




Chapter 15: Procedures in International Arbitration

[Chapter 15]⁽¹⁾


 [page "2120"](#)  [page "2121"](#) This Chapter addresses the procedural conduct of international commercial arbitrations. It first outlines the basic objectives of the international arbitral process, in particular as compared with and distinguished from litigation in national courts. The Chapter then examines the freedom of the parties to agree upon the procedural rules governing their arbitration and the tribunal's discretion to order particular arbitral procedures (absent contrary agreement by the parties), as well as international and national limitations on the parties' procedural autonomy and arbitrators' procedural discretion. The Chapter also addresses the general principle of non-interference by national courts in ongoing international arbitral proceedings. Finally, the Chapter discusses how, as a practical matter, parties and international arbitral tribunals generally handle subjects such as written submissions, oral hearings, evidence presentation, deliberations and the other major procedural steps in an arbitration.⁽²⁾

 [page "2122"](#) § 15.01. INTRODUCTION

It is the procedural conduct of international arbitration proceedings, as much as any other factor, that leads parties to agree to arbitrate their disputes. In particular, as summarized below, parties agree to arbitrate with the objective of obtaining fair and neutral procedures that are flexible, efficient and capable of being tailored to the needs of their particular dispute, without reference to the formalities and technicalities of procedural rules applicable in national courts.⁽³⁾ As discussed below, the principal means of pursuing these objectives are through the substantial autonomy that parties enjoy, under international arbitration conventions and developed national arbitration legislation, to agree upon arbitral procedures (including institutional arbitration rules), and the broad discretion that arbitrators are granted by the same sources to prescribe arbitral procedures (absent contrary agreement by the parties).⁽⁴⁾


[A]. Objectives of International Arbitral Procedures

The international arbitral process seeks to achieve a number of related objectives. The most significant of these are procedural neutrality, procedural fairness, efficiency, expertise and tailoring procedures to specific disputes and parties.

One of the fundamental objectives of most international commercial arbitrations is procedural neutrality.⁽⁵⁾ International disputes almost inevitably involve parties from different home jurisdictions (e.g., a Kuwaiti company, with procedural experience and expectations rooted in Islamic law and culture, contracting with a French company, whose procedural experience and expectations will be based upon contemporary European civil law procedures). One of the fundamental objectives of international arbitration is to ensure that, unless the parties agree otherwise, disputes will not be resolved in accordance with the procedures of one party's – and not the  [page "2123"](#) other party's – home jurisdiction,⁽⁶⁾ which may favor, explicitly or implicitly, one party over the other.

Naturally, some parties will be more "international" than others, and have greater or lesser expectations that the procedures of their own home jurisdiction will necessarily apply in future disputes. Nonetheless, the objective of procedural neutrality is an expression of the basic equality of the parties, lying at the heart of their efforts to achieve a neutral, objective means of international dispute resolution and guaranteed by leading international arbitration conventions and national arbitration legislation.⁽⁷⁾

A closely related objective of international commercial arbitration is procedural fairness. Parties agree to international arbitration, among other things, in order to obtain fair and objective procedures guaranteeing both parties an equal opportunity to be heard. This objective is inherent in the adjudicative character of international arbitration, in which the arbitrators are obligated to decide the parties' dispute impartially and objectively, based on the law and the evidence the parties present.⁽⁸⁾ This objective is implemented by the terms of both international arbitration conventions and national arbitration legislation, both of which guarantee the parties' procedural rights.⁽⁹⁾

Beyond neutrality and fairness, parties agree to international arbitration with the objective of obtaining dispute resolution procedures that streamline the arbitral proceedings and allow a speedy, efficient and expert result.⁽¹⁰⁾ This objective is facilitated by the minimal scope that is permitted for judicial review of arbitral awards and other decisions by the arbitrators in either annulment or recognition proceedings – a legal regime under which the parties exchange the safeguards of appellate review for the benefits of speed, economy and finality.⁽¹¹⁾ This reflects desires of business men and women for certainty of results and efficiency of procedures, as well as skepticism  [page "2124"](#) about the possibilities of achieving "correct" or "perfect" results through multiple layers of appellate review in national courts.

International arbitration is also designed with the objective of avoiding the formalities and technicalities that are associated with many national litigation systems.⁽¹²⁾ International business men and women choose arbitration in order to provide commercially-sensible and practical resolutions to cross-border commercial disputes. This permits – indeed, requires – dispensing with many of the procedural protections that are designed for domestic litigation involving individual litigants, and instead adopting procedures that will achieve commercially-practicable results.

A closely-related objective of international arbitration is the use of

Jurisdiction

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arbitral procedures that are flexible and tailored to the parties' particular dispute and mutual desires.⁽¹³⁾ This is well-described in the UNCITRAL Notes on Organizing Arbitral Proceedings:

"This [procedural flexibility] is useful in that it enables the arbitral tribunal to take decisions on the organization of proceedings that take into account the circumstances of the case, the expectations of the parties and of the members of the arbitral tribunal, and the need for a just and cost-efficient resolution of the dispute."⁽¹⁴⁾

Indeed, this procedural freedom and flexibility is one of the essential foundations of the international arbitral process:


"unlike the position in court, when both the parties and the tribunal are governed by fixed procedural rules which will be generally adversarial in character, in arbitrations the mutual functions of the parties' lawyers and the tribunal tend to be complementary and co-operational, at least on the surface. Although coming from different cultures and legal philosophies, they must work, and to some extent live, together from the beginning to the end of each case, with intermittent hearings in hotels or other locations which may cover periods of weeks, interspersed with periods of correspondence. During this process they must largely fashion their own procedure. They must perforce get to know and show respect for each other, and make allowances for different points of view, with both the lawyers and the tribunal constantly trying to ensure as much harmony as circumstances may permit."⁽¹⁵⁾

 [page "2125"](#) The tailoring of procedures to a particular case may involve establishing an expedited "fast-track" arbitral procedure,⁽¹⁶⁾ or emphasizing particular types of evidence (e.g., technical, site inspection),⁽¹⁷⁾ or employing innovative evidence-taking procedures (e.g., witness-conferencing, meetings of experts).⁽¹⁸⁾ Alternatively, it may involve using relatively conventional litigation procedures, much like those in some national courts, to hear the parties' submissions and evidence.⁽¹⁹⁾ In all cases, however, the parties' autonomy and the tribunal's discretion are intended to be used to adopt procedures designed to permit the most efficient, reliable and sensible presentation of the parties' evidence and arguments in a particular case.

[B]. Differences Between Arbitral and Judicial Procedures


It is not surprising, given the considerations outlined above, that arbitration proceedings are usually different from litigations in national courts. One national court has described the arbitral process as follows:

"Arbitral fact-finding is generally not equivalent to judicial fact-finding....[T]he record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable."⁽²⁰⁾

In many instances, a party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."⁽²¹⁾ This exchange is a deliberate one, motivated by the perception that the formalities and technicalities of domestic litigation in national courts often produce parochial, inefficient and expensive dispute resolution proceedings, subject to lengthy appeals in  [page "2126"](#) one or several national court systems. All of this is generally ill-suited to the needs of commercial parties in international settings.⁽²²⁾

Nevertheless, the contrast between litigation and arbitration can be exaggerated. As discussed elsewhere, arbitration remains an adjudicative process, with the arbitrators functioning in a quasi-judicial capacity by providing the parties opportunities to be heard and rendering a reasoned, binding decision based on the parties' legal submissions and evidentiary proof.⁽²³⁾ As one respected Indian authority puts it, "[t]hrough litigation is compulsory and arbitration is consensual, both are judicial processes of an adversarial character."⁽²⁴⁾

Moreover, particularly in major matters, elements of the procedures of an international arbitration can closely resemble proceedings in the commercial courts of some major trading states. Arbitral tribunals and parties often conclude that complex arbitrations require considerable issue definition, disclosure or discovery, detailed written and oral submissions, cross-examination, testimony under oath, verbatim transcripts and the like.⁽²⁵⁾ Even in smaller disputes, it is not uncommon in international arbitration to encounter written pleadings, briefs, evidentiary hearings, witness examination and a measure of document disclosure.⁽²⁶⁾

Indeed, although the complaint is not new,⁽²⁷⁾ critics of contemporary arbitration sometimes bemoan the fact that arbitration has supposedly lost the informality and expedition that once characterized the arbitral process, and urge reforms returning to less formal procedures.⁽²⁸⁾ This criticism is largely misplaced. It is true that commercial parties agree to international arbitration in important part to obtain procedural freedom and flexibility, permitting the adoption of more efficient, reliable and expeditious procedures than those applicable in national courts. Nonetheless, an aspect of the parties' autonomy and the arbitrators' procedural discretion is the  [page "2127"](#) freedom to adopt more elaborate or "judicial" procedures, either when this is what particular parties desire in a specific case or where such procedures appear best-suited for handling one or more aspects of a dispute.

The various procedural objectives of international arbitration can produce both successful and less successful results. In some cases, international arbitration can produce a happy marriage of civil law, common law and other procedures that is efficient and effective;

it can also allow the parties to agree upon innovative or other procedures specially adapted to their particular arbitration, sometimes with arbitrators selected for their expertise in a field (e.g., accounting, M&A, engineering). In other cases, particularly where irresponsible or obstructionist party behavior coincides with an inexperienced or reticent tribunal, procedural flexibility can yield a morass of confusion and inconsistency. Nevertheless, it is fair to say that the procedural conduct of most international arbitrations substantially achieves the parties' basic procedural objectives – as evidenced among other things by the increasing popularity of the international arbitral process among business and other users.⁽²⁹⁾

At the same time, leading arbitral institutions have recognized the need to minimize delays and costs in the arbitral process. The ICC Commission on Arbitration established a Task Force in 2005 to study ways of effectively reducing time and costs in international arbitration, particularly in complex cases.⁽³⁰⁾ The Task Force's recommendations, reflected in a report titled "*Techniques for Controlling Time and Cost in Arbitration*," are part of an ongoing effort to improve arbitral procedures in international cases.⁽³¹⁾ Those recommendations were subsequently revised and elaborated in a 2012 edition to the Task Force's report, reflecting continuing experience with techniques for saving costs and time.⁽³²⁾

That effort has continued at the ICC with the adoption of a revised ICC Arbitrator Statement of Acceptance, Availability, Impartiality and Independence, requiring prospective ICC arbitrators to list their "currently pending" cases and to confirm that they will conduct the arbitral process "diligently, efficiently and in accordance with the time limits in the Rules."⁽³³⁾ The same effort is reflected in the revisions to the [page "2128"](#) institutional arbitration rules of many leading arbitral institutions over the past fifteen years (including the UNCITRAL, ICC, AAA, LCIA, SIAC, HKIAC and SCC Rules).⁽³⁴⁾

One still occasionally encounters critical remarks about arbitral procedures from some national courts, along the following lines: "the arbitration system is an inferior system of justice, structured without due process, rules of evidence, accountability of judgment and rules of law."⁽³⁵⁾ Likewise, some courts also occasionally characterize arbitration as suited only for small-stakes disputes where "informality" and rough justice is acceptable.⁽³⁶⁾

This perception is largely inapposite in the context of international commercial and investment arbitration, as distinguished from domestic arbitration. On the contrary, most international businesses and legal advisers consider international arbitration as a superior system of adjudication of international disputes to that available in most national courts – which is one of the reasons they resort to it so frequently.⁽³⁷⁾ There are thousands of currently pending domestic and international commercial and investment arbitrations involving very large, complex disputes, many with amounts well in excess of \$1 billion;⁽³⁸⁾ practical experience shows that businesses frequently choose arbitration, rather than national courts, to resolve their most complex and sensitive international disputes.⁽³⁹⁾ Judges on national courts frequently acknowledge the expertise and advantages of arbitral tribunals in international disputes: "first, what you do we don't have to do;...second, in many fields you are more professional than we are."⁽⁴⁰⁾

Moreover, as detailed below, it is also incorrect to say that due process, rules of evidence, or rules of substantive law are disregarded in contemporary international [page "2129"](#) arbitration: on the contrary, there is often greater attention to such matters in international arbitration than in many national courts. That is particularly true in national courts where elected judges, lay juries, or lay judges are responsible for decision-making.⁽⁴¹⁾

That is in part because international arbitration conventions, arbitration legislation and institutional rules guarantee the parties' rights to due process and procedural regularity, and in part because arbitral tribunals normally take these guarantees seriously.⁽⁴²⁾ Equally, the "rules of evidence" used in international arbitration are material improvements in complex commercial disputes on the technical, often archaic, evidentiary codes employed generally in many domestic legal systems.⁽⁴³⁾ Nor is there serious force to the suggestion that international arbitral tribunals disregard rules of substantive law⁽⁴⁴⁾ – the expert application of which, on the contrary, is one of the reasons that sophisticated commercial parties turn to the arbitral process to resolve international business disputes.

This Chapter discusses the means by which the foregoing objectives are realized, as well as obstacles and defects that are encountered in the arbitral process. The Chapter first considers the general principle of party autonomy with regard to matters of arbitral procedure, the arbitrators' discretion (absent contrary agreement, including agreement to the use of certain institutional rules) in relation to procedural matters, the mandatory limits imposed by international and national law on the parties' procedural autonomy and arbitrators' procedural discretion, and the principle of judicial non-interference in arbitral proceedings. The Chapter then examines, in roughly chronological order, how the major procedural steps in the international arbitral process are ordinarily handled in practice.

§ 15.02. PARTIES' AUTONOMY TO DETERMINE PROCEDURES IN INTERNATIONAL ARBITRATION

One of the most fundamental characteristics of international commercial arbitration is the parties' freedom to agree upon the arbitral procedure. This principle is acknowledged in and guaranteed by the New York Convention and other major international arbitration conventions; it is guaranteed by arbitration statutes in virtually all jurisdictions; and it is contained in and facilitated by the rules of most arbitral institutions.⁽⁴⁵⁾ The principle of the parties' procedural autonomy is qualified [page "2130"](#) only by mandatory requirements of fundamental procedural fairness, which are narrowly limited in scope under most international and national arbitration regimes.

[A]. Parties' Procedural Autonomy Under International

Arbitration Conventions


Leading international arbitration conventions uniformly recognize and give effect to the parties' autonomy to determine the arbitral procedures.⁽⁴⁶⁾ Most importantly, the New York Convention gives effect to the central role of the parties' autonomy to fashion the arbitration procedure, and provides for the non-recognition of awards following proceedings that failed to adhere to the parties' agreed procedures.⁽⁴⁷⁾ Thus, Article V(1)(d) permits non-recognition of an award if:

"[t]he composition of the arbitral authority or the arbitral 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."⁽⁴⁸⁾

Article V(1)(d) is of vital importance because it recognizes, in explicit terms, the parties' autonomy to agree upon the arbitral procedures, including procedures different from those the laws of the arbitral seat prescribe: where the parties have made such an agreement, Article V(1)(d) requires, in effect, that their agreement be followed, notwithstanding contrary procedural rules in the seat of the arbitration. As one commentator correctly puts it:

"Article V(1)(d) simply makes party autonomy the sole determinant in matters procedural, the only limit to such autonomy at the enforcement stage being subparagraph [V(1)(b)], which reflects the principles of natural justice."⁽⁴⁹⁾


Even more directly, and applicable outside the recognition context, Article II of the Convention requires courts of Contracting States to recognize valid arbitration agreements and refer the parties to arbitration pursuant to such agreements.⁽⁵⁰⁾ As discussed above, this obligation extends to all material terms of an agreement to arbitrate – including the parties' agreement regarding the arbitral seat, number of arbitrators, institutional rules and arbitral procedures.⁽⁵¹⁾

 [page "2131"](#) Properly understood, Article II requires Contracting States to give effect to agreements regarding arbitral procedures. As discussed above, this obligation is subject to a limited exception where the parties' procedural agreement violates mandatory national public policies guaranteeing an opportunity to be heard or equality of treatment. Even in these limited cases, however, the Convention should be interpreted as imposing international limits on the extent to which mandatory national procedural requirements may override the parties' procedural autonomy.⁽⁵²⁾

Even more directly, but to the same effect, the European Convention provides in Article IV(1)(b)(iii) that parties shall be free "to lay down the procedure to be followed by the arbitrators."⁽⁵³⁾ The Inter-American Convention similarly provides in Article 2 and 3 that the arbitration shall be conducted according to the "agreement of the parties."⁽⁵⁴⁾ These provisions specifically affirm the parties' procedural autonomy in international arbitration. Although both instruments do so in more direct and mandatory terms than the language of the New York Convention, the same principles and conclusions apply equally under the New York Convention.


[B]. Parties' Procedural Autonomy Under National Arbitration Legislation


Arbitration legislation in most major trading nations implements the provisions of the New York Convention (and parallel international arbitration conventions) by guaranteeing parties the freedom to agree mutually upon the procedural rules governing the conduct of the arbitration, subject only to limited mandatory restrictions of national law.⁽⁵⁵⁾ Indeed, there are very few jurisdictions where the parties' broad freedom to agree upon procedural matters in international arbitration is not recognized.

 [page "2132"](#) The UNCITRAL Model Law is representative, providing in [Article 19\(1\)](#), that "[s]ubject 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."⁽⁵⁶⁾ More specifically, the parties' freedom to agree upon various matters relating to the presentation of their cases and the taking of evidence is expressly recognized in the text of [Articles 18](#), [19\(1\)](#) and [24\(1\)](#) of the Model Law.⁽⁵⁷⁾ Similarly, the drafting history of the Model Law confirms the parties' procedural autonomy in emphatic terms:

"probably the most important principle on which the Model Law should be based is the freedom of the parties in order to facilitate the proper functioning of the international commercial arbitrations according to their expectations."⁽⁵⁸⁾

Decisions in Model Law jurisdictions underscore the central importance of the parties' procedural autonomy (and, as discussed below, the tribunal's procedural discretion).⁽⁵⁹⁾

Likewise, [Article 18\(1\) Swiss Law on Private International Law](#) provides that "[t]he parties may, directly or by reference to arbitration rules, determine the arbitral procedure; they may also submit it to a procedural law of their choice."⁽⁶⁰⁾ The revised French Code of Civil Procedure is similar, providing that: "An arbitration agreement may define the procedure to be followed in the arbitral proceedings, directly or by reference to arbitration rules or to procedural rules."⁽⁶¹⁾ Provisions in other national  [page "2133"](#) arbitration legislation are comparable, including England,⁽⁶²⁾ Germany,⁽⁶³⁾ Belgium,⁽⁶⁴⁾ Austria,⁽⁶⁵⁾ Japan,⁽⁶⁶⁾ Singapore,⁽⁶⁷⁾ Hong Kong,⁽⁶⁸⁾ India,⁽⁶⁹⁾ Russia,⁽⁷⁰⁾ and elsewhere.⁽⁷¹⁾

Even in jurisdictions where arbitration legislation does not expressly address the parties' procedural autonomy, courts have almost uniformly confirmed that autonomy in expansive terms. In the United States, the FAA's statutory text is silent regarding procedural matters, but U.S. judicial decisions and other authority uniformly confirm  [page "2134"](#) the parties' freedom to agree upon the

arbitral procedures, subject only to very limited requirements of procedural fairness.⁽⁷²⁾ The commentary to the Revised Uniform Arbitration Act is representative, providing:

"arbitration is a consensual process in which autonomy of the parties who enter into arbitration agreements should be given primary consideration, so long as their agreements conform to notions of fundamental fairness. This approach provides parties with the opportunity in most instances to shape the arbitration process to their own particular needs."⁽⁷³⁾

One U.S. court observed, to similar effect, that "[p]arties may choose to be governed by whatever rules they wish regarding how an arbitration itself will be conducted,"⁽⁷⁴⁾ while another remarked, more colorfully, that between competent parties, even procedures such as "flipping a coin, or, for that matter, arm wrestling" are enforceable.⁽⁷⁵⁾ For their part, English authorities have upheld *sui generis* procedural mechanisms, such as selecting arbitrators by drawing names by lot.⁽⁷⁶⁾

Other national courts have adopted similarly expansive conceptions of the parties' autonomy with regard to procedural matters.⁽⁷⁷⁾ The parties' autonomy was affirmed in emphatic terms by the Paris Cour d'appel:

"It has been established that the arbitration in question...is an international arbitration governed by the intentions of the parties. In this case, the rules of domestic law have a purely subsidiary role and apply only in the absence of a specific agreement by the parties...the rules of the [ICC] Court of [page 2135](#)" Arbitration, which constitute the law of the parties, must be applied to the exclusion of all other laws."⁽⁷⁸⁾

Similarly, a leading decision of the Swiss Federal Tribunal concluded that the Swiss Law on Private International Law "leaves the determination of the arbitral procedure to the parties' autonomy."⁽⁷⁹⁾ Likewise, the Austrian Oberster Gerichtshof has held that "[t]he parties may determine the arbitral procedure in the arbitration agreement or in a separate written agreement."⁽⁸⁰⁾

In contrast, it is virtually impossible to identify contemporary authority which denies or even questions the principle of the parties' procedural autonomy in international commercial or investment arbitration. At the same time, as discussed below, the parties' autonomy in all developed jurisdictions is subject only to the (relatively minimal) limitations of mandatory public policies regarding equality of treatment and an opportunity to be heard.⁽⁸¹⁾

[C]. Parties' Procedural Autonomy to Select Institutional Rules

One element of the parties' procedural autonomy is the freedom to agree to arbitration pursuant to institutional arbitration rules.⁽⁸²⁾ In agreeing to arbitrate in accordance with a particular set of institutional rules, the parties consent to the procedural and substantive provisions of those rules, including delegation of some procedural decisions to the arbitral institution (such as selection of the arbitral seat or of the arbitrators).⁽⁸³⁾

The parties' freedom to agree to arbitrate in accordance with institutional rules, and to delegate decisions about the arbitral procedure to the arbitral institution, is made explicit in many national arbitration statutes, which include specific reference to the possibility of institutional arbitration. [Article 2\(d\) of the UNCITRAL Model Law](#) is representative, providing that "where a provision of this Law...leaves the parties free to determine a certain issue, such freedom includes the right of the parties to [page 2136](#)" authorize a third party, including an institution, to make that determination."⁽⁸⁴⁾ Other national arbitration legislation is similar.⁽⁸⁵⁾

National courts also uniformly recognize the parties' autonomy to agree to institutional arbitration and to delegate various procedural decisions to the arbitral institution.⁽⁸⁶⁾ One French decision concludes: "The choice of a professional arbitral institution of this kind implies that the parties intended to submit their disputes to the judgment of those members of that profession chosen by the arbitral institution."⁽⁸⁷⁾ Likewise, in the words of a U.S. decision, "[w]hen parties agree to arbitrate before the AAA and incorporate the Commercial Arbitration Rules into their agreement, they are bound by those rules and by the AAA's interpretation."⁽⁸⁸⁾

As discussed elsewhere, national courts accord institutional decisions regarding procedural matters broad deference in virtually all instances, including selection of the arbitral seat, appointment and removal of arbitrators and fixing the arbitrators' fees.⁽⁸⁹⁾ There are arguably limits on the parties' autonomy to delegate resolution of substantive aspects of their underlying dispute to an arbitral institution (e.g., selection of the applicable substantive law), but this is virtually never encountered in practice.⁽⁹⁰⁾


[page 2137](#)" As discussed above, parties very frequently use their procedural autonomy to incorporate institutional arbitration rules into their agreement.⁽⁹¹⁾ Indeed, a very substantial proportion of international arbitrations are conducted pursuant to institutional arbitration rules of some sort.⁽⁹²⁾ As discussed below, institutional arbitration rules generally take a more complicated approach to the parties' procedural autonomy than national law, often subjecting that autonomy to either the arbitrators' mandate to conduct the arbitration fairly and efficiently or (occasionally) to particular mandatory procedural provisions.

[D]. Parties' Procedural Autonomy Under Institutional Rules

Leading institutional rules generally parallel and complement the treatment of the parties' procedural autonomy in the Model Law and other developed arbitration legislation. The rules of most arbitral institutions expressly permit parties, by agreement, to adopt such procedures as they choose.⁽⁹³⁾ At the same time, however, many

institutional rules also include some form of mandatory provisions, which the parties accept in agreeing to arbitrate under the institution's rules; these mandatory provisions generally imply limitations on the parties' future exercise of their procedural autonomy.


The 2010 UNCITRAL Rules are representative, robustly affirming the principle of party autonomy, including by permitting modification of the UNCITRAL Rules themselves. Article 1(1) of the Rules provides that, "[w]here the parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules *subject to such modification as the parties may agree*."⁽⁹⁴⁾ Moreover, unlike some institutional rules, the UNCITRAL Rules do not, by their terms, contain any expressly mandatory procedural provisions from which the parties are unable to derogate by agreement.⁽⁹⁵⁾

 [page "2138"](#) Nonetheless, the 2010 UNCITRAL Rules also provide, in Article 17(1) for the arbitral tribunal to conduct the arbitration in the manner it considers most appropriate, without express reference to the parties' procedural autonomy:

"Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute."⁽⁹⁶⁾


As discussed in greater detail below, the text of Article 17(1) fairly clearly suggests the possibility that the arbitral tribunal, in conducting the arbitral proceedings, need not give effect to the parties' procedural agreement if doing so would conflict with its obligations to treat the parties with equality, to afford each party a reasonable opportunity to present its case and conduct the arbitration fairly and efficiently.⁽⁹⁷⁾ Rather than a pure affirmation of the parties' procedural autonomy, Articles 1(1) and 17(1) of the UNCITRAL Rules, read together, acknowledge *both* the parties' autonomy and the arbitrators' procedural authority, with the latter being capable, in some cases, of overriding the former. (In general, the arbitrators' procedural authority is limited to matters of procedure and does not extend to basic substantive aspects of the parties' arbitration agreement (e.g., location of arbitral seat, choice of arbitrators, choice of applicable law).⁽⁹⁸⁾)

Most other institutional rules also confirm, in general terms, the parties' procedural autonomy, but with (relatively narrow) exceptions and limitations. For example, the LCIA Rules generally affirm the principle of party autonomy, providing that "[t]he parties may agree on the conduct of the arbitral proceedings, and they are encouraged to do so."⁽⁹⁹⁾ At the same time, like the UNCITRAL Rules, the parties' procedural autonomy under the LCIA Rules is generally subject to the arbitrators' obligations to conduct the arbitration fairly and "to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay or expense, so as to provide a fair and efficient means for the final resolution of the parties' dispute."⁽¹⁰⁰⁾ Again, the parties' procedural autonomy is confirmed in conjunction with, but subject to, the arbitrators' procedural responsibility to conduct the arbitration fairly and efficiently.

Somewhat differently, Article 19 of the 2012 ICC Rules provides that "the proceedings before the arbitrator shall be governed by these Rules, and, where these Rules are silent, by *any rules which the parties* or, failing them, the arbitral tribunal *may settle*  [page "2139"](#) on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration."⁽¹⁰¹⁾ As the order of the references in this provision suggests, with its initial reference to the ICC Rules governing the arbitral procedure, there are a (limited) number of mandatory provisions of the ICC Rules which the parties are not permitted to alter by agreement.⁽¹⁰²⁾

Some other institutional rules are similar in including mandatory provisions from which the parties may not derogate.⁽¹⁰³⁾ The basic objective of these various provisions is to ensure the fairness and efficiency of the institutional arbitration process, even if this may result in overriding the parties' procedural autonomy in limited instances. In practice, as discussed below, arbitral tribunals override the parties' procedural agreements only very infrequently, but many institutional rules expressly contemplate the possibility and it is sometimes employed in practice.

[E]. Arbitral Tribunal's Objections to Parties' Procedural Agreements

Difficult issues arise in those (rare) cases where an arbitral tribunal does not wish to accept a procedure agreed upon by the parties. That unwillingness may arise for various reasons, including because the tribunal regards the parties' agreement as not  [page "2140"](#) affording one or both parties a reasonable opportunity to present its case, because the tribunal concludes that one party will be denied equality of treatment, because the tribunal views the parties' agreed procedures as unacceptably inefficient, or otherwise. Where this occurs, there is obvious tension between the parties' procedural autonomy and the arbitrators' mandate to conduct the arbitral proceedings fairly and efficiently.

For example, the parties may wish to permit extensive document discovery, followed by a six week evidentiary hearing, while the arbitral tribunal firmly believes that limited discovery and a one week hearing is appropriate. Alternatively, the parties may agree to no disclosure, no witness evidence and no oral hearing, while the tribunal is convinced that an oral evidentiary hearing is essential to fairly resolving the dispute. In these circumstances, the question arises whether the tribunal has the authority to reject the parties' agreement and impose different procedures that it considers appropriate.⁽¹⁰⁴⁾

[1]. Parties' General Procedural Autonomy, Notwithstanding Arbitral Tribunal's Objections

A number of authorities affirm the arbitrators' power to reject the parties' procedural agreements and order alternative procedures different from those agreed by the parties. One experienced practitioner has addressed the issue as follows:

"I would advocate the existence of...a right for the arbitrator to lead – even lead firmly, when necessary – in establishing the arbitral procedures over the heads of counsel on both sides. The arbitrator does not have a judge's power to regulate procedures unilaterally, nor should he or she forget that party autonomy may be the most important arbitral principle of all. The scope for persuasion by the arbitrator before making a ruling is large, and the need to impose procedures should thus be rare. But it is possible – at least for one with a common law background – to imagine situations in which counsel for both sides may slide toward extended and acrimonious evidentiary procedures that could be shortened or avoided by an arbitrator who was prepared to 'just say no.'"⁽¹⁰⁵⁾

There is much to recommend this approach. At the end of the day, however, the better view is that the tribunal is subject to the parties' agreement to arbitrate, [page "2141"](#) including the parties' agreement concerning procedural aspects of the arbitration,⁽¹⁰⁶⁾ save where that agreement violates applicable mandatory law⁽¹⁰⁷⁾ or where the parties have agreed (in institutional rules or otherwise) to grant the arbitrators the authority to override their joint procedural agreements.⁽¹⁰⁸⁾

An arbitrator has the right, and arguably the obligation, to seek assertively to dissuade the parties from unreasonable or inefficient procedures, including by requiring direct communications with the parties' officers (as distinguished from the parties' external counsel). The arbitrator may also call upon the parties to honor their obligations to arbitrate in good faith, including cooperating with the tribunal in fashioning an efficient and fair arbitral procedure.⁽¹⁰⁹⁾ If the arbitrator's efforts to persuade the parties to accept his or her proposed procedures fail, however, the arbitrator is generally bound to comply with the terms of the parties' arbitration agreement, including any procedural terms thereof, and the parties' subsequent agreements on procedural matters.

As discussed above, an arbitrator may in principle resign if the parties reach unforeseen post-appointment procedural agreements that are oppressive or unreasonable for the arbitrator personally or (in the arbitrator's judgment) that are fundamentally unfair.⁽¹¹⁰⁾ But, absent resignation, the arbitrator is generally required to give effect to the parties' agreements regarding arbitral procedures, even if he or she considers them unwise or inefficient; only in the circumstances discussed below, where the parties' agreement violates applicable mandatory law or where the parties have agreed to grant the arbitrators the authority to override their joint procedural agreements, is a contrary result permitted.

[2]. Arbitrators' Procedural Authority to Require Compliance With Mandatory Rules of Procedural Fairness and Equality

The principal exception to the parties' ultimate procedural autonomy is where the parties' agreement on arbitral procedures violates mandatory rules of procedural fairness and equality, denying one party the opportunity to be heard. In these [page "2142"](#) instances, the arbitrator's adjudicatory function justifies, and indeed requires, refusing to implement the parties' procedural agreement and instead proceeding with a fair procedure. These mandatory procedural protections (and limitations) are discussed below.⁽¹¹¹⁾

As a practical matter, an arbitrator will conclude only very rarely that a party has agreed to procedures, during a contested arbitral proceeding between commercial entities, that are so fundamentally unfair as to be unenforceable.⁽¹¹²⁾ Nonetheless, in those extremely rare cases where such a conclusion is justified, an arbitral tribunal may, and indeed must, refuse to give effect to a fundamentally unfair procedural agreement.

[3]. Arbitrators' Procedural Authority Under Institutional Rules

A second exception to the parties' autonomy to agree upon the arbitral procedures involves arbitration agreements incorporating institutional rules that grant the arbitrators authority over the arbitral procedures.⁽¹¹³⁾ The scope of the arbitrators' procedural authority in these instances depends, of course, on the precise terms of the institutional rules to which the parties have agreed.

As discussed in greater detail below, many institutional rules compromise the parties' otherwise existing procedural autonomy, granting the arbitrators power to determine the arbitral procedure, even in the face of agreements between the parties on specific procedural matters.⁽¹¹⁴⁾ In particular, under the UNCITRAL, LCIA, ICDR, SIAC and VIAC Rules, the arbitral tribunal has the authority to prescribe the arbitral procedures, including to ensure the parties' equal treatment and an opportunity to be heard and to provide a fair and efficient arbitral procedure. Notably, this procedural authority is broader than that available to arbitrators under most national arbitration legislation, which only allows a tribunal to override the parties' agreed procedures when they would produce unequal treatment or a denial of an opportunity to be heard; instead, the UNCITRAL, LCIA and ICDR Rules all permit the arbitrators to prescribe procedures necessary for a fair and efficient arbitration, even over the parties' contrary agreement.⁽¹¹⁵⁾ The consequences of this grant of procedural authority to the arbitrators is discussed in greater detail below.⁽¹¹⁶⁾

In other cases, institutional rules will not grant the arbitral tribunal any general procedural authority to override the parties' agreed arbitral procedures.⁽¹¹⁷⁾ In these cases, the arbitrators' procedural

authority will be no different from that under generally-applicable national arbitration legislation – which, as discussed above, gives [page "2143"](#) effect to the parties' agreements regarding arbitral procedures in all cases except where mandatory national law overrides such agreements.⁽¹¹⁸⁾

[F]. National Arbitration Legislation Not Recognizing Parties' Procedural Autonomy

In contrast to the overwhelming weight of national legislation and judicial authority, some states have not recognized the parties' autonomy to agree upon arbitral procedures, instead imposing specific, mandatory procedural regimes for the arbitral proceedings. For example, until recently, arbitration statutes in some Latin American states imposed detailed procedural time tables and requirements that arbitral tribunals, including in international arbitrations, were obliged to follow.⁽¹¹⁹⁾ Other states sometimes imposed procedural requirements imported from local litigation on arbitral tribunals.⁽¹²⁰⁾

These approaches reflected a minority view, which was inconsistent with the affirmation of the parties' procedural autonomy in Articles II and V(1)(d) of the New York Convention and parallel provisions of other arbitration conventions.⁽¹²¹⁾ It was also contrary to the approaches in virtually all national legal systems, which emphasize the parties' freedom with regard to the arbitral procedure.⁽¹²²⁾ At the same time, this view was inconsistent with a sensible, fair approach to procedural matters in international commercial disputes and with the parties' superior appreciation of the most efficient and fair way of resolving their particular dispute. As a consequence, and as detailed above,⁽¹²³⁾ the view that national law should prescribe or closely regulate the procedures in an international arbitration has been decisively rejected in both practice and in theory over the past century.

§ 15.03. ARBITRAL TRIBUNAL'S DISCRETION TO DETERMINE PROCEDURES IN INTERNATIONAL ARBITRATION

Although national law in most states permits the parties to agree upon the arbitral procedures, subject only to minimal mandatory due process requirements, parties in [page "2144"](#) practice often do not agree in advance on detailed procedural rules for their arbitration. Instead, the parties' arbitration agreement will ordinarily provide for arbitration pursuant to a set of institutional rules, which supply only a broad procedural framework, without addressing other procedural issues.⁽¹²⁴⁾ As summarized by the ICC Task Force on *Controlling Time and Costs in International Arbitration*:

"One of the salient characteristics of arbitration as a dispute resolution mechanism is that the rules of arbitration themselves present a framework for arbitral proceedings but rarely set out detailed procedures for the conduct of the arbitration."⁽¹²⁵⁾

Filling in the considerable gaps in the framework provided by institutional rules is left to the subsequent agreement of the parties or, if they cannot agree, the arbitral tribunal. The arbitrators' discretion to determine the arbitral procedure, in the absence of agreement between the parties on such matters, is one of the foundational elements of the international arbitral process.⁽¹²⁶⁾

[A]. Arbitral Tribunal's Procedural Discretion Under International Arbitration Conventions

Leading international arbitration conventions confirm the arbitral tribunal's power, in the absence of agreement by the parties, to determine the arbitral procedures. Most explicitly, Article IV(4)(d) of the European Convention provides that, where the parties have not agreed upon arbitral procedures, the tribunal may "establish directly or by reference to the rules and statutes of a permanent arbitral institution the rules of procedure to be followed by the arbitrators."⁽¹²⁷⁾

The Inter-American Convention also expressly recognizes the arbitral tribunal's procedural authority, albeit indirectly, providing in Article 3 that, "in the absence of an express agreement between the parties, the arbitration shall be conducted in accordance with the rules of procedure of the Inter-American Commercial Arbitration Commission."⁽¹²⁸⁾ In turn, Article 15 of the IACAC Rules grants the arbitrators broad procedural authority, subject only to basic requirements of equality and fairness.⁽¹²⁹⁾

[page "2145"](#) The New York Convention refers less directly to the arbitral tribunal's power to determine the arbitral procedures, but produces the same result. The Convention makes no direct reference to the tribunal's authority to conduct the proceedings, only indirectly acknowledging such powers in Articles V(1)(b) and (d) (as discussed above).⁽¹³⁰⁾ At the same time, Article II(3) of the Convention requires giving effect to the parties' agreement to arbitrate, an essential element of which is either express or implied authorization to the arbitrators to conduct the arbitral proceedings as they deem best (absent contrary agreement by the parties on specific matters).⁽¹³¹⁾

Even where the tribunal's procedural authority is not expressly recognized in applicable international conventions, there can be no doubt as to such authority. An inherent characteristic of the arbitral process is the tribunal's adjudicative role and responsibility for establishing and implementing the procedures necessary to resolve the parties' dispute.⁽¹³²⁾ The tribunal's procedural authority is an implicit part of the parties' agreement to arbitrate⁽¹³³⁾ and is an indispensable precondition for an effective arbitral process.

Accordingly, just as Article II of the New York Convention guarantees the parties' procedural autonomy,⁽¹³⁴⁾ the Convention also guarantees the tribunal's authority over the arbitral procedures (absent contrary agreement).⁽¹³⁵⁾ As discussed below, the tribunal's authority is subject to restrictions, imposed by mandatory national laws regarding procedural matters, but these limitations are very

narrow.⁽¹³⁶⁾

[B]. Arbitral Tribunal's Procedural Discretion Under National Arbitration Legislation

Consistent with the New York Convention, most national legal systems provide the arbitral tribunal with substantial discretion to establish the arbitral procedures in the absence of agreement between the parties, subject only to general due process requirements. [Article 19\(2\) of the UNCITRAL Model Law](#) is representative, providing that, where the parties have not agreed upon the arbitral procedures, "the arbitral tribunal may...conduct the arbitration in such a manner as it considers [page "2146"](#) appropriate."⁽¹³⁷⁾ Likewise, the Swiss Law on Private International Law provides "[i]f the parties have not determined the procedure, the Arbitral Tribunal shall determine it to the extent necessary, either directly or by reference to a statute or to rules of arbitration."⁽¹³⁸⁾ French, German, Austrian and other civil law arbitration statutes in Europe are similar,⁽¹³⁹⁾ as is contemporary arbitration legislation in much of Asia⁽¹⁴⁰⁾ and Latin America.⁽¹⁴¹⁾

In the United States, the FAA does not contain provisions addressing the subject of arbitral procedures or providing a basic procedural framework for arbitrations; rather, the FAA effectively leaves all issues of procedure entirely to the parties and arbitrators. The FAA does so by providing for the validity of agreements to arbitrate, including their procedural terms, in §2, and by providing for orders to compel arbitration, in accordance with the provisions of the parties' arbitration agreement, in §4;⁽¹⁴²⁾ both provisions require giving effect to the parties' agreed arbitral procedures and, in the absence of any such agreement, leaving the arbitral procedures by default to the arbitrators' general adjudicative authority, without imposing any statutory limitations on that authority.

The Revised Uniform Arbitration Act makes the arbitrators' procedural authority explicit in §15(a), which provides:

"An arbitrator may conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding. The authority conferred upon the arbitrator includes the power to hold conferences with the parties to the arbitration proceeding before the [page "2147"](#) hearing and, among other matters, determine the admissibility, relevance, materiality and weight of any evidence."⁽¹⁴³⁾

Although the FAA does not expressly address the subject of arbitral procedures, U.S. courts have uniformly held that arbitrators possess broad powers to determine arbitral procedures, absent agreement on such matters by the parties.⁽¹⁴⁴⁾ As one U.S. court concluded:

"Unless a mode of conducting the proceedings has been prescribed by the arbitration agreement or submission, or regulated by statute, arbitrators have a general discretion as to the mode of conducting the proceedings and are not bound by formal rules of procedure and evidence, and the standard of review of arbitration procedures is merely whether a party to an arbitration has been denied a fundamentally fair hearing."⁽¹⁴⁵⁾

Or, in another U.S. court's words: "An arbitrator typically retains broad discretion over procedural matters."⁽¹⁴⁶⁾

Particularly following the 1996 Arbitration Act, English law is to the same effect, with §34(1) of the Act providing that "[i]t shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter."⁽¹⁴⁷⁾ Other common law jurisdictions also affirm the arbitrators' broad procedural authority.⁽¹⁴⁸⁾

[page "2148"](#) Civil law courts have also reached the same conclusions, repeatedly upholding the arbitrators' broad procedural discretion.⁽¹⁴⁹⁾ In the words of an Austrian decision: "The parties may determine the arbitral procedure in the arbitration agreement or in a separate written agreement. Lacking such agreement, the arbitrators decide on the procedure."⁽¹⁵⁰⁾ Likewise, commentary uniformly confirms the arbitral tribunal's broad procedural discretion under leading national arbitration regimes (subject only to mandatory due process requirements).⁽¹⁵¹⁾

[C]. Arbitral Tribunal's Procedural Discretion Under Institutional Rules

Leading institutional rules complement and generally parallel the Model Law and other developed arbitration legislation. With no material exceptions, these rules uniformly confirm the arbitrators' authority to determine the arbitral procedures, while subjecting that discretion to the parties' procedural autonomy and limited mandatory protections of procedural fairness, regularity and efficiency.

The 2010 UNCITRAL Rules are representative. As discussed above, Article 1(1) recognizes the parties' general procedural autonomy, providing that disputes referred to arbitration under the UNCITRAL Rules "shall be settled in accordance with these Rules *subject to such modification as the parties may agree*."⁽¹⁵²⁾ Nonetheless, as also discussed above, Article 17(1) of the 2010 UNCITRAL Rules also provides for the [page "2149"](#) arbitrators to conduct the arbitration in the manner it considers most appropriate, without express reference to the parties' procedural autonomy: "Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate...."⁽¹⁵³⁾

Moreover, Article 17(1) of the 2010 Rules goes on to provide that "[t]he arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute."⁽¹⁵⁴⁾ At the same time, as also discussed above, several provisions of the Rules concerning basic structural aspects of the

arbitration such as seat, language and selection of the arbitrators and choice of applicable law are specifically made subject to the parties' agreement.⁽¹⁵⁵⁾

The interaction of these provisions of the UNCITRAL Rules is not precisely defined and there is very little arbitral or judicial authority on the subject. The better view of the Rules is that the arbitral tribunal is granted broad procedural authority by Article 17(1), subject only to mandatory obligations under the same provision of (a) equal treatment and due process; (b) efficiency; and (c) a general obligation to give effect to the parties' agreed arbitral procedures.

With regard to the first of these categories, it is clear that arbitrators are permitted (and required) to override the parties' procedural agreements where they would violate mandatory guarantees of equal treatment or due process (*i.e.*, an opportunity to present a party's case). These mandatory guarantees include both those of the arbitral seat (pursuant to Article 1(3) of the UNCITRAL Rules) and the arbitrators' conception of such requirements under Article 17(a). As discussed below, the procedural requirements imposed by mandatory law are exceptional, generally leaving both the parties and the arbitrators very wide discretion to adapt procedures suited to particular settings.⁽¹⁵⁶⁾ Nonetheless, there are (rare) instances in which requirements of equal treatment or due process will mandatorily require a particular procedural decision, regardless of the parties' agreement or the arbitrators' preferences.

Second, with regard to considerations of procedural efficiency, Article 17(1) of the 2010 UNCITRAL Rules requires that arbitrators "shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute."⁽¹⁵⁷⁾ The language of Article 17(1) appears to accord considerations of efficiency identical status with mandatory requirements of equal treatment and due process: the references to "unnecessary delay and expense" and an [page "2150"](#) "efficient process" are phrased in mandatory terms ("shall") and are referred to together with considerations of fairness. As with requirements of equal treatment and due process, however, it is only in very exceptional circumstances where considerations of efficiency warrant overriding the parties' procedural agreements.

Finally, with regard to the parties' procedural autonomy, Article 17(1) makes no reference to the parties' agreed arbitral procedures – in contrast to other provisions of the Rules, concerning basic structural aspects of the arbitration (such as the arbitral seat, language, choice of arbitrators and applicable substantive law).⁽¹⁵⁸⁾ That omission reflects the ultimate primacy of the arbitral tribunal's procedural authority, other than with respect to the basic structure of the arbitral process as set forth in the parties' arbitration agreement.⁽¹⁵⁹⁾

Thus, as to most procedural matters arising in the course of the arbitration (*e.g.*, timing, number, length of written submissions; number of witnesses; availability and scope of disclosure; structure and length of hearing; admissible evidence; nature of witness examination), the arbitral tribunal retains the ultimate authority under the UNCITRAL Rules to prescribe the arbitral procedures, including where the parties have agreed otherwise and including where mandatory requirements of equal treatment and due process would permit the parties' agreed procedures. Under Article 17(1), it is ultimately the tribunal that is authorized to prescribe the arbitral procedures, notwithstanding the parties' agreements on the subject.

This conclusion can appear to be in tension with general conceptions of party autonomy. In principle, however, there can be little doubt that the parties are free to compromise their procedural autonomy by an agreement to institutional rules containing provisions like those in the UNCITRAL Rules – this itself being an exercise of the parties' autonomy. One award adopted just this rationale, concluding:


"In accordance with Article 32 of the UNCITRAL Rules, and with the general principles of arbitral procedure, it is for the Tribunal to determine which issues need to be dealt with and in what order....If the parties are not content with the submission of the dispute to arbitration under the UNCITRAL Rules and under the auspices of the Permanent Court of Arbitration, they may no doubt, by agreement notified to the Permanent Court, terminate the arbitration. What they cannot do, in the Tribunal's view, is by agreement to change the essential basis on which the Tribunal itself is [page "2151"](#) constituted, or require the Tribunal to act other than in accordance with the applicable law."⁽¹⁶⁰⁾

That rationale is well-considered. The parties' ceding of their procedural authority, to the arbitrators, under Article 17 of the 2010 UNCITRAL Rules (and equivalent provisions of other institutional rules) is an exercise of their procedural autonomy. Once that autonomy has been exercised by concluding a binding agreement on arbitral procedures, it cannot be unilaterally revoked by either party, just as other agreements cannot be unilaterally revoked. Moreover, once a tribunal is appointed pursuant to the parties' arbitration agreement, and an arbitrator contract formed (as discussed below),⁽¹⁶¹⁾ the tribunal's procedural authority cannot be revoked or altered by either one party unilaterally or both parties acting jointly; rather, such a change requires the consent of the arbitrators or, alternatively, termination of the arbitration by mutual consent and commencement of a new arbitration, with a new tribunal, pursuant to a revised arbitration agreement with a different treatment of arbitral procedures.⁽¹⁶²⁾ Thus, notwithstanding the parties' general procedural autonomy, where they exercise that autonomy by granting procedural authority to the arbitral tribunal, and then appointing a tribunal pursuant to that agreement, they may not subsequently alter their agreement, absent the arbitrators' consent.

Notwithstanding this, Article 1(1) and the central importance of party autonomy in the arbitral process generally,⁽¹⁶³⁾ also argue strongly against arbitrators exercising their authority to override the parties' procedural agreements absent compelling justifications.⁽¹⁶⁴⁾ Where sophisticated commercial parties, advised by external counsel, have agreed to particular procedures, an arbitral tribunal properly may


override those agreements only in very exceptional cases.

Particularly at the outset of an arbitration, where the parties have substantially greater familiarity with the dispute, an arbitral tribunal should virtually never override the parties' agreement regarding particular procedural matters; in these instances, the arbitrators must recognize their inevitable lack of knowledge about the underlying dispute and give broad deference to the parties' informed (and mutual) choices regarding what would constitute a fair and efficient arbitral procedure. As an arbitration progresses, and the arbitrators become more familiar with the parties' dispute and claims, the possibility of rejecting the parties' agreed arbitral procedures becomes more concrete; that is particularly true with respect to ancillary aspects of the arbitral procedure (e.g., length of pre-hearing written submissions), as distinguished from fundamental choices about the arbitral process (e.g., whether to permit document disclosure).

 **page "2152"** As a practical matter, it is relatively unusual that the arbitrators will disagree sufficiently seriously with the parties' agreed arbitral procedures that they will overrule that agreement. Moreover, it is even more unusual that, when arbitrators seek to do so, that the parties (and the tribunal) will not agree upon alternative procedural arrangements that satisfy all concerned.

Ultimately, however, there is a category of issues under the UNCITRAL Rules as to which an arbitral tribunal may properly override the parties' agreed arbitral procedures, simply because it concludes that those procedures would be inefficient, unnecessary, less effective, or less fair than an alternative approach. Tribunals should rarely exercise this authority, but it is contemplated by the UNCITRAL Rules and arbitrators do not violate their mandate by doing so.

Other leading institutional arbitration rules are broadly similar to the UNCITRAL Rules in their treatment of the arbitrators' procedural discretion. As discussed above, the LCIA, ICDR, HKIAC, SIAC, VIAC and SCC Rules all grant the tribunal power to determine the arbitral procedures in terms parallel to those of the UNCITRAL Rules.⁽¹⁶⁵⁾ Like the UNCITRAL Rules, the provisions of these institutional rules all provide the arbitrators with the ultimate authority over the arbitral procedure, subject to mandatory law protections⁽¹⁶⁶⁾ and to the parties' power to agree on basic structural aspects of the arbitration.⁽¹⁶⁷⁾ As to these basic elements of the institutional arbitration regime (i.e., the choice of the arbitral seat, arbitrators and applicable law), arbitrators may not, even if they consider it efficient and sensible to do so, derogate from the provisions of the institutional rules and parties' agreement.⁽¹⁶⁸⁾

 **page "2153"** Under many institutional arbitration regimes, the arbitrators' procedural discretion is also subject to mandatory requirements imposed by the institutional arbitral regime itself. The nature of these mandatory requirements varies among institutional regimes, but includes matters such as the ICC's Terms of Reference,⁽¹⁶⁹⁾ the ICC's and LCIA's confirmation of arbitrators,⁽¹⁷⁰⁾ and the ICC's and SIAC's scrutiny of draft arbitral awards.⁽¹⁷¹⁾ As to these aspects of the arbitral procedure, institutional rules forbid either the parties or the arbitrators from adopting inconsistent procedural provisions. Where parties or an arbitral tribunal disregard such prohibitions, the arbitral institution will typically refuse to continue to administer the arbitration, which gives rise to both significant practical difficulties (in continuing a smooth and efficient arbitral procedure) and risks with respect to annulment or non-enforcement of the arbitral award (on the grounds that it will not have been rendered in accordance with the parties' agreed arbitral procedures, which included institutional arbitration rules).⁽¹⁷²⁾

§ 15.04. MANDATORY PROCEDURAL REQUIREMENTS IN INTERNATIONAL ARBITRATION

The parties' freedom to agree upon the arbitral procedures, and the tribunal's discretion to adopt such procedures (absent contrary agreement), are subject to the mandatory requirements of applicable national and international law. As discussed below, in most cases applicable mandatory law imposes only very limited and general, albeit important, guarantees of procedural fairness and regularity.⁽¹⁷³⁾

[A]. Mandatory Procedural Protections Under International Arbitration Conventions

All leading international arbitration conventions indirectly recognize and give effect to mandatory requirements of procedural fairness and regularity of the arbitral proceedings. They do so by permitting arbitral awards to be denied recognition if basic requirements of procedural fairness have not been satisfied, while leaving room for non-discriminatory, non-idiosyncratic rules of mandatory national law aimed at ensuring procedural fairness and equality.

page "2154" [1]. New York Convention

Four provisions of the New York Convention are of principal importance to defining the role of mandatory national law in the arbitral process. Together, these provisions accord predominant importance, in most cases, to the parties' procedural autonomy (and arbitrators' procedural discretion), while allowing non-recognition of arbitral awards in limited circumstances where the parties' agreed arbitral procedures or arbitrators' procedural decisions violate fundamental procedural protections.

First, as discussed above, Article II of the Convention requires Contracting States to recognize valid agreements to arbitrate, including their procedural provisions.⁽¹⁷⁴⁾ The predominant position of the parties' procedural autonomy (and arbitrators' procedural discretion) is confirmed by Article V(1)(d) of the Convention, which, as discussed above, accords the parties' agreed arbitral procedures priority over the procedural requirements of the law of the arbitral seat.⁽¹⁷⁵⁾

Second, and notwithstanding Article II and the parties' procedural autonomy, Article V(1)(b) of the Convention permits non-recognition

of an award where "[t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise *unable to present his case*."⁽¹⁷⁶⁾ Third, Article V(1)(d) of the Convention permits non-recognition of an award where the arbitrators did not comply with the parties' agreed arbitral procedures or, absent such agreement, the law of the arbitral seat.⁽¹⁷⁷⁾ Finally, Article V(2)(b) of the Convention is also potentially applicable in cases of serious procedural unfairness, permitting non-recognition of awards for violations of local public policy, including procedural public policies.⁽¹⁷⁸⁾

As discussed below, Articles II, V(1)(b), V(1)(d) and V(2)(b) of the Convention afford the parties and arbitral tribunal substantial freedom to establish the arbitral procedures and to conduct the arbitral process without intervention by national courts.⁽¹⁷⁹⁾ Nonetheless, these provisions also permit national courts to deny recognition to arbitral awards that are the result of fundamentally unfair, arbitrary, or unbalanced procedures; national courts may do so by applying either a uniform international standard of procedural fairness under Article V(1)(b)⁽¹⁸⁰⁾ or mandatory national procedural public policies and procedural protections given effect under Articles V(1)(d) and V(2)(b).⁽¹⁸¹⁾ These provisions provide limited grounds on which either the parties' procedural agreements or an arbitral tribunal's procedural orders (absent agreement of the parties) can be overridden by national law for purposes of recognition proceedings.


page "2155" [a]. Article II

As discussed above, Article II of the Convention requires courts of Contracting States to recognize valid agreements to arbitrate and to refer the parties to arbitration pursuant to the terms of those agreements, including their procedural provisions.⁽¹⁸²⁾ This obligation extends to all material terms of an arbitration agreement – including the parties' agreements with regard to the arbitral seat, the number and identities of the arbitrators, the incorporation of institutional arbitration rules and the adoption of arbitral procedures (e.g., fast track arbitration).⁽¹⁸³⁾ By virtue of Article II, the Convention imposes an international obligation on Contracting States to give effect to the procedural terms of agreements to arbitrate.

Despite the primary position of the parties' procedural autonomy under Article II, the Convention also contemplates limitations on the parties' procedural autonomy. These exceptions are reflected in Articles II, V(1)(b), V(1)(d) and V(2)(b) of the Convention.

Under Article II, the obligation of Contracting States to recognize parties' procedural agreements is subject to a limited, and indirect, exception where the parties' agreements violate mandatory national laws or public policies in the arbitral seat guaranteeing an opportunity to be heard or equality of treatment; Article II leaves Contracting States free to impose internationally-neutral mandatory laws safeguarding the procedural integrity and fairness of the arbitral process, notwithstanding the parties' contrary procedural agreements.⁽¹⁸⁴⁾ As discussed above, the Convention is properly interpreted as restricting the extent to which mandatory national law may override the parties' procedural autonomy.⁽¹⁸⁵⁾ In particular, as discussed above, the Convention imposes international limits on the application of idiosyncratic or discriminatory local public policies.⁽¹⁸⁶⁾

Thus, Article II would not permit a Contracting State to refuse to recognize all agreements regarding arbitral procedures (for example, by imposing local rules of civil procedure on every arbitration conducted locally), to refuse to recognize agreements incorporating foreign arbitral institutions' arbitration rules (for example, by denying effect to agreements selecting the UNCITRAL, CIETAC, VIAC, or ICDR Rules), to refuse to recognize agreements on a foreign arbitral seat (for example, by requiring that all arbitrations be conducted locally), to refuse to recognize agreements on confidentiality (for example, by requiring that all arbitrations be open to the public), or to refuse to recognize agreements on the selection, qualifications and identities of the arbitrators (for example, by requiring that all arbitrators be local nationals). All of these requirements would be idiosyncratic or discriminatory rules of local law, rather than generally-applicable, internationally-neutral guarantees of procedural fairness, which the Convention would not give effect to.

 page "2156" There is very little authority that adopts this interpretation of Article II. Nonetheless, this interpretation produces results that are consistent with those of most national court decisions in annulment and recognition actions. As discussed elsewhere, those decisions adopt very restrictive approaches to mandatory procedural requirements, according substantial weight to the parties' procedural autonomy and the arbitrators' procedural discretion.⁽¹⁸⁷⁾ More fundamentally, this interpretation of Article II is required by the Convention's basic objectives of ensuring the enforceability of international arbitration agreements and awards in all Contracting States.⁽¹⁸⁸⁾

In sum, Article II of the Convention requires general recognition of the parties' procedural autonomy, forbidding Contracting States from applying discriminatory or idiosyncratic national laws to override the parties' procedural agreements. Article II does not itself impose mandatory procedural protections or restrictions on the parties' procedural autonomy, but it permits Contracting States to do so in a limited category of cases involving mandatory national laws or public policies guaranteeing parties an opportunity to be heard or equality of treatment.

[b]. Article V(1)(b)

Even more directly than Article II, Article V(1)(b) of the Convention contemplates limits on the parties' procedural autonomy. As discussed elsewhere, Article V(1)(b) provides that an arbitral award may be denied recognition if a party "was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise *unable to present his case*."⁽¹⁸⁹⁾ Under Article V(1)(b), an otherwise valid arbitral award may be denied recognition if it was the result of fundamentally unfair arbitral procedures – thereby imposing limits on the parties' procedural autonomy and arbitrators' procedural discretion.

Properly interpreted, the mandatory procedural standards applicable under Article V(1)(b) are not based on national laws or public policies, but instead impose a uniform international standard of procedural fairness and equality.⁽¹⁹⁰⁾ As discussed elsewhere, this public policy applies uniformly in all Contracting States and does not permit individual states to deny recognition to awards based on local laws or public policies.⁽¹⁹¹⁾ These international standards of procedural fairness are related to, and [page "2157"](#) informed by, standards of fair and equitable treatment that have developed in the context of international investment law.⁽¹⁹²⁾

By definition, the international procedural protections applicable under Article V(1)(b) do not include idiosyncratic or discriminatory local requirements – for example, that the arbitral seat be located locally, that the arbitrators be local nationals, or that the arbitrators apply local rules of civil procedure. Rather, Article V(1)(b) permits non-recognition only where an award is based on procedures that deny the parties equality of treatment or an opportunity to be heard.⁽¹⁹³⁾ As discussed in detail below, Article V(1)(b) generally applies only in cases involving very grave denials of basic requirements of procedural fairness, such as failure to provide notice of the arbitration, denial of a reasonable opportunity to present arguments or evidence, or serious misconduct by the arbitrators.⁽¹⁹⁴⁾

As also discussed below, Article V(1)(b) only permits non-recognition of an award in cases involving material violations of a fundamental procedural guarantee; immaterial or trivial violations of procedural rights are not grounds for non-recognition.⁽¹⁹⁵⁾ Similarly, Article V(1)(b) only contemplates non-recognition of an award where a denial of procedural rights has a material effect on the arbitral tribunal's decision; procedural violations concerning immaterial, irrelevant, or cumulative issues do not provide grounds for non-recognition of an award.⁽¹⁹⁶⁾ These limitations on non-recognition under Article V(1)(b) underscore the predominant position of both the parties' procedural autonomy and arbitrators' procedural discretion under the Convention.

[c]. Article V(1)(d)

Article V(1)(d) also imposes indirect limits on the parties' procedural autonomy and arbitrators' procedural discretion, providing for non-recognition of an award where "[t]he composition of the arbitral authority or the arbitral 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."⁽¹⁹⁷⁾ As noted above, Article V(1)(d) grants primacy to the parties' procedural autonomy, permitting annulment of an award where that autonomy is not given effect – including, for [page "2158"](#) example, where an arbitral tribunal disregards the parties' agreed arbitral procedures in favor of its own conception of the appropriate arbitral process.⁽¹⁹⁸⁾

Additionally, but subsidiarily, Article V(1)(d) permits non-recognition of an award where, in the absence of any agreement between the parties on arbitral procedures, the tribunal fails to comply with mandatory provisions of the law of the arbitral seat.⁽¹⁹⁹⁾ Article V(1)(d) only provides for non-recognition of an award based on the mandatory law of the arbitral seat where the parties have not agreed upon an aspect of the arbitral procedure; where such an agreement exists, non-recognition based on the law of the arbitral seat is not permitted under Article V(1)(d).

Moreover, Article V(1)(d) imposes constraints on a Contracting State's freedom to prescribe mandatory rules for locally-seated international arbitrations. In particular, paralleling the limitations applicable to national laws and public policies under Article II, Article V(1)(d) does not give effect to discriminatory or idiosyncratic procedural requirements; instead, Article V(1)(d) only permits non-recognition of awards based upon objective, neutrally-applied safeguards for the arbitral process.⁽²⁰⁰⁾

As with Article V(1)(b), Article V(1)(d) also provides for non-recognition of an award only where a procedural violation is significant and has a material effect on the arbitral tribunal's decision.⁽²⁰¹⁾ These limitations again confirm the primary importance of the parties' procedural autonomy and arbitrators' procedural discretion under the Convention, by limiting non-recognition of awards to cases involving grave and substantial procedural violations.

[d]. Article V(2)(b)

Finally, Article V(2)(b) of the Convention also contemplates limits on the parties' procedural autonomy and arbitral tribunal's procedural discretion. The procedural public policy applicable under Article V(2)(b) is different in character from the standards applicable under Articles V(1)(b) and V(1)(d): Article V(2)(b) establishes an exceptional escape device based on local public policy, rather than uniform international standards, which does not affect the validity or enforceability of the award in other states.⁽²⁰²⁾ Thus, Article V(2)(b) permits a Contracting State to rely on its own, national public policies to deny recognition to an award, just as it may generally invoke its own local procedural public policies to annul an award made locally.⁽²⁰³⁾

There have been suggestions that, for purposes of both non-recognition of an award under Article V(2)(b) and annulment of an award made locally, the relevant procedural public policy in international cases must, under the Convention, be international.⁽²⁰⁴⁾ That position rests on the desirability of applying uniform, neutral [page "2159"](#) international standards, particularly as to procedural matters where basic concepts of fairness and equality are broadly similar in most states.

Nonetheless, this argument is ultimately impossible to accept, at least as a matter of interpreting the Convention's requirements: as discussed below, it is relatively clear that both Article V(2)(b) and the Convention's treatment of annulment contemplate the possibility of application of local, national public policies and not international

public policy.⁽²⁰⁵⁾ Requiring the application of uniform international procedural public policies would contradict the primary role reserved for the local public policies and mandatory laws of Contracting States under Articles V(1)(e) and V(2) of the Convention. Nonetheless, as discussed elsewhere, the better view of the Convention is also that it imposes international limitations on the extent to which Contracting States may deny recognition of awards, including under Article V(2)(b), or annul awards.⁽²⁰⁶⁾

Under this interpretation, a Contracting State could not deny any role for the parties' procedural autonomy or arbitrators' procedural discretion in international arbitrations. Thus, paralleling analysis under Article II, a Contracting State would not be free to deny effect to any procedural agreement between the parties (for example, by imposing local litigation procedures on every arbitration conducted locally, regardless of the parties' agreement on cross-examination, document discovery, or a fast-track procedure), to deny effect to any choice by the parties of a foreign arbitral institution's arbitration rules (for example, by denying effect to agreements selecting the UNCITRAL, ICC, or CIETAC Rules), to deny effect to the parties' choice of a foreign arbitral seat (for example, by requiring that all arbitrations be conducted locally), or to deny effect to the parties' agreements regarding the identities of the arbitrators (for example, by requiring that all arbitrators be local nationals).

These results would all violate the basic premise of party autonomy, underlying Article II and V(1)(d) of the Convention,⁽²⁰⁷⁾ as well as the Convention's objectives of facilitating the enforcement of agreements to arbitrate and the international arbitral process.⁽²⁰⁸⁾ Equally, these results would convert the role of local public policy under Article V(2)(b) from providing an exceptional escape device to affirmatively mandating a comprehensive procedural code; again, that is contrary to the Convention's structure and treatment of the public policy exception generally.⁽²⁰⁹⁾

For much the same reasons, the Convention may be interpreted as precluding a Contracting State from requiring that all international arbitrations, regardless of the arbitral tribunal's procedural judgments, be conducted according to local rules of civil procedure or pursuant to procedures that discriminated against foreign parties to the [page "2160"](#) benefit of local nationals (e.g., requiring that all arbitrations be conducted exclusively in that state's official language or requiring that all arbitrators be local nationals). Such requirements would contradict the state's obligation under Article II to recognize the parties' agreement to arbitrate, and specifically their agreement to arbitrate according to procedures that the arbitral institution and tribunal adopted for the circumstances of their case. They would also contradict the Convention's basic objectives of facilitating the resolution of international disputes through the use of a neutral adjudicative process, instead substituting a state's parochial effort to advance the commercial interests of local litigants. This is not what the Convention was intended to permit.

Rather, in both annulment actions (applying Article II) and recognition actions (applying Articles V(1)(b), V(1)(d) and V(2)(b)), the Convention should be interpreted as permitting Contracting States to apply only internationally-neutral, non-discriminatory procedural protections that are consistent with state practice under the Convention. This interpretation of the Convention, which mandates structural limitations on Contracting States' reliance on local public policies, parallels the limitations imposed by Articles II and V on the permissible grounds for a Contracting State to deny effect to the validity of an international arbitration agreement⁽²¹⁰⁾ or to annul an award.⁽²¹¹⁾

There is little authority expressly adopting these interpretations of the Convention. Nonetheless, as discussed below, the standards that this interpretation produces are consistent with the results in most decisions by national courts in annulment actions, which adopt very restrictive approaches to mandatory procedural requirements, emphasizing the special procedural characteristics of international arbitration, the parties' procedural autonomy and arbitrators' procedural discretion, and the need for a serious procedural violation causing material injury before an award may be denied effect.⁽²¹²⁾ More importantly, these interpretations of the Convention are required to give effect to both its central provisions – requiring Contracting States to recognize international arbitration agreements and awards – and its basic objectives – to ensure the enforceability of international arbitration agreements and awards in all Contracting States.

There is generally little scope for arguments that parties "contracted into" mandatory procedural requirements of the arbitral seat by agreeing to seat the arbitration there. These arguments have no force at all where the mandatory law of the arbitral seat conflicts with specific procedural provisions of the arbitration agreement. Put simply, by agreeing to arbitrate in a particular location, parties do not thereby intend to override or undo specific procedural mechanisms on which they have agreed (such as [page "2161"](#) number of arbitrators, choice of arbitral institution, or particular procedures). That is particularly true given the reduced contemporary role of the procedural law of the arbitral seat in international arbitrations.⁽²¹³⁾

Even where the parties have not agreed upon a specific arbitral procedure, they should not be considered ordinarily to have contractually agreed to local procedural rules⁽²¹⁴⁾ or to idiosyncratic or archaic local procedural requirements (e.g., even number of arbitrators, nationality or religious requirements).⁽²¹⁵⁾ Rather, consistent with fundamental respect for the parties' autonomy⁽²¹⁶⁾ and the arbitrator's discretion⁽²¹⁷⁾ with regard to arbitral procedures, the parties should generally be considered to have excluded local procedural requirements. That is particularly true where the parties have agreed to either institutional rules⁽²¹⁸⁾ or a comprehensive set of *ad hoc* arbitration rules (e.g., UNCITRAL Rules): in each case, the parties' intention to adopt an autonomous international procedural regime is ordinarily evident. These conclusions have particular force when local mandatory procedural requirements inhibit or obstruct the arbitral process, rather than facilitate or support it.⁽²¹⁹⁾

Finally, even if the Convention were (incorrectly) interpreted as allowing Contracting States freedom to impose discriminatory or

idiosyncratic mandatory national procedural requirements on international arbitrations that are seated locally, it is clear that other Contracting States are free to recognize awards that were annulled on the basis of such local procedural requirements. This result is contemplated expressly by Article V(1)(d), which gives priority to the parties' procedural autonomy, and by Article VII, which leaves Contracting States free to recognize awards on more liberal grounds than those under Article V.⁽²²⁰⁾ Indeed, other Contracting States are in principle required, by virtue of Articles II(3) and V(1)(b), to recognize awards that have been annulled in the arbitral seat on the basis of national laws that prescribe discriminatory or idiosyncratic mandatory procedural requirements.⁽²²¹⁾

[2]. Other International Arbitration Conventions

The European and Inter-American Conventions are broadly similar to the New York Convention in their treatment of mandatory procedural requirements. Both instruments recognize the authority of national courts to deny recognition of awards for serious procedural unfairness or irregularity, as well as on grounds of local public policy.⁽²²²⁾ They also both impose the same basic obligations on Contracting States with regard to recognition of the parties' procedural autonomy, providing the same [page "2162"](#) structural basis for prohibitions against discriminatory or idiosyncratic mandatory national procedural requirements.⁽²²³⁾

[B]. Mandatory Procedural Protections Under National Arbitration Legislation

Consistent with the New York Convention, most national arbitration regimes do not impose significant mandatory limitations on the freedom of the parties or the authority of the arbitral tribunal to conduct the arbitration: subject only to very limited mandatory restrictions, parties are free to agree to arbitral procedures that suit their interests, and arbitrators are empowered to prescribe arbitral procedures when the parties have made no agreement on the subject.⁽²²⁴⁾ Nevertheless, legislation and/or judicial decisions in most developed jurisdictions require that arbitral proceedings seated on local territory satisfy minimal standards of procedural fairness and equality; these standards are variously referred to as requiring "equality of treatment," "due process," "natural justice," "procedural regularity," or "fair and equitable treatment."⁽²²⁵⁾

Care must be exercised with regard to the terminology used concerning matters of procedural fairness in international arbitration, to avoid unnecessarily implying that domestic procedural standards apply to the international arbitral process. Thus, some authorities refer to "due process" – a term which is often used, with particular legal meanings, in domestic legal systems⁽²²⁶⁾ – in international arbitration.⁽²²⁷⁾ The better approach is to avoid phrases which coincide with domestic procedural rules, instead referring neutrally to "procedural fairness." Nonetheless, the use of terms such as "due process" and "natural justice" are well-established in both national court decisions and commentary relating to international arbitration and it is difficult to avoid such references.

[1]. Mandatory Procedural Protections: Basic Principles

Preliminarily, most national arbitration regimes impose a limited set of mandatory procedural requirements, capable of overriding both the parties' procedural agreements and the arbitrators' procedural discretion. These mandatory requirements are often based on domestic constitutional principles, adapted to [page "2163"](#) international settings, guaranteeing a minimal set of procedural protections.⁽²²⁸⁾ In most jurisdictions, these protections consist of the right to be heard and the right to equal treatment – with both rights being qualified by a high degree of deference to the parties' procedural autonomy and the arbitrators' procedural discretion.

The UNCITRAL Model Law is representative of the mandatory requirements of procedural fairness which apply to international arbitrations in most jurisdictions. Article 18 of the Model Law requires that "[t]he parties *shall be treated with equality and each party shall be given a full opportunity of presenting his case.*"⁽²²⁹⁾ In the words of one commentator, "Article 18 establishes the fundamental principles that in all arbitrations under the Law each party must be treated with equality and be given a full opportunity to present his case."⁽²³⁰⁾


It is clear that Article 18's mandatory procedural guarantees apply to, and override, both the parties' procedural autonomy and the arbitral tribunal's procedural discretion. That is clear from the text of Articles 18 and 19(1) and (2), with the former being phrased in unqualified terms and the text of both Articles 19(1) and (2) being similarly qualified (by reference to Article 18). Likewise, the drafting history of the Model Law includes specific comments (by the Working Group) that the guarantees of equal treatment and an opportunity to be heard "should be observed not only by the arbitral tribunal but also by the parties when laying down any rules of procedure."⁽²³¹⁾

It is also clear that Article 18 applies during all phases of the arbitral proceedings – including constitution of the tribunal, fixing of time limits for written submissions, submission of witness evidence, conduct of hearings, opportunities for witness [page "2164"](#) examination and post-hearing written submissions.⁽²³²⁾ Thus, the drafting history of the Model Law indicates that what became Article 18 "would apply to arbitral proceedings in general; it would thus govern all the provisions in Chapter V [regarding the arbitral procedures] and other aspects, such as the composition of the arbitral tribunal, not directly regulated therein."⁽²³³⁾ (Notwithstanding this, there is no question but that Article 18 does not apply to litigation in national courts, outside the arbitral process governed by the Model Law.⁽²³⁴⁾)

Article 18 is sometimes referred to as the "Magna Carta of arbitral procedure."⁽²³⁵⁾ This formulation is only partially appropriate. It is correct that Article 18 states vital and fundamental procedural

protections – what the Model Law's drafting history term "basic notions of fairness."⁽²³⁶⁾


It is inappropriate, however, to associate those protections with a particular national legal tradition, particularly one focused on domestic concerns. Rather, the more fitting characterization of Article 18, if one is to be adopted, is to describe both it and Article 19 as akin to a universal charter for arbitral procedures – reflecting the international character of both the arbitrations subject to Articles 18 and 19 and the sources of law relevant under Article 18.⁽²³⁷⁾

 [page "2165"](#) Moreover, it is significant that Article 18 was modeled on Article 15(1) of the UNCITRAL Rules⁽²³⁸⁾ and, like the Rules, is a uniform international instrument whose procedural guarantees must be interpreted by reference to international sources. As the Model Law's drafting history explains:

"Taken together with the other provisions on arbitral procedure, a liberal framework is provided [by Articles 18 and 19] to suit the great variety of needs and circumstances of international cases, unimpeded by local peculiarities and traditional standards which may be found in the existing domestic law of the place [of arbitration]."⁽²³⁹⁾

The same basic procedural guarantees set forth in Article 18 are also contained in the (related) provisions of the UNCITRAL Model Law regarding the annulment and/or recognition of arbitral awards. Thus, [Articles 34\(2\)\(a\)\(ii\)](#) and [36\(1\)\(a\)\(ii\)](#) of the Model Law provide for annulment or non-recognition of an award if "the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or was otherwise unable to present his case."⁽²⁴⁰⁾ These provisions permit, in at least some circumstances, annulment or non-recognition of an award where Article 18's procedural protections were not accorded the award-debtor.

As discussed elsewhere, an award may only be annulled or denied recognition under [Articles 34\(2\)\(a\)\(ii\)](#) and [36\(1\)\(a\)\(ii\)](#) where the procedural unfairness or irregularity was serious and materially affected the arbitrators' decision; minor or immaterial procedural violations are not grounds for the exceptional annulment or non-recognition of an award.⁽²⁴¹⁾ Moreover, as also discussed elsewhere, a procedural irregularity can generally provide grounds for annulment or non-recognition if it has not been waived (for example, by a failure to object at the time).⁽²⁴²⁾ Thus, even where the arbitral process violated Article 18's procedural protections, the tribunal's award will not necessarily be subject to annulment or non-recognition; additional requirements, beyond a violation of Article 18, must be satisfied for annulment and non-recognition.⁽²⁴³⁾

 [page "2166"](#) Other national arbitration regimes are similar to the Model Law's treatment of mandatory procedural protections. The recent reform of the French Code of Civil Procedure included an express requirement for procedural fairness and equality in international arbitration, paralleling that under Article 18 of the Model Law: "Irrespective of the procedure adopted, the arbitral tribunal shall ensure that the parties are treated equally and shall uphold the principle of due process."⁽²⁴⁴⁾ A decision of the Paris Cour d'appel concluded in similar terms that arbitrators are responsible for:

"guaranteeing...the conditions for a 'fair hearing' in accordance with general fundamental principles and where appropriate, in accordance with Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms."⁽²⁴⁵⁾

As with a proper interpretation of the Model Law, French courts have also emphasized that the mandatory procedural norms applicable in international arbitrations must take into account the international character of the arbitral process and international standards of procedural fairness, applying "the fundamental notions of due process, within the French understanding of international policy."⁽²⁴⁶⁾

Likewise, [Article 182\(3\) of the Swiss Law on Private International Law](#) provides, again in mandatory terms, that: "Whatever procedure is chosen [by the parties and/or tribunal], the arbitral tribunal shall assure equal treatment of the parties and the right of the parties to be heard in an adversarial procedure."⁽²⁴⁷⁾ In considering claims of procedural unfairness in international arbitration, Swiss courts have looked to principles developed under the Swiss Constitution⁽²⁴⁸⁾ and Article 6 of the European [page "2167"](#) Convention on Human Rights,⁽²⁴⁹⁾ in each case applicable by analogy to international arbitral proceedings.

Applying these principles, the Swiss Federal Tribunal has held: "Equal treatment of the parties is also guaranteed by [the Swiss Law on Private International Law] and requires the proceedings to be organized and conducted in such a way that each party has the same possibilities to present its arguments," and "the principle of contradiction, guaranteed by the same provisions, requires each party to have the possibility to express its views on the arguments of its opponent, to review and to discuss the evidence the latter brings in and to refute them by its own evidence."⁽²⁵⁰⁾ Other developed national arbitration regimes are similar to the Model Law in their approaches to mandatory procedural protections in international arbitrations with their seats on local territory.⁽²⁵¹⁾

Even in jurisdictions where there are no express statutory provisions requiring equality of treatment and due process, national courts have imposed similar mandatory procedural requirements. In the United States, the FAA has been interpreted as imposing mandatory requirements of basic procedural fairness, based (by analogy) on the due process guarantees of the U.S. Constitution; these guarantees [page "2168"](#) emphasize equality of treatment, an adequate opportunity to be heard and procedural regularity.⁽²⁵²⁾ In the words of one leading U.S. judicial decision:


"the hearing should 'meet the minimal requirements of due process': adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator.... The parties must have an opportunity to be heard at a

meaningful time and in a meaningful manner.”⁽²⁵³⁾

As under the Model Law, U.S. courts have also emphasized that mandatory procedural protections must be formulated and applied in light of the international character of the arbitral process:

“attempt to state a due process claim fails for several reasons. First, inability to produce one’s witnesses before an arbitral tribunal is a risk inherent in an agreement to submit to arbitration. By agreeing to submit disputes to arbitration, a party relinquishes his courtroom rights – including that to subpoena witnesses – in favor of arbitration ‘with all of its well known advantages and drawbacks.’ ... [T]he logistical problems of scheduling hearing dates convenient to parties, counsel and arbitrators scattered about the globe argues against deviating from an initially mutually agreeable time plan unless a scheduling change is truly unavoidable.”⁽²⁵⁴⁾

As discussed in greater detail below, judicial decisions in other leading jurisdictions reach similar results.⁽²⁵⁵⁾

International arbitral awards have adopted the same reasoning, consistently concluding that the parties’ procedural autonomy and arbitrators’ procedural  [page "2169"](#) discretion are subject to overriding requirements of procedural fairness and equality. In the words of one award:

“both parties to the case are entitled to have an equal opportunity to present written submissions and to respond to each other’s submissions. This also means that the parties must have an equal opportunity to go through the evidence and the arguments submitted by the other party, and to prepare their own position and arguments in advance of the hearing.”⁽²⁵⁶⁾


These mandatory procedural protections are of fundamental importance, to both the parties and the arbitral process more generally. Unless basic standards of procedural fairness are observed, arbitration satisfies neither the parties’ expectations nor the requirements of a civilized adjudicative process.

At the same time, mandatory procedural protections are also often in tension with other basic objectives of the arbitral process – including the objectives of speed, efficiency and party autonomy.⁽²⁵⁷⁾ Procedural safeguards for a party’s right to be heard inevitably take more time, cost more money and produce more opportunities for judicial intervention – all of which contradict basic objectives of the arbitral process.⁽²⁵⁸⁾ As a consequence, both national court decisions and arbitral awards addressing procedural issues struggle to reconcile competing goals of fairness, equality, efficiency and party autonomy.

Particularly in international commercial arbitrations, the overwhelming weight of authority accords priority to considerations of efficiency, party autonomy and equality of treatment, as distinguished from the parties’ right to be heard. As discussed below, rather than insisting on compliance with procedural rules used in national litigation contexts, providing particular mechanisms for the parties to be heard, both national courts and arbitral tribunals have almost always permitted the use of arbitral procedures devised by the parties, or the arbitrators, for presentation of their cases – provided that those procedures are applied equally and afford a minimal level of procedural rights. Only in exceptional cases will a national court conclude that an international arbitral tribunal violated a party’s rights to be heard by adopting particular procedures.


