CHAPTER 3

A Negotiation Perspective on the Agreement to Arbitrate and Its Completion

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§3.01 INTRODUCTION

Looking at the 2018 International Arbitration Survey[1] it seems that users of arbitration rank flexibility of procedure as one of the most attractive features of international arbitration. The word 'flexibility' seems to be used in a relative sense, meaning more flexible than court proceedings. Users simultaneously point out lack of speed and lack of effective sanctions as being among the least attractive features of the arbitral process. This would presumably be in comparison to user expectations.

The flexibility of arbitration is due to its consensual basis. The parties may choose their arbitrators, the place and the language of the proceedings. The procedural rules are considerably less comprehensive than the ones in the rule book that the courts have to follow. This gives the parties wide opportunities to agree on the procedural design, including the scope of the proceedings, the rules for taking of evidence and the use of interlocutory and partial awards. In principle, the freedom to agree on the procedure extends to the point where the agreement violates the requirements of fair and equal treatment, the right to be heard and the right to be represented by an attorney or to the point where the agreed procedure does not qualify as 'arbitration' at all, in which case the outcome of the procedure may not be recognized and enforced as an arbitral award (although the agreement and its outcome may have other legal effects).

Standard ad hoc arbitration agreements have little to say about the proceedings as such; the agreement basically says that the parties shall settle their dispute by way of arbitration, also perhaps specifying the place and the language of the proceedings.

1. Queen Mary University of London and White & Case, 2018 International Arbitration Survey: The Evolution of International Arbitration (2018).

When the parties settle for such a 'naked' arbitration agreement, they have opted out from the opportunity to agree *ex ante* how to use the flexibility afforded to them. Instead they will have to try to reach an agreement *ex post*. What might have been considered as reasonable for a party *ex ante* does not always appear 'reasonable' *ex post*.

Usually the procedural agreement has to be hammered out after the fact in a three-party negotiation involving the arbitrators who happens to have a great deal of discretionary power unless the parties unite. In fact, to a certain extent, the arbitrators may have to write the details of agreement for the parties. In other words, they may have to invent an agreement that reasonable parties of the same kind as the parties would have made *ex ante* behind a 'veil of ignorance' regarding who is going to be the claimant and who is going to be the respondent.

Speaking of discretionary power, complaints about lack of speed in court proceedings is common. One of the reasons for lack of speed in civil proceedings is taken to be the failure of the courts to use the discretionary power that it already possesses according to the applicable procedural rules.[2] One might try the hypothesis that the perceived lack of speed in arbitration is due to the same cause. The complaints about lack of sanctions against obstruction seem to be regarded a special case of a general hesitance to use the powers that are already in hand.

§3.02 THE ENFORCEABILITY INTEREST

For the arbitrators the question will often be how much of the discretionary power they shall dare to use to achieve speedy flexibility in demand without risking the enforceability of the award.

In considering creative ideas to tailor the proceedings to the case at hand, applying sanctions against obstruction, preventing an unnecessary round of lengthy submissions and inefficient presentation of evidence, the arbitrators can be expected to prioritize the interest that the proceedings will result in an enforceable award. For the award to be enforceable under the 1958 New York Convention Article V(d) the proceedings must be in accordance with the agreement of the parties or, where an agreement is missing, in accordance with the law of the country where the arbitration takes place.

Procedural shortcomings may lead to the setting aside of an award rendered in Sweden under section 34 item 7 of the Swedish Arbitration Act (1999:116). More specifically, the award shall be wholly or partially set aside if the arbitrators erred in the handling of the case, provided that the error was not due to a fault of the requesting party and that it is probable that the error influenced the outcome.

2. *See*, e.g., European Commission for the Efficiency of Justice, Length of court proceedings in the Member States of the Council of Europe based on the case law of the European Court of Human Rights, CEPJ (2018) 26 by (Françoise Calvez and Nicolas Regis, 3rd ed. by Nicolas Regis), Strasbourg, 3–4 Dec. 2018.

