

**IN THE MATTER OF AN ARBITRATION
BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH
THE FREE TRADE AGREEMENT BETWEEN THE REPUBLIC OF KOREA AND THE
UNITED STATES OF AMERICA, DATED 30 JUNE 2007**

- and -

**THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW, 1976**

PCA CASE N° 2018-55

- between -

- 1. MASON CAPITAL L.P. (U.S.A.)**
- 2. MASON MANAGEMENT LLC (U.S.A.)**
(the “Claimants”)

- and -

REPUBLIC OF KOREA
(the “Respondent,” and together with the Claimants, the “Parties”)

PROCEDURAL ORDER NO. 1

The Arbitral Tribunal

Professor Dr. Klaus Sachs (Presiding Arbitrator)

The Rt. Hon. Dame Elizabeth Gloster

Professor Pierre Mayer

Registry

Permanent Court of Arbitration

25 February 2019

WHEREAS on 22 December 2018, the Tribunal provided the Parties with a draft of Procedural Order No. 1;

WHEREAS on 19 February 2019, a First Procedural Meeting was held by telephone conference, in which counsel and representatives for both Parties, all members of the Tribunal, and the PCA participated;

WHEREAS this Procedural Order records the agreement of the Parties on procedural matters set out herein, and where no agreement was reached, sets forth the Tribunal's directions, having heard the Parties and deliberated;

THE TRIBUNAL HEREBY ORDERS:

1. Place of Arbitration (Legal Seat)

The place of arbitration (legal seat) shall be Singapore, pursuant to the Parties' agreement.

2. Procedural Calendar

- 2.1. The Procedural Calendar will be determined by the Tribunal in another Procedural Order after consulting with the Parties.
- 2.2. Unless otherwise provided, all time limits shall refer to midnight at the place of arbitration at the end of the day on the due date.

3. Filings and Submissions

- 3.1. On the due date of any written submission, the Party in question shall send, by e-mail, the submission together with any witness statements and expert reports or opinions (but excluding other supporting documents and legal authorities) to the Tribunal, PCA, and opposing counsel.
- 3.2. All written submissions, including witness statements and expert reports or opinions, shall be provided as fully text-searchable Adobe Portable Document Format ("PDF") files, and preceded by a hyper-linked table of contents.
- 3.3. Within three business days following the filing by e-mail, the Party in question shall send hard copies of the written submissions and all accompanying documents, except for legal authorities, to the Tribunal, the PCA, and opposing counsel by courier:
 - 3.3.1. to Professor Sachs, to the PCA and to opposing counsel, written submissions and accompanying documents shall be printed double-sided in A5 paper, unbound in separate self-standing ring binders;
 - 3.3.2. to Dame Elizabeth, written submissions shall be printed single-sided in A4 paper, unbound in separate self-standing ring binders; accompanying documents shall be printed double-sided in A4 paper, unbound in separate self-standing ring binders; and
 - 3.3.3. to Professor Mayer, written submissions shall be printed double-sided in A4 paper, unbound in separate self-standing ring binders; accompanying documents shall be printed double-sided in A5 paper, unbound in separate self-standing ring binders.

- 3.4. Hard copies shall be organized in chronological or other appropriate order, with a separate tab for each exhibit, and preceded by a list describing each document by exhibit number, date, name, author, and recipient (as applicable).
- 3.5. Electronic and hard copies of documents translated into Korean shall be sent to the Respondent and the PCA but not to the Claimants and the Tribunal.
- 3.6. Within three business days following the filing by e-mail, documents (including exhibits and legal authorities) shall also be submitted in electronic form on an encrypted USB flash memory drive or by way of encrypted file transfer service, as searchable PDF files (or in their native format if they must be supplied in their native format in accordance with paragraph 5.9 below).
- 3.7. For any simultaneous submissions, each side shall submit all electronic and hard copies only to the PCA. The PCA shall distribute copies to the Tribunal and opposing counsel once both submissions have been received.
- 3.8. Extensions may be agreed between the Parties or granted by the Tribunal for justifiable reasons, provided that the request for an extension is submitted as soon as practicable after a Party becomes aware of the circumstances which prevent it from complying with the deadline, and that absent extenuating circumstances, such extensions do not affect the dates fixed for any hearing or other meeting.