[2]. Equality of Treatment

Most national legal systems impose a mandatory duty on the arbitral tribunal to treat the parties equally. As one authority concludes, the equality of treatment “is a fundamental principle of justice.”⁽²⁵⁹⁾

 [page "2170"](#) The UNCITRAL Model Law is representative in this respect, providing that “[t]he parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.”⁽²⁶⁰⁾ The Model Law’s requirement of equality of treatment is based on a comparable requirement in the UNCITRAL Rules.⁽²⁶¹⁾ This requirement was specifically retained during the drafting of the original 1985 Model Law, despite suggestions in the drafting process that a guarantee of fair treatment was sufficient:

“In this context, the comment was made that what was important was not the imposition of an obligation to observe the principle of equal treatment, since in certain circumstances (such as where the parties made conflicting requests to an arbitral tribunal) such treatment was impossible; the real need was to stress that both parties should receive fair treatment. It was suggested, however, that the best course might be to modify the paragraph so as to impose an obligation on the arbitrators to treat the parties both with equality and fairness.”⁽²⁶²⁾

The same requirement for equality of treatment was retained in the 2006 revisions of the Model Law.⁽²⁶³⁾ Other national arbitration legislation and judicial decisions also impose mandatory guarantees of equality of treatment.⁽²⁶⁴⁾ An illustrative civil law provision is [Article 182\(3\) of the Swiss Law on Private International Law](#), which provides: “Regardless of the procedure chosen, the arbitral tribunal shall ensure equal treatment of the parties.”⁽²⁶⁵⁾

 [page "2171"](#) National courts have also repeatedly affirmed the parties’ rights to equality of treatment. In the words of the Swiss Federal Tribunal:

“Equal treatment of the parties, guaranteed by Art. 182(3) and 190(2)(d) [of the SLPIL] implies that the proceedings must be organized and conducted in such a way that each party has the same possibilities to present its case. Under that principle, which also

applies to the time limits within which the briefs must be filed, the arbitral tribunal must treat the parties in the same way at all stages of the proceedings.”⁽²⁶⁶⁾

Other formulations have focused more generally on considerations of fairness:

“The overriding concern...is fairness. The best rule of thumb to adopt is to treat the parties equally and allow them reasonable opportunities to present their cases as well as to respond. Fairness, however, is a multidimensional concept and it would also be unfair to the successful party if it were deprived of the fruits of its labour as a result of a dissatisfied party raising a multitude of and technical challenges after an arbitral award has been made.”⁽²⁶⁷⁾

Many institutional rules also guarantee equality of treatment, including, as noted above, the UNCITRAL Rules.⁽²⁶⁸⁾ Unusually, the 2012 ICC Rules do not provide for equality of treatment and instead require that “the tribunal shall act *fairly and impartially* and ensure that each party has a reasonable opportunity to present its case.”⁽²⁶⁹⁾

It is sometimes remarked that “as long as one party has adequate time to present its case, it cannot elicit overwhelming sympathy by objecting that its adversary ends up with more than adequate time.”⁽²⁷⁰⁾ This approach wrongly conflates an adequate opportunity to present a party’s case with an equal opportunity to do so.⁽²⁷¹⁾ It is in fact fundamentally unjust to grant one party a disproportionate opportunity to present its [page "2172"](#) case, even if both parties receive adequate opportunities to do so; the mandatory requirement of equality of treatment forbids just such an approach.

The concept of equality of treatment is essentially a requirement of non-discrimination. All parties to the arbitration must be subject to the same procedural rules and afforded the same procedural rights and opportunities. These requirements are reflected in adages such as “a level playing field,” “equality of arms” and “equality of treatment,” all of which embody a core principle of equality and non-discrimination.

Whatever formulation of equal treatment is adopted in arbitration legislation or institutional rules, it is important to determine what particular aspects of the arbitral process are relevant to equality of treatment. In principle, the guarantee of equal treatment is universally-applicable, to all aspects of the arbitral procedure, from notice of the arbitration to constitution of the tribunal to conduct of the proceedings to making of the award.⁽²⁷²⁾

Despite its universal application, the guarantee of equal treatment must be applied with care. The fact that the arbitral tribunal conducts the arbitral hearings at a location that is closer (in terms of geographic distance) to one party than the other does not implicate equal treatment. On the other hand, a party would likely be denied equal treatment if it was denied the right to counsel (or counsel of its choice), while its counter-party was not; if it was permitted five days to prepare its written submissions, while its counter-party was granted five weeks; if it was permitted to offer testimony from only three witnesses, while its counter-party was permitted to offer testimony from thirteen witnesses; or if it was subject to a ten-page limit, while its counter-party was permitted to submit a twenty-five page Memorial.

One court has held that the requirement of equal treatment is satisfied where each party is afforded a reasonable opportunity to fully state its case; each party is given an opportunity to understand, test and rebut its opponent’s case; proper notice is given of hearings and the parties and their advisers have the opportunity to be present throughout the hearings; and each party is given reasonable opportunity to present evidence and argument in support of its case.⁽²⁷³⁾ Although generally noncontroversial, this formulation is directed towards the parties’ opportunities to present their cases, rather than the guarantee of equal treatment; the latter guarantee focuses on differences in the procedural treatment of the parties, rather than (only) on opportunities to be heard.

Application of the principle of equal treatment also requires careful consideration of the context in which the treatment occurs. In practice, it is almost impossible to treat parties perfectly equally or identically, either in terms of time and other opportunities allowed for presenting their case. Inevitably, the differences between the parties’ positions will make identical treatment both impossible and, in many cases, unimportant.

[page "2173"](#) For example, it is impossible to grant both the claimant and respondent identical amounts of time to prepare their cases. This is because the claimant has “as long as it likes within statutory limitation periods to prepare and bring the claim,” but the respondent will normally have a much shorter period of time to prepare an answer.⁽²⁷⁴⁾ Moreover, as discussed below, exact equality of time (e.g., both parties are permitted 12 ½ hours to present their cases) may, in some circumstances, not amount to equal treatment and may, instead, be unequal and unfair – because one party’s case may, by its nature, take longer to present.⁽²⁷⁵⁾ Similarly, the parties will invariably make submissions of varying length, offer differing numbers of witnesses, have different opportunities to examine one another’s witnesses and respond to tribunal questions and the like.

In determining what constitutes “equality of treatment” it is necessary to consider in detail the circumstances of the parties’ respective positions, claims and evidence, and the arbitral process as a whole.⁽²⁷⁶⁾ “Equal” treatment does not mean the “same” treatment and there are circumstances where treating the parties identically will in fact be both unfair and unequal.⁽²⁷⁷⁾

Instead, the core value reflected by “equality” of treatment is that both parties are guaranteed the same status before the tribunal. No party is entitled to, or may be given, preferential treatment, favor, or dispensation by virtue of its identity, its nationality, or other factors extraneous to the arbitral process: any procedural decision of the tribunal should be no different if the parties’ positions in the

arbitration were reversed. In particular, equal treatment means applying the same procedural rules and granting the same procedural rights to both parties, while ensuring that non-discriminatory or “like” opportunities and treatment are afforded both parties.⁽²⁷⁸⁾

This latter guarantee of non-discrimination involves detailed judgments about how to afford “like” treatment to parties that are inevitably in “unlike” positions, if only (as discussed above) by virtue of the differences in their claims, evidence and arguments. In these circumstances, “like” or non-discriminatory treatment means treatment that [page “2174”](#) affords both parties essentially the same opportunities to present their cases – which may involve identical time periods, numbers of witnesses, numbers of pages and similar quantitative measures, but which may also involve somewhat different time periods, witnesses and the like.

Nonetheless, as a general proposition, while the “same” treatment will not necessarily be “equal” treatment, it is a highly relevant consideration in ascertaining whether equal treatment has been afforded. There may well be good reasons for affording one party more time than another party to address an issue, or present its case, but the burden of proving that different is equal will almost always be on the party seeking to do so. And the ultimate touchstone will be that neither party will be favored, or disfavored, and that both parties will be treated with equal fairness and respect.

[3]. Opportunity to Be Heard

Like the principle of equality of treatment, virtually all legal systems guarantee the parties’ opportunity to be heard, also frequently referred to as a party’s right to present its case. As discussed below, the parties’ right to be heard is guaranteed by the New York Convention, which provides in Article V(1)(b) that an award may be denied recognition if a party was “unable to present its case.”⁽²⁷⁹⁾ Similarly, most national legal systems also guarantee the parties’ opportunity to be heard in the arbitral process.

The UNCITRAL Model Law is again representative, providing in Article 18 that “each party shall be given a full opportunity of presenting his case.”⁽²⁸⁰⁾ The drafting history of the Model Law emphasized that Article 18’s right to be heard is “fundamental”⁽²⁸¹⁾ in nature and reflects “basic notions of fairness.”⁽²⁸²⁾ Other national arbitration legislation is similar to the Model Law, although a number of statutes provide more specifically that parties shall be given a “reasonable” or “fair” opportunity to be heard.⁽²⁸³⁾ These formulations do not differ materially from guarantees of an “opportunity to be heard,” which is impliedly limited by considerations of reasonableness and fairness.

[page “2175”](#) National court decisions also uniformly recognize the fundamental importance of the parties’ right to be heard, under both the UNCITRAL Model Law and otherwise.⁽²⁸⁴⁾ In one court’s words, under the Model Law: “Parties to arbitration have, in general, a right to be heard effectively on every issue that may be relevant to the resolution of a dispute.”⁽²⁸⁵⁾ Another Model Law court held that Articles 18 and 24 reflect the “essence of fair adjudication, deeply rooted in tradition and conscience, to be ranked as fundamental.”⁽²⁸⁶⁾

In the United States, courts considering the fairness of international arbitral proceedings have applied, by analogy, the U.S. constitutional requirement of due process, applicable to U.S. judicial and administrative proceedings. The due process clause of the U.S. Constitution guarantees “an opportunity to be heard” at a meaningful time and in a meaningful manner.”⁽²⁸⁷⁾ The protections of the due process clause are fundamentally important, but impose limited procedural requirements in practice. In the words of one U.S. court:

“A fundamentally fair [arbitration] hearing requires only notice, opportunity to be heard and to present relevant and material evidence and argument before the decision makers.”⁽²⁸⁸⁾

Or, in the words of another U.S. court: “To constitute misconduct requiring vacation of an award, an error in the arbitrator’s determination must be one that is not simply an error of law, but which so affects the rights of a party that it may be said that he was deprived of a fair hearing.”⁽²⁸⁹⁾

In England, the opportunity to be heard is “perhaps the most important single aspect of fairness and is codified in the general principle in the Arbitration Act 1996, s 33.”⁽²⁹⁰⁾ [page “2176”](#) The general principle of procedural fairness under the [English Arbitration Act, 1996](#), was summarized by one well-considered decision as follows:

“The arbitrators’ duty was to give the parties a fair opportunity of addressing them on all factual issues material to their intended decision as to which there had been no reasonable opportunity to address them during the hearing.”⁽²⁹¹⁾

Or, as another English court held, an arbitral tribunal must give the parties an opportunity to present arguments on all the “essential building blocks” of the tribunal’s conclusions.⁽²⁹²⁾

Nonetheless, as in the United States, English law leaves substantial scope to the arbitrators’ discretion. As another English court concluded, “[i]t is not a ground for intervention that the court considers that it might have done things differently.”⁽²⁹³⁾ An [page “2177”](#) award will only be annulled on procedural grounds if the arbitral process was “so removed from what could reasonably be expected of the arbitral process that the court should be expected to intervene.”⁽²⁹⁴⁾ Other common law jurisdictions are similar.⁽²⁹⁵⁾

Courts in civil law jurisdictions also uniformly affirm the fundamental importance of a party’s opportunity to be heard. As one French court declared, “arbitrators must respect the equality of parties and the principle of contradictory proceedings. They must allow each party to present its case on issues of fact and law, to know the case of its adversary and to discuss it.”⁽²⁹⁶⁾

Similarly, in the words of the Swiss Federal Tribunal:

"The right to be heard, as guaranteed as by [Art. 182\(3\)](#) and [190\(2\)\(d\) \[of the Swiss Law on Private International Law\]](#), is not different in principle from that contained in constitutional law. Thus in the field of international arbitration it was held that each party has the right to express its views on the facts essential for the decision, submit arguments, to propose evidence on pertinent facts, and to participate in the arbitral hearings."⁽²⁹⁷⁾

The Swiss Federal Tribunal has also emphasized the circumscribed role of mandatory procedural protections in international arbitration:

"It should be underlined that procedural public policy will constitute only a simple exclusion provision namely that it will merely have a protective function and will not generate any positive rules. This is because the legislature did not desire that procedural public policy should be extensively interpreted and that there should arise a code of arbitral procedure to which the procedure, as freely selected by the parties, should be subjected."⁽²⁹⁸⁾

That is, procedural protections imposed by mandatory law or public policy do not impose some general procedural code or regime ("will not generate any positive [page "2178"](#) rules"), but are instead specific, tailored protections ("a simple exclusion provision") aimed at preventing a fundamentally unfair procedure from being agreed to by the parties or imposed by the arbitral tribunal.

Institutional arbitration rules generally parallel the provisions of national law and judicial decisions, guaranteeing the parties' right to be heard in international arbitral proceedings.⁽²⁹⁹⁾ As with most national arbitration statutes, this guarantee is generally accompanied by and related to the mandatory requirement that parties be treated with equality. Although national arbitration legislation and judicial decisions guarantee the right to be heard in international arbitral proceedings, it is clear that these sources protect only the most basic procedural rights of parties to an international arbitration.

In most jurisdictions, the right to be heard in international arbitration does not impose any particular procedural code or comprehensive definition of the parties' procedural rights. In part, that is because of the diversity of international arbitrations, with a wide variety of different procedures being applied, tailored to the circumstances of particular cases, which inhibits formulation of a single, comprehensive definition of the opportunity to be heard. These difficulties are exacerbated by the inevitable involvement of parties from different legal systems, with different approaches to the adjudicative process, in international arbitrations.

Despite this, it is possible to formulate a common core of procedural protections that are central to the right to be heard under [Article 18 of the UNCITRAL Model Law](#) and comparable provisions in other jurisdictions. These protections are limited to the safeguards which are fundamental to a fair adjudicative process, reflecting the minimum procedural rights necessary to enable a party to present its case to an adjudicative decision-maker in an adversarial process. These safeguards are not the protections necessary for a flawless, a good, an efficient, or even a merely satisfactory arbitral process; they are only those guarantees that are absolutely necessary to provide a minimally fair adjudicative process.

The procedural protections contemplated by the right to be heard in international arbitration consist of: (a) adequate notice of the proceedings, including notice of the major steps in arbitration; (b) adequate notice of the claims, evidence and legal arguments of other parties to the arbitration; (c) representation by counsel of the party's choice (except where specifically waived); (d) reasonable time to present a party's claims or defenses, evidence and legal arguments, including, in most cases, at an oral evidentiary hearing in the presence of the arbitral tribunal; (e) reasonable time to prepare claims or defenses, evidence and legal arguments, including responses to the claims or defenses, evidence and legal arguments of other parties to the arbitration; (f) an impartial and independent tribunal; (g) a decision based on the evidence and legal arguments submitted by the parties, and not upon *ex parte* communications or the tribunal's independent factual investigations (except where specifically agreed to the contrary); and (h) protection against "surprise" decisions, not based upon factual or legal grounds that a party had no opportunity to address.

[page "2179"](#) Conversely, the right to be heard does not generally include: (a) a substantively correct decision, including a decision applying the correct substantive law; (b) a reasoned award; (c) arbitral procedures that resemble those of a party's home jurisdiction; (d) disclosure or discovery; (e) hearings open to the public; (f) advance notice of the contents of the tribunal's decision and an opportunity to comment thereon; (g) unlimited time to prepare or present a party's case; (h) a verbatim transcript; or (i) financial assistance to ensure that a party has resources equivalent to those of a counter-party to present its case. Although parties not infrequently demand one or more of these procedural protections (and are sometimes granted them), they are not ordinarily regarded as essential to an opportunity to be heard.

[4]. Deference to Parties' Procedural Autonomy and Arbitrators' Procedural Discretion

For the most part, there are only limited differences among the national standards of procedural fairness that are applied to the international arbitral process in developed jurisdictions. That is in part because, in most jurisdictions, mandatory standards of procedural fairness are comprised only of a limited number of basic requirements, best represented by the Model Law's requirements of equal treatment and an opportunity to be heard (as discussed above).

The similarities in national approaches to mandatory procedural requirements in international arbitration is also in part a result of

steps towards “convergence” that have occurred with regard to both litigation and arbitration procedures in developed jurisdictions over the past decade.⁽³⁰⁰⁾ This convergence makes the likelihood of fundamentally different conceptions of procedural fairness materially less likely. This is confirmed by the increasingly widespread adoption of the UNCITRAL Model Law, which provides a uniform international approach to mandatory procedural protections (in Article 18) and which should be interpreted in light of the international character of both international arbitration and the Model Law itself.⁽³⁰¹⁾

Most fundamentally, the similarities between national approaches to mandatory procedural requirements in international arbitration are also the result of the substantial deference that is afforded the parties’ procedural autonomy and the arbitrators’ procedural discretion in most jurisdictions. That deference arises from the fundamental importance of party autonomy to the arbitral process, the limited role of judicial intervention by national courts in international arbitration and the importance of efficiency in the arbitral process; imposing rigorous mandatory procedural requirements, enforced by national courts, compromises all of these objectives – a result that legislatures and courts in most jurisdictions have been unwilling to accept.

Thus, in most states, mandatory national law imposes only very limited restrictions on the parties’ autonomy to agree upon arbitral procedures, particularly where commercial parties are involved, or on the arbitrators’ procedural discretion. In general, only agreements imposing egregiously and flagrantly unconscionable, or [page "2180"](#) wholly arbitrary and unfair, arbitral procedures will be held unenforceable; similarly, only procedural decisions by an arbitral tribunal that are grossly unfair and one-sided, or that effectively preclude a party from presenting its case, will be held to violate a party’s rights to equal treatment or a fair hearing.

This approach is reflected in the drafting history of the [UNCITRAL Model Law, which emphasized that Article 18](#) was not intended to undermine the parties’ autonomy or the efficiency of the arbitral process.⁽³⁰²⁾ Among other things, the Secretariat’s Note on the draft Model Law explained:

“Article [18 and Article 19] may be regarded as the most important provision[s] of the model law. [They go] a long way towards establishing procedural autonomy by recognizing the parties’ freedom to lay down the rules of procedure and by granting the arbitral tribunal, failing agreement of the parties, wide discretion as to how to conduct the proceedings, both subject to fundamental principles of fairness. Taken together with the other provisions on arbitral procedure, a liberal framework is provided to suit the great variety of needs and circumstances of international cases, unimpeded by local peculiarities and traditional standards which may be found in the existing domestic law of the place [of arbitration].”⁽³⁰³⁾

Decisions in Model Law jurisdictions have adopted the same analysis of Article 18, underscoring the narrow and exceptional character of application of Article 18’s mandatory procedural protections in actions to annul or deny recognition of an award.⁽³⁰⁴⁾ As one Indian decision put it, “one of the Act’s ‘main objectives’ [was] ‘to minimize the supervisory role of courts in the arbitral process.’”⁽³⁰⁵⁾

[page "2181"](#) Decisions in other jurisdictions also emphasize the limited scope of judicial review of arbitral procedures. As one U.S. decision concluded: “[f]ederal courts do not superintend arbitration proceedings. Our review is limited to determining whether the procedure was fundamentally unfair.”⁽³⁰⁶⁾ Thus, if an arbitration agreement “specifies methods of procedure for the arbitration, the arbitrators will be bound to that procedure unless it is in violation of law or public policy.”⁽³⁰⁷⁾ Another U.S. decision adopted a particularly robust view of the parties’ autonomy, declaring that:

“Short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes; parties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract.”⁽³⁰⁸⁾

Only somewhat less expansively, albeit less colorfully, the 1996 English Arbitration Act provides:

“the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest.”⁽³⁰⁹⁾

This provision is correctly described as “giving effect to the principle of party autonomy, that is to say that the parties should be free to agree how their disputes are resolved subject only to such safeguards as are necessary in the public interest.”⁽³¹⁰⁾ Under this standard, the only limitations on the parties’ procedural autonomy arise from the “public interest,” and not from the private interests of individual parties in particular cases.

Courts from other jurisdictions have adopted similar formulations.⁽³¹¹⁾ As one judicial decision put it:

[page "2182"](#) “From the viewpoint of German procedural public policy, the recognition of a foreign arbitral award can therefore only be denied if the arbitral procedure suffers from a grave defect that touches the foundation of the State and economic functions.”⁽³¹²⁾

The Swiss Federal Tribunal has expressed a comparable view, reasoning that:

“procedural public policy is violated when some fundamental and generally acknowledged principles were violated, thus leading to an unbearable contradiction with the sentiment of justice, so that the

decision appears incompatible with the values recognized in a state of laws.”⁽³¹³⁾

These various authorities reflect the limited, if nonetheless vital, role of mandatory procedural protections in international arbitration. In the vast majority of all cases, the parties’ procedural agreements and arbitrators’ procedural decisions will be upheld; only procedures that are gravely one-sided and unfair, or that effectively prevent a party from presenting its case, will be held to violate procedural guarantees in most jurisdictions (such as [Article 18 of the UNCITRAL Model Law](#)).

Finally, as discussed above, mandatory procedural guarantees apply to both procedures agreed upon by the parties and procedures ordered by the arbitrators.⁽³¹⁴⁾ There is nonetheless an important distinction between the application of mandatory law limits to the parties’ procedural agreements and the application of mandatory law limits to the arbitral tribunal’s procedural directions in the absence of agreement between the parties.

Although it is possible for parties’ procedural agreements to be unconscionably one-sided or unfair, national courts are very reluctant to reach such a conclusion in cases involving commercial parties.⁽³¹⁵⁾ Indeed, as noted above, some jurisdictions consider only the “public interest,” not the interests of individual parties, in determining whether the parties’ agreement regarding arbitral procedures can be denied effect.⁽³¹⁶⁾

National courts are deferential, but less so, to procedural directions made by arbitral tribunals, in the absence of the parties’ consent to those directions.⁽³¹⁷⁾ This distinction [page “2183”](#) is appropriate. Although the parties’ arbitration agreement will ordinarily grant the arbitrators broad procedural discretion, this is not intended to be, and cannot be regarded as, unlimited. A tribunal’s imposition of unfair or arbitrary procedures, over a party’s objection, is very different from a party’s knowing and informed acceptance of such procedures, either for reasons of its own or in return for other benefits.⁽³¹⁸⁾

[C]. Representative Applications of Mandatory Procedural Protections

Mandatory procedural protections have been considered in a wide range of cases. In general, arbitration agreements and arbitral awards have been denied recognition or annulled on grounds of procedural unfairness only in rare and exceptional cases. Nonetheless, where an arbitration agreement provides for, or an award rests on, fundamentally unfair arbitral procedures it will be denied recognition or annulled. The circumstances in which mandatory procedural protections have been invoked (or denied application) are addressed in detail in [Chapters 25](#) and [26](#), and only summarized here.⁽³¹⁹⁾

First, as discussed above, a number of national courts have refused to give effect to arbitration agreements providing for fundamentally unfair arbitral procedures on grounds of unconscionability (or related national contract law defenses).⁽³²⁰⁾ In particular, national courts have refused to give effect to provisions of arbitration agreements granting one party a disproportionate role in the selection of the arbitrators;⁽³²¹⁾ imposing financial conditions that effectively deny a party the opportunity to present its case;⁽³²²⁾ providing one party with gross and unacceptable procedural advantages;⁽³²³⁾ denying a party the possibility of effective remedial measures;⁽³²⁴⁾ or obligating a party to arbitrate under the rules of a biased arbitral institution.⁽³²⁵⁾


At the same time, national courts have also rejected unconscionability and related defenses to the validity of arbitration agreements in the vast majority of cases in which parties allege that their procedural rights have been compromised by the terms of those agreements. Among other things, courts have rejected claims that the choice of arbitral seat or arbitral institution is fundamentally unfair;⁽³²⁶⁾ that the unavailability of discovery denies a party an opportunity to present its case;⁽³²⁷⁾ that the means of [page “2184”](#) selecting the arbitrators is unfair;⁽³²⁸⁾ and that the arbitral procedures do not provide the same protections as national litigation procedures.⁽³²⁹⁾

Even where a provision of an arbitration agreement is unconscionable or otherwise invalid, because it unacceptably compromises a party’s procedural rights, this will not ordinarily affect the validity of the remainder of the parties’ arbitration agreement. As discussed above, national courts have generally severed unconscionable provisions of arbitration agreements, enforcing the basic commitment to arbitrate without the offending terms.⁽³³⁰⁾

Second, as discussed below, a number of national courts have considered claims that arbitral awards should be annulled or denied recognition based on alleged violations of fundamental procedural rights during the arbitral proceedings. Among other things, courts have annulled or denied recognition to awards where a party was not given adequate notice of the arbitration;⁽³³¹⁾ was not afforded adequate time to present its case;⁽³³²⁾ was prevented from submitting vitally-important evidence;⁽³³³⁾ was not given notice of or permitted to address important factual or legal bases for the tribunal’s decision;⁽³³⁴⁾ was required to present its case to a biased arbitral tribunal;⁽³³⁵⁾ or was afforded a materially less favorable opportunity to present its case than its counter-party.⁽³³⁶⁾ Conversely, national courts have rejected challenges to arbitral awards, based on alleged procedural unfairness, in the vast majority of cases.⁽³³⁷⁾

Importantly, an arbitral award may generally be annulled or denied recognition only where a serious violation of a fundamental procedural right has been established (by the award-debtor).⁽³³⁸⁾ Even where such a procedural irregularity has occurred, an award will be denied recognition only regarding an irregularity that has materially affected the arbitral process.⁽³³⁹⁾ In the words of one court:

"the principles of autonomy that apply to arbitration, in the sense of absence of judicial surveillance except on limited grounds, as well as the clear deference the legislature intended courts to observe with respect to arbitral awards, is incompatible with the automatic annulment of an award in which there has been a flaw, however minor, in the arbitral procedure."⁽³⁴⁰⁾


 [page "2185"](#) Other national court decisions are similar, in both annulment⁽³⁴¹⁾ and recognition⁽³⁴²⁾ proceedings. Simply put, abstract procedural unfairness, that does not affect the arbitrators' decision, is not grounds for annulling or denying recognition of an award.

[D]. International Limits on Mandatory National Procedural Requirements

Although mandatory national procedural guarantees are in principle applicable to arbitrations seated on local territory, the application of national law to override the parties' agreement on arbitral procedures is subject to international limits, contained in the New York Convention (and other leading international arbitration conventions). These international limits on mandatory national procedural requirements have several aspects.

First, as discussed in detail above, only violations of generally-applicable, internationally-neutral procedural norms, tailored to safeguard the fairness of the arbitral process, may be grounds for refusals to recognize the parties' agreements on arbitral procedures or the arbitrators' procedural discretion in either annulment or recognition proceedings.⁽³⁴³⁾ Second, as also discussed above, only serious violations of basic procedural rights, causing material harm to the award-debtor's rights, are grounds for non-recognition of an award under the New York Convention.⁽³⁴⁴⁾ Finally, as discussed below, the internationally-recognized principle of judicial non-interference in the arbitral process requires that violations of mandatory procedural guarantees be redressable only at the end of the arbitral process through non-recognition of the arbitral award – in annulment or recognition proceedings – not by interlocutory judicial intervention in the ongoing arbitral process.⁽³⁴⁵⁾


§ 15.05. WAIVER OF PROCEDURAL RIGHTS IN INTERNATIONAL ARBITRATION

It is well-settled under virtually all national laws that procedural protections provided by national or international law may be waived.⁽³⁴⁶⁾ [Article 1466 of the French Code of Civil Procedure](#) is representative, providing: "A party which, knowingly and without a legitimate reason, fails to object to an irregularity before the arbitral tribunal in a  [page "2186"](#) timely manner shall be deemed to have waived its right to avail itself of such irregularity."⁽³⁴⁷⁾ Other national arbitration statutes are similar.

National court decisions also uniformly conclude that objections to virtually all types of procedural irregularities may be waived by a failure to object when such irregularities occur.⁽³⁴⁸⁾ In the words of one national court, a procedural objection will be dismissed where a party was:

"aware of this alleged fault at the time of the arbitration, and waived its right to object by waiting until issuance of an unfavorable award to do so."⁽³⁴⁹⁾

Institutional arbitration rules contain similar provisions regarding waivers of procedural objections.⁽³⁵⁰⁾

The waiver of procedural rights and objections rests on principles of party autonomy and the needs of the arbitral process. A party's ability to waive or abandon its procedural rights, expressly or otherwise, rests on the same conceptions of party autonomy that underlie the entire arbitral process and the basic rule of presumptive validity of international arbitration agreements;⁽³⁵¹⁾ just as the New York Convention and national arbitration legislation recognizes the parties' autonomy to conclude valid agreements to arbitrate, waiving access to public courts, the same instruments recognize the parties' capacity to waive or abandon other procedural protections. Moreover, the principle of waiver is essential to the efficient and fair conduct of arbitral proceedings: a party cannot, either efficiently or fairly, be permitted to hold back a procedural objection, until the time at which it could be cured has passed, and  [page "2187"](#) then challenge an unfavorable decision in the arbitration on the grounds of procedural unfairness.⁽³⁵²⁾

It is also clear that a party may only waive an objection when it was aware of the basis for the objection.⁽³⁵³⁾ As a leading French decision explained:

"a waiver can only be opposed to a party which knew of an irregularity of the arbitration during the arbitration itself and voluntarily did not raise an objection, leaving the proceedings to continue until the end."⁽³⁵⁴⁾

This reflects common sense and basic fairness: where a party was unaware of particular circumstances or occurrences (*e.g.*, unauthorized *ex parte* contacts between a party and arbitrator; an arbitrator's conflicts), its failure to object cannot be the basis for a waiver. Nonetheless, the better view should be that waiver may arise from circumstances that the party should have been aware of, even if it did not have actual knowledge of, the particular facts on which an objection could be based; there is virtually no authority on the appropriate standard for constructive knowledge but this again reflects basic standards of fairness and sound arbitral procedures.

In general, a waiver of procedural objections does not require a showing that the award-debtor knowingly and intentionally relinquished the right to challenge an award on the grounds in question. Rather, the question is whether the award-debtor failed to avail itself of available means to protest, and seek correction of, a procedural decision in a timely manner: waiver can be demonstrated simply by an absence of action by the award-debtor, in circumstances where it was or should have been aware of the

asserted procedural irregularity, regardless of the award-debtor's subjective intentions at the time.⁽³⁵⁵⁾ The touchstone for analysis should be principles of good faith (embodied in the New York Convention and most national arbitration laws) and facilitating a fair, efficient arbitral process.

There are a very limited number of procedural irregularities that are arguably non-waivable. Agreements involving outright corruption and grossly abusive procedural arrangements should in principle not be valid, even where a party fails to object to them at the time.⁽³⁵⁶⁾ That is particularly true where non-commercial parties, whose ability to safeguard their own interests is doubtful, are concerned. Equally, protections [page "2188"](#) aimed at safeguarding the interests of third parties or public values are likely not readily waivable.⁽³⁵⁷⁾

§ 15.06. JUDICIAL NON-INTERFERENCE IN INTERNATIONAL ARBITRAL PROCEEDINGS

In addition to addressing the content of the procedures that are used in international arbitrations, and the subject of waiver, leading international arbitration conventions, arbitration legislation and institutional rules all adopt a basic principle of judicial non-interference in the ongoing conduct of the arbitral proceedings. This principle is fundamentally important to the efficacy of the international arbitral process, ensuring that an arbitration can proceed, pursuant to the agreement of the parties or under the direction of the tribunal, without the delays, second-guessing and other problems associated with interlocutory judicial review of procedural decisions.

[A]. Principle of Judicial Non-Interference Under International Arbitration Conventions

Leading international arbitration conventions recognize the principle of judicial non-interference in the arbitral proceedings, albeit usually indirectly. The New York Convention reflects an indirect treatment of the issue, while other instruments are more explicit.⁽³⁵⁸⁾

[1]. New York Convention

Nothing in the New York Convention provides expressly that courts of Contracting States may not entertain interlocutory applications concerning the ongoing procedural conduct of international arbitrations (e.g., to dispute a tribunal's procedural timetable, disclosure orders, or evidentiary rulings). Nonetheless, the Convention's basic structure gives rise to such an obligation of judicial non-interference in the arbitral process.

The Convention provides for only limited, specifically defined intervention by national courts in the arbitral process. Article II(3) of the Convention provides that national courts shall "refer the parties to arbitration" after ascertaining the existence of a valid arbitration agreement, without making provision for any further judicial role in the arbitration proceedings.⁽³⁵⁹⁾ As discussed above, Article II(3) is a mandatory [page "2189"](#) provision, requiring that national courts either dismiss or stay claims that are subject to a valid arbitration agreement and refer the parties to arbitration.⁽³⁶⁰⁾ The only exception to this principle involves interlocutory judicial decisions on jurisdictional challenges to the arbitration agreement,⁽³⁶¹⁾ which are contemplated by Article II of the Convention.⁽³⁶²⁾

The effect of Article II(3)'s requirement to refer parties to arbitration is to forbid the courts of Contracting States from supervising or second-guessing the ongoing procedural conduct of arbitrations. Absent contrary agreement by the parties, Article II(3) requires that national courts simply "refer the parties to arbitration," leaving procedural matters to the arbitral tribunal, without any provision for continuing judicial supervision or oversight of the arbitral process.

This is confirmed by Articles III, IV and V of the Convention – which provide for the only other involvement of national courts in the arbitral process contemplated by the Convention. That involvement is defined by exclusive reference to the recognition and enforcement of arbitral awards.⁽³⁶³⁾ Thus, apart from enforcing (or refusing to enforce) agreements to arbitrate, the Convention provides that the sole role of national courts in the arbitral process is in annulment or recognition proceedings, without making any provision for courts to either make or supervise procedural decisions in the course of an ongoing arbitration.⁽³⁶⁴⁾

This is a fundamentally important consequence of the Convention, which is not always appreciated. Article II(3) does not leave the principle of judicial non-interference in international arbitrations to national legislation. Rather, Article II(3) imposes this obligation directly on Contracting States, forbidding their courts from doing anything other than referring the parties to a valid arbitration agreement to arbitration pending an award.

[page "2190"](#) [2]. Inter-American Convention

The Inter-American Convention is even more specific in adopting a principle of judicial non-interference in the arbitral process than the New York Convention. As noted above, Article 3 of the Convention incorporates the IACAC Rules, including Article 15(1) thereof, which grants the arbitral tribunal authority "to conduct the arbitration in such manner as it considers appropriate."⁽³⁶⁵⁾ These provisions, coupled with the absence of any provisions for general judicial supervision of ongoing arbitral proceedings, leave no room for interlocutory judicial intervention in the procedural conduct of the arbitration under the Inter-American Convention.

[3]. European Convention

The European Convention also affirms the principle of judicial non-interference in the arbitral proceeding. Article IV(1) provides that parties "shall be free to submit their disputes" to arbitration, and "to lay down the procedure to be followed by the arbitrators."⁽³⁶⁶⁾ Like the New York and Inter-American Conventions, nothing in the European Convention provides for judicial supervision of arbitral

procedures, instead contemplating only national court involvement in relation to jurisdictional decisions,⁽³⁶⁷⁾ interim relief⁽³⁶⁸⁾ and review of awards.⁽³⁶⁹⁾ This again leaves no room for national courts to supervise or regulate the arbitrators' procedural decisions.

[B]. Principle of Judicial Non-Interference Under National Arbitration Legislation

Arbitration statutes and judicial decisions in most jurisdictions are even more emphatic than international arbitration conventions in adopting the principle of judicial non-interference. [Article 5 of the UNCITRAL Model Law](#) provides "[i]n matters governed by this Law, no court shall intervene except where so provided in this Law."⁽³⁷⁰⁾

The Model Law then sets forth limited circumstances involving judicial support for the arbitral process (e.g., resolving jurisdictional objections, assisting in the constitution of the tribunal, granting provisional relief, considering applications to annul awards)⁽³⁷¹⁾ but not permitting judicial supervision of procedural decisions [page "2191"](#) through interlocutory appeals or otherwise.⁽³⁷²⁾ In the words of one court, asked to review interim decisions by a tribunal:

"It is premature, in effect, at this stage of proceedings, to ask the Superior Court of Quebec to intervene on questions that can eventually, and only, be remitted to it after a final arbitral award has been made....The Quebec Superior Court is not clothed with the power to examine [these questions] at this moment, but only once the final arbitral decision has been rendered."⁽³⁷³⁾

Courts in Model Law jurisdictions have held that Article 5 is a mandatory provision, with which courts are obliged to comply.⁽³⁷⁴⁾ At the same time, it is well-settled that Article 5 does not preclude judicial assistance to the arbitral process pursuant to the Model Law's provisions regarding provisional relief, appointment and removal of arbitrators, evidence-taking, and recognition and enforcement of international arbitration agreements and arbitral awards.⁽³⁷⁵⁾ There is also scope under Article 5, and the Model Law more generally, for other forms of judicial assistance to the arbitral process.⁽³⁷⁶⁾

[page "2192"](#) Arbitration legislation in other jurisdictions is similar, either in expressly excluding judicial supervision of arbitral procedures, as in England⁽³⁷⁷⁾ and elsewhere (principally in Model Law jurisdictions),⁽³⁷⁸⁾ or in omitting any provision for interlocutory judicial review or supervision of arbitrators' procedural rulings.⁽³⁷⁹⁾

National courts in common law jurisdictions have repeatedly and (almost) uniformly rejected requests for judicial intervention in the procedural conduct of international arbitrations. In the words of one English decision, the English Arbitration Act "contemplates that once matters are referred to arbitration, it is the arbitral tribunal that will generally deal with issues of their jurisdiction and the procedure in the arbitration up to an award,"⁽³⁸⁰⁾ while another English court held that the Act provided for a "minimum of interference in the arbitral process by the courts, at least before an award is made" and emphasized that "the scope for the court to intervene by injunction before an award is made by arbitrators is very limited."⁽³⁸¹⁾

Consistent with this, a New Zealand decision rejected both an application to review an arbitrator's interlocutory procedural directions and a request for a judicial order enforcing those directions, making clear the court's "immediate reluctance to be used as a 'cuckoo' to be whistled out to exercise the coercive power of the State through its judicial arm, but without any ability to make an adjudication upon the matter."⁽³⁸²⁾ [page "2193"](#) Likewise, a recent Indian decision held that "a Court can intervene only in the event that its intervention is provided for under the Act. One of the main objects of the Act is to minimise the supervisory role of the courts in the arbitral process."⁽³⁸³⁾ Other national court decisions are similar.⁽³⁸⁴⁾

In the United States, the statutory text of the FAA does not expressly provide for judicial non-interference in the arbitral proceedings. Nonetheless, lower U.S. courts have repeatedly held that judicial intervention in pending arbitral proceedings (both international and domestic), to correct procedural errors or evidentiary rulings, is improper.⁽³⁸⁵⁾ As one U.S. lower court declared, "[n]othing in the [FAA] contemplates [page "2194"](#) interference by the court in an ongoing arbitration proceeding."⁽³⁸⁶⁾ Or, as another court has put it, to permit judicial review of arbitrators' interlocutory rulings would be "unthinkable."⁽³⁸⁷⁾ Thus:

"Under the FAA, the district court has the authority to determine (1) whether arbitration should be compelled, and (2) whether an arbitration award should be confirmed, vacated, or modified. Beyond those narrowly defined procedural powers, the court has no authority to interfere with an arbitration proceeding.... The FAA provides for minimal judicial involvement in resolving an arbitrable dispute; the court is limited to only a few narrowly defined, largely procedural tasks. ...The court [may not], in effect, become a roving commission to supervise a private method of dispute resolution and exert authority that is reserved, by statute, case law, and longstanding practice, to the arbitrator. That supervision is inconsistent with the scope of inherent authority and with federal arbitration policy, which aims to prevent courts from delaying the resolution of disputes through alternative means."⁽³⁸⁸⁾

National court decisions in civil law jurisdictions are similar.⁽³⁸⁹⁾ The Paris Cour d'appel has affirmed the principle of judicial non-interference in emphatic terms, holding:

"the exercise of the prerogatives attached to the [arbitrators' authority], which is legitimate and autonomous in its own right, must be guaranteed in a totally independent manner, as befits any judge, without any interference with the organization which

set up the arbitral tribunal and thus exhausted its powers, and without any intervention by the courts.”⁽³⁹⁰⁾

Likewise, a German appellate court concluded that “[d]ecisions of state courts in arbitral matters, in particular interference with pending arbitral proceedings, are not provided for by statute and inadmissible,”⁽³⁹¹⁾ while another decision upheld the “principle that German courts do not take part in foreign arbitral proceedings.”⁽³⁹²⁾

There are only isolated exceptions to the principle of judicial non-interference, typically in ill-considered lower court decisions.⁽³⁹³⁾ Indeed, it is striking how few [page "2195"](#) instances there are, even in less-developed legal systems, of interference by national courts in the ongoing conduct of international arbitrations.

There are occasional deviations from the principle of judicial non-interference when national courts refer parties to arbitration. In a few cases, courts in Model Law jurisdictions ordered the parties to complete the arbitration swiftly.⁽³⁹⁴⁾ In another case, the court referred a dispute to a religious tribunal specified in the arbitration agreement, but on the condition that the tribunal either proceed with the arbitration on a fixed timetable or indicate its refusal to resolve the dispute.⁽³⁹⁵⁾ Courts have also occasionally referred actions to arbitration on the condition that the defendant agree not to raise a defense of prescription in the arbitration proceeding.⁽³⁹⁶⁾

In principle, these various decisions contradict the principle of judicial non-interference in the arbitral process, and violate Article 5 of the Model Law and parallel provisions of other national arbitration legislation. It is for the arbitrators to determine the procedural timetable and resolve the substantive issues in the arbitration and national courts may not intrude upon this mandate, including when referring the parties to arbitration.

The principle of judicial non-interference in international arbitral proceedings is vitally important. Judicial orders purporting to establish arbitral procedures would directly contradict the parties’ objectives in agreeing to arbitrate – including particularly their desire for less formal and more flexible procedures,⁽³⁹⁷⁾ their desire for a high degree of party control over such procedures⁽³⁹⁸⁾ and their desire for neutral and expert arbitral procedures adopted by a tribunal of the parties’ choice, rather than a national court.⁽³⁹⁹⁾ Interlocutory judicial review of an arbitral tribunal’s procedural decisions would frustrate all of these objectives, while also subjecting the arbitral process to substantial risks of delay and appellate second-guessing.⁽⁴⁰⁰⁾

These considerations go beyond matters of sound national legislative policy. These considerations reflect the premises of an agreement to arbitrate international disputes (absent express contractual provisions to the contrary) and are given effect by the New York Convention to mandatorily exclude interlocutory judicial involvement in procedural decisions in an ongoing international arbitration. As noted above, under Article II of the Convention (and similar provisions in other conventions), as well as under leading national arbitration regimes, the parties’ agreement excluding [page "2196"](#) interlocutory judicial interference in the arbitral process is binding on Contracting States and their courts.⁽⁴⁰¹⁾

§ 15.07. PROCEDURAL CONDUCT OF INTERNATIONAL ARBITRAL PROCEEDINGS

For all the reasons detailed above, the procedural conduct of international arbitrations is largely in the hands of the parties and arbitral tribunal.⁽⁴⁰²⁾ In practice, parties frequently reach agreement on only the broad outlines of the arbitral process (typically, by incorporating institutional arbitration rules in their agreement to arbitrate) and/or on a few particular issues (e.g., whether or not some measure of disclosure will be permitted; how witness testimony will be adduced). As a consequence, many aspects of the arbitral process will be subject to the arbitral tribunal’s direction, exercising the discretion granted to it under national law and most institutional rules.⁽⁴⁰³⁾ This is a characteristic feature of arbitration, distinguishing it from national court litigation where preexisting and relatively fixed, formal procedural rules apply generally to all cases.⁽⁴⁰⁴⁾

[A]. No General Procedural Code for International Arbitrations

In most international commercial arbitrations, there is no preexisting or generally-applicable code of procedural rules that governs the conduct of the arbitral proceedings. As discussed elsewhere, it is well-settled in virtually all jurisdictions that arbitrators are not required to apply local civil procedure rules applicable in national court litigation, in an international arbitration.⁽⁴⁰⁵⁾ Furthermore, in *ad hoc* arbitrations, there will often be no procedural rules of any sort incorporated into the parties’ arbitration agreement. The tribunal and the parties will ordinarily have full discretion to establish the course of the proceedings (subject only to the requirements of mandatory national law, which, as discussed above, in most developed jurisdictions, are very limited).⁽⁴⁰⁶⁾

Commentators sometimes urge that “a formal system of procedure designed specifically for arbitration would be a good idea.”⁽⁴⁰⁷⁾ That suggestion contradicts some of the basic objectives of the arbitral process, which is selected by commercial parties precisely because it is informal, tailored to specific cases, developed jointly with the parties and flexible.⁽⁴⁰⁸⁾ Indeed, this approach would impose less flexible, more formal [page "2197"](#) and more arbitrary rules, in a manner redolent of Procrustes’ bed, on parties who believed they had escaped precisely this result by agreeing to arbitrate. This result would be particularly ill-advised given the wide range of different disputes and procedural expectations that exist in international commercial settings.


It is the essence of international arbitration that the procedural rules and schedules of each arbitration are designed in light of the specific needs and requirements of the parties and their particular dispute.⁽⁴⁰⁹⁾ This was well put, more than half a century ago, in the

context of state-to-state arbitrations:

"Procedure is no unalterable course of conduct to which all tribunals must adhere. It should always be adapted to facilitate the course of the particular arbitration and to enable the economical accomplishment of its task within the time fixed. In each arbitration the rules of procedure should be designed to reconcile the divergence of national viewpoints concerning procedure, to require of litigants no more procedural steps than are necessary to enable a satisfactory disposal of the particular case, to conserve litigants' interests from injury by departures from the contemplated course of proceedings, and to bring the arbitration to the speediest possible end compatible with justice. Only through a conscious and careful adaptation of procedural rules to the requirements of each arbitration as it arises will the procedural ills of international arbitration be minimized and its utility as a means for the settlement of disputes between states be fostered."⁽⁴¹⁰⁾

The same observations can be made today, with respect to international commercial arbitrations, where the absence of a generally-applicable procedural code is both an attraction and an opportunity. At the same time, the absence of pre-defined procedural rules is a challenge and responsibility, which requires tribunals to address procedural needs afresh in each arbitration.⁽⁴¹¹⁾


[B]. No Mandatory Application of Domestic Rules of Civil Procedure

 [page "2198"](#) Also preliminarily, it is well-settled, under the New York Convention and most national arbitration legislation, that international arbitral tribunals are not generally required to apply the domestic rules of civil procedure applicable in litigation in the arbitral seat. As discussed in detail above, there is no requirement under the UNCITRAL Model Law, or most contemporary arbitration statutes, that arbitrators apply the civil procedure rules of the arbitral seat.⁽⁴¹²⁾ This rejects the archaic view, adopted in some early authorities, that arbitrators were bound to apply the civil procedure rules of the arbitral seat, either mandatorily or because the parties were deemed to have selected those rules by agreeing to arbitrate in the arbitral seat.⁽⁴¹³⁾

Rather, under all contemporary national arbitration legislation, the procedures applicable in an international arbitration are those agreed upon by the parties or, absent agreement, specified by the arbitrators, subject only to those (limited) mandatory requirements imposed by the arbitration legislation of the arbitral seat.⁽⁴¹⁴⁾ A well-reasoned arbitral award explained:

"international arbitrators do not have a *lex fori* in the manner of a national court judge. In particular, the international arbitrator sitting in Switzerland is not required to apply either Swiss civil procedure rules or conflict of law rules. Where appropriate, reference may be made to Swiss procedural laws or conflict rules, just as reference may be made to other national procedural laws or to apposite international arbitration practice. In any event, Swiss civil procedure law (whether cantonal or federal) does not gain relevance on the mere basis that the seat of the arbitral tribunal is situated in Geneva."⁽⁴¹⁵⁾

Other authorities are to the same effect, uniformly holding that arbitral tribunals in international arbitrations are not obligated to apply the domestic procedural rules applicable in courts, whether in the arbitral seat or elsewhere.⁽⁴¹⁶⁾

Some institutional rules underscore the inapplicability of local rules of civil procedure (although the same result applies even in the absence of such provisions). For example, the ICC Rules expressly provide that the tribunal may determine procedural rules "whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration."⁽⁴¹⁷⁾ This proviso specifically affirms the meaning implicit in other institutional rules and in *ad hoc* arbitration agreements:  [page "2199"](#) arbitrators are free, but not obliged, to adopt procedural rules used in domestic litigations in national legal systems.⁽⁴¹⁸⁾

In practice, as discussed below, arbitral tribunals only rarely expressly adopt national procedural rules, instead either fashioning *ad hoc* procedural rules or adopting international procedural rules (such as the IBA Rules on the Taking of Evidence⁽⁴¹⁹⁾). It is only in unusual cases that an international arbitral tribunal will adopt wholesale the civil procedure code of a particular national legal system: indeed, one of the reasons that parties agree to international arbitration is to avoid this sort of approach.⁽⁴²⁰⁾

[C]. Arbitral Procedures Under Institutional Rules

As discussed above, most arbitral institutions – notably the ICC, AAA, LCIA and ICSID – have promulgated procedural rules that apply to arbitrations where the parties have adopted those rules in their arbitration agreement or otherwise.⁽⁴²¹⁾ In addition, the UNCITRAL Rules are available for selection by parties who desire an essentially *ad hoc* arbitration, but supplemented by a skeletal procedural framework and mechanism for selecting an appointing authority.⁽⁴²²⁾

Each of these sets of institutional arbitration rules gives useful structure and predictability to the arbitral process by providing a general procedural framework for the conduct of the arbitration and granting the arbitrators broad procedural authority over the arbitral process.⁽⁴²³⁾ Where parties have agreed to arbitrate in accordance with a set of institutional arbitration rules, these rules provide a largely autonomous legal regime, that almost entirely displaces any default rules of national law.⁽⁴²⁴⁾ As a frequently-cited French decision explained:

"[I]n international arbitration, the rules of domestic law have a purely subsidiary role and apply only in the absence of a specific agreement by the [page "2200"](#) parties...the rules of the [ICC] Court of Arbitration, which constitute the law of the parties, must be applied to the exclusion of all other laws."⁽⁴²⁵⁾

Nonetheless, most institutional rules provide only a general framework for the arbitral procedure, while reserving the overwhelming bulk of issues relating to the arbitral process for resolution by the arbitral tribunal and the parties.⁽⁴²⁶⁾ There are significant similarities between the procedural frameworks set forth by the ICC, AAA, LCIA, UNCITRAL and HKIAC rules.⁽⁴²⁷⁾

Each of these (and other) sets of institutional rules sets forth, in relatively broad outline, the procedural framework of the arbitral proceedings. While these rules vary, sometimes significantly,⁽⁴²⁸⁾ they all generally make provision for: (a) filing and service of the request for arbitration; (b) filing and service of the reply and counterclaim(s); (c) the appointment of arbitrators, challenges and other matters concerning the constitution of the arbitral tribunal; (d) selection of the arbitral seat and language of the arbitration; (e) disposition of jurisdictional challenges, including the arbitrators' competence-competence and the separability of the arbitration agreement; (f) written submissions; (g) the taking of evidence and holding of hearings; (h) provisional measures; (i) choice of substantive law; (j) timetable for an award; (k) formalities of and procedures for making awards; and (l) costs.

It bears emphasis that most institutional rules do not provide a comprehensive or detailed procedural timetable for the arbitral procedure (e.g., the sequence, timing and nature of written submissions, the taking and presentation of evidence, the structure and organization of hearings). Rather, institutional rules generally establish only the broad outlines of a procedural framework, with key events (e.g., the request for arbitration, the hearing, the award) identified. Within the broad framework provided by a set of institutional rules, the parties and tribunal are left to work out the [page "2201"](#) details of arbitral procedures in particular cases as they see fit – much as they are in *ad hoc* arbitrations.⁽⁴²⁹⁾

[D]. Arbitral Tribunal's Exercise of Discretion Over Arbitral Procedures

The procedures that are adopted by international arbitral tribunals and parties vary substantially – and properly – from case to case.⁽⁴³⁰⁾ There are a wide variety of different factors that influence parties' and tribunals' exercise of their procedural autonomy and discretion, and, hence, the procedures that they adopt.

[1]. Tailoring Procedures to Particular Parties and Disputes

One of the reasons that arbitral tribunals are afforded broad discretion over the arbitral procedures is in order to tailor those procedures to the needs and circumstances of individual disputes, parties and cases.⁽⁴³¹⁾ The objective of any arbitral procedure should be to allow the parties the opportunity to present the facts relevant to the particular dispute (through documentary, witness and other evidence) in the most reliable, efficient and fair manner possible. This objective is affirmed in leading national arbitration regimes, including the UNCITRAL Model Law,⁽⁴³²⁾ the [1996 English Arbitration Act](#),⁽⁴³³⁾ the FAA,⁽⁴³⁴⁾ the French Code of Civil Procedure⁽⁴³⁵⁾ and other national arbitration legislation.⁽⁴³⁶⁾ It is also embraced by institutional arbitration [page "2202"](#) rules⁽⁴³⁷⁾ and leading practitioners and commentators.⁽⁴³⁸⁾ One well-reasoned explanation of the importance of tailoring arbitral procedures to particular circumstances, in the context of the UNCITRAL Model Law, concluded:

"The UNCITRAL Secretariat observed that Article 19, along with Article 18, was the 'Magna Carta of Arbitral Procedure' and said that these Articles might be regarded as 'the most important provision[s] of the model law.'...Moreover, this principle...expresses a profound confidence in the ability of the parties and arbitrators to conduct the arbitration in a fair and orderly manner so as to arrive at a just resolution of a dispute."⁽⁴³⁹⁾

A tribunal's selection of one approach to procedural matters, rather than another, will as a practical matter be influenced significantly by the need for evidentiary inquiry in particular cases, the parties' respective backgrounds and desires with regard to procedural matters, the applicable law and the nature of the dispute. These factors can produce procedures ranging from arbitrations with extensive document discovery, depositions and oral witness testimony with broad cross-examination, to arbitrations with no disclosure and written witness statements with limited (or no) cross-examination by parties' counsel, to "documents only" arbitrations, with no oral proceedings at all. Although these procedures are radically different from one another, each one is fully capable of being fair and efficient in the circumstances of particular cases.

In a matter involving modest amounts in dispute, where defined legal issues predominate, limited (or no) disclosure and limited oral witness testimony will likely be appropriate. Conversely, in a matter involving substantial amounts in dispute, [page "2203"](#) where numerous and complex factual disputes exist, extensive disclosure and witness examination will often be appropriate. Similarly, in cases where one party is in possession of probative evidence required by its counter-party (e.g., well-pleaded fraud claims), disclosure will be more appropriate than in other matters. One of the salient procedural benefits of international arbitration is precisely its ability to permit procedures to be tailored to the needs of each specific case.⁽⁴⁴⁰⁾

[2]. "Civil Law," "Common Law" and Other Procedures

Many intangible factors affect a tribunal's exercise of its discretion over the arbitral procedures. As a practical matter, the ability and

willingness of opposing counsel to work together, and their individual and joint preferences, dramatically impact the arbitral process. Similarly, the individual characteristics of the arbitrators – age, temperament, intelligence, time commitments, background and interest – may influence their procedural preferences.

One factor that will frequently influence the tribunal's procedural decisions involves the legal training and experience of the arbitrators,⁽⁴⁴¹⁾ and in particular whether they are of common law, civil law, Islamic, or other backgrounds.⁽⁴⁴²⁾ As a starting point, and recognizing that generalizations are usually overly-simplistic, arbitrators with civil law backgrounds (principally in Continental Europe, Latin America, Japan, Korea and China) can often be expected to adopt somewhat more "inquisitorial" procedures, with the tribunal being primarily responsible for identifying and addressing legal issues, seeking evidence and probing the factual record. Under this approach, there will be less scope for adversarial and oral witness examination procedures – such as broad, party-initiated discovery, depositions, lengthy oral hearings, counsel-controlled direct and cross-examination and the like – than is familiar to common law lawyers.⁽⁴⁴³⁾ In contrast, arbitrators from common law jurisdictions (principally the United States, [page "2204"](#) England, India, Singapore, the former Commonwealth and (less clearly) Scandinavia and the Netherlands) will often be inclined to adopt "adversarial" procedures with each party having relatively broad freedom to develop and then present its own version of the facts and law.⁽⁴⁴⁴⁾

From a civil law practitioner's perspective, the common law arbitrator's role may appear to be that of "a benevolent bystander, until the time of the award."⁽⁴⁴⁵⁾ On the other hand, civil law arbitrators sometimes strike common law practitioners as unduly quick to make assumptions or draw conclusions about issues, without providing sufficient opportunities to submit evidence or examine witnesses.⁽⁴⁴⁶⁾

The differences between common law and civil law approaches to litigation are substantial and, in arbitral settings, may also be significant. Witness testimony is much less significant – and sometimes almost irrelevant – in civil law traditions and, although generalizations can be misleading, civil lawyers favor proof through documents, rather than witness testimony.⁽⁴⁴⁷⁾ This attitude has deep historical roots in civil law systems, where witness testimony was almost unknown and cross-examination was considered "primitive."⁽⁴⁴⁸⁾ Indeed, a leading Belgian practitioner wrote, not long ago, that "[i]n 30 years of commercial litigation, I have known only two instances where a Belgian court has heard witnesses."⁽⁴⁴⁹⁾

And, where witnesses are heard in the civil law tradition, it is the national court judge, and not parties' counsel, who are responsible for examining the witnesses in the overwhelming majority of contexts.⁽⁴⁵⁰⁾ Indeed, rules of professional conduct in a [page "2205"](#) number of civil law jurisdictions prohibit counsel from interviewing or preparing witnesses in domestic litigations.⁽⁴⁵¹⁾

Nonetheless, the contemporary importance of the differences between civil and common law backgrounds is sometimes exaggerated.⁽⁴⁵²⁾ Procedural (and, in some cases, ethical) rules that apply in domestic litigation settings are often not applicable in international arbitrations.⁽⁴⁵³⁾ Moreover, there is no fixed procedural formula for either "common law" or "civil law" arbitrations, with international arbitrations in the United States, England and other common law jurisdictions varying widely among themselves in procedural approaches, as is the case with arbitrations in different Continental Europe and other civil law traditions, which also follow no set "civil law" pattern.⁽⁴⁵⁴⁾

There are also significant limits, even in civil law jurisdictions, on a tribunal's fact-finding authority. In particular, although the arbitrators may conduct the arbitral proceedings in an "inquisitorial" manner, they must do so through directions to the parties, with the evidence included in the record in the arbitration. Even in civil law traditions, arbitrators are not generally permitted to engage in independent fact-finding. As described by one civil law decision:

"the requirements of independence and impartiality of the courts also apply in arbitration proceedings, [and] arbitrators too will in principle have to refrain from gathering evidence, in such a way that they must not themselves, without the involvement of the parties, collect evidence. The arbitrator collecting his own evidence will, after all, soon find himself in the position of disturbing the balance between the parties and losing his impartiality to that extent. The arbitrator's own investigations too, particularly if it concerns the independent gathering of evidence, may result in evidence being obtained in favour of one party and to the detriment of the other, which latter party could subsequently be faced with the necessity to oppose such views. If this latter party on reasonable grounds believes that the arbitrator's investigations were inadequate, but does not find a willing ear for his complaints with the arbitrator, he may also lose his objective faith in that person's impartiality as an arbitrator. For that reason arbitrators in principle should leave it up to the parties to submit evidence, and confine themselves to an assessment of this evidence."⁽⁴⁵⁵⁾

[page "2206"](#) Civil law procedures are frequently no less "adversarial" than common law procedures, while common law arbitrators are often at least as "inquisitorial" as their civil law counterparts (for example, in questioning witnesses or counsel).⁽⁴⁵⁶⁾ As one experienced practitioner observed, "[e]ven two parties from civil law backgrounds, represented by European lawyers, will usually present their cases in a thoroughly adversarial way."⁽⁴⁵⁷⁾ In many cases, differences in the approaches taken by civil law and common law counsel are attributable at least as much to tactical decisions or personal style as they are to cultural or legal differences.⁽⁴⁵⁸⁾

[3]. "Internationalized" or "Harmonized" Procedures

At the same time, efforts to bridge or harmonize differences between traditional common and civil law procedures have been at least partially successful, particularly in recent years.⁽⁴⁵⁹⁾ These efforts are reflected in part in the development of internationally-accepted procedural guidelines or rules for the conduct of international commercial arbitrations, such as the IBA Rules on the Taking of Evidence,⁽⁴⁶⁰⁾ the IBA Guidelines on Conflicts of Interest,⁽⁴⁶¹⁾ the IBA's Guidelines on Party Representation⁽⁴⁶²⁾ and the ILA's projects on parallel proceedings and *res judicata*.⁽⁴⁶³⁾

Equally important, if less visible, has been the development of a body of internationally-neutral procedures, frequently used as starting points in international commercial arbitrations, which blend aspects of both common law and civil law [page](#) "2207" traditions.⁽⁴⁶⁴⁾ As one experienced authority has remarked, probably a touch over-optimistically:

"international arbitration has in general given rise to an internationally accepted harmonized procedural jurisprudence. Apart from providing a functional network for the resolution of commercial disputes it is now playing an important new forensic role. It is establishing a generally accepted procedure for the resolution of disputes which cuts right across past and present barriers between different procedural philosophies and legal systems.... [Contemporary international arbitration] is succeeding in abolishing the distinctions between the traditional practices and philosophies of the common and civil law systems by producing a fusion of their best aspects."⁽⁴⁶⁵⁾

Or, as another practitioner has put it:

"in international cases, tribunals strive to look for cross-cultural solutions....The salutary impetus to meet legitimate expectations leads to harmonization and to the avoidance of the peculiarities of national law."⁽⁴⁶⁶⁾

While influenced by their legal training and background, experienced arbitrators in cases with parties of diverse nationalities will usually seek to arrive at procedural decisions that are "international," rather than reflecting parochial procedural rules in local national courts of either party (or the arbitral seat). This is particularly true in cases involving "multinational" tribunals, with members of different nationalities and backgrounds, and parties and counsel from different jurisdictions. In these circumstances, tribunals will fashion arbitral procedures that do not mimic those of either party's or counsel's home jurisdiction, but that instead provide an internationally-neutral procedural framework, consistent with the parties' objectives in agreeing to arbitrate their disputes.⁽⁴⁶⁷⁾

[page](#) "2208" At the same time, experienced arbitrators (properly) avoid merely "splitting the difference" between competing procedural desires and proposals (except, perhaps, in fixing time deadlines). Doing so will ultimately satisfy no-one and can produce the worst of both worlds:

"The arbitrators should not confuse flexibility with compromise. Having chosen one system, the arbitrators may modify it in the interest of efficiency, but should not try to marry it to the other system. Tribunals sometimes try to operate both systems at once, either out of mutual courtesy between the members of the tribunal, or because of the misplaced feeling that this will be more fair in cases where the parties come from countries with widely differing concepts of procedure. Experience shows that this attempt to amalgamate the two systems invariably produces a solution which embodies the weakest features of each systems; and it almost always guarantees misunderstandings and confusion."⁽⁴⁶⁸⁾

It is sometimes suggested that international arbitration procedures have become "Americanized" in recent years.⁽⁴⁶⁹⁾ These observations are rightly regarded with some surprise by domestic U.S. practitioners when they venture into the international arbitration arena, with its very different approaches to matters such as pleading style, document discovery, oral depositions, hearing length and style, witness statements and the like – just as domestic European practitioners would be surprised by suggestions that international arbitration has been "Europeanized" in recent years. The reality is that contemporary international arbitration procedures are neither European, American, or Asian – but rather international, flexible and efficient.

At the end of the day, there is – and should be – no "standard" or "usual" procedural approach in international arbitration, whether common law, civil law, or something [page](#) "2209" else. There are "infinite variations possible on procedural matters,"⁽⁴⁷⁰⁾ and every case has its own needs, constraints and dynamics, that produce its own procedural approach. Indeed, as discussed above, that is one of the objectives of arbitration – to permit flexible, efficient, internationally-neutral and expert procedures tailored to particular parties' needs and specific disputes.⁽⁴⁷¹⁾

[E]. Arbitral Procedures Under IBA Rules on Taking of Evidence

One of the central procedural elements of most international arbitrations involves the taking and presentation of evidence. Although evidence-taking procedures in international arbitration are (and should be) individually-tailored to the circumstances of particular cases, there have nonetheless been efforts to develop uniform, predictable principles concerning some of the basic structural aspects of the taking of evidence. A leading example of these efforts is the International Bar Association's Rules on the Taking of Evidence in International Arbitration ("IBA Rules on the Taking of Evidence").⁽⁴⁷²⁾

The current IBA Rules on the Taking of Evidence had their origin in the 1983 IBA "Supplementary Rules of Evidence." The IBA Supplementary Rules were designed to provide a neutral set of

procedures for the presentation of witness and documentary evidence that would be equally fair and familiar to both civil law and common law parties.⁽⁴⁷³⁾ Some commentators remarked, however, that the Supplementary Rules ultimately adopted a common law approach to arbitration.⁽⁴⁷⁴⁾ In part because of this perception, the Supplementary Rules did not gain widespread acceptance.

In 1999, an IBA task force consisting of leading international arbitration practitioners produced a revised version of the IBA Supplementary Rules – as noted above, the IBA Rules on the Taking of Evidence.⁽⁴⁷⁵⁾ The 1999 version of the IBA Rules arguably had an even greater common law orientation than their predecessor (for example, permitting a reasonable measure of document discovery, expressly authorizing [page "2210"](#) counsel involvement in the preparation of witness testimony), but won increasing acceptance among users from all jurisdictions.⁽⁴⁷⁶⁾

The 1999 IBA Rules contained a number of significant provisions concerning evidence-taking. Under the Rules, persons affiliated with or employed by a party were not disqualified from giving evidence on behalf of that party (as is the case in some civil law jurisdictions⁽⁴⁷⁷⁾), and it was permissible for the legal representatives of the parties to interview witnesses.⁽⁴⁷⁸⁾ The IBA Rules also set out procedures for dealing with document requests, expert witness evidence and an evidentiary hearing at which the tribunal will receive evidence. In broad outline, the Rules contemplated that witness evidence would be presented through written witness statements, with the witnesses then being subject to cross-examination at an oral evidentiary hearing.⁽⁴⁷⁹⁾ These procedures are described in greater detail below.⁽⁴⁸⁰⁾

The 1999 version of the IBA Rules were updated again during 2009 and 2010 and came into effect in May 2010. The revised 2010 IBA Rules are intended to reflect current practices in international arbitration, including by providing greater guidance on legal privilege, a more prescriptive approach to evidence gathering and an express good faith requirement in the taking of evidence.⁽⁴⁸¹⁾ Additionally, the Rules were revised to make clear that they are meant to be used both in international commercial and investment arbitrations.⁽⁴⁸²⁾

The purpose of the IBA Rules is described as follows:

[page "2211"](#) "The [IBA Rules] are intended to provide an efficient, economical and fair process for the taking of evidence in international arbitrations, particularly those between Parties from different legal traditions. They are designed to supplement the legal provisions and the institutional, ad hoc or other rules to the conduct of the arbitration."⁽⁴⁸³⁾

The IBA Rules are not independently binding in international arbitrations, unless the parties have agreed in advance that they should be (which is rare).⁽⁴⁸⁴⁾ Nonetheless, arbitral tribunals ordinarily have the power, in the exercise of their authority over the conduct of evidence-taking, to adopt the IBA Rules and direct that the parties proceed in accordance with them; alternatively, parties may agree during the arbitration to application of the IBA Rules, either with or without the tribunal's encouragement to do so.⁽⁴⁸⁵⁾ This is a relatively common occurrence in major international arbitrations.⁽⁴⁸⁶⁾

In many cases, tribunals will not adopt the IBA Rules outright (particularly if one party objects), but will instead use them as "guidelines for" or "principles to inform" its decisions. Even when they are not formally adopted, the IBA Rules can influence both the arbitral tribunal's disposition of discovery and evidentiary issues and the parties' approach to negotiating a mutually acceptable procedural timetable. In the words of one tribunal:

"The IBA Rules are used widely by international arbitral tribunals as a guide even when not binding upon them. Precedents and informal documents, such as the IBA Rules, reflect the experience of recognized professionals in the field and draw their strength from the intrinsic merit and persuasive value rather than from their binding character."⁽⁴⁸⁷⁾

That observation is accurate. Although they are not binding, the IBA Rules provide a reasonably well-formulated, predictable set of basic procedures and substantive standards for the evidence-taking process. The Rules' drafters foresaw and adopted sensible solutions for a number of issues that recur in the evidence-taking process, while leaving room for flexibility in individual cases.

A recent survey found that the IBA Rules are used in 60% of international arbitrations.⁽⁴⁸⁸⁾ This statistic likely overstates the frequency with which the IBA Rules are used, because it is biased in favor of larger commercial and investment disputes involving major international law firms; more specialized subject matters and smaller disputes are less likely to involve use of the IBA Rules. Nonetheless, it is clear that the Rules are playing a significant and growing role in international arbitration generally.

[page "2212"](#) § 15.08. MAJOR PROCEDURAL STEPS IN INTERNATIONAL ARBITRAL PROCEEDINGS

With the principles discussed above as background, the major procedural steps in international arbitrations are summarized in the sections below. The descriptions are only general, and many individual arbitrations will omit some (or many) such steps or adopt *sui generis* approaches that differ from common practices. Nonetheless, as a rule of thumb or benchmark, the following descriptions are a useful starting point.

[A]. Notice of Arbitration or Request for Arbitration

The first procedural step in most arbitrations is the filing of a "request for arbitration" or "notice of arbitration" (referred to collectively as "requests for arbitration").⁽⁴⁸⁹⁾ In virtually all cases, requests for arbitration take the form of a written communication from the claimant to the respondent.⁽⁴⁹⁰⁾ It is conceivable that a

request for arbitration could be oral, but this virtually never occurs in practice and would raise issues of formal validity.

The request for arbitration (or notice of arbitration) usually serves the same basic functions as a civil complaint or writ under national litigation rules – that is, the purpose of the notice of arbitration is “to inform the respondent...that arbitral proceedings have been started and that a particular claim will be submitted for arbitration,” to “apprise the respondent of the general context of the claim asserted against him,” and “to enable him to decide on his future course of action.”⁽⁴⁹¹⁾ In addition, the request will often identify the claimant’s claims and requested relief, specify the basis for jurisdiction (*i.e.*, the arbitration agreement) and provide the claimant’s nomination of an arbitrator (or its views concerning the appropriate number, and means of selection, of the arbitrators).⁽⁴⁹²⁾

The required contents of a request for arbitration vary depending on the parties’ arbitration agreement,⁽⁴⁹³⁾ any applicable institutional rules⁽⁴⁹⁴⁾ and applicable national [page “2213”](#) law.⁽⁴⁹⁵⁾ Any or all of these sources may require that a request for arbitration (or notice of arbitration) include specified information in order to be valid.

National arbitration legislation sometimes addresses the contents of a request for arbitration, at least in *ad hoc* arbitrations, where the parties have not otherwise agreed. In general, it is essential to ensure that a notice commencing arbitral proceedings comply with such statutory requirements in the arbitral seat.⁽⁴⁹⁶⁾ (In many cases, statutory requirements are not mandatory; parties will be free to contract out of such statutory requirements, either in their arbitration agreement or by incorporating institutional rules adopting different requirements. Nonetheless, prudence ordinarily counsels complying with any potentially applicable statutory requirements for the request for arbitration.)

In general, however, national law imposes relatively few requirements with regard to the request for arbitration. For example, the Model Law is almost entirely silent regarding the contents of the request for arbitration, leaving this to the parties’ agreement and any applicable institutional rules.⁽⁴⁹⁷⁾ According to the Model Law’s drafting history, the request for arbitration should “identify the particular dispute and make clear that arbitration is resorted to and not, for example, indicate merely the intention of later initiating arbitral proceedings.”⁽⁴⁹⁸⁾ A court in one Model Law jurisdiction held that a letter from the claimant to the respondent, stating that a specified individual had been appointed as arbitrator and inviting the respondent to appoint its arbitrator, constituted a request for arbitration within the meaning of Article 21.⁽⁴⁹⁹⁾

[page “2214”](#) Under English law, unless otherwise agreed, a request for arbitration requires “a notice in writing requiring [a party] to submit [a] matter to the [arbitrator] named or designated” in the notice, or requiring the appointment of an arbitrator.⁽⁵⁰⁰⁾ Under French law, the better view is that a request for arbitration must (unless otherwise agreed) state an unequivocal intention to refer a dispute to arbitration (but nothing else).⁽⁵⁰¹⁾ Under German law, which amended the Model Law in this regard,⁽⁵⁰²⁾ a request for arbitration must set forth the parties, the nature of the dispute and a reference to the arbitration agreement.⁽⁵⁰³⁾ Unusually, under the U.S. Revised Uniform Arbitration Act, a notice of arbitration must include “the nature of the controversy and the remedy sought.”⁽⁵⁰⁴⁾

National arbitration legislation ordinarily will give effect to the parties’ agreement regarding the contents of a request for (or notice of) arbitration. Leading institutional rules provide two basic approaches to the request for arbitration. Some rules contemplate a short document, that serves as little more than a notice of commencement of the arbitration, while others contemplate a longer document that presents the relevant facts and legal arguments of the claimant’s case, together with the requested relief.

Institutional rules that permit a “short-form” request usually contemplate a two-step process in asserting a claim – after the initial notification, the claimant is obliged to more fully present the factual and legal basis of its claims in a longer “statement of claim.” Article 3 of the 2010 UNCITRAL Rules is illustrative of the requirements for a short-form request, requiring the notice of arbitration to include the following:

- “(a) A demand that the dispute be referred to arbitration;
- (b) The names and contact details of the parties;
- (c) Identification of the arbitration agreement that is invoked;
- (d) Identification of any contract or other legal instrument out of or in relation to which the dispute arises or, in the absence of such contract or instrument, a brief description of the relevant relationship;
- (e) A brief description of the claim and an indication of the amount involved, if any;
- (f) The relief or remedy sought;
- [page “2215”](#) (g) A proposal as to the number of arbitrators, language and place of arbitration, if the parties have not previously agreed thereon.”⁽⁵⁰⁵⁾


Under the UNCITRAL Rules, the notice of arbitration may also include:

- “(a) A proposal for the designation of an appointing authority;
- (b) A proposal for the appointment of a sole arbitrator; and
- (c) Notification of the appointment of an arbitrator.”⁽⁵⁰⁶⁾

A notice of arbitration under this provision can be submitted on a single page, and is not uncommonly confined to a few pages. The

2010 UNCITRAL Rules contemplate that the claimant will submit, subsequently, a “statement of claim” that more fully describes the legal and factual basis of the claim.⁽⁵⁰⁷⁾ The drafters of the original 1976 version of the UNCITRAL Rules considered requiring the claimant to include additional information in the notice of arbitration, equivalent to that required in the statement of claim. That proposal was ultimately rejected as imposing unnecessary costs and arguably discouraging settlement.⁽⁵⁰⁸⁾


In contrast, the ICC Rules contemplate a single document – the Request for Arbitration – that contains a somewhat more complete treatment of the claim and requested relief.⁽⁵⁰⁹⁾ No other formal pleading is contemplated by the 2012 ICC Rules prior to specific directions from the tribunal on written submissions, although parties not infrequently submit amendments to their Request for Arbitration or similar filings prior to constitution of the tribunal, while arbitrators almost invariably allow additional pleadings after they begin their mandate. The ICC Request for Arbitration is intended to serve the same basic function as the UNCITRAL Notice of Arbitration and Statement of Claim (taken together), and in particular to provide the respondent with a reasonable understanding of the claims that are being asserted against it.⁽⁵¹⁰⁾

 [page "2216"](#) In appearance and content, an ICC Request for Arbitration and UNCITRAL Statement of Claim should describe the relevant facts, agreements and claims in language accessible to readers from diverse jurisdictions. The request should also append the basic documents in the case (together with translations, where necessary).⁽⁵¹¹⁾ In addition, a thorough request will often set forth the claimant’s legal theory, albeit often in relatively skeletal form, and request particular relief. Citations to relevant statutes and (occasionally) other authorities are sometimes encountered, but detailed legal argument and factual development is usually left to subsequent briefs or memorials.

Even if a request or notice of arbitration is extraordinarily skeletal, it will virtually never be dismissed by an arbitral institution or tribunal on the grounds of providing inadequate notice to the respondent.⁽⁵¹²⁾ Rather, tribunals will generally require further details in subsequent submissions in the arbitration, in order to provide the respondent with adequate notice, instead of dismissing the arbitration entirely. Of course, the request – and other written submissions – must satisfy the formal requirements of the applicable national law and institutional rules, but as discussed above, these requirements are usually minimal.⁽⁵¹³⁾


In general, a request (and other written submissions) should avoid the types of boiler-plate or formalisms that sometimes prevail in domestic litigation. Counsel should strive to produce a document that will be understandable and persuasive to readers from other legal and linguistic backgrounds, who will likely comprise much or all of the arbitral tribunal.

[B]. Service of Request for Arbitration

Under most national laws, the notice of arbitration or request for arbitration must be delivered to the respondent in order to validly commence the arbitration.⁽⁵¹⁴⁾ Equally  [page "2217"](#) important, it is essential to the validity and enforceability of the arbitral award for the request for arbitration (or notice of arbitration) to be provided to the respondent.⁽⁵¹⁵⁾ In some circumstances, actual notice will not be required and service of the request for arbitration will be valid if reasonable efforts were made to deliver the request to the respondent.⁽⁵¹⁶⁾

In unusual cases, national law may require notification of the request for arbitration to all parties to the arbitration agreement (whether or not they are identified in the request for arbitration as parties to the arbitration).⁽⁵¹⁷⁾ The same requirement may, again, unusually, be imposed by the parties’ arbitration agreement. Where such requirements exist, the validity and enforceability of any arbitral award may depend upon compliance with them.

It is sometimes suggested that the request or notice of arbitration must be served in the same manner as a civil complaint or writ in national courts.⁽⁵¹⁸⁾ That suggestion is wrong in principle and has not been adopted in practice.


In general, national⁽⁵¹⁹⁾ and international⁽⁵²⁰⁾ requirements for the service of process which apply in national court litigations do not apply to international arbitrations (and, instead, by their terms apply only in litigations in national courts). That has  [page "2218"](#) been the consistent conclusion of those national courts that have addressed the issue.⁽⁵²¹⁾

This result applies in both institutional arbitrations, where applicable institutional rules generally provide for service mechanisms, and in *ad hoc* arbitrations, where the parties will generally not have agreed upon any particular means of notifying the request for arbitration. More fundamentally, it makes no sense at all to import the very technical and litigation-specific requirements for service in local national courts into the international arbitral process; doing so has as little, and perhaps less, to recommend it than applying other rules of local civil procedure in international arbitration (a result that is uniformly rejected⁽⁵²²⁾). The Mexican Superior Court of Justice explained this conclusion well, in the following terms:

“The summons, to which the petitioner objects, was actually served in a correct manner, because by inserting the arbitral clause in the contract, the parties tacitly waived the formalities established by Mexican procedural legislation...in order to subject themselves to the Arbitration Rules of the ICC and French law. The Court also rejected respondent’s contention that the arbitral award should have been transmitted to the Mexican Court by means of letter rogatory of a French Court, since such a procedure applies only to foreign judgments and not to foreign arbitral awards.”⁽⁵²³⁾

Parties should nonetheless ensure that mechanisms of service or notification of the request for arbitration (or other documents) comply with mandatory due process requirements in the arbitral seat and


states where enforcement of an award may need to be sought. These requirements generally demand a means of service reasonably calculated to provide the respondent with notice of the claims against it.⁽⁵²⁴⁾ A commercial party will be found not to have received notice, transmitted by customary means of communications such as email, fax, or courier, only in unusual cases.⁽⁵²⁵⁾

 [page "2219"](#) Institutional rules often set forth specific requirements concerning service of the request for arbitration. Under some regimes (*i.e.*, the ICC Rules), the request for arbitration is sent to the arbitral institution and it is the institution (rather than the claimant) that notifies the respondent of the filing.⁽⁵²⁶⁾ Under other institutional regimes, the claimant must serve the request or notice directly on the respondent.⁽⁵²⁷⁾

National law and institutional rules typically do not prescribe arbitration-specific time limits for commencing an arbitration, whether through delivery of a request for arbitration or otherwise. Of course, national law may impose general statutes of limitations or prescription periods, within which a claim must be asserted, in either litigation or arbitration; in some cases, national legislation specifically addresses the application of statutes of limitations in arbitration.⁽⁵²⁸⁾ In general, statutes of limitations apply to claims asserted in international arbitration in the same manner as they would in domestic courts – subject to relevant choice-of-law analysis.⁽⁵²⁹⁾


As discussed above, arbitration agreements sometimes impose contractual time limits on the commencement of an arbitration, either requiring that arbitral proceedings be commenced before the expiration of a specified time period or that arbitral proceedings be commenced only after specific procedural steps have been taken.⁽⁵³⁰⁾ Where such provisions exist they obviously should be complied with. However, national courts and arbitral tribunals often hold that such requirements are “non-jurisdictional,”⁽⁵³¹⁾ and that noncompliance with them does not prevent proceeding with an arbitration, but there are exceptions to this rule.⁽⁵³²⁾

[C]. Receipt of Request for Arbitration

The respondent’s receipt of the request for arbitration can be of considerable importance. Where a respondent denies receiving notice of the arbitration, proving  [page "2220"](#) that notice was in fact sent and received can be essential in a subsequent annulment or non-recognition proceedings.⁽⁵³³⁾

The date of the respondent’s receipt of the request can also have significant legal consequences. The date of receipt of the request for arbitration generally establishes the time within which the answer must be filed, under both institutional arbitration rules⁽⁵³⁴⁾ and national arbitration legislation.⁽⁵³⁵⁾ Additionally, under some national arbitration statutes, the arbitral proceedings are only formally commenced upon receipt of the request for arbitration by the respondent.⁽⁵³⁶⁾ (In contrast, under some institutional rules, the arbitration is deemed to commence on the date that the arbitral institution receives the claimant’s request for arbitration.⁽⁵³⁷⁾) The date that the arbitration is commenced may also have relevance for statute of limitations purposes,⁽⁵³⁸⁾ as well as with regard to the application of *lis pendens* principles.⁽⁵³⁹⁾

[D]. Reply and Counterclaims

National law generally does not address replies to a request for arbitration or the assertion of counterclaims, instead leaving this to the parties’ arbitration agreement (including any incorporated institutional rules) or the arbitrators’ procedural  [page "2221"](#) discretion. Under most institutional rules, the respondent will be afforded an opportunity, within specified time limits, to reply to the claimant’s request for arbitration and assert any counterclaims or jurisdictional objections.


