

THE INSTRUMENTS OF EXPEDITIOUSNESS AND EFFICIENCY OF THE ARBITRAL PROCEEDINGS IN THE RULES OF THE INTERNATIONAL ARBITRAL COURTS

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Summary: Currently, the emphasis in international commercial arbitration is on the speed and efficiency of arbitration proceedings in order for international commercial arbitration to maintain its position in resolving disputes in international trade. The article is based on the hypothesis that the need for permanent arbitral courts to remain competitive with state courts, whose proceedings are expedited at the national and EU level by legislation on summary proceedings, leads them to use instruments guaranteeing efficiency and speed in international arbitration. The subject of the analysis and comparison carried out in the article are recent amendments to the arbitration rules of selected permanent arbitration courts and a critical assessment of their applicability in legal practice. In particular, it compares the regulation of the preparation of the hearing of the dispute, consolidation of arbitration proceedings, on-line arbitration, remote oral hearing, and expedited proceedings.

Keywords: arbitration; efficiency; expeditiousness; institution; interim measures.

1 Introduction

The efficiency of arbitration is one of the key decision-making factors for using this method of dispute resolution. The article will provide a description of the current state of the regulation of efficiency rate instruments in the rules of permanent arbitration courts. We will then focus on explaining the reasons that led to the current form of selected procedural institutes in arbitration. In addition, *de lege ferenda* considerations will be presented concerning the future development of the regulation of the efficient conduct of arbitration proceedings before permanent arbitral tribunals. As a hypothesis, we will set the assumption that the procedural regulations of the permanent arbitration courts will increasingly detail the instruments used to expedite arbitration proceedings in order to be able to compete with proceedings before state courts. To this end, we will focus on the constitution of the arbitral tribunal, exploring limitations on the scope of evidence and submissions by the parties, the use of

electronic means of communication, interim measures, consolidation of arbitral proceedings and expedited proceedings. The analysis conducted in the article focuses primarily on the internal factors involved in institutional arbitration. However, one cannot ignore the fact that the assistance and control functions of state courts have a significant impact on the efficient conduct of arbitration. In the course of arbitration, whether interim measures can be enforced if one of the disputing parties does not respect them is of key importance. Similarly, in order to conduct the examination of a witness, it may be necessary for arbitrators to request the state court to perform this act. Once an arbitral award has been issued, the consistent case law of the state courts in deciding applications to set aside arbitral award will also be relevant to the effectiveness of the arbitration. In addition, in the event of a failure to comply with the obligations imposed in the arbitral award, recognition and enforcement of the arbitral award may be sought, but in such a case it is again up to the state courts to determine whether and to what extent recognition of the arbitral award is refused in the state where enforcement is sought.¹ For this reason, it is also worth mentioning the influence of state courts on the speed of arbitration proceedings.

2 Constitution of the Arbitral Tribunal

The advantages of arbitration undoubtedly include the possibility of choosing arbitrators who have the specialisation needed to decide the dispute. If all the members of the arbitral tribunal or a sole arbitrator have such special knowledge and training, there is no need to prepare an expert report, which may cause delays in the proceedings given the limited number of experts and their workload. This problem is accentuated in the situation where both parties submit expert reports containing contradictory conclusions, which may result in the need to prepare a third review report in turn. At the same time, however, this has been the Achilles' heel of arbitration proceedings, particularly in the past, as one of the disputing parties has sought to prolong the arbitration proceedings by not appointing an arbitrator or by making unfounded allegations of bias. Arbitral tribunals are still faced with the use of dilatory tactics today when some litigants also challenge the jurisdiction of the arbitral tribunal both during the arbitration proceedings and in

1 In the current practice of international arbitration, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, which currently has 172 contracting states, plays a key role in the efficiency of the process of recognition and enforcement of arbitral awards. However, the alternative means of enforcing arbitral awards cannot be underestimated, as demonstrated by Viñuales and Bentolila in the investment dispute in *CMS Gas Transmission Company v Argentine Republic* (ICSID Case No ARB/01/08, Award, 12 May 2005), where the Claimant used diplomatic pressure through the United States Trade Representative (VIÑUALES, Jorge E., BENTOLILA, Dolores, 'The use of alternative (non-judicial) means to enforce investment awards'. In BOISSON de CHAZORNES, Laurence, KOHEN, Marcelo, G., VIÑUALES, Jorge (eds). *Diplomatic and Judicial Means of Dispute Settlement: Assessing their Interactions*. [online]. The Hague: Brill, 2012, Available at SSRN: <<https://ssrn.com/abstract=2125051>>. Accessed: 22. 3. 2024, p. 13).

the context of an application to set aside the arbitral award or to refuse recognition and enforcement of the arbitral award. The arbitral tribunals had to react flexibly by addressing the situation of how to proceed when the disputing party does not appoint a member of the arbitral tribunal, or the parties do not agree on the choice of a sole arbitrator. In the first case, the logical solution is to appoint the absent member of the arbitral tribunal by the president of the arbitration court, which is a regulation found, for example, in Article 23(1) of the Rules of the Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic (“the AC Rules”).² The other case can be effectively addressed by appointing a sole arbitrator by the president of the arbitration court, who must be impartial and independent of the disputing parties, otherwise another member of the board of directors would have to appoint the sole arbitrator. Such a provision is found in Article 23(1) of the AC Rules. However, in the London Court of International Arbitration Rules 2020 (“LCIA Rules”)³, there is a significantly more progressive regulation which limits the autonomy of the will of the disputing parties. Both the sole arbitrator [Article 5(8)] and the arbitral tribunal [Article 5(7)] shall be appointed by the London Court of International Arbitration, taking into account the parties’ agreement and proposal regarding the arbitrators or candidates for arbitrator. Mistelis⁴ points out the pitfalls of such a solution in reference to court case law. Accordingly, the LCIA Rules correct this arrangement in Article 7 by allowing the parties to agree on the choice of arbitrators, but they must comply with the requirements of Article 5(3) to (5). In exceptional cases, the possibility of an expedited arbitration panel under Article 9A, an emergency arbitrator under Article 9B and a substitute arbitrator under Article 9C of the LCIA Rules may be used. A more conservative variant of the method of constituting an arbitral tribunal can be found in the Rules of the Court of Arbitration of the International Chamber in Paris (the “ICC AC”).⁵ Article 12 of the ICC Rules of Arbitration of 2021 (the “ICC Rules”) favours the parties’ agreement on the number of arbitrators. Unless the parties agree on the number of arbitrators, the ICC AC will appoint one arbitrator, unless the nature of the dispute requires the appointment of three arbitrators. However, the parties themselves may agree on the procedure for the appointment of the arbitrators, which in such case shall be confirmed by the ICC AC in accordance with Article 13 of the ICC Rules. A certain specificity can be seen in the fact that the parties must submit a declaration of the arbitrator’s impartiality and independence without reservations. Such a procedure seems to be aimed at speeding up the process of appointing an arbitrator or constituting an arbitral tribunal. On the other hand, it is difficult to imagine a situation where a party proposes an arbitrator who

