

ADGM ARBITRATION CENTRE

ARBITRATION GUIDELINES



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INTRODUCTION

These Arbitration Guidelines (the “Guidelines”) have been published by the Abu Dhabi Global Market Arbitration Centre (“ADGMAC”) to provide users of arbitration, their counsel and arbitrators with a set of procedures that they can choose to use in their arbitral proceedings, whether those proceedings take place at the ADGMAC or elsewhere.

The Guidelines are designed to be user friendly and practical, with the needs and interests of the end users of arbitration (i.e. the parties themselves) firmly at the forefront of ADGMAC’s drafting philosophy. The overarching objective of the Guidelines is to provide parties and tribunals with a set of innovative best practice procedures to assist in bringing greater certainty and efficiency to the arbitral process, while ensuring fairness, equality and due process.

In furtherance of these aims, the Guidelines allow the parties or tribunals to adopt all or some of the provisions therein to give greater structure to certain aspects of the arbitral process through a set of clear default procedures which will apply to the arbitration and give tribunals the tools to better control time and costs of the proceedings. The Guidelines also have built-in flexibility and procedural safeguards so that they can be adapted to the unique circumstances of a particular dispute and to ensure fairness and equality in all cases.



INTRODUCTION

The Guidelines have been drafted and structured in 'Modules', each of which deals with a different aspect of the arbitral process. Parties and / or tribunals may choose to adopt these Guidelines in whole or in part by selecting just certain Modules. These Modules are as follows:

1. **Module 1 - Written Submissions, Issues and Applications:** this sets out best practice guidance in relation to certain standard elements of arbitral proceedings, including written submissions, the identification and treatment of the issues to be decided and interlocutory applications for relief.
2. **Module 2 - Fact Witness Evidence:** this sets out best practice guidance in relation to the submission of fact witness evidence in arbitral proceedings.
3. **Module 3 - Expert Witness Evidence:** this sets out best practice guidance in relation to the submission of expert witness evidence in arbitral proceedings.
4. **Module 4 - Documentary Evidence:** this sets out best practice guidance in relation to the request and production of documents in arbitral proceedings.
5. **Module 5 – Hearings:** this sets out best practice guidance in relation to procedural and evidentiary hearings in arbitral proceedings.
6. **Module 6 – Counsel Conduct:** this sets out best practice guidance in relation to the conduct of counsel in arbitral proceedings.

Each Module has at the outset a statement of its intended purpose.

The Guidelines are provided in Word format so that they can be adapted by the parties and by the Tribunal as appropriate.

The Guidelines are drafted in a manner such that they can be used in either ad hoc arbitral proceedings or proceedings that are administered by an arbitral institution. In the latter case, the Guidelines have been designed to complement the leading institutions' arbitration rules and procedures and to be used in conjunction with such rules and procedures. They are not intended to replace or override either the institutional rules that the parties have chosen for their arbitration or the provisions of the arbitration law of their chosen arbitral seat.

The Guidelines are designed to apply neutrally to proceedings involving parties from different legal systems and traditions.

The Guidelines may be adopted by parties at any stage: in their arbitration agreement, once a dispute has arisen but before the arbitration has commenced, at the outset of the arbitration when the first procedural matters are agreed, or at any time thereafter. Similarly, the Guidelines may be used by arbitral tribunals as guidance for the purposes of effective case management, including in particular for the purposes of issuing procedural orders.





ADGM Authorities Building

MODULE 1

WRITTEN SUBMISSIONS, ISSUES AND APPLICATIONS

1. Purpose and Scope of Module

1. The purpose of this Module is to ensure that the parties to the arbitration, their counsel and the Tribunal make every effort to conduct certain aspects of the arbitration in an efficient and cost-effective manner.
2. The default provisions of this Module are expressly subject to modification by agreement of the parties or a direction of the Tribunal.

2. Content and Format of Written Submissions

1. All written submissions made by a party shall:
 - a. Be submitted in electronic format only;
 - b. Be divided into consecutively numbered paragraphs;
 - c. Contain a table of contents, headings and page numbers;
 - d. Contain a list of the documents upon which the party relies in connection with the written submission ('exhibits'), which will be individually numbered;
 - e. Identify in the text of the written submission or in a footnote where each exhibit is relied upon; and
 - f. Be accompanied by electronic copies of all the exhibits which shall be provided to the other party and the Tribunal at the time of service of the written submission. If any of the exhibits are in a language other than the language of the arbitration, translations shall be provided at the same time.
2. The Tribunal shall have the power to impose page limits on written submissions.
3. In the case of pleadings, written submissions shall be limited to a claim, defence and reply in relation to any claim or counterclaim.
4. A reply submission shall be limited to responding to points raised in the submission to which it responds. No new issues may be raised in a reply submission without the permission of the Tribunal or agreement of the parties.
5. If the written submission is accompanied by or otherwise relies upon witness or expert evidence, the text of the submission will identify where that witness or expert evidence is relied upon, by reference to the paragraph numbers of the corresponding witness evidence or expert report.

MODULE 1:

WRITTEN SUBMISSIONS, ISSUES AND APPLICATIONS

3. List of Issues

1. Once written submissions have been exchanged on a given claim or counterclaim, but before that claim or counterclaim is heard, the parties will prepare (on a date agreed by the parties or directed by the Tribunal) and seek to agree a list of the issues of law and the issues of fact that arise from that claim or counterclaim.
2. In the event that the parties do not agree on any part of the list of issues, they will provide to the Tribunal their proposed issues, with each proposed issue identified by reference to the paragraph(s) of the written submissions from which it emerges. The Tribunal will then proceed to fix the list of issues for that claim or counterclaim, by reference to the parties' written submissions.

