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21-1 In some languages the word for “arbitrator” is the same as the word used for “referee” or “umpire” in sporting events. For instance, in German the word “*Schiedsrichter*”, and in Greek the word “*διατητής*”, denote either referee or arbitrator. In real life referees rarely make the rules of the game; they only ensure that certain rules or principles are applied and they have on occasion decision-making power. The teams and their performance determine the game and its outcome.

21-2 This chapter examines the core of arbitration proceedings from a theoretical and a practical perspective. The issue is who controls the procedure and what minimal standards have to be complied with? Most arbitration laws provide a set of rules which may be used to regulate arbitration proceedings. Occasionally such rules are mandatory or express public policy. Furthermore, the internationalisation and harmonisation of international arbitration has resulted in the formulation of international rules for the regulation of arbitration procedure.

21-3 Parties are free to agree generally the procedure and, in any event, the arbitration tribunal has the power to fix the procedure and determine procedural issues. The distinction between procedural and substantive issues is not always clear. *Procedural issues* are technical matters relating to the organisation and conduct of proceedings. *Substantive issues* are matters which influence the outcome of the case.⁽¹⁾ The relevance is that they may be governed by different laws. The English Arbitration Act offers a statutory classification of procedural issues. Section 34(1) English Arbitration Act provides that procedural issues include

- (a) when and where any part of the proceedings is to be held;
- (b) the language or languages to be used in the proceedings and whether translations of any relevant documents are to be supplied;
- (c) whether any and if so what form of written statements of claim and defence are to be used, when these should be supplied and the extent to which such statements can be later amended;
- (d) whether any and if so which documents or classes of documents should be disclosed between and produced by the parties and at what stage;
- (e) whether any and if so what questions should be put to and answered by the respective parties and when and in what form this should be done;
- (f) ...
- (g) whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law;
- (h) whether and to what extent there should be oral or written evidence or submissions.

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21-4 This chapter examines (1) the power of the parties and the tribunal to fix the arbitration procedure, (2) procedural directions and terms of reference, (3) the planning of international arbitration proceedings, with focus on the format of the hearings and submissions, (4) legal or other representation of parties, (5) default proceedings and (6) expedited procedures.

1. Fixing the Arbitration Procedure

21-5 The law or rules governing the arbitration procedure is determined by looking to the intent of the parties. While this autonomy is widely recognised in arbitration theory and practice, in some recent arbitration statutes it is not without limitations. The same limitations apply also when it is the tribunal that fixes the procedure.

1.1. Party Agreement

21-6 It is universally accepted that whatever law governs the arbitration party autonomy plays a significant role in determining the conduct of proceedings. This is evidenced by Article V(1)(d) New York Convention which provides that an award may be refused recognition if the “procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.”⁽²⁾

21-7 Although the arbitration tribunal performs a judicial function, rules of national civil procedure are invariably unsuitable and irrelevant for international arbitration.⁽³⁾ For this reason most national laws contain provisions for the procedures to be adopted in international arbitration which deviate from the rules to be applied by national courts. These provisions allow wide freedom to the parties and the arbitration tribunal to determine the procedure to be followed.

21-8 This is reflected in Model Law Article 19

- (1) 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. The page "523" power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

21-9 The phrase “subject to” does not really restrict party autonomy. There are few rules in the Model Law relating to procedure which are of mandatory nature as they uphold principles of due process.⁽⁴⁾ The same applies to the arbitration laws that have adopted the Model Law⁽⁵⁾ and many other arbitration laws.⁽⁶⁾

21-10 Parties may decide to exercise their autonomy by including specific procedural rules in their arbitration agreement or by reference to institutional rules.⁽⁷⁾ In institutional arbitration the reference will normally be to the rules of the chosen institution. In *ad hoc* arbitration reference is often made to the UNCITRAL Rules. However, these arbitration rules are generally silent on the specific procedures to be followed; they give arbitrators power to fix the procedure in the absence of the parties' agreement.

21-11 Parties do occasionally choose national rules of civil procedure to be followed in arbitration. Unless the chosen law contains specific provisions for international arbitration such a choice is unwise as national civil procedure rules are normally designed for domestic litigation before state courts, not for the arbitration of international cases. Arbitration requires a greater degree of flexibility.

1.2. Arbitrators Fixing the Procedure

21-12 Where parties have not agreed, and under most institutional rules, the tribunal will decide the procedure to be adopted. Such procedure, while it may have general common characteristics, will be adapted to the specifics of the case and will be distinct for each arbitration. In fixing the procedure the tribunal must be fair and reasonable.⁽⁸⁾

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21-13 The tribunal should seek the parties' agreement on the procedure to follow. However, frequently parties cannot agree on procedural issues once a dispute has arisen. In practice, once the tribunal has been constituted and the arbitration started, it will often be for the tribunal to fix the proceedings as it considers appropriate.⁽⁹⁾

1.3. Limitations to Procedure Adopted

21-14 Limitations on the autonomy of the parties and the tribunal to regulate the procedure may result from the mandatory provisions of the law of the place of arbitration.⁽¹⁰⁾ These mandatory rules of the place of arbitration define the outer boundaries within which parties and arbitrators may operate. The limitations imposed by these mandatory provisions may vary from country to country and have changed over the years.

21-15 Before the latest wave of arbitration reform it was of considerable importance which law governed the arbitration proceedings. Various national laws imposed different limitations on the arbitration process, provided for page "525" considerable court intervention and control, and required the tribunal to apply rules of national procedure unsuitable for arbitration.

21-16 In modern arbitration laws, however, the limitations imposed by mandatory rules are restricted to those considered necessary to guarantee that the parties have the opportunity to present their case and answer the case against them. This is generally known as due process and is a fundamental element of international arbitration. Apart from these few minimum requirements, the so called "*Magna Carta of arbitration*",⁽¹¹⁾ all other procedural provisions are usually of a non-mandatory character and can be derogated from by the parties and the tribunal.

21-17 This duty of due process is described in various ways. Article 18 Model Law provides that "parties shall be treated with equality and each party shall be given a *full opportunity* to present his case".⁽¹²⁾ Belgian Law provides that the "tribunal shall give each party *an opportunity* of substantiating his claims and of presenting his case."⁽¹³⁾ English law mandates that each party must be given "a *reasonable* opportunity of putting its case and dealing with that of its opponent."⁽¹⁴⁾ The Model Law requiring a "full opportunity" opts for greater rigidity in controlling proceedings than other systems which empower the tribunal to exercise flexibility to prevent parties abusing the process.

21-18 The universally accepted principle that parties should be allowed to respond to the allegations of the other side⁽¹⁵⁾ is known as the "*principle of page "526" contradiction*". Accordingly, all arguments and evidence invoked by a party must be communicated to the other party who must be given an opportunity to answer them.⁽¹⁶⁾ In practice it is not always necessary to grant absolute equality in quantitative terms to both parties. Often one party needs less time and less evidence to prove its case or rebut the case against it.

2. Terms of Reference and Procedural Directions

2.1. Need for Planning

21-19 At the beginning of the arbitration, the tribunal will often arrange a meeting with the parties to discuss and fix the format and schedule for the proceedings. In the absence of an agreement the tribunal will fix the format and schedule for the arbitration.⁽¹⁷⁾ This may include the different steps or phases of the proceedings and set out dates for the completion of each step. Assuming that they are realistic in the time planning a useful timetable to guide them through the proceedings can be made.

21-20 Essentially it is necessary to determine what has to be done for the conduct of the arbitration. Generally this will include:

- Schedule for the service of written submissions, claims, counter-claims and defences. The form and structure of written submissions, and whether they include witness evidence and documents.
- Any specific evidentiary rules.
- Representation of parties in the hearings and the entire proceedings.
- Whether the tribunal may decide specific issues with orders or interim awards.
- Arrangements for documentary disclosure, if any.
- Arrangements for communications between the parties and the tribunal.
- How interim procedural issues are to be resolved, *e.g.*, requests for extensions of time. page "527"
- Appointment of a secretary to carry on purely administrative tasks for the tribunal.

21-21 UNCITRAL published the *Notes on Organizing Arbitral Proceedings*⁽¹⁸⁾ to assist parties and arbitrators in determining procedural matters in international commercial arbitration.⁽¹⁹⁾ These can be followed in appropriate circumstances. While there is no reliable data as to how often the UNCITRAL Notes have been used

in practice,⁽²⁰⁾ they undoubtedly provide a useful guide for the preparation and running of arbitration proceedings.

