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List of Abbreviations

AAA	American Arbitration Association
AAA International Arbitration Rules	American Arbitration Association Arbitration Rules
ACICA Rules	2016 Australian Centre of International Commercial Arbitration Rules
ADR	Alternate Dispute Resolution
AIA	(Italian Arbitration Association -Associazione italiana per l'arbitrato)
ArbAct	Act (of the Czech Republic) No. 216/1994 Coll., on Arbitration and the Enforcement of Arbitral Awards, as amended.
Australian Arbitration Act	International Arbitration Act 1974, Act No. 136 of 1974 as amended in 2011
CC	Act (of the Czech Republic) No. 89/2012 Coll., the Civil Code
CC (1964)	Act (of the Czech Republic) No. 40/1964 Coll., the Civil Code, as amended
CCP	Act (of the Czech Republic) No. 99/1963 Coll., the Code of Civil Procedure, as amended
CIETAC Rules	2015 China International Economic and Trade Arbitration Commission Arbitration Rules
Commercial Code	Act (of the Czech Republic) No. 513/1991 Coll., the Commercial Code, as amended
DIS Rules	1998 German Institute of Arbitration Rules
HKIAC	Hong Kong International Arbitration

	Centre
IBA	International Bar Association
ICAC Rules	Arbitration Rules of the International Commercial Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, adopted on 18 October 2005, as amended on 23 June 2010
ICC	International Chamber of Commerce.
ICC Rules	ICC Rules of Arbitration of the ICC International Court of Arbitration, in force as from 1 January 2012
ICT	Information and communication technologies
IP	Intellectual Property
LCIA	London Court of International Arbitration
LCIA Rules	Arbitration Rules of the London Court of International Arbitration, in force from 1 October 2014
Milan Rules	Rules of the Chamber of Arbitration of Milan
New York Convention	Convention in the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958
New Zealand Arbitration Act	Arbitration Act 1996, Public Act 1996 No 99, reprint 1 January 2011
OECD	Organisation for Economic Co-operation and Development
RAA Online Rules	Online Arbitration Rules of the Russian Arbitration Association, in force as from 1 October 2015
Rome I Regulation	Regulation (EC) No. 593/2008 of the European Parliament and of the Council of June 17, 2008, on the law applicable to contractual obligations.
SC	Supreme Court of the Czech Republic.
SCC	Stockholm Chamber of Commerce
SCC Rules	Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, in force as from 1 January 2010
SIAC	Singapore International Arbitration Centre
SIAC Rules	Arbitration Rules of the Singapore International Arbitration Centre, in force from 1 April 2013

Swiss Rules	2012 Swiss Rules of International Arbitration
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Arbitration Rules	Arbitration Rules of the United Nations Commission on International Trade Law
UNCITRAL Model law	the Model law on International Commercial Arbitration as adopted by the United Nations Commission on International Trade Law on 21 June 1985, with amendments on 7 July 2006
UNCITRAL Rules	UNCITRAL Arbitration Rules, revised in 2010, adopted in 2013
WIPO	World Intellectual Property Organization

Articles

Alexander Sergeev | Tatiana Tereshchenko

The Flexibility of the Arbitration Procedure

Key Words:
arbitration | flexibility of the procedure | equal treatment | opportunity to present the case | notification | commencement of arbitration | request for arbitration | statements of claim and defense | UNCITRAL Model Law on arbitration | arbitration rules

Abstract | *The term 'arbitration' can be used in various senses, including to describe the set of procedural rules and relations (known as arbitration procedure), within which the legal conflict between the disputing parties is resolved on the merits by an independent and impartial entity – an arbitration court, consisting of an arbitrator or arbitrators panel.*

The regulation of arbitration is determined by the autonomy of its participants will, which is given priority, and because of that, provisions regarding the conduct of procedure generally have a discretionary nature. This is especially true in comparison with the strict, imperative and unified regulations of the proceeding at any state court. However, since arbitration is recognized as a jurisdictional alternative form of dispute resolution, access to the arbitration proceedings is provided by a number of interrelated procedural rights for the purpose of rendering a fair award. In particular, those rights include the right to participate in an adversarial procedure, the right for equal treatment and the opportunity to fully present the case. Parties' autonomy is grounded on the requirements necessary to ensure the enforceability of the minimum required procedural guaranties. This leads to a combination of diversity and flexibility of the standards of the adversarial process, adapting it to the specifics of the particular dispute to be resolved by the due competent authority.

This feature of arbitral process' regulation, i.e. discretion in the necessary frame of jurisdictional demands, makes the procedure as flexible as is

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appropriate according to circumstances of the case. This can be illustrated, for instance, by a description of the general approach to such key issues of the conduct of the arbitration, as (i) notification in arbitration, (ii) the commencement of the arbitration, and (iii) the filing of statements of claim and defense.

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I. Notification in Arbitration

8.01. The proper notice for arbitration purposes is important and creates for each party the real possibility for each party to fully participate in the proceedings. Proper notification is essential in the following areas (though this list is by no means exhaustive): the appointment of the arbitrator, the negotiation of the date of provisional and oral hearings, scheduling of the exchange of documents, the preparation of written explanations, the presentation of evidence, including the preparation of the witness statements and expert opinions, and the arguing of positions before arbitral tribunal. A reasonable opportunity to present the case before an arbitral court would not be possible without the implementation of this procedural right, providing the possibility of obtaining information about both the fact of the arbitration and the scheduling of the main stages of it. The importance of this right is difficult to overestimate, because the lack of proper notice could be considered grounds for setting aside the award or the denial of its recognition and enforcement.[1]

8.02. Proper notification helps to ensure a fair trial, based on principles such as: competitiveness, the equal treatment of the parties and the opportunity to present the case (the so called

[1] See also Articles 34, 36 of the UNCITRAL Model Law, which are similar to Article V of V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted 10 June 1958, entered into force 7 June 1959, available at: http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf (accessed on 13 March 2017).

