16

ARTICLE 16—CONDUCT OF THE ARBITRATION

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Article 16

1. Subject to these rules, the tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.

2. The tribunal, exercising its discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute. It may conduct a preparatory conference with the parties for the purpose of organizing, scheduling and agreeing to procedures to expedite the subsequent proceedings.

3. The tribunal may in its discretion direct the order of proof, bifurcate proceedings, exclude cumulative or irrelevant testimony or other evidence, and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.

4. Documents or information supplied to the tribunal by one party shall at the same time be communicated by that party to the other party or parties.

I. Introduction

Article 16 sets the tone for the heart of the arbitration: it regulates the procedure by which the parties will conduct their arbitration before the tribunal. Article 16 is said to grant the tribunal more discretion in this regard than the majority of other institutional rules. Still, in practice, the parties have significant influence **16.01**

over the process. Article 16 also provides a mandate to the tribunal to expedite the procedure to the extent possible and consistent with providing the parties due process and a fair opportunity to be heard.

II. Textual commentary

A. The tribunal's discretion to conduct the proceedings (Article 16(1))

Article 16(1)

Subject to these rules, the tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.

1. The tribunal's discretion and the parties' agreement on procedural matters

16.02 Under Article 16(1), the arbitrators enjoy free discretion to conduct the arbitration as they deem appropriate, which has been described as 'arguably somewhat less accommodating of the parties' preferences'[1] than other institutions' rules. In contrast with Article 16(1) of the ICDR Rules, which explicitly allows the parties only 'the right to be heard' regarding the conduct of the proceedings, other institutional rules, such as those under the ICC, LCIA, and SCC, all give more deference to the parties' decisions. For example, the LCIA Rules provide that '[t]he parties may agree on the conduct of their arbitral proceedings and they are encouraged to do so',[2] and the ICC Rules provide that 'the proceedings before the Arbitral Tribunal shall be governed by these Rules and, where these Rules are silent, by any rules which the parties or, failing them, the Arbitral Tribunal may settle on, . . . '.[3] The SCC Rules also are deferential to the parties' choice, providing that '[s]ubject to these Rules *and any agreement between the parties*, the Arbitral Tribunal may conduct the arbitration in such manner as it considers appropriate'.[4]

16.03 Institutional rules that are modelled on the 1976 UNCITRAL Rules are more aligned with the ICDR approach, however. For example, the 1976 UNCITRAL Rules provided that '[s]ubject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate . . . '.[5] In a similar vein, the

[1] GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 1,754.
[2] LCIA Rules, Art 14(1).
[3] ICC Rules, Art 15.
[4] SCC Rules, Art 19(1) (emphasis added).
[5] 1976 UNCITRAL Rules, Art 15(1).

SIAC Rule regarding conduct of proceedings provides that '[t]he Tribunal shall conduct the arbitration in such manner as it considers appropriate, after consulting with the parties'.[6] The VIAC Rules, too, are similar, with the relevant rule stating that '[i]n the context of the Vienna Rules and the agreements between the parties, the sole arbitrator (arbitral tribunal) may conduct the arbitration proceedings at his (its) absolute discretion'.[7]

16.04 Despite the strong focus on arbitral discretion under the ICDR rule as written, 'arbitrators under [. . .] ICDR Rules will virtually always affirmatively seek agreement by the parties on procedural issues and will only in the rarest of cases overrule such agreement'.[8] This is, at the very least, a matter of good practice: a procedure that is agreed with the parties will often be perceived as fairer than one that is imposed, will increase the identification of the parties with the process, and will limit any subsequent complaints or challenges to the award.[9]

16.05 In any event, despite the broad language of Article 16, there are several limitations to the discretion of the arbitral tribunal in conducting the proceedings.[10] First, although Article 16 does not expressly address this issue, the arbitrators' discretion is typically thought to be limited by the parties' agreement,[11] as a necessary corollary to the principle of party autonomy.[12] Where the parties affirmatively agree on an issue, the arbitrators—who derive their authority from the parties—cannot conduct the proceedings otherwise (unless the parties' agreement would conflict with applicable law, including by violating due process).

16.06 Thus the European Convention provides, in Article IV(1)(b)(iii), that parties shall be free 'to lay down the procedure to be followed by the arbitrators',[13] and

[6] SIAC Rules, Art 16(1).

[7] VIAC Rules, Art 20(1).