4. Threshold Issues and Bifurcation

1. At the earliest opportunity, the Tribunal may bifurcate the arbitral proceedings according to:
 - a. Any of the issues or categories of issues identified in the list of issues referred to in Section 3 above, including preliminary or threshold factual or legal issues;
 - b. Liability and quantum issues; or
 - c. Any other division of the matters in dispute which it considers would facilitate their efficient and cost effective resolution.
2. The Tribunal shall look for opportunities to bifurcate the arbitral proceedings if it considers that it is appropriate to do so having regard to the circumstances of the case and if it forms the view that bifurcation may lead to savings in cost and time.

5. Applications

1. If a party requires an order or directions from the Tribunal at any stage of the arbitral proceedings, it shall, subject to subsection (5) below, follow the following procedure:
 - a. It will raise the subject matter of its intended application in writing with the other party and will seek the other party's consent to the subject matter of the application in advance, so as to avoid the need for the application;
 - b. It will give the other party a reasonable opportunity to consider and respond to the subject matter of the application in advance, indicating a date by which it requests a response before which no application will be made; and
 - c. If the parties have failed to reach agreement on the subject matter of the intended application, the party seeking relief from the Tribunal may make its application to the Tribunal.

MODULE 1:

WRITTEN SUBMISSIONS, ISSUES AND APPLICATIONS

2. The party making the application will number its application (such as "Claimant's Application No. 1"). All subsequent communications in connection with that application will carry the same numbering.
3. All applications for orders or directions under subsection (1) shall be subject to one round of submission by the parties. Further rounds of submissions shall only be permitted by the Tribunal in exceptional circumstances and on the application of a party.
4. Neither the applicant, nor the other party, will raise arguments or seek relief in its submission to the Tribunal that it has not already communicated to the other party under subsection (1) above.
5. Nothing in this section shall prevent a party from making an application directly to the Tribunal for urgent relief having regard to the nature of the relief sought and the circumstances of the case. For the avoidance of doubt, an application should only be made directly to the Tribunal in exceptional circumstances. The Tribunal shall have discretion whether to consider such a direct application having regard to the nature and circumstances giving rise to the application.



ADGM Arbitration Centre Breakout Room



MODULE 2

FACT WITNESS EVIDENCE

1. Purpose and Scope of Module

1. The purpose of this Module is to provide the parties to the arbitration, their counsel and the Tribunal with practical best practice guidance in relation to the submission of fact witness evidence in the arbitral proceeding. The objective is to avoid the wasted time and costs (which can be substantial) associated with the unnecessarily broad and voluminous submission of such evidence in arbitral proceedings.
2. The default provisions of this Module are expressly subject to modification by agreement of the parties or a direction of the Tribunal.

2. Identification of Fact Witness Evidence

1. The Tribunal shall have discretion to adopt such procedural measures as it considers appropriate in relation to fact witness evidence, including whether it is necessary to give directions as to which issues should be dealt with by fact witness statements.
2. Within the time period set by the Tribunal as soon as possible after issue has been joined on the initial claim and counterclaim submissions made by the parties, each party shall identify to the other party or parties and the Tribunal:
 - a. How any witnesses of fact it intends to rely upon in support of such claim or counterclaim, or defence thereto;
 - b. The specific issue(s) of fact arising in connection with such claim or counterclaim, or defence thereto, to which each fact witness's evidence is said to be relevant;
 - c. In each case the reasons why the fact witness's testimony would materially assist the Tribunal's adjudication of a particular claim or counterclaim, or defence thereto; and
 - d. Its estimate of the approximate length in pages of each fact witness statement.

3. Scope of Fact Witness Statements

1. Any fact witness statement submitted in the arbitration shall be limited to the specific factual issues to which the statement is said to be relevant in the statement made pursuant to Section 2 above. If further factual issues arise for a fact witness beyond those identified pursuant to Section 2 above, the party relying upon such witness shall promptly notify the other party and the Tribunal.
2. Witness statements shall not be used as a conduit to introduce opinion or legal argument.

MODULE 2: FACT WITNESS EVIDENCE

3. The Tribunal may, on the application of a party or on its own initiative, set page limits for fact witness statements having regard to the nature and complexity of the issues which they address.

4. Content of Fact Witness Statements

1. Each fact witness statement submitted in the arbitration shall include:
 - a. The full name and current address of the witness;
 - b. A photograph of the witness on the front page;
 - c. A statement regarding any connection the witness has or previously had to any of the parties;
 - d. A brief description of the witness's professional experience, training and qualifications;
 - e. An appendix containing the curriculum vitae of the witness;
 - f. Assertions of fact within the personal knowledge of the witness, or where not within their personal knowledge, the source of their knowledge;
 - g. References to and copies of all documents referred to and relied upon in the witness statement;
 - h. A statement identifying the language in which the witness statement was originally prepared and the language in which the witness anticipates giving testimony at any future evidentiary hearing;
 - i. A statement as to whether any other person assisted in the preparation of the witness statement;
 - j. An affirmation of the truth of the witness statement; and
 - k. The signature of the witness and its date and place.
2. For the avoidance of doubt, in complying with subsection (1)(i) above a party is not required to disclose any matter or communication which is otherwise protected by privilege.

MODULE 2:

FACT WITNESS EVIDENCE

5. Scope of Reply Fact Witness Statements

A party's submission of any reply fact witness statement in the arbitration shall be limited to matters genuinely responsive to the specific issues to which the statement is said to be in reply to in the opposing party's fact witness statement(s). No new issues may be raised in reply fact witness statements without the permission of the Tribunal or agreement of the parties.