§3.03 THE SKELETON AGREEMENT

Using a naked ad hoc arbitration agreement as a starting point it can be inferred that the parties' common intent was and is that the dispute shall be submitted to a non-governmental decision maker, selected by or for the parties, to render a binding decision resolving the dispute in accordance with neutral adjudicatory procedures affording the parties an opportunity to be heard.[3]

Obviously, such an agreement has to be supplemented by a subsequent agreement regarding details or otherwise by the procedural provisions of the Swedish Arbitration Act when the arbitration takes place in Sweden. The requirement for 'neutral adjudicatory procedures affording the parties an opportunity to be heard' should then be understood as follows:

(1) The arbitrators shall handle the dispute in an impartial[4] manner (section 21).
(2) The arbitrators shall afford the parties, an equal opportunity to be heard by allowing them to present their respective cases in writing or orally to their reasonable satisfaction (section 24 paragraph 1[5]). The claimant shall be given the opportunity to state its claims and the respondent shall be given the opportunity to state its position regarding the claims and the parties shall, in doing so, have the opportunity to invoke the circumstances that they wish in order to support the claims and the positions (section 23 paragraph 1). The parties shall also have the opportunity to proffer evidence for consideration by the arbitrators as far as such evidence is not manifestly irrelevant to the dispute (section 25 paragraph 2).
(3) The arbitrators shall give each party an opportunity to review (and be heard about) all documents and all other materials pertaining to the dispute which are supplied to the arbitrators by an opposing party or another person (section 24 paragraph 2).

In addition to these basic procedural features one should add that the arbitrators may not exceed the claims and that they may not resolve the dispute based on factual circumstances which have not been invoked or on

3. The meaning of the term 'arbitration' is taken from the synthesis in Born, Gary B., International Commercial Arbitration (Wolters Kluwer 2 ed. 2014) 247.
4. Impartial in the sense that an arbitrator's actions and views should stand a role reversal test and be the same even if respondent stepped into claimant's shoes or vice versa. *See* Lindskog, Stefan, Skiljeförfarande. En kommentar (Norstedts 2 ed. 2012) 599.
5. Cf. the Swedish expression '*i all behövlig omfattning*'. The word '*behövlig*' can be translated into 'needed' in order to suit a certain end. The end cannot be 'to be heard' since 'needed' would then be redundant. The end must rather be 'to the party's satisfaction', but under an objective test. A party may not demand to be heard by burdening the proceedings with requests that the arbitrators shall consider material that they think is clearly irrelevant. Cf. prop. 1998/99:35 p. 227 (Government Bill). The provision should therefore be understood to say 'to the parties' reasonable satisfaction'. What is clearly irrelevant is for the arbitrators to determine and their determination, wrong as it may be, regards the substance of the case. Cf. Lindskog, *supra* n. 4, at 881 et seq.

evidence which has not been introduced by the parties.[6] Such authority may be given to, e.g., an expert in expert determination procedures, but not to arbitrators as a matter of semantics.

An agreement that does not live up to these general standards would not qualify as an agreement regarding an adjudicative procedure. The resulting decision may thus not be recognized as an arbitral award and hence not be enforceable.

But there is more to the default arbitration agreement.

(4) The arbitrators shall grant a party's requests to have recourse to courts for court administered testimonies and court administered evidence production when such requests are deemed to be justified having regard to the evidence of the case (section 26[7]).

And further, unless the parties agree otherwise – in my experience they are usually not inclined to do so *ex post* – the following also applies.

(5) The claimant may submit new claims, and the respondent may submit claims of its own, provided that the arbitrators do not consider it inappropriate to adjudicate such claims. Subject to the same condition each party may also amend or supplement previously presented claims and may invoke new circumstances and proffer new evidence in support of theirs claims and positions (section 23 paragraph 2 and section 25 paragraph 2).

(6) An oral hearing shall be held upon request by a party (section 24 paragraph 1).

(7) Subject to the provisions above, the arbitrators shall handle the dispute in a practical and speedy manner and, unless impeded, act as instructed by the parties (section 21).

If the arbitrators deviate from the agreement as now construed they have made a procedural error.

6. For the sake of clarity, an arbitrator may rely on his or her expert knowledge (which obviously must be based on educated assumptions about facts) when evaluating the evidence proffered. Cf. Born, *supra* n. 3, at 264.

