arbitration, shall nominate an arbitrator, as the case may be. If a joint nomination is not made within the applicable period of time, the Center shall appoint one or both arbitrators. The two arbitrators shall, within 20 days after the appointment of the second arbitrator, nominate a third arbitrator, who shall be the presiding arbitrator.

## Default Appointments: Article 19 – WIPO List Procedure

- If a party fails to appoint an arbitrator as required under Articles 15, 17 or 18, the Center then appoints the arbitrator.
- If the sole or presiding arbitrator has not been appointed under Articles 15, 16, 17 or 18, a “list” procedure may be used. The Center will send to each party a list of at least 3 candidates and invite the parties to delete or rank them. The Center will take into account the preferences and objections and invite a person from the list to be the sole or presiding arbitrator.
- However, the Center has the authority to appoint the sole or presiding arbitrator if it determines in its discretion that the list procedure is not appropriate for that case.

## Party Interviews and Communications

- Interviewing prospective party-appointed arbitrators
- Interviewing prospective sole or presiding arbitrators
- Hospitality and transportation for in person interviews
- Selecting the presiding arbitrator

For communications with arbitrators or potential arbitrators see, e.g., IBA Guidelines on Party Representation in International Arbitration (May 2013) especially Guidelines 7-8; also Chartered Institute of Arbitrators, “Practice Guideline 16: The Interviewing of Prospective Arbitrators” (June 2006)

- Joint interviews of prospective arbitrators

## WIPO Expedited Arbitration / Arbitration Fees

Type of Fee	Amount in Dispute	Expedited Arbitration	Arbitration
<b>Registration Fee</b>	Any Amount	\$1,000	\$2,000
<b>Administration Fee *</b>	Up to \$2.5M	\$1,000	\$2,000
	Over \$2.5M and up to \$10M	\$5,000	\$10,000
	Over \$10M	\$5,000 +0.05% of amount over \$10M up to a maximum fee of \$15,000	\$10,000 +0.05% of amount over \$10M up to a maximum fee of \$25,000
<b>Arbitrator(s) Fees *</b>	Up to \$2.5M	\$20,000 (fixed fee)	As agreed by the Center in consultation with the parties and the arbitrator(s) Indicative rate(s) \$300 to \$600 per hour
	Over \$2.5M and up to \$10M	\$40,000 (fixed fee)	
	Over \$10M	As agreed by the Center in consultation with the parties and the arbitrator	

**STATEMENT OF ACCEPTANCE AND DECLARATION OF IMPARTIALITY AND  
INDEPENDENCE**

**Case Number: [...]**

I, the undersigned, [...],

1. Hereby declare that I accept to serve as Arbitrator under the Rules for WIPO Arbitration (the "Rules"). By making this declaration, I confirm that I have familiarized myself with the principles, standards, requirements and fees set out in the aforementioned instruments and that I am available to serve as Arbitrator in accordance therewith. I further declare that, by accepting to serve as Arbitrator in this case, I shall execute my responsibilities honestly, fairly and within the time periods required by the Rules.

2. In accordance with Article 22 of the Rules, hereby confirm my impartiality and independence with regard to the parties involved (which for these purposes include group entities and legal representatives in this arbitration), as well as my intention to remain independent.

As a consequence, I declare not to be aware of any past or present relationship, direct or indirect, with either of the parties, whether financial, professional or of another kind, the nature of which is such that disclosure is called for, and which could put into question my impartiality or independence.

If, at any time during these proceedings, circumstances arise which would entail a change in my position with regard to the parties, be it changes of a financial or personal kind, I engage myself to inform the parties and the Center in writing immediately.

3. Hereby declare to take into account and to respect the obligation of confidentiality of the arbitration procedure, as provided by Articles 75 and 78 of the Rules.

4. Hereby declare to have taken notice of the obligation of Article 23 of the Rules, to devote sufficient time to enable the arbitration to be conducted and completed expeditiously and in accordance with the timelines agreed by the parties in the arbitration agreement.