2 In the full text effective since 1 January 2023.

3 As amended with effect since 1 October 2020.

4 MISTELIS, Loukas. *Efficiency: What Else? Efficiency as the Emerging Defining Value of International Arbitration: between Systems theories and party autonomy*. Queen Mary University of London School of Law Legal Studies Research Paper No. 313/2019, pp. 32–34.

5 Text effective since 1 January 2023.

declares on the form that there are circumstances giving rise to doubts as to his impartiality and independence.

The effectiveness of arbitration has been reduced in the past by cases involving so-called truncated tribunals. These were situations where one of the arbitrators was unable or unwilling to participate in the arbitration for various reasons (e.g. illness, vacation, time constraints or purposeful prolongation of the hearing). In this case, the correct position was that the absent arbitrator should be appointed early in the proceedings and the evidence repeated. At a more advanced stage of the proceedings, it was appropriate to leave the dispute to the remaining arbitrators, if they were able to agree on a final arbitral award. Now, the rules of arbitration courts deal with the situation in such a way that if the arbitrator is not appointed by the disputing party in the event of his/her termination, the president of the arbitration court appoints the missing arbitrator. At the same time, the situation where an arbitrator is inactive is taken into account, leaving it to the discretion of the arbitral tribunal to decide whether certain issues need to be renegotiated after the appointment of a new arbitrator to replace the inactive arbitrator.⁶

3 Appointment of Arbitrators in Expedited Proceedings and Emergency Arbitrator

In the arbitration rules of some foreign arbitral tribunals there is provision for expedited proceedings or an emergency arbitrator. These two institutes are undoubtedly intended to respond to a situation in which it is necessary to take certain measures or decide a dispute quickly, which is reflected in the need to appoint an arbitrator quickly or to appoint an emergency arbitrator.

3.1 Appointment and Functions of an Emergency Arbitrator

The institution of an emergency arbitrator first appears in the Special Rules (Prearbitral Referee Procedure) of the International Chamber of Commerce in Paris of 1990. However, it has only become more widespread twenty years later in the ranks of the permanent arbitral courts that are the subject of this paper (Article 6 of the American Arbitration Association International Centre for Dispute Resolution – International Dispute Resolution Procedures 2014, Article 2 Schedule 1 of the Arbitration Rules of the Australian Centre for International Commercial Arbitration 2021, Article 27 of the Arbitration Rules of the Belgian Centre for Arbitration and Mediation 2020, Article 29 of the ICC Rules, Article 9B of the LCIA Rules, Appendix II SCC Arbitration Rules 2023, Article 43 of the Swiss Rules of International Arbitration of the Swiss Arbitration Centre 2021 and Schedule 1 of the Arbitration Rules of the Singapore International Arbitration Centre 2016).

⁶ See e.g. Article 23(7) and Article 24(4) and (5) of the AC Rules.

The appointment of an emergency arbitrator is governed by Annex V of the ICC Rules, which allows for his appointment on the basis of a request for emergency measures. Proceedings before the emergency arbitrator are conditional upon the filing of a request for arbitration, otherwise the proceedings before the emergency arbitrator will be terminated. The purpose of the proceedings before the emergency arbitrator is to be promptly appointed by the President of the ICC AC for the purpose of taking action. There is also a reduction of the time limit for filing objections to three days from the time the party receives notice of the appointment of the arbitrator. The whole procedure is very fast due to the short procedural time limits of three days for the establishment of the procedural schedule of the proceedings and fifteen days for the issuance of the order on emergency measures. However, the proceedings are subject to a significant limitation in that all orders are generally valid only until the end of the proceedings before the emergency arbitrator or until the arbitrator issues a final arbitral award. This is not surprising, since a similar provision is found in Article 9.12 of the LCIA Rules, which, however, in Article 9.7 expressly authorizes the arbitrator not to meet with the disputing parties and not to order oral hearings, a difference from the ICC Rules for Proceedings before an Emergency Arbitrator, which, by contrast, allow the arbitrator to meet with the parties whenever necessary at any convenient place. The solution under the LCIA Rules appears to be effective but may raise doubts as to the respect of the right to be heard, which constitutes an important component of the right to a fair trial.

The purpose of creating the institution of an emergency arbitrator is to provide the disputing party with a tool to prevent actions by the other disputing party (e.g. destruction of evidence or transfer of cash that could potentially be subject to enforcement later) that could defeat the purpose of the arbitration. Therefore, the emergency arbitrator usually has the task of issuing a relief (order) or award within a short period of time, which is of a temporary nature, before the arbitral tribunal is constituted (appointment of a sole arbitrator). Proceedings before an emergency arbitrator have their own specific features, the purpose of which is to make the proceedings as quick and efficient as possible. The Rules of the arbitral tribunals shorten the time limits for filing a motion to disqualify an arbitrator [e.g., Article 3(5) Schedule 1 of the Arbitration Rules of the Singapore International Arbitration Centre 2016 provides for a time limit of two days for filing a motion to disqualify an arbitrator running from the time of notification of his appointment].