[8] Born, op cit, 1,754–55.

[9] This is not to discourage arbitrators from imposing a procedure where no agreement can be reached.

[10] For a general discussion, *see* F Schwarz, *The Limits of Party Autonomy in International Commercial Arbitration* (Eleven Publishing, 2010).

[11] *See generally* GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 1,756–58. The 1923 Geneva Protocol required in Art 2 that 'the arbitral procedure, including the constitution of the arbitral tribunal shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place'. As discussed above, this provision was understood as requiring compliance with the procedural law of the arbitral seat.

[12] However, where the circumstances change, an arbitrator enjoys discretion to make a ruling that supplements the original, now obsolete, agreement of the parties—eg on a procedural timetable that was agreed, but can no longer be followed. See Award in ICDR Case No 251-04, 2005 WL 6346380 (ICDR).

[13] European Convention, Art IV(1)(b)(iii). As discussed below, Art IV(4)(d) also provides that, where the parties have not agreed upon the arbitral procedure, the arbitral tribunal shall determine the arbitral rules. Like Art V(1)(d) of the New York Convention, Art IX(1)(d) of the European Convention provides for the non-recognition of arbitral awards if the procedure followed by the tribunal departed from that agreed by the parties. *See* DT Hascher, 'European Convention on International Arbitration (1961)' (1995) XX YB Comm Arb 1006, 1017 ff; E Gaillard and J Savage (eds) *Fouchard, Gaillard,*

Article V(1)(d) of the New York Convention permits a state to refuse the recognition or enforcement of an award on the basis that 'the arbitral procedure was not in accordance with the agreement of the parties'.[14] This view also does most justice to the consensual nature of arbitration, which, unlike any state court procedure, cannot be imposed on one of the parties. As the US Supreme Court has recognized:

> An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute. The invalidation of such an agreement in the case before us would not only allow the respondent to repudiate its solemn promise but would, as well, reflect a 'parochial concept that all disputes must be resolved under our laws and in our courts . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.[15]

Another (lower) court in the US aptly articulated the parties' autonomy in choosing their procedure: '[p]arties may choose to be governed by whatever rules they wish regarding how an arbitration itself will be conducted',[16] including that:

> short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes; parties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contracts.[17]

Under the proposed Revised Uniform Arbitration Act, which was drafted to promote the uniformity of US state arbitration law, the arbitral process is described as:

> a consensual process in which autonomy of the parties who enter into arbitration agreements should be given primary consideration, so long as their agreements conform to notions of fundamental fairness. This approach provides parties with the opportunity in most instances to shape the arbitration process to their own particular needs.[18]

16.07 Indeed, parties choose arbitration specifically because they enjoy the freedom to agree upon a procedure that is flexible and efficient, and customized to fit their

Goldman On International Commercial Arbitration (Kluwer Law International, The Hague, 1999) 1,184; LJ Bouchez, 'The Prospects for International Arbitration: Disputes Between States and Private Enterprises', 8(1) J Intl Arb 81, 96 (1991).

[14] New York Convention, Art V(1)(d).

[15] *Scherk v Alberto-Culver Co*, 417 US 506, 519 (1974) (citing *M/S Bremen v Zapata Off-Shore Co*, 407 US 1, 9) (1972); *see also Mitsubishi Motors Corp v Soler-Chrysler Plymouth*, 476 US 614 (1985); *Buckeye Check Cashing,* 546 US 440 (2006); *Prima Paint Corp v Flood and Conklin Mfg Co*, 388 US 395 (1967); *First Options of Chicago, Inc v Kaplan*, 514 US 938 (1995); *Howsam v Dean Witter Reynolds, Inc*, 537 US 79 (2002); *Pacificare Health Sys, Inc v Book*, 538 US 401 (2003); *Doctor's Assoc, Inc v Casarotto,* 517 US 681 (1996); *Southland Corp v Keating*, 465 US 1 (1984); *McDonald v City of West Branch*, 466 US 284, 292 (1984).

[16] *UHC Mgt Co v Computer Sciences Corp*, 148 F3d 992, 997 (8th Cir 1998).

[17] *Baravati v Josephthal, Lyon and Ross*, 28 F3d 704, 709 (7th Cir 1994).

[18] Revised Uniform Arbitration Act, Prefatory Note (2000).

individual case,[19] and which avoids the formalities of state court litigation.[20] Thus the parties' express agreement on procedural issues would only be disregarded if it were to force the arbitrators to violate applicable law or fundamental principles of due process.

