



## **Rules for the Conduct of an administered Arbitration**

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### **EXPLANATORY STATEMENT**

- 1.1 These Rules govern disputes which are international in character, and are referred by the parties to AFSA INTERNATIONAL for resolution.
- 1.2 AFSA INTERNATIONAL is a division of the Arbitration Foundation of Southern Africa, a non-profit institution created by members of the legal and accounting professions to serve commerce, trade and industry.
- 1.3 Matters referred to AFSA INTERNATIONAL are administered by its Secretariat which has responsibility for all administrative aspects of the process. The Secretariat also acts as the appropriate channel of communication between the parties and the Tribunal before and after any hearing, and will intervene whenever necessary in accordance with its powers and functions as set out in these Rules.
- 1.4 The Secretariat maintains an international panel of arbitrators from whom it selects the sole arbitrator, where the parties have failed to agree, or the panel chairman.

### **RULE 1 - DUTY TO COOPERATE**

1. The parties must cooperate with the Secretariat in good faith to facilitate the arbitral process, and such obligation rests on the parties throughout the process, and the Rules are to be interpreted in conformance with this requirement.

### **RULE 2 - FUNDAMENTAL OBJECTIVE**

2. The fundamental objective of these Rules is to provide the process for a fair and expeditious resolution of disputes and these Rules are therefore to be applied and interpreted to

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- 2.1 finalise the arbitral process without interruption or delay;
- 2.2 support the Secretariat's functions in that regard;
- 2.3 recognise the jurisdiction of the Tribunal to provide a final and binding resolution of the dispute and accord it the necessary primary and ancillary powers and competence for that purpose.

### **RULE 3 – DEFINITIONS**

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3.1

3.1.1 "*Agreement in writing*" shall include an electronic communication if the information is accessible so as to be useable for subsequent reference and shall include data messages.

3.1.2 "*Arbitration Agreement*" shall mean a written agreement to arbitrate

3.1.3 "*Answer*" shall mean the answer given by the Respondent in terms of Rule 5

3.1.4 "*Claimant*" shall mean the party initiating arbitration

3.1.5 "*Request for Arbitration*" shall mean the Request given in terms of Rule 5

3.1.6 "*Respondent*" shall mean the party against whom the arbitration is initiated

3.1.7 "*Rules*" shall mean these Rules

3.1.8 "*Secretariat*" shall mean the employees, branches or organisations authorised by AFSA INTERNATIONAL to administer arbitration processes under these Rules

3.1.9 "*Tribunal*" shall mean the arbitration Tribunal whether consisting of a single arbitrator or all the arbitrators where more than one has been appointed

3.2 Words used in the singular include the plural and *vice versa* as the context may require. Similarly, words used such as claimant, respondent, arbitrator and representative shall be construed as gender-neutral.

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## **RULE 4 - INTERPRETATION OF THE ARBITRATION AGREEMENT**

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- 4.1 Unless the Arbitration Agreement expressly provides to the contrary, it shall be interpreted consistently with Rule 2 and in a way most suitable to achieve the fundamental objectives there set out.
- 4.2 Any provision in an arbitration agreement which misdescribes the title or function of any office-bearer of AFSA INTERNATIONAL or the name of AFSA INTERNATIONAL shall be definitively corrected by the Secretariat and the arbitration agreement shall then be interpreted accordingly.

## **RULE 5 – APPLICATION OF RULES**

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- 5.1 Where the parties have agreed to submit any dispute, present or future to arbitration under the Rules then such dispute shall be determined in accordance with the Rules which are in force and effect at the date of the filing the Request for Arbitration.
- 5.2 The parties may by agreement in writing vary the Rules.
- 5.3 In the event of any provision of the Rules conflicting with the mandatory law applicable to the arbitration, such law shall prevail.

## **RULE 6 – WRITTEN NOTIFICATION OR COMMUNICATIONS**

6.

- 6.1 For the purposes of these Rules, any notice, including a notification or communication or proposal, is deemed to have been received if it is delivered to the addressee or if it is delivered at its habitual residence, place of business or working address, or, if none of these can be found after making reasonable inquiry, then at the addressee's last-known residence or place of business. Notice shall be deemed to have been received on the day it is so delivered.
- 6.2 Such notice shall be in writing and delivery may be made by any standard means of communication, including electronic communications that provide a record of dispatch and receipt thereof.
- 6.3 Any notice, documentation or communication filed in the course of the proceedings shall be addressed to the Secretariat and shall be copied to the other party or parties. After the Tribunal has been constituted all notices, documentation or communication shall continue to be addressed to the Secretariat but, where necessary,

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shall be accompanied by copies equal to the number required by the Secretariat to provide one copy for each arbitrator.

- 6.4 The Tribunal shall send any order, directive or award made by it to the Secretariat which shall communicate same to the parties.