An order or award issued by an emergency arbitrator may be set aside by a decision of the emergency arbitrator himself or by a subsequently constituted arbitral tribunal (or subsequently appointed arbitrator). The arbitration rules further provide for the automatic termination of the emergency order when the standard arbitration proceedings are not commenced, or a final award is rendered in the standard arbitration proceedings. However, the weakness of this type of

procedure is the recognition and enforcement of the emergency order.⁷ Hanessian points out, however, that in the United States, Singapore and Hong Kong (Special Administrative Region of the PRC), orders made by an emergency arbitrator may also be enforced, based on references to relevant case law in the case of the former two States and, in the case of Hong Kong, on the addition of Article 22B(1)(3A) to Arbitration Regulation No. 17/2010 by Regulation No. 38/2011 (published in the Government Gazette of the Special Administrative Region of Hong Kong).⁸ It should be noted that in other contracting states to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, however, an emergency order may not be recognised because that Convention applies to the recognition of arbitral awards and not to decisions by which proceedings are conducted (orders, resolutions, etc.).⁹ Hanessian further concludes that it is not the designation of whether it is an emergency order or a finding that is relevant, but the content of the decision at issue.¹⁰ Here again, it should be noted that it will depend on the national regulation¹¹ and the decision-making practice of the

7 For example. In Austrian legal theory, the recognition of orders issued by an emergency arbitrator is controversial (NUEBER, Michael. *Einstweilige Maßnahmen eines Schiedsgerichts*. In CZERNICH, Dietmar, DEIXLER-HÜBNER, Astrid, SCHAUER, Martin (ed). *Handbuch Schiedsrecht*. Vienna: MANZ, 2018, p. 439).

8 HANESSIAN, Grant. In NEWMANN, Lawrence, W., HILL, Richard, D. (ed). *The Leading Arbitrators' Guide to International Arbitration*. Huntington: Juris 2014, pp. 360–365.

9 Although the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 does not contain a complete definition of the term arbitral award [Article II(2) contains only a partial definition], there is a consensus in theory and practice that an arbitral award is a final decision rendered in arbitration proceedings with respect to the subject matter of the dispute, regardless of how it is denominated. Otto further derives from the text of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 and relevant case law additional formal requirements (written form, designation of the parties, signatures of the arbitrators, issues decided, the award and the date) imposed on the arbitral award as conditions for its recognition and enforcement (OTTO, Dirk. In KRONKE, Herbert, NACIMIENTO, Patricia, OTTO, Dirk, PORT, Nicola Christine. *Recognition and Enforcement of Foreign Arbitral Awards, A Global Commentary on the New York Convention*. Alphen aan den Rijn: Kluwer Law International, 2010, pp. 153–155).

10 HANESSIAN, Grant. In NEWMANN, Lawrence, W., HILL, Richard D. (eds). *The Leading Arbitrators' Guide to International Arbitration*. Huntington: Juris 2014, p. 356.

11 For example, under Article 1696 of the Belgian Code of Judicial Procedure, as amended on 25 January 2016, an interim or protective measure issued by an arbitral tribunal (arbitrator) must be recognised as binding and, unless otherwise provided by the arbitral tribunal, enforced by the court of first instance, regardless of the country in which it was issued, unless there is a ground for refusing recognition and enforcement of such a measure within the meaning of Article 1697. Article 1697 allows the refusal of recognition and enforcement of interim and protective measures if:

- (a) the security ordered by the arbitral tribunal to be paid by the claimant has not been deposited,
- (b) the interim or protective measure has been annulled by the court,
- (c) one of the grounds for refusing recognition of the arbitral award under Article 1721 of the Belgian Code of Judicial Procedure applies.

Verbist states that in practice, recognition, and enforcement of interim or protective measures occurred before the amendment of the Belgian Code of Judicial Procedure in 2013, as evidenced by the explanatory memorandum to the amendment (VERBIST, Herman. *New Belgian*

state courts in the place where the application for recognition of the emergency order would be filed, whether they will allow the recognition and subsequent enforcement of this type of decision. The permanent arbitral tribunals therefore distinguish between emergency orders and awards, and orders and awards that terminate the decision. Furthermore, the rules of some arbitral tribunals admit (e.g. Article 9(13) of the LCIA Rules) that the parties may, notwithstanding the proceedings before the emergency arbitrator, apply for interim and conservatory measures of protection from the state court. A review of the provisions of the arbitration rules mentioned at the beginning shows that not all permanent arbitral tribunals have incorporated the institution of the emergency arbitrator in their arbitration rules because they have doubts about its necessity.

An emergency arbitrator may not arbitrate in a subsequent arbitration as an arbitrator unless the parties have agreed otherwise. This is due to the need for the immediate appointment of an emergency arbitrator, who only needs to be temporarily appointed before the arbitral tribunal is constituted.

3.2 Appointment of Arbitrators in Expedited Proceedings

The expedited proceeding has also undergone some development to date in relation to the possibility of using this procedural institute and the appointment of arbitrators. In the past, most arbitral tribunals required the prior consent of the disputing parties to apply the rules of expedited proceedings. An exception from the beginning was the AC Rules, which already in their original version of 1 July 2012 were based in Article 30(1)(b) on the possibility of initiating expedited proceedings with the issuance of an arbitral award within four months at the request of any disputing party that has paid the arbitration fee. The expedited proceeding under Article 30(2)(b) of the AC Rules is based only on halving the procedural time limits. Some arbitral institutions have opted for the creation of separate rules for expedited proceeding, in which a sole arbitrator is usually appointed. The ICC AC has incorporated specific Rules on Expedited Proceedings in Annex VI of the ICC Rules, whereby these Rules are automatically followed for disputes with a value of up to USD 3,000,000, unless the parties exclude it. Here is an appropriate solution that respects the autonomy of the parties' will, which appears to respond to a situation that has arisen repeatedly¹² in relation

Arbitration Law of 24 June 2013 and New CEPANI Arbitration Rules of 1 January 2013, *Journal of International Arbitration*, 2013, vol. 30, no. 5, p. 603).

Baigel is of the opinion that an order issued by an emergency arbitrator pursuant to Article 29(2) of the ICC Rules may be subject to judicial enforcement regardless of its temporary nature (BAIGEL, Baruch. The Emergency Arbitrator Procedure under the 2012 ICC Rules: a Juridical Analysis, *Journal of International Arbitration*, 2014, vol. 31, no. 1, pp. 1–17).