7. From the wording of the provision it can be inferred that it is mandatory. *See also* Lindskog, *supra* n. 4, at 697. Cf. Heuman, Lars, Skiljemannarätt (Norstedts 1999) at 273 et seq. The better approach would be to presume that an agreement to oust the courts is valid but open a reasonability test; the agreement can be adjusted or set aside if deemed to be unreasonable in a particular context. The parties may for instance find that there are good reasons to exclude court assisted document production aiming for documents in a party's possession but leave way for it when it comes to documents in a third-party possession. Cf. IBA Rules on the Taking of Evidence in International Arbitration (2010) Art. 3(9) and the 'adverse inference rule' in Art. 9 (5) regarding a party's refusal to produce documents in its possession. Cf. Born, *supra* n. 3, at 2421. Dupeyron, Carine, Shall National Courts Assist Arbitral Tribunals in Gathering Evidence?, ICCA Congress Series No. 19 (Kluwer 2017).

§3.04 NEGOTIATING THE OPERATIVE AGREEMENT

As indicated above, procedural flexibility is a matter of three-party negotiation; however, it is a negotiation without a walk-away option. The arbitrators will bring their interests to the table and consequently act as a party, yet the arbitrators may simultaneously find that they act as mediators between two other parties. So, it is a peculiar kind of negotiation. The context is even more complex since there can be a great deal of internal negotiations among the arbitrators to clarify and determine the interests of the arbitral tribunal as a party.

If a mutually accepted way cannot be negotiated the parties can come to an agreement between themselves and issue joint instructions regarding the procedure; the parties trump the arbitrators. But, absent such instruction, the arbitrators will have it their way (subject to list items (1)–(7) above). It is inevitable that the outcome often will make one of the parties happier than the other unless the arbitrators seek a compromise that will leave the parties more or less equally unhappy. In order for the arbitrators to maintain the parties' confidence that the arbitrators will handle the case in impartial way, a great deal of up-front transparency on the side of the tribunal is a good thing.

A negotiation perspective on procedural decision-making may help to bring attention to the 'real problems'.

§3.05 THE INTERESTS

As in any sensible negotiation, legitimate interests and needs should be the starting point. The interest that the proceedings shall result in an award that will be recognized and/or be enforceable is predominant, so that it can be taken out of the equation. Without implying any particular order of priorities, it can be assumed that the following legitimate interests will be pivotal:

(a) Finality: The procedure should deal with the dispute in an economic way. This means that the arbitration should be used in order to resolve as many contentious issues as possible, provided that arbitration is an adequate forum. The interest that the dispute is dealt with in an economic way has a bearing on how the arbitrators interpret the scope of the arbitration agreement. In particular the question whether it shall be taken to include issues that are intertwined with the disputed contract.[8] But it also affects how the arbitrators consider the appropriateness of adjudicating new claims by the claimant or claims that are introduced by the respondent. The same goes when it comes to amended or supplemented claims. If finality is a heavy priority, the consequence is that the parties should be allowed to introduce new claims during the proceedings broadening their scope. The possibility to introduce

8. Cf. The Swedish Supreme Court in 'Belgor' NJA 2019 p. 171 para. 18.

claims and to amend them also relates to the interest to achieve justice when the claims cannot be brought up in new proceedings due to res judicata.

(b) Justice: The procedure should lead to a result which is correct as regards the substance of the dispute; i.e., correct pursuant to the applicable substantive law and the invoked facts that have been proved to exist. This interest carries particular weight since an arbitral award cannot be subject to an appeal on the merits or be reopened. Thus, if a party has not been able to invoke a circumstance or to proffer evidence during the proceedings and the circumstance or evidence probably would have led to a different outcome, the award still stands, even when the unhappy party is perfectly excused for his inability. If substantive justice is a heavy priority the consequence is that the parties should be allowed to invoke new circumstances and to introduce new evidence during the proceedings at least when it cannot be ruled out in advance that there is a probability that such new material can influence the outcome. A further consequence is that the parties shall have recourse to courts for court administered evidence production (and perhaps also for testimonies under oath).