#### **RULE 7 – TIME LIMITS**

7.

- 7.1 For the purpose of calculating a period of time under the Rules, such period shall begin to run on the day following the day when a notice, notification, communication or proposal is received. If the last day of such period is an official holiday or a non-business day at the residence or place of business of the addressee, the period is extended until the following business day.
- 7.2 Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.
- 7.3 Any time period provided by these Rules may at the request of either party be extended by the Secretariat prior to the Tribunal being constituted, or by the Tribunal once it has been constituted.

#### **RULE 8 – REQUEST FOR ARBITRATION**

8.

- 8.1 A party wishing to commence an arbitration under the Rules shall send a Request for Arbitration to the Secretariat in conformity with Schedule 1 hereto.
- 8.2 The Request for Arbitration shall be accompanied by a payment transfer to the account of the Secretariat of AFSA INTERNATIONAL of the Registration Fee as required by Schedule 2 (Schedule of the Costs of Arbitration) in force on the date when the Request for Arbitration is given.
- 8.3 In the event of the Request for Arbitration being sent without payment of the Registration Fee having been made, the Secretariat shall set a time period within which the Claimant shall pay the Registration Fee. If the Registration Fee is not paid within this time period, the Request for Arbitration shall be deemed to lapse.

#### **RULE 9 – STATEMENT OF CLAIM**

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- 9.1 The statement of claim is to be made in conformity with paragraph 4 of the Request for Arbitration (see Schedule 1) and as part of that Request.

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- 9.2 Any subsequent amendments to the statement of claim are to be effected in terms of Rule 29.
- 9.3 The Tribunal may, at its own instance or at the request of a party, require submissions in amplification or clarification of the statement of claim

## **RULE 10 – THE SECRETARIAT’S RESPONSE TO THE REQUEST FOR ARBITRATION**

- 10.
  - 10.1 The Secretariat shall consider any Request for Arbitration which is accompanied by the requisite registration fee and shall within 14 days of receipt, or such further period as the Secretariat may deem necessary to complete its assessment –
    - 10.1.1 accept the Request, and notify the Claimant accordingly, or
    - 10.1.2 reject the Request, and notify the Claimant accordingly; or
    - 10.1.3 require the Claimant to provide such further information in support of its Request as it may deem necessary.
  - 10.2 Where the Secretariat accepts a Request for arbitration then, subject to any mandatory law to the contrary, prescription shall be deemed to have been interrupted on that date.
  - 10.3 The Secretariat shall send a copy of the Request for Arbitration and its Schedules and its acceptance of that Request to the Respondent within 10 days of date of acceptance of the Request, or such longer period as the Secretariat may deem necessary in the circumstances. This communication shall be designated the Notice to Commence Arbitration.
  - 10.4 Where the Secretariat accepts a request for arbitration, it must invoice both the Claimant and the Respondent with the tariff administration fee set out in Schedule 2 and such fees fall payable within 14 days of invoicing and are non-refundable.

## **RULE 11 – THE RESPONDENT’S ANSWER**

- 11.
  - 11.1 Within 30 days of the receipt by the Respondent of the Notice to Commence Arbitration, the Respondent shall submit to the Secretariat its Answer to the Request for Arbitration which shall be in accordance with Schedule 3 hereto, and must include any objection to the existence, validity or applicability of the Arbitration Agreement as well as a statement as to whether the Respondent

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accepts or disputes that an arbitration Tribunal constituted under the Rules shall have jurisdiction in relation to the dispute.

- 11.2 The Secretariat may in its discretion extend the time for the submission of the Answer.
- 11.3 Failure by the Respondent to submit an Answer shall not prevent the arbitration from proceeding; if the Rules or the agreement between the parties require the Respondent to nominate an arbitrator and the Respondent fails to do so, such failure shall be deemed to constitute an irrevocable waiver of the Respondent of its right to nominate an arbitrator.
- 11.4 The Statement of Defence shall deal fully with the facts, legal principles and relief or remedy sought by the Claimant and may rely on a claim of set off; the Statement of Defence shall, as far as reasonable, be accompanied by copies of all core documents and other evidentiary material relied upon by the Respondent.
- 11.5 The Respondent shall be entitled to include in its Answer a counterclaim arising from the same contract or set of circumstances and should it wish to do so, it shall comply with the provisions contained in Schedule 1, paragraph 4, regarding the content of such counterclaim.
- 11.6 If the Respondent wishes to counterclaim it shall simultaneously with its Answer to the Notice to Commence Arbitration make payment by way of transfer to the Secretariat of the Administration Fee in respect of such counterclaim calculated in accordance with Schedule 2.
- 11.7 The Secretariat shall send the Answer to the Claimant.
- 11.8 The Tribunal may either at its own instance or at the request of a party require additional submissions in amplification or clarification of the statement of claim.
- 11.9 Where the Secretariat sends a copy of the Request for Arbitration then, subject to any mandatory law, prescription on the counterclaim to the Claimant in terms of sub-Rule 11.7 is deemed to have been interrupted on the date the Secretariat sends a copy to the Respondent.