12 The First Intermediate People's Court of Shanghai (2016 Hu 01 Xie Wai Ren No. 1 of 11 August 2017) refused to enforce an arbitral award rendered by a sole arbitrator in an expedited proceeding before the SIAC because the parties had agreed in the arbitration agreement that the dispute would be arbitrated by three arbitrators. In contrast, the Singapore High Court in *AQZ v ARA* [2015] SGHC 49 of 13 February 2015 rejected the appellant's argument in proceedings to set

to proceedings before the Singapore International Arbitration Centre (“SIAC”) in which the chairman of the arbitral tribunal has decided under Rule 5 of the Arbitration Rules to apply the SIAC Expedited Arbitration Rules 2016 without regard to the parties’ will. The opposite of the SIAC approach is the application of the SCC Arbitration Institute’s 2023 Expedited Arbitration Rules (SCC Expedited Arbitration Rules), which apply only if the parties refer to the application of those rules in the arbitration agreement. The arbitrator must be appointed within ten days, which distinguishes the appointment of the arbitrator from the SCC Arbitration Rules, under which the parties set the deadline for the appointment of the arbitrator or, if they do not agree, the members of the arbitral tribunal, and if they do not agree, the SCC Arbitration Institute Board of Directors sets the deadline.

4 Preparation of the Hearing

Before arbitrators begin to hear a dispute in a proceeding before the ICC AC that is the subject of arbitration, they must, according to Article 23 of the ICC Rules, draw up a document called “The Terms of Reference” – an exception applies to disputes with a value of up to USD 2,000,000,- which are arbitrated by a sole arbitrator. This document shall contain the following particulars:

- (a) designation of the parties,
- (b) the addresses of the parties to which documents and communications are to be served during the arbitration,
- (c) all submissions of the parties and the claims asserted by them,
- (d) the definition of the issues to be decided by the arbitrators,
- (e) the names, occupations, and addresses of the arbitrators,
- (f) the place of arbitration,
- (g) clarifications relating to the procedural rules to be applied by the arbitrators, or the authorisation of the arbitrators to decide according to the principles of fairness.

This document must be signed, as a rule, simultaneously with the procedural timetable by the arbitrators and the parties and must be sent to the ICC AC within 30 days of the transmission of the file containing all the documents to the arbitrators.

If one party fails to cooperate in its execution or to sign the document, the ICC AC may approve it, while at the same time setting an additional time limit for that party to countersign the document. If the time limit expires in vain, the arbitration proceedings may be continued, and an arbitral award issued. Following the example of the ICC Rules, case management conferences and timelines have

aside a partial arbitral award that the arbitration should have been decided by three arbitrators pursuant to the express agreement of the parties, but that the SIAC President had appointed a sole arbitrator pursuant to the Expedited Arbitration Rules.

been introduced in Article 28 of the SCC Arbitration Rules. However, this differs substantially from the ICC Rules in that the arbitral tribunal itself, in consultation with the parties, takes measures to increase the efficiency of the proceedings and sets a timeframe, including a date for the issuance of the award.

5 Evidence and Statement of the Parties

International commercial arbitration is faced with repeated and extensive submissions and statements of the parties, coupled in some cases with an enormous number of voluminous annexes.¹³ This applies not only to investment disputes but also to other commercial disputes as part of an effort to slow down the proceedings but also to overwhelm the other disputing party and their representatives. International arbitral institutions are therefore faced with the dilemma of whether, in view of the right to a fair trial¹⁴, it is possible to narrow in advance the range of issues in dispute and limit the number of submissions by the parties, the scope of documentary evidence and witness testimony.¹⁵

A timely determination of the range of claims that will not be heard by the arbitral tribunal serves to narrow the range of claims¹⁶ to be heard by the defendant and the claimant. Such a provision is contained in Article 22(1)(8) of the LCIA Rules, which allows arbitrators to determine that any claim, procedural defence or counterclaim is inadmissible if it is manifestly outside the jurisdiction of the arbitral tribunal or manifestly inadmissible or unfounded.¹⁷ On the basis of this determination, the arbitrators may issue an award or order.

In order to limit the scope of the proposed documentary evidence, Article 4 of the 2019 Rules for the Efficient Conduct of Proceedings in International Arbitration (the Prague Rules) was created to create a parallel recommendatory regulation to the 2020 IBA Rules on the Taking of Evidence in International Arbitration. The difference between these rules is that the Prague Rules are based on the process of evidence in continental legal culture whereas the IBA Rules on

13 BERGER, Klaus, Peter, JENSEN, Ole, J. Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators, *Arbitration International*, 2016, vol. 32, pp. 416–435.

14 On the observance of the right to a fair trial in the taking of evidence see RISSE, Jörg, BAUMANN, Antje. The permissible scope of witness testimony in arbitral hearings—five proposed rules, *Arbitration International*, 2021, vol. 37, p. 29.

15 Dunmore lists three methods developed for the purpose of streamlining evidence: Witness Conferencing, Böckstiegel Method and Kaplan Opening (DUNMORE, Michael. Increasing Efficiency in International Arbitration. In BĚLOHLÁVEK, Alexander, ROZEHNALOVÁ, Naděžda (ed). *Czech (& Central European) Yearbook of Arbitration. Vol VII., Conduct of Arbitration*. The Hague: Lex Lata, 2017, pp. 77–78).

16 Before the arbitral tribunal identifies the issues it will address, it must be sure that it is aware of all the facts that might be relevant to the decision, which, in the view of Blackaby and Partasides, is not easy (BLACKABY, Nigel, PARTASIDES, Constantine. *Redfern and Hunter on International Arbitration*. New York: Oxford University Press, 2022, p. 343).

