Content:

No. XIII.3.6 - Hearings and written proceedings

(a) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted only on the basis of documents and other materials (“documents-only”). However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

(b) The parties shall be given sufficient advance notice of any hearing and any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.

Commentary:

1 Due to the primacy of party autonomy in international arbitration, an agreement by the parties that oral hearings are to be held is binding on the arbitral tribunal. If the parties have agreed not to hold hearings, such agreement is binding on the parties and the arbitral tribunal. In exceptional cases, the parties’ fundamental due process right to be heard may provide a compelling reason for holding an oral hearing even though the parties have agreed not to hold one. Here, the mandatory due process rules prevail over the parties’ autonomy. In any event, parties which have agreed not to hold hearings are not precluded from later modifying their agreement, and thus to allow a party to request oral hearings.

2 In the vast majority of cases, there is no agreement of the parties on the mode of the proceedings (oral or written). In that case, the arbitral tribunal is free to decide whether to hold a hearing or whether to conduct the arbitration on the basis of documents and other materials (even though the latter approach is not recommended). If one of the parties requests a hearing, the arbitral tribunal must hold hearings in order to ensure that that party’s due process rights are preserved.

3 The question whether a hearing will be conducted must be distinguished from the question how such a hearing will be conducted. This issue falls within the procedural discretion of the arbitral tribunal pursuant to Principle XIII.3.2. (b), but the parties must be heard before the arbitral tribunal makes a decision on the structure of the hearing.