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## **RULE 12 – SEPARABILITY OF ARBITRATION AGREEMENT; DISPUTE ON JURISDICTION**

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- 12.1 Unless otherwise agreed upon, an Arbitration Agreement which forms or was intended to form part of another agreement shall be of full force and effect notwithstanding that such other agreement is invalid or did not come into existence and the Arbitration Agreement shall be regarded as being a separate agreement of indefinite duration.
- 12.2 If any of the parties to the arbitration dispute the jurisdiction of the Tribunal to be appointed in terms of the Rules then such dispute shall be raised as required by Rule 11.1. If the Secretariat is satisfied *prima facie* that an Arbitration Agreement may exist and that the dispute may be subject thereto, it shall refer the issue to the Tribunal.
- 12.3 If the Secretariat is satisfied that no Arbitration Agreement exists or that the dispute manifestly is not subject to an Arbitration Agreement, it may, notwithstanding its earlier acceptance of the Request to arbitrate, reject the reference of both or either of claim or counterclaim and if it rejects the reference of both the claim and counterclaim, the arbitration process is terminated.
- 12.4 The Tribunal may decide any issue raised by either of the parties in relation to its jurisdiction, including an objection with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.
- 12.5 A plea that the Tribunal does not have jurisdiction must be raised no later than in the Statement of Defence, or, if the Respondent has filed a counterclaim, in any Statement of Defence to such counterclaim.
- 12.6 The Tribunal may rule on a plea as to its jurisdiction as a preliminary issue, but is not obliged to do so.

## **RULE 13 - REPRESENTATION**

13.

- 13.1 The parties may be represented or assisted by persons of their choice and the names and addresses of such persons must be communicated to the Secretariat and the other party.
- 13.2 Any change in the identity or address of a party's representative must be communicated to the Secretariat and the other party.

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## **RULE 14 – CONSOLIDATION OF ARBITRATION PROCEEDINGS AND JOINDER**

14.

14.1 The Secretariat may on receipt of the Notice to Commence Arbitration where it is clear that there are two or more claims which involve the same parties and have a question of law or fact in common and are the subject of separate arbitration agreements or the same agreement but have been referred to arbitration separately and are the subject of arbitration under the Rules, after consultation with the parties, include the claims contained in the Request for Arbitration in the pending proceedings or may defer the decision to the Tribunal to be decided by it in terms of Rule 12.

14.2 Where two or more claims which involve the same (and no other) parties and have a question of law or fact in common and are the subject of separate arbitration agreements and are the subject of arbitration proceedings under the Rules, the Tribunal may, after hearing the parties:

14.2.1 Assume jurisdiction over, and hear and determine together, all or part of the claims; or

14.2.2 Assume jurisdiction over and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others.

14.3 The Tribunal may, on the application of a party and after hearing the parties, allow one or more third parties to be joined as a party, provided such third party and the applicant have consented, and make an award in respect of all parties involved in the arbitration.

## **RULE 15 – THE TRIBUNAL**

15.

15.1 The Tribunal shall consist of the number of arbitrators agreed by the parties.

15.2 If the parties have not agreed on the number of arbitrators the Secretariat shall, in its discretion, determine the number of arbitrators to be appointed and, in doing so, shall have regard to the parties' submissions thereon, the complexity of the case, the amount in dispute or any other relevant circumstances.

## **RULE 16 – APPOINTMENT OF THE TRIBUNAL**



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16.

16.1 If a sole arbitrator is to be appointed the Secretariat, in the absence of agreement between the parties as to the identity of the arbitrator, shall appoint such arbitrator.

16.2 Where the Arbitration Agreement provides for the appointment of three arbitrators, unless the agreement provides to the contrary:-

16.2.1 The parties shall confirm their nomination as provided for in Schedules 1 and 3 and the Secretariat shall transmit to the arbitrator so nominated the mandatory Statements of Independence for completion and return;

16.2.2 The Secretariat shall within 30 days of receiving the parties' confirmation of nomination and the nominees' Statements of Independence appoint the third arbitrator, who shall chair the Tribunal, and shall appoint the parties' nominees subject to sub-Rule 16.3;

16.2.3 If any party fails to nominate an arbitrator either as required by the Rules or by the Arbitration Agreement, the Secretariat shall appoint such arbitrator.