(c) Speed: The procedure should be speedy. Speed has no value of its own. The desire for speed is instead explained mainly by two underlying motives. The motive for speed can be that the parties do not like uncertainty; uncertainty is a cost.[9] Uncertainty regarding the outcome is an unavoidable detrimental fact with any form of dispute resolution that is based on a binding third-party decision. To this comes the uncertainty which the prevailing party can feel regarding the auspices that the enforcement of award will have any practical value when (and if) the day comes. Sensitivity to uncertainty correlates to a large extent on a party's degree of risk aversion. Risk aversion in its turn depends much on how big a portion of his wealth (in a very general sense) a party stands to lose should the worst-case scenario be realized with the award. On this theory one can assume that the 'little fish' is more sensitive to uncertainty than 'the bigger fish' on the other side of the table, and consequently, the less wealthy party would normally also be more interested in speed and settlement.

Leaving uncertainty aside, speed may also be desirable due to the time value of what is at stake. Generalizing from the meaning of 'time value of money' one can think of the time value of a claim from the claimant's as well as from the respondents' perspective. For the claimant the concept draws on the insight that a resource that the claimant has now is worth more than the possession of the same resource in the future. This is due to the potential earning capacity of the resource. For the respondent it generally works the other way around; as long as the respondent is in possession of the disputed resource he will enjoy the earning capacity. The problem is accelerated when

9. *See generally* Robert J. Rhee, A Price Theory of Legal Bargaining: An Inquiry into the Selection of Settlement and Litigation under Uncertainty, 56 Emory L.J. 619 (2006) with further references. The article is available at http://scholarship.law.ufl.edu/facultypub/494.

the award of an interest rate cannot compensate for the time value loss. A monetary claim (discounting for uncertainty regarding the respondent's solvency) may however also be a good capital investment when the agreed or statutory interest rate beats the rates offered on the capital market.

Either way, it is apparent that the question regarding how speedy the proceedings should be is likely to define a number of distributive bargaining issues rather than blissful win-win issues.

(d) Cost-efficiency: The procedure should be cost-efficient. That is to say that the arbitration may cost a lot in absolute numbers, but it must not be expensive. From a party's perspective, the costs do not only include fees payable to lawyers and other advisors – and to the other party's advisors where (as in Sweden) the loser generally pays. Costs also include internal costs of various kinds that may not be easy to quantify, such as organizational and investor relations disturbances. It can generally be assumed that costs can be regarded as an investment in avoiding the risk for injustice (and sometimes lack of finality).

What is cost-efficient can normally be related to the value of the dispute. It may be worthwhile to remember that the perceived value at stake can be very different for the parties. To one of the parties the outcome may set a precedent that can be used in other contexts – i.e., the award can have a precedent value beyond the monetary claim – whereas the other party sees the award just as a way to settle an isolated dispute. In effect costly propositions may be more efficient for one side than the other.

The arbitrators are free to consider 'cost sanctions' against a party who turn out to act in ways that reduce cost-efficiency. The principle should be that expenses that were inefficient or unnecessary will not be reimbursed to the winning party: expenses caused by the need to respond to inefficient or unnecessary measures will be recoverable irrespective of the outcome in substance.[10]

§3.06 THE ISSUES

The above interests naturally define a number of issues to negotiate in a pre-hearing conference: issues that we usually find under well-known heads in an early procedural order. Let me mention a few of the central issues just by way of illustration:

(i) Number of submissions.
(ii) New claims, circumstances and evidence.
(iii) Evidence production and recourse to courts.
(iv) Oral evidence.
(v) Hearings.

10. Cf. Born, *supra* n. 3, at 3101 et seq.

Each party is likely to assign different priorities (often by way of intuition and not articulated) to each of the issues. One can think of it as if they are assigning weights to each of the issues. Each issue has a number of possible solutions (more or less acceptable to each party). The priorities are usually redefined and emerge as the range of possible solutions becomes clearer.

The solutions will be evaluated by each party according to the preferences between the best solution, the worst acceptable solution (acceptable depending on the outcome of the remaining issues) and the other solutions ranked in between. If for example one can conceive of three possible solutions (of course in reality there may be many more issues and solution) there will be 243 ways (the number of conceivable negotiation packages) to structure the proceedings given just five issues. Each package will have an attraction value (again usually given by means of intuition) which is a function of the party's priority of each issue addressed and the preference for the given solution to each issue. Usually the parties perceive the attractiveness in different ways, but they should be able to eliminate inferior packages and replace them with a package that is more attractive to both; a win-win package as the saying goes rather than a series of zero-sum negotiations over separate issues.

