

## THE NOMA RULES ON THE TAKING OF EVIDENCE

### Preamble

1. These Rules are mainly based on the IBA Rules on the Taking of Evidence in International Arbitration and are intended to provide an efficient and economical process for the taking of evidence in international arbitrations as an alternative to “discovery”.
2. Parties and Arbitral Tribunals may adopt these Rules, in whole or in part, to govern arbitration proceedings, or they may vary them or use them as guidelines in developing their own procedures. The Rules are not intended to limit the flexibility that is inherent in, and an advantage of, international arbitration.
3. Subject to Article 1 third paragraph, where these Rules are similar to the IBA Rules on the Taking of Evidence in International Arbitration, they should be interpreted similarly.

### Definitions

In the NOMA Rules on the Taking of Evidence:

<i>‘Arbitral Tribunal’</i>	means a sole arbitrator or a panel of arbitrators;
<i>‘Claimant’</i>	means the Party or Parties who commenced the arbitration and any Party who, through joinder or otherwise, becomes aligned with such Party or Parties;
<i>‘Evidentiary Hearing’</i>	means any hearing, whether or not held on consecutive days, at which the Arbitral Tribunal, whether in person, by teleconference, videoconference or other method, receives oral or other evidence;
<i>‘Expert Report’</i>	means a written statement by a Party Appointed Expert;
<i>‘General Rules’</i>	means the institutional, ad hoc or other rules that apply to the conduct of the arbitration;
<i>‘NOMA Rules on the Taking of Evidence’</i> or <i>‘Rules’</i>	means these Rules, as they may be revised or amended from time to time;
<i>‘Party’</i>	means a party to the arbitration;
<i>‘Party-Appointed Expert’</i>	means a person or organisation appointed by a Party in order to report on specific issues determined by the Party;
<i>‘Respondent’</i>	means the Party or Parties against whom the Claimant made its claim, and any Party who becomes aligned with such Party or Parties, and includes a Respondent making a counterclaim;

### Article 1 Scope of Application and Interpretation

1. Whenever the Parties have agreed or the Arbitral Tribunal has determined to apply the NOMA Rules on the Taking of Evidence, the Rules shall govern the taking of evidence, except to the extent that

any specific provision of them may be found to be in conflict with any mandatory provision of law determined to be applicable to the case by the Parties or by the Arbitral Tribunal.

2. Where the Parties have agreed to apply these Rules, they shall be deemed to have agreed, in the absence of a contrary indication, to the version as current on the date of such agreement.
3. In case of conflict between any provisions of these Rules and the General Rules, the Arbitral Tribunal shall apply these Rules in the manner that it determines best in order to accomplish the purposes of both the General Rules and these Rules, unless the Parties agree to the contrary.

## **Article 2 Consultation on Evidentiary Issues**

1. To the extent the case may raise particular issues in respect of taking evidence, the Arbitral Tribunal shall consult the Parties at the earliest appropriate time in the proceedings and invite them to consult each other with a view to agreeing on an efficient, economical, fair and practical process for the taking of evidence.
2. The Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, any issues:
  - a) that the Arbitral Tribunal may regard as relevant to the disputed items and material to their outcome; and/or
  - b) for which a preliminary determination may be appropriate.

## **Article 3 Documents**

1. Within the time ordered by the Arbitral Tribunal, each Party shall submit to the Arbitral Tribunal and to the other Parties all documents available to it on which it relies, including public documents and those in the public domain, except for any documents that have already been submitted by another Party.
2. The Arbitral Tribunal may not order any of the Parties to produce documents (document production), unless the Parties agree to the contrary or, the Arbitral Tribunal decides otherwise (in which case the IBA Rules on the Taking of Evidence shall apply to the document production procedure).
3. A Request to Produce shall contain:
  - a. (i) a description of each requested Document sufficient to identify it, or
    - i. a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist; in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner;
  - b. a statement as to how the Documents requested are relevant to the case and material to its outcome; and
  - c. (i) a statement that the Documents requested are not in the possession, custody or control of the requesting Party or a statement of the reasons why it would be unreasonably burdensome for the requesting Party to produce such Documents, and

i. a statement of the reasons why the requesting Party assumes the Documents requested are in the possession, custody or control of another Party.

4. Within the time ordered by the Arbitral Tribunal, the Party to whom the Request to Produce is addressed shall produce to the other Parties and, if the Arbitral Tribunal so orders, to it, all the Documents requested in its possession, custody or control as to which it makes no objection.