16.3 The Secretariat may decline to appoint any nominee proposed by a party if it considers the nominee to be unsuitable; in which case the Secretariat may in its discretion request a new nomination from that party or proceed to appoint an arbitrator on its own accord. If that party is requested to make a new nomination and fails to make its nomination within 21 days of being requested to do so or if the Secretariat refused to appoint the nominee, the Secretariat shall appoint the arbitrator.

16.4 Before appointment by the Secretariat each prospective arbitrator shall provide to it:

16.4.1 A Statement of Independence in conformance with Rule 17.

16.4.2 Written confirmation of willingness to serve as an arbitrator.

16.5 A copy of the Statements of Independence shall be provided to the parties by the Secretariat.

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- 16.6.1 Where there are multiple Claimants or Respondents, the Claimants, jointly, and the Respondents, jointly, shall nominate an arbitrator if the Tribunal is to be constituted in terms of sub-Rule 16.2.
- 16.6.2 In the absence of a joint nomination the parties shall be deemed to have waived their right to nominate an arbitrator and the Secretariat shall make the appointment as provided for in the Rules.
- 16.7 Where the Tribunal assumes jurisdiction as provided for in Rule 16, the Secretariat may revoke any appointment already made in relation to the dispute over which the Tribunal has assumed jurisdiction, if necessary, and confirm the appointment of the Tribunal assuming jurisdiction in relation to that dispute.
- 16.8 On or after the commencement of the arbitration, any party may apply in writing, copied to all other parties, for the expedited formation of the Tribunal including the appointment of any replacement arbitrator when appropriate which writing shall set out fully the grounds for exceptional urgency and the Secretariat may, in its entire discretion, adjust any time limit under these Rules in order to give effect thereto.

#### **RULE 17 – ARBITRATOR’S DUTIES OF INDEPENDENCE & IMPARTIALITY**

17.

- 17.1 Any arbitrator appointed under the Rules shall be and remain impartial and independent of the parties;
- 17.2 After appointment and at all times during the proceedings an arbitrator shall immediately disclose to the parties and to the Secretariat any circumstances likely to give rise to justifiable doubt as to his or her independence or impartiality.

#### **RULE 18 – NATIONALITY OF ARBITRATOR**

18. Where the parties are of different nationalities, a sole arbitrator or chairman of the Tribunal shall not be of the same nationality as either of the parties unless the parties agree otherwise.

#### **RULE 19 – CHALLENGES TO ARBITRATORS**

19.

- 19.1 Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence.

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- 19.2 A party may challenge the arbitrator nominated by it only for reasons of which it becomes aware after the appointment has been made.
- 19.3 The challenge shall be made in writing within 15 days of the party becoming aware and submitted to the Secretariat and copied to the other parties and the Tribunal and shall set forth fully the facts, circumstances and reasons therefor. Any reply by any party affected thereby must be filed within 15 days of receipt of the challenge. Failure by a party to make the challenge within the stipulated time period shall be deemed to constitute an irrevocable waiver of the right to make such challenge.
- 19.4 Unless the challenged arbitrator withdraws or all other parties agree to the challenge within 15 days of receipt of the challenge, the Secretariat shall decide on the challenge and, subject to the applicable law, its decision shall be final.

## **RULE 20 – REPLACEMENT OF ARBITRATOR**

20.

- 20.1 If an arbitrator dies or becomes unable to perform his or her functions due to any reasons beyond his or her control, or should the parties agree to release him or her of his or her obligations or should the arbitrator give notice of the desire to resign as arbitrator, the Secretariat may revoke the appointment and shall in its sole discretion decide the amount of fees and expenses (if any) to be paid to such arbitrator.
- 20.2 In the event of any arbitrator having to be replaced for whatever reason, the Secretariat shall have the complete discretion as to whether to follow the appointment process provided for in Rule 16 and, if so, the party required to make the nomination shall do so within 30 days of the notification of the Secretariat's decision and failing such nomination, the party shall be deemed to have waived its right to make such nomination.
- 20.3 If the Secretariat decides not to follow the appointment process, it shall appoint an arbitrator to replace the arbitrator whose appointment has been revoked.
- 20.4 If an arbitrator is replaced, the proceedings, unless the Tribunal otherwise directs, shall resume at the stage where the arbitrator whose mandate was revoked, ceased to perform his or her obligations.
- 20.5 Notwithstanding sub-Rules 16.2-16.4 but subject to Rule 15, where the Tribunal consists of three or more arbitrators the Secretariat, after consultation with the parties and only with their agreement, may decide that the remaining arbitrators proceed with

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the arbitration.

## **RULE 21 – POWER OF MAJORITY TO CONTINUE**

21.

21.1 If any member of a Tribunal refuses or persistently fails to participate in the proceedings, the other arbitrators shall have the power, upon having given written notice of such refusal or failure to the Secretariat, the parties and the defaulting arbitrator, to continue the deliberations and make any decision, ruling or award, notwithstanding the absence of the remaining arbitrator.