"due process").[2] Compliance with standards of due process are extremely important, because only the facts and legal arguments, submitted by the parties, should be assessed by the arbitrator or arbitral tribunal, when rendering the award. This eliminates the risk of so-called 'sudden awards'.[3]

8.03. As a general rule and subject to considerations of good faith and reasonableness, parties to arbitration are entitled to establish any notification procedure.[4] This is true, provided that it is built in such a way as to provide procedural efficiency. As such, it must include the possibility of presenting evidences of proper notice, and guarantee the realization of the right to access to the adversary arbitral proceedings.

8.04. This means that at the time of singing the arbitration clause or agreement, counterparties already need to exercise maximum care to factual details and the accuracy of information regarding the person responsible for the correspondence, their location and their status or official powers. This must match the notification procedure, providing its factual efficiency, and to eliminate abusive tactics. For example, due to the lack of mandatory requirements, content and quantity of the notifications could be of any nature and are determined by the sender's discretion in compliance with the needs of arbitration procedure's logic and its stages.[5]

8.05. From a practical point of view to receive all notifications and documents within reasonable timing and in cost effective manner it is advisable (i) to appoint a specially authorized person to undertake a number of important tasks related to notifications; (ii) to choose the most advantageous messaging method (likely to be e-mail with notification of delivery and read receipts); (iii) to agree the procedure of opening any package and verifying its content prior to the confirmation of its receipt in order to make sure that it does contain information, rather than empty pieces of paper (as may happen if the sender is unscrupulous); (iv) to decide on the form of notifications, preferably in written, taking into account that "written form" is considered to be met, if a notice is recorded by mail, telegraph, teletype, electronic or other notification means that allow one to

[2] See also Chapter III and V of the UNCITRAL Model Law.

[3] See also Andrey Panov. The doctrine of "sudden award" in International Commercial Arbitration, No. 2. BULLETIN OF INTERNATIONAL COMMERCIAL ARBITRATION 74-88 (2012).

[4] See also Article 19(1) of the UNCITRAL Model Law.

[5] For example, in one case on recognition and enforcement of arbitral award it was established that for proper notification does no need to look like a single document, informing about all stages of arbitration at once, and may consist of several mutually complementary documents sent step by step as per process of agreeing details regarding the place of arbitration and place of hearing, etc. (Order of the Supreme Court of Russian Federation dated 22 October 2015 No. 310-ES15-4266 the case No. A36-5174/2013, available at: http://vsrf.ru/stor_pdf_ec.php?id=1384328 (accessed on 13 March 2017)).

reliably establish the content and the person from whom such a notification emanates; etc.

8.06. The purpose of the notice is to inform the recipient about actions, circumstances or events within the framework of the arbitration proceedings to ensure the effective realization of the guaranteed procedural right to participate in such proceedings. Therefore, the establishment of a person who is authorized to act on behalf of the recipient is also important and contributes to the prevention of unfair behavior. This is especially true since formally, only a sole executive body usually has the right to act without power of attorney on behalf of the legal entity, and the other person should be given appropriate authorities. Moreover, any notice shall be sent in view of the timeliness standard. For example, according to the Article 24(2) of the UNCITRAL Model Law 'the parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents' It is difficult and probably pointless to speak abstractly about an exact time period beforehand, because everything depends on the circumstances of the case, the message content, the method of communication and so on. However, notification cannot be done properly if the addressee does not have sufficient time to reasonably assess its content and take the necessary actions to respond or to undertake some actions within the arbitral proceedings. In other words, it is not necessary to investigate the issue of compliance with the specific form of notification, but instead to investigate the fact of the notification as such to determine whether it allows the other party to have a timely reasonable opportunity to present their position before the arbitration court.

8.07. If a special notification procedure has not been agreed upon by the parties or if it is incomplete, then it is conducted and interpreted as the arbitral tribunal may consider appropriate, subject to the provisions of certain applicable arbitration rules and laws. The minimum common requirements to ensure proper notification in the arbitration can be formulated as follows. Firstly, notifications need not actually be delivered to the recipient. For proper notice it is enough to establish circumstances under which it is considered received by the addressee. This legal fiction forms a presumption of notice, even if subsequently the recipient furnishes proof that the notification was not actually delivered. This is very helpful, especially when the receiver avoids receipt of the notice or when the actual location of the recipient is difficult to establish. Secondly, the