The time for replying to a request for arbitration under most institutional rules is fairly short: Article 5 of the ICC Rules permits only 30 days, as do Article 3 of the ICDR Rules and Article 5(1) of the HKIAC Rules.⁽⁵⁴⁰⁾ These deadlines are often extended for relatively short periods,⁽⁵⁴¹⁾ either by agreement between the parties or leave of the arbitral institution (or, occasionally, the unilateral actions of the respondent may lead to an “extension”). Unusually, the 1976 version of the UNCITRAL Rules made no provision for the filing of an answer or reply to the notice of arbitration; the revised 2010 UNCITRAL Rules require the respondent to file a short-form response within 30 days of receipt of the notice of arbitration.

There are very few requirements under either national law or institutional rules regarding the contents of an answer or response to a request for arbitration. Under the UNCITRAL Rules, for example, a response to a notice of arbitration is required to include only: “(a) The name and contract details of each respondent; (b) A response to the information set forth in the notice of arbitration.”⁽⁵⁴²⁾ The Rules also provide that a response may, but need not, also include:

“(a) Any plea that an arbitral tribunal to be constituted under these Rules lacks jurisdiction; (b) A proposal for the designation of an appointing authority...; (c) A proposal for the appointment of a sole arbitrator...; (d) Notification of the appointment of an arbitrator; (e) A brief description of counterclaims or claims for the purpose of a set-off, if any, including where relevant, an indication of the amounts involved, and the relief or remedy sought; and (f) A notice of arbitration...in case the respondent formulates a claim against a party to the arbitration agreement other than the claimant.”⁽⁵⁴³⁾

Importantly, if a jurisdictional objection is contemplated, it is ordinarily essential to include it in any response, both in order to avoid potential waiver of the jurisdictional defense⁽⁵⁴⁴⁾ and for tactical and advocacy reasons.

Assuming no jurisdictional objections, the respondents’ reply (or


statement of defense) should generally meet the factual and legal claims of the claimant's case. The observations made above, concerning the desirability of an accessible, internationally-neutral request for arbitration,⁽⁵⁴⁵⁾ are also applicable to the reply. In  page "2222" appearance and content, a well-crafted reply (or statement of defense) will therefore usually resemble the statement of claim, described above.

In addition, most institutional rules require the respondent to assert counterclaims at the time of making its reply.⁽⁵⁴⁶⁾ Again, the considerations discussed above regarding the content and detail of the request for arbitration and answer apply equally to the counterclaims. If a respondent does assert counterclaims, the claimant is entitled to respond, usually within the same time period available for the initial reply.⁽⁵⁴⁷⁾

In general, there are no limits under national law on the subject matter of a respondent's counterclaims, beyond whatever restrictions may be contained in the parties' arbitration agreement: the respondent may assert any counterclaim that falls within the scope of the arbitration agreement. This general freedom may be limited by the parties' arbitration agreement or applicable institutional rules (which, however, usually do not impose further limits).⁽⁵⁴⁸⁾ Requirements of this nature should be interpreted liberally, to minimize the risk of inconsistent arbitral awards and to reduce unnecessary costs of constituting an arbitral tribunal and completing initial procedural arrangements.⁽⁵⁴⁹⁾

As discussed elsewhere, some institutional rules limit the ability of a respondent to assert counterclaims against a new party, not identified as a claimant or respondent in the request for arbitration.⁽⁵⁵⁰⁾ For example, the ICC Rules were for some time interpreted as precluding a respondent from asserting counterclaims against a "new" party, not named in the Request for Arbitration.⁽⁵⁵¹⁾ Even absent such limitations, the introduction of a new party into arbitral proceedings via a counterclaim, asserted after the arbitrators have been selected, can raise serious issues of equal treatment, and therefore enforceability of an award,⁽⁵⁵²⁾ because the new party may be denied an opportunity to participate in the selection of the arbitral tribunal.⁽⁵⁵³⁾

[E]. Constitution of Arbitral Tribunal

 page "2223" As discussed above, the constitution of the arbitral tribunal is a critically-important procedural step arising at the outset of any arbitration.⁽⁵⁵⁴⁾ There are a variety of mechanisms for appointing arbitrators, adopted in both institutional rules and arbitration agreements.⁽⁵⁵⁵⁾ These mechanisms, and the procedural issues they raise, are discussed in detail above.⁽⁵⁵⁶⁾


[F]. Challenges of Arbitrators

As discussed above, many arbitration statutes and institutional rules set forth procedures for the "challenge" of both party-nominated and other arbitrators.⁽⁵⁵⁷⁾ Most challenges are for alleged lack of independence and that is the focus of both institutional rules and national law.⁽⁵⁵⁸⁾

In practice, most challenges to arbitrators in international arbitrations are institutional (as distinguished from judicial). Procedurally, the treatment of challenges in the UNCITRAL Rules is representative, providing that "[a] party that intends to challenge an arbitrator shall send notice of its challenge within 15 days after it has been notified of the appointment of the challenged arbitrator, or within 15 days after the circumstances [permitting the challenge] became known to that party."⁽⁵⁵⁹⁾ The ICC, LCIA, ICDR and HKIAC Rules contain similar provisions.⁽⁵⁶⁰⁾

A party considering whether to challenge an arbitrator faces a difficult decision. Unsuccessfully pursuing the challenge is not likely to make a particularly positive first impression on the challenged arbitrator if the challenge fails. It may also raise suspicions among other members of the tribunal that the challenging party is seeking to delay or obstruct the arbitral proceedings. On the other hand, not pursuing a challenge will very likely waive objections (including legitimate ones) to the arbitrator⁽⁵⁶¹⁾ and create a false impression that ethical transgressions will be acceptable.

[G]. Presiding Arbitrator's Procedural Authority

 page "2224" In three (or five) person tribunals, one of the arbitrators will be the "presiding arbitrator," also called the "president" or "chair."⁽⁵⁶²⁾ The presiding arbitrator plays a significant role in the arbitral process – particularly in speaking for the tribunal, ruling on procedural matters during hearings, overseeing the tribunal's deliberations, (often) holding a decisive vote and drafting the award.


Some arbitration statutes⁽⁵⁶³⁾ and institutional rules⁽⁵⁶⁴⁾ grant the presiding arbitrator specific authority – generally in terms of a decisive vote in case of deadlocks on the tribunal. The parties also frequently agree to grant the presiding arbitrator broader procedural authority (for example, to rule independently on certain procedural matters).⁽⁵⁶⁵⁾ The presiding arbitrator also possesses a degree of inherent authority, by virtue of his or her role in leading deliberations and speaking for the tribunal, both at hearings and otherwise.⁽⁵⁶⁶⁾

[H]. Written Communications With Arbitral Tribunal During Arbitral Proceedings

National law does not generally address the subject of communications between the parties and arbitral tribunal during an arbitration, beyond generally requiring that the arbitrators ensure the parties' opportunity to be heard and forbidding *ex parte* communications about the substance of the parties' dispute.⁽⁵⁶⁷⁾

An experienced tribunal will take care at the outset to organize communications made during the course of the arbitration. This

includes providing a circulation list for all communications (with addresses, fax numbers and (increasingly) email addresses) and giving directions regarding substantive submissions (e.g., number of copies, mode of transmission).⁽⁵⁶⁸⁾ These steps are ministerial, but they can prevent embarrassing and difficult subsequent disputes as to whether particular documents were or were not received or properly sent.

 [page "2225"](#) As to the mode of communication, email is increasingly utilized over registered mail or hand delivery of almost all correspondence and submissions in international arbitration. The most significant formal documents (e.g., request for arbitration, statements of case or memorials, awards) continue to be delivered by hand delivery or registered mail, but almost all other communications in the course of an arbitration are sent initially (and, often, only) by email.


While undoubtedly a highly efficient means of communication, there are potential pitfalls of communicating solely by email. As one commentator has put it:

"While email has proved a great boon in relation to international transactions, care should be taken when it is used as a means for serving important material in an arbitration. Care needs to be taken to ensure that there is adequate proof that certain key communications have in fact been received. A sender is not always appropriately advised when an email has not been received. Similarly, a party might wrongly claim lack of receipt but the contrary is difficult to prove."⁽⁵⁶⁹⁾

Experienced arbitral tribunals will also seek to regulate communications from the parties by providing what submissions are permitted and discouraging "unsolicited" submissions.⁽⁵⁷⁰⁾ The adversarial process can sometimes provoke intemperate and unnecessary correspondence by counsel, of all nationalities and specializations. A firm hand by the tribunal often helps reduce much wasted cost and emotion, while not interfering with the parties' ability to present their respective cases.


The timing of communications is not subject to any general rule and should be addressed on a case-by-case basis by the parties and tribunal. In some instances, it is important that the parties' submissions be exchanged (i.e., submitted simultaneously, so neither party has an opportunity to formulate its position or argument in response to the other); in other cases, sequential submissions are desired and specifically provided for. It is prudent for the tribunal to make clear what the sequence and timing of parties' submissions should be (with counsel being left a degree of flexibility about the precise timing (e.g., agreeing that submissions at the "close of business" means 6:00 pm in a particular time zone)).⁽⁵⁷¹⁾

[I]. No Ex Parte Substantive Communications With Tribunal

After an arbitral tribunal is appointed, the parties and their representatives in an international arbitration are expected (and obliged) to refrain from *ex parte*  [page "2226"](#) communications about the substance of the case with the arbitrators. This is a basic requirement of procedural fairness and is subject to very few exceptions.

The UNCITRAL Model Law is representative of prohibitions in many national systems against *ex parte* communications between the parties and arbitrators. Article 24(3) provides that all materials "supplied to the arbitral tribunal" by one party shall "be communicated to" the other party.⁽⁵⁷²⁾ The prohibition against *ex parte* communications about the substance of the case is included expressly in some institutional rules, which formalize the requirement that communications to the tribunal be copied to the other party.

For example, Article 17(4) of the 2010 UNCITRAL Rules requires that the parties communicate any information that they provide to the tribunal to the opposing party, unless otherwise permitted by the arbitral tribunal.⁽⁵⁷³⁾ A few other institutional rules are similar.⁽⁵⁷⁴⁾ Under these rules, all written communications with the tribunal by the parties and their counsel during the arbitration are required to be copied to opposing counsel;⁽⁵⁷⁵⁾ the same principle applies to communications from the tribunal, which should also be copied to all parties.

The prohibition on *ex parte* communications is applicable even in the absence of express provisions to this effect in the applicable institutional rules. Ethical standards for international arbitrators (discussed above)⁽⁵⁷⁶⁾ generally forbid arbitrators from engaging in *ex parte* communications. The IBA's Rules of Ethics are representative, providing: "[t]hroughout the arbitral proceedings, an arbitrator should avoid any unilateral communications regarding the case with any party, or its representatives."⁽⁵⁷⁷⁾  [page "2227"](#) Exceptions are generally made for scheduling or similar logistical issues, but even these are generally used sparingly and with care.⁽⁵⁷⁸⁾

More generally, the prohibition against *ex parte* communications reflects both the parties' expectations and basic principles of procedural fairness. The parties' obligation to participate in the arbitral proceedings in good faith is inconsistent with secret *ex parte* communications with one or more of the members of the arbitral tribunal;⁽⁵⁷⁹⁾ where an adjudicative body is mandated to resolve a dispute on the basis of adversarial submissions, on an evidentiary record, parties will not ordinarily expect or accept *ex parte* communications that are not included in the record. More fundamentally, *ex parte* communications regarding the substance of the arbitration effectively deny the parties the opportunity to present their cases – by generally denying them knowledge of, and an opportunity to respond to, the evidence, arguments and claims submitted by their counter-party.

As a consequence, in most national legal systems, *ex parte* communications about the substance of the case will subject the tribunal's award to both annulment and non-recognition.⁽⁵⁸⁰⁾

Similarly, *ex parte* communications will expose the arbitrator(s) to removal, under either national law or institutional rules.⁽⁵⁸¹⁾ These sanctions reflect the general prohibition under most national legal systems against *ex parte* communications about the substance of the arbitration.

There is nonetheless no compelling reason that parties should be prohibited from altering the prohibition against *ex parte* communications by the arbitrator(s). Provided that both parties are treated equally, it is difficult to conclude that *ex parte* communications necessarily deny the parties the opportunity to present their cases or otherwise violate mandatory procedural protections; a tribunal would be required to exercise considerable care if *ex parte* communications were permitted, in order to ensure that both parties were fully aware of the evidence and claims against them, but it would in principle be possible for this to be accomplished. In practice, parties virtually never wish to permit *ex parte* communications and only an unambiguous, [page "2228"](#) specific agreement should be permitted to alter the rule against *ex parte* communications.⁽⁵⁸²⁾

Although contemporary international practice decisively rejects the propriety of *ex parte* communications (absent express contrary agreement), less experienced or less scrupulous parties and arbitrators sometimes engage in the practice. Good counsel and arbitrators will be alert to this possibility and, where it occurs, find opportunities to underscore its impropriety.⁽⁵⁸³⁾ In some cases, arbitral tribunals include provisions in the terms of reference or initial procedural order of a tribunal that expressly forbid *ex parte* communications. These sorts of provisions are particularly useful in cases involving co-arbitrators with limited experience or objectivity.⁽⁵⁸⁴⁾

There are limited exceptions to the general prohibition against *ex parte* communications. Prior to appointment, it is common (and indeed necessary) for a party to contact the individual that it contemplates appointing as an arbitrator in order to determine whether he would be willing and able to serve;⁽⁵⁸⁵⁾ there is no prohibition against such communications. It is also common (and appropriate) for a co-arbitrator to confer with his or her nominating party about the selection of a presiding arbitrator, including discussing the relevant background, expertise, experience and availability of different candidates; again, these communications are neither improper nor grounds for challenging the co-arbitrator or arbitral award.⁽⁵⁸⁶⁾ As discussed elsewhere, a good rule of thumb is to treat discussions between the party and prospective appointee as if they were being conducted in the presence of opposing counsel.⁽⁵⁸⁷⁾

[J]. Procedural Orders and Directions

During the course of the arbitral proceedings, an arbitral tribunal will make numerous procedural decisions or arrangements. These range from scheduling hearings, meetings, or conference calls, to establishing timetables for submissions, to [page "2229"](#) ruling on requests for disclosure, to granting or denying requests for stays of arbitral proceedings, to granting or denying requests for extensions of time, to ruling on claims of privilege or requests to submit additional evidence, to addressing confidentiality issues, to granting or denying requests to introduce new claims or counterclaims, to addressing hearing logistics and to making decisions regarding joinder or consolidation. Many of these decisions are made in the form of a "procedural order," usually a relatively skeletal written communication setting out the substance of the tribunal's decision or directions on a particular issue.

Where only a single, relatively limited issue is concerned, a procedural order may be a single page (or, alternatively, the tribunal's decision may be communicated by letter or email). Where a more complex decision, or set of decisions, is made, the tribunal's decision may be dozens of pages, including a summary of the background, the parties' claims and the reasons for the tribunal's decision. As discussed elsewhere, these "procedural orders" are not generally categorized as "awards" and are therefore not generally subject to annulment or confirmation and recognition.⁽⁵⁸⁸⁾ In a few jurisdictions, special mechanisms exist for judicial enforcement of procedural orders (at least in some circumstances);⁽⁵⁸⁹⁾ although this is unusual.

Procedural orders are not (necessarily) consensual; they are decisions of the arbitral tribunal, often issued by a tribunal after considering the parties' submissions (written and/or oral) and they may reject all (or part) of one or both parties' positions. In some cases, procedural orders will record the parties' agreement, or be a product of a measure of negotiation between the parties (and tribunal). Nonetheless, an order remains a ruling by the tribunal with which the parties are required to comply;⁽⁵⁹⁰⁾ in many cases, a procedural order will not reflect the parties' agreement and will instead simply be the decision of the tribunal.

In many cases, there will be no in-person hearing on disputed procedural issues. Parties will submit their respective positions and arguments in writing, typically by letters or other short submissions (often unaccompanied by witness evidence). For more routine procedural issues (e.g., timing of submissions, extensions of time), the tribunal will decide matters based on the parties' written submissions. For more significant issues (e.g., exclusion of witness testimony, seat of the arbitration and language of the arbitration), a telephonic hearing may be conducted. In rare cases (or in cases where all counsel and arbitrators are in the same physical location) an in person hearing may be conducted.

[K]. Jurisdictional Objections

As discussed above, disputes frequently arise over the interpretation and/or validity of arbitration agreements, and are a common feature of contemporary international [page "2230"](#) commercial arbitrations.⁽⁵⁹¹⁾ Although national courts sometimes resolve such disputes at the outset of arbitral proceedings (under Article II of the New York Convention and parallel provisions of national law), the arbitral tribunal itself is also generally authorized to resolve


questions of jurisdiction, exercising its competence-competence.⁽⁵⁹²⁾ The timing and disposition of jurisdictional proceedings before national courts and/or arbitral tribunals in different national legal systems is discussed in detail above.⁽⁵⁹³⁾

National law in the arbitral seat and institutional arbitration rules will sometimes regulate the timing of jurisdictional decisions by the arbitral tribunal.⁽⁵⁹⁴⁾ Most national laws and institutional rules leave the timing of a jurisdictional award to the tribunal's discretion, although sometimes establishing a presumption in favor of interlocutory resolution of any jurisdictional challenge.⁽⁵⁹⁵⁾

A few institutional arbitration regimes (ICC, ICSID, SCC) provide for the administering institution to make an initial "*prima facie*" jurisdictional assessment, dismissing requests for arbitration where there is no plausible jurisdictional base.⁽⁵⁹⁶⁾ The procedures and timing for such institutional determinations is prescribed by the applicable institutional rules and practice.


[L]. Language of Arbitration

The language of the arbitral proceedings is an issue of substantial practical importance. Among other things, the language of the arbitration affects the choice (and performance) of counsel and arbitrators, the effectiveness of witness testimony and cross-examination, the need for translations and similar matters.

Many arbitration agreements specify the language of the arbitral proceedings (and, less frequently, the award). As discussed above, the inclusion of such provisions, selecting the language of the arbitration, in the arbitration agreement is advisable.⁽⁵⁹⁷⁾ There is generally no basis for challenges to the validity of agreements selecting the language of the arbitration, including in annulment or recognition proceedings; such agreements are an exercise of the parties' procedural autonomy and are given full effect.⁽⁵⁹⁸⁾ Parties are free to alter their agreement on the language of the arbitration (including to add a second language, to change languages, or to provide exceptions  [page "2231"](#) to the agreed language).⁽⁵⁹⁹⁾ In practice, English has become the default choice for many international commercial arbitrations (although French, Spanish, Mandarin, Arabic and other languages are of course also frequently used).⁽⁶⁰⁰⁾

Absent such agreement, most institutional rules expressly authorize the arbitral tribunal to select a language or languages for the arbitration.⁽⁶⁰¹⁾ Arbitrators will often select the language of the underlying contract to govern the arbitral proceedings,⁽⁶⁰²⁾ although there are cases where other considerations (including a common language shared by the parties and counsel) will prevail. In one case where the arbitration agreement was silent regarding the seat and language of the arbitration, the tribunal selected Cairo as the seat, which in turn led to a determination that the language of the arbitration would be Arabic.⁽⁶⁰³⁾ National courts have generally refused to annul or deny recognition of awards on the basis of objections to arbitral tribunals' choice of the language of the arbitration.⁽⁶⁰⁴⁾


In some cases, arbitrations will be conducted in two languages, with simultaneous or other translations. Although superficially attractive, this approach is disfavored, because it materially increases the costs and reduces the efficiency of the arbitral process.⁽⁶⁰⁵⁾

 [page "2232"](#) A number of institutional rules specify default choices for the language of the arbitration.⁽⁶⁰⁶⁾ Under a (very) few institutional arbitration rules, a particular language is mandatorily required, usually absent contrary agreement by the parties.⁽⁶⁰⁷⁾ In rare instances, national law may impose local language requirements on locally-seated arbitrations.⁽⁶⁰⁸⁾

Questions sometimes arise over the extent to which parties must translate evidentiary materials and legal authorities which they propose to submit into the language of the arbitration.⁽⁶⁰⁹⁾ In general, any documents created for the arbitration must be translated by the party submitting the document, as must the relevant parts of any other document on which a party relies.⁽⁶¹⁰⁾

Disputes also sometimes arise over the language in which multilingual witnesses must testify, with many tribunals permitting witnesses to testify in their mother tongue, even where they are capable of speaking in the language of the arbitration.⁽⁶¹¹⁾ Nonetheless, particularly where sophisticated international parties and witnesses are involved, tribunals frequently urge witnesses to testify in the language of the arbitration, when they are able to do so, including by counting time used for translations of questions and testimony against the party that produced the witness. It is, of course, axiomatic that the time used for translation of a witness's testimony into the language of the arbitration will be counted against the party on whose behalf the witness has testified.⁽⁶¹²⁾

[M]. Initial Procedural Conference

 [page "2233"](#) After the tribunal is fully constituted, one of its first steps will usually be to hold an initial procedural conference with the parties. Some arbitrators consider this essential, and insist on an early meeting, in person, between the tribunal and the parties (or their counsel).⁽⁶¹³⁾

At the initial meeting, the tribunal will make introductions and discuss the organization of further arbitral proceedings. Such events may be essential to developing the basis for good working relations between the tribunal members, and between the parties' counsel and the tribunal, as well as permitting discussion of procedural and case management issues. In particular, and as discussed in greater detail below, it is essential for the tribunal to solicit the parties' views on an appropriate procedural format and timetable for the arbitration (e.g., hearing or not? if so, when and how long? how many witnesses? what written submissions and when?) and to prescribe a procedural timetable for the arbitration.⁽⁶¹⁴⁾ This enables the parties and their counsel to plan their efforts and is critical to an efficient, and fair, arbitral process.

In practice, advances in means of telecommunications have enabled tribunals to dispense with physical meetings in many contemporary international arbitrations. If the arbitrators and/or counsel reside in different countries, as is often the case, scheduling a prompt initial meeting in person can be difficult; the meeting can also often entail substantial expense, for transportation, accommodation and the like. At the same time, experienced practitioners question the benefits of a physical meeting to discuss procedural matters. Modern technology permits video conferencing or telephonic meetings where interactions may be at least as focused and constructive, if properly managed, as in a physical meeting.

In either case, it is almost always important for the tribunal to conduct a preliminary conference of some sort with the parties' counsel (and, in some instances, parties⁽⁶¹⁵⁾). Oral discussion of procedural and organizational issues is often essential to identifying mutually-acceptable approaches and time-saving schedules. Although such interaction need not occur in the same room, real-time discussion with the tribunal is usually necessary.

The 2012 revision of the ICC Rules requires a mandatory initial procedural conference (termed a "case management conference").⁽⁶¹⁶⁾ An Appendix to the ICC Rules includes a number of specific "Case Management Techniques" which the arbitral tribunal is encouraged to consider in conjunction with the case management conference.⁽⁶¹⁷⁾ The ICC Rules require the tribunal to establish a procedural timetable for the conduct of the arbitration "during or following" the case management [page](#) "2234" conference.⁽⁶¹⁸⁾ Other institutional rules also contemplate initial procedural conferences.⁽⁶¹⁹⁾

As discussed elsewhere, with rare exceptions, the preliminary meeting (and all subsequent meetings and hearings in the arbitration) will be private – closed to third parties, the press and the public. Most institutional rules provide specifically for the exclusion of third parties from the arbitration hearings, absent contrary agreement by the parties, which is unusual.⁽⁶²⁰⁾ More generally, as discussed below, confidentiality and privacy are hallmarks of international commercial arbitration.⁽⁶²¹⁾

[N]. Case Management

In arbitration, even more than in national court litigation, the proceedings must be planned, scheduled and managed: this is particularly important because, in contrast to national court proceedings, there is no standard set of applicable procedural rules and because parties agree to international arbitration in part to obtain an efficient, sensible procedure that is tailor-made for their particular dispute.⁽⁶²²⁾ Planning and case management are necessary in part for reasons of efficiency, so that the parties (and arbitrators) be able to plan the preparation and submission of different aspects of their cases. It is also a basic element of procedural fairness and equality of treatment, so that each party will be granted (and held to) a prescribed timetable for presenting its case.

The procedural planning of an arbitration requires that the arbitral tribunal ascertain at a very early stage of the arbitration (typically the initial procedural meeting)⁽⁶²³⁾ what the dispute really concerns, what the legal and factual issues are, how the parties contemplate the arbitral proceedings and timetable unfolding, and similar matters. Based on this, the parties and arbitrators are able to develop a procedural timetable for the arbitration, ideally with the parties agreeing to many of the procedural steps between themselves. The resulting timetable will then be incorporated in an initial procedural order (discussed below).⁽⁶²⁴⁾ This has the benefit of clearly and hopefully efficiently organizing the arbitral procedure – both in terms of timetable and legal basis – at the outset.

Efforts have been made by some arbitral institutions to codify and regularize the process of case management. A leading example of guidance for case management is provided by the 1996 UNCITRAL "Notes on Organizing Arbitral Proceedings" (the [page](#) "2235" "UNCITRAL Notes").⁽⁶²⁵⁾ The Notes are meant as a reference tool to be used during the initial stages of an arbitration, aimed at producing a well-organized, efficient arbitral proceeding by identifying issues for the tribunal and the parties to address.

The UNCITRAL Notes confirm the tribunal's discretion to manage the arbitral proceedings (subject to the applicable arbitration agreement or institutional rules).⁽⁶²⁶⁾ With regard to the tribunal's decision-making process on procedural matters, the Notes envisage that a tribunal could theoretically issue procedural orders without consultation with the parties in appropriate circumstances.⁽⁶²⁷⁾ In most international arbitrations, however, the parties will expect to be, and must be, consulted on many (if not all) procedural matters and given an opportunity to present their views; a tribunal's failure to do so would arguably expose its award to annulment or non-recognition.

Among other things, the UNCITRAL Notes suggest early consideration of:


- (a) adoption of procedural rules;⁽⁶²⁸⁾
- (b) language, translations and costs;⁽⁶²⁹⁾
- (c) seat of the arbitration and location of hearings;⁽⁶³⁰⁾
- (d) administrative matters and appointment of a secretary;⁽⁶³¹⁾
- (e) deposits for costs and arbitrators' fees;⁽⁶³²⁾
- (f) communications and confidentiality;⁽⁶³³⁾
- (g) timetable for written submissions, evidence (documentary and physical), witness testimony (fact and expert) and hearing;⁽⁶³⁴⁾
- (h) hearing procedures;⁽⁶³⁵⁾
- (i) possible settlement issues;⁽⁶³⁶⁾ and
- (j) [page](#) "2236" issue definition.⁽⁶³⁷⁾

As noted above, the 2012 ICC Rules also set out a list of issues to be considered in conjunction with the "case management conferences" that arbitral tribunals are required to conduct under the

revised ICC Rules.⁽⁶³⁸⁾ The ICC Task Force on *Controlling Time and Costs in International Arbitration* provides a similar set of issues (and recommendations) regarding issues for consideration in case management.⁽⁶³⁹⁾ Commentators have proposed similar lists in relation to specific phases in an arbitration.⁽⁶⁴⁰⁾


The foregoing topics (as well as others) are often addressed orally by the tribunal with the parties and their counsel at an initial meeting. The parties' agreement on particular issues, or the tribunal's directions, can then be recorded in an initial procedural order or in "terms of reference" (discussed below) under the ICC Rules.⁽⁶⁴¹⁾

[O]. Time Limits for Arbitration

 [page "2237"](#) Some international arbitrations are subject to specified time limits, within which an award (or other actions) is required to be completed. These time limits can arise from a variety of sources.

Neither the UNCITRAL Model Law nor most other modern arbitration statutes impose a time limit on international arbitrations; rather, the length of time required for the arbitration is left to the agreement of the parties and discretion of the arbitrators in individual cases.⁽⁶⁴²⁾ Nonetheless, some national arbitration statutes (typically older or domestic legislation) impose fixed time limits for the arbitral tribunal to render a final award.⁽⁶⁴³⁾ In a few jurisdictions, these time limits must be complied with in order to avoid annulment of the award.⁽⁶⁴⁴⁾ In rare cases, statutory time limits are mandatory and cannot be altered by agreement. As a practical matter, where an arbitration is seated in a jurisdiction with statutory time limits of this character, the arbitral tribunal and parties will generally comply with them.⁽⁶⁴⁵⁾

Time limits for the arbitral process also arise from other sources. Some arbitration agreements impose deadlines on the tribunal, either for making an award or taking other steps. That is the case, for example, in fast-track arbitration agreements which will typically require that the arbitrators conduct a hearing and/or render a final award within a specified number of days or months from the submission of a request for arbitration or the constitution of the arbitral tribunal.⁽⁶⁴⁶⁾


It is well-settled that agreements setting time limits for the arbitral process (or parts thereof) are generally valid and will be given effect; agreements of this character are an aspect of the parties' more general procedural autonomy and entitled to  [page "2238"](#) recognition under the New York Convention and national arbitration legislation.⁽⁶⁴⁷⁾ National courts, including in Model Law jurisdictions, have consistently upheld the validity of agreements that the arbitral proceedings must be completed within a determined period of time.⁽⁶⁴⁸⁾

As discussed below, some courts have held that the arbitral tribunal's mandate automatically terminates when the time limit for making an award or concluding the arbitration expires;⁽⁶⁴⁹⁾ the weight of authority holds, however, that a time limit will be jurisdictional only exceptionally, when unambiguously required by the language of the parties' agreement.⁽⁶⁵⁰⁾

Similarly, some institutional rules require that awards be rendered within a specified time period. For example, under the 1998 ICC Rules (and earlier versions of the Rules), an award was required within six months of signing of the Terms of Reference.⁽⁶⁵¹⁾ This time limit was almost always extended and the revised 2012 ICC Rules now authorize the ICC Court to fix a time other than the default six months period where the tribunal's procedural timetable makes the default time limit unrealistic.⁽⁶⁵²⁾ A few other institutional rules also impose prescribed time limits for a final award, in most cases with the arbitral institution or arbitrators empowered to extend the time limits.⁽⁶⁵³⁾

In contrast, the ICDR Rules require that an award be made "promptly," and unless agreed differently between the parties, within thirty days of the close of hearings.⁽⁶⁵⁴⁾ Most other institutional rules adopt the same approach, imposing no time limit for the issuance of an award or conclusion of the arbitration.⁽⁶⁵⁵⁾ This reflects the general preference of commercial parties for flexibility and tailoring of the length of arbitral proceedings to particular circumstances.

In the absence of any mandatory time limit, the duration of the arbitration will be determined by the desires and needs of the parties and the circumstances of particular cases. As one commentary observes:

"There is, of course, no ideal period within which all arbitrations should be completed. In a complicated case, it would be wrong to fix a short period, since neither the parties nor the arbitral tribunal could deal properly with all  [page "2239"](#) the issues.... On the other hand, if a lengthy period is stipulated, this will be a disincentive to diligent conduct of the arbitral proceedings and is likely to be contrary to the interests of the parties or one of them. Everything depends on the nature, subject-matter, complexity and scope of the disputes, and whether the parties have a common interest in reaching an early resolution of their disputes."⁽⁶⁵⁶⁾

The appropriate duration of the arbitration depends on the number and complexity of the issues, the existence (or nonexistence) of bifurcated proceedings, the need for (and complexity of) discovery or disclosure, the length of any hearing, the need for urgency and the parties', tribunal's and counsel's calendars. These issues will generally be identified in the course of establishing the procedural timetable for the arbitration (as discussed below) and then incorporated into that timetable.

[P]. Procedural Timetable for Arbitration and Initial Procedural Order

As already noted, it is essential for the arbitral tribunal to establish a

procedural timetable at the outset of the arbitration. For the most part, developed arbitration legislation does not address the contents of a procedural timetable for the arbitration. These matters are instead left to the parties' agreement or, absent such agreement, the tribunal's directions. As discussed above, the most significant exception to this is the existence, in some arbitration statutes, of mandatory time limits for a final award.⁽⁶⁵⁷⁾

Similarly, few arbitration agreements deal with procedural timetables for the arbitration. Exceptions are so-called "fast-track" arbitration provisions (requiring adherence to a highly-expedited timetable for written submissions, a hearing and an award)⁽⁶⁵⁸⁾ and provisions specifying initial procedural steps in the arbitral process.⁽⁶⁵⁹⁾ Alternatively, as discussed above, some arbitration agreements impose deadlines on the tribunal, either for making an award or taking other steps. In practice, however, time limitations are not infrequently waived or extended once an arbitration is underway and the demands of a particular dispute are appreciated; it is important that such extensions or waivers be done formally, in order to safeguard the enforceability of the award.⁽⁶⁶⁰⁾

Most institutional rules contain time limits for the parties' initial pleadings, such as replies and counterclaims,⁽⁶⁶¹⁾ but do not specify the timing of any further submissions. Instead, most institutional rules simply authorize tribunals to set time limits for written [page "2240"](#) submissions, production of evidence and other subjects.⁽⁶⁶²⁾ Additionally, as discussed above, some institutional rules require that awards be rendered within some particular time period, unless otherwise agreed by the parties or ordered by the arbitrators.⁽⁶⁶³⁾

Arbitrators will generally draw up a procedural timetable for the arbitration at an early stage in the proceedings and record this timetable in an initial procedural order. As discussed above, this will typically occur at or in conjunction with an initial conference with the parties, where procedural matters can be discussed and calendars consulted.⁽⁶⁶⁴⁾

The procedural timetable will ordinarily set out a schedule pursuant to which the parties must make written submissions (discussed below), file documentary and witness evidence (discussed below) and present their cases at a hearing (also discussed below).⁽⁶⁶⁵⁾ The procedural timetable will often also address a number of generally-applicable procedural issues such as the availability and form of disclosure (as well as timing issues), the use of expert evidence, the format and content of post-hearing submissions and the like.⁽⁶⁶⁶⁾

In establishing a procedural timetable, it is essential that the tribunal consider the parties' preferences, but also the nature of the claims and expected evidence. In order for international arbitration to live up to expectations for an efficient, sensible and tailor-made procedure for their dispute,⁽⁶⁶⁷⁾ the tribunal must take account of the nature and requirements of the dispute. This involves a delicate balance between appreciating the parties' preferences as to how the case should be litigated and judging the extent to which those preferences make sense. This may also entail discussion between the tribunal and the parties, including (the relatively rare cases) where the parties desire to adopt a procedural approach and timetable that the arbitrators consider inappropriate.⁽⁶⁶⁸⁾

Having fixed a procedural timetable, it is also essential that the tribunal enforce it.⁽⁶⁶⁹⁾ Sloppiness or untimeliness can cause great expense and waste (contrary to one of the basic aspirations of arbitration), as well as unfairness. Although practice sometimes differs,⁽⁶⁷⁰⁾ tribunals should be circumspect in granting requests for extensions. Only in [page "2241"](#) well-substantiated cases, involving no material prejudice and no reasonable alternative, should material alterations to the procedural timetable be permitted.⁽⁶⁷¹⁾

[Q]. Issue Definition

In connection with establishing a sensible arbitral procedure, the tribunal and parties must define the contested issues of law and fact, and devise an efficient, fair means of presenting and deciding them. It is typically the responsibility of each party to determine what facts it must prove, and how it ought best to go about doing so.⁽⁶⁷²⁾ This requires making legal judgments, as well as practical assessments of how much time and money it is worth investing in particular issues and types of proof, often on the basis of incomplete or unreliable information. This process requires delicate judgment, and sometimes an element of good fortune, by counsel.

To help mitigate the inevitable uncertainties of the adjudicative process, some tribunals will give indications as to what issues are most relevant and what categories of evidence would be appropriate.⁽⁶⁷³⁾ For example, the Iran-U.S. Claims Tribunal issued reasonably detailed directions to the parties regarding proof of various jurisdictional facts (concerning private parties' nationalities).⁽⁶⁷⁴⁾ In the face of arguments by Iranian parties that U.S. claimant corporations should be required to produce passports and birth certificates from all of their shareholders, updated on a daily basis for all relevant times, in order to establish a corporate claimant's U.S. nationality, the Tribunal directed that claimants produce evidence as to shareholdings on specified (and approximate) relevant dates, and that specified governmental records would be accepted as proof.⁽⁶⁷⁵⁾


The process of identifying elements and types of proof in advance entails the tribunal assimilating the issues and facts in a case, and making tentative assessments regarding [page "2242"](#) aspects of the case, at early points in the process.⁽⁶⁷⁶⁾ It is important that, when this occurs, the parties' rights to present their case are not infringed by tribunals that assume they understand the parties' respective cases better than counsel. Although the objectivity, discipline and management a tribunal can provide are useful, it is important that the arbitrators not inhibit the parties in educating the tribunal about matters as to which they have comparative advantages and incentives to master.

[R]. Bifurcation or Other Segmentation of Proceedings

The efficient organization of the parties' presentation of disputed issues sometimes occurs by identifying preliminary or "cut-across" issues, whose resolution will avoid wasted effort and expense. Typical examples of this are jurisdictional issues, choice-of-law questions and separation of liability and damages. It is, for example, not uncommon for a tribunal to request separate briefing on the subject of jurisdiction, and to hear evidence and oral submissions, before issuing an interim award confined to jurisdiction.⁽⁶⁷⁷⁾

If the parties do not agree on whether or not to bifurcate the presentation of a case, the tribunal will be responsible for deciding whether to do so. It is sometimes difficult to obtain directions from a tribunal bifurcating the arbitral proceedings and identifying particular issues for preliminary consideration: some arbitrators are reluctant to impose limitations on the issues that are to be addressed, out of concerns that this may be regarded as denying one party or the other an opportunity to present its case. This is understandable, but unfortunate. Abdicating efforts at case management and hearing all issues by default at a single, final hearing wastes valuable opportunities, for both the tribunal and the parties, to adopt more efficient and fair procedures and in the end seldom satisfies the parties.


On the other hand, bifurcating a case is not always efficient or fair. Bifurcation inevitably imposes delays, which are often significant, in the resolution of some issues, which can only be justified on the basis that expense would be wasted in litigating those issues, which might become moot or irrelevant following decisions on other issues. For example, bifurcation of jurisdictional objections is often justified on the grounds that, if successful, submissions on liability will be unnecessary, while bifurcation of liability and damages is often sought on the grounds that, if liability is not found, there will be no need for submissions on damages.⁽⁶⁷⁸⁾

 [page "2243"](#) In many cases, particularly where there are factual and/or legal overlaps between different issues (e.g., jurisdiction and liability; liability and damages) it may be wasteful, as well as slow, to bifurcate the arbitral proceedings. In other cases, the logic of bifurcation depends on unstated assumptions about the likely outcome of the first phase of proceedings (assumptions whose accuracy is often speculative at early stages in the arbitration). These uncertainties often make it difficult to justify bifurcating an arbitration and potentially delaying complete resolution of the parties' dispute for many months (or more).

Moreover, bifurcation of an arbitration requires particular care, to avoid ambiguity or confusion about definitional issues (e.g., exactly what issues are included in a "liability" or a "damages" phase?). Discovering that the parties have misunderstood the procedural timetable, and proceeded for some time on inconsistent case preparation paths, can cause substantial delays and unnecessary expense. Moreover, bifurcation almost always means that particular issues will be considered and decided without the benefit of evidence and submissions on other, putatively unrelated issues; in practice, it is often difficult to reliably predict whether such compartmentalization is desirable or possible, again arguing for caution in decisions regarding bifurcation.⁽⁶⁷⁹⁾


The quantification of damages can be a time-consuming task and is often more suitable for bifurcation than other issues. If damages quantification is conducted before a liability determination, and no liability is found, the unnecessary expense for both parties can be considerable. Likewise, damage determinations can raise discrete legal issues that merit separate treatment after the parties have ceased to focus on liability and that may not be adequately defined until issues of liability have been determined. And, not infrequently, a determination as to liability can yield settlement without requiring a formal decision on damages.⁽⁶⁸⁰⁾

One of the most significant differences between arbitration and litigation is the comparatively minor role of "motions practice," and the relative difficulty in obtaining partial decisions prior to "trial," in arbitration. It is not common in international arbitration for a party to seek the equivalent of a dismissal for failing to state a legally-cognizable claim (*i.e.*, a claim which would not warrant relief, even if the facts alleged by the claimant were all true).⁽⁶⁸¹⁾

There should be no doubts concerning a tribunal's general authority (absent contrary agreement and subject to permitting the parties an opportunity to be heard)⁽⁶⁸²⁾ to  [page "2244"](#) make awards based on a dispositive motion.⁽⁶⁸³⁾ Nonetheless, some tribunals are unwilling to risk denying a party the opportunity to present its evidence, which will arguably occur in cases of summary dispositions. Nevertheless, there is a trend towards greater efforts to reduce cost and delay in arbitration,⁽⁶⁸⁴⁾ and one can anticipate that summary dispositions will gain wider currency in the future.⁽⁶⁸⁵⁾

[S]. ICC Terms of Reference

The ICC Rules formalize the process of case management and issue definition through a relatively unusual "Terms of Reference" mechanism and a mandatory requirement for a procedural timetable. The ICC initially required Terms of Reference when French law did not enforce arbitration agreements as to future disputes (in the early 1920s).⁽⁶⁸⁶⁾ The Terms of Reference mechanism was adopted to provide a means for obtaining an enforceable post-dispute agreement to arbitrate between the parties, who were called upon to execute a formal instrument setting out the disputed issues and confirming their agreement to arbitrate.⁽⁶⁸⁷⁾

The Terms of Reference mechanism was retained by the ICC Rules even after reforms of French arbitration law which recognized the validity of predispute arbitration agreements. Although these reforms rendered the Terms of Reference unnecessary as a means of enforcing the parties' arbitration agreement, the mechanism was retained  [page "2245"](#) as an organizational and case management tool in subsequent versions of the ICC Rules, including both the 1998 and 2012 versions.⁽⁶⁸⁸⁾


Under Article 23 of the 2012 ICC Rules, the arbitral tribunal is required to prepare a document entitled "Terms of Reference." The tribunal is to prepare the Terms of Reference either on the basis of

documents or in the presence of the parties, but always in light of the parties' most recent submissions. Terms of Reference usually contain a variety of formal details (*i.e.*, identities and addresses of parties, legal representatives), as well as "a summary of the parties' respective claims and of the relief sought by each party, together with the amounts of any quantified claims," a "list of issues to be determined," and "particulars of the applicable procedural rules."⁽⁶⁸⁹⁾

The Terms of Reference are typically reviewed in draft form by the parties (almost always based on a proposal from the tribunal); this can occur without actual meetings, with comments exchanged by email, or in conjunction with an initial procedural meeting. The 2012 ICC Rules provide for the parties and the arbitrator(s) to sign the Terms of Reference, which is then submitted to the ICC's International Court of Arbitration.⁽⁶⁹⁰⁾

Under the ICC Rules, once the Terms of Reference have been established, new claims (but not new defenses) may be asserted only with the leave of the arbitral tribunal.⁽⁶⁹¹⁾ Early versions of the ICC Rules required the consent of both parties, in order to submit a new claim following approval of the Terms of Reference (reflecting the initial jurisdictional function of the Terms of Reference).⁽⁶⁹²⁾ As a consequence, questions not infrequently arose as to what constituted a new "claim" (*e.g.*, Does increasing the amount of requested damages constitute a new claim? Does asserting a new legal basis for an existing request for relief constitute a new claim?).⁽⁶⁹³⁾

Under the 1998 and 2012 versions of the ICC Rules, the jurisdictional function of the Terms of Reference has largely been abandoned. Thus, even where a new "claim" is asserted, which is not contained in the original Terms of Reference, the arbitral tribunal has discretion to permit or to exclude it (as with amendments to claims and other significant procedural steps in the arbitration).⁽⁶⁹⁴⁾


 **page "2246"** As discussed above, the ICC Rules require the arbitral tribunal to establish a procedural timetable for the arbitration in conjunction with, or as soon as possible after issuing, the Terms of Reference.⁽⁶⁹⁵⁾ Additionally, the 2012 ICC Rules impose a (new) requirement that the arbitral tribunal convene a "case management conference" as soon as possible after the Terms of Reference have been drawn up.⁽⁶⁹⁶⁾ The purpose of the conference is to consult the parties on procedural measures to ensure effective case management.⁽⁶⁹⁷⁾

The ICC Rules' Terms of Reference and related requirements for an immediate case management conference and procedural timetable are controversial. Most other institutional rules do not impose the same types of obligations on the arbitral tribunal at the outset of the case.⁽⁶⁹⁸⁾

Some critics regard the Terms of Reference as an unnecessarily detailed, bureaucratic device, that produces little of value, while imposing costs and delay. These criticisms are frequently accompanied by more general complaints about the allegedly bureaucratic and slow character of the ICC Court generally.⁽⁶⁹⁹⁾

Criticism of the Terms of Reference, case management conference and procedural timetable requirements is misconceived: the ICC Rules perform a useful function by ensuring that arbitral tribunals attend at the beginning of a case to routine housekeeping (*e.g.*, the parties' precise identities, representatives and contact details) and to less routine case management and timetabling.⁽⁷⁰⁰⁾ An experienced tribunal will usually attend to all of the issues required by the ICC Rules, even without an institutional requirement to do so. Nonetheless, no harm, and potentially much benefit, comes from requiring less experienced tribunals to complete these same tasks in a systematic manner.

[T]. Advance on Costs or Deposits ⁽⁷⁰¹⁾

 **page "2247"** Once the tribunal is in place, the parties are generally required to advance security towards the fees and costs of the arbitrators. Most institutional rules contain express provisions for payment of an advance on costs (or deposit),⁽⁷⁰²⁾ and arbitrators often have the power under national law to require payment of an advance even absent express provision to that effect.⁽⁷⁰³⁾

The amount of the advance on costs is based upon the expected total amount of fees and expenses of the arbitrators and institutional administrative costs. If the parties do not pay the advance, the arbitration will not go forward; if one party fails to make payment, the other may do so on its behalf,⁽⁷⁰⁴⁾ so that the arbitration will proceed, hopefully to make an award in its favor.⁽⁷⁰⁵⁾ Arbitral tribunals have (correctly) upheld parties' rights to pay a defaulting counter-party's share of the advance on costs even in the absence of express provisions to this effect in the parties' arbitration agreement or applicable institutional rules:

"The UNCITRAL Arbitration Rules, like most other arbitration rules, do not expressly address the issue of reimbursement of advances on costs made by one party on behalf of the other party. The fact that some arbitration rules make explicit provision for a reimbursement claim by the party making the substitute payment against the other party does not necessarily mean that a corresponding obligation may not be implicit in other arbitration rules."⁽⁷⁰⁶⁾

In principle, a party should be entitled to interim relief as a consequence of an adverse party's refusal to pay its share of the advance on costs.⁽⁷⁰⁷⁾


page "2248" [U]. "Disclosure" or "Discovery"

As discussed in detail in [Chapter 16](#) below, "discovery" or "disclosure" play an important role in international arbitration.⁽⁷⁰⁸⁾ Although generalizations are difficult, a measure of document discovery is available in most contemporary international arbitrations, either pursuant to voluntary agreement or by order of the tribunal. At the same time, in many senses, the very term

"discovery" can be misleading in the context of international arbitration: discovery in international arbitration is usually materially less extensive and intrusive than in domestic common law litigation.⁽⁷⁰⁹⁾ It is also (properly) subject to active efforts by arbitral tribunals to manage the disclosure process in order to ensure efficiency and cost-effectiveness.⁽⁷¹⁰⁾

There is no automatic right to disclosure or discovery in international arbitration.⁽⁷¹¹⁾ Rather, parties must obtain procedural orders or directions providing for disclosure or discovery and then proceed in accordance with those orders. Ordinarily, orders regarding disclosure should be sought (and issued) in conjunction with establishing the initial procedural timetable for the case;⁽⁷¹²⁾ that is because of the potential impact of disclosure applications and decisions on other aspects of the procedural timetable, which requires providing for a disclosure phase in the overall procedural timetable.

The timing and format for any disclosure permitted by the tribunal will generally be set forth in advance in procedural rulings from the tribunal (or, less frequently, agreement(s) between the parties). The tribunal's directions will usually establish a procedure for the parties to make requests for disclosure and to respond to such requests (with either production of requested documents or objections to requests), and for the tribunal to rule on the requests and order disclosure.⁽⁷¹³⁾ The directions will also frequently set out guidelines for disclosure requests (for example, by incorporating the IBA Rules on the Taking of Evidence⁽⁷¹⁴⁾).


 [page "2249"](#) A tribunal must also decide when during the course of arbitral proceedings the parties may seek disclosure from one another.⁽⁷¹⁵⁾ This requires considering whether the parties have sufficiently defined the issues (so that the tribunal can assess the relevance and materiality of requested documents), as well as whether the parties will have sufficient time to digest materials which are disclosed and incorporate them into their submissions or hearing preparations.

Frequently, tribunals will provide for disclosure requests and objections to be made immediately following the parties' submission of reasonably detailed statements of their claims and defenses.⁽⁷¹⁶⁾ This permits requests for disclosure to focus on relevant claims and legal issues, while allowing the parties to obtain and review materials produced in disclosure before submitting their full evidentiary case and participating in the oral evidentiary hearing.⁽⁷¹⁷⁾

Finally, as discussed in detail below, it is possible under some national laws for either the parties to an arbitration, or the arbitral tribunal, to seek judicial assistance in obtaining coercive discovery.⁽⁷¹⁸⁾ Depending upon national law, such court-ordered disclosure can be obtained from either other parties or (less frequently) nonparty witnesses.⁽⁷¹⁹⁾ A party's efforts to obtain court-ordered disclosure can have a material impact on the timetable of the arbitration: national court proceedings may be time-consuming, particularly if evidence outside the arbitral seat is sought, and tribunals will be concerned about delaying the arbitration pending such litigation.


[V]. Written Submissions

As discussed above, virtually all international arbitrations commence with the submission of the request for arbitration (or notice of arbitration), an answer (and any counterclaims) and any defense to counterclaims; these various submissions are generally provided for in most institutional rules and will set out each party's basic legal claims and defenses.⁽⁷²⁰⁾ In addition, during the course of most international arbitrations, the parties will file further formal written submissions designed to elaborate upon and to substantiate their initial submission.⁽⁷²¹⁾

 [page "2250"](#) Some national arbitration legislation provides default rules regarding written submissions (which parties are generally free to alter by agreement). [Article 23 of the UNCITRAL Model Law](#) is representative, providing for the submission of a "statement of claim" and "statement of defence."⁽⁷²²⁾ The parties' obligation to provide statements of claim and defense is mandatory under Article 23(1), which provides that "the claimant *shall* state the facts supporting his claim" and "the defendant *shall* state his defence."⁽⁷²³⁾

Article 23 also provides that, unless otherwise agreed, the statement of claim shall "state the facts supporting [the] claim, the points at issue and the relief or remedy sought," while the statement of defense shall state the defense "in respect of these particulars."⁽⁷²⁴⁾ The elements comprising the statements of claim and defense may be agreed between the parties ("unless the parties have otherwise agreed as to the required elements of such statement"). The Model Law's drafting history explains that, although the parties cannot derogate from the principle provided in Article 23(1), they have the freedom to agree on specific rules of procedure with respect of the statements of claim and defence and their contents.⁽⁷²⁵⁾

The possibility of further written submissions is also made explicit in some institutional rules (such as the UNCITRAL Rules, which provide specifically for a further "statement of claim" and "statement of defense"⁽⁷²⁶⁾). These further written submissions are usually filed prior to the evidentiary hearing, and may also be filed after the hearing (so-called post-hearing or closing submissions⁽⁷²⁷⁾). Further written submissions will typically elaborate on the factual allegations and legal arguments contained in the parties' initial request for arbitration and answer, and will ordinarily attach evidentiary materials (e.g., documents, written witness statements⁽⁷²⁸⁾) and/or legal materials (e.g., expert opinions, copies of statutory provisions and judicial authorities).

Written submissions are of paramount importance in international arbitration. As one experienced advocate has correctly described, "the phase of written advocacy is increasingly important [to the arbitration], and much can be done at this stage to  [page "2251"](#) affect the outcome, one way or the other."⁽⁷²⁹⁾ Or, in another

authority's words, "[i]n an overwhelming majority of cases, the arbitral procedure begins with an exchange of written submissions. Written pleadings are often given primary emphasis throughout the proceedings, with a short oral hearing or no hearing at all."⁽⁷³⁰⁾

Some practitioners have suggested that written submissions in international arbitration have become unduly long.⁽⁷³¹⁾ The (necessary) limits on the length of oral hearings and the importance of presenting a party's case in a reasoned and complete manner generally argue decisively for thorough written submissions, as well as decisively against page limits: counsel's professional judgment about how best to present a party's case, in a manner useful and accessible to the tribunal, is a much better safeguard of the parties' rights and interests than inevitably arbitrary and (often) unprincipled page limits.

There are a wide variety of terms used to describe written submissions in arbitration. To a limited extent, institutional rules provide names for some submissions (such as the ICC's "Request for Arbitration"), but this is not the case for most submissions. Examples of commonly-used titles (in English) include "Statement of Claim," "Statement of Case," "Brief," "points of claim," or "Memorial." There is no precise definition of these terms, and the label attached to a particular submission is usually not important. In general, a "memorial," "statement of case," and "brief" are fairly detailed documents submitted after the process of issue definition has largely concluded and factual development has commenced.

The one point at which labels for written submissions can be important is in agreeing to a procedural schedule or timetable for the arbitration (or in interpreting a schedule ordered by the tribunal); here, it is vital to know precisely what contents the tribunal and the adverse party expect a particular submission to include. The safe course is to describe these contents specifically, rather than to rely on a title that can mean different things in different places and to different people. As one authority rightly observes, "whatever the approach taken, the arbitral tribunal must always state clearly what kind of submission it expects."⁽⁷³²⁾

The content, form and timing of written submissions varies from arbitration to arbitration. In some arbitrations (particularly smaller ones), written submissions will be brief, relatively informal documents submitted shortly before the evidentiary hearing; most of the parties' submissions will be oral, made at the hearing itself. In [page "2252"](#) other arbitrations (typically larger disputes), written submissions will require several months to prepare, will be hundreds of pages long (not including exhibits, witness statements and expert reports, which will entail thousands of additional pages or more) and will be very comprehensive, detailed documents.⁽⁷³³⁾ The timetables adopted for the arbitration will obviously vary substantially, depending on whether the parties' written submissions fall closer to one end of this spectrum or the other.

There are inevitably discussions about the sequencing and order of written submissions, with each party seeking the maximum opportunity to present its case in an effective manner and, less constructively, the most limited opportunity for its counter-party to do so. Among the key issues for discussion are (a) the choice between sequential and simultaneous written submissions; (b) the extent and detail of written submissions, including whether or not witness statements and expert reports accompany the submission; (c) which party is entitled to the last word; and (d) the prescription of page limits or other requirements for the parties' submissions. These procedural matters can have a decisive impact on how a case is arbitrated and on the parties' respective abilities to communicate their positions advantageously to the arbitrators.

With regard to the order of submissions, pre-hearing written filings are almost invariably sequential, with the claimant making the first submission. This is ordinarily essential in order that the respondent can understand what the claims against it and supporting evidence are, in order to respond in a meaningful fashion. Simultaneous filings in the early stages of the case run the risk of "two ships passing in the night," as well as the possibility of denying the respondent an adequate opportunity to present its defense.⁽⁷³⁴⁾ A different approach may be appropriate in post-hearing written submissions; by this stage of the proceedings, both parties should know one another's respective positions, and adopting simultaneous post-hearing written submissions may save time. On the other hand, where parties are likely to be continuing to develop legal argument, or where new and important or unforeseen evidence emerged at the hearing, sequential filings may continue to be necessary and appropriate.

For the same reasons, the pre-hearing written submissions should generally set forth the claimant's (and respondent's) entire case, and not be confined to skeletal, notice-style pleadings used in domestic litigation in some jurisdictions.⁽⁷³⁵⁾ This is necessary in [page "2253"](#) order to avoid "trial by ambush" and to ensure that the parties' cases are fully prepared in advance of the evidentiary hearing. As one award of the Iran-U.S. Claims Tribunal explained:


"the arbitrating parties are obliged to present their claim or defence, in principle, as early as possible and appropriate under the circumstances in each case. Compliance with this obligation is indispensable, in the Tribunal's view, to ensure an orderly conduct of the arbitral proceedings and equal treatment of the parties."⁽⁷³⁶⁾

Where a party fails to detail its case with adequate specificity, it should be ordered to make a further submission, and its procedural noncompliance should be sanctioned (through costs orders or otherwise).⁽⁷³⁷⁾ In egregious cases, a claim can be dismissed for procedural noncompliance.⁽⁷³⁸⁾

On the other hand, some flexibility must be allowed to the parties in judging what matters are likely to be relevant and disputed and what is cost-effective. As the drafting history of the UNCITRAL Rules correctly observes, Article 18(2) of the 1976 Rules gives a claimant discretion to decide what information to submit with its statement of claim because it may be "impossible for a claimant to determine at such an early stage of arbitral proceedings what would be all the

relevant documents; for example, the relevance of certain documents would depend on the position taken by the respondent in his defense.”⁽⁷³⁹⁾

As discussed below, witness statements and documentary evidence are often required to be submitted together with written submissions.⁽⁷⁴⁰⁾ This enables parties to present their entire case in their written submissions, which is both helpful to the arbitral tribunal and fair to counterparties (who then know what claims, evidence and arguments they are required to meet). In some cases, witness statements are submitted following written submissions or dispensed with entirely, but this is increasingly disfavored in contemporary international arbitration practice.


An oft-disputed issue concerns which party is entitled to the last word. This is more significant for post-hearing, than for pre-hearing, submissions, but parties nonetheless dispute it in both contexts. The civil law tradition, based on court practice, is that the respondent is entitled to the final word;⁽⁷⁴¹⁾ U.S. practice is similar.⁽⁷⁴²⁾ In contrast, the  page “2254” English common law tradition tends to grant the claimant the last say.⁽⁷⁴³⁾ Tribunals sometimes attempt to avoid this question, particularly in post-hearing submissions, by providing for a simultaneous final exchange of views.

It is also important, as with the initial request for arbitration and answer, to draft subsequent written submissions in clear, accessible language, without using formalisms from particular national litigation systems. Although the temptation may be difficult, counsel should strive to avoid harsh rhetoric or overstatement.⁽⁷⁴⁴⁾ A weak point does not get stronger, in any language, by being exaggerated. Moreover, submissions should be drafted with the expectation that they will not only be read, but reread: again, that counsels against undue rhetoric or overstatement.

Moreover, domestic styles of pleading and advocacy from local courts are usually not effective in international settings. As one recent national court decision observed, “[p]leadings in arbitration need not, indeed normally should not, follow the form of pleadings in common use in the Court of Session.”⁽⁷⁴⁵⁾ Rather, written submissions should be drafted with their audience carefully in mind, which will often be a multinational tribunal that will be unimpressed, or confused, by domestic litigation formulae and rhetoric.

It is sometimes said that “shorter is better” in written submissions.⁽⁷⁴⁶⁾ That is an oversimplification. Shorter is better if the relevant points can be communicated decisively in a short submission; if they cannot, as in legally or technically complex cases, then shorter is a hostage to fortune or chance. The real point is that a party’s arguments must be summarized, and then explained, in the manner best calculated to persuade the arbitrators, which may be either short or long, depending on the case.

[W]. Documentary Evidence


In general, international arbitration tends to rely more heavily on documentary evidence (and written witness statements) than oral testimony.⁽⁷⁴⁷⁾ Indeed, it is often  page “2255” remarked that documentary evidence is “preferred,” or of superior weight, to witness evidence in international arbitrations:

“Probably the most outstanding characteristic of international judicial procedure [including arbitral practice] is the extent to which reliance is placed in it upon the written word.... It may be said that evidence in written form is the rule and direct oral evidence the exception.”⁽⁷⁴⁸⁾

Or, in the words of an International Law Commission study of arbitral procedures: “The verbal presentation of evidence is not as important, before an international tribunal, as written materials.”⁽⁷⁴⁹⁾

This ignores the interest of most international commercial arbitrators in hearing from the individuals involved in a dispute and the willingness of arbitrators to assess witness credibility and reliability. It also overlooks the fact that tribunals will take into account (or discount) self-serving and unreliable documents, just as they discount self-serving and unreliable witnesses. There are not only differences in the medium of proof (written versus oral), but also in the quality, character and circumstances of the respective types of evidence. Thus, although contemporaneous documents are usually the most effective way to prove or rebut allegations in arbitral proceedings, witness testimony can also play a very significant role in such proceedings.⁽⁷⁵⁰⁾

In practical terms, each party will typically submit, to adverse parties and the tribunal in advance of the hearing, documents on which it intends to rely in support of its case. Often, many relevant documents are attached to the parties’ initial written submission in the case, typically in accordance with procedural directions to this effect from the tribunal.⁽⁷⁵¹⁾ Other documents will be attached as exhibits to particular witness statements or submitted apart from any pleading or statement.

 page “2256” Although it is good practice, and may be required under particular procedural directions or rules, there is no general rule that a party must submit all of the evidence that it relies on in its first written submissions. A party’s allegations or pleading will not be “stricken” or dismissed if they are only partially or inadequately supported in its initial submissions. Rather, subject again to specific directions and (if ordered) cut-off dates, a party will be free to offer documents and other evidence at subsequent points in the proceedings. In particular, after whatever document disclosure occurs in the arbitration, or even if no disclosure is ordered, additional documents may typically be submitted by the parties prior to the evidentiary hearing. Indeed, a party may sometimes hold back a document (or number of documents) for tactical reasons until the second round of written submissions.

Deadlines for submitting documents, and the manner of doing so, are often set forth in a procedural order or written communication from the tribunal. Experienced arbitrators take care to ensure that

parties comply with deadlines for submitting documents into evidence, and particularly the cut-off date. This is essential in order to avoid unfair surprise or ambushes through last minute submissions of documents.⁽⁷⁵²⁾

There is typically no need to produce original documents (rather than copies) and no need to "authenticate" documents through oral testimony of an author or custodian of a document.⁽⁷⁵³⁾ If disputes regarding authenticity or provenance of a document arise, they will be dealt with on an *ad hoc* basis by the tribunal.

[X]. Written Witness Statements⁽⁷⁵⁴⁾

It is common for parties to agree, or arbitral tribunals to order, that witness testimony will be submitted in the first instance in written witness statements (comparable to "affidavits" or similar mechanisms used in common law practice). These are written [page "2257"](#) statements, which are signed and generally sworn or attested by the witness, containing the witness's direct testimony on the issues as to which the party proffering that witness wishes to rely. The statements are submitted at a designated time in advance of any oral hearing, to both adverse parties and the tribunal.⁽⁷⁵⁵⁾

Written witness statements were historically unknown in many civil law systems.⁽⁷⁵⁶⁾ It was only after lengthy debate, and strong objections from some civil law representatives, that the 1976 version of the UNCITRAL Rules were drafted to provide expressly for written witness statements;⁽⁷⁵⁷⁾ the revised 2010 UNCITRAL Rules preserve the same approach.⁽⁷⁵⁸⁾ Applying a modified version of the UNCITRAL Rules, the Iran-U.S. Claims Tribunal expressly permitted written witness statements, which were frequently used in practice.⁽⁷⁵⁹⁾

There is little dispute today about the admissibility and general desirability of written witness statements. In addition to the UNCITRAL Rules, the IBA Rules on the Taking of Evidence and a number of institutional arbitration rules also provide expressly for written witness statements (including acknowledgements that the parties' counsel may interview witnesses in preparation for testimony).⁽⁷⁶⁰⁾ As discussed in detail below, this reflects the pervasive practice in contemporary international commercial arbitrations, where counsel routinely interview witnesses and assist in drafting written witness statements.⁽⁷⁶¹⁾

It is sometimes suggested that it is important for a tribunal to consider the parties' counsels' ability to prepare witnesses in deciding whether to permit written witness statements: "if the legal representative of one of the parties cannot, by the ethical rules of his bar, interview a witness, and such ethical rules are found to apply in the arbitration,...the tribunal may rule that witnesses should not be interviewed at all."⁽⁷⁶²⁾ It is unclear, however, why one party should be permitted, through its choice of [page "2258"](#) counsel subject to unusual ethical constraints, to preclude use of an efficient and sensible procedural mechanism that would otherwise be adopted.

The IBA Rules provide useful criteria for the approach to be taken in written witness statements. They require that a statement provide "a full and detailed description of the facts, and the source of the witness's information as to those facts, sufficient to serve as that witness's evidence in the matter in dispute."⁽⁷⁶³⁾ The failure to provide a sufficiently detailed statement will impact on the witness's credibility and may, in extreme cases, lead to the tribunal's exclusion of testimony by the witness.⁽⁷⁶⁴⁾ It also serves neither the tribunal, nor the party relying on a witness statement, for the statement to contain speculation, legal (or other) argument and similar matters.⁽⁷⁶⁵⁾ It is rare that a witness statement which ignores these principles will be struck from evidence; it is even rarer, however, that such a statement will advance a party's case.⁽⁷⁶⁶⁾

As noted above, witness statements are often ordered to be filed accompanying the parties' written submissions.⁽⁷⁶⁷⁾ As one commentary summarizes the advantages: "Efficient management of the arbitration proceedings may, however, make it desirable to have documentary evidence and written statements submitted together in one complementary package."⁽⁷⁶⁸⁾ Nonetheless, other approaches are also sometimes adopted, including simultaneous exchanges of witness statements before either party's principal written submission is filed.⁽⁷⁶⁹⁾ Provision is also often made for rebuttal witness statements, responding to testimony or documents submitted by a counter-party.

There has been occasional criticism of the use of written witness statements in international arbitration. One critic has concluded:


"Written witness statements can bear little relation to the independent recollection of the factual witness, with draft after draft being crafted by the party's lawyer or the party itself, with the witness's written evidence becoming nothing more than special pleading, usually expressed at considerable length. [page "2259"](#) It rarely contains the actual unassisted recollection of the witness expressed in his or her own actual words."⁽⁷⁷⁰⁾

Although it deserves to be taken seriously, and should be instructive for counsel in some circumstances, this criticism substantially overstates the defects in witness statements, and does not address the benefits of efficiency from, or possible alternatives to, such statements. In reality, it is clear to almost all experienced practitioners and arbitrators that written witness statements are fundamental to an efficient arbitral process (with the alternative of live, direct examination necessarily increasing the amount of required hearing time by multiples of at least three or four-fold, while simultaneously detracting significantly from the efficacy of pre-hearing written submissions, which aim to provide a comprehensive presentation of each party's case on both factual and legal issues).⁽⁷⁷¹⁾ At the same time, it is unlikely that current critics of written witness statements would react materially more favorably to oral testimony by witness who have been prepared for live examination with the same care as for preparing a written witness statement.


[Y]. Introduction of New Claims and Defenses

Parties to international arbitrations, like national court litigations, not infrequently wish to amend or supplement their claims or defenses. In most cases, these steps are liberally permitted, at least until the later stages of the proceeding: pleading formality is not required by most institutional rules and is seldom rigorously observed in practice. Nevertheless, where a party's amendments (or other procedural steps) would cause unfairness or serious inefficiency, a tribunal may, and should, forbid or restrict such actions.

Most national laws impose no specific limitations on amendments to the parties' claims or defenses. The UNCITRAL Model Law is relatively unusual, providing a formulation almost identical to the UNCITRAL Rules (discussed below), which grants the arbitral tribunal broad discretion to permit amendments or supplementations of a party's claims or defenses.⁽⁷⁷²⁾ Most national arbitration legislation is silent on the subject, but national court decisions uniformly grant arbitrators similarly broad discretion to permit, or deny, amendments, based on an assessment of the fairness and efficiencies of each course of action.⁽⁷⁷³⁾

 **page "2260"** Most institutional rules also contemplate liberal amendments to the parties' initial statements of claim and defense. Article 22 of the UNCITRAL Rules is illustrative: "During the course of the arbitral proceedings a party may amend or supplement its claim or defense, including a counterclaim or a claim for the purpose of a set-off, unless the arbitral tribunal considers it inappropriate to allow such amendment or supplement having regard to the delay in making it or prejudice to other parties or any other circumstances."⁽⁷⁷⁴⁾ Other institutional rules are to the same effect,⁽⁷⁷⁵⁾ as are most arbitral decisions.⁽⁷⁷⁶⁾

The decision whether to permit an amendment to a party's claims or defenses is a matter for the arbitral tribunal's discretion, subject to annulment only in cases where a party is denied an opportunity to be heard.⁽⁷⁷⁷⁾ Of course, an amendment (or counterclaim) may only be permitted if it is within the scope of the tribunal's jurisdiction under the parties' arbitration agreement.⁽⁷⁷⁸⁾


 **page "2261"** The drafting history of Article 22 of the 2010 UNCITRAL Rules makes it clear that amendments should not be unduly restricted.⁽⁷⁷⁹⁾ One of the advertised advantages of arbitration is its informality and flexibility; escape from procedural formalities and rigid time deadlines is one of the features of arbitration that parties desire, and bargain for.⁽⁷⁸⁰⁾

Nevertheless, amendments can have significant costs, particularly where one party is irresponsible or acting in bad faith. Noncompliance with deadlines and last-minute or far-reaching amendments to pleadings or submission of new evidence can cause substantial prejudice to a counter-party and compromise the efficacy and integrity of the arbitral process. Tribunals have frequently taken these factors into account in determining whether to permit a requested amendment. In the words of one tribunal:

"the Tribunal must consider whether the other Party would be prejudiced by the proposed amendment, whether the other party has had an opportunity to respond to the newly-added or amended claim, and whether the proposed amendment would needlessly disrupt or delay the arbitral process."⁽⁷⁸¹⁾


Other authorities are to the same effect.⁽⁷⁸²⁾ In practice, however, arbitral tribunals are generally highly reluctant to refuse to permit parties to amend existing claims or defenses, as distinguished from a claimant introducing an entirely new claim or counter-claim. Arbitral tribunals frequently reject arguments that a party's "pleadings" cannot be amended, often holding that flexibility and fairness require permitting parties to develop and refine their respective cases.

[Z]. Cut-Off Date

 **page "2262"** A "cut-off" date will often (and should) be established, some period of time prior to the evidentiary hearing, after which point further documentary and other evidence may generally not be submitted. This is designed to prevent ambushes and unfair surprise at the hearing and to ensure efficient conduct of the arbitral proceedings. As one arbitral tribunal explained, "[t]he Tribunal 'has repeatedly stated that no party shall submit any documents only at the Hearing or so shortly before the Hearing that the other Party cannot respond to it without prejudice and in an appropriate way.'"⁽⁷⁸³⁾ Tribunals will generally establish the cut-off date in the initial procedural order for the arbitration or in a subsequent procedural order, in order to provide the parties with ample advance notice of the time by which their evidentiary submissions must be complete.⁽⁷⁸⁴⁾

It is disputed whether documents intended to impeach the credibility of a witness may be submitted for the first time at a witness hearing (*i.e.*, after the cut-off date and without being previously provided to the other party). Resolution of challenges to the admissibility of such documents are in the tribunal's discretion.⁽⁷⁸⁵⁾ The better view is generally that documents which are genuinely relevant for purposes of impeachment may be adduced at the hearing, after a witness gives testimony that a counter-party wishes to challenge. Some arbitrators also permit submission at the hearing of publicly-available documents for purposes of cross-examination, although practice in this regard is mixed.


In some cases, parties attempt to submit evidence after the cut-off date, on various grounds including newly-discovered evidence, hardship, or inadvertence; these efforts are sometimes accompanied by claims that an arbitrary deadline which excludes highly material evidence would deny a party the opportunity to present its case. Except in unusual cases, involving evidence that a party genuinely had not and could not have discovered prior to the cut-off date, such requests are strongly disfavored; when they are granted tribunals can (and must) ensure that the counter-party has a full opportunity to evaluate and respond to the new materials.

 [page "2263"](#) It is the overwhelming practice, confirmed by all leading institutional arbitration rules and many national arbitration statutes, for tribunals to make provision for oral evidentiary hearings, at which the witnesses can be examined and the parties' counsel can make legal submissions. That is particularly true if a hearing is requested by one or both parties, as well as when a hearing is deemed appropriate by the tribunal.⁽⁷⁸⁷⁾ In many respects, the oral hearing is the center-piece of the arbitral process and will have enormous importance in the parties' respective presentations of their cases.

[1]. Oral Hearing Generally Mandatory


Oral hearings are mandatory in virtually all international arbitrations, save where the parties agree otherwise. Conducting an oral hearing when requested by a party is expressly required by many institutional rules, unless the parties' arbitration agreement waives or excludes the possibility of an oral hearing.⁽⁷⁸⁸⁾ Article 17(3) of the 2010 UNCITRAL Rules is representative, providing:

"If at an appropriate stage of the proceedings any party so requests, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials."⁽⁷⁸⁹⁾

 [page "2264"](#) Some national arbitration legislation is similar in its treatment of oral hearings. For example, [Article 24\(1\) of the UNCITRAL Model Law](#) provides that, "unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party."⁽⁷⁹⁰⁾ As the language of Article 24 makes clear, an arbitral tribunal is not required to hold an oral hearing unless such a request is made.⁽⁷⁹¹⁾

The Model Law broadens the right of parties to request hearings, beyond that expressly provided for in the UNCITRAL Rules. It does so by providing for hearings for the "presentation of evidence," without any reference to the "testimony of witnesses"; this change was adopted in order to ensure that parties would be entitled to request cross-examination of witnesses, which might not be treated as witness testimony under some national legal systems.⁽⁷⁹²⁾


A proposal was made during the drafting of the Model Law to limit the right to a hearing under Article 24(1) to substantive issues (*i.e.*, hearings regarding "the substance of the dispute"), thus excluding jurisdictional, procedural and interim relief applications.⁽⁷⁹³⁾ That proposal was rejected, making it clear that the parties' rights to a hearing extend to all issues, regardless how they are denominated.⁽⁷⁹⁴⁾

Other authorities are broadly similar to the Model Law in guaranteeing parties the right to an oral hearing if they so request.⁽⁷⁹⁵⁾ In both Model Law and other jurisdictions, failure to hear oral evidence, when requested by a party to do so, is very likely to invite a challenge to the resulting award for failure to afford the protesting party the opportunity to present its case.⁽⁷⁹⁶⁾ Although this result may seem formalistic  [page "2265"](#) or archaic, it is almost uniformly accepted and reflects sensible policy: the opportunity to present its case, in person and in the physical presence of the tribunal, is a basic, irreducible aspect of the adjudicative process which ought in virtually all cases be fully respected. There is contrary authority, but it is limited and unpersuasive.⁽⁷⁹⁷⁾

In part for these reasons, if one party requests a hearing in an international arbitration, it will almost invariably be granted. There are limited circumstances, termed "documents only" arbitrations, where there will be no opportunity for an oral hearing.⁽⁷⁹⁸⁾ Where the parties have agreed to dispense with oral hearings, that agreement will (and must) generally be given effect.⁽⁷⁹⁹⁾

There are suggestions that, in order to reduce costs and save time, tribunals should dispense with oral hearings, even when requested by one party. The theory is that "[h]earings are expensive and time-consuming," and arbitrators should save time and money by dispensing with hearings even when requested by a party.⁽⁸⁰⁰⁾

This view must be regarded with great caution. There is a unique immediacy and focus engendered by preparation for and participation in in-person hearings that, while costly, materially enhances the adjudicative process. It may be acceptable in small cases, where expectations regarding cost or timing are paramount, and the consequences of ill-informed decisions tolerable. But, in disputes that are of importance to either party, it will be very unusual that an award can be made without any hearing of the parties (absent contrary agreement).

This does not mean that a party may request a hearing (or a separate hearing) on every issue or decision to arise in a case.⁽⁸⁰¹⁾ Rather, a tribunal may usually make procedural decisions based on written submissions (or telephonic "hearings") or may consider multiple (or all) disputed issues at a single hearing. Moreover, as discussed  [page "2266"](#) below, a tribunal may also refuse to hear evidence on particular issues, including because they are irrelevant or the evidence would be duplicative.⁽⁸⁰²⁾


Most arbitrations of any consequence will involve at least one main evidentiary hearing, and perhaps also shorter hearings, at which particular witnesses or issues are heard. Hearings can last anywhere from a few hours, for one or two witnesses, to many months, for dozens (or even hundreds) of fact and expert witnesses, on multiple issues.

[2]. Scheduling Hearings

Although the point may seem trivial, scheduling hearings in international arbitrations is often difficult in practice, especially if the tribunal consists of more than one arbitrator. It is generally prudent to schedule hearings well in advance, to ensure that the tribunal, parties and counsel are all available and to allow time for slippage in the pre-hearing schedule. In virtually all cases, the parties and tribunal will endeavor to agree upon mutually-acceptable dates, often in conjunction with the initial procedural conference.

A hearing date will typically need to accommodate the arbitral tribunal (often three persons), counsel for two parties, the parties' representatives and relevant witnesses, as well (potentially) as national holidays. In most cases, all of the relevant individuals will have busy schedules, involving travel and other commitments. Simply finding a date on which all relevant persons can be in the same city for a pre-set number of days can be challenging – particularly where the tribunal will initially be reluctant to order a hearing on a date that one party objects to.

If agreement is not possible – not infrequently because one party is being uncooperative – the tribunal can order that the hearing occur on a particular date.⁽⁸⁰³⁾ After selecting a date, the tribunal must ensure that the parties receive adequate notice of the schedule.⁽⁸⁰⁴⁾ It goes without saying that hearings should not be ordered on a public holiday in the arbitral seat and that great sensitivity should be demonstrated for public and religious holidays of the parties.⁽⁸⁰⁵⁾

 **page "2267"** Tribunals will sometimes order split hearings, with certain witnesses or issues being heard at one time and other witnesses or issues being heard subsequently. For example, one week of hearings might be conducted in February (on contract formation and negotiation) and another in May (on contract performance and/or damages). This approach sometimes makes sense from a case management perspective (e.g., hearing expert witnesses after hearing fact witnesses may be very sensible). Nonetheless, it more often entails a considerable measure of inefficiency and added cost (because the entire infrastructure for the hearing must be reconstructed and because it is costly and undesirable for counsel and arbitrators to be required to reread into the case on multiple occasions) and tribunals are therefore often reluctant to order split hearings. There may, however, be circumstances where the calendars of the arbitrators, counsel and witnesses allow no alternative.


[3]. Pre-Hearing Planning

It is essential, and customary, for any hearing to be preceded by pre-hearing planning and organizational efforts. These typically include discussions between the parties on how to organize the hearing (in terms of logistics and time-table), submissions to the tribunal (on agreed and disputed issues) and a pre-hearing organizational call, followed by a procedural order or other communication from the tribunal issuing directions about the conduct of the hearing.⁽⁸⁰⁶⁾

This sort of planning is critical to the efficiency and fairness of the arbitral process. As one experienced arbitrator describes a well-organized approach to the subject:

"Hearing management starts at the very outset of the arbitration, at the initial procedural hearing, when you discuss how the evidentiary hearing will proceed. It then continues with a pre-hearing conference where you clear the way, you resolve all outstanding organizational and procedural issues in advance. This will save time at the hearing, avoid last-minute surprises and make sure that everybody prepares with the correct focus."⁽⁸⁰⁷⁾

A good example of the types of issues addressed in pre-hearing communications and orders is reflected in a note issued pursuant to Article 15 of the original 1976 UNCITRAL Rules (now Article 17 of the revised 2010 UNCITRAL Rules) by the Iran-United States Claims Tribunal. The note provided that "[t]he arbitral tribunal may make an order directing the arbitrating parties to appear for a pre-hearing conference"⁽⁸⁰⁸⁾ to address a number of case-management issues. The Tribunal's guidelines provide:

 **page "2268"** "The following list is illustrative of the matters which may be considered at the pre-hearing conference...and the arbitral tribunal may in its discretion determine to consider additional, or fewer, matters at the pre-hearing conference: (a) clarification of the issues presented and the relief sought; (b) identification of any issues to be considered as preliminary questions; (c) status of any settlement discussions; (d) whether any further written statements, including any reply or rejoinder, is requested by the arbitrating parties or required by the arbitral tribunal; (e) fixing a schedule for submission by each arbitrating party of a summary of the documents of lists of witnesses or other evidence it intends to present; (f) fixing a schedule of submission of any documents, exhibits or other evidence [which] the arbitral tribunal may then require; (g) whether voluminous and complicated data should be presented through summaries, tabulations, charts, graphs or extracts in order to save time and costs; (h) desirability of appointing an expert by the arbitral tribunal, and if so the expert's qualifications and terms of reference, whether the arbitrating parties intend to present experts, and, if so, the qualification of and the areas of expertise to be covered by such expert; (i) determining what documentary evidence will require translation; (j) fixing a schedule of hearings; (k) other appropriate matters."⁽⁸⁰⁹⁾

In some respects, the process resembles that of a pre-trial conference under U.S. or English procedural rules.⁽⁸¹⁰⁾ In particular, it is essential that the tribunal provide a preliminary schedule for the hearing, prescribing the order and timing of (any) legal submissions, the order and estimated timing of fact and expert witnesses, the

expected sitting times and the order and timing of any closing submissions.⁽⁸¹¹⁾ Of course, hearings are like snow-flakes, with each one being *sui generis* and unique, and the tribunal's planning must take the particular characteristics of each hearing into account.

[4]. Hearing Logistics

Hearings are typically conducted in law firm offices, hotel conference rooms, or specialized hearing centers catering to the arbitration community.⁽⁸¹²⁾ The conduct of an evidentiary hearing in even medium-sized arbitrations involves substantial technical and logistical effort.

Facilities must be provided for a hearing room to accommodate a considerable number of personnel (often, three arbitrators, several stenographers, two teams of [page "2269"](#) lawyers (of two to two dozen), translator(s), and witnesses), as well as "break-out" rooms for the tribunal, parties and (sometimes) witnesses. The hearing room must be equipped with audio-visual capabilities (microphones, computers, projectors, screens, video equipment and the like). Additionally, the parties will often prepare "war rooms," in facilities adjoining the hearing room, with files, computers, fax and copying machines and other equipment.

[5]. Structure and Scheduling of Hearing Time

The central event at most hearings will be the presentation of evidence,⁽⁸¹³⁾ and, in particular, witness examination (discussed in greater detail below⁽⁸¹⁴⁾). In addition, there will typically be presentations at the evidentiary hearing from parties' counsel on their respective positions and cases, often organized as "openings" or "closings."⁽⁸¹⁵⁾ There will also be not-infrequent procedural issues that arise (regarding issues ranging from timetabling, to admissibility of evidence, to objections to witness examination questions).