6. Further Fact Witness Statements

No further fact witness statements may be submitted in the arbitration after reply fact witness statements have been submitted except in exceptional circumstances and only with the permission of the Tribunal or pursuant to an agreement of the parties

7. Testimony of Fact Witnesses at Evidentiary Hearings

1. Within a reasonable time in advance of the scheduled date of an evidentiary hearing, each party shall serve on the other party and the Tribunal a statement which sets out:
 - a. Each fact witness upon whom it intends to rely at the evidentiary hearing;
 - b. The specific issues under consideration at the evidentiary hearing to which the fact witness's testimony is said to be relevant and material; and
 - c. The dates on which each such fact witness is available to testify.
2. The Tribunal, on the application of a party, may exclude any fact witness identified pursuant to subsection (1) above from testifying at the evidentiary hearing on the basis that the testimony would not materially assist the Tribunal's adjudication of the specific issues under consideration at the evidentiary hearing to which the fact witness's evidence is said to be relevant.
3. The Tribunal may decide that it will not take into account or give weight to the evidence of any fact witness who has submitted a statement in the arbitration but who is not called to testify at an evidentiary hearing by the party relying upon the statement.



MODULE 3

EXPERT WITNESS EVIDENCE

1. Purpose and Scope of Module

1. The purpose of this Module is to provide the parties to the arbitration, their counsel and the Tribunal with practical best practice guidance in relation to the submission of expert witness evidence in the arbitral proceeding. The objective is to avoid the wasted time and costs (which can be substantial) associated with the unnecessarily broad and voluminous submission of such evidence in arbitral proceedings.
2. The default provisions of this Module are expressly subject to modification by agreement of the parties or a direction of the Tribunal.

2. Identification of Expert Witness Evidence

1. The Tribunal shall have discretion to adopt such procedural measures as it considers appropriate in relation to expert witness evidence, including whether it is necessary to give directions as to which issues should be dealt with by expert witnesses.
2. Within the time period set by the Tribunal as soon as possible after issue has been joined on the initial claim and counterclaim submissions made by the parties, each party shall identify to the other party or parties and the Tribunal:
 - a. How many expert witnesses it intends to rely upon in support of such claim or counterclaim, or defence thereto and the discipline of each expert witness;
 - b. The specific issue(s) arising in connection with such claim or counterclaim, or defence thereto, to which each expert witness's evidence is said to be relevant;
 - c. In each case the reasons why the expert witness's testimony would materially assist the Tribunal's adjudication of a particular claim or counterclaim, or defence thereto; and
 - d. Its estimate of the approximate length in pages of each expert report.

3. Scope of Expert Reports

1. Any expert report submitted in the arbitration shall be limited to the specific issues of opinion evidence to which the report is said to be relevant in the statement made pursuant to Section 2 above. If further issues arise for an expert witness beyond those identified pursuant to Section 2 above, the party relying upon such witness shall promptly notify the other party and the Tribunal.

MODULE 3:

EXPERT WITNESS EVIDENCE

2. The Tribunal may, on the application of a party or on its own initiative, set page limits for expert reports having regard to the nature and complexity of the issues which they address.

4. Content of Expert Reports

1. Each expert report submitted in the arbitration shall include:
 - a. The full name and current address of the expert;
 - b. A photograph of the expert witness on the front page;
 - c. A statement regarding any connection the expert has or previously had to the parties, their legal counsel and the Tribunal;
 - d. A description of the expert's professional experience, training and qualifications;
 - e. An appendix containing the curriculum vitae of the expert;
 - f. A description of the expert's instructions pursuant to which he or she is providing his or her opinions and conclusions;
 - g. A statement of his or her independence from the parties, their legal counsel and the Tribunal;
 - h. The facts on which he or she is basing his or her opinions and conclusions
 - i. A statement of the methodology used by the expert to form his or her opinions and conclusions;
 - j. References to and copies of all documents referred to and relied upon in the expert report;
 - k. References to all fact witness statements relied upon by the expert in reaching his or her opinions;
 - l. Where the facts are disputed by fact witnesses on opposing sides, a statement of how the expert's opinion might differ depending on the Tribunal's findings on that disputed factual question;
 - m. A statement identifying the language in which the expert report was originally prepared and the language in which the expert anticipates giving testimony at any future evidentiary hearing;
 - n. A statement as to whether any other person assisted in the preparation of the expert report;

MODULE 3: EXPERT WITNESS EVIDENCE

2. Prior to the appointment of a Tribunal-appointed expert, the expert shall provide the parties and the Tribunal with a statement setting out:
 - a. The full name and current address of the expert;
 - b. A statement regarding any connection the expert has or previously had to the parties, their legal counsel and the Tribunal;
 - c. A description of the expert's professional experience, training and qualifications;
 - d. A description of the expert's instructions pursuant to which he or she will be providing his or her opinions and conclusions; and
 - e. A statement of the expert's independence from the parties, their legal counsel and the Tribunal.
3. Prior to the appointment of a Tribunal-appointed expert, the parties shall be given the opportunity to comment on and, if appropriate, object to:
 - a. The expert's suitability to perform his or her duties and carry out his or her instructions, including in connection with the expert's qualifications and independence; and
 - b. The nature and scope of the expert's instructions.
4. Prior to the appointment of a Tribunal-appointed expert, the parties and the Tribunal shall endeavour to agree a protocol concerning, amongst other things, party and Tribunal communications with the expert.
5. Any expert report submitted by a Tribunal-appointed expert shall include the items set out in Section 4(1) above.
6. Any Tribunal-appointed expert shall be granted access to all documents produced in the arbitration. The Tribunal-appointed expert shall also be entitled to request from the parties such further documents as are necessary to carry out his or her instructions.
7. Any party may apply to the Tribunal for permission to submit a reply expert report in response to the report of a Tribunal-appointed expert.
8. The Tribunal-appointed expert shall also be made available to testify at the evidentiary hearing.
9. The reasonable fees and expenses of a Tribunal-appointed expert shall form part of the costs of the arbitration.