21-22 A number of arbitration rules require the parties and the tribunal to establish terms of reference or procedural directions at an early stage of the proceedings. The purpose is to prescribe the ambit of the arbitration and the issues to be determined.⁽²¹⁾

2.2. Terms of Reference

21-23 Terms of reference are an essential element of ICC arbitration and a pre-requisite to the commencement of the substantive process.⁽²²⁾ The main function of the ICC terms of reference is to fix the subject matter of the arbitration. This is to stop the parties from continually changing the content and nature of their claims.⁽²³⁾ The obligation to draw up the terms of reference is placed on the tribunal “on the basis of documents or in the presence of the parties and in the light of their most recent submissions”. The terms of reference should include

- (a) the full names and descriptions of the parties; page "528"
- (b) the addresses of the parties to which notifications and communications arising in the course of the arbitration may be made;
- (c) a summary of the parties' respective claims and of the relief sought by each party with an indication to the extent possible of the amounts claimed or counterclaimed;
- (d) unless the Arbitral Tribunal considers it inappropriate, a list of issues to be determined;
- (e) the full names, descriptions and addresses of the arbitrators;
- (f) the place of the arbitration; and
- (g) particulars of the applicable procedural rules and, if such is the case, reference to the power conferred upon the Arbitral Tribunal to act as *amiable compositeur* or to decide *ex aequo et bono*.⁽²⁴⁾

21-24 The ICC Rules require the tribunal and the parties to agree and sign the terms of reference within two months of the appointment of the tribunal.⁽²⁵⁾ The effect of the parties' signature is to make the terms of reference an agreement between the parties with its own legal consequences. They may well qualify as a submission to arbitration.⁽²⁶⁾ Terms of reference may also modify the arbitration agreement, *e.g.*, agreeing one rather than three arbitrators or extending jurisdiction to other contracts than the one in which the arbitration agreement exists. If a party refuses to agree or sign the terms of reference the tribunal will sign it and send it for approval to the ICC Court.⁽²⁷⁾ In these cases or when all parties refuse to sign the terms of reference, the document will be merely a record of the tribunal. In any event terms of reference cannot be reviewed by courts.⁽²⁸⁾

21-25 An intriguing complication stems from the fact that arbitrators also sign the terms of reference. Consequently, it has been argued, the terms of reference are binding not only on the parties, but also on the arbitrators, who must comply with the parties' intentions. The Paris Court of Appeal applied this principle page "529" when it set aside an award in which the issue of jurisdiction had been addressed together with the merits of the dispute, though the terms of reference signed by the parties required the arbitrators to rule on their own jurisdiction in a separate award.⁽²⁹⁾ This decision was overruled by the Cour de cassation⁽³⁰⁾ which held that in international arbitration there may be a duty on the arbitrators relating to the procedure to be followed. This can include an obligation to make separate awards concerning jurisdiction and the substance of the dispute, provided that this is unambiguously expressed in the terms of reference. This decision redefines the extent to which the terms of reference bind the tribunal.

21-26 The concept and practice of terms of reference are also found in the rules of other arbitration institutions.⁽³¹⁾ CEPANI is the only other arbitration institution which opted for a detailed list of issues to be agreed in the context of terms of reference. The list of issues includes

...

c) a brief statement of the parties' claims; ...

d) the subject of the arbitration, a description of the circumstances of the case and a definition of the contentious issues; ...

e) the duties of the arbitrator and the questions on which he must decide; ...

...

h) any other particulars deemed useful by the arbitrator.⁽³²⁾

21-27 It has been argued that agreeing terms of reference complicates and delays the proceedings without providing any actual benefit.⁽³³⁾ There are, however, three distinct advantages of terms of reference.⁽³⁴⁾

- First, terms of reference assist the tribunal and the parties to summarise the claims, counterclaims and defences which sometimes are not clearly expressed in the first submissions of the parties.⁽³⁵⁾ The terms of reference set the limits of the dispute and may reduce the risk of the award being set aside by holding that the arbitrators' brief is confined within these limits.⁽³⁶⁾
- Second, terms of reference create a useful framework and focus of consideration and enable the parties to express their views on a number of issues from the outset of the proceedings. They do not limit the discretion of the tribunal regarding the conduct of proceedings.
- Third, terms of reference as a procedural task bring the parties together at the outset of the proceedings. In the event that a party refused to participate in the drawing of the terms, the validity of the subsequent award is not affected.⁽³⁷⁾

2.3. Procedural Directions

21-28 The planning of proceedings in the form of procedural directions is quite a common practice in continental type arbitrations. As a matter of practice international arbitration tribunals increasingly manage the disputes actively by preparing procedural directions. A procedural timetable may take the form of a provisional or final procedural order.⁽³⁸⁾

21-29 Procedural directions, and in particular a procedural timetable, assist the tribunal in the management of the case and can impose discipline on parties which refuse to co-operate or employ delaying tactics. They are often issued in the form of a procedural order so that they can be amended by the tribunal when it is deemed necessary.

21-30 Procedural directions are normally binding on the parties⁽³⁹⁾ but are not enforceable or subject to review by the courts.⁽⁴⁰⁾ Only rarely are courts at the place of arbitration empowered to assist with the enforcement of procedural directions.⁽⁴¹⁾ It will be for the tribunal to decide what action can be taken if a party fails to comply with procedural directions.

21-31 UNCITRAL Notes on Organising Arbitral Proceedings list issues that parties and tribunals may wish to consider. In particular, depending on the volume and kind of documents relevant to each arbitration, it may be helpful to consider whether practical arrangements on details such as the following should be made:

- Whether the submissions will be made as paper documents or by electronic means (*e.g.* CD-ROM), or both;
- The number of copies in which each document is to be submitted;
- A system for numbering documents and items of evidence, and a method for marking them, including by tabs;
- The form of references to documents (*e.g.* by the heading and the number assigned to the document or its date);
- Paragraph numbering in written submissions, in order to facilitate precise references to parts of a text.⁽⁴²⁾

3. Procedural Issues

21-32 The procedural issues to be determined may include (1) whether the proceedings will be conducted in an inquisitorial or adversarial style; (2) the timetable and arrangements for written submission and hearings, including issues of place and language; and (3) additional powers the tribunal may have to decide interim issues and to make interim/partial awards.

3.1. Inquisitorial or Adversarial Proceedings?

21-33 It is a continental European tradition that a court takes the initiative in directing the ascertainment of the facts and the law. For that purpose it may conduct its own examination of witnesses. Litigation in common law countries is, on the other hand, traditionally adversarial.⁽⁴³⁾ In adversarial proceedings the principle is that the parties arrive at the truth by each leading evidence, and then testing that evidence through cross-examination of the relevant witnesses.

21-34 While these characteristics are pertinent in court procedures, arbitration proceedings are more flexible. The parties and the tribunal may agree to conduct proceedings in an adversarial or an inquisitorial way,⁽⁴⁴⁾ or in a hybrid⁽⁴⁵⁾ manner. Often a blend of inquisitorial and adversarial procedure is the best solution. Even where an inquisitorial procedure is followed, it is important that the matters which are to form the basis of the tribunal's decision should be made available for examination and critical analysis by the parties. It is desirable for the tribunal to make use of its general experience and expertise in making its decisions, but where it intends to rely on specific points, these should be put to the parties for examination and comment.⁽⁴⁶⁾

21-35 A harmonising approach would allow a tribunal to permit cross-examination to proceed before the tribunal members put their questions to a witness. This does not prevent a tribunal from, in civil law fashion, exploring matters at length that one or both parties had not viewed as central to their argument. At the same time, this sequence permits the parties to present the case that they think should be advanced, without undue intervention from the tribunal.

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21-36 The choice of the place of arbitration normally has no impact on the style of proceedings. It is the selection of lawyers and arbitrators and their background which may influence the way the proceedings are conducted.⁽⁴⁷⁾

21-37 The choice of institution should not be a determinative factor as to the nature of the proceedings either. In an award made in the Zurich Chamber of Commerce an interesting distinction was made

As the Arbitral Tribunal pointed out at the Hearing of 9 January 1996, the question of jurisdiction is under the inquisitorial system and outside the ambit of the adversarial system which is normally followed on the merits of the case. Accordingly, the Arbitral Tribunal is not limited to the allegations of facts presented to it by the parties. It is on the contrary perfectly proper for an arbitral tribunal to go out on its own and find facts which establish its own jurisdiction.⁽⁴⁸⁾

21-38 English Arbitration Act section 34(2)(g) provides that in the absence of agreement it is for the tribunal to decide "whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law."

21-39 A survey indicates that only a few arbitration laws favour conduct of proceedings in adversarial⁽⁴⁹⁾ or inquisitorial⁽⁵⁰⁾ manner. In any event, it appears that the provisions that favour adversarial or inquisitorial proceedings are not mandatory. Most other laws empower the tribunal to determine the proceedings with regard to ascertaining the facts and the law. Many laws allow for a mixed system.⁽⁵¹⁾ The tribunal should not be bound by any rules applicable in local court proceedings.⁽⁵²⁾

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3.2. Timetable, Written Submissions, and Hearings

a. Timetable

21-40 The tribunal will normally establish in a separate document a timetable which it intends to follow for the conduct of the arbitration.⁽⁵³⁾ In preparing the timetable the tribunal must take into account the complexity and the circumstances of the case, the anticipated amount of evidence to be produced and presented, as well as suggestions of the parties and their counsel. In appropriate circumstances the timetable can always be amended.

b. Hearings or documents only?