As discussed above, prior to the evidentiary hearing, and after consultation with the parties, the tribunal usually will have, and should have, issued procedural orders or directions for the organization and structure of the hearing.⁽⁸¹⁶⁾ The tribunal's orders will fix the length of the hearings (usually based upon earlier reservations in the arbitrators' and counsels' diaries), the order of any oral submissions, the order of witnesses and (ordinarily) the estimated time for counsels' oral statements and witness examination.

The length of the hearing needs to be considered in conjunction with a determination of how long the tribunal will sit each day. Tribunals will typically sit for a total of between five and nine hours per day, with additional time added for refreshment breaks and lunch. Although there are temptations to add to the length of hearing days, to permit more testimony or argument to be heard, there is a limit to [page "2270"](#) the ability of counsel, arbitrators and witnesses to perform, and the arbitrators may also wish to have some time in which to deliberate.

As discussed below, the evidentiary portion of the hearing will usually be divided, between the two parties' witnesses, based generally on equal sharing of available time.⁽⁸¹⁷⁾ It is essential that the identities of the witnesses who will testify be fixed in advance, to avoid surprise and permit proper planning and preparation.⁽⁸¹⁸⁾ Moreover, "once the arbitral tribunal has confirmed who will appear at the hearing, the party must ensure that the announced witnesses will in fact be present."⁽⁸¹⁹⁾ In almost all cases, the attendance of a witness is formally or effectively within the control of the party relying on the witness, and tribunals generally have little patience with claimed refusals by a witness to appear as scheduled (or, if necessary, via video or telephone).

Pursuant to the tribunal's directions, the hearing will typically commence with introductory and organizational statements from the tribunal, almost invariably from the chairman. The tribunal's directions will usually then provide for opening statements by counsel (usually, the claimant first, and then the respondent), followed by witness examination (usually direct, cross and redirect, first of the claimants' fact witnesses and then the respondents') and, if appropriate, closing statements and, occasionally, time for questions from the tribunal to counsel and for witnesses.⁽⁸²⁰⁾

The amount and allocation of time at the hearing is often a sensitive and controversial issue. On the one hand, both parties are typically anxious to be afforded the maximum opportunity to present their case, and are deeply suspicious about their counter-party's efforts to disadvantage them, to intrude upon "their" time, or (sometimes) to delay and prolong the proceedings.

On the other hand, it is an understatement to say that "time is a particularly precious commodity in international arbitral proceedings."⁽⁸²¹⁾ In reality, hearing time is the scarcest commodity in many arbitrations and determining how that time should be divided between the parties is often one of the tribunal's most challenging procedural tasks.

[page "2271"](#) In many common law traditions, trial lawyers face few constraints on the amounts of time they are allotted to question witness and present their cases. As one seasoned U.S. arbitrator describes:

"Litigators from the United States are accustomed to having appellate courts establish strict time-limits for oral argument, but expect trial courts and arbitral tribunals to allow whatever amount of time is reasonably needed by the parties to present their evidence and arguments, without regard to pre-set timetable. Appellate courts are seen as being able to limit the length of oral argument because they have the relatively narrow task of deciding only issues of law based on the written record of the trial in the court below. This contrasts with trial courts which are perceived as being unable to establish schedules in advance because of the difficulty in predicting the

number of witnesses that may be presented, the time required for examination and cross-examination or the strategies counsel may choose to adopt as the case proceeds.”⁽⁸²²⁾


In contrast, trials in civil law systems are often focused almost entirely on the presentation of documents and formal statements of position.⁽⁸²³⁾ Time limits are short and the opportunity (and expectation) for witness examination minimal or nonexistent.⁽⁸²⁴⁾

Marrying these differing traditions is a complex and difficult task. It is clear, though, that most contemporary international arbitral tribunals accept neither approach, and instead adopt a procedural model that permits meaningful witness examination and oral advocacy, while also imposing time limits and forcing the parties to manage their time wisely. An illustration of a “normal time” allocation from the Iran-U.S. Claims Tribunal, which is similar to that in many other international contexts, is again instructive:

“One Day Hearing: Normal Time

Introduction by the Chairman	9:30
Claimant’s First Round Presentation	1 1/2 hour m
Respondent’s First Round Presentation	1 1/2 hour m
Lunch	
Questions by Arbitrators	15:00
Rebuttal Presentation by Claimant	45 minutes m
Rebuttal Presentation by Respondent	45 minutes m

Further Questions by Arbitrators, if any”⁽⁸²⁵⁾


 [page "2272"](#) The guiding principle of this timetable is that each party is allocated an equal amount of time, which is planned in advance and which its lawyers are free to utilize as they choose (within general limits).

This principle of “equal time” reflects the principle of equal treatment (required by most national arbitration regimes⁽⁸²⁶⁾) and applies more generally in managing the hearing, where parties are ordinarily granted equal amounts of time and left free to devote that time to either cross-examination, redirect examination, or oral presentations.⁽⁸²⁷⁾ Critical to this approach is that the tribunal (or its secretary) actively monitors the usage of each party of “its” time, including by taking account of objections or other submissions made by one party during the course of the other party’s time.⁽⁸²⁸⁾ This approach is sometimes called “chess clock arbitration” or the “Böckstiegel Method,” after the arbitrator whose timetable is excerpted above.⁽⁸²⁹⁾

The chess-clock system has been summarized as follows:

“time will normally be divided by two between the two parties and each party will be free to use its time as it prefers for introduction and examination of witnesses presented by itself or the other party.”⁽⁸³⁰⁾

It is fundamental to this approach that any time taken by a party in presenting its case be counted against its allocated amount of time. That includes time taken to make oral opening submissions, to engage in direct examination of a witness (both questions and answers), to cross-examine a witness (again, both questions and answers), to engage in re-direct or follow-up examination of a witness and to make procedural or other arguments to the tribunal. Thus:

“For what this means is that although a witness may be presented by X, time is charged against Y to the extent that Y uses time with the witness in cross-examination. This was a lesson which another judge of the Iran-US Claims  [page "2273"](#) Tribunal described in the bluntest terms as follows: ‘the time used by a party for the examination (and cross-examination) of witnesses was deducted from the time for its oral pleadings in order to ward off possible fraud consisting of making pleadings in between questions put to the witnesses.’”⁽⁸³¹⁾

It is also important that time taken for objections by counsel be counted against that party, and not against the party whose examination is interrupted. Equally, it is important, and proper, that the time taken for translation of a witness’s testimony into the language of the arbitration be counted against the party on whose behalf the witness testifies; this is particularly true where the witness is able to speak the language of the arbitration and chooses to testify in a different language.⁽⁸³²⁾

Proper categorization of these various uses of time is essential to the proper functioning of the chess-clock system and to the fair conduct of the arbitration. Management of time allocations is readily implemented. Junior staff for both parties can keep track of time used, applying the tribunal’s directions, with the tribunal secretary keeping separate track of time. Specialized software applications exist for doing so (the 21st century version of the chess-clock) and permit relatively efficient and noncontroversial time-keeping.

Just as critical, but often overlooked, is the fact that an “equal” division of the time does not necessarily mean a 50/50 division of time: as discussed above, there are circumstances where a 50/50 division of time is not required, and may instead amount to unfair or unequal treatment.⁽⁸³³⁾ As Professor Böckstiegel has explained, “I have not proposed and in fact not used the method as a simple chess clock timing. There must remain some flexibility,”⁽⁸³⁴⁾ and “[v]ariations may be necessary.”⁽⁸³⁵⁾

For example, if one party’s case requires much more detailed affirmative factual proof than the other party, it may be unfair to limit that party to only the amount of time [page “2274”](#) required for proof of its adversary’s case.⁽⁸³⁶⁾ This can be particularly problematic with respect to cross-examination in cases where the parties have significantly different numbers of witnesses, leaving one party with substantial time constraints in cross-examining all its counter-party’s (more numerous) witnesses. One of the difficulties with the “equal time” approach is that even experienced arbitrators are often unwilling to deviate from the 50/50 presumption, notwithstanding potentially arbitrary and unfair results; nonetheless, there is little realistic alternative to the equal time approach.

In this regard, calculating counsel or witnesses sometimes seek ways to consume their opponent’s time, particularly through lengthy testimony on irrelevant points, feigned misunderstandings, translation problems and the like. Although such points appear trivial, in a regime where time is rationed (“a precious commodity”), the opposite is true: tribunals that allocate time owe a responsibility to ensure that their allocations are not manipulated.

Experienced tribunals ordinarily build extra time into the “normal” limits that are scheduled in its procedural orders, to ensure against the risks (often realized) of unexpected delays from evasive or tardy witnesses, technical problems, interlocutory disputes over admissibility, relevance, or the propriety of questioning and the like. It is often wisest for tribunals to protect reserved time jealously, or not necessarily to advertise its existence, in order to prevent it being used or fought over early in proceedings.

[6]. Permissible Fact Witnesses

In some legal traditions, interested persons and/or corporate officers are not permitted to present testimony in judicial proceedings.⁽⁸³⁷⁾ That position is very different from common law evidentiary rules, where testimony by interested parties is admissible, but subject to impeachment as to credibility and reliability.⁽⁸³⁸⁾

Parties to international arbitrations occasionally rely on domestic legal rules to argue against the admission of testimony from “interested” witnesses or corporate representatives, contending that such evidence is inherently partisan and unreliable. [page “2275”](#) An example of this approach was reflected in the dissenting opinion of an Iranian arbitrator at the Iran-U.S. Claims Tribunal:

“Although the Tribunal acknowledges that the Claimant has presented no evidence or documentation in order to establish its nationality, the majority has exempted the Claimant from the obligation to do so. Without the slightest legal basis, it has accepted the assertions solely on the basis of the statements of Mr. Jennings himself, who is an interested party in this claim and thus it has made it clear that its Award is invalid. Is it not unfair and oppressive that the unsubstantiated statements by the Claimant in an international forum be accepted as establishing its allegations, and that such a considerable sum be awarded against a sovereign government merely on the basis of an allegation brought against it? Indubitably, those persons with an interest in the Tribunal’s arbitration will not relax their vigilance and will not readily overlook such high-handed decisions, nor will the international legal system, closely following the Tribunal’s decision.”⁽⁸³⁹⁾

Despite this (misconceived) view, international arbitral tribunals virtually always refuse to exclude testimony from interested parties or their employees.⁽⁸⁴⁰⁾ Tribunals invariably hold that parties are entitled to the opportunity to prove their case, including through the testimony from the parties themselves or their representatives. As one tribunal summarized its conclusions:

“Unimpeached testimony of a person who may be the best informed person regarding transactions and occurrences under consideration cannot properly be disregarded because such a person is interested in a case. No principle of domestic or international law would sanction such an arbitrary disregard of evidence.”⁽⁸⁴¹⁾

At the same time, international arbitral tribunals also permit adverse parties an opportunity to challenge the credibility and reliability of such testimony, taking this into account in weighing the evidence.⁽⁸⁴²⁾ In almost no cases will a tribunal exclude testimony because it is “biased” or “interested.”⁽⁸⁴³⁾

[page “2276”](#) In dealing with witness testimony, care must be exercised to avoid “surprise” witnesses or “ambush” testimony. In principle, parties should be required to provide written witness statements⁽⁸⁴⁴⁾ or to identify witnesses who will testify and the substance of their testimony.⁽⁸⁴⁵⁾ Parties should not be permitted, save in exceptional circumstances, to adduce testimony from a new, previously-unidentified witness, during the evidentiary hearing, and significant direct testimony, not mentioned in a witness’s written witness statement should be viewed with caution.

[7]. Expert Witnesses

Many international arbitrations concern technically (or commercially) complex matters, such as construction, engineering, oil and gas, accounting and the like. Equally, it may be necessary in particular cases to examine complex, controversial legal issues under a

particular jurisdiction's law. In these cases, it is often essential that the arbitral tribunal hear expert witness testimony.

It is sometimes suggested that expert evidence should be presumptively unnecessary.⁽⁸⁴⁶⁾ That ignores practical experience, which is that presumptions of this sort obscure the particularities of individual cases. Expert evidence may or may not be useful, or appropriate, depending on the character of the dispute and the amounts in [page "2277"](#) controversy. It is unhelpful, and in some cases imprudent, to start with presumptions that particular types of evidence are or are not necessary or appropriate.

Expert testimony can be presented through experts designated and prepared by each party and/or by an expert appointed by the tribunal. Many arbitration statutes⁽⁸⁴⁷⁾ and institutional rules⁽⁸⁴⁸⁾ specifically permit the appointment of experts by the tribunal.

It is clear that, while arbitrators generally have the authority to appoint an independent expert, they are not ordinarily obligated to do so.⁽⁸⁴⁹⁾ If an expert is appointed by the tribunal, it is fundamental that the arbitrators may not properly delegate to an expert the responsibility for deciding either all or part of the dispute.⁽⁸⁵⁰⁾

At the same time, most national laws and institutional rules also permit parties, as a general matter, to present expert evidence from their own party-appointed experts.⁽⁸⁵¹⁾ In practice, different tribunals take different approaches to the subject of expert evidence. Tribunals with a common law tenor virtually always permit the parties to present "their" expert witnesses.⁽⁸⁵²⁾ This is consistent with the predominantly [page "2278"](#) adversarial traditions of the common law system, as well as with contemporary practices in domestic litigation.

In contrast, civil law tribunals are in general more skeptical about the benefits and costs of party-nominated expert witnesses.⁽⁸⁵³⁾ Instead, civil law practitioners, particularly more traditionally-minded ones, sometimes incline towards the use of only tribunal-appointed experts, which the tribunal will select and instruct.

Nonetheless, international arbitrators from virtually all backgrounds almost always permit parties to provide "their" own expert testimony if that is the course desired by one or both parties; indeed, in most international arbitrations, there is no controversy regarding the right of the parties to submit expert evidence. Tribunals are wary of denying parties an opportunity to be heard, while ordinary "international" practice is to permit both party-nominated and tribunal-nominated experts. For similar reasons, tribunals rarely uphold challenges to the admissibility of expert reports or opinions that are presented by the parties.⁽⁸⁵⁴⁾

Expert evidence can be submitted on a wide range of different topics. This includes legal experts (although legal arguments are also often made directly by counsel), technical experts and damages experts.⁽⁸⁵⁵⁾ In principle, parties should be free (subject to subsequent allocations of legal costs in a final award) to submit expert evidence on whatever topic or issue they consider appropriate; national law rules regarding the "qualifications" of expert witnesses do not apply in international arbitration and challenges to the authenticity, value, or expert character of putatively expert evidence should be relevant only to the weight and credibility of such evidence, not to its admissibility.

International arbitral tribunals only rarely appoint experts to address technical issues which the parties have already addressed through party-appointed experts. Tribunal-appointed experts are sometimes appointed at the request of one (or both) parties; such a request or agreement is not, however, a prerequisite for the tribunal's [page "2279"](#) appointment of an expert, nor does a request oblige the tribunal to make an appointment.⁽⁸⁵⁶⁾

Arbitrators will often solicit recommendations from the parties concerning the identities and credentials of possible experts, and will usually welcome joint proposals.⁽⁸⁵⁷⁾ Alternatively, arbitrators may seek recommendations from professional or other organizations, likely to have familiarity with particular disciplines or types of expertise.⁽⁸⁵⁸⁾

It is essential to fix terms of reference, clearly defining a tribunal-appointed expert's mandate and responsibilities.⁽⁸⁵⁹⁾ An expert is often empowered to request information and assistance from the parties as required to complete his mandate.⁽⁸⁶⁰⁾ It is fundamental that any report(s) prepared by the tribunal-appointed expert will be provided to the parties, who will be afforded an opportunity to comment on the expert's views.⁽⁸⁶¹⁾

If the parties present testimony from party-selected expert witnesses, the tribunal will often make procedural directions addressing the content and timing of the expert reports. The revised IBA Guidelines provide limited guidance as to customary practice relating to expert witness statements.⁽⁸⁶²⁾

There can be differing expectations about the independence of experts. It is beyond debate that an expert appointed by the tribunal must be independent and impartial, in a manner analogous to the arbitrators.

It is less clear whether party-nominated experts, who submit reports or opinions in support of a particular position in the arbitration, are subject to equivalent duties of independence, although there is authority to this effect.⁽⁸⁶³⁾ It is sometimes suggested [page "2280"](#) that the independence of party-appointed expert witness is "largely (but not completely) a fiction."⁽⁸⁶⁴⁾

That view is extreme: at a minimum, experts are subject to the same duties of honesty as fact witnesses and their failure to demonstrate independent professional judgment will seriously impair their credibility. The better view is that experts are required, including when they are party-appointed, to provide their genuinely-held and sincere professional opinion, and not to assume the role of advocate for a party. Although an expert may be required to make detailed arguments, he or she should do so as explanation and not as advocacy, and should be open to contradictory or alternative analysis throughout the arbitral process.⁽⁸⁶⁵⁾

Despite the expert's obligations of independence, tribunals virtually never "disqualify" experts or exclude their testimony for lack of independence. That is true even in cases where an expert is an employee of a party or otherwise closely affiliated with a party or its legal team.⁽⁸⁶⁶⁾

It is widely-accepted that communications between a party-appointed expert witness and the lawyers instructing him or her are protected from compelled disclosure.⁽⁸⁶⁷⁾ Nonetheless, great care should be exercised with regard to instructions to and communications between expert witnesses and counsel (and parties) in international arbitrations.

The tribunal may also provide for a joint meeting of the experts, without the attendance of the parties or their counsel, for the purpose of identifying areas of agreement and disagreement.⁽⁸⁶⁸⁾ The meeting's conclusions will often be recorded in [page "2281"](#) a joint report, which is submitted to the tribunal and the parties.⁽⁸⁶⁹⁾ Among other things, this process may be helpful because "[e]xperts will often be able to narrow the issues in dispute if they can meet and discuss their views after they have exchanged reports."⁽⁸⁷⁰⁾ That view is somewhat optimistic but, in many cases, little harm and limited cost arises from requiring joint reports, so the added effort can be worthwhile.

[8]. Witness Testimony

The central event in most evidentiary hearings is the examination of the witnesses – usually direct, cross and redirect. As with other aspects of arbitral procedure, there is wide diversity in approaches towards witness testimony.⁽⁸⁷¹⁾

The manner in which evidence is presented at a hearing depends significantly on the nationalities and legal backgrounds of the tribunal and counsel for the parties. For example, if opposing counsel and the chairman are English lawyers, the hearing may be run much like an English High Court action, complete with barristers, English-style pleadings and disclosure of documents. Conversely, a tribunal of retired German judges will tend to conduct arbitral hearings involving German counsel along the lines of a German litigation. On the other hand, if a multinational tribunal and legal advisers from different nations are involved, as is often the case in international commercial arbitrations, departures from particular national legal customs are almost inevitable.

Although traditions have evolved in recent decades, it is often said that witness testimony remains less significant in civil law litigation systems and, less markedly, in international arbitrations conducted among civil law parties and lawyers.⁽⁸⁷²⁾ In particular, as noted above, the testimony of officers and employees of a party is regarded with substantial skepticism by many civil law practitioners (on the grounds that it is inherently partisan).⁽⁸⁷³⁾

[page "2282"](#) Skepticism concerning witness testimony extends to direct examination: "the idea of a witness being presented by the lawyer for a party in the question-and-answer format of common law direct examination is vaguely distasteful to civil lawyers."⁽⁸⁷⁴⁾ Even more so, civil law practitioners and arbitrators have not infrequently questioned the value of cross-examination, which continues to play virtually no role in domestic civil law litigation systems.⁽⁸⁷⁵⁾

In contrast, common law lawyers are more accustomed to oral testimony, with a preference for detailed direct and cross-examination, conducted by the lawyers for the parties. Common law practitioners often regard cross-examination as "the greatest legal engine ever invented for the discovery of truth."⁽⁸⁷⁶⁾ In domestic litigation, counsel are subject to few limits on their cross-examination of witnesses, and they are most comfortable when the same approach is used in international arbitration.

Some critics appear to question whether witness testimony can ever be reliable, preferring reliance largely or entirely on documentary evidence.⁽⁸⁷⁷⁾ This view is ill-considered; it does not reflect either trends in international arbitration and litigation over the past several decades – which are decisively in favor of greater, not lesser, scope for live witness testimony and examination⁽⁸⁷⁸⁾ – or the views of most experienced [page "2283"](#) practitioners about effective means of finding the truth.⁽⁸⁷⁹⁾ The reality is that, despite its flaws, in person witness testimony remains one of the most effective means of ascertaining what actually happened – to expand on Wigmore's classic adage,⁽⁸⁸⁰⁾ an indispensable engine of the truth-finding process.

As noted above, the personal experiences and careers of individual arbitrators can significantly influence their approach to evidentiary issues.⁽⁸⁸¹⁾ A retired corporate lawyer may have different views about cross-examination and discovery than a mid-career litigator; a busy practitioner may approach such matters differently from an academic. Likewise, personal experiences and predispositions inevitably affect an arbitrator's approach towards witness testimony.

Where parties come from different jurisdictions, many international arbitrators seek to blend civil, common law and other relevant legal traditions in structuring and managing witness examination. This is consistent with the parties' expectations (for a neutral, international process)⁽⁸⁸²⁾ and enables the arbitrators to arrive at hybrid procedures tailored to the parties' dispute and convenience.

[9]. Conduct of Witness Examination

Although every arbitration is different, the following procedure for witness testimony (derived from the IBA Rules on the Taking of Evidence⁽⁸⁸³⁾) is not uncommon. Under this approach, each party is free to nominate whatever witnesses it wishes in support of its case.⁽⁸⁸⁴⁾ Only exceptionally will the tribunal suggest or require that a particular witness be designated, or authorize the parties to request that their adversary produce designated witnesses.⁽⁸⁸⁵⁾

As discussed above, parties will frequently submit written witness statements, often attached to their written submissions, setting forth

the direct testimony of the witnesses on whom they rely.⁽⁸⁸⁶⁾ If a witness who has submitted a written witness statement [page "2284"](#) refuses to testify at the oral hearing, the tribunal may, and usually will, disregard the witness statement. This is provided for expressly by the IBA Rules,⁽⁸⁸⁷⁾ and is common in practice.⁽⁸⁸⁸⁾ If the witness has a compelling excuse (e.g., serious illness), then the tribunal may choose not to disregard the witness statement – although its credibility will be affected by the lack of any cross-examination.⁽⁸⁸⁹⁾ In some cases, testimony by video-link may be suitable if a witness is genuinely unable to attend the hearing in person.⁽⁸⁹⁰⁾

The tribunal has full control over the procedural conduct of witness examination at the hearing (under both institutional arbitration rules⁽⁸⁹¹⁾ and national arbitration legislation⁽⁸⁹²⁾). Where a common law approach is followed, examination of a witness can be conducted either by the tribunal or the parties' counsel, with counsel presumptively conducting questioning (and the tribunal adding additional or follow-up questions). In civil law jurisdictions, examination was historically the responsibility of the arbitrators (although counsel would also often follow-up with questions).⁽⁸⁹³⁾

Some institutional arbitration rules require that the parties (as distinguished from the arbitrators) be permitted to question the witnesses;⁽⁸⁹⁴⁾ in contrast, most rules leave the mode and structure of questioning to the tribunal's discretion and parties' agreement.⁽⁸⁹⁵⁾

[page "2285"](#) In most contemporary international arbitrations, the tribunal will presumptively permit the parties' attorneys to conduct both the direct and cross-examinations, with occasional interjections and follow-up questions by the tribunal.⁽⁸⁹⁶⁾ Tribunals with a civil law orientation tend to impose greater limits on cross-examination, both in terms of length of examination, scope of questions and counsel's efforts to "control" a witness. Nevertheless, tribunals with a common-law focus also impose time limits on cross (and direct) examination (in an effort to expedite proceedings and reduce costs).

Under contemporary practice, counsel for the party producing a witness who has submitted a written witness statement will typically conduct a brief direct examination, not infrequently limited to little more than identification of the witness and confirmation of his or her statement. In some cases, this "direct" examination will be conducted by the presiding arbitrator.

The tribunal will ordinarily disfavor lengthy direct examination, on the grounds that such matters should have been included in the witness's written witness statement and may encourage ambush testimony (which opposing counsel will have been unable to prepare for). Exceptions to the prohibition against direct testimony on new subjects will be grudgingly permitted, but only for good reason (such as recently-occurring events).⁽⁸⁹⁷⁾

Although direct oral testimony is usually limited (in the interests of efficiency and fairness), a party should in principle be permitted to adduce direct testimony, at an evidentiary hearing, about matters already addressed in a witness's written witness statement. Where a party concludes that live witness testimony will enable a materially better presentation of a witness's testimony (and its case) than a written witness statement alone, the party should in principle be permitted to use its share of the hearing time for this purpose. In these cases, care is essential to ensure that new matters, not contained in the witness's written statement, are not introduced for the first time at the evidentiary hearing (thereby compromising the counter-party's ability to assess and respond to that evidence).

[page "2286"](#) Following direct examination, opposing counsel will virtually always have the opportunity for cross-examination, often relatively detailed, and which in most respects is the central event in the hearing.⁽⁸⁹⁸⁾ Cross-examination is sometimes limited to matters addressed in the witness's written witness statement, but more frequently is permitted to address any matter relevant to the dispute. Objections to questions by counsel are tolerated,⁽⁸⁹⁹⁾ but experienced practitioners save their complaints for genuinely serious matters. Except in unusual circumstances, tribunals tend to be reasonably firm in enforcing time limits on cross-examination.

Witnesses may have access to their witness statements and the documentary evidence in the case during their testimony; tribunals may also permit witnesses to have access to notes and similar materials,⁽⁹⁰⁰⁾ although sometimes requiring that such materials be disclosed to both parties' counsel. Drafts of witness statements and communications between counsel and the witness will generally not be subject to document disclosure, although oral questioning about preparation of the witness by counsel will often be permitted.

The legal traditions of the tribunal and counsel are reflected in the character of cross-examination and in the initiative displayed by the arbitrators at the hearing. In common law jurisdictions, aggressive cross-examination is prevalent, directed at both the substance of a witness's testimony and his or her credibility. (Civil lawyers are less accustomed to this,⁽⁹⁰¹⁾ and may in particular find attacks on credibility inappropriate or unhelpful.) Common law practitioners also tend to favor more comprehensive, detailed cross-examination, with vigorous follow-up questions, than many civil lawyers.⁽⁹⁰²⁾ Limitations on the scope of discovery,⁽⁹⁰³⁾ and language barriers, make cross-[page "2287"](#) examination more difficult in international arbitration than some common law systems,⁽⁹⁰⁴⁾ but it nonetheless remains a highly effective tool in the fact-finding process when used properly.

Re-direct examination will often follow cross-examination. Re-direct examination will usually be limited to matters addressed in cross-examination. It is essential that arbitrators enforce such limits, to prevent parties from being unable to cross-examine witnesses on new testimony or assertions. Although "re-cross examination" is possible, it denies the examining party the opportunity to prepare fully for such examination (including thorough disclosure, seeking publicly-available documents, or consulting other witnesses) or to adduce contradictory evidence.

At any stage in the process of examination, the arbitrators may intervene with their own questions. In some cases, arbitrators will tend to hold their queries until the parties' counsel have finished with their own questions; at least as frequently, arbitrators interject with questions of their own during cross-examination (for example, about a document that has been presented to the witness). When the tribunal puts questions to a witness, counsel will generally be permitted (upon request) to ask follow-up questions arising out of answers to the tribunal's questions.

[10]. Sequestration of Witnesses

A recurrent issue in organizing hearings in international arbitrations is the "sequestration" of witnesses (i.e., whether one witness may attend another witnesses' testimony).⁽⁹⁰⁵⁾ Although there is no invariable rule, in most cases, tribunals exclude a fact witness from attending other witnesses' examinations prior to his or her own testimony, on the (correct) basis that this may permit a witness to tailor his or her subsequent testimony.⁽⁹⁰⁶⁾ This is a common-sense and time-tested means for attempting to safeguard the integrity of the arbitral procedure and to achieve the [page "2288"](#) tribunal's mandate of ascertaining the facts.⁽⁹⁰⁷⁾ After a witness has testified, he or she will usually be permitted to attend subsequent parts of the hearing (on the basis that there is no longer any material risk that the witness will be recalled to testify).

Tribunals will ordinarily permit expert witnesses to attend testimony of both fact and expert witnesses, prior to their own testimony. The rationale generally is that the expert is not testifying concerning factual matters and that more exposure of the experts to the evidence is beneficial, rather than harmful.

Although sequestration is a sensible, if not perfect, precaution, there are circumstances in which it is appropriately dispensed with. Difficult questions arise when a fact witness is simultaneously a party's representative at the arbitral hearing. In these cases, parties frequently argue that the witness should be permitted to attend all parts of the hearing (including examination of other fact witnesses) in order to be able to instruct the party's counsel.

Tribunals often recognize the force of this position,⁽⁹⁰⁸⁾ but nonetheless impose limits on the number of persons that may be designated as party representatives (to avoid circumvention of sequestration requirements). Tribunals also generally seek to schedule the witness testimony so that party representatives will be examined first, before other witnesses testify.

Fact witnesses are also generally prohibited from speaking with counsel or others about their testimony or the substance of the dispute during the course of their testimony. Tribunals generally instruct witnesses, prior to taking breaks (including overnight breaks) in their testimony, that the witness may not discuss his or her testimony with others. Violations of these admonitions are rare but, if they occur, should bear heavily on a witness's credibility and may raise questions about counsel's professional conduct.

[11]. Tribunal's Role at Evidentiary Hearing

As discussed above, the conduct of the arbitral proceedings generally, and the evidentiary hearings specifically, are subject to the tribunal's control.⁽⁹⁰⁹⁾ The exercise of the tribunal's authority, invariably by the presiding arbitrator (in the case of three-member tribunals), requires a mixture of firmness, diplomacy and careful preparation.⁽⁹¹⁰⁾ In particular, a good command of the issues, documents and witness statements is essential to overseeing efficient and productive witness testimony.

[page "2289"](#) International practitioners and arbitrators frequently debate ways for tribunals to improve the arbitral process. Some commentators have urged arbitrators to take more active roles in hearings:

"In most cases it is wise for an arbitral tribunal to take an active role in augmenting the parties' presentation of the facts. This can be done by conducting pre-hearing conferences with the parties and, in appropriate cases, by issuing orders requiring parties to submit specifically described evidence. Arbitration is more effective and efficient when the arbitrators actively seek to elucidate the facts, rather than merely evaluating what the parties choose to present. This active approach is particularly useful in international cases, which typically bring together parties and arbitrators who have different legal backgrounds and approaches to presenting evidence."⁽⁹¹¹⁾

Another perspective on improvements in the arbitral process emphasizes the need for tribunals to permit adequate exploration of the facts. One focus of international arbitrators and arbitration practitioners over the past two decades has been reducing the length of hearings, both to save costs and to protect arbitrators' calendars.⁽⁹¹²⁾ This has resulted in greater use of written witness statements, limits on the length of hearings and cross-examination and (less frequently or advisedly) page limits on written submissions. Although the objective of these developments is sensible and important (i.e., reducing costs and delay), they come at a tangible price – namely, restricting a party's ability to probe the factual and legal claims of adverse witnesses. In a number of cases, this rewards parties whose counsel can produce thorough witness statements, subtle (or other) obstructions to effective cross-examination and creative advocacy. This does not serve the purposes of either justice or the arbitral process.

The better course is to adopt procedures that enable parties to develop the relevant facts in a reasonable period of time. That means ordering disclosure of material documents (without arbitrary categorizations), allowing effective cross-examination and permitting full written and oral submissions. Major arbitrations involve hundreds of millions, or billions, of Euros, dollars, pounds, or Renminbi, and it is both procedurally fair and economically prudent to permit satisfactory fact (and law) development in these circumstances. Equally, it also argues for the use of additional procedural devices

aimed at factual development – such as witness conferencing,⁽⁹¹³⁾ joint expert reports⁽⁹¹⁴⁾ and oral depositions,⁽⁹¹⁵⁾ all of which are discussed elsewhere.


page "2290" [12]. Witness Testimony Under Oath or Affirmation

Before providing oral testimony at the hearing, witnesses are often required to swear an oath or make an affirmation that they will testify truthfully.⁽⁹¹⁶⁾ In some jurisdictions (particularly common law states), arbitrators are permitted by local law to administer an oath, which often has the consequence of subjecting false testimony to criminal penalties.⁽⁹¹⁷⁾ In other jurisdictions (particularly civil law states), national law forbids arbitrators from administering an oath,⁽⁹¹⁸⁾ although under some statutory regimes a tribunal may seek the assistance of a national court to do so.⁽⁹¹⁹⁾

The formality of an oath may be comparatively unimportant in states where false testimony before an arbitral tribunal is subject to criminal sanctions even in the absence of an oath, as is the case in some jurisdictions.⁽⁹²⁰⁾ In other jurisdictions, however, unsworn testimony is not subject to criminal sanctions unless fraudulent.⁽⁹²¹⁾

Even if no oath is administered, a tribunal should admonish witnesses as to the importance of testifying truthfully and warn them about the consequences of giving false testimony. One common formulation is as follows:

“You must tell the truth, the whole truth and nothing but the truth and, should you not tell the truth, this would be punishable under the laws of [] by imprisonment up to [] or a fine or both.”⁽⁹²²⁾

 **page "2291"** In some jurisdictions, witnesses enjoy a substantial degree of immunity from civil liability,⁽⁹²³⁾ while in other jurisdictions no such protection exists.⁽⁹²⁴⁾

[13]. Hearing Transcripts or Minutes


As with domestic litigations, it is essential that some record be kept of evidentiary hearings in international arbitration. In cases with common law tribunals, verbatim stenographic records of arbitral hearings are often taken. Civil law tribunals were historically less likely to provide for stenographic records, but would prepare written minutes briefly summarizing the proceedings and evidence.

The strong tendency in contemporary international arbitration is to provide for verbatim transcripts of significant evidentiary hearings, save where the size of the case does not justify the cost.⁽⁹²⁵⁾ Court reporters or stenographers from the U.S. or England, as well as specialized services elsewhere, routinely attend arbitral proceedings and record the witness examination, just as in common law litigation.

A verbatim transcript will be circulated to the parties for correction shortly after the hearing, and a corrected final version can be relied on in any post-hearing submissions. In most more substantial cases, the tribunal's award will quote relevant testimony and cite to the transcript. In smaller cases, a tape-recording may be taken, which may subsequently be reviewed or (infrequently) transcribed at lower cost.

It is essential for the parties and tribunal to discuss in advance what method of recording will be adopted for the hearing. This ensures that all necessary logistical arrangements are made (engaging a stenographer, providing facilities, etc.) and that the parties' views on the need for a transcript are considered. Particularly where post-hearing written submissions are scheduled, parties will almost always desire verbatim transcripts which they can incorporate into their submissions. A transcript is also necessary in order to provide evidentiary grounds for challenges to the tribunal's final award on procedural grounds (e.g., refusal to permit examination or cross-examination of a key witness).⁽⁹²⁶⁾

[BB]. "Witness-Conferencing"

Various procedural innovations have been suggested to improve the quality of witness examination in international arbitration. One approach is "witness-conferencing," where two or more witnesses are simultaneously and collectively examined concerning the same set of issues or events.⁽⁹²⁷⁾ The purpose of witness-conferencing is to confront  **page "2292"** two or more witnesses on the same topic with potentially-contradictory testimony, in order to identify areas of agreement, force concessions and evaluate the credibility of differing contentions.

Witness-conferencing can be a powerful tool for evaluating expert witness testimony. It requires careful preparation and firm control of both witnesses and counsel by the tribunal but, properly-implemented, witness-conferencing can effectively identify areas of agreement and expose evasions, oversimplifications and inaccuracies.⁽⁹²⁸⁾

At the same time, witness-conferencing seldom genuinely saves time. On the contrary, witness-conferencing can take more time, because it is often best used in addition to, rather than instead of, traditional cross-examination.⁽⁹²⁹⁾ This enables cross-examination to systematically probe the witnesses' testimony, identifying key areas of disagreement, which can then be focused on in a witness conference.


[CC]. Legal Submissions

With regard to presenting their positions on legal issues, parties must advance their respective positions on the content of the applicable substantive law in a cogent and persuasive manner (just as with other elements of their respective cases). There are different ways of doing this, including presenting legal experts and argument by counsel (sometimes assisted by practitioners and/or academics from the relevant jurisdiction). In general, either method is

acceptable, with parties choosing one or the other for tactical reasons or personal preference.⁽⁹³⁰⁾

Where a substantive law other than that of the arbitral seat is applicable, it is sometimes said, even by experienced practitioners, that a tribunal must apply the law of the seat unless one party establishes the content of foreign law.

"It is a rule of English procedure that the tribunal must assume the foreign law to be the same as English law, except as far as the contrary is alleged and proved. The arbitrator should give full weight to this presumption, in both its aspects."⁽⁹³¹⁾

This approach is inconsistent with the weight of modern authority, which does not equate an arbitral tribunal with a national court of the arbitral seat, and which does not require the arbitrators to apply the domestic procedural rules, choice-of-law rules, or similar rules of the seat.⁽⁹³²⁾ It is also inconsistent with application of the traditional  [page "2293"](#) rule, *jura novit curia*, in international arbitration: an international arbitral tribunal is selected, in part, because it will know and apply the substantive law applicable to the dispute, and not arbitrary rules developed in domestic litigation. As a consequence, it is difficult to see why a tribunal should – much less must – generally apply the law of the arbitral seat in the absence of proof of "foreign" law.

[DD]. Demonstrative Evidence


Parties frequently rely on so-called "demonstrative" evidence, at least in more substantial international arbitrations. "Demonstrative" evidence consists of materials that depict the alleged meaning of "true" factual evidence (via graphs, charts, diagrams, models, or computer simulations). Demonstrative evidence is not, strictly speaking, factual evidence or probative of facts; rather, it is a way of explaining, depicting, or arranging evidence that has otherwise been properly submitted.⁽⁹³³⁾

Demonstrative evidence can be very useful in technically complex disputes, where the tribunal must understand and assess unfamiliar disciplines or a large body of evidence. Tribunals allow parties substantial latitude in presenting demonstrative evidence, although they will also issue directions designed to prevent unfair surprise and to guarantee an adequate opportunity to respond to such evidence.

[EE]. Oral Legal Submissions

A key element of most international arbitrations is the oral presentation of legal argument (or, in the terminology of some civil law jurisdictions, "pleading").⁽⁹³⁴⁾ The timing, length, style and structure of oral legal submissions vary substantially, depending on the nature of the dispute, evidence and issues and the identities of the arbitrators and counsel.

As noted above, many evidentiary hearings begin with "opening statements" by counsel. These statements often involve a substantial measure of oral argument, presenting the law and explaining how the evidence is (or will be) treated under the law. Opening statements in many large (but not enormous) disputes will range from 30 minutes to a day (per side), depending on the complexity of the issues and the identity of the tribunal and counsel. In lengthy cases, at least in the common law tradition, opening statements may take several days or longer.

Opening statements will often combine argument with explanation about the existing and anticipated evidence, and usually will be accompanied by audio-visual materials  [page "2294"](#) (PowerPoint presentations; slides; hand-outs;⁽⁹³⁵⁾ demonstrative evidence). In cases of limited scope, opening statements will be reasonably concise, with the bulk of the hearing being reserved for witness testimony.

The most significant aspect of oral legal submissions usually occurs after the witness testimony has been completed. It is then that counsel has the opportunity to summarize the evidence and argue how the law applies to it. This is an essential part of presenting a party's case and, in many respects, is the most important element of the party's presentation.

There are different approaches to final legal submissions or pleadings. In some common law traditions, final oral submissions, usually termed "closing statements," occur at the end of the evidentiary hearing, with virtually no delay.⁽⁹³⁶⁾ When this approach is used, counsel (and the tribunal) must prepare throughout the hearing for closing argument, which will be the one and only argument on the completed evidentiary record. Depending on the size of the dispute, closing statements will often have roughly the same duration as opening statements.

More common in international arbitration is to have a delay between the conclusion of witness testimony and oral submissions. This permits the transcript to be finalized and studied, as well as more thoughtful preparation for oral argument. In many cases, it also permits an exchange of post-hearing written submissions.⁽⁹³⁷⁾ If this model is adopted, a further hearing will typically be scheduled, with the duration varying from a few hours to a few days. The hearing will involve only oral submissions by counsel, as well as questions from the tribunal.

Different tribunals take different approaches to oral submissions. Common law tribunals historically inclined slightly towards immediate closing statements (with due allowances being made in larger cases), while civil law tribunals are more likely to prefer time for preparation. Common law tribunals also tend to be more active in terms of questioning counsel, while civil law tribunals will often pose few questions.⁽⁹³⁸⁾ Nevertheless, the arbitrators' personal experience and inclinations are also significant: vigorous civil law tribunals and passive common law ones are not unusual.

A recurrent question (as in written submissions) is which party is entitled to the last (oral) word. Civil law practitioners are more

accustomed to permitting the respondent the final word (by providing for equal numbers of submissions), while [page "2295"](#) common law systems are more likely to allow the claimant the final rebuttal.⁽⁹³⁹⁾ The overarching point is that the tribunal will, under developed legal systems, have the discretion (subject to contrary agreement) to fix the procedures it concludes are appropriate in a particular case.⁽⁹⁴⁰⁾

[FF]. Post-Hearing Written Submissions

It is common in many international arbitrations for the parties to request, or the tribunal to order, post-hearing written submissions.⁽⁹⁴¹⁾ These submissions will be prepared after the transcript of the evidentiary hearing and witness testimony has been circulated, and will provide a final summation of each party's position on the complete evidentiary record.

Post-hearing written submissions are often submitted simultaneously, although some tribunals prefer a sequential process (to avoid "ships passing in the night"). Post-hearing submissions are ordinarily welcomed by tribunals, because they aid significantly in assessing the evidence and drafting the award. Although the cost and delay to completion of the award can be material, the benefits of hearing the parties' positions after all evidence has been considered are very substantial.

[GG]. Closing of Arbitral Proceedings

It is important for the tribunal to make a clear and unequivocal close to the submission of evidence and legal argument by the parties. This gives the parties notice of the date beyond which they will not be permitted to further argue their case, ensuring that they focus their energies when the opportunity is available. It also ensures that there will be a definite end to the arbitral process, after which no more money or effort will be expended and the award will be rendered.

Some institutional rules expressly provide for the tribunal to close the proceedings.⁽⁹⁴²⁾ Even absent such provisions, however, experienced tribunals will notify parties in advance of the date after which no further submissions of any sort will be permitted ("closing of the proceedings").⁽⁹⁴³⁾

[page "2296"](#) **[HH]. Ex Parte Proceedings and Default Awards**

Although it is almost always a very bad idea, some parties decide to boycott arbitration proceedings.⁽⁹⁴⁴⁾ That course is sometimes particularly tempting to state entities, who enjoy the apparent security that comes with sovereign immunity and related prerogatives. Even then, such maneuvers are usually regretted in the end, after a substantial default award is made and enforcement efforts are commenced. A sensible alternative to defaulting in an arbitration, in most cases, is to proceed under protest while expressly recording objections to the tribunal's jurisdiction (including its competence-competence) and/or seeking immediate judicial recourse.⁽⁹⁴⁵⁾

Most national arbitration statutes provide expressly for the possibility of default proceedings.⁽⁹⁴⁶⁾ [Article 25 of the UNCITRAL Model Law](#) is representative, providing that, "[u]nless otherwise agreed by the parties, if, without sufficient cause, ... (b) the respondent fails to communicate his statement of defense [within the relevant time period], the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations."⁽⁹⁴⁷⁾ Other arbitration legislation is similar,⁽⁹⁴⁸⁾ while arbitral tribunals have frequently made default awards.⁽⁹⁴⁹⁾ [page "2297"](#) and national courts have routinely rejected annulment and non-recognition defenses to default awards.⁽⁹⁵⁰⁾

Institutional rules also uniformly provide that arbitral proceeding may go forward without the defaulting party's presence and result in a default award. For example, the 2010 UNCITRAL Rules provide that, if the claimant fails to communicate its claim in due time, the tribunal shall terminate the arbitration; if the respondent fails to defend, the tribunal "shall order that the proceedings continue, without treating such failure in itself as an admission of the claimant's allegations."⁽⁹⁵¹⁾ The ICC Rules similarly provide for the appointment of an arbitrator on behalf of the defaulting party, the setting of the basic framework of the case (the "terms of reference") without the defaulting party's participation:

"If any of the parties refuses or fails to take part in the arbitration or any stage thereof, the arbitration shall proceed notwithstanding such refusal or failure." "...If any of the parties, although duly summoned, fails to appear without valid excuse, the arbitral tribunal shall have the power to proceed with the hearing."⁽⁹⁵²⁾


Other institutional rules are to the same effect.⁽⁹⁵³⁾

These provisions for default proceedings are vitally important. In its explanatory note on the Model Law, the UNCITRAL Secretariat wrote:

"Provisions that empower the arbitral tribunal to carry out its task even if one of the parties does not participate are of considerable practical importance. As experience shows, it is not uncommon for one of the parties to have little interest in co-operating or expediting matters. Such provisions therefore provide international commercial arbitration its necessary effectiveness, within the limits of fundamental requirements of procedural justice."⁽⁹⁵⁴⁾


If a party defaults, the tribunal should proceed with the arbitration on an *ex parte* basis, first attempting to obtain the defaulting party's participation and thereafter ensuring at every step that the defaulting party receives notice of the ongoing proceedings.⁽⁹⁵⁵⁾

Equally important, an arbitral tribunal is not a court, empowered to issue a default judgment predicated simply on one party's non-participation. Rather, the tribunal is responsible for evaluating the evidence and arguments presented to it and making a reasoned decision; one party's non-participation does not abrogate that obligation.

 [page "2298"](#) This is generally required by national arbitration legislation dealing with default proceedings. For example, the Model Law provides that, if "any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it."⁽⁹⁵⁶⁾ Other national arbitration legislation is similar, although some statutory provisions give tribunals discretion as to the need for submission of additional evidence.⁽⁹⁵⁷⁾ Institutional arbitration rules are similar.⁽⁹⁵⁸⁾

A tribunal should virtually always direct the claimant to make written submissions, present written evidence, and, where appropriate, appear at a hearing with its witnesses. As one commentator puts it: "there is no summary procedure resulting in a default decision (as in some national legal systems). Rather, the proceedings 'continue' despite the absence or non-participation of a party."⁽⁹⁵⁹⁾ The tribunal should, without substituting itself for the defaulting party, satisfy itself that the claimant's claims are well-founded in law and fact (or not). This procedure culminates in a reasoned award, setting forth the facts and the basis for decision in the same manner that an award in a contested proceeding would be rendered.

A tribunal's task in deciding the parties' dispute will inevitably be less complex in a default proceeding, because the non-defaulting party's evidence will not be challenged, its witnesses will not be cross-examined (although the tribunal can and should ask questions probing the witness's testimony) and affirmative defenses will not be argued or substantiated. Nonetheless, a tribunal should generally resist drawing adverse inferences from a party's default, which can be due to factors other than the strength of its case.⁽⁹⁶⁰⁾


It is reasonable to assume, in most cases involving default proceedings, that the defaulting party will resist enforcement of the arbitral award. Litigation seeking annulment or non-recognition of a default award will likely involve scrutiny of the  [page "2299"](#) arbitral procedure and the resulting award, and care should be taken that no basis for legitimate challenge exists. This typically involves greater expense than a pure default proceeding, but the default award should include an award of costs in favor of the non-defaulting party.⁽⁹⁶¹⁾

[II]. Termination of Arbitral Proceedings

Some national arbitration legislation provides for the termination of the arbitration if the claimant fails to pursue its claim. [Article 25 of the UNCITRAL Model Law](#) is representative, providing that the arbitral tribunal shall terminate the arbitration if the claimant fails to submit its statement of claim and may do so if any party otherwise defaults in producing evidence.⁽⁹⁶²⁾

Consistent with the plain language of Article 25(a), courts have held that, where the claimant did not submit its statement of claim, the arbitral tribunal was obligated to terminate the proceedings.⁽⁹⁶³⁾ One Model Law court held, however, that it did not have jurisdiction to review an arbitrator's decision to terminate proceedings on the ground of the claimants' failure to submit their statement of claim.⁽⁹⁶⁴⁾ On the other hand, the arbitral tribunal has discretion under Article 25(c) either to continue or to terminate the arbitral proceedings if a party "fails to appear at a hearing or to produce documentary evidence."⁽⁹⁶⁵⁾

[JJ]. Deliberations of Arbitrators

After the evidence has been taken, and all legal submissions completed, the tribunal will retire (so to speak) to deliberate, reach a decision and make an award.⁽⁹⁶⁶⁾ The arbitrators are generally required by mandatory law⁽⁹⁶⁷⁾ – certainly by custom and  [page "2300"](#) contractual intention – to "deliberate" together in a collegial way in order to reach their final decision. As one French decision held:

"the requirement of deliberations is a fundamental principle of the procedure which guarantees the judicial character of the decision reached by the arbitral tribunal;...the principle of collegiality assumes...that each arbitrator will have the possibility of discussing each decision with his colleagues."⁽⁹⁶⁸⁾


In multi-member tribunals, the deliberations of the arbitrators can itself be a complicated, sometimes slow process. As discussed elsewhere, it is the rule under almost all developed legal systems that arbitral deliberations are confidential, not to be revealed by the arbitrators to either the parties or others.⁽⁹⁶⁹⁾

Initially, the tribunal must establish a procedure and timetable for its deliberations: they must decide how they wish to go about deciding the issues before them. The process of establishing the procedures for deliberations is very often informal, with the arbitrators cooperating together, making and changing their plans and thinking as discussions unfold.

In some instances, however, particularly where the tribunal has failed to establish collegiate working relations, procedures will be relatively formal.⁽⁹⁷⁰⁾ In principle, the presiding arbitrator will determine the format and timetable for deliberations, with contributions from the co-arbitrators; in particular, the diaries of the co-arbitrators may constrain the presiding arbitrator's initiative in scheduling meetings and concluding deliberations.

In many cases, a tribunal will meet immediately after the final hearing has ended in an effort to identify and resolve issues and perhaps reach a tentative decision. The presiding arbitrator will again usually lead the process, structuring the discussion, soliciting comments from the co-arbitrators and exploring each of the disputed

factual and legal issues and, eventually, attempting to forge a consensus.⁽⁹⁷¹⁾ In complicated cases, deliberations may be a lengthy process, requiring the arbitrators to work through the evidence and law on a large number of issues. This is a desirable process, and one of the reasons that parties select three-arbitrator tribunals: it helps ensure careful consideration of all issues and a sensible, "correct" result.⁽⁹⁷²⁾ Nonetheless, if there is disagreement between the tribunal members, deliberations can proceed slowly.


 *page "2301"* The presiding arbitrator will often proceed with the task of drafting the award during the tribunal's deliberations. He will often begin by drafting, sometimes with appropriate assistance of the administrative secretary, "procedural" sections (reciting the procedural history of the case and the parties' positions) and beginning to draft factual findings and legal conclusions. These drafts can be used to focus discussion and move the deliberations along.

In many cases, the tribunal will reach a unanimous award.⁽⁹⁷³⁾ Sometimes, all three arbitrators will agree from virtually the outset on the outcome and analysis and, often with little debate, the presiding arbitrator can draft the award. In other cases, consensus will be achieved only after protracted discussion, in which one arbitrator is persuaded to abandon initial thoughts or in which the tribunal gradually clarifies issues to reach a common position.

In some deliberations, there is a substantial amount of what might look like "negotiation," in which different issues are resolved through give-and-take; this sometimes derives from a purely-objective assessment of the merits of different issues and sometimes from other factors (including personal egos, general adjudicative philosophies, non-neutral co-arbitrators and the like). One experienced arbitrator has described the deliberative process on a three-person tribunal as follows:

"A prudent president, when he does not already know his two colleagues, will therefore seek both to get to know them and to maintain a certain reserve, at least initially. He will be wise to keep any views he may form on the issues in question to himself, until he has a clearer picture of his colleagues' attitudes as to their role. Yet the president must also create an environment of trust among himself and his colleagues, if only to establish a consensus regarding the confidentiality of the discussions. It is not unusual for the most prejudiced arbitrator to conduct himself with almost model impartiality, especially when he knows he can, at the appropriate time, express his disagreement with a decision against 'his' party."⁽⁹⁷⁴⁾

The nature of the deliberations among the arbitrators in difficult cases can be affected materially by the provisions of the applicable procedural law (or terms of the arbitration agreement).⁽⁹⁷⁵⁾ As discussed above, in some circumstances, a majority award is required (meaning that the chairman must "win" the vote of at least one of the co-arbitrators), while in many cases the chairman is able, if necessary, to make an award independently.⁽⁹⁷⁶⁾ In the latter case, the chairman's role and influence in the deliberations is much more substantial.⁽⁹⁷⁷⁾

 *page "2302"* In any event, most presiding arbitrators will want to produce a unanimous award. This may require substantial patience and diligence, listening carefully and at some length to the views of one (or two) unconvinced co-arbitrator(s). Nevertheless, this is an essential part of a chairman's function – to ensure that the tribunal has fairly considered all sides of the parties' cases before reaching a decision.


As noted elsewhere, there are instances in which a co-arbitrator may be unwilling to accept the majority view and will make repeated attempts to persuade the tribunal of his or her views.⁽⁹⁷⁸⁾ This is not necessarily wrong or improper; tribunals often arrive at better, more careful and more nuanced decisions precisely because different arbitrators have different perspectives and different (initial) views of the evidence and the law. Awards produced through the give-and-take of three intelligent and diligent tribunal members are almost always substantially better than awards produced by a sole arbitrator.⁽⁹⁷⁹⁾

During deliberations, it is essential that all arbitrators be permitted a fair opportunity to express their views, including in writing. In some cases, biased co-arbitrators may attempt to delay issuance of the award (sometimes acting in concert with the party that nominated him or her). Such conduct is improper and presiding arbitrators may properly fix a date at which deliberations conclude and the (majority) award will be issued.⁽⁹⁸⁰⁾

When deliberations are concluded, the presiding arbitrator will circulate a substantially complete draft of the award. This will occasion further comments by the co-arbitrators, which the chairman will seek to incorporate. In some cases (particularly in larger disputes), the tribunal may divide the task of drafting the award, with different arbitrators taking responsibility for different sections. Ordinarily, this will occur when the tribunal is reasonably unified in its initial thinking about the dispute.

In virtually all cases, the arbitral tribunal will not provide the parties with advance notice of the contents of the award, either to permit them to comment on the tribunal's decisions or otherwise.⁽⁹⁸¹⁾

Some national arbitration legislation provides the possibility of such advance notice (and comment),⁽⁹⁸²⁾ but this is unusual. In most


 *page "2303"* cases, the parties are first provided with the tribunal's decision in the copy of the award that the tribunal formally notifies to them.

[KKQ. Making and Notification of Award

The final step in most international arbitrations is the making and notification of the tribunal's award. In virtually all cases, the award is a formal written instrument, signed by the members of the arbitral tribunal, reciting the relevant procedural history, facts, legal arguments and conclusions.⁽⁹⁸³⁾ Many awards in international

arbitration compare favorably to judicial opinions or judgments in national court proceedings in developed jurisdictions; they include careful discussions of the parties' positions and the tribunal's factual and legal analysis. Depending on the size of the case, an award may range from 10 or 20 pages to several hundred pages.

As discussed below, the formal aspects of arbitral awards are generally regulated by national law (in the arbitral seat), any applicable institutional rules and (rarely) the parties' arbitration agreement.⁽⁹⁸⁴⁾ In most developed jurisdictions, and under most institutional rules, awards need only be written, reasoned, signed and dated, and indicate the place of arbitration.⁽⁹⁸⁵⁾ This typically means that multiple, identical copies of the final award will be prepared, signed and dated by the tribunal. In some jurisdictions, further formalities are required, such as depositing the award with a local court, or a notary.⁽⁹⁸⁶⁾


Some institutional rules impose further requirements, like the ICC Rules, which require that awards be scrutinized by the ICC Secretariat and Court.⁽⁹⁸⁷⁾ Some institutional rules also provide that the award will be notified to the parties by the arbitral institution, rather than the arbitral tribunal – which will then circulate final, executed copies of the award to the parties. As discussed below, national arbitration statutes and institutional rules often prescribe periods of time for correcting manifest  [page "2304"](#) errors in an award, seeking interpretations, or commencing actions to annul the award.⁽⁹⁸⁸⁾

The award must be sent to the parties to the arbitration. The requirements for delivery of the award will often be set forth in the applicable institutional rules and national arbitration legislation (in the arbitral seat). In general, institutional rules and national law will require only delivery of the award to the parties (or their counsel), without imposing additional formal requirements.⁽⁹⁸⁹⁾ Courts in most jurisdictions have rejected suggestions that international arbitral awards must be served pursuant to rules of domestic law relating to the service of process in national court litigation.⁽⁹⁹⁰⁾

[LL]. Costs of Arbitration

A significant issue in most international arbitrations is who pays the fees and expenses of the tribunal, any arbitral institution, and the parties' lawyers. As discussed below, many national arbitration statutes and institutional rules provide that the tribunal may include the costs of the arbitration (including reasonable costs of legal representation) in its award, typically making an award of some (or all) such costs to the prevailing party.⁽⁹⁹¹⁾ It is correctly said that "[t]he allocation of costs can be a useful tool to encourage efficient behaviour and discourage unreasonable behaviour,"⁽⁹⁹²⁾ and tribunals often take a party's procedural conduct into account in allocations of the costs of the arbitration.

In order to fulfill its mandate with regard to an award of costs, a tribunal will almost always direct the parties to make submissions regarding their legal and other expenses.⁽⁹⁹³⁾ Such submissions will usually be written, often consisting principally of documents (substantiating cost claims); parties are usually reluctant to submit invoices from their lawyers, for fear of waiving privilege or disclosing confidential information, but statements from in-house personnel or lawyers' attestations can provide adequate alternative proof.

Tribunals frequently permit the parties to make comments on their adversary's cost claims, typically by challenging the reasonableness of such claims or disputing which  [page "2305"](#) party prevailed and how substantially. Such comments are often only in writing, with little or no opportunity for oral submission. Given the size of costs claims in larger arbitrations, which can be in the tens of millions of dollars or Euros, the limited nature of submissions on the issue can appear surprising and may require more careful consideration.

The timing of costs submissions is within the tribunal's discretion, and approaches to the issue are not uniform. Some tribunals will issue a final award "save as to costs," and only then invite costs submissions; this enables the parties to make their cost submissions in light of who "won" the arbitration, which can focus submissions and avoid wasted efforts. Other tribunals prefer to address all disputed issues in a final award, with the parties making submissions on costs before knowing the outcome.


[MM]. Fast-Track Arbitration⁽⁹⁹⁴⁾

The foregoing discussion of arbitral procedures has focused on "ordinary" international arbitrations (recognizing that there is no such creature as an "ordinary" or "average" international arbitration). As noted above, parties sometimes agree to highly expedited or "fast-track" arbitrations, where the entire arbitral process is fit within an abbreviated time period. Some arbitral institutions have adopted rules specifically designed for such proceedings, particularly in recent years.⁽⁹⁹⁵⁾ A number of institutions (including the ICC, LCIA, PCA, SIAC and HKIAC) do not offer specific fast track procedures but parties are free to provide for expedition by agreement.⁽⁹⁹⁶⁾

§ 15.09. EVIDENTIARY RULES AND BURDEN OF PROOF


Closely related to the procedures adopted in an international arbitration are the rules of evidence and burden of proof that are applied by the arbitral tribunal. As with other aspects of the arbitral process, both subjects are matters over which the arbitrators possess broad discretion in international arbitrations.

[A]. Evidentiary Rules

 [page "2306"](#) Some legal systems are characterized by detailed rules of evidence and admissibility (developed in common law traditions because of the role of the lay jury and in other systems for other domestic reasons). These and related evidentiary rules are sometimes invoked in international arbitration and, like courts in litigation, arbitral tribunals therefore not infrequently must resolve the


issues arising from such evidentiary rules, sometimes during the oral witness hearing. These issues include the admissibility of evidence, the weight to be accorded such evidence, the relevance of certain lines of questioning, the rights of counsel to object to one another's questioning, privilege claims and the like.⁽⁹⁹⁷⁾

In general, developed arbitration regimes provide that the disposition of these evidentiary issues is within the discretion of the arbitrators. [Article 19\(2\) of the UNCITRAL Model Law](#) provides that "[t]he power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence."⁽⁹⁹⁸⁾ The Model Law's drafting history underscores the arbitrators' broad discretion over issues of the admissibility and relevance of evidence: "In making rulings on the evidence, arbitrators should enjoy the greatest possible freedom and they are therefore freed from having to observe the strict legal rules of evidence."⁽⁹⁹⁹⁾ Other national arbitration legislation is similar.⁽¹⁰⁰⁰⁾

 [page "2307"](#) Even in the absence of statutory provisions like those in the Model Law, national courts uniformly affirm the arbitral tribunal's inherently broad discretion over evidentiary issues.⁽¹⁰⁰¹⁾ One U.S. court concluded that "[a]rbitrators have broad discretion to make evidentiary decisions,"⁽¹⁰⁰²⁾ while another held that "arbitrators are not bound by the rules of evidence."⁽¹⁰⁰³⁾ Thus, U.S. courts routinely uphold awards based on evidentiary rulings that would not be accepted in judicial proceedings: "[T]he arbitrators appear to have accepted hearsay evidence...as they were entitled to do. If parties wish to rely on such technical objections, they should not include arbitration clauses in their contracts."⁽¹⁰⁰⁴⁾ On the other hand, if a tribunal deems it appropriate, it is also free to apply evidentiary rules applicable in national courts (subject to general due process constraints).⁽¹⁰⁰⁵⁾

The same approach prevails in other jurisdictions.⁽¹⁰⁰⁶⁾ The U.K. Supreme Court has declared that:


"Under section 34 of the 1996 Act...the arbitrators have complete power over all procedural and evidential matters, including how far the proceedings should be oral or in writing, whether or not to apply the strict rules of evidence, whether the proceedings should be wholly or partly adversarial or whether and to what extent they should make their own inquiries. They are the sole judges of the evidence, including the assessment of the probabilities and resolving issues of credibility."⁽¹⁰⁰⁷⁾

 [page "2308"](#) A recent Scottish decision concluded that "[i]t is for the arbitrator to decide questions as to the admissibility, relevance, materiality and weight of any evidence."⁽¹⁰⁰⁸⁾ Similarly, the Dutch Supreme Court has held that

"to the extent that the parties have not agreed otherwise, the arbitral tribunal is free in the application of the rules of evidence. Under this provision the arbitral tribunal in principle is not bound by the general provisions of the law of evidence in [the Dutch] Code of Civil Procedure that do apply to actions before the regular courts, which means that, with respect to, for example, the admissibility and assessment of evidence, the arbitrators are free to act and rule as they see fit."⁽¹⁰⁰⁹⁾

Institutional rules also typically contain either general provisions confirming that the tribunal has control over the arbitral procedure⁽¹⁰¹⁰⁾ or that the tribunal has the power to determine the admissibility and weight of evidence.⁽¹⁰¹¹⁾ The UNCITRAL Rules are representative, with Article 27(4) of the 2010 Rules providing that "[t]he arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered."⁽¹⁰¹²⁾ The LCIA Rules are even more expansive, providing:

"Unless the parties at any time agree otherwise in writing, the Arbitral Tribunal shall have the power, on the application of any party or of its own motion, but in either case only after giving the parties a reasonable opportunity to state their views:... (f) to decide whether or not to apply any strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material tendered by a party on any matter of fact or expert opinion; and to determine the time, manner and form in which such material should be exchanged between the parties and presented to the Arbitral Tribunal."⁽¹⁰¹³⁾

Similarly, the IBA Rules on the Taking of Evidence provide that "[t]he Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence."⁽¹⁰¹⁴⁾ Again, even in the absence of such provisions, arbitral tribunals clearly have the implied authority to resolve issues of admissibility, weight and relevance of  [page "2309"](#) the evidence.⁽¹⁰¹⁵⁾ Commentary confirms these various affirmations of the arbitrators' broad authority over evidentiary issues.⁽¹⁰¹⁶⁾

In practice, international arbitral tribunals typically do not apply strict rules of evidence, particularly rules of evidence applicable in domestic litigations.⁽¹⁰¹⁷⁾ As discussed above, one of the hallmarks of arbitration is the freedom that it offers from technical disputes over admissibility of evidence and other procedural matters, which are often designed for particular national litigation procedures.⁽¹⁰¹⁸⁾ Accordingly, technical rules of evidence are usually not observed in arbitration, and the tribunal will err substantially on the side of permitting presentation of the facts that a party desires.⁽¹⁰¹⁹⁾ Consistent with this, international arbitrators have repeatedly declared that they are not bound by national evidentiary rules or formalities:

"however appropriate may be the technical rules of evidence obtaining in the jurisdiction of either the United States or Mexico as applied to the conduct of trials in their municipal courts, they have no place in regulating the admissibility of and in the weighing of

evidence before this international tribunal. There are many reasons why such technical rules have no application here, among them being that this Commission is without power to summon witnesses or issue processes for the taking of depositions with which [page "2310"](#) municipal tribunals are usually clothed. The Commission expressly decides that municipal restrictive rules of adjective law or of evidence cannot be here introduced and given effect by clothing them in such phrases as 'universal principles of law,' or 'the general theory of law,' and the like. On the contrary, the greatest liberality will obtain in the admission of evidence before this Commission with the view of discovering the whole truth with respect to each claim submitted."⁽¹⁰²⁰⁾

On questions of admissibility, arbitrators ordinarily err in the direction of permitting introduction of irrelevant or duplicative materials. Nonetheless, the IBA Rules permit an arbitral tribunal to limit or exclude evidence if "it considers such question, answer or appearance to be irrelevant, immaterial, unreasonably burdensome, duplicative or otherwise covered by a reason for objection set forth in Article 9.2."⁽¹⁰²¹⁾ In turn, Article 9.2 of the IBA Rules gives the tribunal the power to exclude evidence based on a number of grounds, which include lack of relevance, privilege, confidentiality and more general considerations such as political sensitivity or fairness and equality.⁽¹⁰²²⁾

Despite this, tribunals are acutely conscious of their obligations – under institutional rules, national law and the New York Convention⁽¹⁰²³⁾ – to afford each party the opportunity to present its case. Defects in evidence are therefore usually taken into account in evaluating its credibility, weight and value, rather than in rulings on admissibility.⁽¹⁰²⁴⁾ As one tribunal put it:

"[T]he Respondent has objected on grounds of irrelevance and prejudice to the filing by the Claimant of copies of a number of newspaper and magazine articles....The Tribunal finds no need to exclude this evidence. As with any evidence, the Tribunal is able to assess its bearing on this case as well as its evidentiary value."⁽¹⁰²⁵⁾

As in national courts, parties are typically permitted to present indirect evidence in arbitral proceedings (for example, oral testimony about the existence and contents of a document or hear-say testimony about what occurred or was said by a second-hand [page "2311"](#) witness). Although such evidence is admissible, tribunals will naturally take the absence of direct (or "best") evidence into account in evaluating the evidence.⁽¹⁰²⁶⁾ If a party can demonstrate that there are reasons for non-production of direct evidence (e.g., destruction of a document; death of a first-hand witness), that will mitigate this consideration.

Tribunals are permitted to rely on presumptions or inferences regarding evidence. Examples include negative inferences drawn from a party's failure to produce obviously material documents or witnesses in its control,⁽¹⁰²⁷⁾ a party's failure to comply with disclosure orders,⁽¹⁰²⁸⁾ other types of procedural misconduct in the arbitration,⁽¹⁰²⁹⁾ the absence of contemporaneous objection to invoices or other correspondence,⁽¹⁰³⁰⁾ and the regularity of contemporaneous records.⁽¹⁰³¹⁾ These presumptions are rebuttable, although in practice it may be difficult to do so.⁽¹⁰³²⁾ It is sometimes said that parties must be warned about the possibility of negative inferences,⁽¹⁰³³⁾ but this should ordinarily be self-evident.

[page "2312"](#) It is theoretically possible for national courts to intervene in the arbitral tribunal's resolution of evidentiary issues. But, as discussed above, national arbitration statutes and national courts almost uniformly affirm that international arbitrators are accorded broad discretion in ordering and scheduling hearings, admitting or excluding evidence and similar matters.⁽¹⁰³⁴⁾ As discussed above, courts in developed jurisdictions also follow a principle of judicial non-interference in the arbitral proceedings,⁽¹⁰³⁵⁾ while virtually never annulling or denying recognition to awards based on allegedly erroneous evidentiary rulings.⁽¹⁰³⁶⁾

[B]. Burden of Proof

Issues of burden of proof frequently arise in international arbitration, as in domestic litigation. There is little authority on the allocation of burdens of proof in arbitral contexts. As one commentator concludes, "[i]nternational arbitration conventions, national arbitration laws, *compromis*, arbitration rules and even the decisions of arbitral tribunals are almost uniformly silent on the subject of the standard of proof."⁽¹⁰³⁷⁾ Equally, commentary and national court decisions typically provide little or no guidance on burdens of proof in arbitration.

Nevertheless, a few institutional arbitration rules address the issue, at least at an abstract level, providing that each party bears the burden of providing the facts necessary to its claims or defenses.⁽¹⁰³⁸⁾ The UNCITRAL Rules are representative, providing that "[e]ach party shall have the burden of proving the facts relied on to support its claim or defense."⁽¹⁰³⁹⁾

This is consistent with commentary, which cites the general rule of *actori incumbit probatio*: each party bears the burden of proving the facts relied on in support of its case.⁽¹⁰⁴⁰⁾ Most arbitral awards also take the same approach,⁽¹⁰⁴¹⁾ while emphasizing the [page "2313"](#) need for a pragmatic approach to burden of proof issues, attempting to avoid undue formalism:

"Some *prima facie* distribution of the burden of proof there must be, [but] [t]he degree of burden of proof...to be adduced ought not to be so stringent as to render the proof unduly exacting."⁽¹⁰⁴²⁾


As a practical matter, most arbitrators will conclude that "[w]hen a party...has access to relevant evidence, the Tribunal is authorized to draw adverse inferences from the failure of that party to produce

such evidence.”⁽¹⁰⁴³⁾

In general, although there is little discussion of the issue, the burden of proof appears to be (or assumed to be) a “balance of probabilities” or “more likely than not” standard.⁽¹⁰⁴⁴⁾ One award explained this conclusion as follows:

“The Tribunal finds that the principle articulated by the vast majority of arbitral tribunals in respect of the burden of proof in international arbitration proceedings applies in these concurrent proceedings and does not impose on the Parties any burden of proof beyond a balance of probabilities.”⁽¹⁰⁴⁵⁾


In limited instances, a lower⁽¹⁰⁴⁶⁾ or higher⁽¹⁰⁴⁷⁾ standard of proof arguably applies.

 [page "2314"](#) Allocating the burden of proof arguably presents choice-of-law questions. In particular, tribunals must decide whether to apply the law of the arbitral seat (on the theory that the burden of proof is “procedural”), the law governing the underlying substantive issues, or some international standard. One frequently-expressed view is that burden of proof issues should be subsumed into the underlying substantive law: burden of proof rules are frequently intertwined with substantive legal rules, and it would often distort such rules to separate them. At the same time, some burden of proof rules are the result of procedural matters (such as the availability or unavailability of discovery); it is important in these instances to take this into account in allocating the burden of proof.


The better view is that the tribunal should allocate the burden of proof in the light of its assessment of the applicable substantive law and procedures adopted in the arbitration. In so doing, the tribunal need not apply the burden of proof rules of any specific jurisdiction, but can instead fashion specialized rules in light of the particular substantive issues and procedures at issue in a specific instance.

In some national legal systems, certain allegations require more convincing evidence than others. For example, allegations of wrongdoing, particularly serious wrongdoing such as criminal acts, fraud, corruption and the like, require more convincing evidence than other facts. The Iran-U.S. Claims Tribunal summarized this approach with regard to bribery: “if reasonable doubts remain, such an allegation cannot be deemed to be established.”⁽¹⁰⁴⁸⁾ Other awards are to the same effect.⁽¹⁰⁴⁹⁾ This approach is sensible, both in evidentiary terms and in discouraging baseless allegations of misconduct.

§ 15.10. ARBITRATORS’ AUTHORITY TO IMPOSE SANCTIONS

Disputes sometimes arise over the authority of an international arbitral tribunal to impose sanctions for a party’s refusal to comply with procedural directions. Nothing in the UNCITRAL Model Law, the U.S. FAA, the Swiss Law on Private International Law, or other leading arbitration statutes empowers arbitral tribunals to impose fines or other penalties on either parties or nonparties to an international arbitration.  [page "2315"](#) There are only a few exceptions to this statutory approach.⁽¹⁰⁵⁰⁾ As a consequence, courts and commentators sometimes state in general terms that arbitrators lack coercive authority or the power to impose sanctions.⁽¹⁰⁵¹⁾



These generalizations are not entirely accurate. In practice, arbitral tribunals do occasionally (if exceptionally) impose monetary sanctions for refusals to obey disclosure orders,⁽¹⁰⁵²⁾ orders of interim relief⁽¹⁰⁵³⁾ and other types of procedural or substantive orders.⁽¹⁰⁵⁴⁾ A number of these decisions involve awards of “sanctions” in the form of orders to pay a counter-party’s legal costs, but nonetheless adopt (and apply) the basic principle that tribunals have the authority to award monetary sums based upon a party’s failure to comply with its procedural obligations in the arbitration.⁽¹⁰⁵⁵⁾

Moreover, contrary to some views, international arbitral tribunals do have the power under many national laws to impose at least some coercive sanctions on parties that fail to comply with their procedural orders or other directions; arbitrators do not, of course, have the authority to impose criminal penalties or sanction counsel, but they may generally order parties to pay monetary sanctions or take other similar steps (absent contrary provisions in the parties’ arbitration agreement). Thus, a number of national court decisions have upheld awards or orders by arbitral tribunals imposing monetary sanctions on parties that refuse to comply with the arbitrators’ orders.⁽¹⁰⁵⁶⁾  [page "2316"](#) Some courts have found this authority implied in broadly worded arbitration agreements.⁽¹⁰⁵⁷⁾

As discussed below, arbitrators’ orders of sanctions frequently attract special scrutiny in annulment proceedings.⁽¹⁰⁵⁸⁾ Moreover, some courts have expressed reservations about the consequences for the arbitral process that would flow from recognition of the arbitrators’ authority to order sanctions:

“Under the FAA, the district court has the authority to determine (1) whether arbitration should be compelled, and (2) whether an arbitration award should be confirmed, vacated, or modified. Beyond those narrowly defined procedural powers, the court has no authority to interfere with an arbitration proceeding.... [T]he sanctions order threatens unduly to inflate the judiciary’s role in arbitration. The FAA provides for minimal judicial involvement in resolving an arbitrable dispute; the court is limited to only a few narrowly defined, largely procedural tasks. But by using its power to sanction, a court could seize control over substantive aspects of arbitration. The court would, in effect, become a roving commission to supervise a private method of dispute resolution and exert authority that is reserved, by statute, case law, and longstanding practice, to the arbitrator. That supervision is inconsistent with the scope of inherent authority and with federal arbitration policy, which aims to prevent courts from delaying the resolution of

Despite these reservations, courts in a number of jurisdictions have recognized the authority of arbitrators to order sanctions for breaches of the tribunal's procedural directions.

 [page "2317"](#) Alternatively (or additionally), in a few jurisdictions, special mechanisms exist for obtaining judicial enforcement of arbitrators' procedural directions. The [English Arbitration Act, 1996](#), is a leading example, authorizing judicial enforcement of "peremptory orders" issued by arbitral tribunals.⁽¹⁰⁶⁰⁾  [page "2318"](#)

¹ For commentary, see Andersen, Ryssdal & Lindskog, *Achieving Efficiency in International Arbitration: Some Strategic Suggestions for Arbitral Tribunals in ICC Proceedings*, 22(2) ICC Ct. Bull. 5 (2011); Beale, Nieuweld & Nieuweld, *Summary Arbitration Proceedings: A Comparison Between the English and Dutch Regimes*, 26 Arb. Int'l 139 (2010); Beerbower, *International Arbitration: Can We Realise the Potential?*, 27 Arb. Int'l 75 (2011); Benedettelli, *To Bifurcate or Not to Bifurcate? That Is the (Ambiguous) Question*, 29 Arb. Int'l 493 (2013); [Berger, *The Need for Speed in International Arbitration*](#), 25 J. Int'l Arb. 595 (2008); Berger, *The International Arbitrator's Dilemma: Transnational Procedure Versus Home Jurisdiction – A German Perspective*, 25 Arb. Int'l 217 (2009); Bergsten, *The Americanization of International Arbitration*, 18 Pace Int'l L. Rev. 289 (2006); R. Bishop & E. 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Arbitration, 2(1) J. Int'l Arb. 7 (1985); Wirth, "Ihr Zeuge, Herr Rechtsanwalt!" *Weshalb Civil-Law-Schiedsrichter Common-Law-Verfahrensrecht anwenden*, 2003 SchiedsVZ 9; Wood, Keynote Address: *The Quiet Convergence of Arbitration and Litigation*, 5 World Arb. & Med. Rev. 273 (2011); Zádě, *Reflections on the Role of Institutional Arbitration Between the Present and the Future*, 27 Arb. Int'l 271 (2009); T. Zuberbühler et al., *IBA Rules of Evidence: Commentary on the IBA Rules on the Taking of Evidence in International Arbitration* (2012).

² The topic of disclosure (or discovery) in international arbitration is addressed separately in [Chapter 16](#) below. See [Chapter 16](#).

³ See [§§1.02\[B\]\[6\]-\[7\]](#); [§§15.01\[A\]-\[B\]](#). Not all international arbitrations are necessarily designed to achieve every one of these objectives (for example, arbitrations may be conducted in one party's home jurisdiction, pursuant to domestic procedural rules of that jurisdiction). Nonetheless, in most instances, parties enter into international commercial arbitration agreements with the objective of achieving all or most of these ends.

⁴ Similar objectives exist in the context of state-to-state arbitrations. See Crawford, *Advocacy Before the International Court of Justice and Other International Tribunals in State-to-State Cases*, in R. Bishop & E. Kahoe (eds.), *The Art of Advocacy in International Arbitration* 303, 304-06 (2d ed. 2010) (describing historic use of "combination of full written and oral phases"); [ILC, Memorandum on Arbitral Procedure, Prepared by the Secretariat, U.N. Doc. A/CN.4/35, II Y.B. I.L.C. 157, passim \(1950\)](#) (thorough review of procedures used in contemporary state-to-state arbitrations and their objectives); Institute of International Law, *Projet de règlement pour la procédure arbitrale internationale* Art. 15 (1875). See also 1899 Convention for the Pacific Settlement of International Disputes ("1899 Hague Convention"), Arts. 37-90.

⁵ See [§1.02\[B\]\[1\]](#); *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, ¶51 (Canadian S.Ct.) ("The neutrality of arbitration is one of the fundamental characteristics of this alternative dispute resolution mechanism...[A]rbitration is an institution without a forum and without a geographic basis.").

⁶ As discussed below, this objective is furthered by the adoption of "international" procedures, based either upon international instruments such as the IBA Rules on the Taking of Evidence or upon customary international practice (see [§15.01\[B\]](#); [§15.07\[D\]\[3\]](#)) and by the practice of using party-nominated arbitrators who will be familiar with the parties' procedural expectations and concerns (see [§12.01\[A\]](#); [§12.03\[A\]\[2\]](#)).

⁷ See [§§15.04\[A\]-\[B\]](#); New York Convention, Art. V(1)(b); [UNCITRAL Model Law, Art. 18](#) ("The parties shall be treated with equality.").

⁸ See [§1.05](#); [§2.02\[C\]\[4\]](#); [§§15.04\[A\]-\[B\]](#).

⁹ See [§§15.04\[A\]-\[B\]](#); New York Convention, Art. V(1)(b); [UNCITRAL Model Law, Art. 18](#) ("each party shall be given a full opportunity of presenting his case").

¹⁰ See [§1.02\[B\]\[7\]](#); [English Arbitration Act, 1996, §33](#) (imposing duty on tribunal to "adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means of resolution of the matters falling to be determined"); *AT&T Mobility LLC v. Concepcion*, [131 S.Ct. 1740](#), 1749 (U.S. S.Ct. 2011) ("The purpose of affording parties discretion in designing the arbitral process is to allow for efficient, streamlined procedures tailored to the type of dispute."); *ReliaStar Life Ins. Co. of N.Y. v. EMC Nat'l Life Ins. Co.*, [564 F.3d 81](#), 87 (2d Cir. 2009) ("underlying purpose" of arbitration is to achieve "efficient and swift resolution of disputes without protracted litigation"); *Lufuno Mphaphuli & Assocs. (Pty) Ltd v. Andrews*, [2009] ZACC 6, ¶197 (South African Const. Ct.) ("In determining the proper constitutional approach to private arbitration, we need to bear in mind that litigation before the ordinary courts can be a rigid, costly and time-consuming process and that it is not inconsistent with our constitutional values to permit parties to seek a quicker and cheaper mechanism for the resolution of disputes."). See also ICC, *Techniques for Controlling Time and Costs in Arbitration* (2d ed. 2012).

¹¹ See [§1.02\[B\]\[5\]](#); [§25.03](#); [§25.05\[A\]\[3\]](#).

¹² See [§§1.02\[B\]\[4\]](#) & [\[6\]](#).

¹³ See [§1.02\[B\]\[6\]](#); Gaillard & Pinsolle, *Advocacy in International Commercial Arbitration: France*, in R. Bishop (ed.), *The Art of Advocacy in International Arbitration* 133, 133 (2004) ("International arbitration...gives the parties and their counsels the widest possible range of options."); G. Petrochilos, *Procedural Law in International Arbitration* 81 (2004) ("modern law affords arbitrating parties and arbitral tribunals wide freedom to fashion the procedural rules of the proceedings"); Pietrowski, *Evidence in International Arbitration*, 22 Arb. Int'l 373, 374, *passim* (2006).

¹⁴ [UNCITRAL Notes on Organizing Arbitral Proceedings, ¶14](#). See also ICC, *Controlling Time and Costs in International Arbitration* 5 (2d ed. 2012) ("specific procedures can be tailor-made as appropriate for each dispute and adapted to the legal cultures of the parties and the arbitrators"); [UNCITRAL, Report of the UNCITRAL on the Work of Its Twenty-Ninth Session, U.N. Doc. A/51/17, ¶15 \(1996\)](#).