16.08 Second, as Article 16(1) expressly provides, the arbitrators' discretion is 'subject to these Rules'. This is a logical extension of the principle of party autonomy, in that the parties' have agreed to the application of the ICDR Rules and the arbitrator has accepted the mandate on that basis. Hence, the arbitrators must discharge their mandate as they have accepted it and can therefore only exercise their procedural discretion within the framework of the ICDR Rules. As a result, the tribunal must conduct the arbitration bearing in mind, inter alia, that '[a]rbitrators acting under these Rules shall be impartial and independent',[21] and will diligently implement the procedural framework for written submissions outlined in Articles 2, 3, and 4 of the ICDR Rules.

16.09 Third, the arbitrators' discretion is also limited by the applicable mandatory law at the seat of the arbitration.[22] In the pro-arbitration jurisdiction of England and Wales, for example, the English Arbitration Act 1996 provides that a mandatory general duty of a tribunal exists to:

> act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and [to] adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.[23]

Other pro-arbitration jurisdictions reflect minimum mandatory law provisions that seek to ensure fairness, impartiality, and the exercise of discretion that is in accord with these general notions of due process.[24]

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[19] J Crawford, 'Advocacy Before the International Court of Justice and Other International Tribunals in State-to-state Cases', in RD Bishop (ed) *The Art of Advocacy in International Arbitration* (Juris Publishing, Huntington, NY, 2004) 11 ff (describing historic use of 'combination of full written and oral phases'). *See also* GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 1,739 ff.

[20] G Petrochilos, *Procedural Law in International Arbitration* (Oxford University Press, Oxford, 2004) 84; R Pietrowski, 'Evidence in International Arbitration', 22(3) Arb Intl 373, 374 (2006).

[21] ICDR Rules, Art 7(1).

[22] F Schwarz, *The Limits of Party Autonomy in International Commercial Arbitration* (Eleven Publishing, 2010); FT Schwarz and CW Konrad, *The Vienna Rules: A Commentary on International Arbitration in Austria* (Kluwer Law International, The Hague 2009) para 20-099; *see also* GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 1,765–76; ICDR Rules, Art 1(b) ('These Rules govern the arbitration, except that, where any such rule is in conflict with any provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail').

[23] English Arbitration Act 1996, s 33(1) and (2).

[24] *See eg* UNCITRAL Model Law, Art 18 ('[t]he parties shall be treated with equality and each party shall be given a full opportunity of presenting his case'); Belgian Judicial Code, arts 1693(1),

2. Limits imposed by due process

16.10 The notion of due process and fair trial is an accepted and fundamental feature acknowledged in all major jurisdictions and international instruments. It limits both the parties' autonomy to agree on procedural matters and the arbitrators' discretion. Indeed, it has often been said that, in international arbitration, 'there is often greater attention to such matters than in many national courts'.[25] The equal and fair treatment of the parties,[26] as recognized in Article 16(1), is an important part of due process, together with the right to be heard. Together, these essential values have been said to represent 'foundation pillars of any judicial procedure'.[27] In most countries, a violation of these principles may give rise to the setting aside of the award, bearing in mind that, in such pro-arbitration nations, the threshold is quite high.[28]

16.11 Equal treatment, however, must not be understood formalistically. Equality, as a function of procedural fairness, cannot be reduced to a mathematical formula, does not necessarily mean that the parties are entitled to *identical* treatment in a formulaic sense, and is instead informed by the circumstances of the case.

1694; Netherlands Code of Civil Procedure, arts 1036, 1039(1)–(2); French New Code of Civil Procedure, arts 1502(4), 1502(5); Singapore International Arbitration Act, s 15A(1).

[25] Born, op cit, 1,748. For further overview of the issue, *see* FT Schwarz and H Ortner, 'Procedural *Ordre Public* and the Internationalization of Public Policy in Arbitration', in C Klausegger et al (eds) *Austrian Arbitration Yearbook 2008* (Manz, Vienna, 2008) 133–220.