21-41 Parties may agree in the arbitration clause how they want the proceedings to be conducted, *i.e.*, orally only, documents only, or mixed. In most cases it is advisable to make such a determination in the light of the actual dispute, ideally in consultation with the tribunal. Some degree of flexibility should be maintained throughout the proceedings. For instance, if the parties decide for a documents only process, they should be able to change the choice to a mixed arbitration by agreement.

21-42 The opportunity of the parties to present their arguments orally is a fundamental element of the proceedings in both the common and civil law litigation systems. In principle and in the absence of an agreement to the contrary, a hearing should be held in most arbitration proceedings.⁽⁵⁴⁾ Consequently most arbitration laws⁽⁵⁵⁾ and rules⁽⁵⁶⁾ require the tribunal to hear the parties, unless the parties have expressly waived that right. However, in France page "535" arbitration tribunals can decide to dispense with hearings and reach their decisions on the basis of the parties' written submissions.⁽⁵⁷⁾

21-43 Arbitration proceedings conducted orally only can be attractive to settle very simple issues. The tribunal may require a meeting as soon as the argumentation becomes sophisticated or documentary evidence has to be submitted in support of the claim or the response to it.⁽⁵⁸⁾

21-44 An arbitration without hearings, a documents only arbitration, can also be attractive in some cases. It will save time and money, including travel and extensive legal costs. Therefore documents are practically suited to disputes between parties from different parts of the world where the amount at issue is relatively small. The main pitfall of a documents-only arbitration is that one party may not be in a position to develop its case properly and the arbitrators will not be able to ask simple clarifying questions. However, clarification questions submitted in writing will almost invariably be possible.

21-45 A *mixed arbitration* may well combine the best of both documents only and oral proceedings. The choice of an oral only or a mixed arbitration is an issue which touches upon the cultural differences of the parties and the arbitrators. Common law lawyers are more accustomed than civil law lawyers to extensive oral argument. Civil lawyers attach much greater importance on written submissions.

21-46 The arbitration tribunal in deciding these matters will normally estimate the necessary (minimum) length of the hearings, whether they will be continuous or arranged in instalments, and the format of the hearings. Before the hearing some tribunals will give the parties a fixed time during which to present their case. This will include both witness statements and oral submissions.

21-47 Where a hearing is held minutes of the hearing are often taken. Minutes will normally include indication of the place, date and names of the parties and their representatives attending, the names of the arbitrators and interpreters and other participants of the hearing. Most importantly they will contain a precise description of the proceedings during the hearing and will also bear the signature of the arbitrators.⁽⁵⁹⁾ Another way of recording the content of the hearing is by tape-recording or production of a full transcript of the session. Advanced page "536" technology, such as voice recognition software, facilitates the production of full records of the hearings which can prove invaluable to the parties and the tribunal.

c. Written submissions

21-48 Comprehensive written submissions are a well-established feature of the international arbitration process. This is, however, an area where different cultures in the conduct of proceedings clash.⁽⁶⁰⁾ The civil law idea that all important issues be fully expressed and elaborated in writing is increasingly the norm in international arbitration. These submissions should tell the story, explain the facts and state the legal positions and contentions of the parties. They should all be produced before the hearing.

21-49 The Model Law sets down the accepted international standard for written submissions. Article 2 provides

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.

21-50 This follows a continental style of proceedings, according to which parties make representations as to the facts, not as to the law. It is usual practice though that parties will also make submissions as to the law supporting their claim or defence. Most modern arbitration systems rely on a “ping pong” type exchange of (written) arguments with numerous exhibits. It is essential that the tribunal communicates clearly to the parties its expectations for a certain type of written submission.

21-51 In practice the full written submissions of the parties are normally prepared at an early stage of the proceedings. As a matter of emerging harmonised international arbitration practice these submissions normally include:

- the facts supporting their claim, or defence or counter-claim;
- legal issues in dispute;
- the relief or remedy sought; page "537"
- contentions about the grounds for jurisdiction of the arbitration tribunal;
- submissions concerning the law governing the arbitration and the law applicable to the substance of the dispute;
- the legal argument;
- detailed specification of amounts of damages claimed; and
- requests for the reimbursement of arbitration expenses and counsel fees.

21-52 A claimant who is confident about his case and wishes to avoid unreasonable delays should present all relevant facts and documents at the first stage of proceedings. Failure to do so may give the respondent an opportunity to delay the proceedings. A party that raises new facts at a later stage of proceedings without reasonable ground and delays the process may be penalised and forced to bear the additional costs caused as a result.⁽⁶¹⁾

21-53 In ICC proceedings several written submissions are made prior to the terms of reference, *e.g.*, request for arbitration, answer, counterclaim, answer to counterclaim.⁽⁶²⁾ These early written statements have considerable importance and will have an impact on the drafting of the terms of reference and the composition of the arbitration tribunal. Initial written submissions are of lesser importance under the UNCITRAL Rules.⁽⁶³⁾

21-54 There are few differences between the rules on the required written submissions. Under LCIA Rules, after the parties have delivered the Request for Arbitration and Answer, written submissions consisting of a statement of case, statement of defence, and statement of reply follow each other within certain time limits. The written submissions should be accompanied by all essential documents on which the party concerned relies and by any other relevant samples or exhibits.⁽⁶⁴⁾

21-55 AAA ICDR Rules provide for the exchange of initial statements of claim and defence,⁽⁶⁵⁾ to be followed by additional written statements should the tribunal so decide.⁽⁶⁶⁾

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21-56 ICSID Rules use the American terms memorial and counter-memorial⁽⁶⁷⁾, to be followed, if necessary, by a reply and a rejoinder.⁽⁶⁸⁾ The memorial shall contain a statement of the relevant facts, a statement of law and a submission. The counter-memorial, the reply and the rejoinder shall respond to the statements and submissions made in the memorial and add any additional facts, statement of law or submissions of the respondent.⁽⁶⁹⁾

21-57 Written submissions are normally exchanged sequentially, *i.e.* first the claimant and the respondent answers. If there is a counterclaim, the respondent would normally submit its counterclaim at the same time as the response to the claimant's claim and that document will then be called “answer and counterclaim” or “defence and counterclaim”. The claimant will then submit the reply to the respondent's counterclaim and sometimes may also be allowed to submit a rejoinder to the respondents' response.⁽⁷⁰⁾ It is exceptional, but

sometimes useful, that the arbitration tribunal requires the parties to make their written submissions simultaneously. This can help to expedite the proceedings.

d. Place(s) of hearing

21-58 The place where the hearings are to be held or where the evidence of witnesses is to be taken is important. It may be the seat of arbitration or another place. This must be determined by agreement between the parties or, failing such agreement, by the arbitration tribunal.

21-59 It is common practice that the arbitration tribunal may, for reasons of convenience, hold hearings at locations other than the place of arbitration without changing the seat of arbitration. Indeed, the choice of seat of arbitration does not normally impose any obligation on the arbitration tribunal to have all hearings and evidence gathering meetings at this very place. Most arbitration laws⁽⁷¹⁾ and page "539"rules⁽⁷²⁾ authorise the tribunal to hold hearings in other places than the seat of the arbitration.

e. Language of hearing

21-60 Arbitration proceedings may be conducted in any language convenient for the parties and the tribunal. This is not necessarily the language at the seat of arbitration. The parties are free to agree the language of proceedings.⁽⁷³⁾ The freedom of parties to choose the language of arbitration and, failing that, the power of the tribunal to determine that language is reflected in all major institutional rules.⁽⁷⁴⁾ The choice of the parties may be contained in the arbitration clause or in the terms of reference. The language of the arbitration agreement can also account for an implied choice of language.⁽⁷⁵⁾ The language of the substantive contract and used in the initial documents of arbitration may be another presumption for an implied choice of language. If the parties cannot agree on the language of proceedings, then the arbitration tribunal has to determine the language which is most appropriate for the proceedings, considering also the convenience of the parties.

21-61 The language of the arbitration should be used, in principle, for all written and oral submissions and for the award. Generally documentary evidence submitted in its original language should be accompanied by a translation into the language of the arbitration. To the extent that the parties include voluminous exhibits, arbitration tribunals may accept documents in the original language, thus restricting the translation of documents provided the parties and the tribunal are conversant with those languages. Parties are naturally entitled to express themselves in their native language, provided they arrange for interpretation in the language of proceedings at their own expense.⁽⁷⁶⁾

21-62 It is convenient but not necessary that the proceedings are conducted in one language and that the arbitrators have a degree of fluency in that language. In page "540"fact the IBA Rules of Ethics for International Arbitrators require knowledge of the language of the arbitration and provide in Article 2(2)

A prospective arbitrator shall accept an appointment only if he is fully satisfied that he is competent to determine the issues in dispute, and has an adequate knowledge of the language of the arbitration.