4. Document Production

- 4.1. Each Party may request the production of documents from the other Party in accordance with the Procedural Calendar to be determined by the Tribunal. Requests for the production of documents shall be in writing and set forth reasons for the request in respect of each document or class of documents requested. Unless the requested Party objects to production, it shall produce the requested documents within the applicable time limit.
- 4.2. Any documents produced in response to the opposing Party's request or Tribunal's order shall be "Bates numbered" and transmitted to the requesting Party in electronic/text-searchable PDF form (except Excel spreadsheets which shall be produced in native form pursuant to paragraph 4.5), accompanied by an index that indicates which documents have been produced in response to which requests.
- 4.3. If the requested Party objects to production, the following procedure shall apply:
 - 4.3.1. The requested Party shall submit a response stating which documents or class of documents it objects to producing. The response shall state the reasons for each objection and shall indicate the documents, if any, that the Party would be prepared to produce instead of those requested.
 - 4.3.2. The requesting Party shall respond to the other Party's objection, indicating, with reasons, whether it disputes the objection.
 - 4.3.3. The Parties shall seek agreement on production requests to the greatest extent possible.
 - 4.3.4. To the extent that agreement cannot be reached between the requesting and the requested Party, the Parties shall jointly submit all outstanding requests to the Tribunal for decision.

- 4.3.5. Document production requests submitted to the Tribunal for decision, together with objections and responses, must be in tabular form pursuant to the model appended to this Procedural Order as **Annex 1** (a modified Redfern schedule). The Parties shall use the model format throughout their exchange of requests, objections, and responses.
- 4.3.6. The Tribunal shall rule on any such application, and may for this purpose refer to the *IBA Rules on the Taking of Evidence in International Arbitration 2010*. Documents ordered by the Tribunal to be disclosed shall be produced within the time limit set forth in the Procedural Calendar, unless the Tribunal in its production order fixes a different time period.
- 4.3.7. Should a Party fail to produce documents as ordered by the Tribunal, the Tribunal may draw the inferences it deems appropriate, taking into consideration all relevant circumstances.
- 4.4. Further requests for the production of documents sought by either Party, if any, shall be permitted only with leave of the Tribunal. The request must be substantiated.
- 4.5. Excel spreadsheets shall be produced in their native electronic format (i.e., in Excel format). A Party may submit a reasoned request to the other Party for the production of specified documents in their native electronic format if originally produced in another format. If no agreement is reached, the Tribunal shall take a decision on the request.
- 4.6. The Tribunal may also request the production of documents on its own motion.
- 4.7. The Parties shall not copy the Tribunal or the PCA on their correspondence up until point 4.3.4 above or exchanges of documents in the course of the document production phase.
- 4.8. Documents produced according to the above schedule shall not be considered on the record unless and until a Party subsequently submits them as exhibits to its written submissions or with the leave of the Tribunal after the exchange of submissions.

5. Evidence and Legal Authorities

- 5.1. In addition to the relevant provisions of the UNCITRAL Rules and the provisions on document production above, the Tribunal may use, as a guideline, the *IBA Rules on the Taking of Evidence in International Arbitration 2010*, when considering matters of evidence.
- 5.2. The Parties shall submit with their written submissions all evidence and authorities on which they intend to rely in support of the factual and legal arguments advanced therein, including witness statements, expert reports, exhibits, documents and all other evidence in whatever form.
- 5.3. In the Reply and Rejoinder, the Parties shall submit only additional written witness testimony, expert opinion testimony and documentary or other evidence to respond to or rebut matters raised in the other Party's immediately prior written submission, or to take account of new evidence, including evidence received through document production.
- 5.4. Subject to paragraph 8.5 of this Order, following the submission of the Reply and Rejoinder, the Tribunal shall not consider any evidence that has not been introduced as part of the written submissions of the Parties, unless the Tribunal grants leave on the basis of exceptional circumstances. Should such leave be granted to one side, the other side shall have an opportunity

to comment and submit counter-evidence. A Party requesting leave to file additional or responsive documents may not annex the documents that it seeks to file to its request.