5. If the Party to whom the Request to Produce is addressed has an objection to some or all of the

Documents requested, it shall state the objection in writing to the Arbitral Tribunal and the other Parties within the time ordered by the Arbitral Tribunal. The reasons for such objection shall be any of those set forth in Article 8.2 or a failure to satisfy any of the requirements of Article 3.3.

6. Upon receipt of any such objection, the Arbitral Tribunal may invite the relevant Parties to consult with each other with a view to resolving the objection.

7. Either Party may, within the time ordered by the Arbitral Tribunal, request the Arbitral Tribunal to rule on the objection. The Arbitral Tribunal shall then, in consultation with the Parties and in timely fashion, consider the Request to Produce and the objection. The Arbitral Tribunal may order the Party to whom such Request is addressed to produce any requested Document in its possession, custody or control as to which the Arbitral Tribunal determines that (i) the issues that the requesting Party wishes to prove are relevant to the case and material to its outcome; (ii) none of the reasons for objection set forth in Article 9.2 applies; and (iii) the requirements of Article 3.3 have been satisfied. Any such Document shall be produced to the other Parties and, if the Arbitral Tribunal so orders, to it.

8. In exceptional circumstances, if the propriety of an objection can be determined only by review of the Document, the Arbitral Tribunal may determine that it should not review the Document. In that event, the Arbitral Tribunal may, after consultation with the Parties, appoint an independent and impartial expert, bound to confidentiality, to review any such Document and to report on the objection. To the extent that the objection is upheld by the Arbitral Tribunal, the expert shall not disclose to the Arbitral Tribunal and to the other Parties the contents of the Document reviewed.

9. If a Party wishes to obtain the production of Documents from a person or organisation who is not a Party to the arbitration and from whom the Party cannot obtain the Documents on its own, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps are legally available to obtain the requested Documents, or seek leave from the Arbitral Tribunal to take such

steps itself. The Party shall submit such request to the Arbitral Tribunal and to the other Parties in writing, and the request shall contain the particulars set forth in Article 3.3, as applicable. The Arbitral Tribunal shall decide on this request and shall take, authorize the requesting Party to take, or order any other Party to take, such steps as the Arbitral Tribunal considers appropriate if, in its discretion, it determines that (i) the Documents would be relevant to the case and material to its outcome, (ii) the requirements of Article 3.3, as applicable, have been satisfied and (iii) none of the reasons for objection set forth in Article 8.2 applies.

#### **Article 4 Witnesses of Fact**

1. Within the time ordered by the Arbitral Tribunal, each Party shall identify the witnesses on whose testimony it intends to rely and the subject matter of that testimony.
2. Any person may present evidence as a witness, including a Party or a Party's officer, employee or other representative.
3. It shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses and to discuss their prospective testimony with them.
4. The Arbitral Tribunal may order each Party to submit to the Arbitral Tribunal and to the other Parties a summary which shall contain (for each witness):
  - a) the full name and address of the witness, a statement regarding his or her present and past relationship (if any) with any of the Parties, and a description of his or her background, qualifications, training and experience, if such a description may be relevant to the dispute or to the contents of the statement; and
  - b) the subject matter of the testimony.
5. Written witness statements will not be used unless the Parties agree to the contrary.

#### **Article 5 Party-Appointed Experts**

1. A Party may rely on a Party-Appointed Expert as a means of evidence on specific issues. Within the time ordered by the Arbitral Tribunal, (i) each Party shall identify any Party Appointed Expert on whose testimony it intends to rely and the subject-matter of such testimony and (ii) the Party-Appointed Expert shall submit an Expert Report.
2. The Expert Report shall contain:
  - a) the full name and address of the Party Appointed Expert, a statement regarding his or her present and past relationship (if any) with any of the Parties, their legal advisors and the Arbitral Tribunal, and a description of his or her background, qualifications, training and experience;
  - b) a description of the instructions pursuant to which he or she is providing his or her opinions and conclusions;
  - c) a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal;
  - d) a statement of the facts on which he or she is basing his or her expert opinions and conclusions;

- e) his or her expert opinions and conclusions, including a description of the methods, evidence and information used in arriving at the conclusions. Documents on which the Party-Appointed Expert relies that have not already been submitted shall be provided;
  - f) if the Expert Report has been translated, a statement as to the language in which it was originally prepared, and the language in which the Party-Appointed Expert anticipates giving testimony at the Evidentiary Hearing;
  - g) an affirmation of his or her genuine belief in the opinions expressed in the Expert Report;
  - h) the signature of the Party-Appointed Expert and its date and place; and
  - i) if the Expert Report has been signed by more than one person, an attribution of the entirety or specific parts of the Expert Report to each author.
3. If a Party-Appointed Expert whose appearance has been requested fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal may disregard, in whole or in part in accordance with Article 8, any Expert Report by that Party-Appointed Expert related to that Evidentiary Hearing, depending on the Party-Appointed Expert's reasons for not appearing.