said presumption of proper notice is valid only if the notification was delivered (or at least attempted to be delivered) to the correct recipient. It could be the addressee personally, where 'personal delivery' refers to an individual or to the head of a legal entity such as a CEO. Conversely, it may be delivered to a commercial business such as the property complex, which usually belongs to the addressee. Finally, it could be delivered to the recipient's permanent residence or postal address. When a specific delivery address is not known, it is necessary to try to find it by making 'reasonable inquiries'. Depending on the specific circumstances of each case, such an address may be set by a number of means, including searching public information sources including the Internet, looking within the contact details provided by the addressee, for example, at the conclusion of the contract, examining the table of contents or details of documents used for the execution of disputed transactions including bank documents, or searching in correspondence between the parties. Since 'reasonableness' is the evaluation criterion and has no predetermined content, it is important to ensure that all necessary and sensible steps are done. But it is also important to insure that such actions would be undertaken by any bona fide participant in comparable circumstances, including various requests to competent authorities (e.g., to the state or commercial register authority, the tax or passport office, etc.), the re-implementation of the dispatch or sending it to different addresses, along with other similar methods. If reasonable inquiries to the actual address were not successful and a matching address is still not known, the notice should be sent to the last known address of the business, or to the addressee's permanent residence or postal address. As indicated above, a record of the delivery' attempt should be noted and documented. Thirdly, notification is considered to be received on the day when the delivery to an address or the attempt of such delivery occurs. Such a date is fixed by a receipt, indicating the recipient's personal data, a registration notice, or putting a mark. Such a confirmation likewise has practical effect in a case where the fact of the delivery might be contested. Accordingly, delivery date on the notice does not necessarily coincide with the presentation of the correspondence to a specific person, because its considered received by virtue of the fact of delivery at a specific address.

8.08. The above approach to the peculiarities of notification in arbitration is traditional. In one way or another the same ideas regarding the general criteria of proper notice are embodied in

many well-known arbitration rules, including Article 2 of the UNCITRAL Rules, Article 8 of the SCC Rules, Article 3 of the ICC Rules, Article 2 of the SIAC Rules, Article 4 of the LCIA Rules, § 10 of the ICAC Rules (2017), Articles 1.2 and 1.3. of the RAA Online Rules. Moreover, during recent years many arbitral rules have been appropriately changed and supplemented, given the development of modern means of communication.

8.09. It worth to mention that idea of due notice serves as a kind of litmus regarding notification nuances. It should be taken into account by all parties when agreeing to their notification peculiarities within arbitral procedure. In this respect, it is important to keep in mind that the guarantee of due notice in arbitration cannot be considered in isolation from the obligation of any party to the dispute to act fairly and prudently, including the adoption of necessary and sufficient measures for correspondence. Understanding the guarantee of the notice allows parties to eliminate or at least minimize abuse by unscrupulous arbitral participants. Such participants can paralyze the proceedings in commercial arbitration by evading the receipt of correspondence, despite their voluntary willingness to arbitrate any dispute as previously expressed in the arbitration clause or agreement.

8.10. When an arbitral award is challenged or its recognition and enforcement are contested, the appropriateness of the notice is evaluated to determine whether the party was given a reasonable and factual opportunity to participate in the proceedings and to present necessary arguments and explanations. This is true whether or not the party lost the opportunity for a defense in the absence of actual and timely notice at any specific stage of arbitration.[6]

8.11. Therefore, notification plays a significant role in the framework of arbitration, and the substantive content of such communication demonstrates the indissoluble connection and interdependence of the discretion of the parties, arising from the arbitration clause and the effectiveness of the arbitration procedure, aimed at solving legal conflicts.

II. Commencement of the arbitration

8.12. Since the arbitration regulation has a discretionary nature (see above), including with respect to the beginning of the arbitration proceedings, the disputing parties are free to determine the

[6] See also: BORIS R. KARABELNIKOV, Execution and challenge the awards of international commercial arbitration. Commentary on the New York Convention of 1958, and the Chapters 30 and 31 of the Arbitrazh Procedure Code of Russian Federation of 2002. M, 606 (2008).

beginning of the arbitration proceedings on their own.[7] Usually such a choice occurs by reference to the applicable rules in the arbitration clause or agreement or at the stage of submission of the dispute to the arbitration court.

8.13. Using such discretion, the parties cannot act voluntarily and must keep in mind the practical meaning of the determination of the start of arbitration. For example, the moment of commencement of arbitration is critical for assessment of whether the guarantees of a fair trial are met. Such guarantees include equal treatment of the parties, the opportunity to participate in the choice of arbitrators as well as in the presentation position, and the use of all necessary types of evidence in adversarial proceedings. The violation of these guarantees creates a risk of setting aside the arbitral award or refusing its recognition and enforcement.[8] Besides, the establishment of the start of the arbitration proceedings is essential to determine whether the claim is made in compliance with the limitation period provided for in the applicable law. As a general rule, the limitation period is terminated from the time the claim is filed to the court in the prescribed manner for the protection of violated rights.[9]

8.14. Different arbitration rules, as well as scholarly doctrine, associate the commencement of arbitration with a diverse number of circumstances. These include the conclusion of the arbitration agreement,[10] the moment of recourse to arbitrators about the appointment or formation of the panel of arbitrators, the notification to the parties by the Secretary General about arbitrators' consent for appointment,[11] and the

[7] Provisions of Article 21 of the UNCITRAL Model Law declare that with respect to a particular dispute, the arbitral proceedings commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent. Such a provision is applicable unless otherwise agreed by the parties

[8] See also Articles 34, 36 of the UNCITRAL Model Law.

[9] For example, in accordance with the Article 204(1) of the Civil Code of Russian Federation, available at: http://www.consultant.ru/document/cons_doc_LAW_5142/ "the limitation period does not flow from the date of application the state court in the due manner for the protection of the violated right at all times while judicial protection of violated rights is executed".

[10] See also Tolpakova N.N. & Boyko A.N. The basic principles of the arbitration proceedings, Development of alternative forms of resolving legal conflicts. Saratov 210 (2000). However, this view raises serious objections, because the conclusion of the arbitration agreement does not always lead to the emergence of a legal conflict, which shall be referred to arbitration.