- 5.5. The Parties shall identify each exhibit submitted to the Tribunal with a distinct number. Each exhibit submitted by the Claimants shall begin with the letter “C” followed by the applicable number (*i.e.* C-1, C-2, etc.); each exhibit submitted by the Respondent shall begin with the letter “R” followed by the applicable number (*i.e.* R-1, R-2, etc.). The Parties shall use sequential numbering throughout the proceedings.
- 5.6. Statements of fact witnesses or reports of experts shall be numbered separately as “CWS-” for the Claimants’ witness statements and as “CER-” for the Claimants’ expert reports, and “RWS-” for the Respondent’s witness statements and “RER-” for the Respondent’s expert reports, followed by the applicable number and name (*i.e.* CWS-1 [Smith]).
- 5.7. The Parties shall identify each legal authority submitted to the Tribunal with a distinct number. Each legal authority submitted by the Claimants shall begin with the letters “CLA” followed by the applicable number (*i.e.* CLA-1, CLA-2, etc.); each legal authority submitted by the Respondent shall begin with the letters “RLA” followed by the applicable number (*i.e.* RLA-1, RLA-2, etc.). The Parties shall use sequential numbering throughout the proceedings.
- 5.8. All evidence submitted to the Tribunal, including evidence submitted in the form of copies, shall be deemed to be authentic and complete, unless a Party disputes within a reasonable time its authenticity or completeness, or the Party submitting the relevant evidence indicates the respects in which any document is incomplete.
- 5.9. Excel spreadsheets and calculations performed by experts shall be submitted in their native electronic format (*i.e.* in Excel format rather than PDF).
- 5.10. Legal authorities shall be submitted in electronic version only, unless specifically requested by the Tribunal in hard copy.

6. Witnesses

- 6.1. Any person may present evidence as a witness, including a Party or a Party’s officer, employee, or other representative.
- 6.2. For each witness, a written and signed witness statement shall be submitted to the Tribunal.
- 6.3. Each witness statement shall contain at least the following:
 - (a) The name, date of birth, and present address of the witness;
 - (b) a description of the witness’s position and qualifications, if relevant to the dispute or to the contents of the statement;
 - (c) an affirmation of the truth of the statement;
 - (d) a description of any past and present relationship between the witness and the Parties, counsel, or members of the Tribunal;
 - (e) a description of the facts on which the witness’s testimony is offered and, if applicable, the source of the witness’s knowledge; and

- (f) the signature of the witness.
- 6.4. At the time provided in the Procedural Calendar, each Party shall file a notification regarding the witnesses and experts presented by the other Party that it wishes to cross-examine at the hearing.
- 6.5. Before any oral hearing, and within the time period set forth in the Procedural Calendar, a Party may be called upon by the Tribunal or the other Party to produce at the hearing for examination and cross-examination any witness or expert whose written testimony has been submitted with the written submissions. Should a Party wish to present any of its own witnesses or experts for examination at the hearing who have not been called by the Tribunal or the other Party, it shall request leave of the Tribunal.
- 6.6. Each Party shall be responsible for summoning its own witnesses to the relevant hearing, except when the other Party has waived cross-examination of a witness and the Tribunal does not direct his or her appearance.
- 6.7. The Tribunal may, on its own initiative or at the request of a Party, summon any other witness to appear.
- 6.8. If a witness or expert who has been called to testify by the Tribunal or the other Party does not appear to testify at the hearing, the witness's or expert's testimony, together with evidence submitted with such testimony, shall be stricken from the record, unless the Tribunal determines that a valid reason has been provided for failing to appear. In such case, the Tribunal may summon the witness to appear a second time if satisfied that the testimony of the witness is relevant and material. Whether a witness or expert may testify by video conference will be determined by the Tribunal at the pre-hearing conference or at any other appropriate time after consulting with the Parties.
- 6.9. Each Party shall cover the costs of appearance of its own witnesses. The Tribunal shall decide, if so requested, upon the appropriate allocation of such costs in its final award.
- 6.10. At any hearing, the examination of each witness shall proceed as follows:
- (a) The presiding arbitrator shall admonish the witness;
 - (b) the Party presenting the witness may conduct a brief direct examination lasting no longer than 15 minutes, limited to matters addressed in the respective witness statement(s) and supporting evidence, but including relevant matters that may have come into the record after the witness submitted its last witness statements;
 - (c) the adverse Party may then cross-examine the witness on relevant matters that were addressed or presented in the witness statement or during direct examination;
 - (d) the Party summoning the witness may then re-examine the witness with respect to any matters or issues arising out of the cross-examination;
 - (e) the Tribunal may examine the witness at any time, either before, during or after examination by one of the Parties.
- 6.11. The Tribunal shall, at all times, have complete control over the hearing, including all aspects concerning the examination of witnesses.