MODULE 3: EXPERT WITNESS EVIDENCE

10. The Tribunal shall weigh the evidence submitted by a Tribunal-appointed expert in the same manner it would any other evidence before the Tribunal and, in any event, in accordance with the applicable law of the arbitration.

10. Testimony of Expert Witnesses at Evidentiary Hearings

1. Within a reasonable time in advance of the scheduled date of an evidentiary hearing, each party shall serve on the other party and the Tribunal a statement which sets out:
 - a. Each expert witness upon which it intends to rely at the evidentiary hearing;
 - b. The specific issues under consideration at the evidentiary hearing to which the expert witness's testimony is said to be relevant and material; and
 - c. The dates on which each such expert witness is available to testify.
2. The Tribunal, on the application of a party, may exclude any expert witness identified pursuant to subsection (1) above from testifying at the evidentiary hearing on the basis that the testimony would not materially assist the Tribunal's adjudication of the specific issues under consideration at the evidentiary hearing to which the expert witness's evidence is said to be relevant.
3. The Tribunal may decide that it will not take into account or give weight to the evidence of any expert witness who has submitted an expert report in the arbitration but who is not called to testify at an evidentiary hearing by the party relying upon the expert witness's evidence.





MODULE 4

DOCUMENTARY EVIDENCE

1. Purpose and Scope of Module

1. The purpose of this Module is to provide the parties to the arbitration, their counsel and the Tribunal with practical best practice guidance in relation to the request and production of documents in the arbitral proceeding. The objective is to avoid the wasted time and costs (which can be substantial) associated with the production of documents in arbitral proceedings.
2. The default provisions of this Module are expressly subject to modification by agreement of the parties or a direction of the Tribunal.

2. Definitions

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

“Document Request” means a written request by a party to another party to produce Documents; and

“Document Production” means the service of Documents on the Tribunal and / or parties to the arbitration in connection with a pleading or in response to a Document Request and / or a direction of the Tribunal.

3. General Power of Tribunal in Relation to Documentary Evidence

1. The Tribunal shall have discretion to adopt such proportionate and cost effective procedural measures as it considers appropriate in relation to documentary evidence, including whether or not to permit Document Requests to be submitted in the arbitration, having regard to the nature and complexity of the issues which they address.
2. Document Requests may only be submitted:
 - a. Pursuant to a direction of the Tribunal on the application of a party pursuant to Section 5 below; or
 - b. By written agreement of the parties.

MODULE 4:

DOCUMENTARY EVIDENCE

4. Production of Documents in Support of Claim or Defence

1. At the time of the submission of any claim or counterclaim, or defence thereto, or any other pleading, a party shall produce to the other party and the Tribunal all Documents it relies upon in support of such claim or counterclaim, or defence thereto, or other pleading, including Documents available in the public domain.
2. Subject to an application pursuant to Section 5 below, there is to be a presumption that the Documents produced under subsection (1) above are sufficient for the purpose of the claim or counterclaim, or defence thereto, or any other pleading, to which they relate, and no other production of documents is necessary.
3. Save as provided for below, no additional Documents may be appended to any witness statement without agreement of the parties or the permission of the Tribunal for good cause.

5. Application for Permission to Serve Document Requests

1. Within a reasonable time after the service of the opposing party's claim or counterclaim, or defence thereto, or other pleading, to which they relate, a party may apply to the Tribunal for a direction permitting the service of Document Requests in relation to such claim or counterclaim, or defence thereto, or other pleading.
2. In determining whether or not to permit the service of Document Requests in the arbitral proceeding, the Tribunal shall take into consideration:
 - a. The nature of the issues to which Document Requests are said to be relevant and reasonably necessary for their resolution;
 - b. Procedural efficiency and economy; and
 - c. A party's right to have its claims and defences fairly heard.
3. In the event Document Requests are permitted by the Tribunal, they shall be subject to the provisions of Section 6 below.
4. A party may apply to the Tribunal for permission to serve further Document Requests at a later stage of the proceedings only in exceptional circumstances. In resolving such an application, the Tribunal shall take into consideration the factors set out in subsection (2) above and may only permit such further Document Requests if it is satisfied that the Document Requests could not have been reasonably made in the party's prior application made pursuant to subsection (1) above.