[11] For example, according to Article 6(1) of the ICSID Convention Arbitration Rule, amended, in force from 1 January 2003, available at: https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partF-chap01.htm#r06 'The Tribunal shall be deemed to be constituted and the proceeding to have begun on the date the Secretary-General notifies the parties that all the arbitrators have accepted their appointment'. See also DUBROVINA M.L. International commercial arbitration in Switzerland: synopsis of Ph.D in law thesis. M. 18-19 (2001). This approach is based on the fact that the consideration of the dispute on its merits first requires the creation of an arbitral tribunal, unlike proceedings before a national state court. However, the drawback of this position is that such a stage of dispute resolution as filing a request for arbitration or statement of claim remains formally outside the scope of arbitration proceedings.

receipt of the request for arbitration[12] or statement of claim[13] by the administrative body of the permanent arbitration court or by the respondent.[14] This diversity of possible timing for the commencement of arbitration is explained by the nature of arbitration, which has its basis on the will of the parties as set out in the arbitration clause or agreement. It implies the absence of strict regulation and the flexibility of procedure.

8.15. However, the date of receipt of the request for arbitration (by administrative body or by respondent) should be considered the most widespread provision related to the commencement of the arbitration. It can be found, for example, in Article 21 of the UNCITRAL Model Law (and, consequently, in the majority of national arbitration laws which were based upon it) and in some arbitration rules (see above).

8.16. This approach is very rational, for two reasons. First, it allows parties to the arbitration to participate actively in the choice of the arbitrators and the harmonization of the rules of procedure within the scope of arbitration, as well as the procedural guarantees of it as a whole. Secondly, it allows them to initiate proceedings by filing the request for arbitration with a short summary of the key issues of the dispute without rushing, since they have reasonable time to properly prepare positions (also known as a statement of claim) without missing a limitation period. The request for arbitration usually contains the minimum amount of information necessary to begin. Firstly, it

[12] For example, Article 4(1)(2) of the ICC Rules set that

> [A] party wishing to have recourse to arbitration under the Rules shall submit its Request for Arbitration (the 'Request') to the Secretariat at any of the offices specified in the Internal Rules. The Secretariat shall notify the claimant and respondent of the receipt of the Request and the date of such receipt. The date on which the Request is received by the Secretariat shall, for all purposes, be deemed to be the date of the commencement of the arbitration. Article 4 of the SCC Rules provides that 'Arbitration is commenced on the date when the SCC receives the Request for Arbitration'. See also BRUNTSEVA E.V. INTERNATIONAL COMMERCIAL ARBITRATION. St. Petersburg: Sentyabr Publishers 225 (2002).

[13] For instance, according to the § 2(1) of the ICAC Rules (2017) 'arbitral proceedings shall commence with the filing of a statement of claim with the ICAC'. Due to Article 3.1.1, 3.2.1,3.2.2 of the RAA Online rules note that

> The party initiating the Online Arbitration (the "Claimant") shall forward to the other party (the "Respondent") its statement of claim, together with attachments ("Statement of Claim") by uploading the materials in electronic form to the RAA System…If the Statement of Claim meets the requirements set out in Clause 3.1 hereof, the RAA shall, within five business days of uploading of the Statement of Claim in the RAA System, issue a resolution to commence the Online Arbitration, with information about the Arbitrator appointed by the RAA, and shall notify the parties about this at the email addresses specified in the arbitration agreement as well as those additionally reported by the Claimant, which is considered as a proper and sufficient notification of the parties to the Online Arbitration.

[14] For instance, Article 3(1)(2) of the UNCITRAL Rules state that 'The party or parties initiating recourse to arbitration (hereinafter called the "claimant") shall communicate to the other party or parties (hereinafter called the "respondent") a notice of arbitration. Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent'.

should include information about the name, address, telephone or fax numbers and email addresses of the parties and their representatives. Secondly, it should contain a summary of merits of the dispute. Thirdly, it should have a preliminary statement of the plaintiff's claims. Fourthly, it should include a copy or description of the arbitration agreement/ clause, which forms the basis for competence of the arbitration court to solve the dispute. Finally, it should include comments regarding the number of arbitrators, the place of arbitration, the language and the applicable law, as well as other information and documents that are relevant at the appropriate stage.[15] Compared with the request for arbitration which includes a brief description of the case, the commencement of arbitration including the filing the statement of claim is, obviously, less convenient, because the presentation of existing positions and relief sought in the statement of claim requires serious consideration and significant time' costs.

8.17. Parties to the dispute are free to set the date to commence the arbitration proceeding. Likewise, there is not a unified approach for the determination of possible circumstances (with the appointment of arbitrators, or with the filing or receipt of the request for arbitration or statement of claim, etc.) within which the arbitration procedure shall begin. Taken together,

[15] The requirements for the content of the request for arbitration, of course, have some differences in the various rules, but on the whole the approach is the same. For example, according to Article 2 of the SCC Rules:

> A Request for Arbitration shall include: (i) a statement of the names, addresses, telephone and facsimile numbers and e-mail addresses of the parties and their counsel; (ii) a summary of the dispute; (iii) a preliminary statement of the relief sought by the Claimant; (iv) a copy or description of the arbitration agreement or clause under which the dispute is to be settled; (v) comments on the number of arbitrators and the seat of arbitration; and (vi) if applicable, the name, address, telephone number, facsimile number and e-mail address of the arbitrator appointed by the Claimant.