6.12. Unless the Parties agree otherwise, a fact witness shall not be present in the hearing room during the hearing of arguments and oral testimony, discuss the arguments and testimony of any other witness, or read any transcript of the arguments or any oral testimony, prior to his or her examination. Whether this provision applies equally to factual witnesses who are party representatives will be decided by the Tribunal at the pre-hearing conference or at any other appropriate time after consulting with the Parties.

7. Experts

- 7.1. Each Party may retain and submit the evidence of one or more experts to the Tribunal.
- 7.2. Expert reports shall be accompanied by any documents or information upon which they rely, unless such documents or information have already been submitted with the Parties' written submissions, in which case the reference to the number of the exhibit shall suffice.
- 7.3. The provisions set out in relation to witnesses shall apply, *mutatis mutandis*, to the evidence of experts, except that, unless the Parties agree otherwise, the expert shall present a summary of his or her findings not exceeding 30 minutes instead of a direct examination. Expert witnesses shall be allowed to be present in the hearing room at any time unless both parties or the Tribunal decide otherwise.
- 7.4. In accordance with Article 27 of the UNCITRAL Rules, the Tribunal may, on its own initiative or at the request of a Party, appoint one or more experts. The Tribunal shall consult with the Parties on the selection, terms of reference (including expert fees), and conclusions of any such expert.

8. Hearings

- 8.1. After consultation with the Parties, the Tribunal shall determine the place, time, agenda, and all other technical and ancillary aspects of any hearing.
- 8.2. The PCA shall arrange for hearings to be audio recorded, and make the recording available to the Parties.
- 8.3. The PCA shall arrange transcription using LiveNote or a similar software so that the transcript is available on a real-time basis. At the end of each day of hearings, the Parties shall be provided with the transcript of that day (in draft or final form).
- 8.4. No new documentary evidence may be presented at the hearing except with leave of the Tribunal (following a request by the Party seeking to introduce new evidence, and an opportunity for the opposing Party to be heard on the request). Should the Tribunal grant leave to a Party to present new evidence in the course of the hearing, it shall grant the other Party the opportunity to introduce new evidence to rebut it. PowerPoint slides and demonstrative exhibits in aid of argument may be used by any Party during the hearing and shall be included in the record of the case file, provided that those materials reflect evidence on the record and do not introduce new evidence, directly or indirectly. A demonstrative exhibit shall be notified by the producing Party to the other Party by email not later than 7 pm (local time), the day before its tender at the hearing (or later with the agreement of the other Party). Demonstrative exhibits must include a reference to where the evidence therein can be found in the record. Each such demonstrative exhibit shall be clearly numbered (CDE-1 etc. for Claimants and RDE-1 etc. for Respondent).

- 8.5. Whether there will be post-hearing briefs, and if so, their content and format, will be addressed at the close of hearings. No additional documentary evidence may be produced together with the post-hearing briefs, except with leave from or at the request of the Tribunal.