## **Article 6 Inspection**

1. The Arbitral Tribunal may, at the request of a Party inspect or require the inspection by a Party-Appointed Expert of any site, property, machinery or any other goods, samples, systems, processes or documents, as it deems appropriate. The Arbitral Tribunal shall, in consultation with the Parties, determine the timing and arrangement for the inspection. The Parties and their representatives shall have the right to attend any such inspection.

## **Article 7 Evidentiary Hearing**

1. Each witness (which term includes, for the purposes of this Article, witnesses of fact and any experts) shall, subject to Article 8.2, appear for testimony at the Evidentiary Hearing. Each witness shall appear in person unless the Arbitral Tribunal allows the use of videoconference or similar technology with respect to a particular witness.
2. The Arbitral Tribunal shall at all times have complete control over the Evidentiary Hearing. The Arbitral Tribunal may limit or exclude any question to, answer by or appearance of a witness, if it considers such question, answer or appearance to be irrelevant, immaterial, unreasonably burdensome, duplicative or otherwise covered by a reason for objection set forth in Article 8.2. Questions to a witness during direct and re-direct testimony may not be unreasonably leading.
3. With respect to oral testimony at an Evidentiary Hearing:
  - a) the Claimant shall ordinarily first present the testimony of its witnesses, followed by the Respondent presenting the testimony of its witnesses;
  - b) following direct testimony, any other Party may question such witness, in an order to be determined by the Arbitral Tribunal. The Party who initially presented the witness shall subsequently have the opportunity to ask additional questions on the matters raised in the other Parties' questioning;
  - c) thereafter, the Claimant shall ordinarily first present the testimony of its Party-Appointed Experts, followed by the Respondent presenting the testimony of its Party-Appointed Experts.

The Party who initially presented the Party-Appointed Expert shall subsequently have the opportunity to ask additional questions on the matters raised in the other Parties' questioning;

- d) if the arbitration is organised into separate issues or phases (such as jurisdiction, preliminary determinations, liability and damages), the Parties may agree or the Arbitral Tribunal may order the scheduling of testimony separately for each issue or phase; and
  - e) the Arbitral Tribunal may ask questions to a witness at any time.
4. A witness of fact providing testimony shall first affirm, in a manner determined appropriate by the Arbitral Tribunal, that he or she commits to tell the truth or, in the case of an expert witness, his or her genuine belief in the opinions to be expressed at the Evidentiary Hearing. If the witness has submitted an Expert Report, the witness shall confirm it. The Parties may agree or the Arbitral Tribunal may order that the Expert Report shall serve as that witness's direct testimony.

## **Article 8 Admissibility and Assessment of Evidence**

1. The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.
2. 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 to the case or materiality to its outcome;
  - b. legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;
  - c. unreasonable burden to produce the requested evidence;
  - d. loss or destruction of the Document that has been shown with reasonable likelihood to have occurred;
  - e. grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling;
  - f. grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or
  - g. considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.
3. In considering issues of legal impediment or privilege under Article 9.2(b), and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal may take into account:
  - a. any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice;
  - b. any need to protect the confidentiality of a Document created or statement or oral

communication made in connection with and for the purpose of settlement negotiations;

- c. the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen;
  - d. any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the Document, statement, oral communication or advice contained therein, or otherwise; and
  - e. the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules.
4. The Arbitral Tribunal may, where appropriate, make necessary arrangements to permit evidence to be presented or considered subject to suitable confidentiality protection.
  5. If the Arbitral Tribunal determines that a Party has failed to conduct itself in good faith in the taking of evidence, the Arbitral Tribunal may, in addition to any other measures available under these Rules, take such failure into account in its assignment of the costs of the arbitration, including costs arising out of or in connection with the taking of evidence.
  6. If a Party fails without satisfactory explanation to make available any other relevant evidence, including testimony, sought by one Party to which the Party to whom the request was addressed has not objected in due time or fails to make available any evidence, including testimony, ordered by the Arbitral Tribunal to be produced, the Arbitral Tribunal may infer that such evidence would be adverse to the interests of that Party.
  7. If the Arbitral Tribunal determines that a Party has failed to conduct itself in good faith in the taking of evidence, the Arbitral Tribunal may, in addition to any other measures available under these Rules, take such failure into account in its assignment of the costs of the arbitration, including costs arising out of or in connection with the taking of evidence.