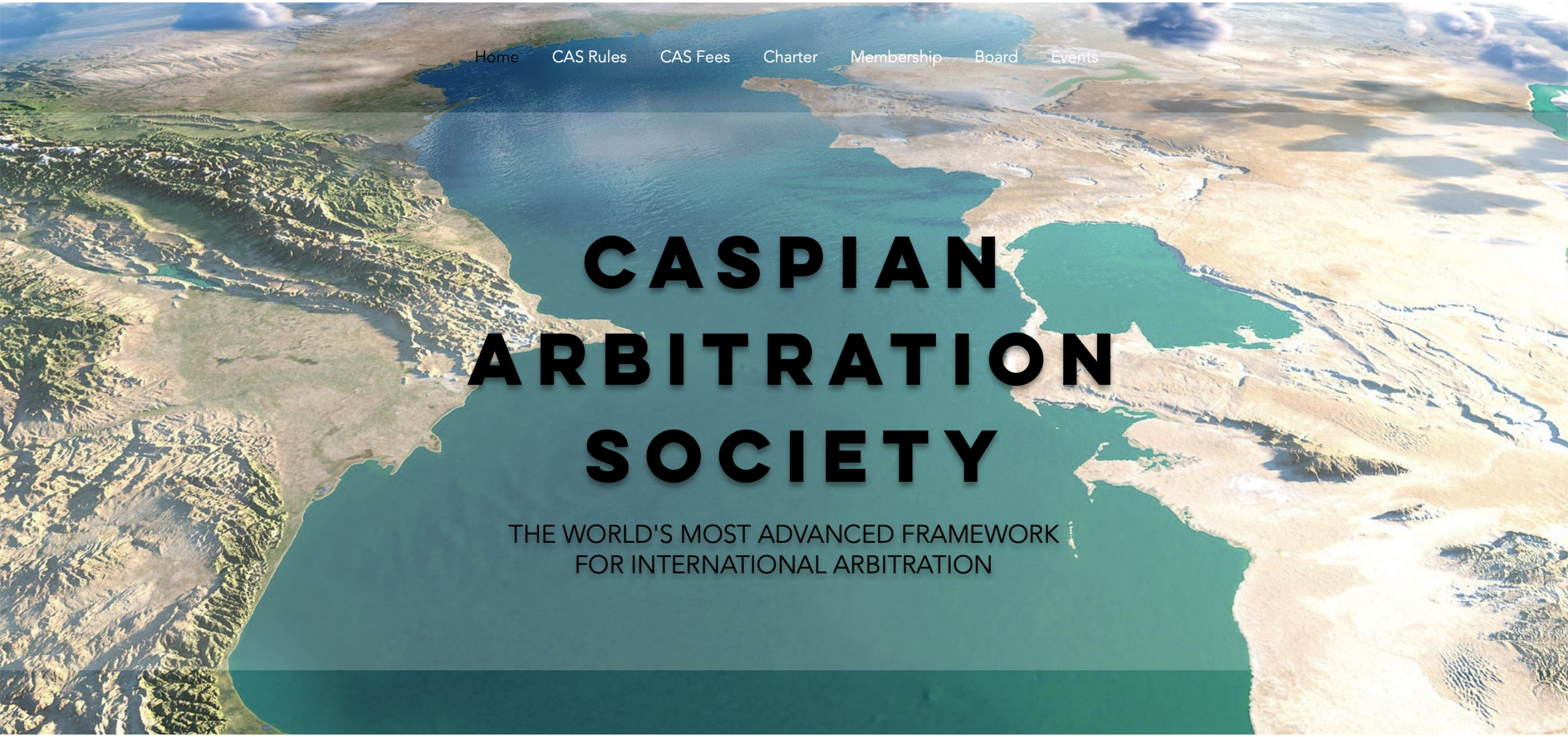
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CASPIAN ARBITRATION SOCIETY
THE WORLD'S MOST ADVANCED FRAMEWORK
FOR INTERNATIONAL ARBITRATION

CASPIAN ARBITRATION RULES

A fresh beginning?

ANYTHING NEW??

- Arbitration is not a novel concept

- *Cook & Songate's Case* (1588) 4 Leon 31 recorded the propensity of arbitration to avoid litigation and controversy, over four hundred years ago
- The two major modern advantages of arbitration when compared to litigation are ease of **enforcement** and **confidentiality**
- But what are the most common contemporary complaints about arbitration??