9. Transparency

- 9.1. The PCA shall make available to the public, on its website, the information and documents listed in Article 11.21.1 of the FTA, subject to the prior redaction of protected information in accordance with the following sub-paragraphs.
- 9.2. Documents that are to be made public pursuant to Article 11.21.1(c) of the FTA shall include pleadings, memorials, and briefs submitted to the Tribunal by a disputing Party, as well as any written submissions submitted pursuant to Article 11.20.4 and 11.20.5 of the FTA, but shall not include expert reports, witness statements, fact exhibits or legal authorities.
- 9.3. Hearings shall be opened to the public pursuant to Article 11.21.2 of the FTA by transmitting a live feed of the hearing to a separate viewing room at the hearing venue, and the PCA shall make the appropriate logistical arrangements in consultation with the Parties and the Tribunal. If a Party intends to use information designated as protected information during a hearing, it shall so advise the Tribunal in advance of that hearing, which shall make appropriate arrangements to protect the information from disclosure.
- 9.4. Protected information shall include any information not in the public domain that is designated as such by a Party on grounds of commercial or technical confidentiality, special political or institutional sensitivity (including information that has been classified as secret by a government or a public international institution), or information in relation to which a Party owes an obligation of confidence to a third party.
- 9.5. Further to Article 11.21.4(b) of the FTA, a Party claiming that documents produced to the other Party contain protected information shall clearly designate the documents at the time the documents are produced to the other Party, and designate the type of information in the document claimed to be protected information.
- 9.6. Pursuant to Article 11.21.4(c) of the FTA, a Party claiming that certain information constitutes protected information shall:
- (a) if it is submitting a document to the Tribunal containing information it claims to be protected; or
 - (b) if the other Party has submitted a document to the Tribunal produced by the Party containing information it claims to be protected,
- submit a redacted version of the document that does not contain such information within 21 days. Only the redacted version shall be provided to the non-disputing Party pursuant to the FTA, and/or made public pursuant to the preceding sub-paragraphs.
- 9.7. In the event that a Party objects to the other Party's designation of information as protected information, it may apply to the Tribunal for a decision pursuant to Article 11.21.4(d) of the FTA within 21 days after the receipt of the redacted document. The Tribunal's decision shall be without prejudice to the right of a disputing Party to seek a determination from the Joint Committee in accordance with Article 11.21.4(e) of the FTA.

- 9.8. In respect of the Tribunal's awards, decisions, and orders, each Party may propose within 21 days after the receipt of any award, decision, or order from the Tribunal the designation of any parts of such documents as protected information. To the extent that the other Party disagrees with the proposed designation, the procedure set out in paragraph 9.6 of this Order shall apply. The Tribunal shall remain constituted for the purpose of making any order under this paragraph in relation to its final award or other final decision.
- 9.9. To the extent that material produced or submitted in these proceedings contains personal data governed by Art. 4 no. 1 of the EU General Data Protection Regulation ("GDPR"), the Parties and any data importers involved with the processing of data (if applicable) shall ensure that such personal data is processed in compliance with all applicable data protection laws, in particular the GDPR and its respective national EU/EEA implementation acts. In particular, the party producing the material shall ensure that the processing and the transfer of personal data is in each case legitimised by an applicable legal basis and that other applicable data privacy obligations, in particular the information obligations pursuant to Arts. 13 and 14 of the GDPR, are fulfilled. For the purpose of transfers of personal data outside the EEA, any such transfers will be based on appropriate safeguards provided by the Standard Contractual Clauses approved by a decision of the European Commission. The Parties shall have in place adequate technical and organisational measures in accordance with Art. 32 of the GDPR in order to safeguard an appropriate level of data protection at all times.

Place of arbitration (legal seat): Singapore



Professor Dr. Klaus Sachs
(Presiding Arbitrator)

On behalf of the Tribunal

Annex 1: Model Redfern Schedule for Document Requests

Document Request Number	
Documents or category of documents requested (requesting Party)	
Relevance and materiality, including references to submission (requesting Party)	
Reasoned objections to document production request (objecting Party)	
Response to objections to document production request (requesting Party)	
Decision (Tribunal)	