6. Document Requests and Production

1. Document Requests shall contain the following:
 - a. A description of each Document requested sufficient to identify it;

MODULE 4: DOCUMENTARY EVIDENCE

- b. A description of a narrow and specific requested category of Documents sufficient to identify them;
- c. A statement setting out:
 - i. The specific issue(s) arising in connection with a claim or counterclaim, or defence thereto, in the arbitration to which the requested Document or category of Documents is relevant, with references to the specific paragraphs in the pleadings, list of issues or other written submissions where the issue(s) arises;
 - ii. Why the requested Document or category of Documents would materially assist in the Tribunal's adjudication of the claim or counterclaim, or defence thereto, to which the Document is said to be relevant;
 - iii. Why the Document or category of Documents are reasonably believed to exist and to be in the possession, custody or control of the party to which the Document Request is addressed; and
 - iv. That the Documents or category of Documents are not in the possession, custody or control of the requesting party.
- 2. A party shall not be permitted to submit Document Requests which seek the production of Documents or categories of Documents that support the other party's own claims, and Document Requests shall therefore not be used as a means of identifying the evidentiary gaps in the other party's claims.
- 3. Within a reasonable time from the date of service of a Document Request, the party to whom the Document Request is addressed shall produce all documents in its possession, custody or control which are responsive to those Document Requests in respect of which it makes no objection. A party may apply to the Tribunal to extend the deadline for such Document Productions for good cause.
- 4. In the event that the party to which the Document Request is addressed objects to the Document Request, it shall serve its objection within a reasonable time from the date of service of the Document Request and set out the reasons for such objection in writing in each case.
- 5. The requesting party shall serve a response to any objections to Document Requests within a reasonable time of the service of such objections. The requesting party shall not include new bases for the request in response to objections, unless it also gives the objecting party the right to comment on those new bases.
- 6. The Document Requests and all subsequent comments as per the above will be organised in a "Redfern Schedule".

MODULE 4: DOCUMENTARY EVIDENCE

7. Either party may request the Tribunal to resolve any objection to any Document Request within a reasonable time from the date of the service of the requesting party's response to the objection. The Arbitral Tribunal may order the party to whom the disputed Document Request is addressed to produce any requested Document or category of Documents in its possession, custody or control provided that:
 - a. The Tribunal is satisfied that the requested Document is relevant to a specific issue arising in connection with a claim or counterclaim, or defence thereto, in the arbitration;
 - b. The Tribunal is satisfied that the requested Document or category of Documents would materially assist in the Tribunal's adjudication of the issue to which the Document is said to be relevant;
 - c. It would be proportionate and not unreasonably burdensome for the producing party to produce such Documents or categories of Documents;
 - d. There is no legal impediment or privilege applicable to the production of such Documents or categories of Documents; and
 - e. There are no grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling that would justify the withholding of such Documents or categories of Documents.
8. The parties shall liaise and seek to agree the format in which the Document Production will be made, in order to ensure that the time and cost associated with transmitting, receiving and organising the Documents are minimised.
9. Unless otherwise agreed between the parties or directed by the Tribunal, a Document Production shall:
 - a. Be organised according to the numbering of the Document Requests and / or directions of the Tribunal ordering the production of Documents;
 - b. Be in an electronic format capable of being searched and, where applicable, loaded onto an electronic document review system in an efficient and economical manner;
 - c. Preserve the original metadata of Documents; and
 - d. Avoid the duplication of Documents.
10. If a party fails without satisfactory explanation to produce any Document pursuant to a Document Request and / or a direction of the Tribunal, the Tribunal may:
 - a. Infer that such Document would be adverse to the interests of that party; and

MODULE 4: DOCUMENTARY EVIDENCE

- b. Impose other sanctions as appropriate, including taking such failure into account in its assignment of the costs of the arbitration.

7. Authenticity of Documents

Documents produced in a Document Production are presumed to be authentic and true and correct copies of originals unless disputed by another party. However, the Tribunal may, on the application of a party or on its own initiative, order the producing party to present the original of the document for examination by the Tribunal and / or an appropriate expert.

8. Confidentiality of Document Productions

Any Document submitted or produced by a party in the arbitration and not otherwise in the public domain shall be kept confidential by the Tribunal and the other party, and may only be used in connection with that arbitration, save where and to the extent that disclosure may be required of a party by the applicable law.





ADGM Arbitration Centre Hearing Room

MODULE 5

HEARINGS

1. Purpose and Scope of Module

1. The purpose of this Module is to provide the parties to the arbitration, their counsel and the Tribunal with practical best practice guidance in relation to procedural and evidentiary hearings in the arbitral proceeding. The objective is to ensure that hearings are organised and conducted in a fair, efficient and cost-effective manner, having regard to the complexity, value and significance of the issues in dispute.
2. The default provisions of this Module are expressly subject to modification by agreement of the parties or a direction of the Tribunal.
3. The reference to “days” in this Module is a reference to calendar days.

2. General Powers of Tribunal in Relation to Hearings

1. If requested to do so by a party or on its own initiative, the Tribunal shall convene hearings for the purpose of:
 - a. Determining procedural and organisational matters, including the fixing of a procedural calendar for the arbitration (“case management conferences”); and
 - b. Hearing fact and expert witness evidence and / or oral submissions regarding the merits of the dispute, including any jurisdictional challenges (“merits hearings”).
2. The Tribunal shall endeavour to organise all case management conferences and merits hearings in a fair, efficient and cost-effective manner, having regard to the complexity, value and significance of the issues in dispute.

3. Timing and Location of Hearings

1. The Tribunal shall consult with the parties in order to fix a date, time and place of any case management conferences or merits hearings.
2. Each party shall promptly respond to any dates / times proposed by the Tribunal or by the other parties for a case management conference or merits hearing, and shall cooperate with the Tribunal and the other party to schedule the earliest possible dates / times that are convenient and practicable in the circumstances.
3. The Tribunal shall give the parties sufficient advance notice in writing of the date / time for any case management conference or merits hearing.

MODULE 5:

HEARINGS

4. Attendance at Case Management Conferences / Merits Hearings

1. The parties may attend a case management conference or merits hearings in person, or through their duly authorised representatives.
2. Unless otherwise agreed between the parties or authorised by the Tribunal, persons not directly involved in the arbitral proceedings will not be permitted to attend case management conferences or merits hearings.