21.2 In determining whether to continue the arbitration, the other arbitrators shall take into account the stage of the arbitration, any explanation given by the defaulting arbitrator for the non-participation and such other matters as they consider appropriate in the circumstances. The reasons for such determination shall be stated in any decision, ruling or award made by the other arbitrators.

21.3 In the event that the other arbitrators determine at any time not to continue the arbitration without the participation of the defaulting arbitrator, they shall notify the parties in writing and the Secretariat in writing of such determination; and in that event, the other arbitrators or any party may refer the matter to the Secretariat for the revocation of the appointment of that arbitrator and the appointment of a replacement arbitrator under Rule 14 above.

## **RULE 22 : APPOINTMENT OF TRIBUNAL CLERK**

22. The Secretariat may appoint a clerk to the Tribunal without any additional expense to the parties, and the clerk shall act as secretary to the Tribunal and will attend at the hearing of the matter.

## **RULE 23 - EXCLUSION OF LIABILITY**

23. No arbitrator (including his or her employees and assistants), expert to the Tribunal or the Secretariat (including its employees or assistants) shall be liable to any party for any act or omission in connection with the performance of his or her tasks under the Rules except if the act or omission was manifestly in bad faith.

## **RULE 24 – DETERMINATION OF PROCEDURE; TRANSMISSION OF FILE TO TRIBUNAL**

24.

24.1 After the appointment of the Tribunal, the Secretariat shall refer the case to the Tribunal and provide it with copies of its files in relation thereto.

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- 24.2 Subject to these Rules, the Tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the Tribunal shall act fairly and impartially and each party shall be given a reasonable opportunity of presenting its case.
- 24.3 The Tribunal shall use its best endeavours to avoid unnecessary delay and expenditure and shall take such steps as are necessary to provide an efficient and fair process for the resolution of the parties' dispute.
- 24.4 Undue delay and/or a failure by the parties to adhere to the directions and rulings of the Tribunal may be taken into account by the Tribunal in making an award as to costs.

#### **RULE 25 – MODIFICATION OF TIME LIMITS**

- 25.
- 25.1 Any time-limits contained in the Rules or the Arbitration Agreement may be varied by agreement between the parties but if agreed after the commencement of the arbitration, shall only become effective on the agreement of the Tribunal.
- 25.2 The Tribunal shall have the power, on application by either party or on its own motion, to extend any time limit provided by the Rules or the Agreement to Arbitrate or any previous direction by it.

#### **RULE 26 – PLACE OF ARBITRATION**

- 26.
- 26.1 Reference in the Arbitration Agreement to a place of arbitration shall ordinarily be construed as defining the juridical seat of arbitration. Any controversy shall be resolved by the Tribunal.
- 26.2 In the absence of agreement between the parties, the juridical seat of the arbitration shall be determined by the Secretariat.
- 26.3 The Tribunal may:
- 26.3.1 conduct hearings or meetings at any place that it in its discretion considers appropriate;
- 26.3.2 meet and deliberate at any place that it considers appropriate.
- 26.4 The award shall be deemed to have been made at the juridical seat of the arbitration.

#### **RULE 27 – LANGUAGE**

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27.

27.1 Unless otherwise agreed, the language of the arbitration shall initially be the language of the Arbitration Agreement. Upon formation of the Tribunal and unless the parties have reached agreement in that respect, the Tribunal shall decide upon the language of the arbitration after having afforded the parties an opportunity to submit comments.

27.2 The Tribunal may direct that any document or part thereof, whether in hard copy or electronic form, relied on by a party and submitted in its original language shall be translated into the language of the arbitration as determined pursuant to sub-Rule 2.1.

## **RULE 28 – PRELIMINARY MEETING**

28.

28.1 As soon as may be reasonably practical, the Tribunal shall convene a Preliminary Meeting for the purposes of establishing the timetable for the proceedings and all procedural matters which it or the parties consider necessary for the proper and efficient determination of the dispute, which Preliminary Meeting may be held in the manner described by the Tribunal and may include tele-conference and video-conferencing.

28.2 The Tribunal may, in its discretion, direct the manner in which the Preliminary Meeting shall be held.

28.3 Should it appear to the Tribunal that further meetings are required to reconsider any procedural matter, it may direct that such meetings be held and the manner in which they are to be held.

## **RULE 29 – AMENDMENTS TO STATEMENT OF CLAIM AND DEFENCE**

29.

29.1 During the course of the Arbitral Proceedings either party may amend or supplement its claim, defence or counterclaim unless the Tribunal considers it inappropriate to allow such amendment having regard to the delay in making it, prejudice to the other party or any other circumstance provided that the amended claim or counterclaim does not fall outside the jurisdiction of the Tribunal.