¹⁵ Kerr, *Concord and Conflict in International Arbitration*, 13 Arb. Int'l 121, 125 (1997).

¹⁶ See [§15.08\[MM\]](#).

¹⁷ See [§16.02\[E\]\[3\]\[e\]](#).

¹⁸ See [§15.08\[AA\]\[7\]](#); [§15.08\[BB\]](#).

¹⁹ See [§15.01\[B\]](#).

²⁰ *McDonald v. City of W. Branch*, [466 U.S. 284](#), 292 (U.S. S.Ct. 1984) (quoting *Alexander v. Gardner-Denver Co.*, [415 U.S. 36](#), 58 n.19 (U.S. S.Ct. 1974)). See also *Slaney v. Int'l Amateur Athletic Fed'n*, [244 F.3d 580](#), 591 (7th Cir. 2001) ("parties that have chosen to remedy their disputes through arbitration rather than litigation should not expect the same procedures they would find in the judicial arena"); *Forsythe Int'l, SA v. Gibbs Oil Co.*, [915 F.2d 1017](#), 1022 (5th Cir. 1990) ("As a speedy and informal alternative to litigation, arbitration resolves disputes without confinement to many of the procedural and evidentiary structures that protect the integrity of formal trials.").

²¹ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, [473 U.S. 614](#), 628 (U.S. S.Ct. 1985). See also *Judgment of 9 December 1986*, DFT 112 la 350, 352 (Swiss Federal Tribunal) ("It is the aim of arbitral proceedings to achieve an expeditious resolution of a legal dispute, an aim which one tries to achieve, among other things, by way of a restriction of appeals and legal remedies."); *Rashtriya*

Chems. v. J.S. Ocean Pvt Ltd, [2010] Writ Petition No. 184, ¶16 (Bombay High Ct.) (“arbitral procedure provides a ray of hope for an easy and expedient mechanism to enforce rights and obligations under the contract”).

Moreover, by agreeing to arbitrate, parties also generally forego the ability to join third parties to their dispute resolution procedure, to readily obtain coercive sanctions and to take advantage of other procedural mechanisms available in some national courts (e.g., depositions). See [§16.02\[E\]\[3\]\[e\]](#).

²² An illustrative example is the jury trial system in the United States, which provides protections intended for individual litigants, typically in domestic contexts, that are seldom perceived as appropriate in international commercial matters.

²³ See [§1.05](#); [§2.02\[C\]\[4\]](#); [§15.04\[B\]](#); Brunet, *Replacing Folklore Arbitration With A Contract Model of Arbitration*, 74 Tulane L. Rev. 39, 62 (1999) (“arbitration signatories are knowingly demanding judicialized arbitration by contracting to arbitrate under the available judicialized rules”); Goldman, *Instance judiciaire et instance arbitrale internationale*, in *Études offertes à Pierre Bellet* 219 (1991); Redfern, *Stemming the Tide of Judicialisation of International Arbitration*, 2 World Arb. & Med. Rev. 21 (2008); Stipanowich, *Arbitration: The “New Litigation”*, 2010 U. Ill. L. Rev. 1, 6 (“as arbitration has been called upon to assume the burden of resolving virtually every kind of civil dispute, it has taken on more and more features of a civil trial”).

²⁴ Nariman, *Standards of Behaviour of Arbitrators*, 4 Arb. Int’l 311 (1988).

²⁵ See [§15.07\[D\]\[3\]](#); [§§15.07\[E\]](#) et seq.

²⁶ See [§§15.08\[V\]](#) et seq.

²⁷ See, e.g., Henryson, *Tale of the Sheep and the Dog*, reprinted in 7 Arb. Int’l 66 (1991) (15th century Scottish poem satirizing formality and complexity of arbitral procedures). See [§§1.01\[B\]\[3\]](#) & [\[8\]](#); [§1.02\[B\]\[6\]](#).

²⁸ See, e.g., H. Brown & A. Marriott, *ADR Principles and Practice* 83 (2d ed. 1999); Hobeck, Mahnken & Koebke, *Time for Woolf Reforms in International Construction Arbitration*, 2008 Int’l Arb. L. Rev. 84 (terming contemporary construction arbitration “off-shore litigation”); Redfern, *Stemming the Tide of Judicialisation of International Arbitration*, 2 World Arb. & Med. Rev. 21 (2008); Stipanowich, *Future Lies Down A Number of Divergent Paths*, 6(3) Disp. Res. Mag. 16 (2000) (many businesses “bemoan the increasing ‘judicialization’ of arbitration”); Wetter, *The Present Status of the International Court of Arbitration of the ICC: An Appraisal*, 1 Am. Rev. Int’l Arb. 91, 101 (1990).

²⁹ See [§1.03](#).

³⁰ See also [§1.04\[C\]\[5\]\[a\]](#). The Task Force on Reducing Time and Costs in Arbitration was co-chaired by Yves Derains and Christopher Newmark. The Task Force was charged with the identification of ways in which time and costs in international arbitration, particularly in complex ICC arbitrations, could be reduced. For more critical perspectives in the context of construction arbitration, see Hobeck, Mahnken & Koebke, *Time for Woolf Reforms in International Construction Arbitration*, 2008 Int’l Arb. L. Rev. 84; Ulmer, *The Cost Conundrum*, 26 Arb. Int’l 221, [231 \(2010\)](#) (acknowledging ICC’s efforts, but concluding that “[m]ost of the suggestions [put forth by the ICC Task Force] depend on agreement between the parties and/or particularly proactive and well-organised arbitrators. But these are precisely the factors that are frequently missing once the arbitration had commenced.”).

³¹ ICC, *Controlling Time and Costs in International Arbitration* (2d ed. 2012). The UNCITRAL Notes on the Organization of Arbitral Proceedings, together with periodic revisions of leading institutional arbitration rules, are similar instances of ongoing efforts to improve procedures in international arbitration. See [§§1.04\[C\]\[1\]](#) & [\[5\]](#); [§15.08\[N\]](#).

³² ICC, *Controlling Time and Costs in International Arbitration* 6 (2d ed. 2012).

³³ 2012 ICC Rules, Art. 11(2); ICC, *Statement of Acceptance, Availability, Impartiality and Independence*. See also J. Fry, S. Greenberg & F. Mazza, *The Secretariat’s Guide to ICC Arbitration* ¶¶3-380 to 3-384, 3-791 to 3-804 (2012) (discussing ICC Arbitrator Statement of Acceptance, Availability and Independence and ICC Rules, Art. 22).

³⁴ See, e.g., T. Stipanowich, C. Kann & D. Rothman, *College of Commercial Arbitrators, Protocols for Expedient, Cost-Effective Commercial Arbitration: Key Action Steps for Business Users, Counsel, Arbitrators & Arbitration Provider Institutions* (2010); T. Webster, *Handbook of UNCITRAL Arbitration* ¶¶0-64 to 0-75 (2010).

³⁵ *Stroh Container Co. v. Delphi Indus., Inc.*, [125 F.2d 743](#), 751 n.12 (8th Cir. 1986). See also *Bowles Fin. Group v. Stifel Nicolaus & Co.*, [22 F.3d 1010](#), 1011 (10th Cir. 1994) (“Arbitration provides neither the procedural protections nor the assurance of the proper application of substantive law offered by the judicial system.”).

³⁶ As discussed below, the U.S. Supreme Court remarked in a domestic context that arbitration is “poorly suited to the higher stakes of class litigation” and that “the point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute.” *AT&T Mobility LLC v. Concepcion*, [131 S.Ct. 1740](#), 1749 (U.S. S.Ct. 2011). For criticism of the Court’s characterization of the arbitral process, for failing to consider international (and some domestic) practices, see Born & Salas, *The United States Supreme Court and Class Arbitration: A Tragedy of Errors*, 2012 J. Disp. Res. 21.

³⁷ See [§1.02\[B\]\[4\]](#).

³⁸ See Goldhaber, *Arbitration Scorecard: Contract Disputes*, The American Lawyer (1 July 2011) (listing over sixty arbitrations with \$1 billion or more in dispute, including one case with \$20 billion in dispute).

³⁹ Representative examples include the IBM/Fujitsu dispute (in the 1980s), the Andersen Consulting and Deutsche Telekom/France Telecom disputes (in the 1990s), and the Chevron/Ecuador and Volkswagen/Suzuki disputes (in the 2000s).

⁴⁰ Lazareff, *International Arbitration: Towards A Common Procedural Approach*, in S. Frommel & B. Rider (eds.), *Conflicting Legal Cultures in Commercial Arbitration: Old Issues and New Trends* 31, 33 (1999).

⁴¹ See [§§15.04\[A\]-\[B\]](#); [§19.01](#).

⁴² See [§§15.04\[A\]-\[B\]](#); [§15.07\[A\]](#); New York Convention, Arts. V(1)

(b), (d); [UNCITRAL Model Law, Arts. 18, 34\(2\)\(a\)\(ii\)](#), (iv); ⁴³ [2010 UNCITRAL Rules, Arts. 17\(1\)](#).

⁴³ See [§15.09\[A\]](#).

⁴⁴ See [§19.04\[B\]\[3\]](#). As discussed below, the overwhelming majority of international commercial arbitration agreements do not select arbitration *ex aequo et bono* or *amiable compositeur*, and rather include choice-of-law clauses selecting the laws of specific developed legal systems. See [§19.06](#); [§19.07](#).

⁴⁵ As discussed above, the principle of party autonomy was one of the historic and characteristic features of the arbitral process. See [§1.02\[B\]\[6\]](#). See also 1958 ILC Model Rules on Arbitral Procedure, Art. 12(1) (“In the absence of any agreement between the parties concerning the procedure of the tribunal, or if the rules laid down by them are insufficient, the tribunal shall be competent to formulate and complete the rules of procedure.”) (emphasis added); Institute of International Law, *Projet de règlement pour la procédure arbitrale internationale* Art. 12 (1875).

⁴⁶ The Geneva Protocol required that “the arbitral procedure, including the constitution of the arbitral tribunal shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.” Geneva Protocol, Art. II. As discussed above, this provision was generally understood as requiring compliance with the procedural law of the arbitral seat. See [§11.03\[C\]\[1\]\[b\]](#).

⁴⁷ See [§11.03\[C\]\[1\]\[b\]](#); [§15.02\[A\]](#).

⁴⁸ New York Convention, Art. V(1)(d). See also [§11.03\[C\]\[1\]\[c\]\[iii\]](#), pp. 1546-47.

⁴⁹ G. Petrochilos, *Procedural Law in International Arbitration* 355 (2004). See also M. Kurkela & S. Turunen, *Due Process in International Commercial Arbitration* 25-28 (2d ed. 2010). As discussed above, this contrasts with Article II of the Geneva Protocol and Article III of the Geneva Convention. See [§1.01\[C\]\[1\]-\[2\]](#); [§11.03\[C\]\[1\]\[a\]-\[b\]](#).

⁵⁰ New York Convention, Arts. II(1), (3).

⁵¹ See [§2.01\[A\]\[1\]](#); [§5.01\[B\]\[2\]](#); [§5.04\[D\]\[1\]\[a\]](#); [§11.03\[C\]](#).

⁵² See [§11.03\[C\]](#); [§12.01\[B\]\[2\]\[c\]](#); [§14.03\[A\]](#); [§17.02\[A\]\[2\]](#); [§18.02\[A\]](#); [§25.02\[A\]-\[B\]](#); [§26.05\[C\]\[9\]\[e\]](#). In particular, the Convention imposes structural limits on the application of idiosyncratic or discriminatory local public policies (such as rules requiring that all arbitrators be local nationals, that local language be used in all arbitral proceedings, or that all arbitral proceedings be conducted on local territory). See [§11.03\[C\]\[1\]\[c\]\[vi\]](#).

⁵³ European Convention, Art. IV(1)(b)(iii); [§11.03\[C\]\[1\]\[d\]](#). As discussed below, Article IV(4)(d) also provides that, where the parties have not agreed upon the arbitral procedure, the arbitral tribunal shall determine the arbitral rules. See [§15.03\[A\]](#). Like Article V(1)(d) of the New York Convention, Article IX(1)(d) of the European Convention provides for the non-recognition of awards if the procedure followed by the tribunal departed from that agreed by the parties. See Bouchez, *The Prospects for International Arbitration: Disputes Between States and Private Enterprises*, 8 Arb. Int'l 81, 96 (1991); Hascher, *European Convention on International Commercial Arbitration of 1961 – Commentary*, XX Y.B. Comm. Arb. 1006, 1017 et seq. (1995).

⁵⁴ Article 2 of the Inter-American Convention provides that the arbitrators shall be appointed “in a manner agreed upon by the parties,” and Article 3 provides that “[i]n the absence of an express agreement between the parties, the arbitration shall be conducted in accordance with the rules of procedure of the Inter-American Commercial Arbitration Commission.” Inter-American Convention, Arts. 2, 3. See [§11.03\[C\]\[1\]\[e\]](#).

⁵⁵ See Lalive, *On the Neutrality of the Arbitrator and of the Place of Arbitration*, in *Swiss Essays on International Arbitration* 23, 29 (1984) (“modern law of international arbitration today leaves a wide autonomy to the parties with regard to procedure (subject only to universally-recognized fundamental guarantees of fairness and equality)”; [Livingstone, Party Autonomy in International Commercial Arbitration: Popular Fallacy or Proven Fact?](#), 25 J. Int'l Arb. 529 (2008); Webster, *Party Control in International Arbitration*, 19 Arb. Int'l 119 (2003).

⁵⁶ [UNCITRAL Model Law, Art. 19\(1\)](#).

⁵⁷ [UNCITRAL Model Law, Arts. 18, 19\(1\), 24\(1\)](#) (“Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials.”).

⁵⁸ ⁴² [Report of the Secretary-General on Possible Features of A Model Law on International Commercial Arbitration, U.N. Doc. A/CN.9/207.1/17, XI Y.B. UNCITRAL 75 \(1981\)](#) (emphasis added). See also Brekoulakis & Shore, *UNCITRAL Model Law*, in L. Mistelis (ed.), *Concise International Arbitration* 625 (2010) (“[A]rt. 19 is a triumph of procedural party autonomy. It provides both the parties with considerable freedom to set out the procedural rules of their arbitration (art. 19(1)) and the tribunal with wide discretion as to how to conduct the proceedings (art. 19(2)).”).

⁵⁹ See, e.g., *Éditions Chouette (1987) Inc. v. Desputeaux*, [2003] 1 S.C.R. 178, 220 (Canadian S.Ct.) (“Articles 2643 C.C.Q. and 944.1 C.C.P....affirm the principle of procedural flexibility in arbitration proceedings, by leaving it to the parties to determine the arbitration procedure or, failing that, leaving it up to the arbitrator to determine the applicable rules of procedure.”); *Judgment of 17 May 2001*, 7 Ob 67/01f (Austrian Oberster Gerichtshof) (“Pursuant to the ZPO, the conduct of the arbitral proceedings forms to a large extent part of the parties’ autonomy. The parties may determine the procedural rules to be applied by the arbitrators in their arbitration agreement or in a separate written agreement. If the parties have not provided for such an agreement concerning the procedural rules, the arbitrators can determine the proceedings.”); *Brunswick Bowling & Billiards Corp. v. Shanghai Zhonglu Indus. Co.* [2011] 1 HKLRD 707, ¶¶84, 85 (H.K. Ct. First Inst.) (“Article 18 of the Model Law prescribes that the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case. The autonomy of the parties in agreeing to arbitral procedures is subject to this overriding objective....Likewise, the arbitrators’ duty to give effect to the agreement of parties on arbitral procedure is subject to the same overriding objective.”).

⁶⁰ [Swiss Law on Private International Law, Art. 182\(1\)](#). See Schneider, in S. Berti et al. (eds.), *International Arbitration in Switzerland* Art. 182 (2000).

⁶¹ [French Code of Civil Procedure, Art. 1509](#); Carducci, *The*

Arbitration Reform in France: Domestic and International Arbitration Law, 28 Arb. Int'l 125, 151 (2012) ("The arbitration agreement may, directly or by reference to arbitration rules or to procedural rules, govern the procedure to be followed for the arbitral proceedings.... Such flexibility allows the parties, or the arbitral tribunal, to devise rules of procedure suitable to the dispute and the parties' expectations."); Gaillard & Pinsolle, *Advocacy in International Commercial Arbitration: France*, in R. Bishop (ed.), *The Art of Advocacy in International Arbitration* 133, 134 (2004) ("French law places no limitation upon the parties' and the arbitrators' freedom.");

⁶² *English Arbitration Act, 1996*, §§1(b), 33, 34 ("parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest"); R. Merkin, *Arbitration Law* ¶¶14.1 to 14.34 (1991 & Update August 2013).

⁶³ German ZPO, §1042(3); Schlosser, in F. Stein & M. Jonas (eds.), *Kommentar zur Zivilprozessordnung* §1042, ¶3 (22d ed. 2002).

⁶⁴ *Belgian Judicial Code, Art. 1700(1)* ("The parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.");

⁶⁵ Austrian ZPO, §594(1) ("Subject to the mandatory provisions of this title, the parties are free to determine the rules of procedure. The parties may thereby refer to other rules of procedure."); *Judgment of 6 September 1990*, 6 Ob 572/90 (Austrian Oberster Gerichtshof) ("There is a significant difference between the state courts on the one hand, which are bound by strict procedural rules and which decisions are typically subject to appeal, and arbitral tribunals on the other hand, against which decisions an ordinary appeal is not admissible and which can proceed, as far as the organization of the proceeding is concerned, in a far more flexible fashion when compared to the state courts. For that reason a challenge is possible only if there was a very substantial violation of fundamental principles of an orderly proceeding."); F. Schwarz & C. Konrad, *The Vienna Rules: A Commentary on International Arbitration in Austria* ¶20-001 (2009);

⁶⁶ *Japanese Arbitration Law, Art. 26(1)* ("The parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the arbitral proceedings. Provided, it shall not violate the provisions of this law relating to public policy.");

⁶⁷ *Singapore International Arbitration Act, 2012, Schedule 1, Art. 19(1)*.

⁶⁸ *Hong Kong Arbitration Ordinance, 2013, §47(1)*; *Brunswick Bowling & Billiards Corp. v. Shanghai Zhonglu Indus. Co.* [2011] 1 HKLRD 707, ¶¶84, 85 (H.K. Ct. First Inst.).

⁶⁹ *Indian Arbitration and Conciliation Act, Art. 19(2)*; *Trimex Int'l FZE Ltd Dubai v. Vedanta Aluminium Ltd.*, [2010] INSC 62, ¶60 (Indian S.Ct.) ("The 'autonomie de la volonté' doctrine is enshrined in the policy objectives of the [UNCITRAL Model Law] on which our Arbitration Act is based"); *Sime Darby Eng'g SDN. Bhd v. Eng'rs India Ltd.*, [2009] INSC 1266, ¶34 (Indian S.Ct.) ("The parties' autonomy in the arbitration agreement must be given due importance in construing the intention of the parties."); *Bhatia Int'l v. Bulk Trading SA.*, (2002) 4 SCC 105, ¶25 (Indian S.Ct.) ("in international commercial arbitrations parties are at liberty to choose, expressly or by necessary implication, the law and the procedure to be made applicable"); *Max India Ltd v. Gen. Binding Corp.*, [2009] INDLHC 2668 (Delhi High Ct.).

⁷⁰ Russian Arbitration Law, Art. 19(1).

⁷¹ See, e.g., *Alberta International Commercial Arbitration Act, Art. 19(1)*; *British Columbia International Commercial Arbitration Act, §19(1)*; *Ontario International Commercial Arbitration Act, Art. 19(1)*; *Québec Code of Civil Procedure, Art. 944.1*; *Greek International Commercial Arbitration Law, Art. 19*; *Portuguese Law on Voluntary Arbitration, 2012, Art. 30(2)*; *Australian International Arbitration Act, 2011, Schedule 2, Art. 19(1)*; *Malaysian Arbitration Act, §21*; *New Zealand Arbitration Act, Schedule 1, §19(1)*; *Czech Act on Arbitral Proceedings and Enforcement of Arbitral Awards, Art. 19*; *Costa Rican Arbitration Law, 2011, Art. 19(1)*. See also European Convention Providing a Uniform Law on Arbitration, Annex I, Art. 15(1) ("Without prejudice to the provisions of Article 16, the parties may decide on the rules of the arbitral procedure and on the place of arbitration. If the parties do not indicate their intention before the first arbitrator has accepted his office, the decision shall be a matter for the arbitrators.");

⁷² See, e.g., *Salt Lake Tribune Publ'g Co. v. Mgt Planning, Inc.*, ¹³⁹⁰ *F.3d 684*, 690 (10th Cir. 2004) ("Parties need not establish quasi-judicial proceedings resolving their disputes to gain the protections of the FAA, but may choose from a range of procedures and tailor arbitration to their peculiar circumstances."); *Sec. Ins. Co. of Hartford v. TIG Ins. Co.*, ¹³⁶⁰ *F.3d 322*, 325 (2d Cir. 2004) ("FAA requires 'arbitration proceed in the manner provided for in [the parties'] agreement'") (emphasis in original); *UHC Mgt Co. v. Computer Sciences Corp.*, ¹⁴⁸ *F.3d 992*, 995 (8th Cir. 1998); *Glass Molders, Pottery, Plastics & Allied Workers Int'l Union, AFL-CIO, CLC, Local 182B v. Excelsior Foundry Co.*, ⁵⁶ *F.3d 844*, 848 (7th Cir. 1995); *Baravati v. Josephthal, Lyon & Ross*, ²⁸ *F.3d 704*, 709 (7th Cir. 1994). See also *Restatement (Third) U.S. Law of International Commercial Arbitration* §4-15 comment a (Tentative Draft No. 2 2012) ("Parties have very wide latitude to agree upon the procedures that will govern an arbitration."); *Volt Info. Sciences, Inc. v. Stanford Univ.*, ⁴⁸⁹ *U.S. 468*, 479 (U.S. S.Ct. 1989).

⁷³ Revised Uniform Arbitration Act, Prefatory Note (2000).

⁷⁴ *UHC Mgt Co. v. Computer Sciences Corp.*, ¹⁴⁸ *F.3d 992*, 995 (8th Cir. 1998).

⁷⁵ *Team Design v. Gottlieb*, ¹⁰⁴ *S.W.3d 512* (Tenn. Ct. App. 2002). Although vivid, it is not clear that entirely arbitrary or random procedures would be acceptable arbitral procedures under most international and national law standards of due process and procedural fairness. In particular, random chance or physical endurance would likely not provide either party with an opportunity to be heard in an adjudicative process, as required under most national and international arbitration regimes. See §§15.04[A]-[B]. See also §§1.05; §2.02[C][4]. A decision based upon random lots or "arm wrestling" might be sustainable on general contract law grounds, but not under most international arbitration regimes.

⁷⁶ *Re Shaw & Sims* [1851] 17 LTOS 160 (English Bail Ct.). See also §12.04[C].

⁷⁷ See, e.g., *Lufuno Mphaphuli & Assocs. (Pty) Ltd v. Andrews*, [2009] ZACC 6, ¶1217 (South African Const. Ct.) ("identity of the arbitrator and the manner of the proceedings will ordinarily be

determined by agreement between the parties”).

⁷⁸ *Judgment of 15 May 1985, Raffineries de pétrole d'Homs et de Banias v. Chambre de commerce internationale*, 1985 Rev. arb. 141 (Paris Cour d'appel). See also J.-L. Delvolvé, J. Rouche & G. Pointon, *French Arbitration Law and Practice* ¶196 (2009) (“The procedural rules of French domestic arbitration are also available in an international arbitration...these articles lay down a rule of French substantive law, that in international arbitration the will of the parties is paramount in settling procedural rules, and that, if they do not agree thereupon, then it is the arbitrators who have the right and obligation to decide how to proceed.”).

⁷⁹ *Judgment of 12 March 2003*, DFT 4P.2/2003, ¶13 (Swiss Federal Tribunal). See also *Judgment of 28 March 2007*, DFT 4A.2/2007, ¶3.1 (Swiss Federal Tribunal) (“Under [Article 182\(1\) and 2\) of the Swiss Law on Private International Law](#), the parties and, if necessary the arbitral tribunal, determine the arbitral procedure.”); von Segesser & Schramm, *Swiss Private International Law Act* (Chapter 12: *International Arbitration*), 1989, in L. Mistelis (ed.), *Concise International Arbitration* 911, 930-34 (2010).

⁸⁰ *Judgment of 25 June 1992*, XXI Y.B. Comm. Arb. 619, 625 (Austrian Oberster Gerichtshof) (1997).

⁸¹ See [§§15.04\[A\]-\[B\]](#); Ziadé, *Reflections on the Role of Institutional Arbitration Between the Present and the Future*, 27 Arb. Int'l 271 (2009).

⁸² See [§1.04\[C\]\[1\]](#).

⁸³ See [§1.04\[C\]\[1\]](#); [§5.04\[C\]](#); [§9.03](#).

⁸⁴ [UNCITRAL Model Law, Art. 2\(d\)](#). See also *id.* at [Art. 2\(e\)](#) (“where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement”).

⁸⁵ See, e.g., [English Arbitration Act, 1996, §§3\(b\), 24\(2\)](#); Revised Uniform Arbitration Act, §1(1) (2000); [French Code of Civil Procedure, Arts. 1446, 1452, 1464\(3\)](#); [Swiss Law on Private International Law, Art. 182](#); [Singapore International Arbitration Act, 2012, Schedule 1, Arts. 2\(d\), \(e\)](#) (incorporating [UNCITRAL Model Law, Arts. 2\(d\), \(e\)](#)); [Hong Kong Arbitration Ordinance, 2013, Art. 47\(1\)](#) (“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 proceedings.”).

⁸⁶ See [§1.03\[C\]\[2\]\[e\]](#); [§5.05\[C\]](#); [§§9.02\[I\]-\[J\]](#); *Koch Oil, SA v. Transocean Gulf Oil Co.*, ⁽²⁾ 751 F.2d 551 (2d Cir. 1985) (AAA Commercial Rules give AAA reasonable discretion to interpret time limits in Rules); *Reeves Bros., Inc. v. Capital-Mercury Shirt Corp.*, ⁽²⁾ 962 F.Supp. 408, 411 (S.D.N.Y. 1997) (“Where...the parties have adopted [particular institutional] rules, the parties are also obligated to abide by the [relevant arbitral institution's] determinations under those rules”); *Judgment of 15 May 1985, Raffineries de pétrole d'Homs et de Banias v. Chambre de commerce int'l*, 1985 Rev. arb. 141, 149 (Paris Cour d'appel) (“provisions of the Rules of the [ICC] Court of Arbitration, which constitute the law between the parties, must be applied to the exclusion of all other rules”); *Judgment of 23 June 1988, République de Guinée v. MM. R. et O.*, 1988 Rev. arb. 657 (Paris Tribunal de grande instance). See also *Himpuma Cal. Energy Ltd v. PT (Persero) Perusahaan Listrik Negara, Final Ad Hoc Award of 4 May 1999*, XXV Y.B. Comm. Arb. 13, 26 (2000) (“Arbitral Tribunal is bound to follow the agreement of the Parties, which in this case means the UNCITRAL Arbitration Rules to which their contract refers”); *Award in ICC Case No. 16655.4(2) Int'l J. Arab Arb. 125, 165-66 (2012)* (“this arbitration is governed in order of priority by the mandatory provisions of French international arbitration law, the ICC Rules, the ToR, and where these rules are silent, by any rules which the Parties or, failing them, the Sole Arbitrator may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration in accordance with Article 15 (1) of the ICC Rules and the Procedural Rules issued by the Sole Arbitrator”).

⁸⁷ *Judgment of Société, Philipp Bros. v. Société Icco*, 1990 Rev. arb. 880, 883 (Paris Cour d'appel).

⁸⁸ *Diemaco v. Colt's Mfg Co.*, ⁽²⁾ 11 F.Supp.2d 228, 232 (D. Conn. 1998). See also *Marshall v. Capital Holdings Ltd*, [2006] IEHC 271, ¶17.16.2 (Irish High Ct.).

⁸⁹ See [§1.02\[B\]\[3\]](#); [§5.01\[C\]](#); [§7.03\[B\]](#); [§7.03\[E\]\[7\]](#); [§7.03\[I\]\[4\]](#).

⁹⁰ For example, under [Article 2\(d\) of the UNCITRAL Model Law](#), the choice of the applicable substantive law under Article 28 cannot be delegated to an arbitral institution. See A. P. Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* ¶11-056 (3d ed. 2009); Broches, *Commentary on the UNCITRAL Model Law on International Commercial Arbitration Art. 2, ¶¶4-6 (1990)* (“[T]he freedom given to the parties to choose the law applicable to the dispute by Art. 28(1)...was a fundamental principle of private international law. It was therefore not desirable to permit parties to entrust this choice to a third party, let alone to an arbitration institution.”); H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 150-82 (1989).

⁹¹ See [§1.02\[B\]\[6\]](#); [§15.02\[C\]](#).

⁹² See [§1.03](#); [§1.04\[C\]\[1\]](#).

⁹³ See J. Waincymer, *Procedure and Evidence in International Arbitration* ¶6.2.3 (2012) (“Another challenge to party autonomy arises where party agreement seeks to both utilise an institution but also alter the institutional rules or practices without the institution's prior consent. Parties to an arbitration agreement can only bind each other. When they select a particular institution, it is not based on an irrevocable institutional offer to utilise a procedure contrary to its norms.”).

⁹⁴ ⁽²⁾ 2010 UNCITRAL Rules, [Art. 1\(1\)](#) (emphasis added). See T. Webster, *Handbook of UNCITRAL Arbitration* ¶11-95 (2010) (“The expression ‘subject to such modifications as the parties may agree’ in Art. 1 establishes the clear primacy of party autonomy with respect to arbitration under the Rules.”).

⁹⁵ Article 1(3) of the UNCITRAL Rules acknowledges, indirectly, limits on the parties' procedural autonomy, imposed by mandatory national law, but does not separately impose any additional limits; the section provides that “[t]hese Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.” ⁽²⁾ 2010 UNCITRAL Rules, [Art. 1\(3\)](#).

⁹⁶ ⁽²⁾ 2010 UNCITRAL Rules, [Art. 17\(1\)](#).

⁹⁷ See [§15.03\[C\]](#).

⁹⁸ A number of provisions of the UNCITRAL Rules grant the parties the authority to resolve specific issues by agreement. See, e.g., ^[2] [2010 UNCITRAL Rules, Art. 18](#) (arbitral seat and places of hearings), Art. 19(1) (language), Art. 28(3) (public hearings), Art. 35 (applicable law). The arbitrators' procedural authority would not ordinarily provide a basis for overriding agreements on these subjects (as distinguished from subjects on which no such specific authorization for the parties' agreement existed in the Rules).

⁹⁹ LCIA Rules, Art. 14(1) (emphasis added).

¹⁰⁰ LCIA Rules, Art. 14(1).

¹⁰¹ 2012 ICC Rules, Art. 19 (emphasis added).

¹⁰² These provisions include the Terms of Reference and scrutiny of the arbitrators' draft awards by the ICC Court. See 2012 ICC Rules, Arts. 23(2), 33. See W. Craig, W. Park & J. Paulsson, *International Chamber of Commerce Arbitration* 295 (3d ed. 2000) ("The ICC Court will refuse to administer an arbitration with party agreed modifications to the Rules only when a fundamental characteristic of ICC arbitration (such as Court scrutiny of the award) is omitted."); [Y. Derains & E. Schwartz, A Guide to the ICC Rules of Arbitration 259-62, 312-16 \(2d ed. 2005\)](#); J. Fry, S. Greenberg & F. Mazza, *The Secretariat's Guide to ICC Arbitration* ¶¶3-862-79, 3-1181-20 (2012).

In contrast to the UNCITRAL and LCIA Rules, the ICC Rules do not expressly subject the parties' procedural autonomy to the arbitrators' procedural mandate to conduct the arbitration fairly and efficiently. See also ICSID Convention, Art. 44; 2010 SCC Rules, Art. 19(1).

¹⁰³ The ICDR Rules parallel the UNCITRAL Rules. See ICDR Rules, Art. 1(a) ("arbitration shall take place in accordance with these rules, ...subject to whatever modifications the parties may agree in writing"), Art. 1(b), Art. 16 ("Subject to these rules, the tribunal may conduct the arbitration in whatever manner it considers appropriate..."). Moreover, like the UNCITRAL Rules, a number of specific provisions of the ICDR Rules grant the parties the authority to resolve a number of specific issues by agreement. See, e.g., ICDR Rules, Art. 3(3) ("the number of arbitrators, the place of the arbitration or the language(s) of the arbitration"), Art. 6(1) ("parties may mutually agree upon any procedure for appointing arbitrators"), Art. 8 (challenge of arbitrators), Art. 18(1) (service of notices), Arts. 20(1), (2) (interpretation of oral testimony and whether hearing is private). It is unclear whether the arbitrators' procedural authority would ordinarily provide a basis for overriding agreements on these subjects.

Other institutional rules parallel the UNCITRAL and ICDR Rules in this respect. See 2012 CIETAC Rules, Art. 4(5) (parties' agreement generally prevails to modify rules unless conflict with mandatory law), Art. 7 (place of arbitration), Art. 8(2) (address of notice), Art. 23 (number of arbitrators), Art. 33(1) (conduct of hearing); 2013 HKIAC Rules, Art. 6(1) (number of arbitrators), Art. 8(1) (constitution of tribunal), Art. 14(1) (seat of arbitration), Art. 15(1) (language of arbitration), Art. 22(5) (timing period to give details of witness evidence), Art. 22(7) (whether hearing is private); 2013 SIAC Rules, Art. 5(2)(c) (whether to decide dispute on documentary evidence only), Art. 6(1) (number of arbitrators), Art. 12(3) (challenge of arbitrator), Art. 18(1) (seat of arbitration), Art. 19(1) (language of arbitration); 2013 VIAC Rules, Art. 25 (place of arbitration), Art. 16(1) (additional qualifications of arbitrators), Art. 14 (number of arbitrators), Art. 20(1) (conduct of proceedings, subject to Rules).

¹⁰⁴ See generally Carter, *The Rights and Duties of the Arbitrator: Six Aspects of the Rule of Reasonableness*, in ICC, *The Status of the Arbitrator* 24, 31 (ICC Ct. Bull. Spec. Supp. 1995); Littman, *The Arbitration Act 1996: The Parties' Right to Agree Procedure*, 13 Arb. Int'l 269 (1997); Partasides, §§33 and 34 of the English Arbitration Act 1996: A Potential Conflict, 13 Arb. Int'l 417 (1997); [Pryles, Limits to Party Autonomy in Arbitral Procedure, 24 J. Int'l Arb. 327 \(2007\)](#); Rokison, "...Pastures New", 14 Arb. Int'l 361, [366-67 \(1998\)](#); Veeder, *Whose Arbitration Is It Anyway: The Parties or the Arbitration Tribunal – An Interesting Question?*, in L. Newman & R. Hill (eds.), *The Leading Arbitrators' Guide to International Arbitration* 347 (2d ed. 2006). See also [§13.04\[B\]](#); [§13.04\[E\]](#).

¹⁰⁵ Carter, *The Rights and Duties of the Arbitrator: Six Aspects of the Rule of Reasonableness*, in ICC, *The Status of the Arbitrator* 24, 31 (ICC Ct. Bull. Spec. Supp. 1995). See also [Judgment of 8 March 1988, Sociétés Sofidif v. O/AETI, 1989 Rev. arb. 481, 486-89](#) (French Cour de cassation civ. 1e), Note, Jarrosson; Briner, *Intervention*, in E. Schwartz (ed.), *The Reform of Commercial Arbitration Procedures* 241 (1994) ("there are limits to the level of detail to which the parties can go in their agreement before they have to take into account the wishes of the arbitrators").

¹⁰⁶ See [§§13.04\[B\] & \[E\]](#); [§15.02](#); M. Mustill & S. Boyd, *Commercial Arbitration* 282 (2d ed. 1989) ("[I]f the parties decline to take his advice [regarding arbitral procedures], he should yield. He is, after all, no more than the agreed instrument of the parties."). This observation goes too far. If the arbitrator concludes that an agreed procedure is not merely inappropriate or unwise, but fundamentally unfair, then his duty is to refuse to give it effect. See [§13.04\[B\]](#); [§15.03\[C\]](#). Naturally, this will occur rarely, but if it does, the arbitrator's judicial function demands that he or she refuse to proceed with an unfair procedure and instead to complete his or her mandate with a fair procedure. See also Rowley & Wisner, *Party Autonomy and Its Discontents: The Limits Imposed by Arbitrators and Mandatory Laws*, 5 World Arb. & Med. Rev. 321, 321 (2011) ("Ultimately, arbitrators should remain servants of the parties, but should work hard with the parties to achieve an approach to procedural and substantive matters which is consistent with best practice and acceptable both to the parties and the arbitral tribunal.").

¹⁰⁷ See [§§13.04\[B\] & \[E\]](#); [§15.02](#).

¹⁰⁸ See [§13.04\[B\]](#).

¹⁰⁹ See [§8.02\[B\]](#); [§13.04\[B\]](#); Rowley & Wisner, *Party Autonomy and Its Discontents: The Limits Imposed by Arbitrators and Mandatory Laws*, 5 World Arb. & Med. Rev. 321, 327 (2011) ("best leadership alternative will almost always be persuasive, i.e., by persuading parties to consider alternatives, rather than by ordering them to follow arbitrators' wishes").

¹¹⁰ See [§13.04\[E\]](#).

¹¹¹ See [§§15.04\[A\]-\[B\]](#).

- ¹¹² See §§15.04[A]-[B]; §26.05[C][5].
- ¹¹³ See §15.02[D].
- ¹¹⁴ See §15.03[C]; ⁽²⁾ 2010 UNCITRAL Rules, Art. 17(1); ICDR Rules, Art. 16; LCIA Rules, Art. 14(1).
- ¹¹⁵ See §15.02[E][2], pp. 2142-43.
- ¹¹⁶ See §15.03[C].
- ¹¹⁷ See, e.g., DIS Rules.
- ¹¹⁸ See §15.02[E][2]. For a contrary suggestion, based on the view that agreements to arbitrate contain implied obligations of reasonableness, see Pryles, *Limits to Party Autonomy in Arbitral Procedure*, 24 J. Int'l Arb. 327, 333 (2007) ("there is an implied term that any agreement the parties may come to on matters of procedure will be within usual or common parameters for commercial arbitrations of the type and nature of the arbitration before the arbitral tribunal").
- ¹¹⁹ See, e.g., Chilean Organic Law of the Judiciary, Art. 223; Guatemalan Code of Civil and Commercial Procedure, Arts. 287, 288.
- The residual effects of this legislative approach remain even in France's current domestic arbitration legislation. *French Code of Civil Procedure*, Art. 1463 (six-month time limit), Art. 1464 (judicial procedures mandatorily applicable in domestic arbitration). See §11.03[D][2][b]; §15.08[P].
- ¹²⁰ Malouche, *National Report for Tunisia* (1996), in J. Paulsson (ed.), *International Handbook on Commercial Arbitration* 1, 7 (1984 & Update 1996); Thanh, in P. McConaughay & T. Ginsburg (eds.), *International Commercial Arbitration in Asia* 449-64 (2006) (Vietnam's Ordinance on Commercial Arbitration, 2003 guarantees party autonomy, abandoning earlier mandatory procedural requirements).
- ¹²¹ See §§11.03[C][1][c]-[e].
- ¹²² See §15.02[B].
- ¹²³ See §11.03[C][1][c]; §15.02.
- ¹²⁴ See §15.03[C].
- ¹²⁵ ICC, *Controlling Time and Costs in International Arbitration* 5 (2d ed. 2012).
- ¹²⁶ The arbitrators' broad procedural discretion was and remains an attribute of state-to-state arbitrations. See 1907 Convention for the Pacific Settlement of International Disputes (Second Hague Conference), Art. 74 ("The Tribunal is entitled to issue rules of procedure for the conduct of the case, to decide the forms, order, and time in which each party must conclude its arguments, and to arrange all the formalities required for dealing with the evidence."); Institute of International Law, *Projet de règlement pour la procédure arbitrale internationale* Art. 15 (1875); ⁽²⁾ ILC, *Memorandum on Arbitral Procedure, Prepared by the Secretariat*, U.N. Doc. A/CN.4/35, II Y.B. I.L.C. 157, 165-66, 171-74 (1950) ("where such rules [concerning the procedure] are lacking in the *compromis*, it has been customary for tribunals to adopt their own rules"); K. Carlston, *The Process of International Arbitration* 204 (1946) ("We may therefore regard it as established that whether so expressed or not in the protocol, commissions have an inherent right to establish rules governing the method of presentation and the consideration of cases submitted to them.").
- ¹²⁷ European Convention, Art. IV(4)(d).
- ¹²⁸ Inter-American Convention, Art. 3.
- ¹²⁹ IACAC Rules, Art. 15(1) ("Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.").
- ¹³⁰ Both Articles V(1)(b) and (d) of the New York Convention provide grounds for non-recognition of an award that presuppose the tribunal's power to determine arbitral procedures in the absence of agreement by the parties. New York Convention, Arts. V(1)(b), (d). See §15.02[A]; §§26.05[C][3] & [5].
- ¹³¹ See §§15.01[A]-[B]; §15.03.
- ¹³² See §2.02[C][4]; §15.03.
- ¹³³ As discussed below, most institutional arbitration rules expressly provide the arbitrators discretion to establish the arbitral procedures (absent agreement between the parties). See §15.03[C]. This grant of authority forms part of the parties' arbitration agreement and is entitled to recognition under Article II of the Convention.
- ¹³⁴ See §15.02[A].
- ¹³⁵ See §15.03[A]; G. Petrochilos, *Procedural Law in International Arbitration* 84 (2004) (imposition of archaic procedural requirements on international arbitration seated locally would "in the view of this author...be an excess of jurisdiction, a delict under international law").
- ¹³⁶ See §§15.04[A]-[B].
- ¹³⁷ UNCITRAL Model Law, Art. 19(2). As discussed below, Article 19(2) limits the tribunal's powers by reference to the "provisions of this Law," which includes Article 18's requirements that the parties be treated "with equality" and be given a "full opportunity of presenting [their] case[s]." See §15.04[B]. Article 24(1) of the Model Law is similar, providing that "[s]ubject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold an oral hearing for the presentation of evidence or for oral argument..." UNCITRAL Model Law, Art. 24(1). See §15.08[AA].
- ¹³⁸ Swiss Law on Private International Law, Art. 182(2).
- ¹³⁹ See, e.g., *French Code of Civil Procedure*, Arts. 1509, 1464 ("Unless otherwise agreed by the parties, the arbitral tribunal shall define the procedure to be followed in the arbitration. It is under no obligation to abide by the rules governing court proceedings."); German ZPO, §1047 ("Subject to agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings or whether the proceedings shall be conducted on the basis of documents and other materials."); *Belgian Judicial Code*, Art. 1700(2); *Netherlands Code of Civil Procedure*, Art. 1036 ("Subject to the provisions of this Title, the arbitral proceedings shall be conducted in such manner as agreed between the parties or, to the extent that the parties have not agreed, as determined by the arbitral tribunal."); Austrian ZPO, §598; Russian Arbitration Law, Art. 19(2).
- ¹⁴⁰ See, e.g., UNCITRAL Model Law, Art. 24(1); Singapore International Arbitration Act, 2012, Schedule 1, Art. 19(2); Hong Kong Arbitration Ordinance, 2013, §47(2); Japanese Arbitration Law, Art. 26(2) ("Failing such agreement [between the parties], the arbitral

tribunal may, subject to the provisions of this Law, conduct the arbitral proceedings in such manner as it considers appropriate.”); [Korean Arbitration Act, Arts. 20\(2\), 25\(1\)](#); [Indian Arbitration and Conciliation Act, §19\(3\)](#) (“Failing any agreement (between the parties)..., the arbitral tribunal may...conduct the proceedings in the manner it considers appropriate.”); [Malaysian Arbitration Act, §21\(2\)](#).

¹⁴¹ See, e.g., [Chilean International Commercial Arbitration Law, Art. 24\(1\)](#); [Costa Rican Arbitration Law, 2011, Art. 19\(2\)](#); [Mexican Commercial Code, Art. 1435\(2\)](#).

¹⁴² See U.S. FAA, [9 U.S.C. §2](#), [§4](#); [§1.04\[B\]\(1\)\[e\]\[iii\]](#).

¹⁴³ Revised Uniform Arbitration Act, §15(a) (2000).

¹⁴⁴ *Berhardt v. Polygraphic Co. of Am.*, [350 U.S. 198](#), 203 (U.S. S.Ct. 1956); *D.E.I., Inc. v. Ohio & Vicinity Reg'l Council of Carpenters*, 155 F.Appx. 164, 170 (6th Cir. 2005) (“Arbitrators are not bound by formal rules of procedure and evidence, and the standard for judicial review of arbitration procedures is merely whether a party to arbitration has been denied a fundamentally fair hearing.”) (quoting *Natl Post Office Mailhandlers v. U.S. Postal Serv.*, [751 F.2d 834](#), 841 (6th Cir. 1985)); *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier*, [508 F.2d 969](#), 975-76 (2d Cir. 1974) (“By agreeing to submit disputes to arbitration, a party relinquishes his courtroom rights – including that to subpoena witnesses – in favor of arbitration with all of its well known advantages and drawbacks.”); *Local 12934 of Int'l Union v. Dow Corning*, [459 F.2d 221](#), 223 (6th Cir. 1972) (“it has long been settled that where the substantive issues of a dispute are a proper subject for arbitration, procedural matters arising out of that dispute are for the arbitrator, not the courts, to determine”); *PK Time Group, LLC v. Robert*, 2013 WL 3833084, at *3-4 (S.D.N.Y.) (“The actions [that petitioner] alleges constitute misconduct were clearly just standard procedural rulings, well within the discretion of the Arbitrators in the control of the proceedings.”); *Laminoids-Trefleries-Cableries de Lens, SA v. Southwire Co.*, [484 F.Supp. 1063](#), 1067 (N.D. Ga. 1980) (“arbitrators are charged with the duty of determining what evidence is relevant and what is irrelevant, and that barring a clear showing of abuse of discretion, the court will not vacate an award based on improper evidence or the lack of proper evidence”).

¹⁴⁵ *U.S. Turnkey Exploration, Inc. v. PSI, Inc.*, [577 So.2d 1131](#), 1135 (La. App. 1991).

¹⁴⁶ *Int'l Union, United Mine Workers of Am. v. Marrowbone Dev. Co.*, [232 F.3d 383](#), 389 (4th Cir. 2000).

¹⁴⁷ [English Arbitration Act, 1996, §1, 34\(1\)](#); *ABB Attorney Gen. v. Hochtief Airport GmbH* [2006] EWHC 388 (Comm) (English High Ct.) (“[i]t is not a ground for intervention that the court considers that it might have done things differently”); *Petroships Pte Ltd of Singapore v. Petec Trading & Inv. Corp. of Vietnam, The Petro Ranger* [2001] 2 Lloyd's Rep. 348, 351 (QB) (English High Ct.) (award may be annulled under §68(2)(a) only “where it can be said that what has happened is so far removed from what can reasonably be expected of the arbitral process, that the Court will take action”); R. Merkin, *Arbitration Law* ¶14.2 (1991 & Update August 2013).

¹⁴⁸ See, e.g., [Canadian Commercial Arbitration Act, 2013, Art. 19\(2\)](#) (“Failing such agreement, the arbitral tribunal may, subject to the provisions of this Code, conduct the arbitration in such manner as it considers appropriate.”); [Alberta International Commercial Arbitration Act, Art. 19\(2\)](#); [British Columbia International Commercial Arbitration Act, §19\(2\)](#); [Ontario International Commercial Arbitration Act, Art. 19\(2\)](#); [Singapore International Arbitration Act, 2012, §3\(1\)](#), Schedule 1, Art. 19(2); [Hong Kong Arbitration Ordinance, 2013, §47\(2\)](#); [Australian International Arbitration Act, 2011, Schedule 2, Art. 19\(2\)](#); [New Zealand Arbitration Act, Schedule 1, Art. 19\(2\)](#). See also *Mungo v. Saverino*, [1995] O.J. No. 3021, ¶180 (Ontario Super. Ct.) (“If an arbitration is basically fair, Courts should resist the temptation to plunge into detailed complaints about flaws in the arbitration process.”).

¹⁴⁹ See, e.g., [Judgment of 15 June 1995, Sonidep v. Sigmoll](#), 1995 Rev. arb. 88 (French Cour de cassation civ. 1e) (generally for tribunal, by agreement with parties or acting under its own authority, to fix timetable for arbitral proceedings); *Éditions Chouette (1987) Inc. v. Desputeaux*, [2003] 1 S.C.R. 178, 220 (Canadian S.Ct.) (“Articles 2643 C.C.Q. and 944.1 C.C.P....affirm the principle of procedural flexibility in arbitration proceedings, by leaving it to the parties to determine the arbitration procedure or, failing that, leaving it up to the arbitrator to determine the applicable rules of procedure.”); *Dens Tech-Dens KG v. Netdent-Techs. Inc.*, [2008] QCCA 1245 (Québec Ct. App.) (arbitral tribunal has jurisdiction to decide validity of request for arbitration where request was filed by non-lawyer on behalf of company).

¹⁵⁰ [Judgment of 25 June 1992, X41 Y.B. Comm. Arb. 619, 625 \(Austrian Oberster Gerichtshof\) \(1997\)](#).

¹⁵¹ See, e.g., Kaufmann-Kohler, *Globalization of Arbitral Procedure*, 36 Vand. J. Transnat'l L. 1313 (2003); M. Kurkela & S. Turunen, *Due Process in International Commercial Arbitration* 3 (2d ed. 2010) (“Most of the provisions of the national arbitration laws are not mandatory. Accordingly, parties may agree on some other way of trying the case instead of following a certain procedural detail or provision in national law...Also, the national law is typically relatively open, at least compared to laws concerning ordinary civil procedure. The arbitrators have a lot of discretion on many specific questions.”); Park, *Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion*, 19 Arb. Int'l 279 (2003); Park, *Two Faces of Progress: Fairness and Flexibility in Arbitral Procedure*, 23 Arb. Int'l 499, 500-01 (2007); [Pyles, Limits to Party Autonomy in Arbitral Procedure](#), 24 J. Int'l Arb. 327 (2007); [Wetter, The Conduct of the Arbitration](#), 2(1) J. Int'l Arb. 7 (1985).

¹⁵² [2010 UNCITRAL Rules, Art. 1\(1\)](#). See [§15.02\[D\]](#), p. 2138.

¹⁵³ [2010 UNCITRAL Rules, Art. 17\(1\)](#). See generally Bagner, *Enforcement of International Commercial Contracts by Arbitration: Recent Developments*, 14 Case W. Res. J. Int'l L. 573, 577 (1982) (Article 17(1) is “heart” of UNCITRAL Rules); D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 30-36 (2d ed. 2013); T. Webster, *Handbook of UNCITRAL Arbitration* ¶17-29 (2010) (“The basic rule in Art. 17(1) is that the Tribunal is responsible for conduct of the arbitral proceedings. The responsibility is tempered by issues relating to (i) agreements or submissions of the parties on procedure; (ii) equal treatment of the parties; (iii) providing an opportunity to the parties to present their cases; and (iv) procedural efficiency.”).

154 ^[2] [2010 UNCITRAL Rules, Art. 17\(1\)](#).

155 See [§15.02\[D\]](#).

156 See [§15.04](#).

157 ^[3] [2010 UNCITRAL Rules, Art. 17\(1\)](#).

158 See ^[2] [2010 UNCITRAL Rules, Art. 7](#) (number of arbitrators), Art. 8-10 (appointment of arbitrators), Art. 18(1) ("If the parties have not previously agreed on the place of arbitration, the place of arbitration shall be determined by the arbitral tribunal..."), Art. 19(1) ("Subject to an agreement by the parties, the arbitral tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings."), Art. 35(1) ("The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute."); [§15.02\[D\]](#).

159 Thus, an arbitral tribunal could not, unless it found the parties' agreement invalid as a substantive matter, override the parties' choice of arbitral seat, language or substantive law. Only if that portion of the parties' arbitration agreement were formally defective, invalid (on grounds of duress, mistake, unconscionability, or the like), or impossible to perform, would a tribunal be authorized to disregard the parties' choice.

160 *Larsen v. Hawaiian Kingdom, Award in PCA Case of 5 February 2001*, 119 I.L.R. 566, 579-80 (2001).

161 See [§13.02\[C\]](#), p. 1969.

162 Parties would also in principle be free, pursuant to Article 1(1) of the UNCITRAL Rules, to modify Article 17(1) in their initial agreement to arbitrate, to require an arbitral tribunal to give effect to the parties' procedural agreements. That virtually never occurs in practice. If an arbitration agreement contained such provisions, they would likely be enforceable, subject to any applicable mandatory laws regarding arbitral procedures (e.g., requirements regarding equality of treatment or opportunity to be heard).

163 See [§15.02](#).

164 As discussed above, Article 1(1) confirms the parties' basic procedural autonomy, including the autonomy to modify the UNCITRAL Rules themselves. See [§15.02\[D\]](#), p. 2138.

165 See, e.g., 2012 ICC Rules, Art. 19(2); LCIA Rules, Art. 14(1); ICDR Rules, Art. 16(1); ICSID Rules, Rule 20; 2013 HKIAC Rules, Art. 13(1).

166 See, e.g., 2012 ICC Rules, Art. 22(4); ICDR Rules, Art. 16(2); LCIA Rules, Art. 14(1)(i); 2013 HKIAC Rules, Art. 13(1); 2010 SCC Rules, Art. 19(1); 2013 SIAC Rules, Art. 16(1); 2013 VIAC Rules, Art. 28. See also J. Fry, S. Greenberg & F. Mazza, *The Secretariat's Guide to ICC Arbitration* ¶3-814 (2012) ("Article 22(4) affirms an overriding and fundamental principle of arbitration, which finds expression in virtually all arbitration laws and rules as well as the New York Convention.").

167 See, e.g., 2012 ICC Rules, Art. 12(2) ("Where the parties have not agreed upon the number of arbitrators, the Court shall appoint a sole arbitrator."), Art. 18(1) ("The place of arbitration shall be fixed by the Court, unless agreed upon by the parties."), Art. 20 ("In the absence of an agreement by the parties, the arbitral tribunal shall determine the language..."); ICDR Rules, Art. 3(3) ("the number of arbitrators, the place of the arbitration or the language(s) of the arbitration"), Art. 6(1) ("parties may mutually agree upon any procedure for appointing arbitrators"), Art. 8 (challenge of arbitrators), Art. 18(1) (service of notices), Arts. 20(1), (2) (interpretation of oral testimony and whether hearing is private); LCIA Rules, Art. 16(1) ("The parties may agree in writing the seat (or legal place) of their arbitration."), Art. 17(1) ("The initial language of the arbitration shall be the language of the Arbitration Agreement, unless the parties have agreed in writing otherwise..."); 2010 SCC Rules, Art. 19(1); 2013 SIAC Rules, Art. 5(2)(c) (whether to decide dispute on documentary evidence only), Art. 6(1) (number of arbitrators), Art. 18(1) ("The parties may agree on the seat of arbitration..."), Art. 19(1) (language of arbitration); 2013 VIAC Rules, Art. 25 (place of arbitration and place of hearing), Art. 16(1) (additional qualifications of arbitrators), Art. 14 (number of arbitrators), Art. 20(1) (conduct of proceedings, subject to Rules).

168 Y. Derains & E. Schwartz, *A Guide to the ICC Rules of Arbitration* 224 (2d ed. 2005) ("[The ICC Rules] establish[] the following hierarchy among the governing rules: first, the Rules themselves; second, where no provisions of the Rules apply, any rules that the parties may agree upon; and third, any rules the arbitrators may settle."); J. Fry, S. Greenberg & F. Mazza, *The Secretariat's Guide to ICC Arbitration* 209 (2012) ("[T]he provisions of the Rules lie at the top of the hierarchy established by Article 19. In practice, agreements between the parties and agreements by the parties and decisions by the arbitral tribunal will have a greater role in determining the nature of the procedure... Article 22 places a limit on the arbitral tribunal's freedom to determine procedure by requiring it to conduct the arbitration fairly and impartially.").

169 See 2012 ICC Rules, Art. 23; [§15.08\[S\]](#), p. 2246.

170 See 2012 ICC Rules, Art. 13; LCIA Rules, Art. 5(5); [§12.03\[D\]](#) [\[4\]](#), p. 1710; [§12.03\[D\]](#) [\[5\]](#).

171 See 2012 ICC Rules, Art. 33; 2013 SIAC Rules, Art. 28(2); [§15.08\[KK\]](#), pp. 2304-05.

172 See J. Fry, S. Greenberg & F. Mazza, *The Secretariat's Guide to ICC Arbitration* ¶¶3-420, 3-1183 (describing case where arbitration clause sought to exclude ICC Court's power to confirm arbitrator appointment and award scrutiny: "[g]iven this was an affront to a fundamental feature of ICC arbitration, the Court determined that the arbitration could not proceed"). See [§26.05\[C\]](#) [\[5\]](#) [\[b\]](#).

173 See [§§15.01\[A\]-\[B\]](#); [§15.03\[C\]](#); [§25.02\[C\]](#) [\[2\]](#) [\[e\]](#); [§26.03\[D\]](#). It is often difficult to identify what precisely constitutes a mandatory procedural requirement of the arbitral seat (or elsewhere). D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 81 (2d ed. 2013) (determining content of mandatory law in arbitral seat "is not always an easy task, if only for the reason that the mandatory or non-mandatory character of a particular norm may be difficult to determine even for a lawyer educated in the country in question").

174 New York Convention, Arts. II(1), (3). See [§15.02\[A\]](#).

175 See [§15.02\[A\]](#).

176 New York Convention, Art. V(1)(b); [§26.05\[C\]](#) [\[3\]](#).

177 New York Convention, Art. V(1)(d); [§26.05\[C\]](#) [\[5\]](#).

178 New York Convention, Art. V(2)(b); [§26.05\[C\]](#) [\[9\]](#).

179 See [§1.04\[A\]](#) [\[1\]](#) [\[c\]](#) [\[i\]](#); [§26.05\[C\]](#) [\[3\]](#), [\[5\]](#) & [\[9\]](#).

180 See [§26.05\[C\]](#) [\[3\]](#).

181 See [§§26.05\[C\]\[5\] & \[9\]](#).

182 New York Convention, Arts. II(1), (3).

183 See [§15.08\[MM\]](#).

184 As discussed above, this is analogous to Article II's requirement that Contracting States apply generally-applicable, internationally-neutral rules of contract law to the validity of arbitration agreements. See [§4.04\[B\]\[2\]\[b\]\[iii\]](#).

185 See [§15.02\[A\]](#).

186 See [§15.02\[A\]](#).

187 See [§15.02\[B\]](#). See also Sanders, *Commentary on the UNCITRAL Arbitration Rules*, II Y.B. Comm. Arb. 172, 179-80 (1977) ("where an arbitration under the UNCITRAL Rules is of an international character, provisions in the Rules although in conflict with national public policy for domestic arbitration, may nevertheless be upheld, when the more restrictive standard of international public policy is applied"); Schwarz & Ortner, *Procedural Order Public and the Internationalization of Public Policy in Arbitration*, 2008 Austrian Arb. Y.B. 133; Schwebel & Lahne, *Public Policy and Arbitral Procedure*, in P. Sanders (ed.), *Comparative Arbitration and Public Policy in Arbitration 205* (ICCA Congress Series No. 3 1987).

188 See [§1.04\[A\]\[1\]\[c\]\[i\]](#).

189 New York Convention, Art. V(1)(b); [§26.05\[C\]\[3\]](#).

190 The grounds for non-recognition under Article V(1)(b), and the international character of those grounds, are discussed below. See [§26.05\[C\]\[3\]](#).

191 See [§26.05\[C\]\[3\]\[c\]](#).

192 See [§26.05\[C\]\[3\]\[c\]](#); *Case Concerning Elettronica Sicula SpA (ELSI)* (U.S.A.), Judgment of 20 July 1989, [1989] I.C.J. Rep. 15, 65 (I.C.J.) (contrasting procedural fairness required by international law with arbitrariness: "Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. This idea was expressed by the Court in the Asylum case, when it spoke of 'arbitrary action' being 'substituted for the rule of law... It is a wilful disregard of due process of law.'"); 2004 U.S. Model Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment, Art. 5(2)(a) ("fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world").

193 See [§26.05\[C\]\[3\]](#).

194 See [§26.05\[C\]\[3\]\[a\]](#).

195 See [§26.05\[C\]\[3\]\[f\]](#).

196 See [§26.05\[C\]\[3\]\[f\]](#).

197 New York Convention, Art. V(1)(b); [§26.05\[C\]\[5\]](#).

198 See [§26.05\[C\]\[5\]\[b\]](#).

199 See [§26.05\[C\]\[5\]\[c\]](#).

200 See [§26.05\[C\]\[5\]\[c\]\[iii\]](#).

201 See [§26.05\[C\]\[5\]\[b\]\[v\]](#).

202 See [§26.05\[C\]\[9\]](#).

203 See [§25.04\[H\]](#).

204 See, e.g., Mayer & Sheppard, *Final ILA Report on Public Policy as A Bar to Enforcement of International Arbitral Awards*, 19 Arb. Int'l 249, [251 n.10](#) (2003); Schwebel & Lahne, *Public Policy and Arbitral Procedure*, in P. Sanders (ed.), *Comparative Arbitration and Public Policy in Arbitration 205*, 209 (ICCA Congress Series No. 3 1987) (concluding that courts are "increasingly recognizing that narrow, nationalistic grounds of public policy that might be properly applicable in domestic cases are inappropriate in international cases").

205 See [§26.05\[C\]\[9\]](#). See also Mantilla-Serrano, *Towards A Transnational Procedural Public Policy*, 20 Arb. Int'l 333, [347](#) (2004) (noting "difficulties in applying transnational procedural public policy").

206 See [§11.03\[C\]\[1\]\[c\]\[vi\]](#); [§25.02\[B\]](#).

207 See [§4.04\[B\]\[2\]\[b\]\[iii-iv\]](#).

208 See [§4.04\[B\]\[2\]\[b\]\[i\]](#). Local procedural rules of this nature would also contradict the premise, contained in Article V(1)(d), that the parties' agreement would be given effect, with the law of the arbitral seat serving only a gap-filling and default function.

209 See [§26.05\[C\]\[9\]](#).

210 See [§1.04\[A\]\[1\]\[c\]\[i\]](#).

211 See [§26.05\[C\]](#).

212 See [§25.04\[B\]\[6\]](#); [§26.05\[C\]\[3\]\[f\]](#); [§26.05\[C\]\[5\]\[b\]\[v\]](#). See also Sanders, *Commentary on the UNCITRAL Arbitration Rules*, II Y.B. Comm. Arb. 172, 179-80 (1977) ("where an arbitration under the UNCITRAL Rules is of an international character, provisions in the Rules although in conflict with national public policy for domestic arbitration, may nevertheless be upheld, when the more restrictive standard of international public policy is applied."); Schwarz & Ortner, *Procedural Order Public and the Internationalization of Public Policy in Arbitration*, 2008 Austrian Arb. Y.B. 133; Schwebel & Lahne, *Public Policy and Arbitral Procedure*, in P. Sanders (ed.), *Comparative Arbitration and Public Policy in Arbitration 205* (ICCA Congress Series No. 3 1987).

213 See [§11.03\[F\]](#); [§11.05\[E\]](#).

214 See [§11.05\[E\]](#).

215 See [§12.01\[B\]\[2\]](#); [§12.04\[A\]\[4\]](#); [§12.04\[B\]\[5\]](#).

216 See [§15.02](#).

217 See [§§15.01\[A\]-\[B\]](#); [§15.03\[A\]](#).

218 See [§1.04\[C\]\[3\]](#); [§§1.04\[C\]\[3\]-\[4\]](#).

219 See [§18.02\[A\]](#).

220 See [§4.06\[A\]\[2\]](#); [§11.03\[C\]\[1\]\[c\]\[iii\]](#).

221 See [§§11.04\[C\]\[1\]\[c\]\[iv\]-\[v\]](#).

222 European Convention, Art. IX(1)(b) (Contracting State may set aside award where "the party requesting the setting aside of the award was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case"); Inter-American Convention, Arts. 5(1)(b), (2)(b).

223 European Convention, Art. IX(1)(d) (Contracting State may set aside award where "the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties"); Inter-American Convention, Arts. 5(1)(b), (2)(b).

224 See [§15.02](#); [§15.03](#).

225 As discussed above, most national arbitration legislation imposes mandatory procedural requirements on arbitrations seated

in their local territory. See [§11.03\[C\]\[2\]](#); [§11.03\[D\]](#); [UNCITRAL Model Law, Arts. 1\(2\), 18](#); [English Arbitration Act, 1996, §§2\(1\), 33](#); [Swiss Law on Private International Law, Arts. 176\(1\), 182\(3\)](#); [Japanese Arbitration Law, Arts. 3\(1\), 25](#).

²²⁶ See [§5.01\[D\]](#); [U.S. Constitution, Amends. V, XIV](#) ("due process of law").

²²⁷ Inoue, *The Due Process Defense to Recognition and Enforcement of Foreign Arbitral Awards in United States Federal Courts: A Proposal for A Standard*, 11 Am. Rev. Int'l Arb. 247 (2000); M. Kurkela & S. Turunen, *Due Process in International Commercial Arbitration passim* (2d ed. 2010).

²²⁸ In most jurisdictions, constitutional requirements of due process and procedural fairness, applicable to national courts and other state entities, do not apply directly to arbitral tribunals. See, e.g., *Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc.*, [191 F.3d 198](#), 206 (2d Cir. 1999) (Due Process Clause does not apply to private arbitration); *FDIC v. Air Fla. Sys., Inc.*, [822 F.2d 833](#), 842 n.9 (9th Cir. 1987) (same); *Lufuno Mphaphuli & Assocs. Pty Ltd v. Andrews*, [2009] ZACC 6, ¶17 (South African Const. Ct.) (South African constitutional requirement for public hearing not applicable to arbitration: "[A]rbitral proceedings...will differ from proceedings before a court, statutory tribunal or forum....[T]he proceedings need not be in public at all."). See also *Davis v. Prudential Sec., Inc.*, [59 F.3d 1186](#), 1191 (11th Cir. 1995) ("It is axiomatic that constitutional due process protections do not extend to private conduct abridging individual rights" and "the state action element of a due process claim is absent in private arbitration cases."); Cole & Spitko, *Arbitration and the Batson Principle*, 38 Ga. L. Rev. 1145, 1178-97 (2004); Kay, *The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law*, 10 Const. Commentary 329 (1993); P. Rutledge, *Arbitration and the Constitution* (2012). Compare [Gyrfas, Constitutional Scrutiny of Arbitral Awards: Odd Precedents in Central Europe](#), 29 J. Int'l Arb. 391 (2012).

²²⁹ [UNCITRAL Model Law, Art. 18](#) (emphasis added).

²³⁰ H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 550, 564 (1989) ("Although Article 18 is only one sentence long, it is the heart of the law's regulation of arbitral proceedings – other Articles provide the detailed mechanisms by which the goals of equality and fair procedure are to be achieved."). See also *Noble China Inc. v. Lei Kat Cheong*, (1998) 42 O.R.3d 69 (Ontario Super. Ct.); P. Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* ¶5-0005 (3d ed. 2009) ("Indeed, art. 18 can be regarded as one of the 'pillars' of the Model Law or even as one of the pillars of any modern judicial system: its essence of guaranteeing the parties equal treatment and an opportunity to present their cases is the basis of a fair trial.").

²³¹ [UNCITRAL, Report of the Working Group on International Contract Practices on the Work of Its Seventh Session, U.N. Doc. A/CN.9/246, ¶162, XI/ Y.B. UNCITRAL 189, 196 \(1984\)](#).

²³² [UNCITRAL, Report of the Secretary-General on the Analytical Commentary on Draft Text of A Model Law on International Commercial Arbitration, U.N. Doc. A/CN.9/264, Art. 19, ¶19 \(1985\)](#) ("arbitral tribunal must be guided, and indeed abide, by this principle when determining the appropriate conduct of the proceedings, for example, when fixing time-limits for submission of statements or evidence or when establishing the modalities of hearings").

²³³ [UNCITRAL, Summary Records of the United Nations Commission on International Trade Law for Meetings Devoted to the Preparation of the UNCITRAL Model Law on Intern. 322d Meeting, U.N. Doc. A/CN.9/SR.305-333, ¶28, XI/ Y.B. UNCITRAL 399, 468 \(1985\)](#). See also [UNCITRAL, Report of the Secretary-General on the Analytical Commentary on Draft Text of A Model Law on International Commercial Arbitration, U.N. Doc. A/CN.9/264, Art. 19, ¶17 \(1985\)](#) ("It is submitted that these principles, in view of their fundamental nature, are to be followed in all procedural contexts, including, for example, the procedures referred to [regarding composition of the arbitral tribunal] in articles 13 and 14."); [UNCITRAL, Report of the UNCITRAL on the Work of the Eighteenth Session, U.N. Doc. A/40/17, ¶106, XVI Y.B. UNCITRAL 3, 16 \(1985\)](#).

The drafters of the Model Law deleted language from what became Article 18 providing that its procedural guarantees applied "at any stage of the proceeding." [UNCITRAL, Report of the Working Group on International Contract Practices on the Work of Its Fourth Session, U.N. Doc. A/CN.9/232, ¶104, XIV Y.B. UNCITRAL 33, 43 \(1983\)](#). This was done, however, in order to discourage dilatory tactics and does not alter the clear textual language and drafting history showing that Article 18 was applicable throughout the arbitral process. See also H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 551-52 (1989).

²³⁴ H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 552 (1989).

²³⁵ [UNCITRAL, Report of the Secretary-General on the Analytical Commentary on Draft Text of A Model Law on International Commercial Arbitration, U.N. Doc. A/CN.9/264, Art. 19, ¶11 \(1985\)](#).

²³⁶ [UNCITRAL, Report of the Secretary-General on the Analytical Commentary on Draft Text of A Model Law on International Commercial Arbitration, U.N. Doc. A/CN.9/264, Art. 19, ¶17 \(1985\)](#).

²³⁷ The UNCITRAL Model Law is, as discussed above, adopted in individual states. Nonetheless, the origins of the Model Law, in international negotiations under UNCITRAL's auspices, and the character of the Model Law, as an international instrument aimed at achieving uniformity, argue strongly for looking to international sources in interpreting Article 18's guarantees of equal treatment and an opportunity to be heard.

²³⁸ [UNCITRAL, Note of the Secretariat, Model Law on International Commercial Arbitration: Draft Articles 1 to 24 on Scope of Application, Arbitration Agreement, Arbitrators, and Arbitral Procedure, U.N. Doc. A/CN.9/WG.III/WP.37, Art. 19, n.34, XIV Y.B. UNCITRAL 51, 54 \(1983\)](#). See also A. Broches, *Commentary on the UNCITRAL Model Law on International Commercial Arbitration* 94

(1990) ("The principle was accepted at the first session of the Working Group which agreed that the model law should contain a mandatory provision modeled after Art. 15(1) of the UNCITRAL Arbitration Rules."); H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 551 (1989) ("The terms of Article 18 were modeled on Article 15(1) of the UNCITRAL Arbitration Rules....[T]he delegates considered that the terms were so well understood in all legal systems that comment was unnecessary and detailed definitions might limit the flexible and broad approach needed.").

²³⁹ ^[2] [UNCITRAL, Report of the Secretary-General on the Analytical Commentary on Draft Text of A Model Law on International Commercial Arbitration, U.N. Doc. A/CN.9/264, Art. 19, ¶1\(1985\).](#)

²⁴⁰ [UNCITRAL Model Law, Arts. 34\(2\)\(a\)\(ii\); 36\(1\)\(a\)\(ii\).](#)

See [§25.04\[B\]; §26.05\[C\]\[3\]](#).

²⁴¹ See [§25.03\[A\]](#).

²⁴² See [§25.04\[B\]\[7\]; §25.04\[C\]\[7\]; §25.04\[D\]\[7\]; §25.04\[E\]\[4\]; §25.04\[F\]\[6\]](#).

²⁴³ Similarly, an arbitrator who is biased or lacks required qualifications will be subject to removal under [Article 12\(2\) of the UNCITRAL Model Law](#). See [§12.05\[A\]\[1\]\[b\]](#). This does not mean, however, that the arbitrators' eventual award, if he or she is not challenged, would be subject to annulment or non-recognition. As discussed below, issues of waiver and causation, as well as the existence of different substantive standards for removal and annulment/non-recognition, may preclude annulment or non-recognition even if the arbitrator could have been removed during the arbitral process. See [§25.04\[E\]\[4\]](#).

²⁴⁴ [French Code of Civil Procedure, Art. 1464](#) (domestic arbitration), [Art. 1510](#) (international arbitration). A similar statutory requirement existed under the former French New Code of Civil Procedure with regard to domestic arbitrations and was applied by analogy to international arbitrations. See [E. Gaillard & J. Savage \(eds.\), Fouchard Gaillard Goldman on International Commercial Arbitration ¶¶1169 et seq. \(1999\).](#)

²⁴⁵ *Judgments of 18 November 1987 & 4 May 1988, Chambre arbitrale de Paris v. République de Guinée*, 1988 Rev. arb. 657, 657 (Paris Cour d'appel). See also *Judgment of 18 April 1991, MORIS v. Supermkt Sys.*, 1995 Rev. arb. 448 (Paris Cour d'appel); *Judgment of 25 May 1990, Fougerolle v. Procofrance*, 1990 Rev. arb. 892, 896 (Paris Cour d'appel) (equal treatment of parties is "a general principle of procedure founded in procedural public policy"); *Judgment of 19 January 1990, Immoplan v. Mercure*, 1991 Rev. arb. 125 (Paris Cour d'appel).

²⁴⁶ *Planor Afrique SA v. Société Emirates Télécomm. corp. 'Etisalat'*, 2012 Rev. arb. 569 (Paris Cour d'appel); *Société Commercial Caribéen Niquel v. Société Overseas Mining Invs. Ltd.*, 2011 Rev. arb. 442 (Paris Cour d'appel); *Judgment of 27 November 1987, C.C.M. Sulzer v. Somagrec*, 1989 Rev. arb. 62 (Paris Cour d'appel). See [Chainais, L'arbitrage, le droit et la contradiction: l'offre du juge arbitral à la recherche de son point d'équilibre](#), 2010 Rev. arb. 3; [E. Gaillard & J. Savage \(eds.\), Fouchard Gaillard Goldman on International Commercial Arbitration ¶¶1638-44 \(1999\).](#)

²⁴⁷ [Swiss Law on Private International Law, Art. 182\(3\)](#). See B. Berger & F. Kellerhals, *Internationale und interne Schiedsgerichtsbarkeit in der Schweiz* ¶¶1003 et seq. (2d ed. 2010); Schneider, in S. Berti et al. (eds.), *International Arbitration in Switzerland* Art. 182, ¶¶49 et seq. (2000).

²⁴⁸ See S. Berti & A. Snyder, in S. Berti et al. (eds.), *International Arbitration in Switzerland* Art. 190, 580 (2000) ("The right to be heard gives each party the opportunity to plead all the facts which it deems to be of relevance, argue points of law, make pertinent offers of evidence and participate in the hearings. Contradictory proceedings allow each party to hear and examine what the other party has to say, make observations and refute by counter-allegations and evidence."); [T. Zuberbühler, et al. \(eds.\), Swiss Rules of International Arbitration: Commentary 253 \(2005\)](#) ("The right to be heard is a fundamental principle of procedural law....It includes the right of each party to give its views on any and all circumstances important for the decision, to support its legal points, to make motions, to obtain relevant evidence and to participate in any hearings. In addition, Swiss arbitration law requires that the parties are heard in adversarial proceedings (Art. 182(3) PILS). This means that each party must have the opportunity to scrutinize the other party's arguments, to express its views thereon and to try to prove them wrong with its own allegations and proofs.").

²⁴⁹ European Convention on Human Rights, Art. 6(1) ("In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society..."), Art. 6(3) ("Everyone charged with a criminal offence has the following minimum rights: a. to be informed promptly, in a language he understands and in detail, of the nature and cause of the accusation against him; b. to have adequate time and facilities for the preparation of his defence; c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court."). See also International Covenant on Civil and Political Rights, U.N. General Assembly Resolution 2200A (XX) of 16 December 1966, Art. 14(3) (entry into force 23 March 1976).

²⁵⁰ *Judgment of 7 January 2011, DFT 137 III 85, ¶4.1* (Swiss Federal Tribunal). See also *Judgment of 30 December 1994, 13 ASA Bull. 217, 221* (Swiss Federal Tribunal) (1995).

²⁵¹ See, e.g., [UNCITRAL Model Law, Art. 18](#); [English Arbitration Act 1996, §33\(1\)](#); [Belgian Judicial Code, Art. 1699](#); [Netherlands Code of Civil Procedure, Arts. 1036, 1039\(1\), \(2\)](#); [Singapore International Arbitration Act, 2012, §§3\(1\), 15A\(1\)](#); [Hong Kong Arbitration Ordinance, 2013, Art. 46](#); [Japanese Arbitration Law, Art. 25](#) ("(1) The parties shall be treated with equality in the arbitral proceeding. (2) Each party shall be given a full opportunity of presenting its case in the arbitral proceedings."); [Australian](#)

[International Arbitration Act, 2011, Schedule 2, Art. 19](#); [Indian Arbitration and Conciliation Act, 1996](#), §18 ("The parties shall be, treated with equality and each party shall be given a full opportunity to present his case."); [New Zealand Arbitration Act, Schedule 1, Art 18](#); [Costa Rican Arbitration Law, 2011, Art. 19](#).

²⁵² Section 10 of the FAA contains the grounds for vacating an arbitral award subject to the domestic FAA. U.S. FAA, [§9 U.S.C. §10](#). As discussed below, §10 permits annulment if "the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced." See [§25.04\[B\]\[3\]\[c\]](#).

²⁵³ *China Nat'l Bldg Material Inv. Co. v. BNK Int'l LLC*, 2009 WL 4730578, at *6 (W.D. Tex.) (quoting *Karah Bodas*, [364 F.3d at 298-99](#)). See also *Tempo Shain Corp. v. Bertek, Inc.*, [120 F.3d 16](#), 20 (2d Cir. 1997) ("Federal courts do not superintend arbitration proceedings. Our review is limited to determining whether the procedure was fundamentally unfair."); *Generica Ltd v. Pharm. Basics, Inc.*, [125 F.3d 1123](#), 1130 (7th Cir. 1997) ("arbitrator must provide a fundamentally fair hearing" that "meets 'the minimal requirements of fairness' – adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator").

²⁵⁴ *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L'Industrie du Papier (RAKTA)*, [508 F.2d 969](#), 976 (2d Cir. 1974).

²⁵⁵ See, e.g., *Gbangbola v. Smith & Sheriff Ltd* [1998] 1 TCLR 136, 137 (QB) (English High Ct.) ("tribunal was subject to its mandatory duties under section 33 of the Act to act fairly and impartially, giving each party a reasonable opportunity of putting its case"); *Judgment of 6 September 1990*, 1991 RdW 327 (Austrian Oberster Gerichtshof); *Judgment of 24 September 1981*, 1982 ÖJZ 77 (Austrian Oberster Gerichtshof); *WFA v. Hobart City Council*, [2000] NSWCA 43 (N.S.W. Ct. App.) (arbitration agreement requiring arbitrators to disregard rules of natural justice would be void on public policy grounds); *Teléfonos de México, Sociedad Anónima de Capital Variable*, Amparo en Revision 759/2003 (Mexican Suprema Corte de Justicia) (arbitrators' authority to conduct proceedings limited by requirement to afford parties opportunity to be heard). See also M. Kurkela & S. Turunen, *Due Process in International Commercial Arbitration* 1-14 (2d ed. 2010); Mantilla-Serrano, *Towards A Transnational Procedural Public Policy*, 20 Arb. Int'l 333 (2004); [Schwarz & Ortner, Procedural Order Public and the Internationalization of Public Policy in Arbitration](#), 2008 Austrian Arb. Y.B. 133.

²⁵⁶ *Vera-Jo Miller Aryeh v. Islamic Repub. of Iran*, Award in IUSCT Case No. 581-842/843/844-1 of 22 May 1997, 33 Iran-US C.T.R. 272, 287-88 (1997). See also *Pope & Talbot, Inc. v. Gov't of Canada*, *Decision on Privileges in NAFTA Case of 6 September 2000*, ¶1.5, available at [www.naftaclaims.com](#) ("overriding principle (Article 15) that the parties be treated with equality").

²⁵⁷ See [§§1.02\[B\]\[6\]-\[7\]](#).

²⁵⁸ See Park, *Two Faces of Progress: Fairness and Flexibility in Arbitral Procedure*, 23 Arb. Int'l 499 (2007).

²⁵⁹ *Order of 15 September 1983 in IUSCT Case No. 37 & 231 (220-37/213-1)*, *Foremost Tehran Inc. v. Islamic Repub. of Iran*, cited in D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 70 (2d ed. 2013) ("Article 15 of the Tribunal Rules requires that the Tribunal treat the parties equally. This is a fundamental principle of justice.").

²⁶⁰ [UNCITRAL Model Law, Art. 18](#). See [§2 UNCITRAL, 2012 Digest of Case Law on the Model Law on International Commercial Arbitration 97 \(2012\)](#) ("The obligation to treat parties with equality requires the arbitral tribunal to apply similar standards to all parties and their representatives throughout the arbitral process."); P. Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* ¶¶5.003 to 5.012 (3d ed. 2009); H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 550-63 (1989).

²⁶¹ [2010 UNCITRAL Rules, Art. 17\(1\)](#). See D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 32-34 (2d ed. 2013); T. Webster, *Handbook of UNCITRAL Arbitration* ¶¶17-40 to 17-55 (2010).

²⁶² [UNCITRAL, Report of the UNCITRAL on the Summary of Discussion of the Preliminary Draft, Eighth Session](#), U.N. Doc. A/10017, ¶99, VI Y.B. UNCITRAL 24, 35 (1975).

