

## **ANNEX H FINAL OFFER ARBITRATION SUPPLEMENTARY RULES**

(also referred to as PENDULUM ARBITRATION SUPPLEMENTARY RULES)

*[\*These Supplementary Rules are patterned after that of USA's International Center for Dispute Resolution or ICDR]*

### 1. Applicability

These *Final Offer Arbitration Supplementary Rules* ("Supplementary Rules") shall apply to disputes where: (a) parties which are bound hereby have not mutually agreed otherwise; or (b) parties which are not bound hereby have mutually agreed to be so bound. Thus, parties who are bound by these Supplementary Rules as their default mode may choose to "opt-out" and mutually agree to be bound by the conventional mode of arbitration. On the other hand, parties who are not bound by these Supplementary Rules may also "opt-out" from the conventional mode or their default mode of arbitration and mutually agree to "opt-in" and be bound by these Supplementary Rules.

### 2. Exchange of Settlement Offers

Each party shall directly exchange with the other party or parties at least two (2) settlement offers after the commencement of the arbitration and prior to the arbitration hearing. The first of the two settlement offers shall be exchanged between the parties (in the manner set forth in Paragraph 3 below) not more than 30 days after the commencement of the arbitration. The second of the two settlement offers shall be exchanged between the parties (in the manner set forth in Paragraph 3 below) not less than 30 days prior to the arbitration hearing. Such settlement offers will not be shared with the arbitral tribunal.

### 3. Exchange of Final Offers

At least two (2) weeks prior to the commencement of the arbitration hearing, each party shall submit to the other party or parties and arbitral tribunal its final offer. In order to ensure simultaneous exchange of final offers, the parties shall submit their offers to the tribunal, which shall hold the offers until all offers are received (but without reading them) and then distribute them to all parties as nearly simultaneously as practicable. The parties (but not the tribunal) may view the final offers at that time.

The tribunal shall not open the final offers until the arbitration hearings have been closed. The tribunal may, in its discretion, require an earlier or later exchange of final offers prior to the commencement of the arbitration hearing, but in no event later than the commencement of the arbitration hearing. In rendering its award, the tribunal shall give consideration only to the final offer submitted by each party.

If a party fails to file a settlement or final offer, the tribunal may proceed with the arbitration.

#### 4. Amendments to Final Offers

Absent mutual agreement of the parties, there is no right to amend final offers once submitted to the arbitral tribunal. If any such amendments to the final offers are submitted, they shall be exchanged in accordance with the procedures set forth in Rule 3 above, except that they may be submitted, if necessary, within two weeks prior to the commencement of the arbitration hearing .

#### 5. Scope of Final Offer

Each party's final offer shall be a single monetary amount that includes all breaches, controversies and claims arising out of or relating to the contract or transaction between the parties to the arbitration, including without limitation all affirmative claims, defenses, setoffs/offsets, counterclaims and/or cross-claims that are at issue in the arbitration. The offer shall identify the currency applicable to such amount, as well as which party is responsible for the payment of such amount and to whom such payment is to be made. The arbitral tribunal may prescribe the form of final offer submissions.

Each final offer shall exclude prejudgment and/or post-judgment interest, which may be added by the tribunal to its final award as applicable and appropriate. Such final offers shall also exclude the costs associated with the arbitration, which shall be awarded in accordance with the governing arbitration rules as determined and allocated by the tribunal.

#### 6 . Award

The arbitral tribunal shall be limited to choosing only one of the final offers submitted by the parties. The tribunal's award shall be based solely thereon, plus any interest, costs, or fees to be awarded pursuant to the governing arbitration rules, applicable law, or the agreement of the parties.

The tribunal's award shall be reasoned, stating the rationale for its selection of one party's final offer over that of the other party or parties.

#### 7. Modifications by Agreement of the Parties

The parties may modify these procedures by written agreement.