21-63 The language of the arbitration may impose a moral obligation on the arbitrators and a *de facto* restriction concerning the selection of arbitrators and the selection of the lawyers representing the parties.

f. Notices and time limits

21-64 Tribunals will invariably fix time limits for the submission of written pleadings. Time limits set by the tribunal should be seen as "target time limits"⁽⁷⁷⁾ rather than deadlines; they should be extended when it is reasonable and fair to do so. When deciding whether to admit late submissions a tribunal should consider the circumstances of the cases, the need for equality and fairness, the possibility of prejudice to the other party and the requirements for orderly conduct of proceedings.⁽⁷⁸⁾ An unreasonable rejection of a late submission may be in breach of due process. Some institutional rules provide for time limits to reply to the request for arbitration. They often opt for a 30 days time limit⁽⁷⁹⁾, less often for a 45 days⁽⁸⁰⁾ time limit. Almost all institutional rules provide for the possibility of extending the time limit⁽⁸¹⁾, when justified, and only few provide for the possibility of shortening the time limit⁽⁸²⁾, when it is appropriate to expedite the proceedings.

3.3. Power of Tribunal to Decide Procedural Issues

21-65 It is generally accepted that the arbitration tribunal has the power to decide interim procedural issues, such as the extension of time and requests for document production. In practice tribunals often request the parties to agree that page "541" the chairman shall have the power to act alone in relation to procedural issues, unless one of the parties expressly requests all three arbitrators to be involved.⁽⁸³⁾ This is essential in cases where the co-arbitrators are elusive, and when the matter is urgent, when, for instance, the requested extended period is to expire before the tribunal can have an opportunity to confer.

4. Representation of Parties

21-66 In almost all international arbitrations parties are represented by legal counsel of their choice. While in court proceedings parties are normally represented by local qualified counsel, in international arbitration the parties may select counsel on the basis of their experience. There are no restrictions on the choice of lawyers or even the lawyers being qualified. Parties can choose lawyers in whom they have confidence even though they are not qualified in the law of the place of arbitration or the applicable law.

21-67 Few arbitration rules expressly allow for representation by non-lawyers.⁽⁸⁴⁾ There are some institutions where lawyers may not attend without the permission of the tribunal.⁽⁸⁵⁾ There are also cases where it may be more appropriate for parties to be represented by non-lawyers, e.g., engineers, accountants. In such cases parties will invariably have legal assistance within the representative team.

21-68 There were some jurisdictions which precluded foreign lawyers from representing parties in arbitration. These included Malaysia, Singapore and Japan. This has changed.

21-69 In Malaysia the Supreme Court ruled in 1989 that foreign lawyers may represent parties in arbitration proceedings held in Malaysia.⁽⁸⁶⁾

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21-70 In Singapore, the Legal Profession (Amendment No 2) Act 1991 overturned the High Court decision in *Turner Pte Ltd v Builders Federal**⁽⁸⁷⁾ that ruled against foreign lawyers appearing in arbitration proceedings.⁽⁸⁸⁾ Singapore was fairly rapid in curing the defect by enacting the Model Law and amending the Legal Profession Act. As a result foreign lawyers can represent parties provided they have local legal representation for matters involving Singapore law.

21-71 Recently, the Supreme Court of California held that a New York lawyer cannot represent a party in arbitration proceedings held in California. The court held that representing a party in arbitration is legal practice which, in the State of California, is reserved for members of the California Bar. The implication was that the counsel was unable to recover his fee when he failed a claim for it.⁽⁸⁹⁾ The court, fortunately, made an express exception from its rule with regard to international arbitration.

21-72 The English Arbitration Act in section 36 takes a liberal approach

Unless otherwise agreed by the parties, a party to arbitral proceedings may be represented in the proceedings by a lawyer or other person chosen by him.

21-73 It seems that this is the approach taken in all modern arbitration laws, either as a result of legislation or case law.⁽⁹⁰⁾ In Japan, rule 4 of the new rules of page "543" the JCAA omit the reference to *bengoshi*, thus allowing foreign lawyers as counsel to arbitration in Japan⁽⁹¹⁾ and following international standards. Article 21 Arbitration Rules of the Singapore International Arbitration Centre follows the same trend.

21-74 A final point with regard to legal representation relates to the existence of power to represent a party and the proof of such power. The tribunal or arbitration institution may require proof of such authority at an early stage. Article 21(4) ICC Rules requires "duly authorised representatives". Article 18(2) LCIA Rules gives a right to the tribunal to require proof of the authority of the representatives. The tribunal has discretion as to when and what form of proof of authority may be requested.⁽⁹²⁾ A number of rules or institutions require the parties to communicate directly with the tribunal in writing to confirm the appointment of their representatives.⁽⁹³⁾ In practice many tribunals require the lawyers to provide a power of attorney confirming their authority to represent the client.

5. Default Proceedings

21-75 There is a general assumption that all parties will co-operate in arbitration proceedings. However, there are cases where one party, normally the respondent, will refuse or just ignore the arbitration. In these circumstances the defaulting party may undermine or, at least, slow down the proceedings. The effect of a defaulting party raises practical questions for both the tribunal and the other party as it may have implications on the enforceability of the award.

21-76 Default of appearance is not unknown in court proceedings. However, in litigation, courts possess coercive power and can proceed without the participation of one party (“*ex parte*”). International arbitration by contrast is based on the agreement of parties to submit their disputes to arbitration and default of appearance raises due process concerns.⁽⁹⁴⁾ The question is whether and page "544" in what circumstances a tribunal can make a default award.⁽⁹⁵⁾ Hence, it is essential that the tribunal has the power to proceed if one of the parties fails to appear. Most recent arbitration laws⁽⁹⁶⁾ and rules⁽⁹⁷⁾ have dealt with default proceedings in an unequivocal support of the arbitration proceedings.

21-77 It is essential that tribunals intending to make use of their power to render a default award exercise maximum care and specify the circumstances in the text of the award.⁽⁹⁸⁾ Such a practise will disarm a party who will try to resist enforcement of any award rendered.

5.1. Forms of Default

21-78 There are four circumstances which can be classified as failure to participate in the proceedings:

- When a party refuses to take any part in the proceedings because the tribunal allegedly lacks jurisdiction.⁽⁹⁹⁾
- When a party refuses to reply to communications from the tribunal or to comply with procedural directions, such as submissions of pleadings, or production of documents.⁽¹⁰⁰⁾
- When a party does not notify any unwillingness to participate, but creates such an unreasonable delay which could be treated as having abandoned its right to present its case.⁽¹⁰¹⁾ page "545"
- When a party disrupts the hearing so that it becomes impossible to conduct it in an orderly manner.⁽¹⁰²⁾

5.2. Proceedings in the Absence of one or more Parties

21-79 The clear intention in the laws or rules relating to default of appearance is to allow arbitrators to continue proceedings and render an award or to dismiss the proceedings, if it is the claimant who defaults. This power is essential in order to safeguard the effectiveness of international commercial arbitration.

21-80 A default procedure, however, is subject to two conditions. First, the parties should not have agreed upon excluding default proceedings or provided for special protection in case of default. Second, the provision can only operate, if the tribunal is of the opinion that the party which failed to take part in the proceedings does not have a “sufficient cause”⁽¹⁰³⁾ for its absence.⁽¹⁰⁴⁾

21-81 Default of claimant and default of respondent should be treated differently. The Model Law covers four different scenarios and differentiates between claimant and respondent in only two of them.

- Under Article 25(a) where a claimant initiated arbitration proceedings but fails to communicate the statement of claim, the tribunal could terminate the proceedings and order the claimant to pay costs. An order for termination should not be automatic. The tribunal must warn the claimant, at least once, normally twice, before terminating the proceedings. A question remains whether the tribunal should dismiss the proceedings “with” or “without prejudice”, *i.e.*, having determined or not determined the substantive issues.⁽¹⁰⁵⁾ page "546"
- Under Article 25(b) where a respondent fails to communicate the statement of defence in time, the tribunal will invariably admit late submissions. The problem is normally where the respondent does not make any submissions and ignores the tribunal's communications. In such case, under Article 25(b) the tribunal has the power to continue the proceedings *ex parte* and make a binding award.⁽¹⁰⁶⁾ The failure of the respondent to react to the claim should not be treated as an admission of the claimant's allegations. The tribunal will have to gather evidence and critically assess the claimant's submissions; it should determine the issues, not merely take

arguments from one party.⁽¹⁰⁷⁾ The tribunal will also have to ensure that the defaulting party has been notified in an appropriate manner, normally by registered letter.

- Where the claimant or the respondent fails to appear at a hearing or in the entire proceedings,⁽¹⁰⁸⁾ without sufficient cause, under Article 25(c) the tribunal may continue the proceedings and render an award on the basis of evidence before it.
- Where the claimant or the respondent fails to produce documentary evidence, the tribunal pursuant to Article 27 can request a court to compel the party to submit this evidence, or the tribunal may continue the proceedings and render an award on the basis of the evidence before it.