Since the arbitrators are somehow sitting in the middle, they should at some point be ready to articulate a default package to speed things up. The package will of course have to be adapted to the case at hand, and here we assume that we are not looking at a mega-case that would normally require hearings for months if taken all together. The proposed solutions can serve as anchor points for the parties' further negotiations. They are free to settle for another package which they both prefer.

If the demand for procedural flexibility shall be met, the arbitrators can hardly sit back and regard the Swedish Procedural Code (Sw. *rättegångsbalken*) as a default standard[11] for handling the case in a practical and speedy manner that should apply unless the parties jointly suggest another way. Instead it should be the other way around. The arbitrators should be proactive in the negotiation. After all, they can normally be expected to have superior experience of how to fit the forum to the fuzz, as the specialists they should be. They should be ready to suggest what they think is a practical and speedy way to handle the case at hand. Although the Procedural Code is not a standard it can be said that what courts can do the arbitrators can also do if they cannot come up with anything better.

The arbitrators' proposition can only to a limited extent be derived from the procedural provisions of the Swedish Arbitration Act. The provisions tend to be too general to be useful (but there are exceptions). Instead the arbitrators can, for inspiration and ideas, have a look at other standards, e.g., International Chamber of Commerce (ICC) Commission Report: Controlling time and costs in arbitration (2nd ed. March 2018)[12] even in an ad hoc arbitration.

The arbitrators could go about it and propose a package deal as suggested below.

11. *See* however Lindskog, *supra* n. 4, at 602.
12. The report is available at https://iccwbo.org/content/uploads/sites/3/2018/03/icc-arbitration-commission-report-on-techniques-for-controlling-time-and-costs-in-arbitration-english-version.pdf.

§3.07 NUMBER OF SUBMISSIONS

Looking at the dispute at a very early stage, the arbitrators might ask themselves what it would take for them to be duly educated by the parties about the dispute, i.e., how many rounds of submissions will there have to be to arrive at an adequate level of education. They realize that there are two teachers and that the teachers will try to sell very different narratives. Therefore, there is a need to let each party correct the other party's perceived misunderstandings and omissions. Beyond that, it should be for the arbitrators to say what they require.

The default position according to the Swedish Arbitration Act is that there is a need for at least one round of submissions; the statement of claims and the response. But the requirement that the parties shall have an equal opportunity to be heard demands that the claimant is given the chance to rebut what the defendant says in the response and that the respondent has an opportunity to have its say on what the claimant says in its rebuttal and so on. A minimum of two rounds may therefore be necessary. The requirement is an outflow of the justice interest. Speed and cost-efficiency may however push the arbitrators to put an end to a further exchange of written submissions (unless the parties jointly agree otherwise). A party's chances to be heard should normally not be considered as unduly limited if the arbitrators give the parties an opportunity to make their conclusive remarks orally.[13] Telephone or video conferencing may work wonders in speeding things up and save costs.

§3.08 NEW CLAIMS, CIRCUMSTANCES AND EVIDENCE

The plan made up thus far may be demolished by new, amended or supplemented claims and new circumstances or new evidence. The arbitrators might say that the principle shall be that the party who introduces news shall bear the costs for it irrespective of the outcome of the dispute unless the arbitrators deem that the costs are insignificant. If the costs are not separable, the costs can be set at a pre-determined standard amount that is presumed to correspond to the actual costs. It can be pertinent to consider the possibility to deal with a new (or amended or supplemented) claim in a separate award (after a separate hearing when necessary) if including the new claim would put the original time plan at jeopardy. The same can be said regarding the late introduction of new circumstances or evidence which relate to a claim made by the belated party. For this to work it may require that a party makes a claim for cost compensation and the arbitration agreement does not preclude such compensation (cf. section 42).

The issue regarding the right to introduce new evidence should leave way to consider the International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration (2010) Article 4.6 where applicable:

> 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

13. *See* Lindskog, *supra* n. 4, at 648.

> 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.

The same applies as regards party-appointed experts pursuant to the Rules Article 5.3.