17 It can be both factual and legal unfoundedness (WALLACH, David. The Emergence of Early Disposition Procedures in International Arbitration, *Arbitration International*, 2021, vol. 37, p. 843).

the Taking of Evidence in International Arbitration are characterised by elements characteristic of the Anglo-Saxon legal system. The admissibility of limiting the scope and time for evidentiary motions is also recognized by case law. The Court of Appeals in *Grand Pacific Holdings and Pacific China Holdings* concluded that full respect for the right to be heard does not mean that “a party is entitled to present a case it pleases, any time it pleases, no matter how long the presentation should take.”^{18,19} The German Federal Court of Appeal held in a review of an arbitral award that, under the German Code of Civil Procedure, arbitrators have discretion as to which evidence they take and are limited only by the right to a fair trial, which would be violated if the arbitral tribunal deviated from the legal opinion communicated to the parties, thereby depriving the parties of their objections and procedural defences.²⁰

6 Use of Electronic Means of Communication

The appropriateness of the use of electronic means of communication in arbitral proceedings is relevant not only with regard to procedural economy, but also in light of the COVID-19 coronavirus pandemic. The earliest use of on-line arbitration in arbitration was due to the speed of communication between the arbitral tribunal and the parties and the cost savings of postage and oral hearings.²¹ In the Czech Republic, this trend has been further enhanced with the introduction of communication via data mailboxes, which allow for the efficient use of the fiction of service, thus largely eliminating the complications associated with the service of documents by post on persons who sought to avoid effective service of the statement of claim, summons to oral hearing and decision in the first place. Gradually, online arbitration began to take hold, but was initially limited by the capacity of transmission networks and data storage facilities. This method of litigation required the express consent of the parties to litigate in this way and was limited by the ability of a party to participate in online arbitration.²² A special alternative dispute resolution method administered by the Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural

18 Court of Appeal (Hong Kong), Civil Appeal No 136 of 2011, 9. May 2012, *Grand Pacific Holdings Ltd and Pacific China Holdings Ltd* (in liq) [2012] 4 HKLRD 1 [95].

19 This decision received a positive response among the professional community, especially after it was also upheld by the Court of Final Appeal (FAMV 18/2012), which emphasised that the arbitral tribunal had acted within its discretion (See KWAN, James, CHAN, Jasmine. Hong Kong In WILLIAMS, Liz (ed). *The Baker & McKenzie International Arbitration Yearbook*. Huntington/New York: Juris, 2014, pp. 134–135).

20 Judgement of the Federal Court of Justice (Germany), III ZR 77/81, 11. November 1982.

21 The 2017 Rules for On-line Arbitration of the Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic.

22 Section 3(4) of the 2017 Rules for On-line Arbitration of the Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic expressly empowers the President of the Arbitration Court or the arbitrator to decide that the proceedings shall be conducted in accordance with the AC Rules in view of the technological incapacity of a party to receive electronic communications.

Chamber of the Czech Republic, which is not arbitration, is the resolution of domain name disputes.²³ This alternative dispute resolution mechanism is exclusively online. A relatively recent development in the rules of arbitration courts is the regulation of videoconferencing, which has been used in legal practice before, although complications may have arisen with its technical security. Distance oral hearings undoubtedly have the advantage of eliminating the need for a meeting room and the personal presence of arbitrators and disputing parties in one place. This eliminates the costs of room rental, travel, and accommodation.²⁴ Given that many arbitration courts do not have their own hearing rooms for arbitration or only offer to rent them, this can be a considerable saving if the parties have chosen a world-class venue.²⁵

The use of videoconferencing raises the problem of the arbitrators' and the parties' consent to such a procedure. There may be a situation where all arbitrators and parties participate in the videoconference from different locations, but there may also be a situation where only the arbitrators meet at the place of arbitration, or the arbitrators and a party participate in the oral hearing. Article 32(2) of the SCC Arbitration Rules strictly provides that the arbitration panel shall decide whether to hold an oral hearing by videoconference. A more balanced solution is provided by Article 28a of the AC Rules, which requires the prior consent of the parties to hold an oral hearing at a distance, while providing for a rebuttable presumption that a party that fails to make a statement within ten days of the service of the notice consents to such a procedure. At the same time, different variations of personal participation of arbitrators and parties are envisaged in Article 3 of the Special Supplement to the AC Rules on the holding of remote oral hearings, whereby additional consent of the parties and arbitrators is required if only a party to the proceedings will be present in person while another party to the proceedings will participate only by teleconference. So far, holding oral hearings by teleconference seems to be advantageous, but we must also be aware of the risks associated with ensuring the functioning of the communication platform and its protection against cyber-attack. Arbitral tribunals do not assume liability for the use of third-party software or expressly exclude such liability in their rules.²⁶ We have to remember that in practice there can be two variants. The first is the use of the arbitrators' and the disputing parties' own hardware and software, in which case there is no doubt that the arbitration court will not

23 .cz Domain Dispute Resolution Rules, which will apply to all proceedings initiated by a petition filed on or after 1 January 2022.

24 Some authors believe that controlling the costs of arbitration leads to increased efficiency of arbitration (BAYKITCH, Alex, BAO, Edmund. A return to initiate arbitration culture: implications from a cost and efficiency perspective, *Arbitration International*, vol. 35, no. 1, p. 63).

25 For analysis of the transnational and delocalised arbitration cf. LEW, Julian, D., M., MISTELIS, Loukas, A., KRÖLL, Stefan, M. *Comparative International Commercial Arbitration*. The Hague: Kluwer Law International, 2003, p. 66.

26 Article 5(5) of the Special Supplement to the AC Rules of Procedure on the Conduct of Oral Hearings at a Distance, effective from 1 December 2020.

be liable for the use of such equipment. A more complex situation arises when the arbitrators and the disputing parties use the arbitration court's hardware, software, and communication platform. If the arbitration court fees for the use of such equipment, it can hardly absolve itself of liability for technical difficulties associated with its use. For this reason, it will be advisable to take out liability and legal indemnity insurance in case of malfunctioning of the technical equipment and security of the videoconference. This will also be practical because the malfunctioning and security of the videoconference may be due to the misconduct of an employee of the arbitral tribunal.