5. Confidentiality

All case management conferences and merits hearings shall be held in private, and the parties shall at all times keep recordings, transcripts and other records of case management conferences and merits hearings confidential.

6. Case Management Conferences

1. In advance of any case management conference, the Tribunal shall make directions for the parties to:
 - a. Agree an agenda no less than 10 days in advance of the case management conference. Unless agreed by the other party or authorised by the Tribunal, a party shall not be permitted to make oral submissions at the case management conference about matters not included in the agenda; and
 - b. Exchange skeleton submissions no less than 7 days in advance of the case management conference. Skeleton submissions shall briefly state the party's position on each agenda item.
2. The Tribunal shall convene case management conferences by telephone or by video conference, rather than in-person, unless:
 - a. The parties otherwise agree; or
 - b. A party makes a request to the Tribunal for an in-person case management conference, and the Tribunal is reasonably satisfied that it is necessary and cost-effective for the parties to convene in-person under the circumstances.

7. Merits Hearings

The following Sections shall apply in relation to all merits hearings.

8. Pre-Hearing Directions

1. The Tribunal shall make directions for the parties to take the following steps in advance of any merits hearing:
 - a. The parties shall attend a pre-hearing teleconference or videoconference with

MODULE 5: HEARINGS

the Tribunal to discuss logistical arrangements and housekeeping matters, no less than 28 days in advance of the merits hearing;

- b. No later than 30 days before the hearing, the parties shall agree, confirm or update (as may be appropriate) a list of issues to be determined at the merits hearing. In the event that the parties do not agree on the list of issues to be determined at the merits hearing, the Tribunal will fix the list of issues. This will be done in accordance with the procedure for lists of issues set out in Section 3 of Module 1 (Written Submissions, Issues and Applications);
- c. The parties shall exchange pre-hearing written submissions no less than 14 days in advance of the merits hearing. Pre-hearing written submissions shall be structured by reference to the list of issues to be determined at the merits hearing, and shall clearly identify the determination and / or relief sought by the party in respect of each issue.

9. Notification and Appearance of Fact Witnesses / Experts

1. No less than 21 days in advance of the merits hearing, each party shall provide written notice to the other party identifying the fact and expert witnesses on whose evidence they rely at the merits hearing. This written notice shall identify the issues in dispute to which each fact and expert witness's testimony is said to be relevant.
2. No less than 14 days in advance of the merits hearing, each party shall provide written notice to the other party indicating which of the other party's fact and expert witnesses they intend to cross examine at the merits hearing, and provide an estimate of the time required for cross-examination of each witness.

10. Hearing Agenda

1. No less than 7 days before the merits hearing, the parties shall seek to agree an agenda for the merits hearing. Failing agreement between the parties, the parties shall set out their respective positions and the Tribunal shall resolve any disputed issues with respect to the agenda.
2. The agenda shall identify the dates on which the hearing will take place, the start and finish times and timings for breaks.
3. The agenda shall identify on a day-by-day basis:
 - a. The party making oral submissions each day, and the estimated duration of those oral submissions; and / or
 - b. The fact and expert witnesses scheduled to testify each day, and the estimated duration of their examination.
4. The parties shall review and update the agenda on a daily basis as the merits hearing progresses, taking into account actual progress, and report to the Tribunal thereon.

MODULE 5: HEARINGS

5. There shall be no change to the proposed order of witnesses without a reasonable explanation for the change. Any such change shall be notified to the Tribunal and to the other party as soon as is reasonably practicable.
6. The parties and the Tribunal recognise that very significant costs are incurred in connection with merits hearings. With this in mind, the parties and the Tribunal shall make every effort to limit the duration and number of merits hearings, having regard to the complexity, value and significance of the issues to be determined.
7. Where appropriate, the Tribunal may make directions limiting the length and scope of oral witness evidence (both fact and expert witnesses) to be heard at any merits hearing.

11. Hearing Venue

1. The claimant(s) shall, with cooperation from the respondent(s), make appropriate arrangements for the hearing venue, the provision of audio visual equipment, and transcription services.
2. The costs of the hearing venue, audio-visual equipment and transcription services shall in the first instance be shared equally between the parties.

12. Attendance at Hearings

1. A party may apply to the Tribunal for one or more of its witnesses (fact or expert) to attend a merits hearing by video conference or telephone, rather than in-person. Any such application shall be made no less than 14 days in advance of the hearing.
2. The Tribunal may permit a witness to testify by video-conference or telephone, if it is reasonably satisfied that it would be impractical, unnecessary or unreasonably costly for the witness to attend in person.
3. Party representatives may be present in the hearing room at any time. However, fact witnesses may not be present for the examination of other fact witnesses or review the transcripts of the evidence given by other fact witnesses until after they have concluded their testimony. Expert witnesses may attend at any time.

13. Sequence of Evidence

1. Merits hearings shall proceed in the following order, unless otherwise agreed or directed by the Tribunal:
Opening statements
2. Merits hearings shall commence with both parties making an oral opening statement.
3. The claimant(s)'s opening statement will be made first, and the respondent(s)'s opening statement will be made second.

MODULE 5: HEARINGS

4. The claimant(s) will have the right of reply.

Fact witnesses

5. Following the parties' opening statements, the parties shall call their fact witnesses.
6. All fact witnesses shall be heard before any expert witnesses.
7. The claimant(s)'s fact witnesses shall appear first, followed by the respondent(s)'s witnesses.
8. Each fact witness shall be cross-examined by one counsel only, and no fact witness will be required to give evidence more than once during a merits hearing.
9. The fact witness will provide confirmation of his or her name, address and occupation and the correctness of his or her witness statement or statements, and will take an oath or affirmation (as applicable). There will be no other direct examination or examination in chief.