§3.09 EVIDENCE PRODUCTION AND RECOURSE TO COURTS

It may be helpful to suggest that a party's request for document production shall be handled with due regard to the IBA Rules on the Taking of Evidence in International Arbitration (2010). If the arbitrators are inclined to do so although one of the parties objects, it should be observed that the IBA Rules will have to be applied subject to section 26 of the Swedish Arbitration Act if the arbitrators want to avoid the risk of a 'procedural irregularity'. This may compel them to try to mimic what state court judges would do in the same situation under the Procedural Code, since some say that an arbitration agreement may not lead to any limitation as regards the possibility to introduce evidence compared to court proceedings[14] (unless it follows by the inappropriateness test according to section 23 paragraph 2 of the Swedish Arbitration Act). One of the problems that the arbitrators often will have to address regards the materiality of the documents requested. In principle the IBA Rules say that all documents requested shall be material to the outcome (*See* Article 3.3(b).) whereas section 26 of the Swedish Arbitration Act read in the light of Chapter 38 section 2 paragraph 1 of the Procedural Code says that documents shall be produced if it can be assumed that they have significance as evidence. This is not the place to go further into the deeper meaning of these provisions. It suffices to say that it could be brought up with the parties whether 'relevance' shall mean significance for an invoked circumstance or significance for the significance of a document (affecting the evidentiary value of a document introduced as evidence). In the name of transparency, the arbitrators should make their position clear beforehand since it may save the parties a lot of unnecessary time and energy in subsequent document production efforts.

§3.10 ORAL EVIDENCE

The arbitrators can propose that, unless the parties agree otherwise, Articles 4 and 5 of the IBA Rules on the Taking of Evidence in International Arbitration (2010) shall apply. Such an order cannot be taken to violate due process. The consequence is that as a default most fact witnesses, and party-appointed experts shall produce written statements. It adds to the expenses, but the good thing is that the uncertainty value may be lower, and cost-efficiency enhanced if the evidentiary hearing can be concentrated on cross-examinations.

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14. *See* Lindskog, *supra* n. 4, at 698.

§3.11 HEARINGS

Disregarding agreements on 'documents only arbitrations', the proposed package would anticipate that at least one party requests an oral hearing. An oral hearing which requires a physical meeting is expensive, and it usually requires scheduling the event long into the future and rescheduling is painful. Nevertheless, it has been noted that the opportunity for a party to present its case in person and in the physical presence of the arbitrators is a basic, irreducible aspect of the adjudicatory process which ought in virtually all cases be fully respected.[15]

In most cases the parties will be able to set a time for the hearings and agree on the structure and scheduling of hearing time although agreement may not come easy. Where the parties cannot agree the arbitrators may have to do it for the parties.[16] The same goes when it comes to opportunities to arrange several hearings, e.g., to deal separately with jurisdiction, preliminary matters, liability, quantum, etc. The situation may then be that one of the parties says that it cannot be present at the venue on the time set by the arbitrators or that one or several of the witnesses cannot attend and that the arbitrators' decision does not give the party a fair chance to be heard.

The default proposition should be that each party shall have an opportunity to present its case in person and in the physical presence of the arbitrators. Where however this would lead to costs or delays that are not reasonable considering the significance of physical presence it must be possible for the arbitrators to decide (unless the parties agree otherwise) that the hearings shall be arranged by way of video conferencing. Courts have the same prerogative pursuant to Chapter 5 section 10 (presence of a party) and Chapter 36 section 19 (presence of a witness) of the Procedural Code. It would hardly be a procedural irregularity if the arbitrators were to give themselves the same prerogative. Furthermore, it can be expected that reasonable parties would not be opposed to it *ex ante*.[17] The principle of equal treatment seems to require however that both parties shall participate at remote venues and that the physical or video presence of the tribunal is balanced so as not to give a party an undue advantage (unless the parties agree otherwise).