Place: \_\_\_\_\_

Signature: \_\_\_\_\_

Date: \_\_\_\_\_



## Conflicts of Interest and Challenges (1)

- Arbitrators should be “impartial and independent”:  
Article 22(a) – “subjective” and “objective” tests
- Before accepting appointment, disclosure should be made of any circumstances that might give rise to “justifiable doubt as to the arbitrator’s impartiality or independence”: Article 22(b)
  - Include all prior relationships no matter how remote wherever and whenever they occurred. No US court has set forth any limits on time or affinity on what should be disclosed or not. Best approach: when in doubt – disclose! Once an item has been disclosed and the parties waive it (e.g., fail to timely object), they lose an ability to vacate the award based on that item.
  - Counsel and parties also need to make disclosures, not just arbitrators.
- Disclosure of any such new circumstances that might arise after appointment at any stage of the arbitration is also necessary:  
Article 22(c)
  - Duty to disclose continues throughout the entire proceeding.

## Conflicts of Interest and Challenges (2)

- For general guidance on disclosure and conflicts of interest, see codes of ethics applied by various arbitral bodies, such as AAA. Approach with caution: IBA Guidelines on Conflicts of Interest in International Arbitration (2004) – “green”, “orange” and “red” lists (“Green” and “orange” lists are too lenient. The Guidelines are not followed by any court or arbitral institution.)
- Disclosure in the digital age – New technologies may well mandate changes and pose some dangers
  - *Guidance Note: Arbitration and Social Media*, C.I. Arb., August 2014 (recommended best practices regarding arbitrators’ use of social media)
- *Hrvatska Elektroprivreda DD v The Republic of Slovenia (ICSID Case No ARB/05/24) (2008)* and *Rompetrol Group NV v Romania (ICSID Case No ARB/06/3) (2010)*, on whether counsel from the same firm as one of the arbitrators should be removed

## Challenges (1)

- An arbitrator may be challenged by a party if circumstances exist that give rise to justifiable doubt as to the arbitrator's impartiality or independence: Article 24(a)
- Time limit in the case of a party challenging an arbitrator it has appointed – only for reasons the challenging party has become aware after the appointment has been made: Article 24(b)

## Challenges (2)

- Procedure for challenge: Articles 25 to 29
- If the other party does not agree to the challenge or the arbitrator does not withdraw, the decision on the challenge is made by the Center.
- The Tribunal may in its discretion suspend or continue the arbitration proceedings during the pendency of the challenge.

## Challenges (3)

- The *lex arbitri* may contain provisions as to whether the court or some other authority may decide on the challenge if the initial challenge is not successful.

## Preparatory Conference

- The Tribunal shall, in general within 30 days after its establishment, conduct a preparatory conference with the parties in any suitable format for the purpose of organizing and scheduling the subsequent proceedings in a time and cost efficient manner: Article 40.
  - Usually conducted by teleconference, but can be conducted in person where appropriate.
  - Recommendation: have party representatives (not just their counsel) present to get their procedural “buy in”.
  - Each arbitration consists of a procedural mediation and a substantive arbitration. Former provides party “ownership” of process, thus sharply reducing procedural objections later. Arbitral procedure agreed to at preparatory conference is not static; it often changes during proceeding as circumstances warrant. Goal is to maintain flexibility but remain conscious of time- and cost-efficiencies.

## Pleas as to the Jurisdiction of the Tribunal (1)

### Article 36

- (a) The Tribunal shall have the power to hear and determine objections to its own jurisdiction, including any objections with respect to form, existence, validity or scope of the Arbitration Agreement examined pursuant to Article 61(c).
- (b) The Tribunal shall have the power to determine the existence or validity of any contract of which the Arbitration Agreement forms part or to which it relates.

## Pleas as to the Jurisdiction of the Tribunal (2)

- (c) A plea that the Tribunal does not have jurisdiction shall be raised not later than in the Statement of Defense or, with respect to a counter-claim or a set-off, the Statement of Defense thereto, failing which any such plea shall be barred in the subsequent arbitral proceedings or before any court. A plea that the Tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The Tribunal may, in either case, admit a later plea if it considers the delay justified.

## Pleas as to the Jurisdiction of the Tribunal (3)

- (d) The Tribunal may rule on a plea referred to in paragraph (c) as a preliminary question or, in its sole discretion, decide on such a plea in the final award.
  - How should tribunal decide timing of ruling?
- (e) A plea that the Tribunal lacks jurisdiction shall not preclude the Center from administering the arbitration.

**Thank You**