Expert witnesses

10. Expert witnesses shall give evidence by like discipline, with the claimant(s)'s experts in each discipline appearing first, followed by the respondent(s)'s equivalent expert.
11. Expert witnesses may give presentations prior to their cross-examination, provided that any such presentation is limited to the contents of their report(s). If an expert witness wishes to refer to demonstratives (including PowerPoint slides) during their presentation, copies of those demonstratives must be provided to the other party at least 48 hours in advance.
12. An expert witness may be cross-examined by more than one counsel, provided that it is on different topics. In this case, the topics will be dealt with sequentially such that once cross-examination on one topic is completed and counsel hands over to another, the same topic cannot be revisited by the same counsel or any other counsel.

14. Documentary Evidence

1. In appropriate cases the parties shall make use of an electronic document management system for merits hearings, and shall make every effort to minimise the use of hard-copy document bundles.
2. A party wishing to use a demonstrative document during cross-examination of any witness must provide a copy of that demonstrative document to the other party at least 48 hours in advance of the commencement of the examination during which it will be used.

MODULE 5: HEARINGS

3. A party wishing to submit any correction in respect of a witness statement or expert report must notify the other party of any correction at least 48 hours before the relevant witness is due to appear.

15. Allocation / Monitoring of Hearing Time

1. The total time available at each merits hearing shall be allocated equally between the parties, unless the parties otherwise agree (or the Tribunal otherwise determines).
2. The parties shall keep track of time used at merits hearings, and time shall be monitored according to the 'chess-clock principle' used in international arbitration.
3. Each party shall designate a particular individual to act as time keeper at the merits hearing. The parties' timekeepers shall, respectively, keep a note of the time used by each party which shall be rounded at the end of each day to the nearest 10 minutes.
4. At the end of each day the time keepers for the parties shall (in consultation with the Tribunal or Tribunal Secretary) agree the total amount of time used by each party during that day and the total time allowance left for each party.
5. The following principles shall apply in allocating time between the parties:
 - a. Time incurred as a result of interventions by the Tribunal shall be deemed to be incurred by the party conducting the proceedings at the time the intervention occurs, unless the parties agree or the Tribunal directs otherwise;
 - b. Time lost through no fault of the parties shall be deemed to be time incurred by the parties equally; and
 - c. Time incurred by procedural or other applications shall be deducted from the time allowance of each party in equal shares, unless the parties agree or the Tribunal directs otherwise.
6. Any disagreements concerning the allocation of time shall be dealt with by the parties outside sitting hours, and referred to the Tribunal only as a last resort.

16. Transcripts

1. A transcript shall be made available to the parties and the Tribunal at the end of each day of the merits hearing.
2. If a party wishes to make any correction to a transcript, it shall notify the other party of any proposed correction within 72 hours of having received the transcript. The parties shall endeavour to agree upon any correction to the transcript within 7 days.





MODULE 6

COUNSEL CONDUCT

1. Purpose and Scope of Module

1. The purpose of this Module is to promote procedural fairness between the Parties by setting out the expected standards of good conduct of Party Representatives.
2. The default provisions of this Module are expressly subject to modification by agreement of the parties or a direction of the Tribunal.
3. Nothing in this Module is intended to affect the standards of professional conduct which may apply to a Party Representative.
4. This Module recognises that:
 - a. A party is entitled to the Party Representative of its choosing; and
 - b. A Party Representative's primary duty is to present that Party's case to the Tribunal.

2. Definitions

"Complaint" means a complaint of a breach of this Module.

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

"Party Representative" means any person, including an employee of a party, who appears in an arbitration on behalf of a party and makes submissions, arguments or representations to the Tribunal on behalf of such Party (other than as a witness or expert), whether or not they hold a legal qualification or are admitted to practice law in any jurisdiction.

3. Representation

Any party may be represented by one or more authorised Party Representatives in the arbitration.

4. Notification of Representation

1. Party Representatives must identify themselves to the other party and to the Tribunal (if constituted) as early as possible, indicating for each Party Representative:

MODULE 6: COUNSEL CONDUCT

- a. The Party Representative's name;
 - b. Whether the Party Representative is admitted to practice as a lawyer in any jurisdiction, and if so which jurisdiction;
 - c. Whether the Party Representative is aware of any relationship between them and an Arbitrator (or a proposed arbitrator) that would create a conflict of interest; and
 - d. Confirmation that each Party Representative agrees to observe the requirements in this Module, as a condition of such representation.
2. If a party intends to change or add to its representation after the constitution of the Tribunal, the party must notify its intended change or addition to the other party and the Tribunal as soon as possible, providing the information required in subsection (1) above, and seek authorisation for that change or addition from the Tribunal.
 3. The Tribunal may withhold authorisation of the requested change or addition in representation if it could compromise the integrity of the proceedings (including because it could give rise to a conflict of interest or could unnecessarily delay the proceedings). In deciding on whether to grant or withhold such approval the Tribunal shall have regard to the circumstances, including the principle set out at Section 1(4) above, and any procedural fairness and efficiency considerations arising out of the request.
 4. A party should not nominate as its Party Representative a person who the party has reason to believe may be a witness, save where any evidence they may give is likely to be purely formal or uncontroversial, and it is clear that this will not compromise the Party Representative's ability to comply with this Module.