[26] J Lew, L Mistelis, and S Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, The Hague, 2003) 25–36; Born, op cit, 1,748 ('[I]nternational arbitration conventions, arbitration legislation and institutional rules guarantee the parties' rights to due process and procedural regularity, and in part because arbitral tribunals take these guarantees seriously'). *See also* N Blackaby, C Partasides, A Redfern, and M Hunter, *Redfern and Hunter on Law and Practice of International Commercial Arbitration* (5th edn, Oxford University Press, Oxford, 2009) para 10-47.

[27] A Reiner, 'Schiedsverfahren und rechtliches Gehör', *Zeitschrift für Europarecht, Internationales Privatrecht und Rechtsvergleichung* (2003) 52 ff.

[28] *Redfern and Hunter*, op cit, para 10.49:

> Each national system usually works well according to its own concepts. US Federal Courts, for example, have regarded the failure to give the parties an oral hearing as a violation of due process, and they recognise this as a ground for setting aside an award or for refusing recognition and enforcement under the New York Convention. In civil law systems, the right of the parties to have a full opportunity to present their case, the classic *droit de la défense*, often incorporates the *principe du contradictoire*, which requires that no evidence or argument serve as a basis for a decision unless it has been subject to the possibility of comment and contradiction by the parties.

See also GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 2,573 ff. For examples of cases upholding an award in spite of due process/procedural fairness challenges, *see Isidor Paiewonsky Assoc, Inc v Sharp Prop, Inc*, 998 F2d 145 (3d Cir 1993) (holding that there was no due process violation for failing to hear a party's arguments in an arbitration where the party did not request a hearing); *Margulead Ltd v Exide Tech* [2004] EWHC 1019 (QB) (in which the court rejected a party's challenge to an award on the grounds that the claimant was denied the right to reply in oral submissions); *Generica Ltd v Pharmaceutical Basics, Inc*, 125 F3d 1123, 1131 (7th Cir 1997) (holding that the arbitrator had discretion in determining the weight of evidence and limiting the cross-examination of a particular witness).

Similarly, the right to be heard does not mean that a party is permitted to make endless submissions, but rather that it must receive a fair opportunity to present its case.[29] As one US court has observed: **16.12**

> It is clear that an arbitrator must provide a fundamentally fair hearing [, but] [a]n arbitrator is not bound to hear all of the evidence tendered by the parties . . . he must give each of the parties to the dispute an adequate opportunity to present its evidence and arguments [in accordance with the arbitration agreement].[30]

In arbitral proceedings and in line with the court's reasoning, the right to be heard is therefore not an unlimited right.[31] Indeed:

> A party's choice to accept arbitration entails a trade-off. A party can gain a quicker, less structured way of resolving disputes; and it may also gain the benefit of submitting its quarrels to a specialized arbiter . . . Parties lose something, too: the right to seek redress from the courts for all but the most exceptional errors at arbitration.[32]

It bears emphasis therefore that the parties must only be afforded a 'fair' opportunity; the arbitrators are not required to wait until a party actually avails itself of the right to be heard. Thus a party cannot insist on the inclusion of evidence that the tribunal considers irrelevant.[33] Equally, a party who simply disregards the opportunities given to it by the tribunal to present its case cannot later complain that its right to be heard has been violated. For example, a Canadian court held that a Mexican party to an arbitration that strategically chose to boycott the arbitration could not later challenge the award because the Mexican party forfeited its opportunity to be heard.[34] Similarly, a party is entitled to a fair opportunity to present its **16.13**

[29] *Redfern and Hunter*, op cit, para 10-47 ('[T]he aim is to ensure that the parties are treated with equality and are given a fair hearing, with a full and proper opportunity to present their respective cases'); Born, op cit, 1,742–43 ('Parties agree to international arbitration, among other things, in order to obtain fair and objective procedures guaranteeing both parties an equal opportunity to be heard. This objective is inherent in the adjudicative character of international arbitration, in which the arbitrators are obligated to decide the parties' dispute impartially and objectively, based upon the law and the evidence the parties present'). *See also* KP Berger, *International Economic Arbitration* (Kluwer Law International, The Hague, 1993) 663; J Lew, L Mistelis, and S Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, The Hague, 2003) para 25-36 (discussing 'minimum standards'); UNCITRAL Model Law, Art 18 ('[E]ach party shall be given a full opportunity of presenting his case'); New York Conventions, Art V(1)(b) (providing grounds for setting aside an award if the 'party against whom the award is invoked . . . was otherwise unable to present his case').

[30] *Generica Ltd v Pharmaceutical Basics, Inc*, 125 F3d 1123, 1130 (7th Cir 1997).