21-82 If a party fails to comply with a tribunal's directions, under certain laws and rules the tribunal is entitled to issue a peremptory order,⁽¹⁰⁹⁾ and failing page "547" compliance with such order it is entitled after notice to the party in default to proceed *ex parte*.⁽¹¹⁰⁾ The tribunal should carry on with a hearing *ex parte*, examine whether it has jurisdiction, assess the situation, and determine the issues in dispute.⁽¹¹¹⁾ It is also important to give notice to the defaulting party for every stage of the proceedings. Whatever the circumstances the tribunal must at all times act impartially and fairly between the parties.

21-83 On the balance of interests and in the interest of justice it is essential that international commercial arbitration does not accommodate delaying and bad faith driven tactics. The power of a tribunal to make a default award pays service to the effectiveness of international commercial arbitration.⁽¹¹²⁾ The tribunal cannot allow the proceedings to drag on indefinitely if one of the parties is not actively participating in the process. In any event, there must be evidence that the defaulting party was summoned in an adequate manner and with reasonable notice. Therefore notices should preferably be made by means which provide proof of receipt and it may even be advisable for the tribunal to repeat the notification shortly before the hearing and other notable dates in the proceedings. All principles of due process must have been regarded. If that is the case then the default award should be enforceable.⁽¹¹³⁾

6. Expedited Procedures

21-84 The development of arbitration world-wide and the emergence of formalism in procedure have slowed down arbitration proceedings significantly. To overcome this problem expedited procedures or fast-track arbitrations have been introduced. Historically, swift arbitrations are not a novelty. Quality, commodity and some motor insurance arbitrations are numerically significant but legally indifferent. Modern fast arbitration concerns international commercial page "548" arbitrations with often complex and challenging legal issues which cannot wait too long to be resolved.

21-85 Expedited proceedings, in which parties agree to shorten the time limits that would otherwise apply, can be found in a number of institutions either explicitly⁽¹¹⁴⁾ or as an expression of party autonomy. Where parties agree on a procedural timetable with stringent deadlines the arbitration may be referred to as fast-track.⁽¹¹⁵⁾

21-86 The widely publicised *Panhandle* case is an example of ICC fast-track arbitration. The parties had agreed that in the event of a dispute, certain issues were to be resolved by the arbitration tribunal within two months of the request for arbitration. These issues concerned the determination of the price in a long-term gas supply contract between Canada and the United States. It took nine weeks for the arbitration proceedings and the award to be rendered by the tribunal.⁽¹¹⁶⁾

21-87 The development of fast-track or expedited arbitration is welcome and may contribute to the appeal of arbitration to potential users who have been reluctant because of costs and time spent. However, fast-track or expedited proceedings can only be used for issues which are capable of being resolved in page "549" such a manner. Price and quality determination are good examples. Sports disputes can also be resolved within a few days.⁽¹¹⁷⁾

21-88 Fast-track proceedings may compromise due process or equality of parties.⁽¹¹⁸⁾ The parties (in particular, the respondent) must have enough time to prepare their cases. Another consideration for fast-track arbitration is to choose a place of arbitration where the local courts can be of assistance in hearing applications to extend time limits.⁽¹¹⁹⁾

21-89 In all fast-track arbitrations the tribunal plays a significant role in ensuring that arbitration will be efficient and as rapid as possible. Setting short deadlines may be counterproductive if the parties and their

counsel do not cooperate. However, active case management and adequate organisation may contribute to a speedy resolution.⁽¹²⁰⁾

21-90 The NAI Rules have also introduced a unique “summary proceedings mechanism”⁽¹²¹⁾ modelled after the Netherlands Code of Civil Procedure summary proceedings (*kort geding*).⁽¹²²⁾ The summary proceedings of NAI⁽¹²³⁾ are automatically available to parties that have agreed on the application of the NAI Rules and the place of arbitration is in the Netherlands, provided that the parties have made a separate agreement to that effect. This mechanism offers a variety of practical and strategic advantages, including the availability of a broad range of reliefs, an extremely expedited process (normally between a few days and few weeks) and reduced legal costs. Further pursuant to Article 1051(3) Netherlands CCP decisions rendered in the context of summary proceedings are classified as awards in the context of the New York Convention.

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21-91 The 1998 NAI Rules establish two alternatives for the use of summary proceedings.

- The first is *an ancillary procedure* that can be used where an arbitration on the merits has been commenced and the tribunal has been constituted.⁽¹²⁴⁾ The ancillary procedure can commence at any stage of the proceedings before an existing tribunal, provided that a party files a request⁽¹²⁵⁾ for summary proceedings seeking an immediate provisional measure.⁽¹²⁶⁾
- The second and more interesting alternative is *the stand-alone procedure* which can be invoked where the proceedings have not commenced and the tribunal has not been constituted.⁽¹²⁷⁾ Section 4A NAI Rules allows the commencement of summary arbitration proceedings by a party in cases where no arbitration on the merits has been filed, or where such arbitration has been filed but the tribunal has not yet been constituted.⁽¹²⁸⁾ The procedures established in Section 4A are designed with speed in mind. The procedure is left to the discretion of the tribunal and typically consists of oral argument by counsel. Parties may produce evidence as they see fit.

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¹—See Karrer, “Freedom of an arbitral tribunal to conduct the proceedings” 10(1) *ICC Bulletin* 14 (1999) 16.

²—See similarly European Convention Article IX(1)(d) and Inter-American Convention Articles 2 and 3.

³—This is true despite the fact that international arbitration proceedings have become increasingly judicialised. See Oppetit, “Philosophie de l’arbitrage commercial international”, 120 *Clunet* 811 (1993) 818.

⁴—See Hong-Lin Yu and Molife, “The Impact of National Law Elements on International Commercial Arbitration”, 4(1) *Int ALR* 17 (2001).

⁵—See, e.g., Germany, ZPO section 1042(4); Russian Federation, Arbitration Law Article 19.

⁶—See, e.g., Belgium, Judicial Code Article 1693; Brazil, Arbitration Law Article 21; England, Arbitration Act section 34(1); France, NCPC Article 1494; Netherlands, CCP Article 1036; Switzerland, PIL Article 182(1).

⁷—See, e.g., Brazil, Arbitration Law Article 21; England, Arbitration Act section 4(3); Switzerland, PIL Article 182(2).

⁸—A good example can be seen in section 5a of the 2002 Rules and Principles of the Arbitration Court attached to the Economic Chamber of Czech Republic which provides:

The arbitrators shall be free to proceed in the proceedings in a manner they consider appropriate always ensuring the equal treatment of the parties and providing all parties with an equal opportunity to exercise their rights with the aim of ascertaining, without unnecessary formalities, all the facts of the dispute necessary for its resolution.

⁹—The issue of whether the party autonomy in determining procedure ceases with the establishment of the tribunal was debated in the UNCITRAL Working Group which discussed the Model Law. The Working Group suggested that the autonomy of parties is continuous. However, as a matter of practice, once arbitration has started, the proceedings are fixed by the arbitrators. See Sanders, “Chapter 12: Arbitration”, in Cappelletti (ed), *IECL Vol XVI: Civil Procedure* (Mohr Siebeck and Martinus Nijhoff 1996), para 157, 102-3.

¹⁰—For a comprehensive discussion of the various models representing the territoriality versus autonomy debate and the importance of mandatory rules of the place of arbitration see Park, “The *Lex Loci Arbitri* and International Commercial Arbitration”, *ICLQ* 31 (1983); Goode, “The Role of the *Lex Loci Arbitri* in International Commercial Arbitration”, 17 *Arb Int* 19 (2001). See also *Union of India v McDonnell Douglas*,

[1993] 2 Lloyd's Rep 48; XIX YBCA 235 (1994); *Dubai Islamic Bank PJSC v Paymentech Merchant Services Inc* [2001] 1 Lloyd's Rep. 65 (QBD). See also the recent debate: Nakamura, "The Place of Arbitration - Its Fictitious Nature and Lex Arbitri", 15(10) *Mealey's IAR* 23 (2000); Rubins, "The Arbitral Seat is No Fiction: A Brief Reply to Tatsuya Nakamura's Commentary, 'The Place of Arbitration - Its Fictitious Nature and Lex Arbitri'", 16(1) *Mealey's IAR* 23 (2001); Pinsolle, "Parties to An International Arbitration With the Seat in France are at Full Liberty to Organise the Procedure as They See Fit: A Reply to the Article By Noah Rubins", 16(3) *Mealey's IAR* 30 (2001); Nakamura, "The Fictitious Nature of the Place of Arbitrations May not Be Denied", 16(5) *Mealey's IAR* (2001).

¹¹See Holtzmann and Neuhaus, *Model Law*, 550.

¹²[Emphasis added].

¹³[Emphasis added], Belgium Judicial Code Article 1694(1).

¹⁴[Emphasis added], England Arbitration Act section 33(1)(a).