DEFECTS WITH CURRENT ARBITRAL REGIMES

- PROCESS IS TOO **SLOW**
- PROCESS IS TOO **COSTLY**, especially in smaller disputes
- Difficulty in obtaining **URGENT INTERIM RELIEF** – emergency arbitrators etc
- **Toothless** sanctions for non-compliance
- **Interference** by National Courts with the award
- Appointment of **unknowns** by some institutions – eg …
- For commercial arbitration, in Europe too **centred** in Paris and in London

AIMS OF THE CAS RULES AND ARBITRATION

- TO RESOLVE DISPUTES **EXPEDITIOIUSLY**
- TO DETERMINE CLAIMS **FAIRLY** AND – FOR SMALLER CLAIMS IN PARTICULAR, IN A **COST EFFECTIVE MANNER**
- TO ENSURE ACCESS TO **URGENT INTERIM RELIEF**, WITH PENALTTIES FOR NON COMPLIANCE
- TO PROVIDE **FIRM SANCTIONS** FOR NON-PARTICIPANTS/ RECALCITRANT DEBTORS
- TO **LIMIT** RIGHTS OF APPEAL

EXPEDITION

- Many arbitrations, especially those involving States or their parastatals can run for many years – I am presently in such an arbitration which has been running for 7 years and shows no sign of reaching a conclusion
- The objective of the CAS rules is swift dispute resolution
- Thus, once arbitration has been commenced under Article 2, the Respondent has only **14 days** in which to provide its reponse; Article 3
- The Statement of Case is to be served either with the Notice of Arbitration or within **28** days of the response; Article 6

EXPEDITION AND SANCTION

- The Statement of Defence and Counterclaim is to be served within **28** days of service of the Statement of Case; Article 7
- Another **28** days is provided for further pleadings, Reply, Defence to Counterclaim and Reply to Defence to Counterclaim
- Time limits are to be strictly adhered to
- The Tribunal **must** move swiftly to a default award in the event of non-compliance with time limits for a period of **28** days: *"the Tribunal shall issue a final award granting all of the Claimant's claims except those which are* ***"manifestly without merit"***; Article 8
- Breaches of peremptory orders can also lead to the making of an award

EXPEDITON

- Limited ability of Tribunal to grant time extensions
- One extension of up to **28 days** in the absolute discretion of the Tribunal
- Thereafter only one additional extension of up to **21 days** *“in exceptional circumstances”,* narrowly defined
- Tribunal retains the power to stay arbitral proceedings in appropriate cases; Article 22
- An application to correct clerical errors to be made within **14 days** of the rendering of an award; Article 11

ECONOMY IN DISPUTE RESOLUTION

- The business of law is a time-consuming exercise and is, therefore, expensive.
- The CAS Rules seek to distinguish between **'bet the company'** type litigation, where costs are less of an issue and **ordinary commercial disputes**
- Thus, Article 9 introduces the concept of costs budgeting is introduced for claims which do not exceed **CHF 20 million**
- The sanctions for failing to comply with this requirement are severe. The non-complaint party cam only recover a maximum of **70%** of its reasonable costs

ECONOMY IN DISPUTE RESOLUTION

- By Article 12:

  - reasonable costs which are recoverable include the cost of *"**in house** counsel, which may be charged at a rate similar to those of external counsel with similar experience"* and *"reasonable contingency fees"*

  - If a losing party has failed to submit a costs budget or if the losing party's costs exceed those of the winning party *"by a substantial margin"* the Tribunal is entitled to award the winning party *"100% of its costs, it being presumed that all costs claimed are reasonable unless **convincing proof** to the contrary is provided."*

ECONOMY IN DISPUTE RESOLUTION

- The Notice of Arbitration and the Response are limited to 2,000 words; Articles 2 and 3

- Brevity is also encouraged for the Statement of Case and Subsequent Pleadings

- In my experience, dilatory pleadings are one of the worst offenders in terms of unnecessary costs

ECONOMY IN DISPUTE RESOLUTION

- Article 23 introduces a mechanism for encouraging settlement which is broadly similar to ‘Part 36’ in the Civil Procedure Rules

- Where a reasonable settlement offer has been made but refused by the other party, and the winning party does better than the offer made, the Tribunal shall have the power to award the winning party *“100% of its costs, it being presumed that all costs claimed are reasonable unless convincing proof to the contrary is provided.”*