Article 4(3) of the ICC Rules provides that:

> The Request shall contain the following information: a) the name in full, description, address and other contact details of each of the parties; b) the name in full, address and other contact details of any person(s) representing the claimant in the arbitration; c) a description of the nature and circumstances of the dispute giving rise to the claims and of the basis upon which the claims are made; d) a statement of the relief sought, together with the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of any other claims; e) any relevant agreements and, in particular, the arbitration agreement(s); f) where claims are made under more than one arbitration agreement, an indication of the arbitration agreement under which each claim is made; g) all relevant particulars and any observations or proposals concerning the number of arbitrators and their choice in accordance with the provisions of Articles 12 and 13, and any nomination of an arbitrator required thereby; and h) all relevant particulars and any observations or proposals as to the place of the arbitration, the applicable rules of law and the language of the arbitration. The claimant may submit such other documents or information with the Request as it considers appropriate or as may contribute to the efficient resolution of the dispute.

these characteristics indicate the mobility of the boundaries of arbitration and its adaptability to the needs of the parties in a dispute, together with the mobility of the scope of the application of procedural guarantees.

III. Filing the statements of claim and defense

8.18. The requirements regarding the content of the statement of claim, the statement of defense, and counterclaims, and the timing of their submission, are usually also formulated in a dispositive and laconic manner.

8.19. In fact, to commence arbitration it is enough to ensure the necessary level of certainty by identification of the disputing parties and the establishment of the frame of legal conflict. Generally, the claimant is obliged to report about the facts supporting the claim, the disputed issues and the reimbursement required, and the defendant shall submit its objections to the relevant paragraphs.[16]

8.20. Such an approach is very helpful and important for the timeliness and efficiency of the arbitral procedure as a whole. One can argue about advantages and disadvantages of such a concept. However, avoidance of excessive regulation and a prioritizing a consideration of the parties' will emanate from the nature of arbitration and contribute to its effectiveness. This is especially true since many arbitration rules provide necessary provisions aimed at clarifying the content of the request for arbitration and statement of claim, if there is such a need. Additionally arbitrators and administrative bodies of arbitral institutions are entitled to require the parties to make refinements in the case, if a certain application is filed in violation of the minimum requirements, or if the information provided is not sufficient for a comprehensive assessment of the merits of dispute.[17]

8.21. In other words, it depends on the discretion of the parties, including those reflected in the arbitration clause or agreement,

[16] According to Article 23(1) of the UNCITRAL Model Law

> Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

[17] For example, according to Article 25(1)(5) of the ICC Rules 'The arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means. At any time during the proceedings, the arbitral tribunal may summon any party to provide additional evidence'. Article 15.6 of the LCIA Rules provides that The Arbitral Tribunal may provide additional directions as to any part of the written stage of the arbitration (including witness statements, submissions and evidence), particularly where there are multiple claimants, multiple respondents or any cross-claim between two or

whether to restrict the initial content of the claims by a minimum set of requirements, or to supplement the statements and make counter claims. It is also at the parties' discretion whether to refer to certain facts and legal provisions, on which rights are based, and how to execute such applications. The law imposes the obligation on the applicants to reinforce the position formulated by the necessary evidence to be presented later, or to attach the relevant documents at once. Such evidence includes documents, witness statements and expert opinions. This obligation is fully consistent with the principle of adversarial proceedings. In such a case all the statements appearing in the communication process must obviously be in writing or recorded in a different objective form, such as an electronic one, and be transmitted to the other side and to the arbitral tribunal.[18]

8.22. Usually the rules of the well-known arbitration institutions impose more detailed requirements for the content of the claim and counterclaim statements.[19] These specify the kind of landmark for the process by which the parties disclose their position. However, in general terms, the approach is uniform. There should be a request for arbitration together with the statement of claim, as well as comments, response or counterclaim on them. This should allow the arbitral tribunal to establish the position of the parties and the facts and arguments on which they are based.

8.23. For example, in accordance with the § 3 of the ICAC Rules (2017), the statement of claim, signed by the authorized representatives

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more respondents or between two or more claimants'. Article 6 of the SCC Rules provides that:

> The Board may request further details from either party regarding any of their written submissions to the SCC. If the Claimant fails to comply with a request for further details, the Board may dismiss the case. If the Respondent fails to comply with a request for further details regarding its counterclaim or set-off, the Board may dismiss the counterclaim or set-off. Failure by the Respondent to otherwise comply with a request for further details shall not prevent the arbitration from proceeding.

See also BORIS R. KARABELNIKOV, INTERNATIONAL COMMERCIAL ARBITRATION. Textbook. 2 ed. M., 190-239 (2013).

[18] For example, according to Articles 13.1-13.3 of the LCIA Rules

> Following the formation of the Arbitral Tribunal, all communications shall take place directly between the Arbitral Tribunal and the parties (to be copied to the Registrar), unless the Arbitral Tribunal decides that communications should continue to be made through the Registrar. Where the Registrar sends any written communication to one party on behalf of the Arbitral Tribunal or the LCIA Court, he or she shall send a copy to each of the other parties. Where any party delivers to the Arbitral Tribunal any communication …, whether by electronic means or otherwise, it shall deliver a copy to each arbitrator, all other parties and the Registrar; and it shall confirm to the Arbitral Tribunal in writing that it has done or is doing so.