[31] J Paulsson, 'The Timely Arbitrator: Reflections on the Böckstiegel Method' in R Briner et al (eds) *Law of International Business and Dispute Settlement in the 21st Century, Liber Amicorum K-H. Böckstiegel* (Carl Heymanns Verlag, Cologne/Berlin/Bonn/Munich, 2001) 608.

[32] *Dean v Sullivan*, 118 F3d 1170, 1173 (7th Cir 1997).

[33] *See* below para 16.17 ff.

[34] *Corporacion Transnacional de Inversiones SA de CV v STET International SpA and STET International Netherlands NV* (1999) 45 OR (3d) 183 (Ont SCJ). *See also* N Blackaby, C Partasides, A Redfern, and M Hunter, *Redfern and Hunter on Law and Practice of International Commercial Arbitration* (5th edn, Oxford University Press, Oxford, 2009) para 10-53; FT Schwarz and CW Konrad, *The Vienna Rules: A Commentary on International Arbitration in Austria* (Kluwer Law International, The Hague, 2009) para 20-076.

case, but is not entitled to an endless procession of written submissions or oral argument.[35] For this reason, the tribunal is entitled to limit the parties' written submissions and the offering of evidence to what is appropriate, as long as the parties are put on advance notice of any cut-off date or comparable mechanism.[36]

B. Duty of expedition (Article 16(2))

Article 16(2)

The tribunal, exercising its discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute. It may conduct a preparatory conference with the parties for the purpose of organizing, scheduling and agreeing to procedures to expedite the subsequent proceedings.

16.14 Article 16(2) serves as a reminder to the arbitrator to conduct the arbitration expeditiously. Of course, speed must not be confused with haste, and the parties must be given a fair opportunity to present their case. Further, arbitrators have duties imposed upon them by both national and international law, including the duty to act promptly.[37] Because justice delayed is justice denied, '[s]ome systems of law endeavour to ensure that an arbitration is carried out with reasonable speed by setting a time limit within which the arbitral tribunal must make its award'.[38]

16.15 As an example for expeditious and proper organization, Article 16(2) also provides for the instrument of a preparatory conference to discuss the precise conduct of the arbitration.[39] Indeed, the arbitral process is more flexible than highly regulated

[35] GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 2,583 ('[A] tribunal is generally afforded substantial discretion in determining the need for and [*sic*] admissibility of evidence or argument on particular issues').

[36] *See eg* ICC Rules, Art 18(4) ('Any subsequent modifications of the provisional timetable shall be communicated to the Court and the parties').

[37] *Redfern and Hunter*, op cit, paras 5-65–5-66. *See also* Born, op cit, 1,623 ('In addition to exercising reasonable care and skill, arbitrators are obligated to conduct an arbitration with diligence and expedition').

[38] *Redfern and Hunter*, op cit, para 5-65, citing the Italian Code of Civil Procedure, as amended in 2006, arts 813 and 820 (240 days from the date of acceptance of appointment by the tribunal) and the Ecuadorean Law of Arbitration, art 25 (150 days from the final hearing).

[39] According to *Redfern and Hunter*, op cit, para 6-27, 'especially where the parties and their representatives come from different legal systems or different cultural backgrounds, it is sensible for the tribunal to convene a meeting with the parties as early as possible in the proceedings'. It is also common amongst many of the arbitral institutions to conduct at least a preliminary conference, sometimes by teleconference, in-person meetings, or through written procedural timetables. *See eg* ICC Rules, Art 18(4) (providing for a 'terms of reference' followed by a 'provisional timetable that [the parties and the tribunal] intends to follow for the conduct of the arbitration'); SCC Rules, Art 23 ('[T]he Arbitral Tribunal shall promptly consult with the parties with a view to establishing a provisional timetable for the conduct of the arbitration. The Arbitral Tribunal shall send a copy of the provisional timetable to the parties and to the Secretariat'); ICSID Rules, Art 20(1) ('As early as possible after the constitution of a Commission, its President shall endeavour to ascertain the views of the parties regarding questions of procedure. For this purpose he may request the parties to meet him');

proceedings before state courts, but by the same token requires a higher degree of organization from the parties and the arbitrators. This is usually done through a preliminary (or 'preparatory', or 'case management') hearing or conference.