29.2 The Tribunal may direct that the party seeking an amendment pay the wasted costs occasioned by the amendment and fix the amount thereof.

## **RULE 30 – DISCLOSURE & PRODUCTION OF DOCUMENTS;**

## INSPECTIONS

30.

30.1 Should either party believe that there are documents in the other party's possession, custody or control which are relevant to the issues in dispute, it may request copies of such documents which shall be provided, save insofar as disclosure may be refused for the reasons set out in sub-Rule 30.4 below.

30.2 Should the party requested to disclose these documents refuse to do so, the other party may apply to the Tribunal for a directive that such document be made available, copied and delivered to it.

30.3 In the event of a dispute arising as to whether a document is subject to disclosure, the Tribunal may decide the application itself or appoint a neutral third party to rule thereon and whose decision shall be final and binding on the parties or may decide the application itself.

30.4 The Tribunal or the third party in exercising its powers and determining whether or not such documents, materials or other evidence are relevant to the issues shall exclude from disclosure documents, materials or other evidence which:

30.4.1 Are protected from disclosure by virtue of legal impediment or privilege under the legal or ethical rules determined by the Tribunal to be applicable;

30.4.2 It would be unreasonable and inappropriate to require any disclosure;

30.4.3 Loss or destruction of the document has been reasonably shown to have occurred;

30.4.4 There are compelling grounds of commercial or technical confidentiality;

30.4.5 There are compelling grounds of special potential or institutional sensitivity (including evidence which has been classified as secret by a government or a public institution);

30.4.6 It would be disproportionate to compel disclosure thereof having regard to the nature, relevance and quantity thereof and the relief and issues in dispute.

30.5 The Tribunal or the third party may attach such conditions as

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deemed appropriate to the use and copying of the documents and materials and may direct that only part of the documents or materials be made available and copied.

- 30.6 Should a third party be appointed the costs occasioned thereby shall be borne by the parties equally and shall be costs in the arbitration.
- 30.7 The Tribunal may, at the request of a party or of its own motion, inspect or require the inspection of any site, property, documents or materials, as it deems appropriate.

## **RULE 31 – BURDEN OF PROOF**

### **Standard International Clause**

- 31. Each party shall have the burden of proving the facts relied on to support its claim or defence, unless otherwise dictated by law.

## **RULE 32 – HEARINGS AND WITNESSES**

32

- 32.1 If at an appropriate stage in the proceedings any party to the arbitration so requests, the Tribunal shall hold a hearing for the presentation of evidence by witnesses, including expert witnesses, or for oral argument or both.
- 32.2 Should there be no request for a hearing, the Tribunal shall decide whether or not a hearing should be held.
- 32.3 In the event of an oral hearing, the Tribunal shall give the parties adequate notice of the date, time and place thereof.
- 32.4 Witnesses called to give evidence at a hearing may be heard subject to such conditions as may be directed by the Tribunal, which may include the prior submission of signed statements containing the substance of their testimony, provided that each party shall have identified the witness on whose testimony it relies and the subject matter of that testimony.
- 32.5 The Tribunal shall determine whether a witness should be absent from the hearing during any part of the proceedings.
- 32.6 The Tribunal may in its discretion, require the parties to provide translations of oral statements and a record of the hearing.
- 32.7 Hearings shall be held in private unless the parties agree otherwise, or the Tribunal so directs for compelling reasons and after consultation with the parties and with due regard for the protection of proprietary or privileged information and



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confidentiality.

- 32.8 The Tribunal shall have the power to determine the admissibility, relevance, materiality and weight of the evidence.

### **RULE 33 – INTERIM & CONSERVATORY MEASURES**

33.

33.1 The Tribunal may, on the application of any party, make interim or conservatory orders and may determine and direct that any of the parties claiming relief in the arbitration provide security for the costs of the arbitration.

33.2 Any order granted in terms of this Rule may, on good cause and at the instance of any party, be dispensed with or varied by the Tribunal.

33.3 The Tribunal shall be entitled to attach such conditions to an order given in terms of this Rule as it considers necessary or advisable which may include the provision of appropriate security by the party requesting the relief.

33.4 The right of any party to interim or conservatory relief from a judicial authority having jurisdiction is not excluded hereby, provided the grant of such relief is not within the power of the Tribunal, or the Tribunal has not yet been constituted, nor is a party who seeks interim or conservatory relief from a judicial authority deemed to have waived its right to pursue the resolution of the dispute in arbitration.

### **RULE 34 – EXPERTS APPOINTED BY THE TRIBUNAL**

34.

34.1 The Tribunal may, after consultation with the parties, appoint one or more experts, called Tribunal experts, to report to it, in writing, on specific issues to be determined by the Tribunal. A copy of the Tribunal Expert's Terms of Reference shall be communicated to the parties.

