Title:
XIII.3.2 - Determination of rules of procedure

Content:
No. XIII.3.2 - Determination of rules of procedure

(a) Subject to the mandatory provisions of the arbitration law in force at the seat of the arbitration, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings, either by reference to a set of arbitration rules or by agreeing on specific rules for the conduct of the proceedings prior to or during the arbitration.

(b) Failing such agreement, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, taking into account the parties’ due process rights under Principle XIII.3.1. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

Commentary:
1 It is a particular characteristic of modern arbitration laws that they leave ample room for party autonomy and contain only very few mandatory provisions, such as the parties’ fundamental right to be heard and to be treated equally as the basis of arbitral due process and provision dealing with the competence of domestic courts. Thus, the provisions contained in the arbitration rules take precedence over the arbitration law in force at the seat of the arbitration all those cases where the arbitration law is not mandatory. Furthermore, the principle of party autonomy, as the hallmark of the arbitral process, always allows the parties to conclude ad hoc agreements on procedural issues during the arbitration. It is only absent party agreements concluded prior to or during the arbitration that the arbitrators may develop their own procedural rules.

2 This means that the hierarchy of rules in international arbitration, which forms the fundamental basis for the regulatory framework of the arbitral process, is:

1 Mandatory provisions of the arbitration law at the seat ("lex loci arbitri");
2 Party agreements during the arbitration;
3 Arbitration rules (ad hoc or institutional) agreed upon by the parties;
4 Non-mandatory provisions of the arbitration law; and
5 Procedural discretion of the arbitral tribunal.