¹⁵See Model Law Articles 23(1), 24(1)(3), 25 and 26(2); Belgium, Judicial Code Articles 1683, 1693, 1694; Brazil, Arbitration Law Articles 19-22; China, Arbitration Law Articles 21-29, 39-48; England, Arbitration Act sections 14, 33-45; France, NCPC Articles 1460-1461, 1467-1468; Germany, ZPO sections 1042-1050; Hong Kong, Arbitration Ordinance sections 2GA-2GG and Model Law provisions; Netherlands, CCP Articles 1036-1042; Switzerland, PIL Articles 181-185; US, FAA section 7. See also GAFTA Rule 4. Under the Model Law where the claimant sets out its claim and relief sought the respondent shall state its defence to the claim: Article 23(1); a party may request a hearing: Article 24(1); all statements, documents or other information supplied to the tribunal by one party must be communicated to the other party. The tribunal is also required to communicate to the parties any expert report or evidentiary document on which the award may rely: Article 24(3); default proceedings may only be carried on when the defaulting party cannot justify its default. Documents and submissions still have to be communicated to the defaulting party: Articles 24(3) and 25; a party may challenge an expert appointed by the tribunal at a hearing: Article 26(2).

¹⁶The principle is known as "*audi alteram partem*". See Van Houtte, "Conduct of Arbitral Proceedings", in Šarčević (ed), *Essays*, 113, 126.

¹⁷See, e.g., Model Law Articles 19(2); Belgium, Judicial Code Article 1693(1); England, Arbitration Act sections 33 and 34; France, NCPC Article 1494; Switzerland, PIL Article 182(2); ICC Rules Article 15(1); LCIA Article 14(2); UNCITRAL Rules Article 15(1).

¹⁸UN Doc V 96-84935. See also XXII YBCA 448 (1997).

¹⁹See discussion on the UNCITRAL Notes on Organising Arbitral Proceedings in van den Berg (ed), *ICCA Congress Series no 7*, 172-195.

²⁰See, however, the first NAFTA award – Annex 1: Decision Regarding the Place of Arbitration in *Ad hoc* arbitration, 28 November 1997, *Ethyl Corporation v The Government of Canada*, XXIVa YBCA 211 (1999).

²¹The terms of reference consist of a document which is signed by the parties and the arbitration tribunal.

²²The original purpose of the terms of reference was to overcome the French legal rule at the time that an agreement to arbitrate future disputes was invalid. By listing the issues in dispute in the terms of reference, which were agreed by the parties, there was a submission agreement of an existing dispute ("*compromis*") which was valid. See Derains and Schwartz, *ICC Rules*, 228; Craig, Park and Paulsson, *ICC Arbitration*, 273-4.

²³ICC Rules Article 19 provides that after the terms of reference "no party shall make new claims or counterclaims 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 or counterclaims, the stage of the arbitration and other relevant circumstances."

²⁴ICC Rules Article 18(1).

²⁵ICC Rules Article 18(2).

²⁶See Cour d'appel Paris, 19 March 1987, *Kis France v ABS*, Rev Arb 498 (1987); Cour d'appel Paris, 12 January 1988, *Replor SA v Ploemeloise de financement, de participation, d'investissement SARL*, Rev Arb 691 (1988). This will, however, only be the case where there is no challenge to the jurisdiction of the tribunal. Where one party is challenging jurisdiction it will either refuse to sign the terms of reference or do so only in respect of the tribunal deciding the jurisdictional challenge.

²⁷ICC Rules Article 18(3). See also CEPANI Rules Article 24(2).

²⁸See, however, Supreme Court of Argentina, 24 October 1995, *Compania Naviera Perez SACFIMFA v Ecofisa SA*, 11(2) *Mealey's IAR* 9 (1996).

²⁹See Cour d'appel Paris, 19 December 1986, *OIAETI v SOFIDIF*, Rev Arb 359 (1987) and note Gaillard, Rev Arb 275 (1987).

³⁰Cour de cassation, 8 March 1988, *SOFIDIF v OIAETI*, Rev Arb 481 (1989).

³¹See CEPANI Article 24; AIA Article 24; JCAA Article 15; Euro-Arab Chamber of Commerce Article 23(7). A different concept of terms of reference is often used with regard to the appointment of an expert by the Tribunal. See, e.g., UNCITRAL 27(1); EDF Article 28(1); CMI 11(4); Iran-US Claims Tribunal 27(1); MIGA 43(c); NAI 31(1); and WIPO 55(a).

³²—CEPANI Rules Article 2(1).

³³—See Smit, “The Future of International Commercial Arbitration: A Single Transnational Institution?”, 25 *Columbia J Transnat'l L* 9 (1986) 21.

³⁴—See Craig, Park and Paulsson, *ICC Arbitration*, 273-293; Bond, “ICC Terms of Reference Rules Saves Time and Money While Promoting Common Understanding”, 6(8) *Mealey's IAR* 33 (1991); Fouchard Gaillard *Goldman on International Commercial Arbitration*, paras 1231-1234.

³⁵—Frequently the effect of terms of reference is to assist the parties to reach a settlement.

³⁶—See Cour de cassation, 6 March 1996, *Farhat Trading Co v Daewoo*, Rev Arb 69 (1997).

³⁷—See Cour d'appel Paris, 28 June 1991, *KFTCIC v Icori Estero*, Rev Arb 568 (1992).

³⁸—See, e.g., the First NAFTA award – Award on Jurisdiction in *Ad hoc* arbitration, 24 June 1998, *Ethyl Corporation v The Government of Canada*, XXIVa YBCA 211 (1999).

³⁹—See, e.g., England, Arbitration Act section 40(2)(a).

⁴⁰—See, e.g., Pryles, “Interlocutory Orders and Convention Awards: The case of *Resort Condominiums v*

Bolwell”, 10 *Arb Int* 385 (1994) 392; Austrian Supreme Court, 12 April 1994, *Dipl Ing Peter L v Dr Andreas R et al*, 4 Obester Gerichtshof 1542/94, and comment by Melis, in XXII YBCA 264 (1997); Tribunal de Grande Instance Paris, 21 May 1997, *Cubic Defense System v Chambre de Commerce Internationale*, Rev Arb 417 (1997). Hjermer, “On partial awards, orders and other decisions in arbitral proceedings, in particular with respect to arbitration in Sweden”, *Yearbook of the Stockholm Arbitration Institute* 31 (1984); Swiss Tribunal Fédéral, 2 July 1997, *L Ltd Gibraltar v The Foreign Trade Association of the Republic of U*, 3 ASA Bulletin 494 (1997) 498; See also Jarvin, “To What Extent Are Procedural Decisions of Arbitrators Subject to Court Review?”, van den Berg (ed), *ICCA Congress series no 9*, 366-382.

⁴¹—The 1991 Alberta Arbitration Act expressly refers to procedural direction in the title of Article 25 and gives power to local courts to enforce procedural directions; see also England, Arbitration Act section 41(5).

⁴²—UNCITRAL Notes para 42 with further references.

⁴³—The case management system introduced with the 1999 Civil Procedure Rules in England is a clear indication that a traditional adversarial procedure is moving towards a mild inquisitorial system. This is also the case with recent reforms in the United States and Japan.

⁴⁴—See Tateishi, “Inquisitorial Approach in Dispute Resolution”, 44 *Wave Length Bulletin of the Japanese Shipping Exchange* 8 (March 2002).

⁴⁵—Such an approach was taken in the Iran-US Claims Tribunal. See Holtzmann, “Fact-finding by the Iran-United States Claims Tribunal”, in Lillich (ed), *Fact-Finding before International Tribunals*, 101 *et seq.*

⁴⁶—There are not many reported cases where an award was challenged because the tribunal based its award on arguments not discussed by the parties. Such a process can be seen as excess of the tribunal's authority. Nevertheless, authority exists to support the proposition that any issue that is inextricably tied up with the merits of the underlying dispute may properly be decided by the arbitrator. See *Dighello v Busconi*, 673 F Supp 85, 87 (D Conn 1987), *aff'd mem* 849 F 2d 1467 (2d Cir 1988).

⁴⁷—See Redfern and Hunter, *International Commercial Arbitration*, para 6-12, with references to two unpublished cases (*Oranzio de Nora Impianti Elettrochimici v The Government of Kuwait* and ICC Case no 1776).

⁴⁸—See award in case no 273/95, 31 May 1996, *Raw material processor (Hungary) and Processing group (Argentina) v Raw material seller (Russian Federation)*, XXIII YBCA 128 (1998).

⁴⁹—Brazil, Arbitration Law Article 21(2). But see Article 8 regarding arbitration agreement and Article 22(1) regarding evidence where the arbitration tribunal can ascertain facts and law in an inquisitorial manner; Portugal, Law no 31/86 Article 16(1).

⁵⁰—Austria, CCP Article 587(1); Iraq, Law of Civil Procedure Article 267; New Zealand, Arbitration Act 1996 section 3(1)(a) of the Second Schedule (optional rules); Singapore, International Arbitration Act 1994 Article 12(3); Japan, Draft Arbitration Law Article 27(1).

⁵¹—See, e.g., Model Law Articles 18 and 23; England, Arbitration Act section 34(2)(g) (at the discretion of the tribunal); France, NCPC Article 1460; Switzerland, PIL Article 182(2).

⁵²—See, e.g., France, NCPC Article 1460.