The original draft of the 1976 version of the UNCITRAL Rules provided that the parties were required to be treated with "absolute equality." [UNCITRAL, Report of the Secretary-General on the Preliminary Draft Set of Arbitration Rules for Optional Use in Ad Hoc Arbitration Relating to International Trade, UNCITRAL Eighth Session](#), U.N. Doc. 9/97, VI UNCITRAL Y.B. 163, 172-73 (1975). The reference to "absolute" equality was deleted in the final draft in order to avoid suggestions that mechanical standards were applicable, but the Rules continued to expressly mandate equal treatment of the parties.

²⁶³ See [UNCITRAL Model Law, 2006 Revisions, Art. 18](#).

²⁶⁴ [English Arbitration Act, 1996, §33\(1\)\(a\)](#) ("The arbitral tribunal must: act fairly and impartially as between the parties..."); [French Code of Civil Procedure, Art. 1510](#) ("Irrespective of the procedure adopted, the arbitral tribunal shall ensure that the parties are treated equally..."); [Scottish Arbitration Act, 2010, Schedule 1, Rule 24\(1\)\(b\)](#) ("The tribunal must...treat the parties fairly."); [Singapore International Arbitration Act, 2012, Schedule 1, Art. 18](#) (incorporating [UNCITRAL Model Law, Art. 18](#)); [Hong Kong Arbitration Ordinance, 2013, §46\(2\)](#) ("The parties must be treated with equality."). See also ALI/UNIDROIT Principles of Transnational Civil Procedure, Principle 3.1 (2004).

²⁶⁵ [Swiss Law on Private International Law, Art. 182\(3\)](#).

²⁶⁶ *Judgment of 19 February 2009*, 27 ASA Bull. 801, ¶4.1 (2009) (Swiss Federal Tribunal). See also *Judgment of 31 January 2012*, DFT 4A_360 2012, ¶4.1 (Swiss Federal Tribunal) ("Equal treatment of the parties requires the proceedings to be organized and conducted in such a way that each party has the same possibilities to present its arguments."); *Judgment of 20 July 2011*, DFT 4A_162/2011, ¶2.3.3 (Swiss Federal Tribunal) ("principle of equal treatment of the parties demands that the arbitral tribunal should in particular treat the parties equally in all procedural issues");

[Judgment of 10 December 2002, 21 ASA Bull. 585, ¶3 \(2003\)](#) (Swiss Federal Tribunal) ("The principle of equal treatment of the parties in accordance with [Article 190\(2\) of the \[Swiss Law on Private International Law\]](#) requires procedural equality between the parties in similar situations; it is broadly compatible with the right to be heard.").

²⁶⁷ *Soh Beng Tee & Co. Prop. Ltd v. Fairmount Dev. Prop. Ltd*, [2007] SGCA 28, ¶65 (Singapore Ct. App.). See also *ED & F Man Sugar Ltd v. Belmont Shipping Ltd* [2011] EWHC 2992, ¶¶12-19 (Comm) (English High Ct.); *London Underground Ltd v. Citylink Telecomms. Ltd* [2007] EWHC 1749, ¶¶26-37 (TCC) (English High Ct.).

²⁶⁸ See, e.g., ¹⁵ [2010 UNCITRAL Rules, Art. 17\(1\)](#); ICDR Rules, Art. 16(1); 2013 AAA Rules, Rule 32(a); 2012 Swiss Rules, Art. 15(1); 2012 CIETAC Rules, Art. 22; 2013 HKIAC Rules, Art. 13(5); 2013 VIAC Rules, Art. 28(1).

²⁶⁹ 2012 ICC Rules, Art. 22(4) (emphasis added). See also LCIA Rules, Art. 14(1)(i); 2012 CIETAC Rules, Art. 33(1); 2013 SIAC Rules, Art. 16(1).

²⁷⁰ Paulsson, *The Timely Arbitrator: Reflections on the Böckstiegel Method*, 22 Arb. Int'l 19, 23-24 (2006).

²⁷¹ See [§15.04\[B\]](#); [§25.04\[B\]\[1\]](#).

²⁷² ¹⁵ [UNCITRAL, 2012 Digest of Case Law on the Model Law on International Commercial Arbitration 98 \(2012\)](#) ("This principle extends to both evidence and submissions on the facts and on the law.").

²⁷³ *Trustees of Rotoaira Forest Trust v. Attorney-Gen.*, [1999] 2 NZLR 452 (Comm) (Auckland High Ct.).

²⁷⁴ [J. Waincymer, Procedure and Evidence in International Arbitration 82 \(2012\)](#).

²⁷⁵ See [§15.08\[AA\]\[5\]](#); [Y. Derains & E. Schwartz, A Guide to the ICC Rules of Arbitration 229 \(2d ed. 2005\)](#) (arguing that "fairness" requires tribunal to give more time to a party that has provided *prima facie* evidence of bribery to gather evidence, as such claims are harder to prove).

²⁷⁶ See ALI/UNIDROIT Principles of Transnational Civil Procedure, comment P-3A (2004).

²⁷⁷ [Y. Derains & E. Schwartz, A Guide to the ICC Rules of Arbitration 229 \(2d ed. 2005\)](#) ("Article 15(2) [of the 1998 ICC Rules] provides that the parties are to be treated 'fairly', rather than 'with equality'. This is because, in some cases, treating the parties in precisely the same manner may lead to unfair results, at least if 'equality' is viewed in the abstract.").

²⁷⁸ See [§25.04\[B\]\[4\]](#), p. 3233; *Order of 15 September 1983 in IUSCT Case No. 37 and 231 (220-37/213-1), Foremost Tehran Inc. v. Islamic Repub. of Iran*, cited in D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 70 (2013) ("Article 15 of the [1983] Tribunal Rules requires that the Tribunal treat the parties equally. This is a fundamental principle of justice. In the circumstances of these cases, the delicate balance of equality would be tipped if one party were to be permitted to present an extensive Memorial and additional exhibits, without providing an opportunity for the other party to file a memorial in response. While the filing by Claimants of their Memorial on the Merits prior to the Hearing may be an advantage to the Respondents in that it informs them in detail of Claimants' contentions and arguments and may be of assistance to the Tribunal in analyzing the case, nevertheless it cannot be accepted without providing the Respondents an equal opportunity to make a written submission.").

²⁷⁹ New York Convention, Art. V(1)(b). See [§26.05\[C\]\[3\]](#).

²⁸⁰ [UNCITRAL Model Law, Art. 18](#). See [Singapore International Arbitration Act, 2012, Schedule 1, Art. 18](#) (incorporating [UNCITRAL Model Law, Art. 18](#)); H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 550-63 (1989).

²⁸¹ ¹⁵ [UNCITRAL, Report of the Secretary-General on the Analytical Commentary on Draft Text of A Model Law on International Commercial Arbitration, U.N. Doc. A/CN.9/264, Art. 19, ¶7 \(1985\)](#).

²⁸² ¹⁵ [UNCITRAL, Report of the Secretary-General on the Analytical Commentary on Draft Text of A Model Law on International Commercial Arbitration, U.N. Doc. A/CN.9/264, Art. 19, ¶7 \(1985\)](#).

²⁸³ [English Arbitration Act, 1996, §33\(1\)\(2\)](#) ("The tribunal shall... [give] each party a reasonable opportunity of putting his case and dealing with that of his opponent."); [Swiss Law on Private International Law, Art. 182\(3\)](#) ("Regardless of the procedure chosen, the arbitral tribunal shall ensure... their right to be heard in adversarial proceedings."); [Scottish Arbitration Act, Schedule 1, Rule 24\(2\)](#) ("Treating the parties fairly includes giving each party a reasonable opportunity to put its case and to deal with the other party's case."); [Hong Kong Arbitration Ordinance, 2013, §46\(3\)\(b\)](#) ("arbitral tribunal is required... to act fairly and impartially as between the parties, giving them a reasonable opportunity to present their cases and to deal with the cases of their opponents"). See also ALI/UNIDROIT Principles of Transnational Civil Procedure, Principle 3.1 (2004).

²⁸⁴ See, e.g., *Judgment of 23 June 2010, Société Top bagage international v. Société Wistar Enter. Ltd*, 2011 Rev. arb. 446 (French Cour de cassation civ. 1e) ("arbitral tribunal violated due process by ordering, without inviting the parties to discuss the issue, [the claimant] to compensate a prejudice which was not claimed by [the respondent]"); *Judgment of 6 April 1995, Thyssen Stahlunion v. Maaden*, 1995 Rev. arb. 446, 446 (Paris Cour d'appel) ("principle of due process implies that the arbitral tribunal cannot introduce any new legal or factual issue without inviting the parties to comment on it"); *Paklito Inv. Ltd v. Kockner E. Asia Ltd*, [1993] 2 HKLR 39, 49 (H.K. High Ct.); *Atul R. Shah v. M/s. Vrijlal Lalooobhai & Co.*, AIR 1999 Bom 67, ¶¶2-3 (Mumbai High Ct.) ("party to the arbitration must not only have notice of the time and place of the meeting, but he should be allowed a reasonable opportunity of presenting his case either by evidence or by arguments or both, and of being fully heard").

²⁸⁵ *Soh Beng Tee & Co. v. Fairmount Dev. Pte.*, [2007] 3 SLR(R) 86, 118 (Singapore Ct. App.).

²⁸⁶ *Impex Corp. v. Elenjikal Aquamarine Exps. Ltd*, AIR 2008 Ker 199 (Kerala High Ct.).

²⁸⁷ *Sonera Holding BV v. Cukurova Holding AS*, 2012 WL 3925853, at *5 (S.D.N.Y.) ("to succeed on this defense, it is not enough for the [award-debtor] to show that in handling evidence the

arbitrator did not follow all the niceties observed by the federal courts. Rather, [the award-debtor] must establish that it was denied an opportunity to be heard at a meaningful time and in a meaningful manner"; *China Nat'l Bldg Material Inv. Co. v. BNK Int'l LLC*, 2009 WL 4730578, at *6 (W.D. Tex.); *Telenor Mobile Commc'ns AS v. Storm LLC*, ²⁸⁷ 524 F.Supp.2d 332, 368 (S.D.N.Y. 2007).

²⁸⁸ *Sheldon v. Vermonty*, ²⁸⁸ 269 F.3d 1202, 1207 (10th Cir. 2001); *Generica Ltd v. Pharm. Basics, Inc.*, ²⁸⁹ 125 F.3d 1123, 1129-30 (7th Cir. 1997) ("award should be vacated if the party challenging the award proves that he was not given a meaningful opportunity to be heard as our due process jurisprudence defines it").

²⁸⁹ *El Dorado Sch. Dist. No. 15 v. Cont'l Cas. Co.*, ²⁸⁹ 247 F.3d 843, 848 (8th Cir. 2001).

²⁹⁰ R. Merkin, *Arbitration Law* ¶15.24 (1991 & Update August 2013). See also *Interbulk Ltd v. Aiden Shipping Co. (The "Vimeira")* [1984] 2 Lloyd's Rep. 66, 75 (English Ct. App.) ("[W]e are simply talking about fairness. It is not fair to decide a case against a party on an issue which has never been raised in the case without drawing the point to his attention so that he may have an opportunity of dealing with it."); *Bulfracht (Cyprus) Ltd v. Boneset Shipping Co.* [2002] EWHC 2292 (Comm) (English High Ct.) ("The arbitrators' duty was to give the parties a fair opportunity of addressing them on all factual issues material to their intended decision as to which there had been no reasonable opportunity to address them during the hearings."); *Zemalt Holdings SA v. Nu-Life Upholstery Repairs Ltd* [1984] 2 EGLR 14, 15 (QB) (English High Ct.) ("If an arbitrator is impressed by a point that has never been raised by either side then it is his duty to put it to them so that they have an opportunity to comment. If he feels that the proper approach is one that has not been explored or advanced in evidence or submission, then again it is his duty to give the parties a chance to comment.").

²⁹¹ *Bulfracht (Cyprus) Ltd v. Boneset Shipping Co. MV Pamphilos* [2002] EWHC 2292, ¶18 (Comm) (English High Ct.). See also *London Underground Ltd v. Citylink Telecomms. Ltd* [2007] EWHC 1749, ¶37 (TCC) (English High Ct.) ("(1) The underlying principle is that of fairness or, as it is sometimes described, natural justice. (2) There must be a sensible balance between the finality of an award and the residual power of a court to protect parties against the unfair conduct of an arbitration. (3) It will generally be the duty of a tribunal to determine an arbitration on the basis of the cases which have been advanced by each party, and of which each has notice. To decide a case on the basis of a point which was not raised as an issue or argued, without giving the parties the opportunity to deal with it, will be a procedural irregularity. (4) In relation to finding of facts: (a) A tribunal should usually give the parties an opportunity to address them on proposed findings of major areas of material primary facts which have not been raised during the hearing or earlier in the arbitral proceedings. (b) A tribunal has an autonomous power to make findings of fact which may differ from the facts which either party contended for. This will often be related to inferences of fact which are to be drawn from the primary facts which are in issue. Such findings of fact will particularly occur where there are complex factual or expert issues where it may be impossible to anticipate what inferences of fact might be drawn. In such a case the tribunal does not have to give the parties an opportunity to address those findings of fact. (c) Where a tribunal has been appointed because of its professional legal, commercial or technical experience, the parties take the risk that, in spite of that expertise, errors of fact may be made or invalid inferences drawn without prior warning. (5) In each case whether there is a procedural irregularity and whether it is serious is a matter of fact and degree which requires a judgment to be made taking into account all the relevant circumstances of the arbitration including an analysis of the substance of the arbitration and its conduct viewed as a whole.").

²⁹² *QAO N. Shipping Co. v. Remolcadores de Marin SL* [2007] EWHC 1821 (Comm) (English High Ct.).

²⁹³ *ABB Attorney Gen. v. Hochtief Airport GmbH* [2006] EWHC 388, ¶67 (Comm) (English High Ct.). See also *Warborough Inv. Ltd v. S. Robinson & Sons (Holdings) Ltd* [2003] EWCA Civ 751 (English Ct. App.); *Husmann (Europe) Ltd v. Al Armeen Dev. & Trade Co.* [2000] 2 Lloyd's Rep. 83, 95 (QB) (English High Ct.); *Petroships Pte Ltd of Singapore v. Petec Trading & Inv. Corp. of Vietnam, The Petro Ranger* [2001] 2 Lloyd's Rep. 348 (QB) (English High Ct.); *Brandeis Brokers Ltd v. Black* [2001] 2 Lloyd's Rep. 359 (QB) (English High Ct.).

²⁹⁴ *Latvian Shipping Co. v. Russian People's Ins. Co.* [2012] EWHC 1412, ¶144 (Comm) (English High Ct.).

²⁹⁵ See, e.g., *Anwer Siraj v. Ting Kang Chung* [2003] SGHC 64, ¶¶41-42 (Singapore High Ct.) ("The arbitrator is, subject to any procedure otherwise agreed between the parties as applying to the arbitration in question, master of his own procedure and has a wide discretionary power to conduct the arbitration proceedings in the way he sees fit, so long as what he is doing is not manifestly unfair or contrary to natural justice."); *Pac. China Holdings Ltd v. Grand Pac. Holdings Ltd* [2011] 4 HKLRD 188, ¶¶94, 95 (H.K. Ct. App.); *Brunswick Bowling & Billiards Corp. v. Shanghai Zhonglu Indus. Co.*, [2011] 1 HKLRD 707, ¶¶27, 28 (H.K. Ct. First Inst.).

²⁹⁶ *Judgment of 1 July 1999, Brasoil v. GMR, XXIVa Y.B. Comm. Arb.* 296, ¶9 (Paris Cour d'appel) (1999).

²⁹⁷ *Judgment of 17 March 2011*, DFT 4A, 600/2010, ¶14.1 (Swiss Federal Tribunal). See von Segesser & Schramm, *Swiss Private International Law Act (Chapter 12: International Arbitration)*, 1989, in L. Mistelis (ed.), *Concise International Arbitration* 911, 933 (2010) ("[I]t encompasses the parties' right to examine the files that will constitute the basis of the arbitral award, to present legal arguments, to express their opinion on any facts that are essential for the decision, to participate in the hearings personally or via a representative, to offer relevant evidence and to comment on the results of the taking of evidence. The right to be heard also encompasses the arbitral tribunal's obligation to examine and to address the relevant problems.").

²⁹⁸ *Judgment of 30 December 1994*, 13 ASA Bull. 217, 221 (Swiss Federal Tribunal) (1995). See also Berger & F. Kellerhals, *Internationale und interne Schiedsgerichtsbarkeit in der Schweiz* ¶1018 (2d ed. 2010).

²⁹⁹ See, e.g., ²⁹⁹ 2010 UNCITRAL Rules, Art. 17; ICDR Rules, Art. 16(1); 2013 AAA Rules, Rule 32(a); 2012 Swiss Rules, Art. 15(1); LCIA Rules, Art. 14(1)(i); 2012 CIETAC Rules, Art. 33(1); 2013 HKIAC Rules, Art. 13(5); 2010 SCC Rules, Art. 19(2); 2013 SIAC Rules, Art. 16(1); 2013 VIAC Rules, Art. 28(1).

³⁰⁰ See, e.g., 2010 IBA Rules on the Taking of Evidence;

ALI/UNIDROIT Principles of Transnational Civil Procedure (2004); [§11.03\[E\]](#) (especially §11.03[E][3][b]); [§15.07\[D\]\[3\]](#).

³⁰¹ See [§§15.04\[B\]\[1\]](#) & [\[3\]](#).

³⁰² See [UNCITRAL, Report of the Working Group on International Contract Practices on the Work of Its Fourth Session, U.N. Doc. A/CN.9/232, ¶104, XIV Y.B. UNCITRAL 33, 43 \(1983\)](#) ("It was felt that the words 'at any stage'...might be relied upon by a party who wished to prolong the proceedings or to make unnecessary submissions. It was therefore suggested that the provision be rephrased in order to eliminate this possibility.").

³⁰³ [UNCITRAL, Report of the Secretary-General on the Analytical Commentary on Draft Text of A Model Law on International Commercial Arbitration, U.N. Doc. A/CN.9/264, ¶1 \(1985\)](#).

³⁰⁴ See, e.g., *Bayview Irrigation Dist. #11 v. United Mexican States*, [2008] O.J. 1858, ¶14 (Ontario Super. Ct.) ("The tribunal has the obligation...to ensure equal treatment of the parties, that minimum procedural standards are observed and that their decision does not offend public policy."); *Xerox Corp. Ltd v. MPI Techs. Inc.*, [2006] CanLII 41006, ¶26 (Ontario Super. Ct.) ("conduct of the Tribunal must be sufficiently serious to offend the court's most basic notions of morality and justice to offend Article 18 or Article 24 of the Model Law"); *Soh Beng Tee & Co. Pte Ltd v. Fairmount Dev. Pte Ltd*, [2007] SGCA 28, ¶60 (Singapore Ct. App.) ("only when the alleged breach of natural justice has surpassed the boundaries of legitimate expectation and propriety, resulting in actual prejudice to a party, can or should a remedy be made"; "[t]his judicial philosophy of minimal interference is not only manifested in relation to an arbitrator's obligation to adhere to the principles of natural justice, but is also adhered to by our courts in addressing other types of challenges to arbitral awards."); *Anwer Siraj v. Ting Kang Chung*, [2003] SGHC 64, ¶¶41-42 (Singapore High Ct.) ("The arbitrator is, subject to any procedure otherwise agreed between the parties as applying to the arbitration in question, master of his own procedure and has a wide discretionary power to conduct the arbitration proceedings in the way he sees fit, so long as what he is doing is not manifestly unfair or contrary to natural justice.");

³⁰⁵ *Great Offshore Ltd v. Iranian Offshore Eng'g & Constr. Co.*, (2008) 14 SCC 240, ¶69 (Indian S.Ct.). See also *Rashtriya Chems. v. J.S. Ocean Pvt Ltd*, [2010] Writ Petition No. 184, ¶¶16, 23 (Bombay High Ct.) ("[T]he arbitral procedure provides a ray of hope for an easy and expedient mechanism to enforce rights and obligations under the contract... [T]he role of Courts is of supervisory nature over arbitral process and judicial intervention need[s] to be as minimum as possible.");

³⁰⁶ *Tempo Shain Corp. v. Bertek, Inc.*, [120 F.3d 16](#), 20 (2d Cir. 1997). Or, as another U.S. court concluded, §10(a)(3) of the FAA and Article V(1)(b) of the New York Convention "protect the fundamental requirement of due process, which is the opportunity to be heard at a meaningful time and in a meaningful manner." *Gas Natural Aprovevisionamientos, SDG, SA v. Atl. LNG Co. of Trinidad & Tobago*, 2008 WL 4344525, at *6-7 (S.D.N.Y.).

³⁰⁷ *Amalgamated Ass'n of St. Elec. Railway & Motor Coach Employees of Am. A.F.L. v. Conn.*, [112 A.2d 501](#), 503 (Conn. 1955).

³⁰⁸ *Baravati v. Josephthal, Lyon & Ross*, [28 F.3d 704](#), 709 (7th Cir. 1994). See also [§26.05\[C\]\[3\]\[b\]\[iii\]](#), p. 3497.

³⁰⁹ [English Arbitration Act, 1996, §1\(b\)](#).

³¹⁰ *Albon v. Naza Motor Trading Sdn Bhd* [2007] EWHC 1879, ¶11 (Ch) (English High Ct.). See also R. Merkin, *Arbitration Law* ¶10.50 (1991 & Update August 2013) ("The 1996 Act is specific in its intention to signpost a move away from arbitrations which resemble court proceedings.");

³¹¹ See, e.g., *Sembawang Eng'rs & Constructors Prop. Ltd v. Covec (Singapore) Prop. Ltd*, [2008] SGHC 229, ¶13 (Singapore High Ct.) (UNCITRAL Model Law, adopted in Singapore, "essentially sets out an efficient framework for the arbitration of disputes with a minimal amount of intervention from courts"); *Great Offshore Ltd v. Iranian Offshore Eng'g & Constr. Co.*, (2008) 14 SCC 240 (Indian S.Ct.) (citing "one of the Act's 'main objectives'": "to minimize the supervisory role of courts in the arbitral process"); *Arbitration Application No. 3 of 2011*, [2011] CSOH 164, ¶3 (Scottish Ct. Sess.) ("That makes it clear that, in arbitrations to which the Act applies, the court cannot intervene by way of judicial review or declarator, nor is there any longer any jurisdiction to bring a legal challenge to an award by way of a stated case.");

³¹² *Judgment of 15 May 1986, XII Y.B. Comm. Arb. 489, 490* (German Bundesgerichtshof) (1987).

³¹³ *Judgment of 7 January 2011*, DFT 4A_440/2010, ¶15.1.1 (Swiss Federal Tribunal).

³¹⁴ See [§15.04\[B\]\[1\]](#).

³¹⁵ See, e.g., *Baravati v. Josephthal, Lyon & Ross*, [28 F.3d 704](#), 709 (7th Cir. 1994); *Amalgamated Ass'n of St. Elec. Railway & Motor Coach Employees of Am. A.F.L. v. Conn.*, [112 A.2d 501](#) (Conn. 1955); *Judgment of 30 December 1994*, 13 ASA Bull. 217, 221 (Swiss Federal Tribunal) (1995); B. Berger & F. Kellerhals, *Internationale und interne Schiedsgerichtsbarkeit in der Schweiz* ¶1018 (2d ed. 2010) (parties generally cannot waive right to fair hearing and equal treatment, but can waive minimum requirement of due process in specified circumstances). See also [§26.05\[C\]\[3\]\[g\]](#), p. 3539.

³¹⁶ See [§15.04\[B\]\[4\]](#).

³¹⁷ See, e.g., *Gallagher v. Schemecker*, [60 Wis.2d 143](#), 151 (Wis. 1973) ("Arbitrators have a good deal of discretion in cutting off repetitious or cumulative testimony but they have gone beyond the limit of discretion when they refuse to hear evidence pertinent and material to this dispute."); *Fox v. P G Welfare Ltd* [1981] 2 Lloyd's Rep. 514, ¶22 (English Ct. App.); *Judgment of 7 September 1993*, DFT 119 II 386, 388-90 (Swiss Federal Tribunal); *Pakito Inv. Ltd v. Klockner E. Asia Ltd, XIX Y.B. Comm. Arb. 664, 665 et seq.* (H.K. High Ct. 1993) (1994) (award denied recognition because losing party was not given opportunity to comment on report produced by tribunal-appointed expert); *Shandong Hongri Acron Chem. Joint Stock Co. v. Petrochina Int'l (H.K.) Corp.*, [2011] HKCFI 53 (H.K. Ct. First Inst.) (letters issued by CIETAC purporting to explain that the award breached natural justice because CIETAC did not give award-debtor opportunity to comment). See [§25.04\[F\]\[3\]\[a\]](#); [§25.04\[C\]\[4\]](#).

³¹⁸ The same distinction is drawn in the annulment and recognition contexts. See [§25.04\[B\]\[3\]\[c\]](#); [§26.05\[C\]\[3\]\[a\]](#).

³¹⁹ See [§15.04\[A\]](#); [§15.04\[B\]\[1\]](#); [§26.05\[C\]\[3\]\[c\]](#).

320 See [§15.04\[B\]\[4\]](#); [§26.05\[C\]\[3\]](#).

321 See [§12.01\[C\]\[2\]](#).

322 See [§5.06\[C\]\[4\]](#).

323 See [§5.06\[C\]\[4\]](#).

324 See [§5.06\[C\]\[5\]](#).

325 See [§5.06\[C\]\[5\]](#).

326 See [§5.06\[C\]\[14\]](#); [§14.04\[B\]](#).

327 See [§1.02\[B\]\[1\]](#); [§5.06\[C\]\[5\]](#).

328 See [§5.06\[C\]\[4\]](#).

329 See [§5.06\[C\]\[4\]](#).

330 See [§5.07](#). See also *WFA v. Hobart City Council*, [2000] NSWCA 43 (N.S.W. Ct. App.) (arbitration clause requiring arbitrators to disregard rules of natural justice would be void on public policy grounds, but validity of arbitration agreement generally will not be affected and determination of procedure would revert to arbitrators under their default powers).

331 See [§25.04\[B\]\[4\]](#).

332 See [§25.04\[B\]\[4\]](#).

333 See [§25.04\[B\]\[4\]](#).

334 See [§25.04\[B\]\[4\]](#).

335 See [§25.04\[E\]](#).

336 See [§25.04\[B\]\[4\]](#).

337 See [§25.04\[B\]\[8\]](#).

338 See [§25.04\[B\]\[5\]](#).

339 See [§25.04\[B\]\[6\]](#).

340 *Rhéaume v. Société d'Investissements L'Excellence Inc.*, [2010] QCCA 2269, ¶157 (Québec Cour d'appel). See also *Soh Beng Tee & Co. v. Fairmount Dev. Pte.*, [2007] 3 SLR(R) 86, ¶198 (Singapore Ct. App.) ("[C]ourts will seek to support rather than frustrate or subvert the arbitration process in order to...preserve party autonomy and to ensure procedural fairness. [The concept of procedural fairness] includes the right to be heard and mandates equality of treatment. Arid, hollow, technical or procedural objections that do not prejudice any party should never be countenanced. It is only where the alleged breach of natural justice has surpassed the boundaries of legitimate expectation and propriety, culminating in actual prejudice to a party, that a remedy can or should a remedy be made available.").

341 See [§25.04](#).

342 See [§26.05\[C\]\[3\]](#).

343 See [§11.03\[C\]\[1\]\[c\]\[vi\]](#); [§12.01\[B\]\[2\]](#); [§14.03\[A\]](#); [§15.02\[A\]](#). In annulment actions, the courts of the arbitral seat would be afforded greater scope to apply local mandatory rules and public policies as escape devices, than in recognition actions, but international limits should nonetheless apply. See [§11.03\[C\]\[1\]\[c\]\[iii\]](#) & [\[v\]](#); [§25.02\[B\]](#).

344 See [§15.04\[A\]\[1\]\[b\]](#); [§26.05\[C\]\[3\]\[f\]](#).

345 See [§15.06\[A\]\[1\]-\[2\]](#).

346 See [§12.06\[E\]](#); [§25.04\[B\]\[7\]](#); [§26.05\[C\]\[3\]\[g\]](#); [§26.05\[C\]\[5\]\[d\]](#); [§26.05\[C\]\[6\]\[i\]](#).

347 *French Code of Civil Procedure*, Art. 1466. See also *Judgment of 7 February 2008, Société française de rentes et de financement Crédirente v. Compagnie générale de garantie SA*, 2008 Rev. arb. 501 (Paris Cour d'appel).

348 See [§25.04\[B\]\[7\]](#), p. 3258. See also *Dealer Computer Servs., Inc. v. Michael Motor Co.*, [485 F.Appx. 724](#) (5th Cir. 2012) (party seeking to vacate award based on arbitrator's evident partiality generally must object during arbitral proceedings; failure to do so results in waiver of right to object); *Goff v. Dakota, Minn. & E. R.R. Corp.*, [276 F.3d 992](#), 998 (8th Cir. 2002) (waiver of procedural objection due to failure to raise objection during arbitration); *Fortune, Alsweet & Eldridge, Inc. v. Daniel*, [724 F.2d 1355](#), 1357 (9th Cir. 1983); *Amicizia Società Navegazione v. Chilean Nitrate & Iodine Sales Corp.*, [274 F.2d 805](#), 809 (2d Cir. 1960); *Milan Nigeria Ltd v. Angeliki B Maritime Co.*, [2011] EWHC 892 (Comm) (English High Ct.) (no basis for annulment if party challenging award was aware of objection but failed to raise it); *Judgment of 22 October 2009, Globale Re AG v. Liquidators of ICD* (Paris Cour d'appel), discussed in Kirby & Bensaude, *A View From Paris*, 25(3) Mealey's Int'l Arb. Rep. 26-27 (2010) (refusing to annul award on grounds that three arbitrations were improperly consolidated, because award-debtor had not opposed consolidation); *Judgment of 16 July 2002, 1 Sch 08/02* (Oberlandesgericht Stuttgart) (procedural objection must be raised without undue delay, i.e., at latest in closing submissions); *Shenzhen Nan Da Indus. Trade United Co. v. FM Int'l Ltd.*, XXIII Y.B. Comm. Arb. 377 (H.K. Ct. Fin. App. 1991) (1993) (party challenging award "took no objection" to use of new institutional rules); *Polytek Eng'g Co. v. Hebei Imp. & Exp. Corp.*, XXIII Y.B. Comm. Arb. 666, 669 (H.K. Ct. Final App. 1998) (1998) (waiver based on fact that party "simply proceeded with the arbitration as if nothing untoward had happened"). See also *Restatement (Third) U.S. Law of International Commercial Arbitration* §4-13 comment g (Tentative Draft No. 2 2012) ("Parties can waive most standard procedures and various types of procedural defects.").

349 *Tiffany & Co. Int'l, Inc. v. Dhirim, Inc.*, 2009 WL 2569190, at *1 (S.D.N.Y.).

350 See, e.g., UNCITRAL Rules, Art. 32; 2012 ICC Rules, Art. 39; ICDR Rules, Art. 25; 2012 CIETAC Rules, Art. 10; 2013 HKIAC, Art. 31; 2010 SCC Rules, Art. 31; WIPO Rules, Art. 58.

351 See [§5.01\[B\]](#); [§5.04\[C\]](#).

352 See [§25.04\[B\]\[7\]](#).

353 *Restatement (Third) U.S. Law of International Commercial Arbitration* §4-25 comment a (Tentative Draft No. 2 2012) ("A waiver of an objection will be effective only if the party in question knew or should have known of the circumstances on which the objection is based, and if the waiver is otherwise valid.").

354 *Braspetro Oil Servs. Company-Brasoil v. Mgt & Implementation Auth.*, XXIV Y.B. Comm. Arb. 296, 298 (Paris Cour d'appel) (1999).

355 See *Lucent Techs., Inc. v. Tatung Co.*, 379 F.3d 24, 31 (2d Cir. 2004) (waiver of objections to arbitrator where party failed to inquire with AAA about prior relationships); *Cook Indus., Inc. v. C. Itoh & Co.*, [449 F.2d 106](#), 107-08 (2d Cir. 1971) ("[A party] cannot remain silent, raising no objection during the course of the arbitration proceeding, and when an award adverse to him has been handed down complain of a situation of which he had knowledge of from the first."); *Restatement (Third) U.S. Law of International Commercial Arbitration* §4-13 comment g (Tentative Draft No. 2 2012) ("Often, waiver is implied by a party's failure to object on a timely basis. If a

party does fail to object to a particular procedure during the arbitration, it ordinarily may not later challenge the award on that procedural ground.”).

³⁵⁶ See [§12.05\[K\]](#); [§12.05\[J\]\[5\]](#); [§12.06\[A\]\[3\]](#); [§25.07\[A\]\[1\]](#); [§26.05\[C\]\[3\]\[h\]](#).

³⁵⁷ See [§26.05\[C\]\[4\]](#).

³⁵⁸ Bom, *The Principle of Judicial Non-Interference in International Arbitration Proceedings*, 30 U. Pa. J. Int'l L. 999, 1025 (2009).

As discussed above, the Geneva Convention and the Geneva Protocol confirm the parties' autonomy to agree upon arbitral procedures (as do the New York, European and Inter-American Conventions). See [§1.01\[C\]](#); [§11.03\[C\]\[1\]\[a\]](#), pp. 1543-44; [§11.03\[C\]\[1\]\[b\]](#), p. 1544. This rule may suggest, but does not necessarily require, a principle of judicial non-interference.

³⁵⁹ New York Convention, Art. II(3). See [§8.02\[C\]](#), p. 1264; [§8.03\[C\]](#), pp. 1278-79. See also Bom, *The Principle of Judicial Non-Interference in International Arbitration Proceedings*, 30 U. Pa. J. Int'l L. 999, 1026 (2009) (“Nothing in the New York Convention expressly provides that national courts shall not entertain interlocutory procedural applications concerning the ongoing conduct of international arbitrations (e.g., to dispute a tribunal’s procedural timetable, disclosure orders, or evidentiary rulings). Nonetheless, Article II(3) of the Convention provides that national courts shall ‘refer the parties to arbitration’ after ascertaining the existence of a valid arbitration agreement without making provision for any further judicial role in the arbitration proceedings.”); A. van den Berg, *The New York Arbitration Convention of 1958* 131, 137 (1981) (“it is a fundamental principle of arbitration, and especially international commercial arbitration, that an arbitrator adjudicates the entire case and that a national court does not interfere with his decision-making powers”; “Article II(3) can therefore be said to have the effect of a partial incompetence of the court”).

³⁶⁰ See [§2.01\[A\]\[1\]\[a\]](#); [§8.03\[C\]](#).

³⁶¹ See [§7.02](#).

³⁶² The only other exceptions involve judicial assistance in constituting the arbitral tribunal, provisional relief in aid of arbitration and judicial assistance in the taking of evidence – all of which are supportive of the arbitral process and mechanisms for giving effect to agreements to arbitrate which are either contemplated by or consistent with the Convention. See [§16.03\[A\]](#); [§17.04\[C\]](#).

³⁶³ See [Chapter 26](#).

³⁶⁴ For similar analysis, see de Boissésou, *Anti-Suit Injunctions Issued by National Courts: At the Seat of the Arbitration or Elsewhere*, in E. Gaillard (ed.), *Anti-Suit Injunctions in International Arbitration* 65, 68 (2005); Rozas, *Anti-Suit Injunctions Issued by National Courts: Measures Addressed to the Parties or to the Arbitrators*, in E. Gaillard (ed.), *Anti-Suit Injunctions in International Arbitration* 73, 81 (2005). See [§26.05\[C\]\[7\]\[h\]-\[i\]](#), for a discussion whether interim awards on liability or partial awards can be recognized or reviewed by courts.

³⁶⁵ Inter-American Convention, Art. 3; IACAC Rules, Art. 15(1). See [§11.03\[C\]\[1\]\[e\]](#); [§15.02\[A\]](#).

³⁶⁶ European Convention, Art. IV(a)(b)(iii).

³⁶⁷ European Convention, Arts. VI(1)-(3).

³⁶⁸ European Convention, Art. VI(4).

³⁶⁹ European Convention, Art. IX.

³⁷⁰ [UNCITRAL Model Law, Art. 5](#) (emphasis added). See also Bom, *The Principle of Judicial Non-Interference in International Arbitration Proceedings*, 30 U. Pa. J. Int'l L. 999, 1028-33 (2009); ^[5][UNCITRAL, 2012 Digest of Case Law on the Model Law on International Commercial Arbitration 21](#) (2012) (“Article 5 is a key provision of the Model Law. It emphasizes that the role of courts to intervene in arbitrations conducted under the Model Law is limited strictly to such matters as are specifically provided in this Law.”).

³⁷¹ [UNCITRAL Model Law, Arts. 8, 9, 11\(3\), 13, 14\(1\), 16\(3\), 17, 27, 34, 36](#).

³⁷² In drawing up the Model Law, the Working Group and the Secretariat provided non-exhaustive lists of matters not governed by the Model Law and therefore appropriate as matters on which a court may intervene under Article 5. Those lists included a number of procedural matters, such as the fixing of fees and costs and requests for deposits or security, consolidation of arbitral proceedings and enforcement by a court of interim measures of protection ordered by the arbitral tribunal. See H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 218 (1989); ^[5][UNCITRAL, 2012 Digest of Case Law on the Model Law on International Commercial Arbitration 20](#) (2012) (“Article 5... guarantees that all instances of possible court intervention are defined in this Law, except for matters not regulated by it (for instance, consolidation of arbitral proceedings, contractual relationship between arbitrators and parties or arbitral institutions, or fixing of costs and fees, including deposits).”). See also P. Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdiction* ¶¶1-106 (3d ed. 2009).

³⁷³ *Cie Nationale Air France v. Libyan Arab Airlines*, [2000] R.J.Q. 717, ¶92 (Québec Super. Ct.). See also *Inforica Inc. v. CGI Info. Sys. & Mgt Consultants Inc.*, [2009] ONCA 642, ¶14 (Ontario Ct. App.) (“The Act encourages parties to resort to arbitration, ‘require[s] them to hold to that course once they have agreed to do so,’ and ‘entrenches the primacy of arbitration over judicial proceedings...by directing the court generally, not to intervene.”) (quoting *Ontario Hydro v. Denison Mines Ltd.*, [1992] O.J. No. 2848 (Ontario Super. Ct.)); *Corporación Transnacional de Inversiones, SA de CV v. STET Int'l, SpA*, (1999) 45 O.R.3d 183 (Ontario Super. Ct.) (“Article 5 of the Model Law expressly limits the scope for judicial intervention except by application to set aside the award or to resist enforcement of an award under one or more of the limited grounds specified in Articles 34 or 36.”), *aff'd*, (2000) 49 O.R.3d 414 (Ontario Ct. App.).

³⁷⁴ *Noble China Inc. v. Lei Kat Cheong*, (1998) 42 O.R.3d 69 (Ontario Super. Ct.). See also *Vibroflotation AG v. Express Builders Co.* [1994] HKCFI 205 (H.K. Ct. First Inst.).

³⁷⁵ [UNCITRAL Model Law, Arts. 8, 9, 11\(3\), 13, 14\(1\), 16\(3\), 17, 27, 34, 36](#). See also ^[5][UNCITRAL, 2012 Digest of Case Law on the Model Law on International Commercial Arbitration 20](#) (2012) (“Courts have interpreted Article 5 (or enactments thereof) to limit courts’ intervention but not to limit the support that courts can

provide to arbitral tribunals.”).

³⁷⁶ Article 5 has been held not to prohibit a court from ordering a party to disclose its place of business (to facilitate arbitral tribunal’s order of security for costs of the arbitration). *China Ocean Shipping Co. v. Whistler Int’l Ltd.*, [1999] HKCFI 693 (H.K. Ct. First Inst.).

³⁷⁷ [English Arbitration Act, 1996, §1\(c\)](#) (“in matters governed by this Part the court should not intervene except as provided by this Part”); R. Merkin, *Arbitration Law* ¶1.26 (1991 & Update August 2013).

[Section 1\(c\) of the English Arbitration Act, 1996](#), provides that English courts “should” not – rather than “shall” or “may” not – intervene in arbitral proceedings. This is intended to preserve – in narrowly-cabined and exceptional circumstances – the inherent judicial power to intervene to correct serious injustices. See also *Ust-Kamenogorsk Hydropower Plant JSC v. AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, ¶33 (U.K. S.Ct.) (“The use of the word ‘should’ in section 1(c) was also a deliberate departure from the more prescriptive ‘shall’ appearing in [article 5 of the UNCITRAL Model Law](#).... Even in matters which might be regarded as falling within Part 1, it is clear that section 1(c) implies a need for caution, rather than an absolute prohibition, before any court intervention.”).

³⁷⁸ See, e.g., [Hong Kong Arbitration Ordinance, 2013, §3\(2\)\(b\)](#) (“court should interfere in the arbitration of a dispute only as expressly provided for in this Ordinance”); [Japanese Arbitration Law, Art. 4](#) (“with respect to arbitral proceedings, no court shall intervene except where so provided by the law”), Arts. 25-35; [Korean Arbitration Act, Art. 6](#); [Indian Arbitration and Conciliation Act, 1996, §5](#) (“in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part”); [Australian International Arbitration Act, 2011, Schedule 2, Art. 5](#); [Malaysian Arbitration Act 2005, §8](#); [New Zealand Arbitration Act, Schedule 1, §5](#).

³⁷⁹ See, e.g., [French Code of Civil Procedure, Arts. 1464-1476, 1509](#); [Swiss Law on Private International Law, Arts. 180-187](#); German ZPO, §1026; [Belgian Judicial Code, Arts. 1699-1709](#); [Chinese Arbitration Law, Arts. 39-48](#).

³⁸⁰ *Elektrim SA v. Vivendi Universal SA* [2007] EWHC 571, ¶63 (Comm) (English High Ct.). See also *ibid* (“it was well established under the old regime that the court did not have a general supervisory role over arbitrations at their interlocutory stage beyond that granted by the Arbitration Acts themselves”).

³⁸¹ *Elektrim SA v. Vivendi Universal SA* [2007] EWHC 571, ¶68 (QB) (English High Ct.). See, e.g., *Elektrim SA v. Vivendi Universal SA* [2007] EWHC 11, ¶75 (Comm) (English High Ct.) (“general approach of the Act is to give the courts only a very limited role to interfere in arbitrations”); *J. Jarvis & Sons Ltd v. Blue Circle Dartford Estates Ltd* [2007] EWHC 1262 (TCC) (English High Ct.) (court lacks authority to review interim ruling by arbitral tribunal); *Hiscox Underwriting Ltd v. Dickson Manchester & Co.* [2004] EWHC 479 (QB) (English High Ct.); *Vale do Rio Doce Navegacao SA v. Shanghai Bao Steel Ocean Shipping Co.* [2000] 2 All ER (Comm) 70 (QB) (English High Ct.).

³⁸² *Weatherhead v. Deka NZ Ltd.*, [1997] 10 PRNZ 625, 631 (Gisborne High Ct.).

³⁸³ *Bhushan Steel Ltd v. Singapore Int’l Arbitration Ctr.* [2010] INDLHC 3007, ¶25 (Delhi High Ct.). See also *M/S SBP & Co. v. M/S Patel Eng’g Ltd.*, [2005] INSC 601 (India S.Ct.); *Max India Ltd v. Gen. Binding Corp.*, [2009] INDLHC 2668 (Delhi High Ct.).

³⁸⁴ See, e.g., *Environmental Exp. Int’l of Canada Inc. v. Success Int’l Inc.*, [1995] O.J. No. 453, ¶14 (Ontario Super. Ct.) (“There is nothing in the Arbitration Act providing for appeals from, or applications to set aside, decisions of arbitrators on procedural points. It would be wrong...for the courts to invent such a remedy and inject it into the arbitration process.”); *Sembawang Eng’rs & Constructors Prop. Ltd v. Covec (Singapore) Prop. Ltd.*, [2008] SGHC 229, ¶13 (Singapore High Ct.) (UNCITRAL Model Law, adopted in Singapore, “essentially sets out an efficient framework for the arbitration of disputes with a *minimal amount of intervention from the courts*.”) (emphasis added); *Arbitration App. No. 3 of 2011* [2011] CSOH 164, ¶3 (Scottish Ct. Sess.) (“That makes it clear that, in arbitrations to which the Act applies, the court cannot intervene by way of judicial review or declarator, nor is there any longer any jurisdiction to bring a legal challenge to an award by way of a stated case.”). See also Law Reform Commission of Hong Kong, *Report on the Adoption of the UNCITRAL Model Law*, 14, 18 (1987) (“On the face of it the intention of the provision is plain – it is intended to isolate the operation of the law from court supervision, except when court supervision is expressly permitted.”; “[T]he only remedies appear to be those under Articles 13 (challenging of an arbitrator) and 14 (termination because of failure to act). We considered recommending that there be some right where there was manifest misconduct by tribunal to refer the matter to a court during the course of the hearing. Such a provision would, however, be contrary to the whole spirit of the model law’s concept of minimizing the opportunity for delay through interference by the judicial process.”).

³⁸⁵ See *Aerjet-Gen. Corp. v. Am. Arbitration Ass’n*, ⁴²⁴478 F.2d 248, 251 (9th Cir. 1973) (“judicial review prior to the rendition of a final arbitration award should be indulged, if at all, only in the most extreme cases”); *Compania Panemena Maritima San Gerassimo, SA v. J.E. Hurley Lumber Co.*, ⁴²⁵244 F.2d 286, 288 (2d Cir. 1957) (“It should not be the function of the District Court, after having ordered an arbitration to proceed, to hold itself open as an appellate tribunal to rule upon any questions of evidence that may arise in the course of the arbitration”; interlocutory judicial review of arbitrators’ evidentiary rulings would “result only in waste of time, the interruption of the arbitration proceeding, and encourage delaying tactics.”); *Krauss Bros. Lumber Co. v. Louis Bossert & Sons*, ⁴²⁶62 F.2d 1004, 1005 (2d Cir. 1933); *Banco y CIA v. Bancolumbia SA*, ⁴²⁷123 F.Supp.2d 771, 771 (S.D.N.Y. 2000) (“court’s authority to direct or oversee [an] arbitration is narrowly confined....In particular, [the court] has little or no power to afford interlocutory review of procedural matters, let alone to determine at the outset what procedural rules are to be applied.”); *Foremost Yam Mills, Inc. v. Rose Mills, Inc.*, 25 F.R.D. 9, 11 (E.D. Pa. 1960); *Mobil Oil Indonesia Inc. v. Asamera Oil (Indonesia) Ltd.*, ⁴²⁸43 N.Y.2d 276, 279 (N.Y. 1977) (“courts have no authority to review an interlocutory ruling made by the arbitrators”; “for the court to entertain review of

intermediary arbitration decisions involving procedure or any other interlocutory matter, would disjoint and unduly delay the proceedings, thereby thwarting the very purpose of conservation"); *Cavanaugh v. McDonnell & Co.*, 258 N.E.2d 452, 457 (Mass. 1970) (to allow judicial review of interlocutory arbitral rulings "would tend to render the proceedings neither one thing nor the other, but transform them into a hybrid, part judicial and part arbitral"). See also Revised Uniform Arbitration Act, §18 comment 1 (2000) ("courts are very hesitant to review interlocutory orders of tribunals"); *Tempo Shain Corp. v. Bertek, Inc.*, ³⁸⁵ [120 F.3d 16](#), 20 (2d Cir. 1997) ("Federal courts do not superintend arbitration proceedings. Our review is limited to determining whether the procedure was fundamentally unfair.");

³⁸⁶ *Stanton v. Paine Webber Jackson & Curtis, Inc.*, ¹²³ [685 F.Supp. 1241](#), 1242 (S.D. Fla. 1988).

³⁸⁷ *Harleysville Mut. Cas. Co. v. Adair*, ¹²³ [218 A.2d 791](#), 794 (Pa. 1966).

³⁸⁸ *Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, ¹²³ [619 F.3d 458](#), 462 (5th Cir. 2010).

³⁸⁹ See, e.g., *Judgment of 1 November 1996*, DFT 122 III 492 (Swiss Federal Tribunal) (court's jurisdiction does not extend to examining procedural orders or directives which can be amended or overruled during further course of proceedings). See also A. Baumbach et al., *Zivilprozessordnung* §1026 (71st ed. 2013); G. Petrochilos, *Procedural Law in International Arbitration* 93 (2004) ("[M]odern arbitration law overwhelmingly takes the view that it is up to the parties and the tribunal to ensure the procedural propriety of the arbitral procedures in the first instance, for the whole of the duration of the arbitration. Instances of procedural misconduct will be censured after a final award has been made.");

³⁹⁰ *Judgment of 18 November 1987, Chambre arbitrale de Paris v. République de Guinée*, 1988 Rev. arb. 657, 657 (Paris Cour d'appel). See also *Judgment of 15 February 1995, 1996 Rev. arb. 503 (Paris Tribunal de grande instance)*.

³⁹¹ *Judgment of 28 June 2006*, 34 SchH 11/05, Principle 1 (Oberlandesgericht München).

³⁹² *Judgment of 5 October 2004*, 2004 SchiedsVZ 316, 317 (Bayerisches Oberstes Landesgericht).

³⁹³ See, e.g., *Windward Agency, Inc. v. Cologne Life Reins. Co.*, 123 F.Appx. 481 (3d Cir. 2005) (agreement to arbitrate does not completely oust court of jurisdiction; rather, court retains continuing supervision of arbitration to ensure that arbitration is conducted within a reasonable time); *Tuesday Indus. Ltd v. Condor Indus. Ltd*, [1978] (4) SA 379 (South African South Gauteng High Ct.) (claiming power to review procedural ruling of tribunal, but not exercising it). See also [§11.05\[G\]](#); [§15.02\[F\]](#).

³⁹⁴ *Fuller Austin Insulation Inc. v. Wellington Ins. Co.*, [1995] CanLII 5752 (Saskatchewan Q.B.); *E. African Dev. Bank v. Ziva Horticultural Exps. Ltd.*, [2000] UGCommC 8 (Uganda High Ct.).

³⁹⁵ *Popack v. Lipszyc*, [2009] ONCA 365 (Ontario Ct. App.).

³⁹⁶ *Cont'l Res. Inc. v. E. Asiatic Co. (Canada)*, [XXV B. Comm. Arb. 278 \(Canadian Fed. Ct. 1994\) \(1995\)](#); *Iberfreight SA v. Ocean Star Container Line AG*, [1989] 104 N.R. 164 (Canadian Fed. Ct. App.).

³⁹⁷ See [§1.02\[B\]\[6\]](#); [§§15.01\[A\]-\[B\]](#).

³⁹⁸ See [§1.02\[B\]\[6\]](#); [§15.07\[A\]](#).

³⁹⁹ See [§1.02\[B\]\[6\]](#); [§15.07\[A\]](#).

⁴⁰⁰ Interlocutory appeals are either unavailable or strictly limited in many judicial systems, precisely because of the delays that such appeals cause to the litigation process. The same rationale applies to arbitration.

⁴⁰¹ See [§15.06\[A\]](#). See also Born, *The Principle of Judicial Non-Interference in International Arbitration Proceedings*, 30 U. Pa. J. Int'l L. 999, 1032-33 (2009).

⁴⁰² See [§15.02](#).

⁴⁰³ See [§15.03](#).

⁴⁰⁴ See [§15.01\[B\]](#).

⁴⁰⁵ See [§11.03\[F\]](#); [§11.05\[E\]\[2\]](#).

⁴⁰⁶ See [§15.04](#). As also discussed above, in some jurisdictions local law may impose procedural requirements. See [§§11.03\[D\]-\[E\]](#); [§15.02\[F\]](#).

⁴⁰⁷ Silberman, *International Arbitration: Comments From A Critic*, 13 Am. Rev. Int'l Arb. 9, 13 (2002). See also Park, *Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion*, 19 Arb. Int'l 279 (2003).

⁴⁰⁸ See [§1.02\[B\]](#); [§15.01](#).

⁴⁰⁹ See [§§1.02\[B\]\[4\]](#) & [\[6\]](#); [§15.01\[A\]](#); Kaufmann-Kohler, *Globalization of Arbitral Procedure*, 36 Vand. J. Transnat'l L. 1313 (2003); Peter, *Witness Conferencing Revisited*, in S. Bond (ed.), *Arbitral Procedure at the Dawn of the New Millennium, Reports of the International Colloquium of CEPANI* 156 (2004).

⁴¹⁰ Carlston, *Procedural Problems in International Arbitration*, 39 Am. J. Int'l L. 426, 448 (1945). See also ICC, *Controlling Time and Costs in International Arbitration* 6 (2d ed. 2012) ("experience shows that in practice it is difficult at the time of drafting the [arbitration] clause to predict with a reasonable degree of certainty the nature of disputes and the procedures that will be suitable for those disputes"); ¹²³ [ILC Memorandum on Arbitral Procedure, Prepared by the Secretariat, U.N. Doc. A/CN.4/35, II Y.B. I.L.C. 157, 165, 172 \(1950\)](#) ("no agreement could foresee all possible procedural questions which might arise").

⁴¹¹ For similar conclusions, see Lévy & Reed, *Managing Fact Evidence in International Arbitration*, in [A. van den Berg \(ed.\), International Arbitration 2006: Back to Basics?](#) 633, 644 (ICCA Congress Series No. 13 2006) ("Adopting formal guidelines [for arbitral procedures] (beyond possibly adjusting the IBA Rules occasionally to include a practice that has been firmly established or to dispel uncertainty) is unnecessary and counter-productive."); Mentschikoff, *The Significance of Arbitration – A Preliminary Inquiry*, 17 Law & Contemp. Probs. 698, 700 (1952) ("although there are indeed standards or criteria for decision in arbitration, they are as in matters of procedure and evidence more flexible and more dependent on the requirements of the particular case or particular disputants than we normally find in the formal legal system").

⁴¹² See [§11.05\[E\]\[2\]](#).

⁴¹³ See [§11.03\[F\]](#); [§11.05\[E\]](#). As discussed above, it was frequently said during the 19th and early 20th century that arbitral tribunals were bound by the procedural law of the arbitral seat, which was sometimes understood to mean the civil procedure code applicable

in litigation in the courts of the arbitral seat. See§11.03[F]; §11.05[E]. This approach has long since been abandoned, in multiple respects. As discussed above, the parties' autonomy to select the procedural law governing the arbitral proceedings is now uniformly upheld. See§11.03[F]; §11.05[E]. Similarly, the procedural law governing an arbitration is now virtually never deemed to include the domestic civil procedure code in the arbitral seat – but instead only general arbitration legislation, which typically grants arbitral tribunals broad procedural discretion. See§11.05[E][1], p. 1622.

414 See§11.03[E]; §19.04[B][5][b].

415 *Award in ICC Case No. 12073*, XXXIII Y.B. Comm. Arb. 73, ¶24 (2008).

416 N. Blackaby et al. (eds.), *Redfern and Hunter on International Arbitration* ¶6-01 (5th ed. 2009) ("An international arbitration may be conducted in many different ways. There are no fixed rules of procedure....The only certainty is that the parties' counsel should not bring the rule books from their home courts with them.").

417 2012 ICC Rules, Art. 19.

418 See§11.03[F]; §11.05[E]; §15.01[B]; *Himpuna Cal. Energy Ltd v. PT (Persero) Perusahaan Listrik Negara, Final Ad Hoc Award of 4 May 1999*, XXV Y.B. Comm. Arb. 13, 26 (2000) ("The Arbitral Tribunal is not required to apply any national rules of procedure unless a Party has shown that the application of such a rule is mandatory."); G. Petrochilos, *Procedural Law in International Arbitration* 175 (2004) ("it is inappropriate without more to adopt a procedural rule reflecting a particularity of municipal law, such as the English law rule that if the content of the foreign law pleaded is not proved as a fact the arbitrator is 'compelled' to presume that the law of the seat is the same as that foreign law").

419 See§1.04[D][1]; §15.07[E].

420 See, e.g., D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 45 (2d ed. 2013) ("Except for the mandatory norms of the *lex loci arbitri*, [the arbitral tribunal] does not have to follow any national rules; on the other hand, if they deem it useful, the arbitrators can choose a specific national law of procedure."); W. Craig, W. Park & J. Paulsson, *International Chamber of Commerce Arbitration* ¶¶16.01 to 16.03 (3d ed. 2000).

421 See§1.04[C][1]; §5.05[C]; §9.03.

422 For a discussion of the UNCITRAL Rules, see§1.04[C][4].

423 See§15.03[C].

424 See§15.04[D].

425 *Judgment of 15 May 1985, Raffineries de pétrole d'Homs et de Banias v. Chambre de commerce internationale*, 1985 Rev. arb. 141, 149 (Paris Cour d'appel).

426 See, e.g., D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 17, 31 (2d ed. 2013) ("it is useful to have a ready-made set of procedural rules to which the parties may resort if they so agree"; ⁽¹⁾UNCITRAL Rules "in many cases only provide a framework for the exercise of arbitral discretion"); W. Craig, W. Park & J. Paulsson, *International Chamber of Commerce Arbitration* ¶10.01 (3d ed. 2000) ("A conscious choice [under the ICC Rules] was thus made to eschew an elaborate code of procedure containing answers to every conceivable procedural question."); ICC, *Controlling Time and Costs in International Arbitration* 5 (2d ed. 2012); T. Webster, *Handbook on UNCITRAL Arbitration* ¶¶0-47 to 0-59 (2010) (UNCITRAL Rules aim at "providing a framework for an international arbitration practice").

427 Each set of rules prescribes important (and generally similar) substantive principles on subjects such as choice of law (⁽²⁾2010 UNCITRAL Rules, Art. 35; 2012 ICC Rules, Art. 21; ICDR Rules, Art. 29; LCIA Rules, Art. 13), separability of the arbitration agreement (⁽³⁾2010 UNCITRAL Rules, Art. 23(1); 2012 ICC Rules, Art. 6(9); ICDR Rules, Art. 15; 2013 HKIAC Rules, Art. 19(2)), provisional relief (⁽⁴⁾2010 UNCITRAL Rules, Art. 26; 2012 ICC Rules, Art. 28; ICDR Rules, Art. 22; 2013 HKIAC Rules, Art. 23), the arbitrators' procedural discretion (⁽⁵⁾2010 UNCITRAL Rules, Art. 17(1); ICDR Rules, Art. 16(1); LCIA Rules, Art. 14(1)) and waiver of judicial review (⁽⁶⁾2010 UNCITRAL Rules, Art. 34; 2012 ICC Rules, Art. 34(6); ICDR Rules, Art. 28; 2013 HKIAC Rules, Art. 34(2)).

428 These differences are particularly marked where the ICC and ICSID are involved, whose Rules provide for a materially greater degree of administrative involvement over the course of the arbitration than is the case under other leading arbitral regimes. See§1.04[A][4]; §1.04[C][5][a].

429 As discussed above, institutional arbitration rules generally grant the arbitral tribunal broad procedural authority, including to override the parties' procedural autonomy in order to obtain more efficient and fair proceedings. See§15.02[D]. Arbitrators in *ad hoc* arbitrations generally lack the same authority and, in general, may disregard the parties' agreed arbitral procedures only when required by mandatory procedural requirements in the arbitral seat. See§15.07[A], p. 2197.

430 See§15.07[D].

431 SeeN. Blackaby et al. (eds.), *Redfern and Hunter on International Arbitration* ¶6-01 (5th ed. 2009); Briner, *Domestic Arbitration: Practice in Continental Europe and Its Lessons for Arbitration in England*, 13 Arb. Int'l 155, 159-60 (1997) ("there exist as many procedures as there exist arbitral tribunals"); §15.01.

432 UNCITRAL Model Law, Arts. 18, 19. See H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 550-91 (1989).

433 *English Arbitration Act, 1996*, §§1, 33, 34; *Egmatra AG v. Marco Trading Corp.* [1999] 1 Lloyd's Rep. 862 (QB) (English High Ct.); R. Merkin, *Arbitration Law* ¶¶14.8 et seq. (1991 & Update August 2013); U.K. Departmental Advisory Committee on Arbitration Law, *Report on the Arbitration Bill* ¶150 (1996).

434 See, e.g., *Dean Witter Reynolds, Inc. v. Byrd*, ⁽¹⁾470 U.S. 213, 220 (U.S. S. Ct. 1985); *Sink v. Aden Enters., Inc.*, ⁽²⁾352 F.3d 1197, 1201 (9th Cir. 2003) ("One purpose of the FAA's liberal approach to arbitration is the efficient and expeditious resolution of claims.") (citing H.R. Rep. No. 96, 68th Cong., 1st Sess., 2 (1924)); *Stulberg v. Intermedics Orthopedics*, 1999 U.S. Dist. LEXIS 14284, at *16 (N.D. Ill.) ("The [FAA] promotes the resolution of 'disputes promptly and inexpensively without resorting to litigation.'") (quoting *Baravati v. Josephthal Lyon & Ross*, ⁽³⁾834 F. Supp. 1023, 1027 (N.D. Ill. 1993)); *Bennett Enters. v. Zee Med.*, 1995 U.S. Dist. LEXIS 18544, at *4 (D. Ala.).

435 *French Code of Civil Procedure, Art. 1467*. See M. de

Boissésou, *Le droit français de l'arbitrage interne et international* ¶720 (2d ed. 1990); E. Gaillard & J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* ¶¶1179-81 (1999).

⁴³⁶ See, e.g., Uniform Arbitration Act, §15(a) ("An arbitrator may conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding."); *Scottish Arbitration Act, §1(a)* ("The founding principles of this Act are – that the object of arbitration is to resolve disputes fairly, impartially and without unnecessary delay or expense..."); *Swedish Arbitration Act, §21* ("The arbitrators shall handle the dispute in an impartial, practical, and speedy manner."); *Hong Kong Arbitration Ordinance, 2013, §3(1)* ("The object of this Ordinance is to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense.").

⁴³⁷ See, e.g., *2010 UNCITRAL Rules, Arts. 17* ("[T]he arbitral tribunal may conduct the arbitration in such manner as it considers appropriate....The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving parties' dispute."); 2012 ICC Rules, Art. 4(3) ("The claimant may submit such other documents or information with the Request as it considers appropriate or as may contribute to the efficient resolution of the dispute."); Arts. 5(1), (5) ("The respondent may submit such other documents or information with the Answer as it considers appropriate or as may contribute to the efficient resolution of the dispute."); Art. 22(1) ("The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute."); LCIA Rules, Art. 14(1)(ii) ("The parties may agree on the conduct of their arbitral proceedings and they are encouraged to do so, consistent with the Arbitral Tribunal's general duties at all times: ...to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay or expense, so as to provide a fair and efficient means for the final resolution of the parties' dispute."); Art. 14(2) ("[T]he Arbitral Tribunal shall have the widest discretion to discharge its duties...and at all times the parties shall do everything necessary for the fair, efficient and expeditious conduct of the arbitration.").

⁴³⁸ W. Craig, W. Park & J. Paulsson, *International Chamber of Commerce Arbitration* ¶16.01 (3d ed. 2000); Kaufmann-Kohler, *Globalization of Arbitral Procedure*, 36 Vand. J. Transnat'l L. 1313 (2003); Paulsson, *The Timely Arbitrator: Reflections on the Böckstiegel Method*, 22 Arb. Int'l 19 (2006).

⁴³⁹ H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 550-91, 564 (1989).

⁴⁴⁰ See *§1.02; §15.01[A]; §15.07[D][1]*.

⁴⁴¹ Gelinas, *Evidence Through Witnesses*, in L. Lévy & V. Veeder (eds.), *Arbitration and Oral Evidence* 29, 39 (2004) ("it must be realized that the most taxing hurdle for lawyers in international arbitration is to leave outside the hearing room their own procedure colored spectacles").

⁴⁴² See, e.g., *Berger, The International Arbitrators' Application of Precedents*, 9(4) J. Int'l Arb. 5 (1992); Bernardini, *The Role of the International Arbitrator*, 20 Arb. Int'l 113 (2004); Elsing & Townsend, *Bridging the Common Law-Civil Law Divide in Arbitration*, 18 Arb. Int'l 59 (2002); Kern, *Internationale Schiedsverfahren zwischen Civil Law und Common Law*, 109 ZVglRWiss 80 (2010); Mentschikoff, *Commercial Arbitration*, 61 Colum. L. Rev. 846 (1961) (outlining "adversary" and "investigatory" models); Staughton, *Common Law and Civil Law Procedures: Which Is the More Inquisitorial? A Common Lawyer's Response*, 5 Arb. Int'l 351 (1989); *Wetter, The Conduct of the Arbitration*, 2(1) J. Int'l Arb. 7 (1985).

⁴⁴³ See, e.g., Elsing & Townsend, *Bridging the Common Law-Civil Law Divide in Arbitration*, 18 Arb. Int'l 59 (2002); Hartley, *Pleading and Proof of Foreign Law: The Major European Systems Compared*, 45 Int'l & Comp. L.Q. 271 (1996); Raymond, *Civil Law and Common Law: Which Is the Most Inquisitorial? A Civil Lawyer's Response*, 5 Arb. Int'l 357 (1989); van Houtte, *Counsel-Witness Relations and Professional Misconduct in Civil Law Systems*, 19 Arb. Int'l 457 (2003).

In the past century, the differences between civil and common law approaches to fact-development and presentation were more pronounced. van Houtte, *Counsel-Witness Relations and Professional Misconduct in Civil Law Systems*, 19 Arb. Int'l 457, 457-58 (2003) ("In the past, civil law courts investigated a case without any contribution from counsel, not only in criminal matters, but also in civil and commercial matters."); Wirth, *"Ihr Zeuge, Herr Rechtsanwalt!" Weshalb Civil-Law-Schiedsrichter Common-Law-Verfahrensrecht anwenden*, 2003 SchiedsVZ 9, 14.

⁴⁴⁴ Staughton, *Common Law and Civil Law Procedures: Which Is the More Inquisitorial? A Common Lawyer's Response*, 5 Arb. Int'l 351 (1989).

⁴⁴⁵ Raymond, *The President of the Arbitral Tribunal*, 9 ICSID Rev. 1, 2 (1994).

⁴⁴⁶ Staughton, *Common Law and Civil Law Procedures: Which Is the More Inquisitorial? A Common Lawyer's Response*, 5 Arb. Int'l 351 (1989); *von Mehren & Salomon, Submitting Evidence in An International Arbitration: The Common Lawyer's Guide*, 20 J. Int'l Arb. 285 (2003).

⁴⁴⁷ For descriptions of the approaches of some civil law practitioners to international arbitration, see Beardsley, *The Proof of Fact in French Civil Procedure*, 34 Am. J. Comp. L. 459 (1986); Böckstiegel, *Assumptions Regarding Common Law Versus Civil Law in the Practice of International Commercial Arbitration*, 2011 SchiedsVZ 113, 114; Elsing, *Procedural Efficiency in International Arbitration: Choosing the Best of Both Legal Worlds*, 2011 SchiedsVZ 114, 123; Landolt, *The Contribution of Civil Law Systems to International Arbitration*, 2 Transnat'l Disp. Mgt (2011); Triebel, *An Outline of the Swiss/German Rules of Civil Procedure and Practice Relating to Evidence*, 47 Arb. 221, 223 (1982) (pleadings should include "not merely facts" but also "evidence by which facts will be proved" and "facts set out in detail and often also immaterial facts"); Wirth, *"Ihr Zeuge, Herr Rechtsanwalt!" Weshalb Civil-Law-Schiedsrichter Common-Law-Verfahrensrecht anwenden*, 2003 SchiedsVZ 9, 13.

⁴⁴⁸ See van Houtte, *Counsel-Witness Relations and Professional Misconduct in Civil Law Systems*, 19 Arb. Int'l 457, 458-59 (2003).

449 van Houtte, *Counsel-Witness Relations and Professional Misconduct in Civil Law Systems*, 19 Arb. Int'l 457, 458 (2003). Even in 1983, a leading French treatise on arbitration (Robert's *L'arbitrage*) contained no reference to witness testimony. *Id.* at 459.

450 See, e.g., Beardsley, *The Proof of Fact in French Civil Procedure*, 34 Am. J. Comp. L. 459, 466-67 (1986); Gerstenmaier, *The "German Advantage" – Myth or Model?*, 2010 SchiedsVZ 21, 23; Kern, *Internationale Schiedsverfahren zwischen Civil Law und Common Law*, 109 ZvgIRWiss 78, 89 (2010); Langbein, *The German Advantage in Civil Procedure*, 52 U. Chi. L. Rev. 823, 834 (1985); Rogers, *Fit and Function in Legal Ethics: Developing A Code of Conduct for International Arbitration*, 23 Mich. J. Int'l L. 341 (2002).

451 See §21.03[A][2][b].

452 See Kern, *Internationale Schiedsverfahren zwischen Civil Law und Common Law*, 109 ZvgIRWiss 78, 78-93 (2010) (discussing confluence of civil law and common law procedures in international commercial arbitration).

453 See §21.03[A][2][b]. For example, ethical prohibitions on counsel interviewing and preparing witnesses also generally do not apply in international arbitrations.

454 See, e.g., Briner, *Domestic Arbitration: Practice in Continental Europe and Its Lessons for Arbitration in England*, 13 Arb. Int'l 155, 159 (1997) ("there exists no such thing as a civil law or Continental arbitration proceeding"); Veeder, *Whose Arbitration Is It Anyway: The Parties or the Arbitration Tribunal – An Interesting Question?*, in L. Newman & R. Hill (eds.), *The Leading Arbitrators' Guide to International Arbitration* 347, 349-50 (2d ed. 2008).

455 *Judgment of 29 June 2007, Case No. R06/005HR, ¶¶3.3.3 to 3.3.4 (Dutch Hoge Raad)*. See also *Judgment of 24 March 1998, Excelsior Film v. UGC-PH*, 1999 Rev. arb. 255 (French Cour de cassation civ. Ie) (award annulled where tribunal relied on one arbitrator's knowledge from related arbitration); *Judgment of 10 June 1993, Compagnie Aéroflot v. AGF*, 1995 Rev. arb. 447 (Paris Cour d'appel) (annulling award where tribunal assessed value of leasehold by referring to information not provided by or available to parties); *Judgment of 18 January 1983, Société Sporprom Servs. BV v. Polyfacne Immo*, 1984 Rev. arb. 87 (Paris Cour d'appel) (award annulled where tribunal relied on expert report not provided to parties).

456 See, e.g., Lazareff, *International Arbitration: Towards A Common Procedural Approach*, in S. Frommel & B. Rider (eds.), *Conflicting Legal Cultures in Commercial Arbitration: Old Issues and New Trends* 31 (1999); Pair, *Cross-Cultural Arbitration: Do the Differences Between Cultures Still Influence International Commercial Arbitration Despite Harmonization?*, 9 ILSA J. Int'l & Comp. L. 57 (2002); Reymond, *Civil Law and Common Law: Which Is the Most Inquisitorial? A Civil Lawyer's Response*, 5 Arb. Int'l 357 (1989); Staughton, *Common Law and Civil Law Procedures: Which Is the More Inquisitorial? A Common Lawyer's Response*, 5 Arb. Int'l 351 (1989).

457 Crawford, *Advocacy Before the International Court of Justice and Other International Tribunals in State-to-State Cases*, in R. Bishop & E. Kehoe (eds.), *The Art of Advocacy in International Arbitration* 303, 323 (2d ed. 2010). See also Brown-Berset, *Switzerland*, in P. Eijsvoegel, *Evidence in International Arbitration Proceedings* 247, 250 (1994) ("arbitrators have complete discretion to decide the way in which evidence is proposed by the parties, even when it is inspired by Anglo-Saxon procedure").

458 von Mehren & Salomon, *Submitting Evidence in An International Arbitration: The Common Lawyer's Guide*, 20 J. Int'l Arb. 285, 286 (2003).

459 It is also often overlooked that considerable progress in this direction was made in state-to-state arbitrations in the late 19th and early 20th centuries. See §1.01[A][5]; §15.01[A]; §15.03.

460 See §1.04[D][1]; §15.07[E]; §15.08[X]; §15.08[AA][9]; §16.02[E][3].

461 See §1.04[D][2]; §12.05[J].

462 2013 IBA Guidelines on Party Representation.

463 ILC, International Commercial Arbitration Committee, *Final Report on Lis Pendens and Arbitration* (72d Conference, Toronto 2006).

464 These internationally neutral principles are reflected, to an extent, in the ALI/UNIDROIT Principles of Transnational Civil Procedure (2004). Although not likely to be considered by national courts as a basis for litigation procedures, the ALI/UNIDROIT Principles identify common ground between civil and common law traditions in commercial disputes involving sophisticated parties.

465 Kerr, *Concord and Conflict in International Arbitration*, 13 Arb. Int'l 121, 125-26 (1997).

466 Paulsson, *Differing Approaches in International Arbitration Procedures: A Harmonization of Basic Notions*, 1 ADR Currents 17, 18-19 (1996). See also Kaufmann-Kohler, *When Arbitrators Facilitate Settlement: Towards A Transnational Standard*, 25 Arb. Int'l 187, 189 (2009) ("[T]here has been a powerful wave of harmonisation of the law and practice of international arbitration in the last decades. The beauty of this harmonisation process is that it merges very different procedural cultures.").

467 See §1.02[B][1]-[6]; §15.01[A]; Berger, *The International Arbitrator's Dilemma: Transnational Procedure Versus Home Jurisdiction – A German Perspective*, 25 Arb. Int'l 217 (2009); Bernardini, *The Role of the International Arbitrator*, 20 Arb. Int'l 113, 119 (2004) ("tendency is to organize a model of arbitration which, by establishing a strict co-operation between the arbitrator and the parties, produces an economic and efficient proceeding respectful at the same time of the equality of the parties and their right to be heard"); Lazareff, *International Arbitration: Towards A Common Procedural Approach*, in S. Frommel & B. Rider (eds.), *Conflicting Legal Cultures in Commercial Arbitration: Old Issues and New Trends* 31 (1999); Pair, *Cross-Cultural Arbitration: Do the Differences Between Cultures Still Influence International Commercial Arbitration Despite Harmonization?*, 9 ILSA J. Int'l & Comp. L. 57 (2002); Patocchi & Meakin, *Procedure and Taking of Evidence in International Commercial Arbitration: The Interaction of Civil Law and Common Law Procedures*, 7 Int'l Bus. L.J. 884 (1996); Reymond, *The President of the Arbitral Tribunal*, 9 ICSID Rev. 1, 1-2 (1994) (mission of "international arbitration practice, whether one is acting as counsel or as arbitrator, is the constant confrontation between different legal cultures and traditions, and the necessity to accommodate them in order to lead to an acceptable solution");

Voser, *Harmonization by Promulgating Rules of Best International Practice in International Arbitration*, 2005 SchiedsVZ 113.

⁴⁶⁸ Mustill, *Arbitral Proceedings*, at 6 (ICC Arbitration Seminar, Malbun, 24 November 1976), quoted in W. Craig, W. Park & J. Paulsson, *International Chamber of Commerce Arbitration* ¶23.04 (3d ed. 2000). See also Gelin, *Evidence Through Witnesses*, in L. Lévy & V. Veeder (eds.), *Arbitration and Oral Evidence* 29, 44-45 (2004) ("True multicultural arbitrators must be preferred to those whose only claim to fame is the mastering of the civilist and common law traditions."); Lazareff, *International Arbitration: Towards A Common Procedural Approach*, in S. Frommel & B. Rider (eds.), *Conflicting Legal Cultures in Commercial Arbitration: Old Issues and New Trends* 31, 32 (1999) ("we should not be striving for uniformity, but rather flexibility").

⁴⁶⁹ Bergsten, *The Americanization of International Arbitration*, 18 Pace Int'l L. Rev. 289, 294, 301 (2006); Bishop, *Introduction*, in R. Bishop (ed.), *The Art of Advocacy in International Arbitration* 5 (2004) ("Because so many parties to international arbitrations today are United States' companies, counsel from the United States are appearing in more and more international arbitrations, pressing the procedures and styles of advocacy they learned in the courts of the United States. This has pressured many international tribunals to adapt to the American style to some extent."); Helmer, *International Commercial Arbitration: Americanized, "Civilized," or Harmonized*, 19 Ohio St. J. Disp. Res. 35 (2003-2004); Hobeck, Mahnen & Koebke, *Time for Woolf Reforms in International Construction Arbitration*, 2008 Int'l Arb. L. Rev. 84 (criticizing use of common law procedures, including party-initiated disclosure and cross-examination, in construction arbitration); Reed & Sutcliffe, *The "Americanization" of International Arbitration*, 16(4) Mealey's Int'l Arb. Rep. 37 (2001).

⁴⁷⁰ D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* vii (2d ed. 2013).

⁴⁷¹ See §1.02[B][1]-[6]; §15.01[A]; §15.07[D][1].

⁴⁷² See www.ibanet.org. The IBA Rules are also discussed above. See §1.03[D][1][p]; §20.04[C].

⁴⁷³ Shenton, *IBA Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration*, X.Y.B. Comm. Arb. 145, 146 (1985).

⁴⁷⁴ See, e.g., M. Rubino-Samartano, *International Arbitration Law* 375 (1990).

⁴⁷⁵ For commentary on the IBA Rules, see Bühler & Dorgan, *Witness Testimony Pursuant to the 1999 IBA Rules of Evidence in International Commercial Arbitration – Novel or Tested Standards?*, 17(1) J. Int'l Arb. 3 (2000); IBA Working Party, *Commentary on the New IBA Rules of Evidence in International Commercial Arbitration*, 2 Bus. L. Int'l 16 (2000); Raeschke-Kessler, *The Production of Documents in International Arbitration – A Commentary on Article 3 of the New IBA Rules of Evidence*, 18 Arb. Int'l 411, 425 (2002); Veeder, *Evidential Rules in International Commercial Arbitration: From the Tower of London to the New 1999 IBA Rules*, 65 Arb. 291 (1999); T. Zuberbühler, et al. (eds.), *IBA Rules of Evidence: Commentary on the IBA Rules of the Taking of Evidence in International Arbitration* (2012).

⁴⁷⁶ 2010 IBA Rules on the Taking of Evidence, Art. 3(2) ("Within the time ordered by the Arbitral Tribunal, any Party may submit to the Arbitral Tribunal a Request to Produce."), Art. 4(2) ("It shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses.").

In 1987, the Mediterranean and Middle East Institute of Arbitration drafted a set of discovery and evidentiary rules, titled the Standard Rules of Evidence, intended as an alternative to the IBA Rules. The Standard Rules take a somewhat more limited approach to discovery than the IBA Rules. These Rules have seldom been used and remain relatively unknown in international arbitration.

⁴⁷⁷ See §15.08[AA][6].

⁴⁷⁸ See §15.08[X].

⁴⁷⁹ 1999 IBA Rules on the Taking of Evidence, Art. 4 (fact witnesses), Art. 5 (experts).

⁴⁸⁰ See §15.08[X].

⁴⁸¹ Thus, "[t]he taking of evidence shall be conducted on the principle that each Party shall act in good faith and be entitled to know, reasonably in advance of any Evidentiary Hearing or any fact or merits determination, the evidence on which the other Parties rely." 2010 IBA Rules on the Taking of Evidence, Preamble, ¶4. See Kläsener, *The Duty of Good Faith in the 2010 IBA Rules on the Taking of Evidence in International Arbitration*, 2010 Int'l Arb. L. Rev. 160; von Segesser, *The IBA Rules on the Taking of Evidence in International Arbitration: Revised Version, Adopted by the International Bar Association on 29 May 2010*, 28 ASA Bull. 735 (2010); T. Zuberbühler, et al. (eds.), *IBA Rules of Evidence: Commentary on the IBA Rules of the Taking of Evidence in International Arbitration* 167, 172 (2012) ("In Art. 9(3), the Review Subcommittee provided additional non-binding guidance on determining the applicable privileges under Art. 9(2)(b), by referring in particular to the following criteria... In addition, the new Art. 9(7) specifically grants arbitral tribunals the discretion to sanction parties for breaches of good faith in the assignment of the costs of arbitration." "Because the parties may have relied on different privileges with different protection levels, it has been suggested to develop best practice standards by institutions such as the IBA instead of *ad hoc* decision-making by arbitrators in a given case, in order to avoid unequal treatment of the parties.").

⁴⁸² T. Zuberbühler, et al. (eds.), *IBA Rules of Evidence: Commentary on the IBA Rules of the Taking of Evidence in International Arbitration* 1 (2012).

⁴⁸³ 2010 IBA Rules on the Taking of Evidence, Preamble.

⁴⁸⁴ 2010 IBA Rules on the Taking of Evidence, Preamble, ¶¶1, 2.

⁴⁸⁵ See, e.g., *CME Czech Repub. BV v. Czech Repub.*, Final Award of 14 March 2003, 15 VTAM 83, 100 (2003) ("Tribunal decided, to the extent appropriate, to apply the IBA Rules [on the Taking of Evidence in International Arbitration]").

⁴⁸⁶ The IBA Rules can, for example, be incorporated by reference into an initial procedural order by the tribunal. See §15.08[M]. Alternatively, the substance of the Rules, or selected provisions of the Rules, can be repeated in the body of the tribunal's procedural order.

⁴⁸⁷ *R.R. Dev. Corp. (U.S.A.) v. Repub. of Guatemala*, Decision on

Provisional Measures in ICSID Case No. ARB/07/23 of 15 October 2008, ¶15.

⁴⁸⁸ Queen Mary, University of London, *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process 2* (2012) (IBA Rules used as guidelines in 53%, and as binding rules in 7%, of surveyed cases).

⁴⁸⁹ See ⁽²⁾ [2010 UNCITRAL Rules, Art. 3; 2012 ICC Rules, Art. 4; ICDR Rules, Art. 2; LCIA Rules, Art. 1; 2012 CIETAC Rules, Art. 12; 2013 HKIAC Rules, Art. 4\(1\); 2010 SCC Rules, Art. 2; 2013 SIAC Rules, Art. 3; 2013 VIAC Rules, Art. 9. Compare UNCITRAL Model Law, Arts. 21, 23](#) (no specific requirements).

The terms “request for arbitration” and “notice of arbitration” are generally synonymous. ⁽²⁾ [UNCITRAL, 2012 Digest of Case Law on the Model Law on International Commercial Arbitration 105 \(2012\)](#) (“The term ‘request’ to arbitrate is used interchangeably with ‘notice’ to arbitrate.”).