[19] As was stated above arbitration is typically commenced by a request for arbitration, which only briefly formulates the essence of the dispute and claims. This approach is more efficient, since time-consuming preparation of the statement of claim could be made later.

and accompanied by documented evidence of such powers, shall include the following information:

(a) 'date of the statement, names, postal addresses, telephone and fax numbers, and e-mail addresses of the parties;
(b) demands of the claimant;
(c) substantiation of the jurisdiction of the ICAC;
(d) a statement of the factual circumstances supporting the claim;
(e) evidence confirming such circumstances;
(f) substantiation of the claims with reference to applicable law;
(g) amount of the claim;[20]
(h) calculation of the amount of each demand; and
(i) a list of documents attached to the statement of claim.'[21]

8.24. Sometimes in arbitration practice special tools are used to help to deal with the submitted statements in the most precise way. On their basis, one can outline the subject matter and the dispute frame, as well as the powers of the arbitral tribunal on the case. For example, the arbitral tribunal shall draw up, on the basis of documents or in the presence of the parties and in the light of their most recent submissions, a document defining its Terms of Reference, which should include the particulars about parties and arbitrators, including their contact details, addresses for notifications and communications arising during arbitration procedure, as well as a summary of the parties' respective claims and the relief sought, list of issues to be determined by arbitral tribunal and etc.[22]

8.25. Another important consideration is the timeliness for any statement, which should be made in the terms agreed to by

[20] Besides, according to § 4 of the ICAC Rules (2017) the amount of the claim shall be:
"(a) in claims for recovery of money, the amount sought, and, where interest continues to accrue, the amount accruing on the filing date of the claim; (b) in claims for recovery of property, the value of the property sought; (c) in claims for recognition or transformation of a legal relationship, the value of the subject matter of the legal relationship at the moment when the claim is brought; and (d) in claims for an act to be done or forborne from, determined on the basis of available information about the property interests of the claimant. The claimant shall also indicate in his statement of claim the amount of the claim where his statement of claim or any part of the claim is not of a monetary nature. Where the claim consists of several demands, the amount of the claim shall be the total amount of all demands. The amount of the claim shall not include demands for recovery of arbitration fees and costs, and the expenses incurred by the parties. Where the claimant has not stated or misstated the amount of the claim, the ICAC shall, on its own initiative or at the request of the respondent, determine the amount of the claim on the basis of available evidence".

[21] The state of defense for the Respondent, likewise, shall include similar information – see for details § 6 of the ICAC Rules (2017). For comparison (and understanding the flexibility of requirements) see also Articles 20,21 of the UNCITRAL Rules.

[22] See for details Article 23(1) of the ICC Rules.

the parties or determined by the arbitral tribunal.[23] By virtue of the principle of equal treatment of the parties and a real opportunity to present the case,[24] such terms are defined by taking into account the specific circumstances of the dispute and reasonable considerations.[25]

8.26. Analysis of the various arbitration rules shows that the time period usually reasonable for preparation and submission of these applications is considered to be 30 days, For example, in accordance with §§ 6, 7 of the ICAC Rules (2017), and Article 5(1),(6) of the ICC Rules, the duration of term is 30 days. This is generally considered enough time to correct defects of the statement of claim and for a response to it, or for filing a counterclaim or request for offset.[26] According to Article 2 (2.1) of the LCIA Rules a written response to a request for arbitration must be submitted within 28 days from the date of commencement of the arbitration). Having said all of this, it is difficult to talk about a general rule due to the peculiarities of any arbitration.

8.27. In other words, the violation of the principle of a reasonable opportunity to present the case creates the risk of contesting the arbitration award or refusal of its recognition and enforcement.[27] Therefore, it is necessary to follow the common flexible approach to the question of the duration of the timing for relevant statements (and evidences) and the possibility of their amendments. Supplementing and giving additional time

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[23] See also Article 19 of the UNCITRAL Model Law, providing, that 'Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate'.

[24] See also Article 18 of the UNCITRAL Model Law.

[25] For example, according to Article 22(1)(4) of the ICC Rules Article 22:

> The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute. In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.

According to Article 14.4, 14.5 of the LCIA Rules:

> Under the Arbitration Agreement, the Arbitral Tribunal's general duties at all times during the arbitration shall include: (i) a duty to act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent(s); and (ii) a duty to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties' dispute. The Arbitral Tribunal shall have the widest discretion to discharge these general duties, subject to such mandatory law(s) or rules of law as the Arbitral Tribunal may decide to be applicable; and at all times the parties shall do everything necessary in good faith for the fair, efficient and expeditious conduct of the arbitration, including the Arbitral Tribunal's discharge of its general duties.

[26] If there is an arbitration clause/agreement covering such a claim or claims along with the requirements for the initial claim.

[27] See also Articles 34, 36 of the UNCITRAL Model Law.

can occur only if such an action is not an unfair tactical method aimed at delaying the proceedings. Examples of such behavior include when a party deliberately refuses to participate in one form or another in arbitration, avoids appointing the arbitrator, refuses to submit a written position, or refuses to participate in a conference or a hearing, and hinders by any other means effective and rapid arbitral proceedings.[28]

8.28. As a general rule, failure of the claimant to communicate during arbitral proceedings should, if there is no sufficient excuse, led to termination of the arbitration. To the opposite, passiveness of the respondent do not prevent the arbitral proceedings from continuation and should not be treated by the arbitral tribunal like an admission of the claimant's allegations. Moreover, even if both parties fails to appear at a hearing, the arbitral tribunal has the full authority to make award, based on the evidences available.[29] Such an approach fully complies with the optionality and competitiveness of arbitration, based by virtue of the arbitration clause/agreement, and helps to ensure the necessary protection for the party making statements, regardless of the active or passive position of other party.[30]

8.29. Besides, as a general rule each party to arbitration has the right to modify or supplement its claim or defense or objection to the claim any time before the arbitral tribunal would decide the dispute by rendering the award.[31] However, execution of such a right could bring uncertainty to the arbitration procedure and, in particular, impede its timely and effective implementation.