URGENT OR INTERIM RELIEF

- In cases of urgency, the CAS will appoint an emergency arbitrator with the power to grant interim relief **within 2 days**; Article 13
- Interim relief is widely defined, including but not limited to:
  - an order to pay money, regarding the disposition of property, for the preservation of property, the taking of samples,
  - the provision of security for a claim or a counterclaim and the provision of security for costs; Article 14

URGENT OR INTERIM RELIEF

- Where a without notice order or an especially urgent order is required, an application may be made by the party seeking the order in any one of up to three separate fora (Article 14.2):
  - The Courts of the **seat** of the arbitration
  - The Courts in which any relevant property is situated (the **situs**)
  - The **Commercial Court** in London

FINALITY

- By Article 32, all rights of appeal on matters of law are waived, to the extent permissible by the applicable law
- This would, of course leave available appeals on matters of jurisdiction and appeals based on allegations of serious irregularity and bias, or the like
- The tribunal has power to rule on its own jurisdiction; Article 19
- But Article 32 will prevent a judge from substituting his own views on the law for those of the tribunal

An appeal for parties to be proactive in decisions on law/ seat

- **"Boilerplate"** clauses are rarely, if ever scrutinised in the same manner as commercial clauses dealing with matters such as remuneration
- The CAS rules contain, in **Article 4**, default provisions regarding the applicable law and seat of arbitration provisions, but that is all they are default provisions
- The clear invitation is to the parties to make an **express** choice
- The default rules provide for either the application of English law and London seat or Swiss law and Geneva seat, depending on choices made

AVOID ARBITRATION IN THE FIRST PLACE; UNNECESSARY MISTAKES

- It is difficult to categorise mistakes in commercial contracts into watertight compartments, but they might be categorised, very broadly (and borrowing loosely from the late Lord Mustill) as follows:
- **The Tea-Break** – low-level disasters – a vital passage in the script in skipped over by the typist. The result can be unintelligible. This is more common than most would imagine.
- Equally common is the **failure to delete** e.g. *"whichever is more …"*
- **The Lucky Dip –** a perfectly good clause, usually selected by an office junior <u>but</u> inserted into the wrong type of contract

AVOID ARBITRATION IN THE FIRST PLACE; UNNECESSARY MISTAKES

- **The Collage** – too much is thrown into a contract without thought for mutual (in)consistency (eg. the increasing propensity for inconsistent jurisdiction and arbitration clauses to feature in the self-same contract)

- **The Lazy Catch-All Title** – the definitions provided are so broad and wide ranging so as to become practically meaningless

- **The Palimpsest** – hallowed old verbiage persists even when none of the living (below the age of 300) have any idea what it means e.g. the insured peril *"rovers"* in marine insurance, which still persists today. Absent historical archaeology, meaningless

AVOID ARBITRATION IN THE FIRST PLACE; UNNECESSARY MISTAKES

- **The 'ampersand blunderbuss' &/or**; sometimes it must be one or the other! Which is it?? This is the paradigm **hallmark** of the lazy lawyer reaching for a crutch
- **The false friend**; a perfectly good clause used over the years but designed for a different type of transaction. Contracts of sale are materially different from charterparties and contract of marine insurance and yet it is frequently the case that clauses spill over without thought from one to the other. Sometimes they work, just about …
- **Designer confusion/ elastic exemptions**. Phrases like *"consequential loss"* are routinely overlooked/ misunderstood. Phrases like *"directly or indirectly caused"* are equally problematic in practice.

AVOID ARBITRATION IN THE FIRST PLACE; UNNECESSARY MISTAKES

'The blunt instrument' aka linguistic bodges. Perhaps the most common of all, that which keeps me in a job. This is the clause which is ***"sort-of good enough"*** for the job, ***"wet towel"*** in hand. This is a real example from a major arbitration I appeared in; it was not straightforward to interpret:

"INTERLOCKING CLAUSE

In the event of the Reassured being liable in respect of any one loss for any sum in excess of the retention hereunder under two or more years of account, then it is hereby understood and agreed that the amount of retention in respect of such loss shall be reduced to that percentage that the Reassured's loss bears to the total amount on net loss in respect of that loss in question.

The limit of indemnity shall be appointed in the same manner."

WHY CHOOSE CAS??

- *“A quelque chose malheur est bon”*
- A tightly controlled panel of a particular breed of arbitrators and confidentiality expressly preserved; Article 30
- Little scope for outside interference
- Rapid resolution, cost sensitive for smaller cases and **fair**