34.2 The parties shall give the Tribunal Expert all relevant information or produce any relevant documents or goods for his or her inspection and provide access to property that he or she might require. Any dispute as to the relevance of the information, production or access shall be referred to the Tribunal for its decision.

34.3 The Tribunal may, prior to or subsequent to the receipt of the

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Tribunal Expert's report, issue such directions as it considers necessary for the identification of the matters on which the Tribunal expert and the parties and/or their experts are agreed or disagreed.

- 34.4 Upon receipt of the Tribunal expert's report, the Tribunal shall deliver a copy of the report to the parties who shall be given an opportunity to express, in writing, their opinion on the content of the report. A party shall be entitled to examine any document on which the Tribunal expert has relied in his report.
- 34.5 At the request of any party the Tribunal expert, after delivery of the report, may be heard at a hearing where the parties shall have an opportunity to be present and to interrogate the expert. At this hearing any party may present expert evidence in order to testify on the points in issue.
- 34.6 The opinion of the Tribunal Expert, unless the parties agree to the contrary, shall not be conclusive in respect of any issue and shall be subject to the same assessment as any other evidence adduced in the arbitration.
- 34.7 The fees and expenses of the Tribunal Expert shall be borne by the parties equally and shall be costs in the arbitration.

#### **RULE 35 - DEFAULT**

35.

- 35.1 Any party that fails to comply with the requirements of these Rules and persists in such failure after due warning from the Secretariat or the Tribunal as the case may be shall fall into default.
- 35.2 Any party that fails to pay any fee falling due under these Rules and persists in such failure after due warning by the Secretariat shall fall into default.
- 35.3 Any party that fails to comply with a direction of the Tribunal and persists in such failure after due warning by the Tribunal shall fall into default.
- 35.4 If the Claimant falls into default, the Secretariat or the Tribunal, as the case may be, shall notify all parties to that effect.
- 35.5 If the Claimant does not purge its default within 10 days of such notification, or such extended period as may be allowed by the Secretariat or Tribunal, as the case may be, the Claimant will be deemed to have waived or abandoned its claim.
- 35.6 If the Respondent falls into default, the Secretariat or the Tribunal,

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as the case may be, shall notify all parties to that effect.

- 35.7 If the Respondent does not purge its default within 10 days of such notification, or such extended period as may be allowed by the Secretariat or Tribunal, as the case may be, the Respondent will be deemed to have waived or abandoned its defence.
- 35.8 A Respondent which has a counterclaim and that does not purge its default within 10 days of such notification, or such extended period as may be allowed by the Secretariat or Tribunal, as the case may be, will be deemed to have waived or abandoned its counterclaim.
- 35.9 Any party who falls into default may in the discretion of the Secretariat or the Tribunal, as the case may be, be excluded from further participation in the arbitration process.

#### **RULE 36 – CLOSURE OF PROCEEDINGS**

36.

- 36.1 The Tribunal shall declare the proceedings in whole or in part closed when it is satisfied that the parties have had an adequate opportunity to present submissions and evidence in relation to the whole case or the relevant part.
- 36.2 If it considers that it is necessary owing to exceptional circumstances, the Tribunal may, of its own motion or on the application of a party, re-open the proceedings at any time before an award is made.

#### **RULE 37 – WAIVER OF RULES**

37. A party who knows that a provision of these Rules, or any requirement under the Arbitration Agreement, has not been complied with and yet proceeds with the arbitration without promptly stating its objection in writing to such non-compliance within 15 days or, if another time limit is provided, within such period of time, shall be deemed to have waived its right to object.

#### **RULE 38 – RULES APPLICABLE TO THE SUBSTANCE OF THE DISPUTE**

38.

- 38.1 The Tribunal shall decide the merits of the dispute in accordance with the rules of law agreed upon by the parties or if and to the extent that the Tribunal determines that the parties have not made a choice, the Tribunal shall apply the rules of law which it considers to be the most appropriate.
- 38.2 In all cases, the Tribunal shall decide the dispute having due

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regard to the terms of any relevant contract and taking into account applicable trade usages.

- 38.3 The Tribunal shall only decide the dispute *ex aequo* or as *amiable compositeur* if the parties have agreed thereto in writing.

### **RULE 39 – TIME LIMITS FOR MAKING AWARD**

39. By agreeing to the Rules, the parties shall be deemed to have agreed to extend the time limit stipulated by any applicable law for the rendering of the award and shall, if required to by the Tribunal, confirm such waiver in writing.

### **RULE 40 – DECISIONS**

- 40.
- 40.1 Where there are more than two arbitrators, any award or other decision shall be made by a majority of the arbitrators or failing a majority, any award or other decision shall be made by the Chairman of the Tribunal alone.
- 40.2 In matters of questions of procedure, if there is no majority or when the Tribunal so authorises, the Chairman of the Tribunal may decide such questions alone.