16.16 Skilled arbitrators will use the preparatory conference to establish the ground rules that govern the proceeding at the very outset of the arbitration. If properly done, the preliminary hearing will ensure that both parties know how and when exactly they are expected to present their case—which is particularly important when the parties come from different legal traditions with different expectations as to a fair process. Most arbitrators therefore insist on such an early meeting to discuss the organization of the proceedings,[40] in person, or remotely (over the telephone, or through video link), often following the guidance provided in the UNCITRAL Notes.[41] In the practice of the ICDR, arbitrators are provided a Preliminary Hearing and Scheduling Order, which invites discussion with the parties of essential elements of the case, such as: deadlines for any amendments to the claims or counterclaims; a stipulation of uncontested facts by a certain date; an early notification of witnesses that a party intends to proffer; the exchange of information and documentary evidence by a certain date; and the date of the hearing.

C. Evidence (Article 16(3))

Article 16(3)

The tribunal may in its discretion direct the order of proof, bifurcate proceedings, exclude cumulative or irrelevant testimony or other evidence, and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.

16.17 Article 16(3) reinforces the arbitrators' broad discretion in establishing the facts and taking evidence as they deem appropriate. By way of example, but in no way limiting the general discretion conferred on the arbitrators by virtue of Article 16(1), Article 16(3) addresses the tribunal's authority with respect to several important elements of the arbitral procedure.

CPR Rules, Art 9(3) ('The Tribunal shall hold an initial pre-hearing conference for the planning and scheduling of the proceeding'); SIAC Rules, Art 16(3) ('As soon as practicable after the appointment of all arbitrators, the Tribunal shall conduct a preliminary meeting with the parties, in person or by any other means, to discuss the procedures that will be most appropriate and efficient for the case').

[40] *Redfern and Hunter*, op cit, para 6-27 ff (discussion of preliminary meetings and their role and importance). *See also UNCITRAL Report of the Secretary-General on the Revised Draft Set of Arbitration Rules*, Ninth Session, Addendum 1 (Commentary), UN Doc A/CN.9/112/Add. 1 (1975), (1976) VII UNCITRAL YB 166, 175 (Art 25(3) of the UNCITRAL Rules 'deals with certain preparatory measures for hearings that the arbitrators must take in order to ensure that the hearings run smoothly').

[41] For international instruments, *see* the 1996 UNCITRAL Notes on Organizing Arbitral Proceedings ('UNCITRAL Notes').

16.18 First, the tribunal may, in its discretion, direct the order of proof. Thus the tribunal is entitled, on its own accord and without application from the parties, to request the parties to offer certain evidence that the tribunal considers relevant for the case. Included in that authority is, of course, the power to order the production of documents by way of disclosure, either upon a party's request or, again, if the tribunal, of its own volition, deems it appropriate in the circumstances of the case.[42]

16.19 Second, the tribunal may bifurcate proceedings where it deems that segmenting the arbitration into different phases would make the proceedings more expeditious.[43] For example, proceedings can often be bifurcated in a jurisdictional phase and a phase on the merits. In the practice of international arbitration, regardless of the applicable institutional rules chosen by the parties, '[i]t is, for example, not uncommon for a tribunal to request separate briefing on the subject of jurisdiction, and to hear evidence and oral submissions, before issuing an interim award confined to jurisdiction'.[44] The ICDR Rules, of course, contemplate this common practice, providing, in Article 15(3), that '[t]he tribunal may rule on such [jurisdictional] objections as a preliminary matter or as a part of the final award'.[45] Following a finding that the tribunal may validly exercise jurisdiction over the dispute, the tribunal ordinarily would proceed to a hearing on the merits in accordance with the parties' agreement and the institutional rules that govern.

16.20 Proceedings may also be bifurcated into separate phases on liability and on quantum. In this regard, some commentators recognize that:

> In many modern disputes arising out of international trade, the quantification of claims is a major exercise . . . [that] may involve both the parties and the arbitral tribunal considering large numbers of documents, as well as complex technical matters involving experts appointed by the parties, or by the arbitral tribunal, or both.[46]

Bifurcating the case in some cases may expedite and clarify the presentation of issues in an arbitration.

16.21 In addition, the tribunal may direct the parties to 'focus their presentations on issues the decision of which could dispose of all or part of the case'.[47] Similar to the rationale underlying the bifurcation of the proceedings, it may not make sense to hear the entire case if the claim stands or falls on jurisdiction, time bar, or other

[42] *See also* ICDR Rules, Art 19 (for a discussion of the ICDR Guidelines for Arbitrators Concerning Exchanges of Information).