7 Interim Measures

7.1 Czech Republic

Pursuant to Section 22 of Act No. 216/1994 Sb., on Arbitration Proceedings and Enforcement of Arbitral Awards, if during the arbitration proceedings or even before the arbitration proceedings are initiated, it appears that the enforcement of the arbitral award may be jeopardised, the court may order an interim measure (pursuant to Section 74 of Act No. 99/1963 Sb., Civil Procedure Code) at the request of any party.²⁷ This concept is rather restrictive, because interim measures can be ordered under Czech law only by a state court, and, as Bělohávek²⁸ correctly notes, not for the purpose of adjusting the parties' relationships, but only to ensure the enforcement of the arbitral award.

7.2 France

If it appears during the arbitration proceedings or even before the arbitration proceedings are initiated²⁹ that the enforcement of the arbitral award may be jeopardised, the arbitral tribunal may, on application by any party, order an interim measure. However, only the state courts have jurisdiction to seize assets. Arbitrators may impose a fine on a daily basis in the event of non-compliance with an interim measure pursuant to Article 1468 of the French Code of Civil

27 Tweeddale states that it is typical of the Anglo-Saxon legal system that the application may be filed by the disputing party or by arbitrators, which is also admitted in Sweden and Switzerland (TWEEDDALE, Andrew, TWEEDDALE, Keren. *Arbitration of Commercial Disputes. International and English Law and Practice*. Oxford/New York: Oxford University Press, 2007, pp. 298–299)

28 BĚLOHLÁVEK, Alexander. *Act on Arbitration and Enforcement of Arbitral Awards. Private International Law (Selected Provisions)*. Commentary. Prague: C.H. Beck, 2023, p. 788.

29 An interim measure has an important role not only before the constitution of the arbitral tribunal but also during the arbitral proceedings, since the limitation of the arbitrators' jurisdiction is that they cannot impose an obligation on third parties, unlike state courts. Boog cites the example of freezing money in a bank account or securing evidence from a third party (BOOG, Christopher. *Interim Relief by State Courts*. In KRÖLL, Stefan, BJORKLUND, Andrea, FERRARI, Franco (ed). *Cambridge Compendium of International Commercial and Investment Arbitration*. Cambridge: Cambridge University Press, 2023, p. 1347).

Procedure.³⁰ However, it must be borne in mind that, even in France, only a state court can order the enforcement of an interim measure. Unless the parties have agreed otherwise, under Article 28(1) of the ICC Rules, the arbitral tribunal may, after referring the file to the arbitral tribunal, order any interim or protective measure it deems appropriate at the request of either party. Prior to the referral of the case to the arbitral tribunal, only a state court may order an interim measure at the request of a party.

7.3 Hong Kong

Article 23 of the HKIAC Arbitration Rules contains considerably more sophisticated provisions than Art. 23 of the China International Economic and Trade Arbitration Commission Arbitration Rules 2015 (the “CIETAC Arbitration Rules”), by setting out in demonstrative lists the grounds (preservation of the status quo, avoidance of injury, safeguarding of assets, or safeguarding of evidence) and the conditions (the injury threatened to the claimant is irreparable and at the same time the injury caused by the interim measure is not greater than the injury threatened to the claimant and there is a reasonable prospect of the claimant’s success in the dispute) for ordering an interim measure. An interim measure may be modified, suspended, or revoked by the arbitral tribunal at the request of any party or, in exceptional cases, without an application. The Hong Kong Arbitration Ordinance³¹ has largely adopted in Articles 35 to 42 the regulation of interim measures contained in Articles 17 to 17G of the UNCITRAL Model Law on International Commercial Arbitration 2006. In addition to interim measures ordered by the arbitrators, the parties may apply to the state court for an interim measure, which, pursuant to Article 45(4)(b) of the Hong Kong Arbitration Ordinance, may refuse to order an interim measure if it concludes that it would be more appropriate for the arbitrators to order it. Interim measures issued within or outside the territory of Hong Kong may, under Article 61 of the Hong Kong Arbitration Ordinance, be enforced by a non-appealable order of a state court. Singapore’s International Arbitration Act 1994 allows for the issuance of an interim measure by both the arbitrator and the state court, but under Article 12A(6), the state court may issue an interim measure only if the arbitrator lacks jurisdiction to do so or the arbitrator is unable to issue an interim measure promptly. Article 12 of Annex 1 of the SIAC Rules states that the parties agree that an order or award made by the emergency arbitrator shall be binding on the parties at the time it is made, and the parties waive their right to any form of review of that decision by the state court. As the order or award granting the interim measure is to be issued by the emergency arbitrator within 14 days, the party against whom such

30 As amended with effect since 5 October 2023.

31 The new Hong Kong Arbitration Ordinance (Cap. 609) dates back to 2011 and was last amended on 19. May 2021.

measure is directed should consider whether it will agree to hear the matter before the emergency arbitrator.

7.4 *Federal Republic of Germany*

In the Federal Republic of Germany, both state courts and arbitrators can order interim measures during arbitration proceedings. Pursuant to Section 1033 of the German Code of Civil Procedure (the “GCCP”) of 1950, state courts have the power to order interim measures both before and during arbitration proceedings on the application of a party. Unless the parties agree otherwise, the arbitral tribunal may, pursuant to Section 1041 GCCP, order such interim measures as it deems necessary in relation to the subject matter of the dispute. For this purpose, the arbitration panel may require the disputing party to provide adequate security. The state court may, on the application of a party, order the enforcement of an interim measure issued by the arbitrator, unless the state court has already issued a corresponding interim measure. The state court may reformulate the interim measure if this is necessary for its enforcement. The state court may annul or supplement the interim measure it has ordered. If the interim measure was unjustified from the outset, the party in whose favour the interim measure was ordered shall be obliged to compensate the other party by enforcing the interim measure. For reasons of procedural economy, the disputing party may claim damages or security directly in the pending arbitration proceedings. It is disputed in the literature whether the parties may agree in advance to exclude the possibility of bringing an application for an interim measure before a state court. The case-law of the German courts³² is based on the assumption that, without an express agreement of the parties, an interim measure may be applied for before a state court or an arbitral tribunal. It remains disputed whether an express provision in an arbitration agreement excluding the jurisdiction of the state court to order interim measures is permissible.³³ Kreindler and Schmidt consider that such an express provision in the arbitration agreement is possible, but it must be made before the arbitration proceedings are commenced and the scope of the measures excluded from the jurisdiction of the arbitral tribunals must be defined.³⁴

32 Decision of the Higher Regional Court of Munich of 26 October 2000, Case No. U (K) 3208/00 and orders of the Higher Regional Court of Nuremberg of 27 October 2004 and 30 November 2005, Case No. 12 U 2881/04.