⁵³—See, e.g., ICC Rules Article 18(4).

⁵⁴—See Wilbeforce, “Written Briefs and Oral Advocacy”, 5 *Arb Int* 348 (1989); Borris, “Common Law and Civil Law: Fundamental Differences and Their Impact on Arbitration” 2 *ADRLJ* 92 (1995) 95.

⁵⁵—Unlike arbitration rules, only a few arbitration laws have specific provisions. See, e.g., Model Law Article 24; China, Arbitration Law Article 39; England, Arbitration Act section 33; France, NCPC Article 1494; Germany, ZPO section 1047; Netherlands, CCP Article 1039; Sweden, Arbitration Act section 24; Switzerland, PIL Article 182.

⁵⁶—See, e.g., UNCITRAL Rules Article 15(2); AAA ICDR Articles 16, 20; CIETAC Articles 6, 32; CEPANI Article 25; DIS Section 28; Iran-US Claims Tribunal Article 15(2); ICC Articles 20, 21; LCIA Article 19(1);

LMAA Term 14; ICAC Rule 27 (hearing only); NAI Article 26; SIAC Rule 22; Stockholm Institute Article 25; Vienna Article 14(1); WIPO Article 53.

⁵⁷—See Fouchard Gaillard Goldman *on International Commercial Arbitration*, 706, para 1296.

⁵⁸—See van Houtte, “Conduct of Arbitral Proceedings”, in Šarčević (ed), *Essays*, 113, 117.

⁵⁹—See, e.g., Economic Chamber of Czech Republic Arbitration Court Rules and Principles 2002 section 30.

⁶⁰—See Lew and Shore, “International Commercial Arbitration: Harmonising Cultural Differences”, 54-Aug *Disp Resol J* 33 (1999).

⁶¹—Van Houtte, “Conduct of Arbitral Proceedings”, in Šarčević (ed), *Essays*, 113, 121.

⁶²—See ICC Rules Articles 4 and 5.

⁶³—See UNCITRAL Rules Articles 18 and 19.

⁶⁴—LCIA Article 15(6). The WIPO Rules take a similar approach with regard to statement of claim (Article 41) and statement of defence and further written statements (Article 42).

⁶⁵—AAA ICDR Rules Article 2.

⁶⁶—AAA ICDR Rules Article 17(1).

⁶⁷—On the terminology see Redfern and Hunter, *International Commercial Arbitration*, para 6-56.

⁶⁸—ICSID Rules Article 31.

⁶⁹—ICSID Rules Article 31(3).

⁷⁰—See Redfern and Hunter, *International Commercial Arbitration*, para 6-55.

⁷¹—See, e.g., Model Law Article 20(1). See similar formulations in Belgium, Judicial Code Article 1693(2); England, Arbitration Act section 53 (impliedly); Germany, ZPO section 1043(2); Netherlands, CCP Article 1037(3).

⁷²—See, e.g., UNCITRAL Rules Article 16(2) and (3); AAA ICDR Article 13(2); DIS section 21(2); ICC Article 14(2) and (3); LCIA Article 16(2); ICAC section 7(2) and (3) (only within the territory of Russian Federation); NAI Article 22; Vienna Article 1(3); WIPO Article 39(b).

⁷³—See, e.g., Model Law Article 22(1) and Holtzmann and Neuhaus, *Model Law*, 628-630.

⁷⁴—See, e.g., UNCITRAL Rules Article 17; AAA ICDR Rules Article 14; CIETAC Article 75; CEPANI Articles 12, 22; DIS sections 6(3) and 22; Iran-US Claims Tribunal Article 17; ICC Article 16; LCIA Article 17; MIGA Article 29; ICAC Rule 10; NAI Article 40; SIAC Rule 20; Stockholm Institute Article 23; Vienna Article 6; WIPO Article 40; Zurich Article 22.

⁷⁵—See AAA ICDR Article 14.

⁷⁶—See UNCITRAL Report, *ILM* 1343 (1985).

⁷⁷—See Redfern and Hunter, *International Commercial Arbitration*, para 6-57.

⁷⁸—See Holtzmann, “Fact-finding by the Iran-United States Claims Tribunal”, in Lillich (ed), *Fact-Finding before International Tribunals*, 101, III-1.

⁷⁹—See, e.g., LCIA Article 15; CAMCA Article 19; CIETAC Article 19; SIAC Rule 18.

⁸⁰—See, e.g., UNCITRAL Rules Article 23; SIAC Article 18(5); AAA ICDR Rules Article 17(2). In all the mentioned rules 45 days are deemed as the maximum period unless otherwise agreed.

⁸¹—See, e.g., ICC Article 5; LCIA Articles 4, 15; UNCITRAL Rules Articles 22; Geneva Rule 6, CAMCA Article 19; Vienna Article 8; CEPANI Article 15; AIA Article 10; NAI Article 3; SIAC Article 18(5); AAA ICDR Article 4, 17.

⁸²—See, e.g., ICC Article 32; Geneva Article 31.

⁸³—Hunter, “The Procedural Powers of Arbitrators under the English Act”, 13 *Arb Int* 345 (1997) 357. See also, e.g., England, Arbitration Act section 34(3).

⁸⁴—See UNCITRAL Rules Article 4; AAA ICDR Article 12; ICC Article 21(4); LCIA Article 18; LMAA Third Schedule 14; NAI Article 21; WIPO Article 13. The silence of the other rules should not be read as tacit exclusion of non-lawyers. Tateishi, “Recent Japanese Case Law in Relation to International Arbitration”, 17(4) *J*

Int'l Arb 63 (2000) 66; Rivkin, “Keeping Lawyers out of International Arbitrations”, *Int'l Fin L Rev* 11 (1990).

⁸⁵—See LME Rules Article 8(1). See also *Henry Bath & Son Ltd v Birgby Products* [1962] 1 Lloyd's Rep 389 (QBD).

⁸⁶—*Government of Malaysia v Zublin - Muhibbah Joint Venture, consisting of Ed Zublin AG and Muhibbah Engineering Sdn Bhd*, XVI YBCA 166 (1991) (Supreme Court, 2 January 1990). The High Court decision is published in 2 *Current Law Journal* 112 (July 1990). The Supreme Court stated:

Having heard submissions from ... parties, and ... from the Bar Council, I gave a decision ... that a person representing a party in an arbitration proceeding need not be an advocate and solicitor within the meaning of the Legal Profession Act 1976; and that the said Act has no application to an arbitration proceeding in West Malaysia.

⁸⁷—*Turner (East Asia) Pte Ltd (Singapore) v Builders Federal (Hong Kong) Ltd (Hong Kong) and Josef Gartner & Co (FR Germany)*, (1988) 5(3) *J Int'l Arb* 139; (1988) 3(4) Mealey's IAR 6-9 and C1-C26; (1989) XIV YBCA 224 (High Court of Singapore 30 March 1988).

⁸⁸—The High Court of Singapore, although it acknowledged that the Legal Profession Act has no application to arbitration proceedings, ruled that representation of the respondents by a New York firm would contravene sections of the Act in its 1988 version. See the critical discussion in Lowenfeld, “Singapore and the Local Bar: Aberration or III Omen?”, 5(3) *J Int'l Arb* 71 (1988); Rivkin, “Restrictions on Foreign Counsel in International Arbitrations”, XVI YBCA 402 (1991).

⁸⁹—*Birbrower, Montabano, Condon & Frank v The Superior Court of Santa Clara County*, 1998 Cal Lexis 2; 1998 WL 1346 (Cal 1/5/98).

⁹⁰—In France see Cour de cassation, 19 June 1979, *SARL Primor v Société d'exploitation industrielle de Bétaigne*, Rev Arb 487 (1979). See also Rivkin, “Restrictions on Foreign Counsel in International Arbitration” XVI YBCA 402 (1991). The survey identified in the early 1990s Singapore, Turkey, Japan, Portugal and Yugoslavia as arbitration venues which do not allow for foreign legal counsels. In almost all these countries the practice or the law has changed.

⁹¹—See Stevens, “Japan Commercial Arbitration Rules Revisited”, 9(3) *Arb Int* 317 (1993); Stevens, “Foreign Lawyer Advocacy in International Arbitrations in Japan”, 2 *JCAA Newsletter* 1 (1997). See also Nakamura,

“Continuing Misconceptions of International Commercial Arbitration in Japan”, 18(6) *J Int'l Arb* 641 (2001) 642-3.

⁹²—SIAC Article 21 vests the tribunal with similar discretion.

⁹³—See, e.g., ICSID Rules Article 18(1); UNCITRAL Rules Article 4; WIPO Article 13(a).

⁹⁴—See, e.g., New York Convention Article V(1)(b).

⁹⁵—For a comparison of default awards and default judgments see Steyn, “Remedies Against the Reluctant Respondent: The Position Under English Law”, 5(3) *Arb Int* 294 (1989).