8.30. Therefore, these possibilities to change or supplement the statements may be limited by the agreement of the parties, but also by the arbitral tribunal. For example, the parties could decide that any changes or additions to the statements and evidence supporting them should be made within a certain agreed-upon time period before the hearing. But, the arbitral tribunal also has the right to set certain time limits regarding the period of delay, if it considers it inappropriate to allow such changes or amendments. Obviously, in such cases, the arbitral tribunal must assess a number of factors, including the availability of

[28] See also Zykov R. O. International arbitration in Sweden: law and practice. Moscow, 2014. 285 p. (para. 11.9 of the chapter 11) available at: http://www.estatut.ru/pdf/806.pdf).
See also award of the ICAC dated 15 September 2015 case No. 33/2015, available at: http://www.consultant.ru/cons/cgi/online.cgi?req=doc;base=ARB;n=462484#0, showing that to postpone any stage of arbitration its necessary to provide reasonable explanations.

[29] A similar approach is enshrined in Article 25 of the UNCITRAL Model Law, and with various nuances, in many arbitration rules.

[30] See also Article 15.8 of the LCIA Rules, Article 30 of the UNCITRAL Rules.

[31] As noted in Article 23(2) of the UNCITRAL Model Law: 'Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.'

valid reasons for late changes or additions to the statements, their importance in terms of the impact on the subject of the dispute and the effectiveness of the proceedings as a whole, keeping in mind the provision of validity and enforceability of the arbitral award.[32]

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Summaries

FRA [***La flexibilité de la procédure d'arbitrage***]

Les nombreuses significations de la notion d'arbitrage incluent, entre autres, l'ensemble de règles de procédure et de relations, c'est-à-dire la procédure d'arbitrage. C'est dans ce cadre que le litige entre les parties est tranché quant au fond. Le tribunal arbitral, indépendant et impartial, est représenté par un arbitre ou un panel d'arbitrage.

Si les procédures devant les tribunaux publics sont soumises à des règles strictes, impératives et unifiées, les règles de la procédure d'arbitrage, déterminées avant tout par la volonté des parties, sont généralement de nature discrétionnaire, qui découle des mesures relatives au déroulement de la procédure. Comme la procédure d'arbitrage est considérée comme une méthode alternative du règlement des litiges, l'accès équitable à cette procédure est assuré par un certain nombre de droits procéduraux reliés entre eux (il s'agit concrètement du droit d'être partie à une procédure contradictoire, du droit à un traitement équitable et du droit à une présentation exhaustive de l'affaire). Une telle autonomie des parties, fondée sur la nécessité d'assurer

[32] It is obvious that the refusal of the tribunal to accept amendments and supplements to the statements may be treated like a violation of the principle of equal treatment and a reasonable opportunity to present position. This could create the risk of a challenge and potentially limit enforceability of the arbitral award. Therefore it is important to ascertain whether the presentation of amendments constitutes unfair tactics.

A similar approach is reflected in many arbitration rules. As set out by Article 23(4) of the ICC Rules

> "After the Terms of Reference have been signed or approved by the Court, no party shall make new claims which fall outside the limits of the Terms of Reference unless it has been authorized to do so by the arbitral tribunal, which shall consider the nature of such new claims, the stage of the arbitration and other relevant circumstances".

According to the Article 22 of the UNCITRAL Rules

> "During the course of the arbitral proceedings, a party may amend or supplement its claim or defense, including a counterclaim or a claim for the purpose of a set-off, unless the arbitral tribunal considers it inappropriate to allow such amendment or supplement having regard to the delay in making it or prejudice to other parties or any other circumstances. However, a claim or defense, including a counterclaim or a claim for the purpose of a set-off, may not be amended or supplemented in such a manner that the amended or supplemented claim or defense falls outside the jurisdiction of the arbitral tribunal".

les garanties procédurales minimales, mène à des normes à la fois variées et flexibles de la procédure contradictoire, adaptées aux spécificités du litige en question, tel qu'il est tranché par les autorités arbitrales compétentes dans le cadre juridictionnel.
Cette discrétion, limitée par le cadre des exigences juridictionnelles, représente un aspect régulateur de l'arbitrage : grâce à elle, la flexibilité de la procédure est adaptée aux circonstances de l'affaire. Cette idée peut être illustrée à travers l'analyse des étapes clés de la procédure d'arbitrage, dont notamment: (i)la notification de la procédure d'arbitrage, (ii) l'ouverture de l'arbitrage, (iii) le dépôt des conclusions de la partie demanderesse et de la partie défenderesse.