33 The opinion on the admissibility of unconditional agreements is held by BANDEL, Stefan. *Einstweiliger Rechtsschutz im Schiedsverfahren – Zulässigkeit und Wirkungen schiedsrechtlicher und gerichtlicher einstweiliger Maßnahmen gemäß den Bestimmungen des SchiedsVfG*. Munich: C.H. Beck, 2000, p. 334.

34 BÖCKSTIEGEL, Karl-Heinz, KRÖLL, Stefan Michael, NACIMIENTO, Patricia (eds). *Arbitration in Germany. The Model Law in Practice. Second Edition*. Alphen aan den Rijn: Kluwer Law International, 2015, p. 136.

8 Consolidation of Arbitration Proceedings

One way to reduce the costs of proceedings and avoid adversarial decisions is to join (consolidate) proceedings on matters that are related with respect to the facts or the parties. In proceedings before the state courts, this issue is usually dealt with in the Civil Procedure Code (in the Czech Republic, Section 112 of the Code of Civil Procedure) in such a way that, if the two proceedings are related, the state court may decide to consolidate the cases.

In the case of arbitration proceedings, we can find a regulation allowing the state court to join two or more arbitration proceedings on the motion of a disputing party rather rarely. An example of such a provision is Article 1046(1) of the Netherlands Code of Civil Procedure of 1986 (Book Four – Arbitration), which allows, on the application of a disputing party, the consolidation of proceedings by a decision of the President of the District Court of Amsterdam if the seat of arbitration is in the Kingdom of the Netherlands.

Most of the arbitration rules examined contain a special provision relating to the consolidation of proceedings. Consolidation of proceedings is possible on the basis of a proposal by the parties (or a party), or by a proposal by the arbitral tribunal (or the arbitrator), or by a decision of the arbitral tribunal (or the board or the president). In the case of the third option, it is worth mentioning Article 13(2) of the Arbitration Rules of the Belgian Centre for Arbitration and Mediation 2020 and Article 4(1) of the Swiss Rules of International Arbitration 2021, which allow the Belgian Centre for Arbitration and Mediation in the first case and the Arbitration Institute of the Swiss Chambers of Commerce in the second case to decide on the consolidation of proceedings even without the consent of the disputing parties. Article 26a of the AC Rules and Article 10 of the ICC Rules empower the arbitral tribunal to decide on the consolidation of the proceedings, while the SCC Arbitration Rules provide that the jurisdiction to decide on the consolidation of the proceedings rests with the board of that arbitration court. However, unlike the ICC Rules, Article 26a of the AC Rules lacks the rule that the proceedings which were initiated first are consolidated. Article 15(2) of the SCC Arbitration Rules instructs the SCC Board to consider the consolidation of proceedings having regard to the stage of the arbitration, the efficiency and speed of the proceedings and other relevant circumstances. The difference between the AC Rules, the ICC Rules and the SCC Arbitration Rules is also that a condition for the consolidation of proceedings under the former two Rules is the identity of the composition of the arbitral tribunal, but the SCC Arbitration Rules do not impose such a condition and allow the SCC Board to remove an arbitrator. The solution contained in the SCC Arbitration Rules may be considered more flexible, but it does not correspond to the will of a party in case it has appointed an arbitrator who will be removed by the board without its consent in the interest of compatibility of the composition of the arbitral tribunal deciding the claims in the joined proceedings.

In order to assess the appropriateness and the possibility of consolidating arbitration proceedings, the Rules of Arbitration provide for different criteria, sometimes only one of which is required, while at other times several criteria must be met simultaneously. Where several criteria must be met simultaneously, consolidation may be more difficult and less frequent. On the other hand, this is to ensure that only closely related disputes are decided together. If only one criterion is required to be met, proceedings which may or may not be factually related (e.g. consolidation by agreement of the parties) will be more likely to be joined. The criteria that arbitral tribunals tend to set out in their rules for deciding whether to consolidate proceedings are as follows:

- (a) the identity of the parties to the various proceedings,
- (b) the assertion of claims in different proceedings in accordance with the same arbitration agreement,
- (c) claims under the same contract,
- (d) the eligibility of the proceedings for consolidation,
- (e) the prior consent of the parties to consolidate the proceedings,
- (f) the identity of the arbitration panel (arbitrator) in all proceedings,
- (g) the identity of the place of arbitration.

In the event that arbitration proceedings are consolidated, the three arbitration rules analysed (Article 8(5) of the AAA International Dispute Resolution Procedures, Article 17(3) of the CIETAC Arbitration Rules and Article 10 of the ICC Rules) provide that all consolidated arbitration proceedings shall be consolidated with the proceedings first commenced, unless the parties have agreed otherwise. Such a solution may not be optimal if the later initiated proceedings are before a three-member arbitral tribunal and are at a more advanced stage than the earlier initiated proceedings conducted by a sole arbitrator. In such a situation, Article 17(2) of the CIETAC Arbitration Rules requires the China International Economic and Trade Arbitration Commission to assess whether the same arbitrators have been appointed or constituted in the dispute, which is unlikely to be met here (unless the sole arbitrator in the first case is also a member of the three-member panel in the second case) and the request to consolidate the proceedings may be rejected. A more complex, but at the same time more flexible solution is offered by Article 8(6) of the AAA International Dispute Resolution Procedures, which entrusts the decision to consolidate the proceedings to a consolidation arbitrator appointed by the administrator, who may decide on the appeal of an arbitrator in one of the consolidated proceedings and may also decide that the proceedings will be conducted by an arbitral panel already constituted. It can therefore be summarised that the arbitration rules regulate the consolidation of proceedings in different ways and lay down different conditions for it. In most cases, however, the consent of the disputing parties, or at least their prior statements, is required for the consolidation of proceedings.