[43] *Redfern and Hunter*, op cit, paras 6-43–6-53.

[44] GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 1,816.

[45] ICDR Rules, Art 15(3).

[46] *Redfern and Hunter*, op cit, para 6-43.

[47] ICDR Rules, Art 16(3).

dispositive preliminary issues that can be heard separately without wasting the resources associated with hearing the entire case.

16.22 Finally, the tribunal can also 'exclude cumulative or irrelevant testimony or other evidence'. As Article 16(3) confirms, emphasizing again the arbitrators' duty to conduct the arbitration expeditiously, a party is not entitled, in the guise of its right to be heard, to make factual assertions or produce evidence that is irrelevant or immaterial to the dispute at bar.[48] Thus the right to be heard is not violated if the arbitrators, either *ex officio* or upon the request of a party, exclude or dismiss factual allegations or evidence that fail(s) to make a material contribution to the resolution of the case.

16.23 Again, these powers are listed in Article 16(3) only by way of example. Beyond those powers, the tribunal enjoys broad discretion under Article 16(1) to conduct the proceedings as appropriate in the individual circumstances of the case[49] and under applicable law. Under US law, for example:

> An arbitrator enjoys wide latitude in conducting an arbitration hearing. Arbitration proceedings are not constrained by formal rules of procedure or evidence; the arbitrator's role is to resolve disputes, based on his consideration of all relevant evidence, once the parties to the dispute have had a full opportunity to present their cases.[50]

[48] Article 9(2) of the IBA Rules provides: 'The Arbitral Tribunal shall, *at the request of a Party or on its own motion*, exclude from evidence or production any document, statement, oral testimony or inspection for any of the following reasons: (a) lack of sufficient relevance or materiality.' Likewise, the UNCITRAL Model Law, Art 19(2), provides that '[t]he power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence'. The vast majority of national laws also recognize the discretion of a tribunal to determine the relevance and materiality of evidence. *See eg* Austrian ZPO, s 599(1); English Arbitration Act 1996, s 34(1) and (2); German ZPO, s 1042(4); Hong Kong Arbitration Ordinance, art 34C(1); Japanese Arbitration Law, art 26(3). Case law in the US also recognizes these evidentiary principles. For a full selection of US cases, *see* GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 1,852, n 575. *See eg Intl Chem Workers Union v Columbian Chem Co*, 331 F3d 491 (5th Cir 2003) ('Arbitrators have broad discretion to make evidentiary decisions'); *Generica Ltd v Pharm Basics, Inc*, 125 F3d 1123, 1130 (7th Cir 1997) ('[A]rbitrators are not bound by the rules of evidence'); *Petroleum Separating Co v Interamerican Refining Corp*, 296 F2d 124 (2d Cir 1961); *Compania Panemena Maritima San Gerassimo, SA v JE Hurley Lumber Co*, 244 F2d 286 (2d Cir 1957); *Reichman v Creative Real Estate Consultants, Inc*, 476 FSupp 1276 (SDNY 1979).

[49] In one of the reported ICDR awards, ICDR Case No 251-04, 2005 WL 6346380 (ICDR), the tribunal admitted the witness statements of witnesses even though those witnesses did not appear at the hearing. However, the tribunal afforded those written statements decreased probative value because neither the tribunal nor the other side had the opportunity to question the witnesses orally. *See also* N Blackaby, C Partasides, A Redfern, and M Hunter, *Redfern and Hunter on Law and Practice of International Commercial Arbitration* (5th edn, Oxford University Press, Oxford, 2009) paras 6-82–6-180; Born, op cit, 1,828–30.

[50] *Hoteles Condado Beach, La Concha and Convention Centre v Union De Tronquistas*, 763 F2d 34, 38 (1st Cir 1985).

D. Notification of information to the other parties (Article 16(4))

Article 16(4)

Documents or information supplied to the tribunal by one party shall at the same time be communicated by that party to the other party or parties.

16.24 As a matter of course, all information that one party provides to the tribunal must simultaneously also be provided to each other party. This is both a function of the prohibition on *ex parte* communications with the tribunal (discussed above at Chapter 7), and due process, which requires that each party is afforded an opportunity to comment on the evidence before the tribunal.