CZE [***Flexibilita rozhodčího řízení***]
Pojem rozhodčí řízení může mít mnoho významů. Může zahrnovat i onen definující soubor procesních pravidel a vztahů (rozhodčí řízení). V jejich rámci se rozhoduje spor ve věci samé nezávislými a nestrannými subjekty – rozhodčí soud, tj. rozhodce, resp. rozhodčí senát.
Úprava rozhodčího řízení je ovlivněna autonomií vůle stran, která má v tomto ohledu prioritu, jakož i opatřeními týkajícími se vedení rozhodčího řízení v rámci obecně diskrece rozhodců, a to na rozdíl od striktní, imperativní a jednotné úpravy procesu jakéhokoliv státního soudu. I přesto a vzhledem k tomu, že rozhodčí řízení je považováno za jurisdikční alternativní formu řešení sporů, je spravedlivými přístup k rozhodčímu řízení zajišťován množstvím provázaných precesních práv, konkrétně právem na účast v kontradiktorním řízení, právem na rovné zacházení a možností zcela prezentovat svůj pohled na spor. Taková autonomie stran, založená na požadavcích nutných k zajištění prosazení minimálních požadovaných procesních záruk, vede ke kombinaci různorodosti a flexibility standardů kontradiktorního řízení, přizpůsobujíce je, přinejlepším, zvláštnostem konkrétního sporu rozhodovaného příslušnými rozhodčími institucemi a soudy v rámci jejich pravomoci.
Tento charakter úpravy rozhodčího řízení, tj. diskrece v nutném rámci jurisdikčních požadavků, které tvoří proces tak flexibilní, jak je vhodné vzhledem k okolnostem případulze ilustrovat například popisem obecných postupů ke klíčovým otázkám rozhodčího řízení jako je (i) zahájení rozhodčího řízení, (ii)

sdělení o zahájení rozhodčího řízení, (iii) přednesy (vyjádření) stran.

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POL [***Elastyczność postępowania arbitrażowego***]
Artykuł ilustruje to, jak autonomia stron, oparta na wymogach niezbędnych celem zapewnienia egzekwowania minimalnych wymaganych gwarancji procesowych (jak np. prawo do równego traktowania i możliwość przedstawienia całości sprawy) prowadzi do połączenia różnorodności i elastyczności standardów procesu kontradyktoryjnego, dostosowując je, w idealnym przypadku, do specyfiki konkretnego sporu rozstrzyganego przez kompetentne organy arbitrażowe w ramach systemu sądowniczego. W tym celu opisano ogólną procedurę dla kluczowych czynności arbitrażu, jakimi są zgłoszenie sporu, wszczęcie postępowania i wydanie oświadczenia.

DEU [***Zur Flexibilität des Schiedsverfahrens***]
Der Beitrag will illustrieren, wie die Parteienautonomie, die auf den für die Gewährleistung bestimmter prozeduraler Mindeststandards (Recht auf Gleichbehandlung, Recht auf umfassendes Gehör) notwendigen Anforderungen gründet, zu einer Vielfalt und Flexibilität der Prozessmaximen für das kontradiktorische Verfahren führt, dank derer im Idealfall auf die Besonderheiten des konkreten Falls eingegangen und dieser dann von kompetenten Schiedsrichtern innerhalb des von der Rechtsprechung gezogenen Rahmens entschieden werden kann. Zu diesem Zweck beschreibt der Artikel die allgemeine Vorgehensweise hinsichtlich einiger Schlüsselmomente im Schiedsverfahren: Verfahrensmitteilungen, Eröffnung des Schiedsverfahrens und Abgabe von Erklärungen.

RUS [***Гибкость арбитражной процедуры***]
Статья призвана показать, как автономия сторон, основанная на требованиях, необходимых для обеспечения соблюдения минимально необходимых процессуальных гарантий (таких, как право на равное обращение и возможность надлежащим образом представить позицию), приводят к сочетанию разнообразия и гибкости стандартов состязательности процесса, адаптируя их лучшим образом к специфике конкретного спора, который подлежит разрешению компетентным арбитражным органом. Для этой цели в статье описывается общий подход

к таким ключевым вопросам проведения арбитражного разбирательства, как уведомление, начало арбитражного разбирательства, подача различных заявлений.

ESP [***La flexibilidad del procedimiento arbitral***]
El artículo pretende ilustrar que la autonomía de las partes, basada en los requisitos necesarios para cumplir las mínimas garantías procesales (como son el derecho al trato equitativo y la posibilidad de presentar íntegramente el caso), origina una combinación de diversidad y flexibilidad de los estándares del proceso contradictorio adaptándolos, en el mejor de los casos, a las particularidades del caso concreto que deben resolver las autoridades arbitrales competentes en el marco jurisdiccional. Para tal, fin se describe el desarrollo general de actos clave del procedimiento arbitral, a saber: la notificación, la apertura y la presentación de declaraciones.

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Bibliography

DUBROVINA M.L. International commercial arbitration in Switzerland: synopsis of Ph.D in law thesis. Moscow (2001).

BRUNTSEVA E. V. INTERNATIONAL COMMERCIAL ARBITRATION. St. Petersburg: Setyabr Publishers (2002).

BORIS R. KARABELNIKOV, Execution and challenge the awards of international commercial arbitration. Commentary on the New York Convention of 1958, and the Chapters 30 and 31 of the Arbitrazh Procedure Code of Russian Federation of 2002. Moscow, (2008).

BORIS R. KARABELNIKOV, INTERNATIONAL COMMERCIAL ARBITRATION. Textbook. 2 ed. Moscow, (2013).

Andrey Panov. *The doctrine of "sudden award" in International Commercial Arbitration,* No. 2. BULLETIN OF INTERNATIONAL COMMERCIAL ARBITRATION (2012).

Tolpakova N.N. & Boyko A. N. The basic principles of the arbitration proceedings, Development of alternative forms of resolving legal conflicts. Saratov (2000).