9 Expedited Proceeding

Expedited proceeding is intended to be a tool to increase the efficiency of arbitration. The purpose of expedited proceeding is to simplify, shorten and make the arbitration process cheaper. To this end, various tools are used in a number of arbitral courts. The first is procedural deadlines. The rules of arbitral courts for expedited proceeding either set time limits for procedural acts³⁵, or shorten the length of time limits applicable to “non-expedited” proceeding³⁶, or set a maximum time frame within which a final award is to be rendered.³⁷ In addition, we must mention the disadvantages that expedited proceedings may have, as they are not usually mentioned. The first disadvantage is the inappropriateness of the expedited proceeding for complex disputes where it will be practical to constitute an arbitral tribunal whose members may divide the work and where it may also be considered less likely that the disputing party can influence the majority of the members of the arbitral tribunal. However, the procedural rules of expedited proceeding are characterised by the appointment of a sole arbitrator, and only some rules allow for the express possibility of deviating from this rule.³⁸ The second disadvantage is related to the need to proceed quickly, which may result in procedural errors by the arbitrators. For this reason, arbitration rules either allow for extensions of time limits for the conclusion of arbitration proceedings or provide that the parties shall be refunded the increased fee for expedited proceeding if the arbitrators do not render a decision within the time limit.³⁹ The third problematic aspect lies in the availability and qualifications of arbitrators. For this reason, arbitrators now sign declarations of availability⁴⁰ and qualifications⁴¹ in some arbitral courts. In view of past experience, the permanent arbitration courts try to penalise inactive arbitrators by reducing their remuneration or by sanctioning them under the ethical rules of the arbitral institution. Such a sanction may include not only the exclusion of an arbitrator from hearing a particular dispute, but also, in the case of repeated misconduct and delay, removal from the list of arbitrators.

10 Conclusion

In order to assess the efficiency of arbitration, a comparison and analysis of selected arbitration institutes was carried out to increase the efficiency of arbitration. For the purpose of comparison, legal regulations and arbitration rules were purposively selected in which different solutions to the issues under

35 E.g. Article 18(3) SCC Expedited Arbitration Rules.

36 E.g. according to Article 30(2) of the AC Rules.

37 Examples are the time limits of two or four months set out in Article 30(1) of the AC Rules.

38 The AC Rules may be cited as an exception, as they are based on the arbitration of the dispute by the arbitral tribunal in Section 3(4), unless the parties have agreed that the dispute will be decided by a sole arbitrator.

39 Section 49(3) of the AC Rules.

40 E.g. Article 11(3) of the ICC Regulations

41 Article 16(3) of the Vienna Arbitration Centre Rules 2021.

study can be found. On the basis of the comparison, an analysis was made of the solutions chosen in national legislation and in the rules of the permanent courts of arbitration.

The comparison shows that the rules of the permanent courts of arbitration are forced to deal with the same problems and issues, while the solutions chosen often differ. This is obviously determined by the fact that arbitral tribunals are trying to balance the increase of their attractiveness with the promotion of the parties' autonomy, while at the same time regulating the course of the proceedings in increased detail in order to avoid the emergence of contentious situations and delays in the application practice. This is undoubtedly due to the conflict of interests between the arbitral tribunal, the claimant, and the defendant. Arbitrators need to have clearly set rules of procedure in order to decide a dispute quickly and efficiently. The disputing parties seek to win the dispute using all the means offered by the procedural rules of arbitration at the lowest possible cost. However, what matters in terms of the efficiency of the arbitration procedure is whether both disputing parties act in good faith⁴², as provided for, for example, in Article 14(2) of the LCIA Rules, and seek to resolve the dispute as quickly as possible. In the event that one of the parties to the dispute is likely to give in, it may cause delays in the proceedings by its passivity (e.g. by not appointing a member of the arbitral tribunal and by expedient requests for adjournment of the oral hearing) or by unreasonable requests to review the jurisdiction of the arbitral tribunal, to disqualify the arbitrator, to take redundant evidence or to set aside the award.

In the interest of maintaining a fair trial, it is not possible to disregard the parties' submissions that do not completely depart from the merits of the case at hand. Rigorous preparation for the hearing, including the definition of the subject matter of the dispute and the procedural issues, serves to eliminate obstacles that may arise during the course of the hearing. Such preparation will be more difficult in the case of expedited proceeding, where arbitrators and parties are generally bound by short procedural deadlines. Most arbitration rules leave it up to the disputing parties whether to opt for expedited proceeding, although the SIAC case demonstrated otherwise. In many cases, however, it will be crucial for the disputants to obtain interim or protective measures quickly, but here the arbitration procedure faces the limitation that these measures must be enforced on application to the state court. A similar pitfall lies with measures issued by emergency arbitrators. It should be considered *de lege ferenda* to simplify Articles 17 to 17G of the UNCITRAL Model Law on International Commercial Arbitration 2006, which will lead to the wider acceptance of the interim measures ordered by the arbitral tribunal in vast majority of the national legal orders.

The challenge currently facing arbitration is the conduct of litigation in electronic form. Here, attention must be paid to the security of communication

42 On the application of good faith in arbitration proceedings in the common law concept cf. BERGER, Klaus Peter, ARNTZ, Thomas. Good faith as a 'general organising principle' of the common law, *Arbitration International*, 2016, vol. 32, pp. 167–178.

in order to ensure the non-public nature of the proceedings and the confidentiality of all documents submitted in the arbitration. In addition, there may be problems with the technical equipment of the parties and the related ability to communicate during online proceedings. In addition, it will be necessary to maintain a hard copy of the arbitral award in case an application for enforcement is filed in states that would not allow recognition of an award issued in electronic form. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 clearly provides in Article IV that “the party applying for recognition and enforcement of the award shall, at the time of the application supply the duly authenticated original or duly certified copy thereof”. The requirement of a written form under Article II(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, also applicable to arbitration agreements, is not affected by the fact that, according to the Recommendation regarding the interpretation of Article II(2) and Article VII(1) of 7 July 2006, the provision in Article II requiring written form is to be interpreted as a non-exhaustive list because it is a recommendation and the only possibility to change the definition of written form in Article II(2) is to approve the Additional Protocol to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

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