### **RULE 41 – FORM, EFFECT AND DELIVERY OF AWARD**

- 41.
- 41.1 The Tribunal may make final, interim, interlocutory and partial awards and may record a settlement of the dispute by the parties by way of a consent award.
- 41.2 The award shall be in writing and shall be final and binding on the parties.
- 41.3 By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any award immediately and without delay; and also waive irrevocably their rights to any form of appeal, review or recourse to any state court or other judicial authority, insofar as such waiver may validly be made.
- 41.4 The award shall state the reasons on which it is based unless the parties have agreed in writing that no reasons need be given or the award is a consent award.
- 41.5 The award shall be signed by the arbitrators and it shall contain the date thereof and the seat of the arbitration. An award by the majority of arbitrators or by the Chairman as provided for in Rule 40 shall be sufficient. Where there are three arbitrators and one of them fails to sign, the award shall state the reason for the

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absence of the signature.

- 41.6 The award shall be delivered by the Tribunal to the Secretariat in a number of originals sufficient for the Secretariat to provide each of the parties and the arbitrator or arbitrators with a copy. The Secretariat shall deliver an original of the award to each party and the arbitrator or arbitrators, provided that all the arbitrators' costs and expenses have been paid to the Secretariat.
- 41.7 The award shall comply with any mandatory provisions of the applicable law and the Secretariat shall, at the request of any party, ensure that any procedural requirements in relation thereto is carried out.
- 41.8 The award may be made public with the consent of the parties or where, but only to the extent thereof, disclosure is required by law or is necessary to pursue a legal right before a court of law or other judicial authority.

#### **RULE 42 – COSTS OF ARBITRATION**

42.

- 42.1 The Tribunal shall include in any award by it an order for the costs of the arbitration.
- 42.2 Such costs order may in the discretion of the Tribunal –
- 42.2.1 be an award in favour of the successful party; or
- 42.2.2 be an award of some costs to one party and some costs to the other party; or
- 42.2.3 be an order that both parties shall carry their own costs; or
- 42.2.4 be such other award of costs as the Tribunal may decide.
- 42.3 The costs which the Tribunal may order shall be the reasonable and necessary costs incurred by the party in whose favour the award is made in an amount to be fixed by the Tribunal, including the Tribunal costs, Tribunal Expert costs, venue, transcription and interpreter costs and necessary travel and accommodation costs.
- 42.4 At the conclusion of argument, the Tribunal may require each party to submit to it a statement of its necessary and reasonable costs and in fixing the costs award the Tribunal may grant costs as therein set out or such percentage of those costs as the Tribunal thinks fit.
- 42.5 In general, and without binding the Tribunal thereto, the costs

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should be awarded in favour of the party which enjoyed substantial success in the arbitration.

### **RULE 43 – CORRECTION AND INTERPRETATION OF AWARD; ADDITIONAL AWARD**

43.

- 43.1 Within 30 days after the receipt of the award:
  - 43.1.1 either party, with notice to the other party, may request that the Tribunal give an interpretation of the award. If the Tribunal considers the request to be reasonable, justified and necessary to a proper understanding and implementation of the award, it shall within 30 days after receipt of the request, provide an interpretation by way of a supplemental award;
  - 43.1.2 any party, with notice to the other party, may request the Tribunal to correct in the award any errors in computation, any clerical or typographical errors, or any errors of a similar nature. The Tribunal may, if it considers the request justified, within 30 days after the notice has been received, correct the award to the extent that it considers necessary. The Tribunal may, if and to the extent that it considers it necessary, extend the period of time within which it is required to make the correction, by giving written notice to the parties;
  - 43.1.3 any party, with notice to the other party, may request an additional award as to claims or counterclaims presented in the arbitration proceedings but omitted from the award.
- 43.2 Within 30 days of the delivery of the award by the Tribunal to the Secretariat the Tribunal may of its own initiative correct any errors in the award such as described in sub-Rule 43.1.2.
- 43.3 If the Tribunal considers the request for an additional award is justified, it shall as expeditiously as is reasonable make the additional award.
- 43.4 In considering any of the requests made pursuant to sub-Rule 43.1.2 the Tribunal shall afford the parties an opportunity to be heard.
- 43.5 Any correction to the award or additional award shall comply with the provisions of sub-Rules 41.2 – 41.8.

### **RULE 44 – POWER OF SECRETARIAT TO AMEND SCHEDULES**

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44. The Secretariat may from time to time amend the provisions of the Schedules.

#### **RULE 45 – GENERAL RULE**

45. In all matters not expressly provided for in the Rules, the Secretariat, the Tribunal and the parties shall act in the spirit of the Rules and shall make every reasonable effort to ensure that the award is enforceable at law.