Different institutional rules and national laws attach different labels to the initial pleading in an arbitration. For the most part, the specific label is unimportant; rather, the character of any required contents are decisive.

⁴⁹⁰ *Blackpool Borough Council v. F Parkinson Ltd* [1992] 58 BLR 85 (QB) (English High Ct.).

⁴⁹¹ ⁽²⁾ [UNCITRAL, Report of the Secretary-General on the Preliminary Draft Set of Arbitration Rules for Optional Use in Ad Hoc Arbitration Relating to International Trade, Eighth Session, U.N. Doc. A/CN.9/97, VI UNCITRAL Y.B. 163, 167 \(1975\)](#).

⁴⁹² See ⁽²⁾ [2010 UNCITRAL Rules, Art. 3; 2012 ICC Rules, Art. 4; ICDR Rules, Art. 2; ICSID Rules, Rules 2, 3; 2012 CIETAC Rules, Art. 12; 2013 HKIAC Rules, Art. 4\(3\); 2010 SCC Rules, Art. 2; 2013 SIAC Rules, Art. 3\(1\); 2013 VIAC Rules, Art. 9](#).

⁴⁹³ Arbitration agreements generally do not impose requirements for the contents of a request for arbitration. Occasionally, an arbitration agreement will require that the request for arbitration nominate a co-arbitrator or (less frequently) identify the alleged dispute and the exhaustion of contractual ADR procedures.

⁴⁹⁴ See, e.g., ⁽²⁾ [2010 UNCITRAL Rules, Art. 3; 2012 ICC Rules, Art. 4; 2013 HKIAC Rules, Art. 4\(3\)](#).

Less formally, civil law practice will sometimes favor more detailed initial notices (or submissions), supported by documentary evidence, while common law systems may incline towards relatively skeletal “notice” pleading. Elsing & Townsend, *Bridging the Common Law-Civil Law Divide in Arbitration*, 18 Arb. Int’l 59, 59-60 (2002).

⁴⁹⁵ National arbitration legislation not infrequently imposes requirements on the contents of a request or notice of arbitration (typically, subject to the parties’ contrary agreement). See, e.g., Revised Uniform Arbitration Act, §9(a) (2000); [English Arbitration Act, 1996, §§14\(3\)-\(5\)](#); German ZPO, §1044; [Chinese Arbitration Law, Art. 23](#); [Japanese Arbitration Law, Art. 29\(1\)](#) (“notice to refer that dispute to the arbitral proceedings”); [Korean Arbitration Act, Art. 22\(2\)](#); [Costa Rican Arbitration Law, 2011, Art. 21](#). Compare [UNCITRAL Model Law, Arts. 21, 22](#).

⁴⁹⁶ In principle, such requirements are capable of enforcement through rejection of the request for arbitration by an arbitral institution or tribunal or by an application to annul any final award. See §§25.04[D][1]-[3].

⁴⁹⁷ Article 21 of the Model Law refers only to a request “for that dispute to be referred to arbitration,” suggesting that the request must identify a dispute and request that it be referred to arbitration. [UNCITRAL Model Law, Art. 21](#). See also ⁽²⁾ [UNCITRAL, 2012 Digest of Case Law on the Model Law on International Commercial Arbitration 106 \(2012\)](#) (“Although the request need not be in great detail, the recipient of the notice should be in a position to understand what is alleged against him.”).

⁴⁹⁸ ⁽²⁾ [Analytical Commentary on Draft Text of A Model Law on International Commercial Arbitration, U.N. Doc. A/CN.9/264, Art. 21 \(1985\)](#). The drafting history make no reference to the question of whether the request has to be made in a written form or whether an oral request is permissible.

⁴⁹⁹ *Fung Sang Trading Ltd v. Kai Sun Sea Prods. & Food Co.*, [1991] HKCFI 190 (H.K. Ct. First Inst.); *Milkfood Ltd v. M/S GMC Ice Cream (P) Ltd*, [2004] INSC 229 (Indian S.Ct.). Compare *Fustar Chems. Ltd v. Sinochem Liaoning Hong Kong Ltd*, [1996] 2 HKC 407 (H.K. Ct. First Inst.) (receipt of request from claimant to appoint arbitrator would constitute request for arbitration but mere inquiry into respondent’s position with regard to arbitration would not).

⁵⁰⁰ [English Arbitration Act, 1996, §§14\(3\)-\(5\)](#); R. Merkin, *Arbitration Law* ¶14.14 (1991 & Update August 2013). Care must be taken to comply with any purportedly mandatory requirements of the arbitral seat with regard to the contents of a request for arbitration or notice of arbitration.

⁵⁰¹ ⁽²⁾ [E. Gaillard & J. Savage \(eds.\), Fouchard Gaillard Goldman on International Commercial Arbitration ¶¶1212-18 \(1999\)](#).

⁵⁰² As noted above, the Model Law imposes no requirements on the notice of arbitration. See [UNCITRAL Model Law, Arts. 21, 22; §15.08\[A\]](#).

⁵⁰³ German ZPO, §1044 (“The request shall state the names of the parties, the subject-matter of the dispute and contain a reference to the arbitration agreement.”). See Geimer, in R. Zöller (ed.), *Zivilprozessordnung* §1044, ¶12 (30th ed. 2013).

⁵⁰⁴ Revised Uniform Arbitration Act, §9(a) (2000).

⁵⁰⁵ ⁽²⁾ [2010 UNCITRAL Rules, Art. 3\(3\)](#). See D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 363-64 (2d ed. 2013); T. Webster, *Handbook of UNCITRAL Arbitration* ¶3-3 (2010).

⁵⁰⁶ ⁽²⁾ [2010 UNCITRAL Rules, Art. 3\(4\)](#).

⁵⁰⁷ ⁽²⁾ [2010 UNCITRAL Rules, Art. 20. The LCIA, HKIAC and Swiss Rules are to the same effect, see 2012 Swiss Rules, Art. 18; LCIA Rules, Art. 15\(1\); 2013 HKIAC Rules, Art. 16](#). However, the HKIAC Rules also provide an additional option of treating the Notice of Arbitration as the Statement of Claim. 2013 HKIAC Rules, Art. 16(1).

⁵⁰⁸ ⁽²⁾ [UNCITRAL, Summary Record of the Second Meeting of the Committee of the Whole \(II\), Ninth Session, U.N. Doc. A/CN.9/9/C.2/SR.2, 7-8 \(1976\)](#).

⁵⁰⁹ 2012 ICC Rules, Art. 4. See W. Craig, W. Park & J. Paulsson,

International Chamber of Commerce Arbitration ¶10.04 (3d ed. 2000); [Y. Derains & E. Schwartz, A Guide to the ICC Rules of Arbitration 32-40 \(2d ed. 2005\)](#). The ICDR Rules are similar to the ICC Rules in their contemplation of a single, comparatively-detailed statement of claim. ICDR Rules, Art. 3.

The ICC and AAA's approach to the Request for Arbitration has been criticized on the grounds that the claimant has essentially unlimited time to prepare its Request setting forth its claims in detail, while the respondent (under current ICC Rules, see [§15.08\[D\]](#)) has only 30 days to prepare what should be an equally detailed reply. Wetter, *The Present Status of the International Court of Arbitration of the ICC: An Appraisal*, 1 Am. Rev. Int'l Arb. 91, 98 & n.13 (1990).

⁵¹⁰ Nonetheless, the mandatory informational contents of an ICC Request for Arbitration are limited, and if a party chooses it can submit a very "short-form" document. Some Requests for Arbitration are only a few pages long, particularly when a party seeks to withhold aspects of its case for tactical or other reasons. Tschanz, *Advocacy in International Commercial Arbitration: Switzerland*, in R. Bishop & E. Kehoe (eds.), *The Art of Advocacy in International Arbitration* 195, 213-14 (2d ed. 2010) ("tactically preferable to keep one's option open until one knows what the opponent's case will be").

The same approach can also be taken to the Statement of Case. See [§15.08\[V\]](#). Compare M. Bühler & T. Webster, *Handbook of ICC Arbitration* 57-58 (2d ed. 2008) (detailed Request for Arbitration has tactical advantages of putting pressure on respondent). Experienced arbitral tribunals exercise care to ensure that these sorts of "ambush" tactics are not permitted to cause unfair surprise and disadvantage.

⁵¹¹ Generally, a party need only attach the principal contract from which the parties' dispute arises and in which the arbitration agreement appears (together with any amendments). See also Elsing & Townsend, *Bridging the Common Law-Civil Law Divide in Arbitration*, 18 Arb. Int'l 59 (2002).

⁵¹² See *United Parcel Serv. of Am., Inc. v. Gov't of Canada, Award on Jurisdiction in NAFTA Case of 22 November 2002*, ¶¶123-33, available at [§2 www.italaw.com](#) (refusing to dismiss case based on allegedly inadequate statement of claim); *Ad Hoc Award on Jurisdiction of 16 February 2001, Link-Trading v. Moldova*, available at [§2 www.italaw.com](#) (failure to refer to contract supporting jurisdiction was not sufficient to dismiss claim because tribunal could base its jurisdiction on applicable BIT).

⁵¹³ See [§15.08\[A\]](#).

⁵¹⁴ See, e.g., [UNCITRAL Model Law Arts. 3, 21; English Arbitration Act, 1996, §14](#) (arbitration commenced when "a party serves on the other party or parties notice in writing requiring him or them to appoint an arbitrator or to agree to the appointment of an arbitrator in respect of the matter"); [Swiss Law on Private International Law, Art. 181](#) ("one of the parties initiates the procedure for the constitution of the tribunal"); German ZPO, §1044; [Hong Kong Arbitration Ordinance, 2013, Art. 49\(1\); Japanese Arbitration Law, Art. 29\(1\); Korean Arbitration Act, Art. 22\(1\); Australian International Arbitration Act, 2011, Schedule 2, Art. 21; Malaysian Arbitration Act, §23](#).

These statutory provisions generally do not contain formal service requirements. See also Dahlberg & Öhrström, *Proper Notification: A Crucial Element of Arbitral Proceedings*, 27 J. Int'l Arb. 539 (2010).

⁵¹⁵ As discussed below, Article V(1)(b) of the New York Convention and parallel provisions of national law (including [Articles 34\(2\)\(a\)\(ii\) and 36\(1\)\(a\)\(ii\) of the UNCITRAL Model Law](#)) provide for the annulment and non-recognition of awards where the award-debtor was not provided notice of commencement of the arbitration. See [§25.04\[B\]\[1\], p. 3222; §26.05\[C\]\[3\]\[a\], pp. 3493-94](#).

⁵¹⁶ One court held that the arbitral tribunal had no duty to investigate whether the address indicated in the parties' underlying agreement was accurate. *Judgment of 15 March 2005*, 11 Sch 19/05 (Oberlandesgericht Dresden).

⁵¹⁷ See, e.g., Revised Uniform Arbitration Act, §9(a) (2000) (notice of arbitration must be provided to all parties to arbitration agreement). This requirement is unusual.

⁵¹⁸ See Dahlberg & Öhrström, *Proper Notification: A Crucial Element of Arbitral Proceedings*, 27 J. Int'l Arb. 539 (2010).

⁵¹⁹ National court provisions regarding service of process are often complex and formalistic (e.g., requiring service of prescribed forms, often by or with the approval of court or governmental officials). See EC Regulation 1348/2000; G. Born & P. Rutledge, *International Civil Litigation in United States Courts* 867-80 (5th ed. 2011).

⁵²⁰ The Hague Convention on the Service Abroad of Extra-Judicial and Judicial Documents is the principal example of an international treaty regulating cross-border service of process in national court proceedings. See G. Born & P. Rutledge, *International Civil Litigation in United States Courts* 909-52 (5th ed. 2011). The Convention provides for service via a Central Authority mechanism, with alternative means where Member States have not objected. *Id.* at 857-58.

In general, the formalities and delays that attend service under the Hague Service Convention make it entirely unsuitable for international arbitration. See also *Judgment of 14 February 2003, XXXY.B. Comm. Arb. 819, 827 (Zürich Bezirksgericht) (2004)* ("Because of the private nature of arbitration, the Hague Convention on Service Abroad is not applicable."); *aff'd, Judgment of 17 July 2003, id.* at 831 (Zürich Obergericht) (2004) ("Hague [Service] Convention of 1965 does not apply to the delivery of written documents in arbitral proceedings").

⁵²¹ See, e.g., *Judgment of 14 February 2003, XXXY.B. Comm. Arb. 819, 827 (Zürich Bezirksgericht) (2004)* ("no formal requirements in international arbitration for the delivery of documents abroad"); *Skorimpex Foreign Trade Co. v. Lelovic*, [1991] O.J. No. 641 (Ontario Super. Ct.); *Vanol Far E. Mktg Pte Ltd v. Hin Leong Trading Pte Ltd*, [1997] 3 SLR 484 (Singapore High Ct.); Revised Uniform Arbitration Act, §9(a) comment 3 (2000) (service in U.S. arbitrations is typically "through the use of regular mail"). But see Dahlberg & Öhrström, *Proper Notification: A Crucial Element of*

Arbitral Proceedings, 27 J. Int'l Arb. 539 (2010).

⁵²² See [§11.05\[E\]\[2\]](#); [§26.05\[C\]\[3\]\[d\]](#).

⁵²³ [Judgment of 24 February 1977, IV Y.B. Comm. Arb. 301, 301-02 \(Mexican Suprema Corte de Justicia\) \(1979\).](#)

⁵²⁴ Most courts have rejected claims that a commercial party did not receive adequate notice of an arbitration because of a failure to translate (or translate fully) the notification. See [§26.05\[C\]\[3\]\[d\]](#). For exceptions, see *Bankhaus Wobbern v. China Constr. Bank Corp.* [2012] EWHC 3285, ¶23-24 (Comm) (English High Ct.) (failure to send translated order meant that addressee had no notice of it); *Forever Maritime Ltd v. State Unitary Enter. Foreign Trade Enter. Mashioimport*, Case No. 3253/04 (Russian Moscow Dist. Fed. Arb. Ct. 2003) (denying enforcement of award on grounds that translation of notifications into Russian had not been notarized).

The revised 2010 UNCITRAL Rules provide that a request for arbitration will be deemed to be received if it is delivered to a physical address, or through a facsimile or email that has been designated by a party specifically for that purpose or authorized by the arbitral tribunal. ⁵²⁵ [2010 UNCITRAL Rules, Art. 2\(2\)](#). See also T. Webster, *Handbook of UNCITRAL Arbitration* 56-57 (2010).

⁵²⁵ See, e.g., [Award of 12 February 1987 in IUSCT Case No. 353 \(292-353-2\), FMC Corp. v. Govt of the Islamic Repub. of Iran, 4 J. Int'l Arb. 147, ¶28 \(1987\)](#) (although contractually agreed form of communication was delivery in person, notice was adequate by telex, due to change in surrounding circumstances during 1979 in Iran).

⁵²⁶ 2012 ICC Rules, Art. 4(5) ("The Secretariat shall transmit a copy of the Request and the documents annexed thereto to the respondent for its Answer..."). See also ICSID Rules, Rule 5(2); LCIA Rules, Art. 1(2); 2010 SCC Rules, Art. 5.

⁵²⁷ ⁵²⁸ [2010 UNCITRAL Rules, Art. 3\(1\)](#). Under the AAA Commercial Rules, the claimant is to provide the demand to the respondent and must also file it with the institution, which then confirms the filing to both parties (2013 AAA Rules, Rules 4(a), (g), (h)).

⁵²⁸ ⁵²⁹ [N.Y. Civil Practice Law & Rules, §57502\(b\)](#), 7503; [English Arbitration Act, 1996, §13](#). See ⁵³⁰ [UNCITRAL, Report of the Secretary-General on the Revised Draft Set of Arbitration Rules, Ninth Session, U.N. Doc. A/CN.9/112/Add.1, VII Y.B. UNCITRAL 166, 168 \(1976\)](#) ("time of commencement of the arbitral proceedings may have relevance to the question of whether provisions on prescriptions of rights or limitations of actions under national law are operative in relation to the dispute").

⁵²⁹ The choice-of-law issues raised by statutes of limitations are discussed below. See [§19.05\[B\]\[2\]](#).

⁵³⁰ See [§2.02\[C\]\[2\]\[f\]](#), p. 279; [§5.08, pp. 916-17](#). These steps can involve the exhaustion of contractual ADR mechanisms (e.g., good faith consultations, reference to senior corporate management).

⁵³¹ See [§5.08\[B\]](#).

⁵³² See [§5.08\[B\]](#).

⁵³³ Applicable national law may provide presumptions regarding the receipt of requests dispatched by appropriate means of transmission.

⁵³⁴ See, e.g., 2012 ICC Rules, Art. 5(1); LCIA Rules, Art. 2(1); 2012 CIETAC Rules, Art. 14(1); 2013 HKIAC, Art. 5(1); 2010 SCC Rules, Art. 5; 2013 SIAC Rules, Art. 4; 2013 VIAC Rules, Art. 10. Compare ICDR Rules, Arts. 2(2), 3(1); ICSID Rules, Rule 6 (Secretary General shall determine whether or not to register request for arbitration; proceeding shall be deemed instituted upon date of registration).

⁵³⁵ See, e.g., [UNCITRAL Model Law, Art. 3\(1\)\(b\)](#) ("Unless otherwise agreed by the parties: the communication is deemed to have been received on the day it is so delivered."); Revised Uniform Arbitration Act, §2(c) (2000) ("A person receives notice when it comes to the person's attention or the notice is delivered at the person's place of residence or place of business, or at another location held out by the person as a place of delivery of such communications."); [Hong Kong Arbitration Ordinance, 2013, Art. 10](#) (incorporating 2006 [UNCITRAL Model Law, Art. 3](#)); [Japanese Arbitration Law, Art. 12](#) ("Unless otherwise agreed by the parties, when notice in arbitral proceedings is given in writing, it is deemed to have been given at the time it is delivered to the addressee..."); [Australian International Arbitration Act, 2011, Schedule 2, Art. 3](#) (incorporating 2006 [UNCITRAL Model Law, Art. 3](#)).

⁵³⁶ See, e.g., [UNCITRAL Model Law, Art. 21](#); German ZPO, §1044; [Hong Kong Arbitration Ordinance, 2010, Art. 49\(1\)](#); [Japanese Arbitration Law, Art. 29\(1\)](#); [Korean Arbitration Act, Art. 22\(1\)](#); [Malaysian Arbitration Act, §23](#); [Australian International Arbitration Act, 2011, Schedule 2, Art. 21](#); Russian Arbitration Law, Art. 21; [Costa Rican Arbitration Law, 2011, Art. 21](#); Dominican Arbitration Law, Art. 25.

These provisions are generally subject to contrary agreement. Under Article 21 of the Model Law, for example, parties may provide for a different point in time to ascertain when the arbitration has commenced. [UNCITRAL Model Law, Art. 21](#).

⁵³⁷ 2012 ICC Rules, Art. 4(2) ("The date on which the Request is received by the Secretariat shall, for all purposes, be deemed to be the date of the commencement of the arbitration."). See M. Bühler & T. Webster, *Handbook of ICC Arbitration* 54 (2d ed. 2010) (ICC arbitration commences with filing of Request for Arbitration with ICC, rather than receipt by respondent, as under UNCITRAL Model Law).

⁵³⁸ Issues of statutes of limitations will generally be matters of substantive law, governed by national legal systems. See [§19.05\[B\]\[3\]](#), p. 2738. It will be for national law, in these instances, to characterize what constitutes commencement of the arbitration for purposes of determining when the statute of limitations was tolled.

⁵³⁹ See [§27.03](#) discussing *lis pendens* as applied to international arbitrations.

⁵⁴⁰ 2012 ICC Rules, Arts. 4, 5; ICDR Rules, Art. 3; 2013 HKIAC Rules, Art. 5(1).

⁵⁴¹ Article 5(2) of the ICC Rules provides that the ICC Secretariat may extend the time for filing an answer. Note that at the time of the respondent's answer, no arbitral tribunal will yet have been constituted, and that the only "authority" capable of granting an extension of time is the ICC Secretariat; note also that the Secretariat has little power to enforce the time limits concerning an

answer, and that the tribunal that will receive the answer will usually not exist for several more weeks or months. In any event, extensions are routinely granted by the ICC Secretariat, usually in return for the respondent's appointment of an arbitrator. See generally W. Craig, W. Park & J. Paulsson, *International Chamber of Commerce Arbitration* ¶10.05 (3d ed. 2000).

⁵⁴² [2010 UNCITRAL Rules, Art. 4.](#)

⁵⁴³ [2010 UNCITRAL Rules, Art. 4\(2\).](#)

⁵⁴⁴ See [§7.05\[A\]](#).

⁵⁴⁵ See [§15.07\[D\]\[3\]](#).

⁵⁴⁶ See, e.g., [2010 UNCITRAL Rules, Art. 3\(2\)](#); ICDR Rules, Art. 21(3); 2012 ICC Rules, Art. 5(5); LCIA Rules, Arts. 2, 6(3); 2013 HKIAC Rules, Art. 5(4); 2013 SIAC Rules, Art. 4(2).

As discussed below, however, parties to international arbitrations are generally able to amend their cases, including by adding new claims and counterclaims, relatively freely. See [§15.08\[Y\]](#). It is conceivable that preclusion principles might, under some national laws, be invoked to require a respondent, on pain of preclusion, to assert counterclaims, in its reply, related to the claims in the request for arbitration. Such a rule, essentially requiring mandatory assertion of claims, would be unusual and there is no reported authority addressing it.

⁵⁴⁷ See, e.g., 2012 ICC Rules, Art. 5(6); ICDR Rules, Art. 3(2); LCIA Rules, Art. 15(4).

⁵⁴⁸ Unusually, the ICSID Convention provides that any counterclaims must arise "directly out of the subject-matter of the dispute" identified in the request for arbitration (and this also applies to any ancillary claim by the claimant). ICSID Convention, Art. 46; ICSID Rules, Rule 40(1).

⁵⁴⁹ D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 472 (2d ed. 2013) (counterclaims seeking ancillary additions to damages originally claimed, or asserting different legal basis for factual claims, generally permitted).

⁵⁵⁰ See [§15.08\[Y\]](#).

⁵⁵¹ See [§15.08\[S\]](#); [§18.02\[C\]](#); Y. Derains & E. Schwartz, *A Guide to the ICC Rules of Arbitration* 266-70 (2d ed. 2005); J. Fry, S. Greenberg & F. Mazza, *The Secretariat's Guide to ICC Arbitration* ¶¶3-890 to 3-911 (2012).

⁵⁵² See [§25.04\[C\]\[3\]](#); [§25.04\[D\]\[4\]](#); [§26.05\[C\]](#).

⁵⁵³ See [§25.04\[C\]\[3\]](#); [§25.04\[D\]\[4\]](#). The introduction of new parties also has the potential to result in significant delays to hearing the claimant's claims (through added complexity and similar issues).

⁵⁵⁴ See [Chapter 12, §12.01](#).

⁵⁵⁵ See [§12.01\[A\]](#); [§12.03](#).

⁵⁵⁶ See [§12.03](#); [§25.04\[C\]\[3\]](#); [§25.04\[D\]\[4\]](#); [§25.04\[E\]](#); [§26.05\[C\]\[6\]](#).

⁵⁵⁷ See [§12.06](#).

⁵⁵⁸ See [§12.06\[A\]\[2\]](#) & [\[5\]](#).

⁵⁵⁹ [2010 UNCITRAL Rules, Arts. 12, 13](#). The 15-day period is generally viewed as absolute. If a challenge is late, it is out of time and not admissible. See T. Webster, *Handbook of UNCITRAL Arbitration* ¶13-41 (2010).

⁵⁶⁰ 2012 ICC Rules, Art. 14; ICDR Rules, Art. 9; LCIA Rules, Art. 10; 2013 HKIAC Rules, Art. 11(7). See also 2012 CIETAC Rules, Art. 30(1); 2010 SCC Rules, Art. 15(2); 2013 SIAC Rules, Arts. 11-13; 2013 VIAC Rules, Art. 16. See [§12.06\[A\]\[1\]](#), p. 1915.

Under all of these institutional rules, challenges to an arbitrator are resolved by the appointing authority, following written (but not oral) submissions, in some cases subject to interlocutory or eventual judicial review. See [§12.06\[A\]\[1\]](#), p. 1915. Most arbitral institutions do not publish or provide reasons for their decisions on challenges, in large part to expedite decisions. See [§12.06\[A\]\[4\]](#), p. 1921. A few institutions differ, including the LCIA (since 2007) and the PCA (in its capacity under the UNCITRAL Rules). See [§12.06\[A\]\[4\]](#), pp. 1921-22.

⁵⁶¹ See [§12.06\[A\]\[3\]](#); [§12.06\[E\]](#).

⁵⁶² See [§12.03\[C\]](#).

⁵⁶³ See, e.g., [UNCITRAL Model Law, Art. 29](#); [Swiss Law on Private International Law, Art. 189\(2\)](#); [Japanese Arbitration Law, Art. 37\(3\)](#). See also [§23.04\[B\]](#).

⁵⁶⁴ See, e.g., [2010 UNCITRAL Rules, Art. 33\(2\)](#) ("In the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorizes, the presiding arbitrator may decide alone, subject to revision, if any, by the arbitral tribunal."); 2012 ICC Rules, Art. 31(1) ("When the arbitral tribunal is composed of more than one arbitrator, an award is made by a majority decision. If there is no majority, the award shall be made by the president of the arbitral tribunal alone."). See also [§23.04\[B\]](#).

⁵⁶⁵ This may modestly increase the efficiency of the arbitral process. See ICC, *Controlling Time and Costs in International Arbitration* 9 (2d ed. 2012) ("Where there is a three-member tribunal, it may not be necessary for all procedural issues to be decided upon by all three arbitrators. The parties should consider empowering the president of the arbitral tribunal to decide on certain procedural issues alone."). In practice, an experienced chair can accomplish much the same result through careful management of discussions on procedural issues with the co-arbitrators.

⁵⁶⁶ See J. Fry, S. Greenberg & F. Mazza, *The Secretariat's Guide to ICC Arbitration* ¶13-1137 (2012) (commenting on Art. 31(1)): "[d]epending on how they operate, arbitral tribunals may occasionally forgo deliberations for very minor procedural orders.... These minor issues can sometimes be addressed fairly and effectively by the president of the arbitral tribunal alone. Indeed, the president will sometimes seek advance agreement from the parties and the co-arbitrators to proceed in this manner."; [§15.08\[AA\]\[1.1\]](#).

⁵⁶⁷ See [§15.04](#); [§25.04](#) (especially [§25.04\[B\]\[4\]](#)); [§26.05\[C\]](#) (especially [§26.05\[C\]\[3\]\[d\]](#)).

⁵⁶⁸ These matters are typically dealt with in the ICC Terms of Reference. See [§15.08\[S\]](#).

⁵⁶⁹ J. Waincymer, *Procedure and Evidence in International Arbitration* ¶4.8 (2012). See also J. Fry, S. Greenberg & F. Mazza, *The Secretariat's Guide to ICC Arbitration* ¶¶3-65, 3-68 (2012) (ICC Rules "now formally recognize[] email as a possible means of communication and has removed obsolete means of communication such as telex, which was still mentioned in the 1998 Rules"; "it is unlikely that the Secretariat will notify any originating documents, such as a Request for Arbitration or an Answer, exclusively by

email. The Secretariat generally uses a courier service or registered mail, where available, to notify parties of a Request for Arbitration or a Request for Joinder.”).

⁵⁷⁰ See also ICC, *Controlling Time and Costs in International Arbitration* 13 (2d ed. 2012) (“Avoid unnecessary correspondence between counsel.... Avoid sending correspondence between counsel to the arbitral tribunal unless a decision of the arbitral tribunal is required.”).

⁵⁷¹ To provide certainty and avoid squabbles, tribunals sometimes specify the time at which all submissions will be due on their specified due dates (e.g., 6:00 p.m. Singapore time).

⁵⁷² [UNCITRAL Model Law, Art. 24\(3\)](#). See *Methanex Motunui Ltd v. Spellman*, [2004] 3 NZLR 454 (Wellington Ct. App.) (party should be given notice of: (1) evidence and argument provided by other parties; (2) independent expert reports; (3) evidentiary materials; no obligation to disclose documents prepared by arbitral tribunal in its work or copies of published works of general application or public records).

⁵⁷³ [2010 UNCITRAL Rules, Art. 17\(4\)](#) (“All communications to the arbitral tribunal by one party shall be communicated by that party to all other parties. Such communications shall be made at the same time, except as otherwise permitted by the arbitral tribunal if it may do so under applicable law.”). See T. Webster, *Handbook of UNCITRAL Arbitration* ¶17-87 (2010).

⁵⁷⁴ See, e.g., ICDR Rules, Art. 7(2) (“No party or anyone acting on its behalf shall have any *ex parte* communication relating to the case with any arbitrator, or with any candidate for appointment as party-appointed arbitrator.... No party or anyone acting on its behalf shall have any *ex parte* communication relating to the case with any candidate for presiding arbitrator.”); LCIA Rules, Art. 13(2) (“Thereafter, unless and until the Arbitral Tribunal directs that communications shall take place directly between the Arbitral Tribunal and the parties (with simultaneous copies to the Registrar), all written communications between the parties and the Arbitral Tribunal shall continue to be made through the Registrar.”); 2013 HKIAC Rules, Art. 13(3) (“All documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to the other party.”); 2013 SIAC Rules, Art. 10(7) (“No party or anyone acting on its behalf shall have any *ex parte* communication relating to the case with any arbitrator, or with any candidate for appointment as party-nominated arbitrator.... No party or anyone acting on its behalf shall have any *ex parte* communication relating to the case with any candidate for presiding arbitrator.”).

⁵⁷⁵ See, e.g., [2010 UNCITRAL Rules, Art. 3\(1\)](#); 2012 ICC Rules, Arts. 6(1), 14(1); ICDR Rules, Art. 16(2); LCIA Rules, Art. 13(3); 2013 SIAC Rules, Art. 16(6). See also AAA/ABA Code of Ethics, Canon III(C).

⁵⁷⁶ See [§12.05\[J\]-\[K\]](#).

⁵⁷⁷ IBA Rules of Ethics, Art. 5.3 (“If such communications should occur, the arbitrator should inform the other party or parties and arbitrators of its substance.”). See also AAA/ABA Code of Ethics, Canons III(B), (B)(5), (C) (“Unless otherwise provided in this Canon, in applicable arbitration rules or in an agreement of the parties, whenever an arbitrator communicates in writing with one party, the arbitrator should at the same time send a copy of the communication to every other party, and whenever the arbitrator receives any written communication concerning the case from one party, which has not already been sent to every other party, the arbitrator should send or cause it to be sent to the other parties.”); Paulsson, *Securing the Integrity, Impartiality and Independence of Arbitrators: Judicial Intervention*, 1993 Y.B. Arb. Inst. Stockholm Cham. Comm. 91, 93, 94.

As discussed elsewhere, the current provisions of the AAA/ABA Code of Ethics replaced earlier versions of the Code, which permitted party-nominated arbitrators to have *ex parte* communications with their nominating party, provided that a general disclosure was made. See [§12.05\[J\]\[1\]](#); AAA/ABA Code of Ethics, Canon VII.

⁵⁷⁸ AAA/ABA Code of Ethics, Canon III(B)(5). As discussed above, it is not uncommon for a sole or presiding arbitrator to contact the parties’ counsel individually to discuss logistical matters.

See [§12.05\[K\]](#).

⁵⁷⁹ See [§8.02](#).

⁵⁸⁰ See [§25.04\[B\]\[4\]](#); [§26.05\[C\]\[3\]\[d\]](#).

⁵⁸¹ See [§12.06\[A\]-\[B\]](#) *et seq.* (especially [§12.06\[B\]\[4\]](#)).

⁵⁸² As noted above, there are some domestic arbitration contexts where *ex parte* contacts by the parties with non-neutral co-arbitrators are permitted. See [§12.05\[J\]\[1\]](#), p. 1834; [§12.05\[K\]](#), pp. 1876-77; [§15.08\[1\]](#), p. 2229; AAA/ABA Code of Ethics, Canon III(A) (“If any agreement of the parties or applicable arbitration rules establishes the manner or content of communications between the arbitrator and the parties, the arbitrator should follow those procedures...”).

⁵⁸³ The same should generally apply to communications with arbitral institutions, for instance, prior to appointment of the tribunal. By way of example, the Secretariat to the ICC Court of Arbitration only communicates in writing with both parties and will forward any *ex parte* written communications it receives promptly to the other party, emphasizing that all party correspondence addressed to the ICC Court must be copied to the other party. This practice reflects that of all major institutions.

⁵⁸⁴ The LCIA Court removed an arbitrator who conducted a meeting with one party alone while providing a verbatim transcript to the other party. See *Decision of the LCIA Court of 13 February 2002*, reported in G. Nicholas & C. Partasides, *LCIA Court Decisions on Challenges to Arbitrators: A Proposal to Publish*, 23 Arb. Int’l 16 (2007). See also J. Waincymer, *Procedure and Evidence in International Arbitration* ¶4.8 (2012).

⁵⁸⁵ See [§12.03\[A\]\[3\]](#); IBA Rules of Ethics, Art. 5(1); AAA/ABA Code of Ethics, Canon III(B)(1). As discussed above, such contacts must not touch upon the potential appointee’s views about the merits of the claims. See [§12.03\[A\]\[3\]](#); IBA Guidelines on Conflicts of Interest, Green List, 4.5.1; AAA/ABA Code of Ethics, Canon III(B)(2).

⁵⁸⁶ See IBA Guidelines on Conflicts of Interest, Green List, 4.5.1; [§12.03\[A\]\[3\]](#); [§12.03\[C\]\[2\]](#).

⁵⁸⁷ See [§12.03\[A\]\[3\]](#).

- 588 See [§22.02\[B\]\[3\]\[d\]](#).
- 589 [English Arbitration Act, 1996, §42](#); R. Merkin, *Arbitration Law* ¶16.32 (1991 & Update August 2013).
- 590 As noted above, there are specialized enforcement mechanisms for procedural orders in some jurisdictions. See [§22.02\[B\]\[3\]\[e\]](#), p. 2934. Even absent such mechanisms, the parties' agreement to arbitrate includes the obligation to comply with the tribunal's procedural directions. See [§15.03, p. 2145](#).
- 591 See [Chapter 5: §3.02\[E\]](#).
- 592 See [§7.02; §7.05\[A\]](#).
- 593 See [§7.05\[A\]](#).
- 594 See [§7.05\[A\]](#).
- 595 See [§7.05\[A\]](#).
- 596 See [§7.05\[C\]](#).
- 597 G. Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* 87 (4th ed. 2013); Lamèthe, *Les langues de l'arbitrage international: liberté raisonnée de choix ou contraintes réglementées?*, 4 J.D.I. (Clunet) 9 (2007); [§1.04\[E\]\[6\]](#). Language clauses can influence choice (and background) of arbitrators, and thus may have considerable practical importance. See [§12.03\[A\]\[2\]](#).
- 598 See [§1.04\[E\]\[6\]](#), p. 208. Failure to give effect to the parties' agreement on the language of the arbitration would expose the tribunal's award to annulment and non-recognition. See [§25.04\[B\]\[4\]](#), p. 3238. See also *Judgment of 5 March 2008, Case No. Gž 6/08-2* (Croatian S.Ct.) (party was not prevented from presenting its case based on unfamiliarity with language of arbitration; party could have requested translations).
- 599 *Judgment of 22 June 2009, 34 Sch 26/08, 373* (Oberlandesgericht München) ("fact that Spanish was used in the arbitration – rather than English as agreed in the arbitration clause – did not contravene the agreement of the parties, who agreed [during the arbitral proceedings] to Spanish as the language of the arbitration").
- 600 Fry & Greenberg, *The Arbitral Tribunal: Applications of Articles 7-12 of the ICC Rules in Recent Cases*, 20(2) ICC Ct. Bull. 12, 21 (2009) (75% of ICC arbitrations conducted in English, 7% in French and 5% in Spanish).
- 601 See, e.g., [2010 UNCITRAL Rules, Art. 19; 2012 ICC Rules, Art. 20; ICDR Rules, Art. 14; LCIA Rules, Art. 17; 2013 HKIAC Rules, Art. 15\(1\); 2010 SCC Rules, Art. 21; 2013 SIAC Rules, Art. 19\(1\)](#). See also *Fluor Corp. v. Islamic Repub. of Iran, Order in IUSCT Case No. 810 of 16 February 1987, Guidelines for the Translation of Documentary Evidence*, reprinted in D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 388-89 (2d ed. 2013); D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 376-84 (2d ed. 2013).

It is also possible to have bilingual (or multilingual) arbitral proceedings. See M. Bühler & T. Webster, *Handbook of ICC Arbitration: Commentary, Precedents, Materials* 205-06 (2d ed. 2008) (dual language arbitrations); D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 355 (2d ed. 2013) ("[N]otably where not only the parties have different languages, but also the contract has been drafted in two equally authentic languages, the adoption of two languages should be considered. But even in such cases the adoption of one language only is generally preferable, as the conduct of the proceedings in multiple languages is likely to increase both the time and the cost of arbitration"). The costs and potential confusion resulting from such arrangements should not be underestimated.

- 602 See 2012 ICC Rules, Art. 20. See J. Fry, S. Greenberg & F. Mazza, *The Secretariat's Guide to ICC Arbitration* ¶3-735 (2012).
- 603 *Award in CRCICA Case No. 1/1994 of 31 October 1995*, discussed in M. Alam Eldin (ed.), *1 Arbitral Awards of the Cairo Regional Centre for International Commercial Arbitration* 135, 137 (2000).
- 604 See, e.g., *Judgment of 2 October 2001, 8 Sch 03/01* (Oberlandesgericht Celle); *Judgment of 5 March 2008, Case No. Gž 6/08-2 (Croatian S.Ct.)*.
- 605 ICC, *Controlling Time and Costs in International Arbitration* 8 (2d ed. 2012) ("Having two or more languages of the arbitration will normally increase the time and cost. Consideration should be given to whether the use of two or more languages truly justifies the additional time and cost.").
- 606 Polish Chamber of Commerce Arbitration Rules, Art. 20(1) (presumption of Polish); Hungarian Chamber of Commerce Court of Arbitration Rules of Proceedings, Art. 9(3) (Hungarian).
- 607 See Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania ("CICA-CCIR") Rules, Art. 89 (1) ("If the venue of arbitration is in Romania" then language of arbitration is Romanian unless "all arbitrators are of foreign nationality and have reached an agreement.").
- 608 Where such requirements purport to override the parties' agreed arbitral procedures, the better view is that they violate Articles II and V(1)(d) of the Convention. See [§11.03\[C\]\[1\]\[c\]\[v\]](#), p. 1561; [§15.02\[A\]](#), p. 2132.
- 609 [2010 UNCITRAL Rules, Art. 19\(2\)](#) (tribunal has discretion whether to order translations of evidence and annexes); D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 382 (2d ed. 2013) ("Whereas Article 19(1) only requires the language(s) of the arbitration to be used in the written statements of the parties, any annexes, exhibits and the like mentioned in Article [19(2)], i.e., documentary evidence, may be submitted in their original language only, unless otherwise ordered by the arbitral tribunal."); T. Webster, *Handbook of UNCITRAL Arbitration* 19-25 (2010) ("Where the parties submit a translation, unlike in many national court proceedings, it is not generally required that the translation be sworn. The basic approach is usually that a party submits a translation and, if the other party objects to the translation, a sworn translation may be ordered.").
- 610 D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 382 (2d ed. 2013) ("Documents specifically prepared for the purpose of the arbitration, such as affidavits, are likely to require translation, as they typically relate very closely to the written statements, which automatically must be submitted in the language(s) of the arbitration. Conversely, translation is less crucial with respect to documents that are not prepared specifically for purposes of the arbitration case.").

- 611 M. Kurkela & S. Turunen, *Due Process in International Commercial Arbitration* 164 (2d ed. 2010).
- 612 See §15.08[A][5].
- 613 N. Blackaby et al. (eds.), *Redfern and Hunter on International Arbitration* ¶¶6-27, to 6-37 (5th ed. 2009) (discussion of role and importance of preliminary meetings).
- 614 ICC, *Controlling Time and Costs in International Arbitration* 10 (2d ed. 2012) ("Whenever possible, the procedure for the entire arbitration should be determined at the first case management conference and reflected in the procedural timetable.").
- 615 ICC, *Controlling Time and Costs in International Arbitration* 10 (2d ed. 2012) ("tribunal should consider requiring such attendance [of the clients]"; clients "should be empowered to make case management decisions").
- 616 2012 ICC Rules, Art. 24.
- 617 2012 ICC Rules, Appendix IV.
- 618 2012 ICC Rules, Art. 24(2).
- 619 2013 AAA Rules, Rule 10; ICSID Additional Facility Rules, Art. 29; Association of Arbitrators (Southern Africa) Rules, Art. 31; CCAC Rules, Art. 28; CPR Rules, Rule 9.3; 2013 FCCC Expedited Arbitration Rules, Arts. 28, 29(1); 2011 JAMS Rules, Art. 22; MIGA Arbitration for Disputes Under Contracts of Guarantee Rules, Art. 28; VENCA Rules, Art. 18; WIPO Mediation and Expedited Arbitration Rules, Art. 38.
- 620 See §20.07; ¹⁵2010 UNCITRAL Rules, Art. 28(3); ICDR Rules, Art. 20(4); LCIA Rules, Art. 30; 2013 HKIAC Rules, Art. 22(7).
- 621 See §1.02[B][8]; §20.01.
- 622 See §15.01 (especially §15.01[B]); §15.07.
- 623 See §15.08[M].
- 624 See §15.08[O][P].
- 625 UNCITRAL, *Notes on Organizing Arbitral Proceedings*, available at ¹⁵www.uncitral.org. See also §1.04[D][4], p. 203.

The drafting of the UNCITRAL Notes occasioned substantial controversy, with some critics voicing concerns that they were unduly "common law" in orientation and would unwisely constrain the arbitrators' discretion. *Ceccon, UNCITRAL Notes on Organizing Arbitral Proceedings and the Conduct of Evidence – A New Approach to International Arbitration*, 14(2) J. Int'l Arb. 67 (1997) ("the actual and substantial risk was a possible limitation of the freedom of the arbitrator in managing the proceedings"). These objections were overridden, but only after it was made clear that the Notes provide a non-binding, non-exclusive list of topics for consideration.

- 626 UNCITRAL, *Notes on Organizing Arbitral Proceedings* ¶4.
- 627 UNCITRAL, *Notes on Organizing Arbitral Proceedings* ¶7.
- When a tribunal is deciding whether to consult the parties on procedural matters, the UNCITRAL Notes suggest that the nature of the issue in question is relevant, as is whether consultation would be beneficial in improving procedural predictability or the atmosphere. *Ibid.*
- 628 UNCITRAL, *Notes on Organizing Arbitral Proceedings* ¶¶14-16.
- 629 UNCITRAL, *Notes on Organizing Arbitral Proceedings* ¶¶17-20.
- 630 UNCITRAL, *Notes on Organizing Arbitral Proceedings* ¶¶21-23.
- 631 UNCITRAL, *Notes on Organizing Arbitral Proceedings* ¶¶24-27.
- 632 UNCITRAL, *Notes on Organizing Arbitral Proceedings* ¶¶28-30.
- 633 UNCITRAL, *Notes on Organizing Arbitral Proceedings* ¶¶31-37.
- 634 UNCITRAL, *Notes on Organizing Arbitral Proceedings* ¶¶38-42, 48-49, 55-58, 60-68, 74-77.
- 635 UNCITRAL, *Notes on Organizing Arbitral Proceedings* ¶¶74-85.
- 636 UNCITRAL, *Notes on Organizing Arbitral Proceedings* ¶47.
- 637 UNCITRAL, *Notes on Organizing Arbitral Proceedings* ¶¶43-46.
- 638 See §15.08[M]. Appendix IV to the 2012 ICC Rules includes:
- "a.) Bifurcating the proceedings or rendering one or more partial awards on key issues, when doing so may genuinely be expected to result in a more efficient resolution of the case. b.) Identifying issues that can be resolved by agreement between the parties or their experts. c.) Identifying issues to be decided solely on the basis of documents rather than through oral evidence or legal argument at a hearing. d.) Production of documentary evidence: (i) requiring the parties to produce with their submissions the documents on which they rely; (ii) avoiding requests for document production when appropriate in order to control time and cost; (iii) in those cases where requests for document production are considered appropriate, limiting such requests to documents or categories of documents that are relevant and material to the outcome of the case; (iv) establishing reasonable time limits for the production of documents; (v) using a schedule of document production to facilitate the resolution of issues in relation to the production of documents. e.) Limiting the length and scope of written submissions and written and oral witness evidence (both fact witnesses and experts) so as to avoid repetition and maintain a focus on key issues. f.) Using telephone or video conferencing for procedural and other hearings where attendance in person is not essential and use of IT that enables online communication among the parties, the arbitral tribunal and the Secretariat of the Court. g.) Organizing a pre-hearing conference with the arbitral tribunal at which arrangements for a hearing can be discussed and agreed and the arbitral tribunal can indicate to the parties issues on which it would like the parties to focus at the hearing. h.) Settlement of disputes: (i) informing the parties that they are free to settle all or part of the dispute either by negotiation or through any form of amicable dispute resolution methods such as, for example, mediation under the ICC ADR Rules; (ii) where agreed between the parties and the arbitral tribunal, the arbitral tribunal may take steps to facilitate settlement of the dispute, provided that every effort is made to ensure that any subsequent award is enforceable at law."
- 639 See ICC, *Controlling Time and Costs in International Arbitration* (2d ed. 2012). See also *id.* at 5 ("useful and efficient for the parties and the tribunal to make conscious decisions as early as possible on the procedures best suited to the dispute at hand").
- 640 Moser, *The "Pre-Hearing Checklist" – A Technique for Enhancing Efficiency in International Arbitral Proceedings*, 30 J. Int'l Arb. 155-59 (2013) ("Adopting measures designed to ensure the efficient conduct of the oral hearing itself are also useful.... Preparations for an efficient hearing can be aided by the adoption of a 'Pre-Hearing Checklist' procedure."). See also 2013 AAA Rules, P-1, P-2 (procedural checklist and principles).

⁶⁴¹ See [§15.08\[S\]](#).

⁶⁴² See, e.g., UNCITRAL Model Law (no time limit); U.S. FAA (same); English Arbitration Act, 1996 (same); French Code of Civil Procedure (same); Swiss Law on Private International Law (same).

⁶⁴³ [Article 1463 of the French Code of Civil Procedure](#) provides that a domestic arbitrator's mandate lasts only six months from the date of his appointment (subject to extension by the French courts). See [§23.06\[A\]](#). Other nations have similar legislation. See, e.g., [Luxembourg Code of Civil Procedure, Arts. 1007, 1009](#) (three months from date of submission to arbitration, unless otherwise agreed); [Spanish Arbitration Act, 2011, Art. 37\(2\)](#); [Brazilian Arbitration Law, Art. 23](#); Venezuelan Commercial Arbitration Law, Art. 22; [§23.06\[A\]](#). See also W. Craig, W. Park & J. Paulsson, *International Chamber of Commerce Arbitration* ¶19.01 (3d ed. 2000) ("Many national laws are hostile to arbitration procedures that are not subject to a fixed limitation of time."). Compare [Belgian Judicial Code, Art. 1713\(2\)](#) ("The parties may determine the time limit within which the Arbitral Tribunal must render its award, or the terms for setting such a time limit. Failing this, if the arbitral tribunal is late in rendering its award, and a period of six months has elapsed between the date on which the last arbitrator has been appointed, the President of the Court of First Instance, at the request of one of the parties, may impose a time limit on the arbitral tribunal in accordance with article 1680, §3.").

⁶⁴⁴ See, e.g., [Spanish Arbitration Act, 2011, Art. 41\(4\)](#); [Brazilian Arbitration Law, Art. 32\(VII\)](#) ("An arbitral award is null and void if...it is made after the time limit, except in the case of Article 12, item III, of this Law...").

⁶⁴⁵ There is a substantial argument, however, that the New York Convention would not permit a Contracting State to override the parties' agreement on the appropriate length of the arbitral process, based on a mandatory local statutory time limit. An absolute limit of this character would not appear to be discriminatory, but is idiosyncratic and out of step with the overwhelming weight of state practice. In practice, these issues seldom arise, because tribunals and parties do not ordinarily disregard mandatory national time limits.

⁶⁴⁶ [G. Bom, International Arbitration and Forum Selection Agreements: Drafting and Enforcing 104-05 \(4th ed. 2013\)](#); P. Friedland, *Arbitration Clauses for International Contracts* 87-89 (2d ed. 2007).

⁶⁴⁷ See [§15.02\[A\]](#).

⁶⁴⁸ See, e.g., *Judgment of 26 November 2002*, 9 Sch 19/02 (Oberlandesgericht Köln).

⁶⁴⁹ See [§23.06](#); *N.B.C.C. Ltd v. J.G. Eng'g Pvt Ltd*, (2010) 2 SCC 385 (Indian S.Ct.); *Judgment of 3 December 2002*, Case No. 134 (Tunisian Cour d'appel).

⁶⁵⁰ See [§25.04\[C\]\[5\]](#).

⁶⁵¹ 1998 ICC Rules, Art. 24(1). See [Y. Derains & E. Schwartz, A Guide to the ICC Rules of Arbitration 303-04 \(2d ed. 2005\)](#).

⁶⁵² 2012 ICC Rules, Art. 30(1). See J. Fry, S. Greenberg & F. Mazza, *The Secretariat's Guide to ICC Arbitration* ¶3-1108 (2012).

⁶⁵³ See, e.g., CAM Rules, Art. 32 ("The Arbitral Tribunal shall file the final award with the Secretariat within six months from its constitution, unless otherwise agreed by the parties in the arbitration agreement."); 2012 CIETAC Rules, Art. 46(1) ("The arbitral tribunal shall render an arbitral award within six (6) months from the date on which the arbitral tribunal is formed."); 2010 SCC Rules, Art. 37 ("The final award shall be made not later than six months from the date upon which the arbitration was referred to the Arbitral Tribunal pursuant to Article 18."); WIPO Rules, Art. 63.

⁶⁵⁴ ICDR Rules, Art. 27(1).

⁶⁵⁵ That is true of the UNCITRAL, LCIA, ICSID, HKIAC and VIAC.

⁶⁵⁶ [J. Delvolvé et al., French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration 175 \(2d ed. 2009\)](#).

⁶⁵⁷ See [§15.08\[O\]](#).

⁶⁵⁸ See [§15.08\[MM\]](#); [G. Bom, International Arbitration and Forum Selection Agreements: Drafting and Enforcing 104-05 \(4th ed. 2013\)](#).

⁶⁵⁹ See [§2.02\[C\]\[2\]\[f\]](#); [§5.08](#); [G. Bom, International Arbitration and Forum Selection Agreements: Drafting and Enforcing 112 \(4th ed. 2013\)](#).

⁶⁶⁰ See [§25.04\[C\]\[D\]](#); [§26.05\[C\]\[5\]\[b\]](#).

⁶⁶¹ See [§15.08\[A\]](#).

⁶⁶² See, e.g., [2010 UNCITRAL Rules, Art. 24](#); [LCIA Rules, Art. 19\(2\)](#); 2013 SIAC Rules, Art. 17; 2013 HKIAC Rules, Art. 21 ("The period of time set by the arbitral tribunal for the communication of written statements...should not exceed 45 days.").

⁶⁶³ See [§15.08\[O\]](#).

⁶⁶⁴ See [§15.08\[M\]](#).

⁶⁶⁵ See [§15.08\[M\]](#); [§15.08\[AA\]](#).

⁶⁶⁶ For an example, see *Mercer Int'l Inc. v. Gov't of Canada*, Procedural Order No. 1 in ICSID Case No. ARB(AF)/12/13 of 24 January 2013; *Occidental Petroleum Corp. v. Repub. of Ecuador*, Award in ICSID Case No. ARB/06/11 of 5 October 2012.

⁶⁶⁷ See [§15.08\[R\]](#).

⁶⁶⁸ This is discussed in greater detail above. See [§§1.02\[B\]\[1\]-\[6\]](#); [§15.01](#); [§15.07](#).

⁶⁶⁹ ICC, *Controlling Time and Costs in International Arbitration* 10 (2d ed. 2012) ("arbitrators and parties should make all reasonable efforts to comply with the procedural timetable").

⁶⁷⁰ See D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 507 (2d ed. 2013) (Iran-US Claims Tribunal's "practice of granting extensions can be characterized as liberal").

⁶⁷¹ See D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 506, 507-08 (2d ed. 2013) ("Legitimate reasons for an extension may include illness of counsel, communication problems, or unexpected problems in gathering evidence to be submitted in support of the written witness statement in question"; refusal to accept late-filed submission may be appropriate where no explanation is offered, previous request for extension was denied or opposing party will suffer prejudice).

⁶⁷² See [§15.09\[B\]](#).

⁶⁷³ See Hobeck, Mahnken & Koebke, *Time for Woolf Reforms in International Construction Arbitration*, 2008 Int'l Arb. L. Rev. 84, 93 ("In most complex construction arbitrations it is appropriate to prioritise the issues according to their relevance."); Holtzmann, *Fact-*

Finding by the Iran-United States Claims Tribunal, in R. Lillich (ed.), *Fact-Finding Before International Tribunals* 101, 106-07 (1991); Hunter, *The Procedural Powers of Arbitrators Under the English 1996 Act*, 13 Arb. Int'l 345, 352 (1997); Schneider, *Lean Arbitration: Cost Control and Efficiency Through Progressive Identification of Issues and Separate Pricing of Arbitration Services*, 10 Arb. Int'l 119 (1994).

⁶⁷⁴ Holtzmann, *Streamlining Arbitral Proceedings: Some Techniques of the Iran-U.S. Claims Tribunal*, 11 Arb. Int'l 39 (1995). See also D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 603 (2d ed. 2013) ("The arbitral tribunal may reduce the need for lengthy (and costly) hearings by specifying in appropriate cases – preferably after consultation with the parties – the issues on which oral evidence and argument should concentrate.").

⁶⁷⁵ Holtzmann, *Streamlining Arbitral Proceedings: Some Techniques of the Iran-U.S. Claims Tribunal*, 11 Arb. Int'l 39, 41-44 (1995) (quoting *Flexi-Van Leasing, Inc. v. Islamic Repub. of Iran*, Order in IUSCT Case No. 36 of 20 December 1982, 1 Iran-US C.T.R. 455 (1981-1982)).

⁶⁷⁶ The tribunal must also avoid prejudging its decision, before the parties have had an opportunity to present their cases. Failure to do so would expose the arbitrators' award to annulment or non-recognition. See §25.04[B].

⁶⁷⁷ See §7.05[E], p. 1244. As discussed above, national law may require or encourage preliminary disposition of jurisdictional issues. See §7.05, p. 1239. Additionally, as discussed below, most national arbitration legislation expressly permits arbitral tribunals to issue preliminary decisions, including in the form of partial awards. See §23.01[B], p. 3016.

⁶⁷⁸ See Greenwood, *Does Bifurcation Really Promote Efficiency?*, 28 J. Int'l Arb. 105 (2011); Raviv, *No More Excuses: Toward A Workable System of Dispositive Motions in International Arbitration*, 28 Arb. Int'l 487, 488 n.3 (2012) ("However, such arrangements do nothing to limit the length and cost of arbitration in cases where damages can be resolved summarily. In cases where damages issues are resolved relatively early in the proceeding, such a finding...may prompt the parties to move closer to settlement. Indeed, in cases where the Tribunal holds that little if any damages are available, such a ruling may even persuade the claimant to drop the case entirely.").

⁶⁷⁹ See Benedettelli, *To Bifurcate or Not to Bifurcate? That Is the (Ambiguous) Question*, 29 Arb. Int'l 493, 499-500 (2013) ("[I]t may be that the matter to be determined earlier requires an intensive fact-finding exercise so that the arbitral tribunal either is forced to deliberate after having carried out a full evidentiary phase (what may deprive bifurcation of its efficiency function), or takes its decision when the matter is not yet ripe for being deliberated.").

⁶⁸⁰ The bifurcation of jurisdictional issues is discussed above. See §7.05.

⁶⁸¹ See, e.g., Collins, *Summary Disposition in International Arbitration*, in A. van den Berg (ed.), *50 Years of the New York Convention* 532 (ICC Congress Series No. 14 2009); Ehrenhaft, *Effective International Commercial Arbitration*, 9 Law & Pol'y Int'l Bus. 1191, 1193-94 (1977).

⁶⁸² *Schlessinger v. Rosenfeld, Meyer & Susman*, 47 Cal. Rptr.2d 650, 660 (Cal. Ct. App. 1995) ("propriety of summary adjudication motions will depend upon a variety of factors, including the nature of the claims and defenses, the provisions of the arbitration agreement, the rules governing the arbitration, the availability of discovery, and the opportunity to conduct adequate discovery before making or opposing a motion"). See also Benedettelli, *To Bifurcate or Not to Bifurcate? That Is the (Ambiguous) Question*, 29 Arb. Int'l 493, 505 (2013) ("Even where not expressly mentioned, the power to split the proceedings in different phases, each finalized to the rendering of a decision on a discrete matter, may be considered 'inherent' to the judicial function performed by the arbitral tribunal.").

⁶⁸³ See, e.g., Revised Uniform Arbitration Act, §15(b) (2000) (authorizing arbitral tribunal to "decide a request for summary disposition of a claim or particular issue"); *Pegasus Constr. Corp. v. Turner Constr. Co.*, 929 P.2d 1200 (Wash. App. 1997) (approving arbitrators' decision based on "motion to dismiss"); *Schlessinger v. Rosenfeld, Meyer & Susman*, 47 Cal. Rptr.2d 650, 657 (Cal. Ct. App. 1995) (confirming award based on summary adjudication but noting concerns about ensuring opportunity to be heard: "an arbitrator [may] conduct a hearing on a summary adjudication motion in lieu of a hearing with oral testimony"); *Stiffler v. Seymour Weiner*, 488 A.2d 192 (Md. App. 1985) (approving arbitrators' partial decision on statute of limitations grounds).

⁶⁸⁴ See §1.04[C][5][a], pp. 178-79; §15.01[B], pp. 2126-27; Beale, Nieuwveld & Nieuwveld, *Summary Arbitration Proceedings: A Comparison Between the English and Dutch Regimes*, 26 Arb. Int'l 139 (2010); Bom & Beale, *Party Autonomy and Default Rules: Reframing the Debate Over Summary Disposition in International Arbitration*, 21(2) ICC Ct. Bull. 19 (2010); Y. Derains & C. Newmark, *ICC Task Force on Reducing Time and Costs in Arbitration, Techniques for Controlling Time and Costs in Arbitration* (2007); Raviv, *No More Excuses – Toward A Workable System of Dispositive Motions in International Arbitration*, 28 Arb. Int'l 487 (2012).

⁶⁸⁵ Recent revisions to some institutional rules expressly permit arbitrators to rule upon dispositive motions. 2013 AAA Rules, Rule 23 (granting arbitrator authority to rule on dispositive motion).

⁶⁸⁶ Lazareff, *Terms of Reference*, 17(1) ICC Ct. Bull. 1 (2006); Lazareff & Schaefer, *The 1992 Practical Guide on Terms of Reference Revisited*, 10(2) ICC Ct. Bull. 14 (1999).

⁶⁸⁷ Y. Derains & E. Schwartz, *A Guide to the ICC Rules of Arbitration* 247 (2d ed. 2005); Wetter, *The Present Status of the International Court of Arbitration of the ICC: An Appraisal*, 1 Am. Rev. Int'l Arb. 91, 101 (1990). See §1.01[B][4].

⁶⁸⁸ 2012 ICC Rules, Art. 23(1); 1998 ICC Rules, Art. 18(1). See Y. Derains & E. Schwartz, *A Guide to the ICC Rules of Arbitration* 247-49 (2d ed. 2005); J. Fry, S. Greenberg & F. Mazza, *The Secretariat's Guide to ICC Arbitration* ¶¶3-826 to 3-861 (2012).

⁶⁸⁹ 2012 ICC Rules, Art. 23(1).

⁶⁹⁰ 2012 ICC Rules, Art. 23(2).

⁶⁹¹ 2012 ICC Rules, Art. 23(4).

⁶⁹² 1988 ICC Rules, Art. 16 ("The parties may make new claims or counter-claims before the arbitrator on condition that these remain within the limits fixed by the Terms of Reference provided for in Art. 13 or that they are specified in a rider to that document, signed by

the parties and communicated to the Court.”).

⁶⁹³ [Y. Derains & E. Schwartz, A Guide to the ICC Rules of Arbitration 40 \(2d ed. 2005\).](#)

⁶⁹⁴ See [Y. Derains & E. Schwartz, A Guide to the ICC Rules of Arbitration 266-70 \(2d ed. 2005\)](#); J. Fry, S. Greenberg & F. Mazza, *The Secretariat's Guide to ICC Arbitration* ¶¶3-890 to 3-911 (2012); [§15.08\[Y\]](#). See also [Award in ICC Case No. 11195, 1\(3\) Int'l J. Arb. Arb. 453 \(2009\)](#) (“It is generally agreed that Article 19 of the 1998 Rules, which has replaced Article 16 of the previous Rules, permits greater flexibility and gives broad discretion to the Sole Arbitrator in deciding whether to allow or not to allow new claims or counterclaims [after the Terms of Reference have been signed or approved by the Court]....In exercising his broad discretion in this respect the Sole Arbitrator shall take into account the nature of such new claims or counterclaims, the stage of the proceedings and the relevant circumstances.”).

⁶⁹⁵ See [§15.08\[S\]](#).

⁶⁹⁶ 2012 ICC Rules, Art. 24(1).

⁶⁹⁷ 2012 ICC Rules, Art. 24(1).

⁶⁹⁸ The ICSID Arbitration Rules require an early meeting between the tribunal and parties, which has the effect of focusing early attention on organizational and procedural issues. See ICSID Rules, Rule 20 (preliminary procedural consultation); C. Schreuer *et al.*, *The ICSID Convention: A Commentary* Art. 44, ¶¶26-31 (2d ed. 2009).

⁶⁹⁹ Smit, *The Future of International Arbitrations, A Transnational Institution?*, 25 Colum. J. Transnat'l L. 9, 25-27 (1986); Wetter, *The Present Status of the International Court of Arbitration of the ICC: An Appraisal*, 1 Am. Rev. Int'l Arb. 91, 101 (1990).

⁷⁰⁰ W. Craig, W. Park & J. Paulsson, *International Chamber of Commerce Arbitration* ¶15.01 (3d ed. 2000); [Y. Derains & E. Schwartz, A Guide to the ICC Rules of Arbitration 246-64 \(2d ed. 2005\)](#); J. Fry, S. Greenberg & F. Mazza, *The Secretariat's Guide to ICC Arbitration* ¶3-827 (2012).

⁷⁰¹ For commentary, see Fadlallah, *Payment of the Advance to Cover Costs in ICC Arbitration: The Parties' Reciprocal Obligations*, 14(1) ICC Ct. Bull. 53 (2003); Nieuwveld, *ICC Rules: What Do You Do When the Respondent Refuses to Pay Its Portion of the Advance on Costs? An Alternative Approach*, Kluwer Arbitration Blog (23 February 2010); Nieuwveld, *Respondents Play With Advance on Costs as A Strategy: Do Claimants as Well?*, Kluwer Arbitration Blog (5 March 2010); [Price & Stans, Using Costs as A Case Management Tool in International Arbitration](#), 25 ASA Bull. 704 (2007); [Rohner & Lazopoulos, Respondent's Refusal to Pay Its Share of the Advance on Costs](#), 29 ASA Bull. 549 (2011); [Rosell, Arbitration Costs as Relief and/or Damages](#), 28 J. Int'l Arb. 115 (2011); [Secomb, Awards and Orders Dealing With the Advance on Costs in ICC Arbitration: Theoretical Questions and Practical Problems](#), 14(1) ICC Ct. Bull. 59 (2003); [Tamminen, The Arbitrator and the Arbitration Procedure – The Obligation to Pay the Advance on Costs Under the Vienna Rules and Austrian Law](#), 2009 Austrian Arb. Y.B. 281. See also [§8.02\[B\]](#); [§23.08](#).

⁷⁰² See, e.g., [2010 UNCITRAL Rules, Art. 43](#); 2012 ICC Rules, Art. 30; LCIA Rules, Art. 24; 2012 CIETAC Rules, Arts. 12(3), 15(3), 72; 2013 HKIAC Rules, Art. 40; 2010 SCC Rules, Art. 45; 2013 SIAC Rules, Art. 30.

⁷⁰³ See, e.g., Favre-Bulle, *Les conséquences du non-paiement de la provisions pour frais de l'arbitrage par une partie – Un tribunal arbitral peut-il condamner un défendeur au paiement de sa partie de l'avance de frais?*, 19 ASA Bull. 227, 241 (2001); Karali & Ballantyne, in F.-B. Weigand (ed.), *Practitioner's Handbook on International Arbitration* 396 (2d ed. 2009); K. Lionnet & A. Lionnet, *Handbuch der internationalen und nationalen Schiedsgerichtsbarkeit* 3 II 4 b) (3d ed. 2005); [F. Schwarz & C. Konrad, The Vienna Rules: A Commentary on International Arbitration in Austria](#) ¶34-014 (2009).

⁷⁰⁴ [Award in ICC Case No. 14046, XXXV Y.B. Comm. Arb. 270 \(2010\)](#) (party that pays advance on costs on behalf of other party has right to claim for interest on amount paid in lieu of counter-party); [Award in ICC Case No. 9667, 2002 Rev. arb. 1009](#) (Article 6(1) of European Human Rights Convention interpreted as providing that prospect of paying counter-party's advance on costs was not an unreasonable limitation on right to be heard).

⁷⁰⁵ See, e.g., 2012 ICC Rules, Art. 36(4); ICDR Rules, Art. 33(3); LCIA Rules, Art. 24(3); 2010 SCC Rules, Art. 45(4).

⁷⁰⁶ [Partial Ad Hoc Award of 2008, XXXV Y.B. Comm. Arb. 22 \(2009\)](#).

⁷⁰⁷ See [§8.02\[B\]](#); [§17.02\[G\]\[4\]\[e\]](#); [Final Award in ICC Case No. 13009, XXXVI Y.B. Comm. Arb. 70, 71 \(2011\)](#) (“[The tribunal] then issued a partial award on the advance to cover the costs of the arbitration, by which it directed First Buyer to reimburse Seller for the payment of its share of the advance on costs.”); [Interim Award in ICC Case of 26 March 2002, 21 ASA Bull. 802 \(2003\)](#) (ordering interim measure requiring payment of amount of share of advance that respondent was required to pay); [Schubert v. H.O. Eng'g, Inc.](#), Docket No. L-4310-90 (N.J. Sup. Ct. 1994), quoted in [Y. Derains & E. Schwartz, A Guide to the ICC Rules of Arbitration 346 n.43 \(2d ed. 2005\)](#); *Judgment of 9 April 1998, Société Fertalge Euromade v. SA Kaltenbach Thuring*, 2002 Rev. arb. 993 (Beauvais Tribunal de Grande Instance), cited in W. Craig, W. Park & J. Paulsson, *International Chamber of Commerce Arbitration* ¶14.04 (3d ed. 2000) (ordering respondent to pay its share of advance on costs). See also [Judgment of 10 November 2010, XXXVI Y.B. Comm. Arb. 604 \(2011\)](#) (Swiss Federal Tribunal) (holding that partial award was actually order to pay requested advance on costs); [Judgment of 2 May 2005, 23 ASA Bull. 739 \(2005\)](#) (Geneva Tribunal).

⁷⁰⁸ See [Chapter 16](#).

⁷⁰⁹ See [§16.02](#). See also *Bain Cotton Co. v. Chestnutt Cotton Co.*, Docket No. 12-11138 (5th Cir. 2013) (“Had this discovery dispute arisen in and been ruled on by the district court, it is not unlikely that the denial of [Plaintiff-Appellant's] pleas would have led to reversal; however, under the ‘strong federal policy favoring arbitration, judicial review of an arbitration award is extremely narrow.’”) (quoting *Rain C. II Carbon, LLC v. ConocoPhillips Co.*, [674 F.3d 469](#), 471-72 (5th Cir. 2012)).

⁷¹⁰ ICC, *Controlling Time and Costs in International Arbitration* 12 (2d ed. 2012) (recommendations for efficient disclosure procedures); ICC Commission on Arbitration Task Force, *Techniques for Managing Electronic Document Production When It Is Permitted or Required in International Arbitration* ¶3.13 (2012).

711 See [§16.02\[E\]\[3\]\[a\]](#).

712 See [§§15.08\[O\]-\[P\]](#).

713 See [§16.02\[E\]\[3\]\[a\]\[iii\]](#), pp. 2349-50. This is the procedure contemplated by the IBA Rules for the Taking of Evidence, which are frequently adopted or used as guidelines in international arbitrations. See [§15.07\[E\]](#), p. 2212; [§16.02\[E\]\[3\]\[a\]\[ii\]](#), p. 2348.

714 See [§15.07\[E\]](#); [§16.02\[E\]\[3\]\[a\]\[ii\]](#).

715 See [§§16.02\[E\]\[4\]\[f\]-\[g\]](#).

716 See [§§16.02\[E\]\[4\]\[f\]-\[g\]](#).

717 In unusual cases, parties may be granted opportunities to seek disclosure at an earlier time, but this is often wasteful and unnecessary.

718 See [§16.03](#).

719 See [§16.02\[E\]](#); [§§16.03](#) et seq.

720 These submissions are discussed above. See [§§15.08\[A\]-\[D\]](#).

721 D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 492 (2d ed. 2013) ("In most international arbitrations, further written submissions are likely to be useful, unless the case is disposed of on jurisdictional or other preliminary grounds. Therefore, arrangements should be made for a second round of written pleadings, consisting of a reply (*réplique*) by the claimant to the statement of defence (and any counterclaim) and a rejoinder (*duplicque*) by the respondent to the reply."); ^[2] [UNCITRAL, Report of the Secretary-General on the Revised Draft Set of Arbitration Rules, Ninth Session, U.N. Doc. A/CN.9/112/Add.1, VII Y.B. UNCITRAL 166, 173 \(1976\)](#) (under Article 19(2), respondent's defense is "without prejudice to his right to present additional or substitute documents at a later stage in the arbitral proceeding"); Wilberforce, *Written Briefs and Oral Advocacy*, 5 Arb. Int'l 348 (1989).

722 [UNCITRAL Model Law, Art. 23](#).

723 [UNCITRAL Model Law, Art. 23\(1\)](#). See also *Judgment of 29 September 1999*, 4 Z Sch 02/99, II.2 (Bayerisches Oberstes Landesgericht) (requirement to file statement of claim is essential and mandatory obligation).

724 [UNCITRAL Model Law, Art. 23](#). See ^[3] [UNCITRAL, 2012 Digest of Case Law on the Model Law on International Commercial Arbitration 109 \(2012\)](#) ("The statements [of claim and defense] should identify the facts at issue, the points in dispute and the relief or remedy claimed.").

725 [UNCITRAL, Report of the United Nations Commission on International Trade Law on the Work of Its Eighteenth Session, ^{\[2\]} Official Records of the General Assembly, Fortieth Session, Supplement No. 17, U.N. Doc. A/40/17, ¶196](#).

726 ^[3] [2010 UNCITRAL Rules, Art. 25](#) (providing for further submissions after 45-day period). See ^[4] [UNCITRAL, Report of the Secretary-General on the Revised Draft Set of Arbitration Rules, Ninth Session, U.N. Doc. A/CN.9/112/Add.1, VII Y.B. UNCITRAL 166, 175 \(1976\)](#) (45-day time period referred to in Article 23 of 1976 Rules is "merely intended to serve as a general guideline"; use of term "should" reflects Article 23's precatory nature).

727 See [§15.08\[FF\]](#).

728 See [§§15.08\[W\]-\[X\]](#).

729 Crawford, *Advocacy Before the International Court of Justice and Other International Tribunals in State-to-State Cases*, in R. Bishop & E. Kehoe (eds.), *The Art of Advocacy in International Arbitration* 303, 319 (2d ed. 2010).

730 D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 409 (2d ed. 2013).

731 See, e.g., Beerbower, *International Arbitration: Can We Realize the Potential?*, 27 Arb. Int'l 75 (2011) (without page limits and deadlines, counsel "labor in vain and give birth to confusion"); Kotuby & Sobota, *Practical Suggestions to Promote the Legitimacy and Vitality of International Investment Arbitration*, 28 ICSID Rev. 454 (2013); Landau, *Luncheon Address: Advocacy in International Arbitration*, 5 World Arb. & Med. Rev. 351 (2011) (criticizing "huge, frightening written memorials").

732 D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 495 (2d ed. 2013). See also ICC, *Controlling Time and Costs in International Arbitration* 11 (2d ed. 2012) (suggesting, with degree of understatement, that tribunal should consider "specifying the form and content of written submissions").

733 Particularly when arbitral tribunals seek to expedite the arbitral process, by reducing the length of oral hearings, comprehensive written submissions assume even greater importance.

734 V. Mani, *International Adjudication: Procedural Aspects* 107 (1980) ("where the plaintiff-defendant relationship is discernible simultaneous presentation is illogical in that it requires the defendants to produce a complete defence without knowing fully in advance of the arguments of the claimant"); International Court of Justice Practice Direction I (as amended on 6 December 2006) ("The Court wishes to discourage the practice of simultaneous deposit of pleadings in cases brought by special agreement.").

735 See, e.g., Briner, *Domestic Arbitration: Practice in Continental Europe and Its Lessons for Arbitration in England*, 13 Arb. Int'l 155, 161 (1997); D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 414 (2d ed. 2013) ("Although the requirements of Article 20(2) may be somewhat flexible depending on the nature of the case, a statement that fails to meet these requirements is not a 'statement of claim' within the meaning of Article 28," and subjects the claimant's claims to dismissal under Article 30(1)); International Court of Justice Practice Direction II (as amended on 6 December 2006) ("pleadings are intended not only to reply to the submissions and arguments of the other party, but also, and above all, to present clearly the submission and argument of the party which is filing the pleadings").

736 *Arthur Young & Co. v. Islamic Repub. of Iran, Award in IUSCT Case No. 338-484-1 of 1 December 1987*, 17 Iran-US C.T.R. 245, 253-54 (1987).

737 D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 414-15 (2d ed. 2013) ("It is accepted, both in theory and in practice, that a claimant who has submitted a defective statement of claim may cure the shortcomings by submitting supplementary information.").

738 D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 415 (2d ed. 2013) (defects in statement of claim "rarely justify the termination of the proceedings under Article 30").

739 ^[5] [UNCITRAL, Report of the UNCITRAL on the Summary of Discussion of the Preliminary Draft, Eighth Session, U.N. Doc.](#)

[A/10017, ¶116, VI Y.B. UNCITRAL 24, 36 \(1975\).](#)

⁷⁴⁰ See [§§15.08\[W\]-\[X\]](#).

⁷⁴¹ *Foremost Tehran Inc. v. Islamic Repub. of Iran*, Order in IUSCT Case Nos. 37 & 231 of 14 September 1983, 3 Iran-US C.T.R. 361, 362 (1983) (“While the filing by Claimants of their Memorial on the Merits prior to the Hearing may be an advantage to the Respondents in that it informs them in detail of Claimants’ contentions and arguments and may be of assistance to the Tribunal in analyzing the case, nevertheless it cannot be accepted without providing the Respondents an equal opportunity to make a written submission.”); Briner, *Domestic Arbitration: Practice in Continental Europe and Its Lessons for Arbitration in England*, 13 Arb. Int’l 155, [161 \(1997\)](#); D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 495 (2d ed. 2013) (Iran-US Claims Tribunal practice evolved towards permitting respondent to have last word).

⁷⁴² L. Edmonson (ed.), *Domke on Commercial Arbitration* ¶29.17 (3d ed. & Update 2013) (“briefs may either be submitted first by the claimant and then the respondent, or simultaneously by both parties”).

⁷⁴³ N. Blackaby et al. (eds.), *Redfern and Hunter on International Arbitration* 116-231 (5th ed. 2009).

⁷⁴⁴ Crawford, *Advocacy Before the International Court of Justice and Other International Tribunals in State-to-State Cases*, in R. Bishop & E. Kehoe (eds.), *The Art of Advocacy in International Arbitration* 303, 321-22 (2d ed. 2010) (“[written submissions] need not to pour abuse on the other side or to use language which is overblown or unsustainable”; “written pleadings should not be excessively argumentative, nor should they be academic or pedantic in their presentation”); Legum, *The Ten Commandments of Written Advocacy in International Arbitration*, 29 Arb. Int’l 1 (2013).

⁷⁴⁵ *Arbitration Application No. 3 of 2011* [2011] CSOH 164 (Scottish Ct. Sess.).

⁷⁴⁶ Legum, *The Ten Commandments of Written Advocacy in International Arbitration*, 29 Arb. Int’l 1, 1 (2013) (“Shorter is better for communication.”).

⁷⁴⁷ That is in part because many experienced arbitrators regard documentary evidence as superior to witness testimony. See [§15.08\[W\], p. 2256](#). This approach is also adopted in significant part because presentation of oral testimony is more difficult in international arbitration, where hearings are difficult to schedule and where language and translation problems may be acute (particularly with regard to cross-examination).

⁷⁴⁸ D. Sandifer, *Evidence Before International Tribunals* 197 (1975). See D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 566-67 (2d ed. 2013) (“documentary evidence normally plays a paramount role in international proceedings”); Dimolitsa, *Giving Evidence*, in L. Lévy & V. Veeder (eds.), *Arbitration and Oral Evidence* 11, 13 (2004) (“Documentary evidence has a preponderant role in international arbitration.”); von Mehren & Salomon, *Submitting Evidence in An International Arbitration: The Common Lawyer’s Guide*, 20 J. Int’l Arb. 285 (2003); T. Zuberbühler et al. (eds.), *IBA Rules of Evidence: Commentary on the IBA Rules on the Taking of Evidence in International Arbitration* 29 (2012) (“documentary evidence is generally seen as more credible and thus stronger than other evidentiary means”; “general preference for documentary evidence can also be explained by the fact that it is usually easier, less costly and less time-consuming to present than evidence introduced by witnesses”).

⁷⁴⁹ ⁽²⁾ [I.L.C. Memorandum on Arbitral Procedure, Prepared by the Secretariat, U.N. Doc. A/CN.4/35, II Y.B. I.L.C. 157, 165, 173 \(1950\).](#)

⁷⁵⁰ B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 318-19 (1953); Pietrowski, *Evidence in International Arbitration*, 22 Arb. Int’l 373, [391-92 \(2006\)](#); D. Sandifer, *Evidence Before International Tribunals* 197 (1975).

⁷⁵¹ See [§15.08\[V\]](#); Crawford, *Advocacy Before the International Court of Justice and Other International Tribunals in State-to-State Cases*, in R. Bishop (ed.), *The Art of Advocacy in International Arbitration* 11, 35 (2004) (“One of the essential requirements of a good written pleading is that it presents the core documentation in an orderly fashion so that the tribunal has this before it in an accessible way.”).

⁷⁵² See *Dadras Int’l v. Islamic Repub. of Iran*, Award in IUSCT Case No. 567-213/215-3 of 7 November 1995, 31 Iran-US C.T.R. 127, 135-36, 143-44 (1995) (“Tribunal precedent is...strongly against the admission into evidence of unauthorized late-filed documents. The Tribunal has expressed a particular aversion to admitting documents that are submitted not only after filing deadlines, but also after the Hearing itself.”); *Uitenwyk Corp. v. Islamic Repub. of Iran*, Award in IUSCT Case No. 375-381-1 of 6 July 1988, 19 Iran-US C.T.R. 107, 113-16 (1988) (“Absent any convincing explanation by the Respondents, the tribunal cannot accept a tactic that unveils previously-existing evidence at literally the last moments of the hearing, without prior notice having been given that the witness would testify, without showing that the evidence is presented in rebuttal, and when the documents the witness proffered had not been included with – or even referred to in – the Respondent’s prior submissions.”); *Harris Int’l Telecomms., Inc. v. Islamic Repub. of Iran*, Award in IUSCT Case No. 323-409-1 of 2 November 1987, 17 Iran-US C.T.R. 31, 45-46 (1987).

⁷⁵³ Pietrowski, *Evidence in International Arbitration*, 22 Arb. Int’l 373, [393-94 \(2006\)](#).

⁷⁵⁴ For commentary, see Böhler & Dorgan, *Witness Testimony Pursuant to the 1999 IBA Rules of Evidence in International Commercial Arbitration – Novel or Tested Standards?*, 17(1) J. Int’l Arb. 3 (2000); Gelinas, *Evidence Through Witnesses*, in L. Lévy & V. Veeder (eds.), *Arbitration and Oral Evidence* 29 (2004); Schlaepfer, *Witness Statements*, in L. Lévy & V. Veeder (eds.), *Arbitration and Oral Evidence* 65 (2004); Straus, *The Practice of the Iran-United States Claims Tribunal in Receiving Evidence From Parties and From Experts*, 3(3) J. Int’l Arb. 57 (1986); Strong & Dies, *Witness Statements Under the IBA Rules of Evidence: What to Do About Hear-Say?*, 21 Arb. Int’l 301 (2005); van Houtte, *Counsel-Witness Relations and Professional Misconduct in Civil Law Systems*, 19 Arb. Int’l 457 (2003); von Segesser, *Witness Preparation*, 20 ASA Bull. 222 (2002); T. Zuberbühler et al. (eds.), *IBA Rules of Evidence: Commentary on the IBA Rules of the Taking of Evidence in International Arbitration* (2012).

⁷⁵⁵ 2010 IBA Rules on the Taking of Evidence, Arts. 4(4)-(7).

⁷⁵⁶ D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 564-65 (2d ed. 2013) (some civil law systems forbid written witness testimony); W. Craig, W. Park & J. Paulsson, *International Chamber of Commerce Arbitration* ¶23-02 (3d ed. 2000).

⁷⁵⁷ See [UNCITRAL, Summary Record of the Ninth Meeting of the Committee of the Whole \(II\), Ninth Session, U.N. Doc. A/CN.9/9/C.2/SR.9, ¶138 et seq. \(1976\)](#).

⁷⁵⁸ [2010 UNCITRAL Rules, Art. 27\(2\)](#) ("Unless otherwise directed by the arbitral tribunal, statements by witnesses, including expert witnesses, may be presented in writing and signed by them.").