⁹⁶—See, e.g., Model Law Article 25; Canada, Act to Amend CC and CCP in Respect of Arbitration Article 944(5); China, Arbitration Law Article 42; Colombia, Law 315 of 1996 Article 22; Czech Republic, Arbitration Act 1994 Article 21; England, Arbitration Act section 41; Germany, ZPO section 1048; Hungary, Act LXXI 1994 section 35; Japan, Draft Arbitration Law Article 26; Netherlands, CCP Article 1040; US, FAA Section 4. France, NCPC contains no specific provision.

⁹⁷—See, e.g., UNCITRAL Rules Article 28; WIPO Article 56; MIGA Rules Article 49; IACAC Article 28; AAA ICDR Article 23; CIETAC Article 42; DIS Section 30; JCAA Article 28; NAI Article 36. See also Tunik, “Default Proceedings in International Commercial Arbitration”, 1(2) *Int ALR* 86 (1998).

⁹⁸—See van den Berg (ed), *ICCA Congress Series no 5*.

⁹⁹—See, e.g., Award on Re-opening, *ad hoc* arbitration, August 1974, *British Petroleum Company (Libya) Ltd v The Government of the Libyan Arab Republic*, 53 ILR 297 (1979), V YBCA 158 (1980).

¹⁰⁰—See, e.g., Model Law Article 25(a) and (b). For a commentary see Holtzmann and Neuhaus, *Model Law*, 698-701 and legislative history, 701-716.

¹⁰¹—It is worth noting that arbitration tribunals are normally very liberal with deadlines as they want to avoid unfair hearing allegations. See Redfern and Hunter, *International Commercial Arbitration*, 337, para 6-109. See also Irish Supreme Court, 11 July 1989, *SH Ltd v Grangeford Structures Ltd*, 5(2) Mealey's IAR B1-5 (1990). See also ICSID Convention Article 45(2). On the application of this rule by ICSID tribunals see, e.g., ICSID case no ARB/83/2, 31 March 1986, *Liberian Eastern Timber Corp v The Government of the Republic of Liberia*, 26 ILM 647 (1987), XIII YBCA 35 (1988).

¹⁰²—Redfern and Hunter, *International Commercial Arbitration*, paras 6-108 and 6-109.

¹⁰³—This phrase was debated extensively in the drafting of the Model Law. See Holtzmann and Neuhaus, *Model Law*, 698-716.

¹⁰⁴—Van Houtte, “Conduct of Arbitral Proceedings”, in Šarčević (ed), *Essays*, 113, 122.

¹⁰⁵—For example, in ICC award in case no 6998 (1994), *Hotel and Hotel v Joint Venture Co and Joint Venture Co*, XXI YBCA 54 (1996) para 83, the tribunal held that “without prejudice” refers to future rights but not to rights prior to the hearing date.

¹⁰⁶—See also England Arbitration Act section 41(4)

If without showing sufficient cause a party-

- (a) fails to attend or be represented at an oral hearing of which due notice was given, or
- (b) where matters are to be dealt with in writing, fails after due notice to submit written evidence or make written submissions, the tribunal may continue the proceedings in the absence of that party or, as the case may be, without any written evidence or submissions on his behalf, and may make an award on the basis of the

evidence before it.

¹⁰⁷—See England, Arbitration Act section 33 and DAC Report, February 1996, para 208. See also ICSID Article 45(1). See ICC case law to the same effect, e.g., ICC award no 6670 (1992), *Financial institution based in France v Two companies*, 119 Clunet 1010 (1992); ICC award no 7153 (1992), *Austrian party v Yugoslav party*, 119 Clunet 1005 (1992); ICC award no 7701 (1994), 8(2) *ICC Bulletin* 66 (1997).

¹⁰⁸—The ICC Rules were modified in 1998 to reflect the fact that a party can default throughout the whole proceedings or at “any stage thereof.” See Derains and Schwartz, *ICC Rules*, 102.

¹⁰⁹—See, e.g., England, Arbitration Act section 41(5):

If without showing sufficient cause a party fails to comply with any order or directions of the tribunal, the tribunal may make a peremptory order to the same effect, prescribing such time for compliance with it as the tribunal considers appropriate.

¹¹⁰—*Bremer Vulkan v South India Shipping* [1981] AC 904, 987 E-F.

¹¹¹—See Redfern and Hunter, *International Commercial Arbitration*, para 6-110.

¹¹²—See Hanotiau, “Default Procedure”, in *International Commercial Arbitration, Procedure and Evidence* (Kluwer 1985); Wenger, “Säumnis und Säumnisfolgen im internationalen Schiedsverfahren”, in Reymond and Bucher (eds), *Recueil des travaux suisses sur l'arbitrage international*, 245 (Schulthess 1984).

¹¹³—See, e.g., Landgericht Bremen, 8 June 1967, *IPRspr* 1966-1967 no 283, II *YBCA* 234 (1977); High Court of the Hong Kong Special Administrative Region, Court of First Instance, 19 January 1998; *Ng Fung Hong Ltd v ABC*, 13(2) *Mealey's IAR D-1* (1998); Court of Appeal Tokyo (2d Civ Sect) 14 March 1963, I *YBCA* 194 (1976); Singapore High Court, 29 September 1995 *Hainan Machinery Import and Export Corporation (PR China) v Donald & McArthur Pte Ltd (Singapore)*, [1996] 1 Singapore L Rep 34, (1997) XXII *YBCA* 771.

¹¹⁴—See, e.g., WIPO Expedited Rules 1994; Stockholm Institute Rules for Expedited Arbitrations 1995; CAMCA Arbitration Rules 1996 Article 39; Venice Arbitration Court Rules 1998 Article 39; JCAA Arbitration Rules 1996 Articles 52-61; Korean Commercial Arbitration Board Rules 1989/1993 Articles 57-61; Geneva Rules Article 31. See also “Chapter 2: Accelerating the procedures: the parties” with contributions by Werner, Freyer, Bond and Derains in Davis (ed), *Improving International Arbitration*, 99-120.

¹¹⁵—See, e.g., ICA Rules 1998 Article 43; LMAA Terms 1997/2002, FALCA Rules (Third Schedule of LMAA Terms).

¹¹⁶—See Rovine, “International Fast-Track Arbitration - Part I: An Overview”, 5 *WAMR* 165 (1994); ICC Final award in cases no 7385 (1992) and no 7402 (1992), XVIII *YBCA* 68 (1993). See also Davis, “Fast-Track Arbitration and Fast-Tracking Your Arbitration”, 9(4) *Int'l Arb* 14 (1992); Davis (ed), *Improving International Arbitration*; Müller, “Fast-Track Arbitration: Meeting the Demands of the Next Millennium”, 15(3) *J Int'l Arb* 5 (1998) with a comparative table. See also the special issue - 10(4) *J Int'l Arb* (1993) with papers by Davis, Lagacé, Volkovitsc, “When Doctrines Meet - Fast-Track Arbitration and the ICC Experience”, *ibid*, 69; Silverman, “The Fast-Track Arbitration of the International Chamber of Commerce - The User's Point of View”, *ibid*, 113; Smid, “The Expedited Procedure in Maritime and Commodity Arbitrations”, *ibid*, 59; Tschanz, “The Chamber of Commerce and Industry of Geneva's Arbitration Rules and their Expedited Procedure”, *ibid*, 51; Mustill, “Comments on Fast-Track Arbitration”, *ibid*, 121.

¹¹⁷—See, e.g., Paulsson, “Arbitration of International Sports Disputes”, 9 *Arb Int* 359 (1993) 360; Rochat, “Tribunal arbitral du sport: quelle procédure pour quel litige?”, in *Arbitration of Sports-Related Disputes: A Collection of Reports and Materials*, delivered at the Swiss Arbitration Association - Court of Arbitration for Sport Conference Held in Lausanne on January 16, 1998, 11 *ASA Special Series* (1998).

¹¹⁸—See Schwartz, “Reconciling Speed with Justice in International Arbitration”, in Davis (ed), *Improving International Arbitration*, 44.

¹¹⁹—See Fouchard Gaillard Goldman on *International Commercial Arbitration*, paras 1248 and 1387.

¹²⁰—See, e.g., Karrer, Lazareff, Caldwell, and Rubino Sammartano, “Chapter 5: Accelerating the procedure: the arbitrator”, in Davis (ed), *Improving International Arbitration*, 135. See also Smit, “Fast-Track Arbitration”, 2(2) *Am Rev Int Arb* 138 (1991).

¹²¹—See NAI Rules Articles 37, 42a-42o.

¹²²—See Netherlands, CCP Article 289 and the reference to this provision in Article 1051.

¹²³—See King and van Leeuwen, “Summary Arbitral Proceedings: A Powerful New Mechanism in NAI Arbitrations”, 15(3) *Mealey's IAR* 59 (2000).

¹²⁴—NAI Rules Article 37(6) and (7).

¹²⁵—NAI Rules Article 37(2).

¹²⁶—NAI Rules Article 37(1).

¹²⁷—NAI Rules Articles 42a-42o.

[128](#) NAI Rules Article 42a, in general, and relationship with Article 37 on procedure.