There are a plethora of questions to address in conjunction with such a decision, but the arbitrators do not have to invent the wheel right from the beginning. Reference can be made, e.g., to the Seoul Protocol on Video Conferencing in International

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15. *See* Born, *supra* n. 3, at 2266.
16. Scheduling sub-issues will be left aside here with the remark that the default proposition would be that the parties be allotted equal time and that the chess-clock method be used. *See*, further e.g., Böckstiegel, Karl Heinz, Case Management by Arbitrators: Experiences and Suggestions, in Aksen, Gerald (ed.), Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner, at 23 (ICC 2005) and Jan Paulson, The Timely Arbitrator: Reflections on the Böckstiegel Method, 2(1) Arb. Int'l. 19 (2006).
17. Cf. Queen Mary University of London and White & Case, *supra* n. 1: 43% of respondents used videoconferencing 'frequently' during arbitrations, 17% 'always' used it, and 30% used it 'sometimes'. Around 89% said that videoconferencing should be used more often in arbitration. *See also* ICC Commission Report: Controlling time and costs in arbitration paras 22 and 71.

Arbitration.[18] The Protocol addresses due process, confidentiality and practical issues that will not be further discussed here. Suffice it to say that a reference to the Protocol can be part of the parcel.

§3.12 THE DEFAULT PACKAGE

The arbitrators would now be ready to place the basics of a default procedural agreement on the table. The proposition stands unless the parties are able to agree on how to better it by making trade-offs across the issues. It should be stressed that in real life, the package would have to be adapted much more to the specifics of the given case as known in the planning phase:

> ***Submissions***: *The claimant shall state his claims in writing. The respondent shall then state his position in respect of the claims in writing and state all claims of its own. If the respondent has presented claims of its own, the claimant shall state its position concerning such claims in a separate written submission. Each party shall in their written submissions invoke all the facts and proffer all evidence they wish to rely on in support of the claims respective the position. The arbitrators may decide that a party shall respond to the arbitrators' questions or the other party's questions in respect of a submission. The arbitrators may decide that the response to questions shall be given in writing or orally in a preparatory telephone or video conference. The arbitrators may on their own motion or upon a party's reasoned request decide to convene a preparatory conference in order to give the parties an opportunity to give final comments on his or the other party's case.*
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> ***New claims, circumstances and evidence***: *A party may request that the arbitrators shall decide new, amended or supplemented claims. A party may also request that the arbitrators shall consider new circumstances and new evidence. The arbitrators will allow such claims, circumstances and evidence if it is not inappropriate having regard to the finality of the award, the interest of justice, the time plan and the possibility to render a separate award. The party who introduces such claims, circumstances or evidence shall bear all additional arbitration costs and costs for the other party which are due to the late introduction unless the introducing party shows that his request was due to a fault by the other party or it is made pursuant to the IBA Rules on the Taking of Evidence in International Arbitration (2010) Articles 4.6 or 5.3.*
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> ***Evidence production and recourse to courts***: *A request for evidence production shall be directed to the possessor of the evidence without undue delay. A party shall make any request to have recourse to courts for court administered testimonies or court administered evidence production in its first submission. A party may also make such request at a later stage in which case the arbitrators will consider it as a request to introduce new evidence. Article 3 of*

18. The Protocol is available at http://www.kcabinternational.or.kr/user/Board/comm_notice.do?BD_NO = 172&CURRENT_MENU_CODE = MENU0015&TOP_MENU_CODE = MENU0014.

the IBA Rules on the Taking of Evidence in International Arbitration (2010) shall apply subject to section 26 of the Swedish Arbitration Act.
***Oral evidence**: Articles 4 and 5 of the IBA Rules on the Taking of Evidence in International Arbitration (2010) shall apply.*
***Hearings**: The hearings will be arranged at a place and on the dates set out by the arbitrators below. If a party cannot attend in person at the venue and the hearings cannot be re-scheduled subject to agreement between the parties and the arbitrators, the hearings will be conducted by way of videoconferencing using the Seoul Protocol on Video Conferencing in International Arbitration as a steering document. The arbitrators may issue further directions. If a party proffers oral evidence by a person who cannot attend, the same shall apply as regards the examinations of the person.*
***Note**: If a party, without valid cause, fails to appear at a hearing or otherwise fails to comply with an order of the arbitrators, such failure shall not prevent a continuation of the proceedings and a resolution of the dispute on the basis of the existing materials pursuant to section 24 paragraph 3 of the Swedish Arbitration Act.*

Further details to be agreed on in round two of the negotiations.