5. Communication with the Tribunal

1. Party Representatives shall not, unless otherwise agreed by the parties or permitted by applicable law, have any communication with the Tribunal that is not also communicated to every other party to the proceedings before or at the same time as the communication to the Tribunal.
2. This Module does not regulate communications between a party or a Party Representative and a prospective arbitrator (or an appointed arbitrator where there is more than one arbitrator and the Presiding Arbitrator has yet to be appointed) prior to constitution of the Tribunal.

6. Conduct with Respect to the Tribunal

1. A Party Representative should not engage in activities intended to obstruct or delay the arbitration or jeopardise the integrity of the proceedings or the finality of any award.

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COUNSEL CONDUCT

2. A Party Representative should not knowingly or recklessly make a false statement to the Tribunal.
3. A Party Representative shall have the duty to investigate any prior statement it has made to the Tribunal in respect of which it has a reasonable apprehension may have been false.
4. In the event that a Party Representative becomes aware that they previously made a false statement to the Tribunal, the Party Representative should promptly correct that statement, unless there are countervailing considerations of confidentiality or privilege that would prevent them from doing so.
5. A Party Representative should not knowingly assist in the preparation of, or submit, or make submissions based upon, any fact witness or expert evidence which the Party Representative knows is, or believes might be, false.
6. In the event that a Party Representative becomes aware that they previously submitted or made submissions based upon false fact witness or expert evidence, and subject to any countervailing considerations of privilege or confidentiality, the Party Representative should promptly take remedial measures, as appropriate given the circumstances. These may include:
 - a. Causing the false evidence to be corrected;
 - b. Withdrawing the false evidence; and
 - c. Withdrawing as Party Representative (if the circumstances are sufficiently serious to so warrant).

7. Conduct with respect to Witnesses and Experts

1. A Party Representative may assist fact witnesses in the preparation of written witness statements, and may assist experts in the preparation of a written expert report.
2. If oral testimony is required, a Party Representative may also meet with fact witnesses and experts to discuss and prepare their prospective testimony, subject to the overarching requirement that evidence given should in all cases reflect the fact witness's own factual account, or the expert's own analysis or opinion.

8. Conduct with respect to Documentary Evidence

1. A Party Representative should not knowingly conceal, or advise a party to conceal, documents that the Tribunal has ordered to be produced.
2. When the arbitration is likely to involve document production, the Party Representative should advise the party they represent, at the earliest opportunity, of the need to preserve as far as reasonably possible documents (whether electronic or in hard copy) which are potentially relevant to the arbitration.

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3. When the Tribunal has ordered that documents be produced, or a party has undertaken to voluntarily produce documents, the Party Representative must advise the party they represent as to the reasonable steps that party must take to ensure that:
 - a. A reasonable search is made for documents which that party has been ordered to produce, or which it has undertaken to produce; and
 - b. All non-privileged, responsive documents are produced.
4. If during the course of the arbitration the Party Representative becomes aware of a document that should have been produced but was not, the Party Representative should advise that party of the need to produce that document and the consequences of failing to do so.
5. If during the course of the arbitration the Party Representative becomes aware of a document that should have been produced but was destroyed, the Party Representative should inform the opposing party and the Tribunal as soon as is practicable explaining the circumstances of the document's destruction.

9. Allegations of a Breach of this Module

1. A Complaint under this Module may be made either by a party or by the Tribunal on its own initiative.
2. A Complaint must not be made without also being accompanied by a statement as to what the proposed consequence of a finding of a breach of this Module might be.
3. For a Complaint to be considered and decided upon, a Complaint shall:
 - a. Be in writing and must be communicated to all parties and to the Tribunal;
 - b. Identify the named Party Representative against whom the Complaint is made; and
 - c. Set out the specific conduct complained of, and be accompanied by the documentary evidence relied upon, with specific reference to why that documentary evidence is said to support the Complaint.
4. In the event of a Complaint (whether raised by a party or on the Tribunal's own initiative), the Tribunal will grant the Party Representative the subject of the Complaint an opportunity to answer the Complaint. If the Tribunal considers it necessary, the Tribunal may direct further submissions, but it is not required to consider submissions for which permission has not been sought and granted.
5. The Tribunal's decision on a Complaint must be in writing, with reasons, and must be issued to all parties to the arbitration.

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6. In making its decision on a Complaint, the Tribunal will consider:
 - a. The need to ensure the integrity and fairness of the proceedings and to ensure the enforceability of any award;
 - b. The potential impact of its decision on the rights of the parties;
 - c. The nature and gravity of the alleged breach of this Module, including the extent to which it affects the conduct of the proceedings; and
 - d. The extent to which questions of privilege and confidentiality affect its ability to assess the conduct in question.
7. If the Tribunal decides to uphold a Complaint then the Tribunal may order any one or more of the following sanctions:
 - a. A written reprimand to the Party Representative;
 - b. A written caution as to the Party Representative's future conduct in the arbitration;
 - c. Adverse inferences may be drawn when assessing the evidence relied upon, or legal submissions made, by the Party Representative;
 - d. An award of costs in relation to the conduct the subject of Party Representative's breach of this Module, against the party instructing the Party Representative; or
 - e. Any other appropriate measure the Tribunal considers necessary to preserve the fairness and integrity of the proceedings.
8. Depending on the circumstances, an unparticularised, unsubstantiated, or otherwise unfounded Complaint may itself constitute a breach of this Module, and in particular Section 6(1) above.
9. In all events, the Tribunal is entitled to consider the conduct of the parties and the Party Representatives with respect to this Module when making any decision allocating the costs of the arbitration between the parties.

REQUIRE MORE INFORMATION?

The ADGM Arbitration team is available to provide more information and further explanation on arbitration in ADGM. Please feel free to contact us to arrange a meeting or request further information.

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