⁷⁵⁹ See *Thomas Earl Payne v. Islamic Repub. of Iran*, Order in IUSCT Case No. 335, cited in D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 593 (2d ed. 2013) (allowing claimant to file unsigned copies of deposition transcripts for purposes of hearing, but requiring signed copies before case is complete); D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 565 (2d ed. 2013) ("The use of written statements signed by the witness is common practice among international arbitral tribunals.").

⁷⁶⁰ See 2010 IBA Rules on the Taking of Evidence, Art. 4(3); LCIA Rules, Art. 20(6); 2010 SCC Rules, Art. 28(2); 2013 SIAC Rules, Art. 22(4). See also *Robert Azinian v. United Mexican States*, Award in ICSID Case No. ARB(AF)/97/2 (NAFTA) of 1 November 1999, 14 ICSID Rev. 538 (1999) (ICSID tribunal permits witness interviews, subject to procedural limitations).

⁷⁶¹ See [§21.03\[A\]\[2\]\[b\]](#).

⁷⁶² G. Petrochilos, *Procedural Law in International Arbitration* 216 (2004). See also Schlaepfer, *Witness Statements*, in L. Lévy & V. Veeder (eds.), *Arbitration and Oral Evidence* 65, 68 (2004) ("tribunal should ensure that the same rules regarding the preparation of witnesses apply to all parties").

⁷⁶³ 2010 IBA Rules on the Taking of Evidence, Art. 4.5(b).

⁷⁶⁴ See *Intercarbon Bermuda Ltd v. Caltex Trading & Transp. Corp.*, 146 F.R.D. 64 (S.D.N.Y. 1993).

⁷⁶⁵ [Bühler & Dorgan, Witness Testimony Pursuant to the 1999 IBA Rules of Evidence in International Commercial Arbitration – Novel or Tested Standards? 17\(1\) J. Int'l Arb. 3, 14 \(2000\)](#); Schlaepfer, *Witness Statements*, in L. Lévy & V. Veeder (eds.), *Arbitration and Oral Evidence* 65, 69 (2004) ("[C]ounsel would be well advised to use the witness' own words and expressions.... This would make the witness statement more credible (and often more interesting)."); Strong & Dies, *Witness Statements Under the IBA Rules of Evidence: What to Do About Hear-Say?*, 21 Arb. Int'l 301, [306-07 \(2005\)](#).

⁷⁶⁶ Hunter, *The Procedural Powers of Arbitrators Under the English 1996 Act*, 13 Arb. Int'l 345, [353 \(1997\)](#) ("Unfortunately, a tendency has developed for written witness testimony to be written by lawyers in their own language, tracking the written pleading in the case rather than telling the story in the witness's own words. This has reduced the effectiveness (and readability) of the procedure.").

⁷⁶⁷ See [§15.08\[X\]](#); M. Bühler & T. Webster, *Handbook of ICC Arbitration: Commentary, Precedents, Materials* 293-94 (2d ed. 2008) (pros and cons of simultaneous and sequential exchanges of witness statements).

⁷⁶⁸ D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 494 (2d ed. 2013).

⁷⁶⁹ As noted above, witness statements are sometimes submitted separately, after the exchange of written submissions. See [§15.08\[X\]](#). In some traditions, simultaneous exchanges are common. Hunter, *The Procedural Powers of Arbitrators Under the English 1996 Act*, 13 Arb. Int'l 345, [353 \(1997\)](#).

⁷⁷⁰ Veeder, *Introduction*, in L. Lévy & V. Veeder (eds.), *Arbitration and Oral Evidence* 7-9 (2004). See also P. Sanders, *Quo Vadis Arbitration?* 262 (1999) ("Drawn up with the party or its legal advisers the witness may be influenced in formulating his or her Statement which has to be signed and affirmed by him or her as being the truth. In my opinion, the Witness Statements preceding the hearings of the witnesses in person are not in accordance with the expectations of many parties in an international arbitration.").

⁷⁷¹ Schlaepfer, *Witness Statements*, in L. Lévy & V. Veeder (eds.), *Arbitration and Oral Evidence* 65, 66 (2004) (witness statements "increase[] the efficiency of the proceedings by reducing the length of the evidentiary hearings").

⁷⁷² [UNCITRAL Model Law, Art. 23\(2\)](#). See also T. Webster, *Handbook of UNCITRAL Arbitration* ¶¶22-11 to 22-21 (2010).

⁷⁷³ See, e.g., *Carte Blanche (Singapore) Pte Ltd v. Carte Blanche Int'l, Ltd*, [888 F.2d 260](#), 266 (2d Cir. 1989) (confirming award addressing claim allegedly not within ICC Terms of Reference); *Wachovia Sec. LLC v. Barnes*, 2006 U.S. Dist. LEXIS 34020, at *6 (N.D. Ill.) (upholding award where one party alleged that new claims were never argued during arbitration hearings); *Grosso v. Barney*, 2003 WL 22657305, at *7 (E.D. Pa.) ("refusal to allow petitioners to amend their Statement of Claim was not error"); *Peters Fabrics, Inc. v. Jantzen, Inc.*, [582 F.Supp. 1287](#), 1292 (S.D.N.Y. 1984) (upholding award where arbitrator refused to allow counterclaim submitted one week before hearing); *Faberge Inc. v. Felsway Corp.*, [539 N.Y.S.2d 944](#), 946 (N.Y. App. Div. 1989) (award upheld where arbitrator permitted party to assert claim not made in request for arbitration; AAA Rules permitted amendment); *Westland Helicopters Ltd v. Sheikh Salah Al-Hajailan* [2004] EWHC 1625 (Comm) (English High Ct.) (where claimant initially stated interest not sought and then later made claim for interest to be awarded, and respondent did not object, arbitrator entitled to award interest). But see *Judgment of 18 May 2007*, Case Nos. A40-4577/07-8-46 & A40-4582/07-8-47 (Russian Moscow Arb. Ct.) (awards set aside because tribunal admitted claims based on different causes of action and matters in controversy after merits hearing). See also [§25.04\[B\]\[4\]](#).

⁷⁷⁴ [2010 UNCITRAL Rules, Art. 22](#). See D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 471 (2d ed. 2013) ("amendment should be rejected if it causes inordinate delay").

⁷⁷⁵ See, e.g., ICDR Rules, Art. 4; LCIA Rules, Art. 22(1); 2012 CIETAC Rules, Art. 16; 2013 HKIAC Rules, Art. 18(1); 2010 SCC Rules, Art. 25; 2013 SIAC Rules, Art. 17(5).

⁷⁷⁶ *Int'l Schs. Servs., Inc. v. Islamic Repub. of Iran*, Award in IUSCT Case No. ITL 57-123-1 of 30 January 1986, 10 Iran-US C.T.R. 6 (1987) (Article 20 of 1976 UNCITRAL Rules (and Article 22 of 2010 UNCITRAL Rules) "affords wide latitude to a party who

seeks to amend a claim, and the Tribunal's practice is in accord with this liberal approach. As Article 20 directs, the Tribunal will permit an amendment unless delay, prejudice or other concrete circumstances make it inappropriate to do so."); *Merrill & Ring Forestry LP v. Gov't of Canada, Decision on Motion to Add A Party in NAFTA/UNCITRAL Case of 31 January 2008*, 22-31 (tribunal set out list of factors to be considered when assessing appropriateness of proposed amendment). See also D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 467 (2d ed. 2013) ("For practical and economic reasons, the tribunal should maintain a flexible attitude towards accepting such modifications [to parties' claims], as the alternative may be the commencement of new arbitral proceedings."). Compare *Final Award in ICC Case Nos. 6515 and 6516, XXIva Y.B. Comm. Arb.* 80 (1999) (relying on domestic civil procedure rules of arbitral seat to refuse to permit amendment).

⁷⁷⁷ See [§25.04\[B\]\[4\], p. 3238](#); [§26.05\[C\]\[3\]\[d\], p. 3515](#). See also *Coastal Gen. Constr. Servs. Corp. v. Virgin Islands Housing Auth.*, 238 F.Supp.2d 707, 709-10 (D.V.I. 2002) ("To constitute misconduct requiring the vacation of an arbitration award, the arbitrator's conduct 'must be one that is not simply an error of law, but which so affects the rights of a party that it may be said that he was deprived of a fair hearing.'"; vacating award on grounds that arbitrator's decision to permit substantially amended pleading one day prior to hearing failed to give each party adequate opportunity to present its evidence and argument) (quoting *Newark Stereotypers' Union v. Newark Morning Ledger Co.*, [153 F.2d 594](#), 599 (3d Cir. 1968)); *Ebasco Constructors, Inc. v. Ahtna, Inc.*, [932 P.2d 1312](#), 1315-16 (Alaska 1997); *Claire & Co. v. Thames Water Utilities Ltd* [2005] EWHC 1022 (TCC) (English High Ct.).

⁷⁷⁸ See H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 649 (1989) (Model Law does not permit counterclaims that go beyond scope of arbitration agreement); T. Webster, *Handbook of UNCITRAL Arbitration* ¶22-2 (2010) ("Article 22 was amended in comparison with Art. 20 of the 1976 Rules to provide that amendments are possible if they fall within the jurisdiction of the arbitral Tribunal. Under the 1976 Rules, the amendments were required to fall within the arbitration agreement. In addition, Art. 22 refers to defences, counter-claims and claims for set-off."). See also *Merrill & Ring Forestry LP v. Canada, Decision on Motion to Add A New Party in ICSID Administered (NAFTA) Case of 31 January 2008*, available at italaw.com; [Sanders, Commentary on the UNCITRAL Arbitration Rules, II Y.B. Comm. Arb. 172, 206 \(1977\)](#) ("arbitrators should not hesitate to reject an amendment of the claim which falls outside the scope of the arbitration agreement").

⁷⁷⁹ S. Baker & M. Davis, *The UNCITRAL Arbitration Rules in Practice: The Experience of the Iran-United States Claims Tribunal* 92 (1992); D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 468-69 (2d ed. 2013).

⁷⁸⁰ See [§15.01](#); [§15.07\[D\]](#).

⁷⁸¹ *Harris Int'l Telecomms., Inc. v. Islamic Repub. of Iran, Award in IUSCT Case No. 323-409-1 of 2 November 1987*, 17 Iran-US C.T.R. 31, 55-57 (1987) (prejudice to respondent grounds for refusing to permit introduction of counterclaim).

⁷⁸² See, e.g., *Judgment of 18 November 2004, SA Thalès Air Défense v. GIE Euromissile*, 132 J.D.I. (Clunet) 357, 359 (Paris Cour d'appel) (2005) ("principles of procedural honesty and good faith in international arbitrations require the parties to make their claims known as soon as possible, particularly at the mission statement stage when the allegations on which the proceedings are to be based are summarised in order to prevent any claim that could or should have been raised from being subsequently omitted"); *A's Co. v. Dagger*, Case No. M1482-SD00 (Auckland High Ct. 2003) (denial of opportunity to be heard where arbitrator allowed party to develop different case from that pleaded and to present evidence on new issues). See also D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 471 (2d ed. 2013) (prejudice to party is grounds for refusing to permit introduction of new claim).

⁷⁸³ *Harris Int'l Telecomms., Inc. v. Islamic Repub. of Iran, Award in IUSCT Case No. 323-409-1 of 2 November 1987*, 17 Iran-US C.T.R. 31, 45-46 (1987) (quoting *Sylvania Tech. Sys., Inc. v. Islamic Repub. of Iran, Award in IUSCT Case No. 180-64-1 of 27 June 1985*, 8 Iran-US C.T.R. 298 (1985)).

⁷⁸⁴ ICC, *Controlling Time and Costs in International Arbitration* 14 (2d ed. 2012) ("In advance of any evidentiary hearing, consider setting a cut-off date after which no new documentary evidence will be admitted unless a compelling reason is shown.").

⁷⁸⁵ See [§15.09\[A\]](#).

⁷⁸⁶ For commentary, see Böckstiegel, *Major Criteria for International Arbitrators in Shaping An Efficient Procedure*, in *ICC Arbitration in the Next Decade* 49 (ICC Ct. Bull. Spec. Supp. 1999); Briner, *Domestic Arbitration: Practice in Continental Europe and Its Lessons for Arbitration in England*, 13 Arb. Int'l 155 (1997); Brower, *Evidence Before International Tribunals: The Need for Some Standard Rules*, 28 Int'l Law. 47 (1994); [Bühler & Dorgan, Witness Testimony Pursuant to the 1999 IBA Rules of Evidence in International Commercial Arbitration – Novel or Tested Standards?](#), 17(1) J. Int'l Arb. 3 (2000); Coulson, *Appropriate Procedure for Receiving Proof in Commercial Arbitration*, 71 Dick. L. Rev. 63 (1966); Cremades, *Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration*, 14 Arb. Int'l 157 (1998); P. Eijssvoegel, *Evidence in International Arbitration Proceedings* (1994); Friedland, *Combining Civil Law and Common Law Elements in the Presentation of Evidence in International Commercial Arbitration*, 12(9) Mealey's Int'l Arb. Rep. 25 (1997); Goldman, *The Complementary Roles of Judges and Arbitrators in Ensuring That International Commercial Arbitration Is Effective*, in ICC, *International Arbitration: 60 Years of ICC Arbitration: A Look at the Future* 255 (1984); Holtzmann, *Fact-Finding by the Iran-United States Claims Tribunal*, in R. Lillich (ed.), *Fact-Finding Before International Tribunals* 101 (1991); ICC, *Taking Evidence in International Arbitral Proceedings* (1990); M. Kurkela & S. Turunen, *Due Process in International Commercial Arbitration* 157-58 (2d ed. 2010); L. Lévy & V. Veeder (eds.), *Arbitration and Oral Evidence* (2004); Mamiott, *Evidence in International Arbitration*, 5 Arb. Int'l 280 (1989); [Paulsson, Overview of Methods of Presenting Evidence in Different Legal Systems](#), in A. van den Berg (ed.), *Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration* 112 (ICCA Congress Series No. 7 1996); Paulsson, *The Timely Arbitrator: Reflections on the Böckstiegel Method*, 22 Arb. Int'l 19 (2006); Reed & Sutcliffe, *The*

"Americanization" of International Arbitration, 16(4) Mealey's Int'l Arb. Rep. 37 (2001); [Robert, Administration of Evidence in International Commercial Arbitration](#), 1 Y.B. Comm. Arb. 221 (1976); Saleh, *Reflections on Admissibility of Evidence: Interrelation Between Domestic Law and International Arbitration*, 15 Arb. Int'l 141 (1999); [Smit, Roles of the Arbitral Tribunal in Civil Law and Common Law Systems With Respect to Presentation of Evidence](#), in A. van den Berg (ed.), *Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration* 160 (ICCA Congress Series No. 7 1996); Staughton, *Common Law and Civil Law Procedures: Which Is the More Inquisitorial? A Common Lawyer's Response*, 5 Arb. Int'l 357 (1989); [Straus, The Practice of the Iran-United States Claims Tribunal in Receiving Evidence From Parties and From Experts](#), 3(3) J. Int'l Arb. 57 (1986); von Segesser, *Witness Preparation*, 20 ASA Bull. 222 (2002); T. Zuberbühler et al. (eds.), *IBA Rules of Evidence: Commentary on the IBA Rules of the Taking of Evidence in International Arbitration* (2012).

⁷⁸⁷ See, e.g., [2010 UNCITRAL Rules, Art. 17\(3\)](#); 2012 ICC Rules, Art. 26; LCIA Rules, Art. 19(2); 2012 CIETAC Rules, Arts. 39, 40; 2010 SCC Rules, Art. 27(1); 2013 SIAC Rules, Art. 21(1); 2013 VIAC Rules, Art. 30.

⁷⁸⁸ See, e.g., [2010 UNCITRAL Rules, Art. 17\(3\)](#); 2012 ICC Rules, Art. 25(6); LCIA Rules, Art. 19(1); 2013 HKIAC Rules, Art. 22(4); 2010 SCC Rules, Art. 27(1).

⁷⁸⁹ [2010 UNCITRAL Rules, Art. 17\(3\)](#). See also D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 49-53 (2d ed. 2013); T. Webster, *Handbook of UNCITRAL Arbitration* ¶¶17-80 to 17-85 (2010).

⁷⁹⁰ [UNCITRAL Model Law, Art. 24\(1\)](#).

⁷⁹¹ *Gov't of the Repub. of the Philippines v. Philippine Int'l Air Terminals Co., Inc.*, [2006] SGHC 206 (Singapore High Ct.). See also *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA*, [2006] SGCA 41 (Singapore Ct. App.) (neither party requested oral hearing and therefore no party would be entitled to complain about not having opportunity to orally address tribunal).

⁷⁹² H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 673 (1989). Compare [English Arbitration Act, 1996, §34\(2\)\(h\)](#) (granting arbitrators discretion not to hear oral evidence if they deem it unnecessary). See also Gaffney, *Counsel Must Ensure the Right of Cross-Examination in Arbitration*, 27 Int'l Litig. Q. 12 (2010).

⁷⁹³ H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 674 (1989).

⁷⁹⁴ Article 24(1) deals only with the general entitlement of a party to oral hearings (as an alternative to proceedings conducted on the basis of documents) and not with the procedural aspects, such as the length, number, or timing of hearings. These procedural aspects of the hearing are subject to the parties' autonomy and arbitrators' general procedural discretion. See [§15.02\[E\]\[1\]](#), p. 2141; [§15.03](#), p. 2145.

⁷⁹⁵ See [§15.08\[AA\]](#); [§26.05\[C\]\[3\]](#) & [\[5\]](#); European Convention Providing a Uniform Law on Arbitration, Annex I, Art. 16(3) ("The procedure shall be in writing where the parties have so provided or in so far as they have waived oral proceedings."). Compare [English Arbitration Act, 1996, §34\(2\)\(h\)](#) (granting arbitrators discretion not to hear oral evidence if they deem it unnecessary).

⁷⁹⁶ See [§25.04\[B\]](#); [§26.05\[C\]\[3\]](#); *Judgment of 30 June 2010*, 7 Ob 111/10i (Austrian Oberster Gerichtshof) (refusal of arbitral tribunal to hold oral hearing, despite request of party, was violation of right to be heard); *Judgment of 21 February 2002*, 10 Sch 08/01 (Oberlandesgericht Naumburg) (same). See also D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 49 (2d ed. 2013) (under Article 15(2), "any party has the right to have hearings not only for the presentation of witness evidence, but also for oral argument"). Compare *Judgment of 21 February 2002*, 10 Sch 08/01 (Oberlandesgericht Naumburg) (refusal of request for oral hearing does not amount to violation of right to be heard, where party had possibility of filing written defense).

⁷⁹⁷ See, e.g., *Schlessinger v. Rosenfeld, Meyer & Susman*, [47 Cal. Rptr.2d 650](#), 656 (Cal. Ct. App. 1995) ("[T]he arbitrator's obligation 'to hear evidence' does not mean that the evidence must be orally presented or that live testimony is required. 'Legally speaking the admission of evidence is to hear it.' An arbitrator 'hears' evidence by providing a 'legal hearing,' that is, by affording an 'opportunity to...present one's side of a case.'").

⁷⁹⁸ N. Blackaby et al. (eds.), *Redfern and Hunter on International Arbitration* 116-182 (5th ed. 2009); R. Merkin, *Arbitration Law* ¶15.3 (1991 & Update August 2013). See also 2010 UDRP Rules, Rule 13 ("There shall be no in-person hearings (including hearings by teleconference, videoconference, and web conference), unless the Panel determines, in its sole discretion and as an exceptional matter, that such a hearing is necessary for deciding the complaint.").

⁷⁹⁹ See [§26.05\[C\]\[5\]\[b\]\[vi\]](#), pp. 3569-70; [Belgian Judicial Code, Art. 1705\(1\)](#) ("Unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party."); [Judgment of 30 July 1998, XXV Y.B. Comm. Arb. 714 \(Hanseatisches Oberlandesgericht Hamburg\) \(2000\)](#) ("The rules of arbitration of the agreed arbitral tribunal provide that a decision may be rendered without an oral hearing."); *Desputeaux v. Editions Chouette (1987) Inc.*, [2003] 1 S.C.R. 178 (Canadian S.Ct.) (agreement on documents only arbitration without witness examination is valid).

⁸⁰⁰ ICC, *Controlling Time and Costs in International Arbitration* 13 (2d ed. 2012). See *id.* at 10 ("Consider whether or not it is necessary for there to be a hearing in order for the arbitral tribunal to decide the case.").

⁸⁰¹ *Dadras Int'l v. Islamic Repub. of Iran, Award in IUSCT Case No. 567-213/215-3 of 7 November 1995*, 31 Iran-US C.T.R. 127, 135-36, 143 (1995) ("even where no hearing has been held, Article 15, paragraph 2 does not oblige the Tribunal to accede to any request by a party for a hearing").

⁸⁰² See [§25.04\[B\]\[4\]](#); *Century Indem. Co. v. Certain Underwriters at Lloyd's, London*, [584 F.3d 513](#), 558 (3d Cir. 2009) ("arbitration panel refused to admit Century's proffered extrinsic evidence based on the panel's determination that the evidence was 'irrelevant and inadmissible.'"); [Judgment of 7 January 2011, DFT 4A_440/2010, ¶14.1](#) (Swiss Federal Tribunal) ("The arbitral tribunal may refuse to

hear evidence without violating the right to be heard if the evidence is improper to base its decision, if the fact to be proved is already established, if it is without pertinence or also when the tribunal, by assessing the evidence in advance, reaches the conclusion that its mind is already made up and that the result of the evidentiary procedure requested could not alter it.”).

⁸⁰³ D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 51 (2d ed. 2013) (“arbitral tribunal must have considerable control over such matters as the number of hearing days and the hearing procedure”). Under many national laws, an award can be challenged for misconduct or denial of due process if the tribunal schedules hearings without adequate regard to a party’s commitments. The exception is extremely narrow. See [§25.04\[B\]\[4\]](#), pp. 3236-37; [§26.05\[C\]\[3\]\[d\]](#), pp. 3520-22.

⁸⁰⁴ See [§2010 UNCITRAL Rules, Art. 28\(1\)](#); 2012 ICC Rules, Art. 21(1); ICDR Rules, Art. 20(1); 2013 HKIAC Rules, Art. 22(4); 2013 SIAC Rules, Art. 21(2). See also [§25.04\[B\]\[4\]](#); [§26.05\[C\]\[3\]\[d\]](#).

⁸⁰⁵ Failing to do so may raise issues of enforceability and public policy.

⁸⁰⁶ ICC, *Controlling Time and Costs in International Arbitration* 10 (2d ed. 2012) (recommending pre-hearing conference to “discuss matters such as time allocation, use of transcripts, translation issues, order of witnesses and other practical arrangements that will facilitate the smooth conduct of the hearing”); Moser, *The “Pre-Hearing Checklist” – A Technique for Enhancing Efficiency in International Arbitral Proceedings*, 30 J. Int’l Arb. 155-59 (2013) (“Adopting measures designed to ensure the efficient conduct of the oral hearing itself are also useful.”).

⁸⁰⁷ Kaufmann-Kohler, *Beyond Gadgets – Substantive New Concepts to Improve Arbitral Efficiency*, 5 J. World Inv. & Trade 70 (2004).

⁸⁰⁸ Iran-US C.T.R. Tribunal Rules of Procedure, Notes to Art. 15, Doc. No. 4 (1983).

⁸⁰⁹ Iran-US C.T.R. Tribunal Rules of Procedure, Notes to Art. 15(2), Doc. No. 3-3FT (1983).

⁸¹⁰ Holtzmann, *Fact-Finding by the Iran-United States Claims Tribunal*, in R. Lillich (ed.), *Fact-Finding Before International Tribunals* 101, 106-10 (1991) (“pre-hearing conferences can be of great help in providing timely guidance for ordering parties to submit the evidence needed to make informed decisions”); Moser, *The “Pre-Hearing Checklist” – A Technique for Enhancing Efficiency in International Arbitral Proceedings* 30 J. Int’l Arb. 155-59 (2013) (providing a list of pre-hearing issues to be decided with parties).

⁸¹¹ ICC, *Controlling Time and Costs in International Arbitration* 14 (2d ed. 2012) (recommending “an agenda and timetable for all hearings, with an equitable division of time between each of the parties”).

⁸¹² As discussed above, hearings need not be held in the location designated as the seat of the arbitration, but instead can be conducted elsewhere for the convenience of the parties. See [§11.04](#).

⁸¹³ *Am. Bell Int’l, Inc. v. Islamic Repub. of Iran*, Decision No. DEC 58-48-3 of 19 March 1987, 14 Iran-US C.T.R. 173, 174 (1987) (“does not identify any aspect of the Award where the Tribunal’s interpretation is necessary”).

⁸¹⁴ See [§§15.08\[AA\]\[8\]-\[10\]](#).

⁸¹⁵ W. Craig, W. Park & J. Paulsson, *International Chamber of Commerce Arbitration* ¶24.01 (3d ed. 2000) (“The governing principles of the ICC Rules and the particularities of international disputes, where the parties and the arbitrators may be domiciled in different countries” are “dominated by the exchange of documents between the parties,” with hearings “serv[ing] principally as an occasion for arguments based on facts revealed in written evidence already submitted.”). Compare Crawford, *Advocacy Before the International Court of Justice and Other International Tribunals in State-to-State Cases*, in R. Bishop (ed.), *The Art of Advocacy in International Arbitration* 11, 28 (2004) (“oral proceedings retain their importance, in particular because they form the focal point of the presentation, the point to which the parties are working”).

⁸¹⁶ D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 409 (2d ed. 2013) (“Even when a more comprehensive hearing is envisaged, efficient arbitral proceedings require that the parties, in writing and prior to the hearing, specifically determine the issues to sufficiently delineate their scope.”); [Report of the UNCITRAL on the Work of Its Ninth Session, U.N. Doc. A/31/17, Annex II, ¶1116, VII Y.B. UNCITRAL 66, 75 \(1976\)](#) (“in order to prevent surprise at hearings the arbitral tribunal may require delivery in advance to other party and to the arbitral tribunal of a summary of the documents and other evidence which a party intends to present”).

⁸¹⁷ See [§15.08\[AA\]\[5\]](#), pp. 2273-75; Paulsson, *The Timely Arbitrator: Reflections on the Böckstiegel Method*, 22 Arb. Int’l 19 (2006). As discussed above, the principle of equal treatment requires that the parties be afforded a fair and equal opportunity to present their cases. In many, but by no means all, circumstances, this is best accomplished through an equal (50/50) division of the available time. See [§15.04](#), p. 2154; [§15.08\[AA\]\[5\]](#), pp. 2273-75.

⁸¹⁸ Gelinas, *Evidence Through Witnesses*, in L. Lévy & V. Veeder (eds.), *Arbitration and Oral Evidence* 29, 36 (2004) (“Except in very exceptional circumstances and in any event with the other party’s acquiescence, no eleventh hour witness should be tolerated; this is tantamount to a violation of due process.”); [UNCITRAL, Summary Record of the Ninth Meeting of the Committee of the Whole \(II\), Ninth Session, U.N. Doc. A/CN.9/9/C.2/SR.9, ¶¶3-11 \(1976\)](#).

Typically, written witness statements will be provided for and testimony will not be admitted from persons who have not submitted such a statement. Lévy & Reed, *Managing Fact Evidence in International Arbitration*, in A. van den Berg (ed.), *International Arbitration 2006: Back to Basics?* 633, 636 (ICCA Congress Series No. 13 2006) (“the question is more or less settled that no witness will be allowed to testify if he or she has not submitted a witness statement”).

⁸¹⁹ Gelinas, *Evidence Through Witnesses*, in L. Lévy & V. Veeder (eds.), *Arbitration and Oral Evidence* 29, 35 (2004).

⁸²⁰ These are discussed in greater detail below. See [§§15.08\[AA\]\[8\]-\[9\]](#) & [\[11\]](#).

⁸²¹ Paulsson, *The Timely Arbitrator: Reflections on the Böckstiegel Method*, 22 Arb. Int’l 19, 19 (2006). See also W. Craig, W. Park & J. Paulsson, *International Chamber of Commerce*

Arbitration ¶24.01 (3d ed. 2000) ("In international arbitration, extensive hearings are not practical.").

⁸²² Holtzmann, *Streamlining Arbitral Proceedings: Some Techniques of the Iran-U.S. Claims Tribunal*, 11 Arb. Int'l 39, 46-47 (1995).

⁸²³ See §15.07[D][2].

⁸²⁴ See the comments discussed above concerning the infrequent use of witness testimony in many civil law litigation systems; §15.07[D][2], pp. 2205-06.

⁸²⁵ Memorandum From Prof. K.-H. Böckstiegel to Mr. M.K. Eshragh, Agent of the Government of the Islamic Republic of Iran, and Mr. J.R. Crook, Agent of the Government of the United States (26 May 1987), quoted in Holtzmann, *Streamlining Arbitral Proceedings: Some Techniques of the Iran-U.S. Claims Tribunal*, 11 Arb. Int'l 39, 47 (1995). See also *Tradex Hellas SA v. Repub. of Albania*, 14 ICSID Rev. 161 (1999); D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 617-19 (2d ed. 2013) (examples of timetables for hearings).

⁸²⁶ See §15.04[B][2].

⁸²⁷ Procedural Order in ICC Case No. 7314, in D. Hascher (ed.), *Collection of Procedural Decisions in ICC Arbitration 1993-1996* 135 (1997) (after specifying time for hearing, "it is left to the Parties how and to which extent they use the time allotted to them for these various purposes").

⁸²⁸ Bellet, *Presentation*, in D. Hascher (ed.), *Collection of Procedural Decisions in ICC Arbitration 1993-1996* 15 (1997).

⁸²⁹ See, e.g., Böckstiegel, *Case Management by Arbitrators: Experiences and Suggestions*, in G. Aksen (ed.), *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* 123 (2005); Böckstiegel, *Party Autonomy and Case Management – Experiences and Suggestions of An Arbitrator*, 2013 SchiedsVZ 1; Paulsson, *The Timely Arbitrator: Reflections on the Böckstiegel Method*, 2006 Arb. Int'l 19, 24 (2006); Rivkin, *Towards A New Paradigm in International Arbitration: The Town Elder Model Revisited*, 24 Arb. Int'l 375, 378 (2008) ("In every case in which I have been involved where a chess clock has been used, the time limit has forced the parties to present only material and relevant evidence, and it has avoided cumulative and unnecessary testimony."). Compare J. Grierson & A. van Hooft, *Arbitrating Under the 2012 ICC Rules* 189 (2012) ("[C]hess clock" time allocation "can cause more problems than it solves. It is rare that the parties will use up the same amount of time, and for good reason.").

⁸³⁰ Böckstiegel, *Case Management by Arbitrators: Experiences and Suggestions*, in G. Aksen (ed.), *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* 123 (2005).

⁸³¹ Paulsson, *The Timely Arbitrator: Reflections on the Böckstiegel Method*, 2006 Arb. Int'l 19, 24 (2006). See also J. Waincymer, *Procedure and Evidence in International Arbitration* 890 (2012) ("First, a decision needs to be made by the tribunal as to whether time taken in cross-examination counts against the party for whom the cross-examination is being conducted or counts against the party who called the witness being cross-examined. There would be a problem in the latter event as counsel could cross-examine at length to take away available time from the opposing party. It also goes against the substantive policy basis of a time limit for presenting one's case if factors beyond counsel's control are used against it. Hence, the norm is to count cross-examination time against the party conducting the cross-examination.") (emphasis added).

⁸³² Compare J. Waincymer, *Procedure and Evidence in International Arbitration* 729 (2012) (where "one party's witnesses require translation and the others do not, extra time is inevitable").

⁸³³ See §15.04[B][2]. See also Ulmer, *The Cost Conundrum*, 26 Arb. Int'l 221, 243 (2010) ("[C]hess-clock system is a technique for managing certain arbitration proceedings; it is not a procedure in and of itself"; "[i]t works best when the parties have a roughly equal number of witnesses and are both represented by similarly sophisticated counsel who are well-prepared for the hearings and can intelligently make the difficult trade-offs required by chess-clock rules. It works badly, if at all, when the case is 'unbalanced', either in the strength of evidence or counsel.").

⁸³⁴ Böckstiegel, *Party Autonomy and Case Management – Experiences and Suggestions of An Arbitrator*, 2013 SchiedsVZ 1.

⁸³⁵ Böckstiegel, *Case Management by Arbitrators: Experiences and Suggestions*, in G. Aksen (ed.), *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* 123 (2005).

⁸³⁶ M. Bühler & T. Webster, *Handbook of ICC Arbitration: Commentary, Precedents, Materials* 273 (2d ed. 2008) ("there is no commitment to more than rough equality as to the allocation of time"); Gaillard & Pinsolle, *Advocacy in International Commercial Arbitration: France*, in R. Bishop (ed.), *The Art of Advocacy in International Arbitration* 133, 148 (2004) ("[T]he notion of equality of the parties...does not mean that the parties should do exactly the same thing when presenting their case. It just implies that the parties should be given the same opportunity to present their case."); Gelinas, *Evidence Through Witnesses*, in L. Lévy & V. Veeder (eds.), *Arbitration and Oral Evidence* 29, 46 (2004) (calculation of equal time); Paulsson, *The Timely Arbitrator: Reflections on the Böckstiegel Method*, 22 Arb. Int'l 19, 23-24 (2006). Compare G. Petrochilos, *Procedural Law in International Arbitration* 146 (2004) ("In most cases...fairness will command plain equality.").

⁸³⁷ D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 564 (2d ed. 2013) (describing traditional civil law position: "an arbitral tribunal may or may not admit oral evidence presented by persons closely affiliated with the parties").

⁸³⁸ See, e.g., 2010 IBA Rules on the Taking of Evidence, Art. 4(2); LCIA Rules, Art. 20(7) ("Any individual intending to testify to the Arbitral Tribunal on any issue of fact or expertise shall be treated as a witness under these Rules notwithstanding that the individual is a party to the arbitration or was or is an officer, employee or shareholder of any party.").

⁸³⁹ *Economy Forms Corp. v. Islamic Repub. of Iran*, Award in IUSCT Case No. 55-165-1 of 14 June 1983, *Dissenting Opinion of Mahmoud M. Kashani* of 1 December 1983, 3 Iran-US C.T.R. 42 (1983). See D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 563-64 (2d ed. 2013) (Iran-US Claims Tribunal

refused to accept party officers as “witnesses,” but accepted them as “party representatives” or “party witnesses”).

⁸⁴⁰ See, e.g., Gelinas, *Evidence Through Witnesses*, in L. Lévy & V. Veeder (eds.), *Arbitration and Oral Evidence* 29, 31-32 (2004) (“As a general rule, any person will be admitted to testify without the arbitrators making any differentiation among the various qualities or capacities in which a person may appear: representative of a party, employee or former employee of a party, consultant or expert remunerated by a party or appointed by the Tribunal, spouses or other related persons.”); D. Sandifer, *Evidence Before International Tribunals* 349 (1975); Straus, *The Practice of the Iran-United States Claims Tribunal in Receiving Evidence From Parties and From Experts*, 3(3) J. Int’l Arb. 57 (1986). See also 2012 Swiss Rules, Art. 25(2) (“any person may be a witness”).

⁸⁴¹ *Dillon v. Mexico, Award of U.S. & Mexico General Claims Commission, Opinion of Commissioner Nielson of 3 October 1928*, IV R.I.A.A. 368, 371 (1952).

⁸⁴² For a detailed, if not entirely satisfactory, analysis, see *W. Jack Buckamier v. Islamic Repub. of Iran, Award in IUSCT Case No. 528-94-1-3 of 6 March 1992*, 28 Iran-US C.T.R. 53, 74-76 (1992) (“The Tribunal has often been presented with notarized affidavits or oral testimony of claimants or their employees....The probative value of such written or oral declarations is usually hotly debated between the parties, each of them relying on the peculiarities of its own judicial system....As an international Tribunal established by agreement between two sovereign States, the Tribunal cannot, in the field of evidence as in any other field, make the domestic rules or judicial practices of one party prevail over the rules and practices of the other, in so far as such rules and practices do not coincide with those generally accepted by international Tribunals....It is clear that the value attributed to this kind of evidence is directly related not only to the legal and moral traditions of each country, but also to a system of sanctions in case of perjury, which can easily and promptly be put into action and is rigorous enough to deter witnesses from making false statements. Such a system does not exist within international Tribunals and recourse to the domestic courts of the witness or affiant by the other party would be difficult, lengthy, costly and uncertain. In the absence of any practical sanction (other than the rejection by the international Tribunal of the discredited evidence), oral or written evidence of this kind cannot be accorded the value given to them in some domestic systems. Also it cannot be discounted that the ethical barriers which prevent the making of statements not in conformity with the truth before national courts will not have the same strength in international proceedings. ...In order to keep an equitable and reasonable balance between those contradictory requisites, the Tribunal must take into consideration the specific circumstances of each case, as well as the elements which can confirm or contradict the declarations submitted by the Claimants. The list of such elements is practically unlimited and varies from case to case. The absence or existence of internal contradictions within these declarations, or between them and events or facts which are known by other means, is obviously one of them. Explicit or implied admission by the other party is another, as well as the lack of context or the failure to adduce contrary evidence, when such evidence is apparently available or easily accessible.”).

⁸⁴³ See authorities cited §15.08[A][6], pp. 2276-77 nn.839-842.

⁸⁴⁴ See §15.08[X].

⁸⁴⁵ ^[2] 2010 UNCITRAL Rules, Arts. 27(3), 28(2); D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 605 (2d ed. 2013) (although Articles 27(2) and 28(2) no longer expressly require parties to give 15 days’ notice of names and addresses of witnesses it will present, “tribunal’s general duty to provide advance notice of the hearings would in any event encompass ‘the identification of persons who were to be examined at the hearing.’”); Stipanowich, *Rethinking American Arbitration*, 63 Ind. L.J. 425, 444 (1987) (“in such cases, arbitration threatens to become ‘trial by surprise’”).

⁸⁴⁶ ICC, *Controlling Time and Costs in International Arbitration* 13 (2d ed. 2012) (“helpful to start with a presumption that expert evidence will not be required”).

⁸⁴⁷ Article 26(1) of the UNCITRAL Model Law authorizes an arbitral tribunal to appoint “one or more experts to report to it on specific issues to be determined by the arbitral tribunal.” Other national laws are similar. See, e.g., *English Arbitration Act, 1996, §37(1)*; *Netherlands Code of Civil Procedure, Art. 1042*; *Swedish Arbitration Act, §25(1)* (tribunal may appoint expert unless both parties agree otherwise); *Chinese Arbitration Law, Art. 44(1)*; *Japanese Arbitration Law, Art. 34*; *Australian International Arbitration Act, 2011, Schedule 2, Art. 26(1)(a)*; *Costa Rican Arbitration Law, 2011, Art. 26*.

⁸⁴⁸ See, e.g., ^[2] 2010 UNCITRAL Rules, Art. 29; 2012 ICC Rules, Art. 25(4); ICDR Rules, Art. 22; LCIA Rules, Art. 21; 2012 CIETAC Rules, Art. 42(2); 2013 HKIAC Rules, Art. 25(1); 2010 SCC Rules, Art. 29(1); 2013 SIAC Rules, Art. 23; 2013 VIAC Rules, Art. 29(1).

⁸⁴⁹ See §25.04[B][4]; §26.05[C][3][d]. See also *Judgment of 15 December 1999*, 4 Z Sch 23/99 (Bayerisches Oberstes Landesgericht) (rejecting award-debtor’s argument that arbitral tribunal did not possess required knowledge of Italian patent law and had duty to request expert opinion); *Nat’l Thermal Power Corp. Ltd v. Wig Bros. Builders & Eng’rs Ltd*, [2009] INDLHC 1466 (Delhi High Ct.) (no obligation for arbitral tribunal to call for expert evidence, particularly where arbitrators themselves are experts); ^[2] UNCITRAL, *2012 Digest of Case Law on the Model Law on International Commercial Arbitration* 116 (2012) (“This is a power granted to the arbitral tribunal and not an obligation for the arbitral tribunal to appoint an expert in all cases.”).

⁸⁵⁰ *Starrett Housing Corp. v. Islamic Repub. of Iran, Award in IUSCT Case No. 314-24-1 of 14 August 1987*, 16 Iran-US C.T.R. 112, 197 (1987) (“It is fundamental that an arbitral tribunal cannot delegate to [the expert] the duty of deciding the case.”). See §13.04[A][6].

Most courts are reluctant to conclude that an expert exceeded his or her mandate. See, e.g., *Luzon Hydro Corp. v. Transfield Philippines Inc.*, [2004] SGHC 204, ¶20 (Singapore High Ct.) (“unless there was strong and unambiguous evidence of irregularity in the manner in which the arbitration was conducted, the integrity of the tribunal should not be questioned”; court refused to permit parties to “mount what appeared to be a ‘back-door’ appeal by attacking the manner in which the tribunal had made use of [the expert] when there was no evidence but only speculation that [the

expert] had overstepped his bounds”).

⁸⁵¹ [UNCITRAL Model Law, Art. 23\(1\)](#) (parties’ general right to submit evidence); 2010 IBA Rules on the Taking of Evidence, Art. 5(2)(c); ⁸⁵² [2010 UNCITRAL Rules, Art. 27\(2\)](#). See also Chartered Institute of Arbitrators, *Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration* (2007).

⁸⁵² D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 647 (2d ed. 2013) (“UNCITRAL’s support for the use of party-appointed experts at any time and in any manner necessary is unambiguous”); Jones, *Party Appointed Experts: Can They Be Usefully Independent?*, 8(1) *Transnat’l Disp. Mgt.* (2011); Jones, *Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last*, 24(1) *Arb. Int’l* 137 (2008); Kreindler, *Benefiting From Oral Testimony of Expert Witnesses: Traditional and Emerging Techniques*, in L. Lévy & V. Veeder, *Arbitration and Oral Evidence* 87 (2004).

⁸⁵³ Triebel, *An Outline of the Swiss/German Rules of Civil Procedure and Practice Relating to Evidence*, 47 *Arb.* 221, 226 (1982).

⁸⁵⁴ See, e.g., *Swisslion DOO Skopje v. Former Yugoslav Repub. of Macedonia*, Award in ICSID Case No. ARB/09/16 of 6 July 2012, ¶¶22; *Enron Creditors Recovery Corp. v. Argentine Repub.*, Decision on Application for Annulment in ICSID Case No. ARB/01/3 of 30 July 2010, ¶¶182-85; *Helnan Int’l Hotels AS v. Arab Repub. of Egypt*, Award in ICSID Case No. ARB/05/19 of 3 July 2008, ¶¶39-42.

⁸⁵⁵ See, e.g., *Murphy Exploration & Prod. Co. Int’l v. Repub. of Ecuador*, Award on Jurisdiction in ICSID Case No. ARB/08/4 of 15 December 2010, ¶¶26 (international law experts); *AES Summit Generation Ltd v. Repub. of Hungary*, Award in ICSID Case No. ARB/07/22 of 23 September 2010, ¶¶7.5.6, 9.2.21 (legal experts); *Aguaytia Energy, LLC v. Repub. of Peru*, Award in ICSID Case No. ARB/06/13 of 11 December 2008, ¶¶71-74, 77-83 (same); *Sempra Energy Int’l v. Argentine Repub.*, Award in ICSID Case No. ARB/02/16 of 28 September 2007, ¶¶358, 361, 364 (international law experts); *CMS Gas Transmission Co. v. Argentine Repub.*, Award in ICSID Case No. ARB/01/8 of 12 May 2005, ¶¶334, 339, 349 (same); *Methanex Corp. v. United States, Final Ad Hoc Award on Jurisdiction and Merits* of 3 August 2005, ¶¶41-100 (scientific experts); *Československá obchodní banka, AS v. Slovak Repub.*, Award in ICSID Case No. ARB/97/4 of 29 December 2004, ¶¶47-72 (legal experts).

⁸⁵⁶ Holtzmann, *Fact-Finding by the Iran-United States Claims Tribunal*, in R. Lillich (ed.), *Fact-Finding Before International Tribunals* 101, 123 (1991); [Straus, The Practice of the Iran-United States Claims Tribunal in Receiving Evidence From Parties and From Experts](#), 3(3) *J. Int’l Arb.* 57 (1986); G. White, *The Use of Experts by International Tribunals* 34 et. seq. (1965).

⁸⁵⁷ See, e.g., Allison & Holtzmann, *The Tribunal’s Use of Experts*, in D. Caron & J. Crook (eds.), *The Iran-United States Claims Tribunal and the Process of International Claims Resolution* 313 (2000) (procedures for selecting tribunal-appointed expert; soliciting parties’ views); [Straus, The Practice of the Iran-United States Claims Tribunal in Receiving Evidence From Parties and From Experts](#), 3(3) *J. Int’l Arb.* 57, 65-67 (1986). Compare D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 639 (2d ed. 2013) (arbitral tribunal may appoint expert *sua sponte*).

⁸⁵⁸ *El Paso Energy Int’l Co. v. Argentine Repub.*, Award in ICSID Case No. ARB/03/15 of 31 October 2011, ¶40 (tribunal consults ICC’s International Centre for Expertise regarding potential experts).

⁸⁵⁹ See, e.g., ⁸⁵⁹ [2010 UNCITRAL Rules, Art. 29\(1\)](#); D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 640-42 (2d ed. 2013); [Straus, The Practice of the Iran-United States Claims Tribunal in Receiving Evidence From Parties and From Experts](#), 3(3) *J. Int’l Arb.* 57, 65-67 (1986).

⁸⁶⁰ See, e.g., *Final Award in ICC Case No. 6497, XXIVa Y.B. Comm. Arb.* 71, 77-78 (1999) (tribunal orders independent expert to investigate allegations of bribery associated with underlying contract); D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 644 (2d ed. 2013).

⁸⁶¹ van Haersolte-van Hof, *UNCITRAL Arbitration Rules, Section III, Article 27 [Experts]*, in L. Mistelis (ed.), *Concise International Arbitration* 209, 210 (2010).

⁸⁶² Article 5(2) includes a requirement to describe the instructions given to the expert and a statement of his or her independence. See 2010 IBA Rules on the Taking of Evidence, Art. 5(2).

⁸⁶³ See Chartered Institute of Arbitrators, *Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration*, Art. 4(1) (“An expert’s opinion shall be impartial, objective, unbiased and uninfluenced by the pressures of the dispute resolution process or by any party.”). See also Gaffney & O’Leary, *Tilting at Windmills?: The Quest for Independence of Party-Appointed Expert Witnesses in International Arbitration*, 2011 *Asian Disp. Rev.* 2; Jones, *Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last*, 24 *Arb. Int’l* 137 (2008); Kantor, *A Code of Conduct for Party-Appointed Experts in International Arbitration – Can One Be Found?*, 26 *Arb. Int’l* 323 (2010).

⁸⁶⁴ Kantor, *A Code of Conduct for Party-Appointed Experts in International Arbitration – Can One Be Found?*, 26 *Arb. Int’l* 323, 334 (2010) (citing late Professor Thomas Walde).

⁸⁶⁵ [De Berti, Experts and Expert Witnesses in International Arbitration: Adviser, Advocate or Adjudicator?](#), 2011 *Austrian Y.B. Int’l Arb.* 53 (2011); Kantor, *A Code of Conduct for Party-Appointed Experts in International Arbitration – Can One Be Found?*, 26 *Arb. Int’l* 323 (2010).

⁸⁶⁶ See, e.g., *Alpha Projektholding GmbH v. Ukraine*, Award in ICSID Case No. ARB/07/16 of 8 November 2010, ¶¶155-56 (experts were employees of party); *Helnan Int’l Hotels AS v. Arab Repub. of Egypt*, Award in ICSID Case No. ARB/05/19 of 3 July 2008, ¶¶39-42 (rejecting argument that expert was unqualified to testify as an “independent expert witness” because he was former employee of claimant and presently working on respondent’s legal team); *Jan de Nul NV v. Arab Repub. of Egypt*, Award in ARB/04/13 of 6 November 2008, ¶¶28, 42 (rejecting argument that expert witness’s report should be excluded on grounds that expert witness was member of board of entity with interest in dispute).

⁸⁶⁷ Friedland & Brown de Vejar, *Discoverability of Communications Between Counsel and Party-Appointed Experts in International Arbitration*, 28 *Arb. Int’l* 1 (2012).

- ⁸⁶⁸ See, e.g., *Occidental Petroleum Corp. v. Repub. of Ecuador*, Award in ICSID Case No. ARB/06/11 of 5 October 2012, ¶¶80-87, 694-701 (requiring party-appointed experts to prepare joint expert report); *Libananco Holdings Co. v. Repub. of Turkey*, Award in ICSID Case No. ARB/06/8 of 2 September 2011, ¶¶72, 74, 352, 365 (joint reports from audio, computer and document forensics experts, who were then examined through witness conferencing); *Chevron Corp. v. Ecuador I*, Ad Hoc Procedural Order No. 8 of 31 March 2010, ¶3.1 (requiring party-appointed experts to prepare joint expert report). See also Hunter, *Expert Conferencing and New Methods*, in A. van den Berg (ed.), *International Arbitration 2006: Back to Basics?* 820 (ICCA Congress Series No. 13 2006).
- ⁸⁶⁹ See, e.g., Kreindler, *Benefiting From Oral Testimony of Expert Witnesses: Traditional and Emerging Techniques*, in L. Lévy & V. Veeder (eds.), *Arbitration and Oral Evidence* 87, 97 (2004); M. Kurkela & S. Turunen, *Due Process in International Commercial Arbitration* 170 (2d ed. 2010) ("Clarity may be obtained by organizing a 'tête-à-tête' conference between the experts.");
- ⁸⁷⁰ ICC, *Controlling Time and Costs in International Arbitration* 13 (2d ed. 2012).
- ⁸⁷¹ M. Kurkela & S. Turunen, *Due Process in International Commercial Arbitration* 166-68 (2d ed. 2010).
- ⁸⁷² See, e.g., Brown, *Oral Evidence and Experts in Arbitration*, in L. Lévy & V. Veeder (eds.), *Arbitration and Oral Evidence* 77 (2004) (detailing "distrust of oral evidence" in civil law systems); Lazareff, *International Arbitration: Towards A Common Procedural Approach*, in S. Frommel & B. Rider (eds.), *Conflicting Legal Cultures in Commercial Arbitration: Old Issues and New Trends* 31, 35 (1999) ("the English and the Americans are more inclined to rely on the testimony of witnesses than their sceptical Continental colleagues who are more apt to rely on contemporaneous documentary evidence"); van Houtte, *Counsel-Witness Relations and Professional Misconduct in Civil Law Systems*, 19 Arb. Int'l 457, 459 (2003). See §15.07[D][2].
- ⁸⁷³ See, e.g., Briner, *Domestic Arbitration: Practice in Continental Europe and Its Lessons for Arbitration in England*, 13 Arb. Int'l 155, 163 (1997) (quoting "old arbitrators [as saying] that they did not give any importance whatsoever to what the witnesses said"); Elsing & Townsend, *Bridging the Common Law-Civil Law Divide in Arbitration*, 18 Arb. Int'l 59, 62 (2002); Triebel, *An Outline of the Swiss/German Rules of Civil Procedure and Practice Relating to Evidence*, 47 Arb. 221 (1982). See also §15.08[AA][6].
- ⁸⁷⁴ Elsing & Townsend, *Bridging the Common Law-Civil Law Divide in Arbitration*, 18 Arb. Int'l 59, 62 (2002). See also Beardsley, *The Proof of Fact in French Civil Procedure*, 34 Am. J. Comp. L. 459 (1986); von Mehren & Salomon, *Submitting Evidence in An International Arbitration: The Common Lawyer's Guide*, 20 J. Int'l Arb. 285, 288-89 (2003). At the same time, as noted above, written witness statements are disfavored and seldom-used in civil law litigation. See §15.08[X].
- ⁸⁷⁵ Briner, *Domestic Arbitration: Practice in Continental Europe and Its Lessons for Arbitration in England*, 13 Arb. Int'l 155, 163 (1997) ("I have the feeling that by and large English, and also American, arbitrators are more apt to rely on what the witnesses state... Continental arbitrators basically seem to be more inclined to rely on contemporaneous documents and the circumstances surrounding the establishment of those documents."); Elsing & Townsend, *Bridging the Common Law-Civil Law Divide in Arbitration*, 18 Arb. Int'l 59 (2002).
- ⁸⁷⁶ See, e.g., *U.S. v. Salerno*, 505 U.S. 317, 328 (U.S. S.Ct. 1992) (Stevens, J., dissenting) ("Even if one does not completely agree with Wigmore's assertion that cross examination is 'beyond any doubt the greatest legal engine ever invented for the discovery of truth,' one must admit that in the Anglo-American legal system cross examination is the principal means of undermining the credibility of a witness whose testimony is false or inaccurate."); M. Kurkela & S. Turunen, *Due Process in International Commercial Arbitration* 168 (2d ed. 2010) ("The right to cross-examine a witness is in principle a part of due process."); Shenton, *IBA Supplementary Rules Governing the Presentation and Reception of Evidence in Int'l Commercial Arbitration*, X.Y.B. Comm. Arb. 145, 148 (1985); J. Wigmore, 32 Evidence §1367 (J. Chadborn Rev. 1974). See §15.08[W]; §16.02[E][3][a].
- ⁸⁷⁷ See, e.g., Kirby, *Witness Preparation: Memory and Storytelling*, 28 J. Int'l Arb. 401, 403 (2011) ("Given the inherent weaknesses of witness testimony, one might wonder how it has become such a prominent feature of the international arbitration landscape."); Landau, *Tainted Memories: Exposing the Fallacy of Witness Testimony* (Kaplan Lecture, 2010).
- ⁸⁷⁸ See §15.08[W], p. 2256; §15.08[AA][8], p. 2282; ALI/UNIDROIT Principles of Transnational Civil Procedure, comment P-19A (2004) ("Traditionally, all legal systems received witness testimony in oral form. However, in modern practice, the tendency is to replace the main testimony of a witness by a written statement. Principle 19 allows flexibility in this regard. It contemplates that testimony can be presented initially in writing, with orality commencing upon supplemental questioning by the court and opposing parties."); Lévy & Reed, *Managing Fact Evidence in International Arbitration*, in A. van den Berg (ed.), *International Arbitration 2006: Back to Basics?* 633, 636 (2007) ("there is a trend to limit hearing time almost exclusively to witness testimony, curtailing opening argument and saving closing argument for written post-hearing submissions").
- ⁸⁷⁹ Donovan, *Act III: Advocacy With Witness Testimony*, 21 Arb. Int'l 583, 605, 607 (2005) (on witness conferencing, "It may be one thing for an expert to tell something to a Tribunal of lawyers, whose understanding of the technical issues may be limited, but in front of his or her peers, the degree of truthfulness is increased."); Lévy & Reed, *Managing Fact Evidence in International Arbitration*, in A. van den Berg (ed.), *International Arbitration 2006: Back to Basics?* 633, 637-38 (2007) ("Some parties (and counsel) may (in despair?) hope for serendipity, meaning that their case will improve in the course of a hearing. If nothing else, it is certainly true that, even after a strong written phase of fact finding, only live witnesses will bring to life what, for the arbitrators, has been so far only a pile of paper."); Lörcher, *Improving Procedures for Oral and Written Witness Testimony*, in A. van den Berg (ed.), *Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration* 145, 147-48 (ICCA Congress Series No. 7, 1994); J. Waincymer, *Procedure and Evidence in International Arbitration* 884 (2012).
- ⁸⁸⁰ J. Wigmore, 32 Evidence §1367 (J. Chadborn Rev. 1974) (cross-examination is "the greatest legal engine ever invented for the

discovery of truth"). See [§15.08\[AA\]\[9\]](#).

⁸⁸¹ See [§15.07\[D\]\[2\]](#); [§15.08\[AA\]\[5\]](#).

⁸⁸² See [§15.01](#) (especially [§15.01\[A\]](#)); [§15.06\[B\]](#); [§§15.07\[A\]-\[B\]](#).

⁸⁸³ See [§15.07\[E\]](#).

⁸⁸⁴ 2010 IBA Rules on the Taking of Evidence, Arts. 4(2), (3).

⁸⁸⁵ 2010 IBA Rules on the Taking of Evidence, Arts. 4(9), (10).

Nonetheless, where a party fails to offer evidence from an apparently important witness, particularly its own officer or director, tribunals will request or, occasionally, order attendance of the individual(s) at a hearing.

⁸⁸⁶ See [§15.08\[X\]](#).

⁸⁸⁷ 2010 IBA Rules on the Taking of Evidence, Art. 4(7).

⁸⁸⁸ See [§15.08\[X\]](#).

⁸⁸⁹ 2010 IBA Rules on the Taking of Evidence, Art. 4(7) ("If a witness whose appearance has been requested...fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Witness Statement related to that Evidentiary Hearing by that witness unless, in exceptional circumstances, the Arbitral Tribunal decides otherwise."); Schlaepfer, *Witness Statements*, in L. Lévy & V. Veeder (eds.), *Arbitration and Oral Evidence* 65, 71-72 (2004) ("[T]he tendency in international arbitration is to give little credence to witness statements, especially when the witness is not heard in the course of an evidentiary hearing....Since it is widely accepted that witness statements are not written by the witness himself, the only way to ascertain whether the wording of the statement genuinely reflects the message that the witness intended to convey is to hear this witness."). See also [§16.02\[E\]\[3\]\[b\]](#).

⁸⁹⁰ M. Bühler & T. Webster, *Handbook of ICC Arbitration: Commentary, Precedents, Materials* 277-78 (2d ed. 2008) (testimony by video-link).

⁸⁹¹ See [§15.03](#); ^[2] [2010 UNCITRAL Rules, Art. 28\(3\)](#); 2012 ICC Rules, Art. 21(3); 2010 SCC Rules, Art. 27(2).

⁸⁹² [UNCITRAL Model Law, Arts. 19\(2\), 24\(1\)](#); [English Arbitration Act, 1996, §34\(1\)](#); [Costa Rican Arbitration Law, 2011, Art. 19](#). The tribunal's exercise of its authority will be subject to review, in an annulment or recognition action. See [§15.04](#); [§25.04\[B\]\[4\]](#).

⁸⁹³ See Marriott, *Evidence in International Arbitration*, 5 Arb. Int'l 280 (1989); Shenton, *IBA Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration*, X.Y.B. Comm. Arb. 145, 149-51 (1985).

⁸⁹⁴ See, e.g., ICSID Rules, Rule 35 ("Witnesses and experts shall be examined before the Tribunal by the parties under the control of its President.") (emphasis added).

⁸⁹⁵ The UNCITRAL Rules leave the issue of witness examination to the discretion of the Tribunal. See ^[2] [2010 UNCITRAL Rules, Art. 28\(2\)](#) ("Witnesses, including expert witnesses, may be heard under the conditions and examined in the manner set by the arbitral tribunal."). See also D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 604-05 (2d ed. 2013) ("The arbitral tribunals' discretion in this regard extends to any number of issues relating to the examination of witnesses, including advance notice of witness testimony, the administration of declarations of truthfulness, and cross-examination.").

Other institutional rules are similar. See, e.g., ICDR Rules, Art. 20(4) ("The tribunal may determine the manner in which witnesses are examined."); 2012 Swiss Rules, Art. 25(4) ("At the hearing, witnesses and expert witnesses may be heard and examined in the manner set by the arbitral tribunal."); 2013 HKIAC Rules, Art. 22(7) ("The arbitral tribunal is free to determine the manner in which witnesses or expert witnesses are examined."); 2013 SIAC Rules, Art. 22(3) ("Any witness who gives oral evidence may be questioned by each of the parties, their representatives and the Tribunal in such manner as the Tribunal shall determine.").

⁸⁹⁶ Historically, it was sometimes suggested that cross-examination was not common in international arbitration. ^[2] [UNCITRAL, Report of the Secretary-General on the Revised Draft Set of Arbitration Rules, Ninth Session, U.N. Doc. A/CN.9/112/Add.1, VII Y.B. UNCITRAL 166, 175-76 \(1976\)](#) ("[T]he arbitrators may decide whether cross-examination of the witnesses is or is not to be permitted. Cross-examination is a technique that is customarily employed in many areas of the work and cannot...be prescribed for international arbitration. Consequently, in cases where both parties or their counsel are accustomed to the technique of cross-examination, the arbitrators may in their discretion permit it, while in cases where one or both parties are unacquainted with this technique the arbitrators may find it inappropriate to permit."). This view was never representative and is today largely archaic (save for occasional idiosyncratic proceedings).

⁸⁹⁷ Schlaepfer, *Witness Statements*, in L. Lévy & V. Veeder (eds.), *Arbitration and Oral Evidence* 65, 72 (2004) ("scope of direct examination (if there is any) should be limited by the content of the witness statement").

⁸⁹⁸ Bishop, *Advocacy in International Commercial Arbitration: United States*, in R. Bishop & E. Kehoe (eds.), *The Art of Advocacy in International Arbitration* 519, 554 (2004) ("If the Panel orally hears only the cross-examination and not the direct examination, the author is concerned that psychologically the Panel may give the oral cross-examination greater weight than the written testimony.").

⁸⁹⁹ It is sometimes suggested that leading questions may not be objected to in international arbitration. M. Bühler & T. Webster, *Handbook of ICC Arbitration: Commentary, Precedents, Materials* 321 (2d ed. 2008) ("it is generally not possible to object to a question on [the] basis of being leading"). That is incorrect. As part of the tribunal's authority over procedural issues and evidence-taking, a tribunal clearly may (and tribunals frequently do) forbid leading questions on direct and redirect. See 2010 IBA Rules on the Taking of Evidence, Art. 8(1) ("Questions to a witness during direct and redirect testimony may not be unreasonably leading.").

⁹⁰⁰ M. Kurkela & S. Tununen, *Due Process in International Commercial Arbitration* 168 (2d ed. 2010) ("giving testimony is not an exercise in memorization").

⁹⁰¹ Beechey, *Advocacy in International Commercial Arbitration: England*, in R. Bishop (ed.), *The Art of Advocacy in International Arbitration* 233, 254 (2004) (civil law practitioners regard "emergence [of cross-examination] as a recognized feature in the arbitration process as something of a trump card in the hands of their common law trained colleagues"); Gelinas, *Evidence Through Witnesses*, in

L. Lévy & V. Veeder (eds.), *Arbitration and Oral Evidence* 29, 41 (2004) ("Professor Claude Reymond was one of the first to voice that American styled 'examination' and 'cross-examination' have no place in international commercial arbitration.").

⁹⁰² W. Craig, W. Park & J. Paulsson, *International Chamber of Commerce Arbitration* ¶24.01 (3d ed. 2000) ("Proponents of oral proceedings argue that the examination and cross-examination of witnesses at length and at leisure by counsel is an important means of revealing the truth. Such tedious practices are largely unknown in ICC arbitration.").

⁹⁰³ See [§16.02\[E\]\[4\]](#), p. 2358. It is often said in some domestic settings that, in cross-examination, one should "never ask a question to which you do not know the answer." Bishop, *Advocacy in International Commercial Arbitration: United States*, in R. Bishop & E. Kehoe (eds.), *The Art of Advocacy in International Arbitration* 519, 556 (2d ed. 2010). In international arbitration proceedings with no oral depositions and limited discovery, this advice is unrealistic, and usually counter-productive.

⁹⁰⁴ Tschanz, *Advocacy in International Commercial Arbitration: Switzerland*, in R. Bishop & E. Kehoe (eds.), *The Art of Advocacy in International Arbitration* 195, 223 (2d ed. 2010) ("Cross-examination is severely handicapped by the lack of pre-trial discovery. It is more difficult to impeach a witness also because an arbitrator that is unfamiliar with the process might interrupt the line of questioning at a crucial moment.").

⁹⁰⁵ As with other procedural and evidentiary matters, tribunals have relatively broad discretion with regard to sequestration. See, e.g., [§2010 UNCITRAL Rules, Art. 28\(3\)](#). See D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 608-09 (2d ed. 2013) (under Article 28(3) "the arbitral tribunal ultimately decides, depending on the circumstances of the case, whether and to what extent witnesses may be present in the hearing room when they are not giving testimony.... An important consideration in applying the rule on witness retirement is how the matter is regulated in the respective national legal systems of the parties.").

⁹⁰⁶ D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 608 (2d ed. 2013) ("According to general arbitral practice, witnesses are not allowed in the hearing room until they testify, but may remain in the hearing room after their testimony."); Gelinas, *Evidence Through Witnesses*, in L. Lévy & V. Veeder (eds.), *Arbitration and Oral Evidence* 29, 42-44 (2004) (tribunal discretion to sequester witnesses); Tschanz, *Advocacy in International Commercial Arbitration: Switzerland*, in R. Bishop & E. Kehoe (eds.), *The Art of Advocacy in International Arbitration* 195, 224 (2d ed. 2010) (fact witnesses ordinarily excluded from testimony of other fact witnesses, but this is not "universally followed").

⁹⁰⁷ In practical terms, this also requires instructing witnesses and counsel that witnesses should not be given access to hearing transcripts of other fact witnesses' testimony and should not discuss the content of other witnesses' testimony with them or members of the legal team prior to testifying.

⁹⁰⁸ [Harris Int'l Telecomms., Inc. v. Islamic Repub. of Iran, Award in IUSCT Case No. 323-409-1 of 2 November 1987, 17 Iran-US C.T.R. 31, 62-63 \(1987\)](#); Straus, *The Practice of the Iran-United States Claims Tribunal in Receiving Evidence From Parties and From Experts*, 3(3) J. Int'l Arb. 57 (1986).

⁹⁰⁹ See [§15.03](#); [§15.08\[AA\]\[5\]](#).

⁹¹⁰ Gelinas, *Evidence Through Witnesses*, in L. Lévy & V. Veeder (eds.), *Arbitration and Oral Evidence* 29, 39 (2005) ("failure to control the proceedings can be disastrous for the arbitral process").

⁹¹¹ Holtzmann, *Fact-Finding by the Iran-United States Claims Tribunal*, in R. Lillich (ed.), *Fact-Finding Before International Tribunals* 101, 132 (1991). See also Elsing, *Procedural Efficiency in International Arbitration: Choosing the Best of Both Legal Worlds*, 2011 SchiedsVZ 114, 123 ("What is needed are arbitrators 'with a backbone' who proactively and determinedly manage the proceedings and are confident enough to curtail any procedural debauchery.").

⁹¹² Lévy & Reed, *Managing Fact Evidence in International Arbitration*, in [A. van den Berg \(ed.\), International Arbitration 2006: Back to Basics? 633, 636](#) (ICCA Congress Series No. 13 2006) ("Evidentiary hearings are a most onerous part of arbitration, measured by time and expense.").

⁹¹³ See [§15.08\[BB\]](#).

⁹¹⁴ See [§15.08\[AA\]\[7\]](#).

⁹¹⁵ See [§16.02\[E\]\[3\]\[e\]](#).

⁹¹⁶ M. Kurkela & S. Turunen, *Due Process in International Commercial Arbitration* 164-65 (2d ed. 2010); Roth, *Consequences and Prevention of False Evidence Under the English Arbitration Act 1996: A Comparative Perspective*, 13 Arb. Int'l 391 (1997).

⁹¹⁷ Revised Uniform Arbitration Act, §17(a) (2000) ("An arbitrator may issue a subpoena for the attendance of a witness and for the production of records and other evidence at any hearing and may administer oaths."); [English Arbitration Act, 1996, §38\(5\)](#); [English Perjury Act, §§1\(1\), 2](#); [Netherlands Code of Civil Procedure, Art. 1041\(1\)](#) ("If the arbitral tribunal deems it necessary, it shall examine the witnesses on oath or affirmation as provided in article 107(1)."); [Québec Code of Civil Procedure, Art. 944.7](#) ("The arbitrators have the power to administer oaths."); [Singapore International Arbitration Act, 2012, §12\(2\)](#) ("An arbitral tribunal shall, unless the parties to an arbitration agreement have (whether in the arbitration agreement or in any other document in writing) agreed to the contrary, have power to administer oaths to or take affirmations of the parties and witnesses."); [Hong Kong Arbitration Ordinance, 2013, §56\(8\)\(a\)](#) ("Unless otherwise agreed by the parties, an arbitral tribunal may administer oaths to, or take the affirmations of, witnesses and parties"); [Hong Kong Crimes Ordinance, §31](#).

⁹¹⁸ [French Code of Civil Procedure, Art. 1467\(2\)](#); [Belgian Judicial Code, Art. 1700\(4\)](#) ("[The tribunal] may hear any person and such hearing shall be taken without oath."); [Swedish Arbitration Act, §25\(3\)](#); [Finnish Arbitration Act, §27\(2\)](#). Compare [UNCITRAL Model Law, Art. 19\(2\)](#).

Other jurisdictions require arbitrators to take evidence under oath. [Israeli Arbitration Law, Art. 14](#); T. Rüede & R. Hadenfeldt, *Schweizerisches Schiedsgerichtsrecht* 263 (1993); G. Walter, W. Bosch & J. Brönnimann, *Internationale Schiedsgerichtsbarkeit in der Schweiz* 224 (1991).

⁹¹⁹ [UNCITRAL Model Law, Art. 27](#); [Swiss Law on Private](#)

[International Law, Art. 184\(2\)](#); Austrian ZPO, §§306-309; [Hong Kong Arbitration Ordinance, 2013, §55](#); [Japanese Arbitration Law, Art. 35](#); [Korean Arbitration Act, Art. 28](#); [Australian International Arbitration Act, 2011, Schedule 2, Art. 27](#); [Malaysian Arbitration Act, §29](#); [New Zealand Arbitration Act 1996, Schedule 1, §27\(2\)\(b\)](#).

⁹²⁰ Swiss Penal Code, Arts. 306-309.

⁹²¹ German Penal Code, §§153 *et seq.*; Austrian Penal Code, §288.

⁹²² See, e.g., [Schneider, *Les témoins dans la procédure arbitrale*, Partie II](#), 11 ASA Bull. 568, 591 (1993). Less specific admonitions include "You are required to tell the truth, the whole truth and nothing but the truth. If you fail to do so, you may be personally subject to serious legal sanctions. Do you understand this?"

⁹²³ See, e.g., *Gen. Motors Corp. v. Mendicki*, [Ⓔ]367 F.2d 66 (10th Cir. 1966); *Corbin v. Washington Fire & Marine Ins. Co.*, [Ⓔ]278 F.Supp. 393 (S.D.N.Y. 1980).

⁹²⁴ Roth, *Consequences and Prevention of False Evidence Under the English Arbitration Act 1996: A Comparative Perspective*, 13 Arb. Int'l 391, 393 (1997).

⁹²⁵ D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 610 (2d ed. 2013) ("The nature of the record [of the hearing] depends on the particular features of the arbitration.").

⁹²⁶ See §25.04[B][4].

⁹²⁷ For good explanations, by experienced practitioners, see [Hunter, *Expert Conferencing and New Methods*](#), in [A. van den Berg \(ed.\), *International Arbitration 2006: Back to Basics?*](#) 820 (ICCA Congress Series No. 13 2006); Peter, *Witness Conferencing Revisited*, in S. Bond (ed.), *Arbitral Procedure at the Dawn of the New Millennium, Reports of the International Colloquium of CEPANI* 156 *et seq.* (2004).

⁹²⁸ Peter, *Witness Conferencing Revisited*, in S. Bond (ed.), *Arbitral Procedure at the Dawn of the New Millennium, Reports of the International Colloquium of CEPANI* 156 (2004).

⁹²⁹ Ulmer, *The Cost Conundrum*, 26 Arb. Int'l 221, 244 (2010) ("Hot tubbing does not necessarily save hearing time as it is generally necessary that the witnesses be examined by the opposing party separately before testifying jointly.").

⁹³⁰ Presenting legal submissions through a legal expert typically requires that the expert prepare a report or opinion on the relevant issues and attend the hearing for cross-examination. In contrast, presenting legal submissions through counsel may permit more flexibility, in that counsel may make submissions with fewer restrictions (and not just during the witness hearing), while arguably being perceived to have less independence.

⁹³¹ M. Mustill & S. Boyd, *Commercial Arbitration* 72 (2d ed. 1989).

⁹³² See §4.04[B][6][d], p. 592; §11.03[A], p. 1542; §11.05[E][2], pp. 1623-25; §19.03[D], p. 2637.

⁹³³ Tschanz, *Advocacy in International Commercial Arbitration: Switzerland*, in R. Bishop & E. Kehoe (ed.), *The Art of Advocacy in International Arbitration* 195, 218 (2d ed. 2010) ("The procedural rules usually allow demonstrative exhibits at the hearings, provided that no new evidence is contained therein and that copies are provided to opposing counsel and the arbitrators.").

⁹³⁴ [Ⓔ]UNCITRAL, *Report of the Secretary-General on the Revised Draft Set of Arbitration Rules, Suggested Modifications, Ninth Session*, U.N. Doc. A/CN.9/112/Add.2, ¶15, VII Y.B. UNCITRAL 182, 183 (1976) ("preponderant opinion that the presentation of oral argument was a right generally available in [national] legal proceedings which should also be available in arbitral proceedings at the request of either party").

⁹³⁵ There may be procedural disputes as to whether hand-outs constitute further written submissions. In general, equality of treatment should be observed, allowing each party to submit outlines, (true) skeleton arguments, or similar summaries, as well as to use demonstrative evidence.

⁹³⁶ Kerr, *Concord and Conflict in International Arbitration*, 13 Arb. Int'l 121, 125 (1997).

⁹³⁷ See §15.08[FF].

⁹³⁸ See also Crawford, *Advocacy Before the International Court of Justice and Other International Tribunals in State-to-State Cases*, in R. Bishop & E. Kehoe (ed.), *The Art of Advocacy in International Arbitration* 11, 13 (2d ed. 2010) ("internationally the free interchange of argument, question and analysis between bench and bar, based on a grasp of the dossier rather than a prepared text, is rather exceptional"); Kaufmann-Kohler, *The Arbitrator and the Law: Does He/She Know It? Apply It? How? And A Few More Questions?*, 21 Arb. Int'l 631 (2005); Triebel, *An Outline of the Swiss/German Rules of Civil Procedure and Practice Relating to Evidence*, 47 Arb. 221, 223 (1982) ("written pleadings play such an important role that oral submissions are thereby often rendered superfluous" in civil law settings).

⁹³⁹ [Ⓔ]N. Blackaby *et al.* (eds.), *Redfern and Hunter on International Arbitration* ¶6-231 (5th ed. 2009); W. Craig, W. Park & J. Paulsson, *International Chamber of Commerce Arbitration* ¶25.05 (3d ed. 2000).

⁹⁴⁰ See §15.04.

⁹⁴¹ Some commentators question the value of post-hearing written submissions. D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 494 (2d ed. 2013) ("a predisposition against post-hearing written submission is appropriate", but "the fundamental principle of party equality may occasionally necessitate allowing the parties to submit post-hearing memorials or briefs").

This view does not accord with common (and good) practice in more complex disputes. Compare Case Nos. 33, 87 and 174, *Dissenting Opinion of H. Holtzmann From Orders Permitting Post-Hearing Statements of 20 June 1983*, 3 Iran-US C.T.R. 87-88 (1983).

⁹⁴² 2012 ICC Rules, Art. 27. See also [Ⓔ]2010 UNCITRAL Rules, Art. 31; 2013 HKIAC Rules, Art. 30(1); 2010 SCC Rules, Art. 34; 2013 SIAC Rules, Art. 28(1).

⁹⁴³ *Watkins-Johnson Co. v. Islamic Repub. of Iran, Order in Case No. 370 of 3 December 1987*, excerpted in D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 70 (2d ed. 2013) ("It has been the established practice of the Tribunal to close the exchange of written pleadings after the submission of Memorials in Rebuttal. In order to secure equal treatment of the Parties and an orderly conduct of the proceedings, the Tribunal admits further written submissions close to the Hearing date only in exceptional circumstances.").

⁹⁴⁴ See Butchers & Kimbrough, *The Arbitral Tribunal's Role in Default Proceedings*, 22 Arb. Int'l 233 (2006); Tunik, *Default Proceedings in International Commercial Arbitration*, 1998 Int'l Arb. L. Rev. 86.

In rare circumstances, involving evident bias or corruption of the tribunal, or other misconduct, non-participation may be both inevitable and prudent. See Hunter & Paulsson, *A Code of Ethics for Arbitrators in International Commercial Arbitration*, 13 Int'l Bus. Law. 153 (1985). Less likely to be successful is non-participation in the merits of the case after an unsuccessful jurisdictional challenge.

⁹⁴⁵ State immunity or political consideration may, however, make judicial review in a foreign arbitral seat unattractive. Additionally, in some jurisdictions, the act of participating in the arbitration, regardless of reservations of jurisdictional objections, may involve some waiver of these objections. See [§7.05\[G\], p. 1251](#).

⁹⁴⁶ The ICSID Convention provides, in Article 45(2), that "[i]f a party fails to appear or to present his case at any stage of the proceedings, the other party may request the Tribunal to deal with the questions submitted to it and to render an award." Article 45(1) also provides that "[f]ailure of a party to appear or present his case shall not be deemed an admission of the other party's assertions." ICSID Convention, Art. 45(1). Other international arbitration conventions do not specifically address the subject of default proceedings.

⁹⁴⁷ [UNCITRAL Model Law, Art. 25](#). See also H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 700 (1989) (default proceedings under Article 25(b) of Model Law).

⁹⁴⁸ See, e.g., [English Arbitration Act, 1996, §41\(4\)](#) (in case of default, tribunal may "make an award on the basis of the evidence before it"); [Netherlands Code of Civil Procedure, Art. 1040](#); [Japanese Arbitration Law, Art. 33](#); [Costa Rican Arbitration Law, 2011, Art. 25](#). See also European Convention Providing a Uniform Law on Arbitration, Annex I, Art. 17 ("If, without legitimate cause, a party properly summoned does not appear or does not present his case within the period fixed, the arbitral tribunal may, unless the other party requests an adjournment, investigate the matter in dispute and make an award.").

⁹⁴⁹ See, e.g., *Final Award in ICC Case No. 7701*, 8(2) ICC Ct. Bull. 66 (1997); *Award in ICC Case No. 6670*, 119 J.D.I. (Clunet) 1010 (1992). See also D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 672 (2d ed. 2013) ("once the arbitral proceedings are initiated and the jurisdiction of the arbitral tribunal is established, the parties are bound by the final outcome – whether or not they participate").

⁹⁵⁰ See [§23.01\[F\]](#); [§25.04\[B\]\[4\]](#); [§26.05\[C\]\[3\]\[d\]](#).

⁹⁵¹ [2010 UNCITRAL Rules, Art. 30\(1\)\(b\)](#). Article 30(2) provides that "if one of the parties, duly notified under these Rules, fails to appear at a hearing without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration."

⁹⁵² 2012 ICC Rules, Arts. 6(8), 26(2). See also 1998 ICC Rules, Arts. 6(3), 21(2).

⁹⁵³ See, e.g., ICDR Rules, Art. 23; 2013 AAA Rules, Rule 31; LCIA Rules, Art. 15(8); 2013 HKIAC Rules, Art. 26(2); 2010 SCC Rules, Art. 30; 2013 SIAC Rules, Arts. 17(8), (9).

⁹⁵⁴ *Explanatory Note by the UNCITRAL Secretariat on the Model Law on 1985 International Commercial Arbitration, as amended in 2006*, U.N. Doc. A/CN.9/264 ¶38.

⁹⁵⁵ See *Rebah Constr. CC v. Renkie Bldg Constr. CC*, [2008] (3) SA 475 (T) (South African High Ct.) (annulling award where arbitral tribunal rendered default award six days after respondent failed to file its statement of defense).

⁹⁵⁶ See, e.g., [UNCITRAL Model Law, Art. 25\(c\)](#). See H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 698–716 (1989).

⁹⁵⁷ See, e.g., [Netherlands Code of Civil Procedure, Art. 1040\(3\)](#) ("[T]he arbitral tribunal shall render an award in favour of the claimant, unless it considers the claim to be unlawful or unfounded. Before rendering an award, the arbitral tribunal may require the claimant to produce evidence in support of one or more of his allegations."); [Japanese Arbitration Law, Art. 33](#) ("If any party fails to appear at an oral hearing or to produce documentary evidence, the arbitral tribunal may make the arbitral award on the evidence before it that has been collected up until such time. Provided, this shall not apply in the case where there is sufficient cause with respect to the failure to appear at an oral hearing or to produce documentary evidence."); [Hong Kong Arbitration Ordinance, 2013, §35](#); [Korea Arbitration Act, Art. 26\(3\)](#); [Australian International Arbitration Act, 2011, Schedule 2, Art. 25\(c\)](#); [Malaysian Arbitration Act, §27\(c\)](#).

⁹⁵⁸ See, e.g., [2010 UNCITRAL Rules, Art. 30](#); 2012 ICC Rules, [Art. 6\(3\)](#); ICDR Rules, Art. 23; 2013 AAA Rules, Rule 31; LCIA Rules, Art. 15(8); 2013 HKIAC Rules, Art. 26; 2010 SCC Rules, Art. 30; 2013 SIAC Rules, Art. 17(9). See T. Webster, *Handbook of UNCITRAL Arbitration* ¶¶30–34 (2010) ("The Tribunal may proceed with the arbitration, including the hearing that the party has failed to attend. In the absence of one of the parties, the conduct of the hearing must be adapted to permit the Tribunal to review the evidence and question any witnesses.").

⁹⁵⁹ D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 672 (2d ed. 2013).

⁹⁶⁰ Despite this, one Indian court held that, while the arbitral tribunal is required to investigate the merits of the claimant's case, it is entitled to draw adverse inference against the defaulting party. *M/s Prime TeleSys. Ltd v. Sasken Comm'n Techs. Ltd.*, [2009] INDLHTC 5430 (Delhi High Ct.).

⁹⁶¹ See [§23.08](#).

⁹⁶² [UNCITRAL Model Law, Art. 25\(a\)](#).

⁹⁶³ *Judgment of 29 September 1999*, 4 Z Sch 02/99 (Bayerisches Oberstes Landesgericht) (award set aside because arbitral tribunal issued award instead of terminating proceedings where claimant did not submit statement of claim). In one case, the arbitrator terminated only the proceedings which related to the defaulting party; the court held that, although the arbitration was terminated with respect to the claimant's claim, the respondent could proceed with its counterclaim. *Indian Oil Corp. Ltd v. Atv. Projects India Ltd.*, [2004] 2 ARBLR 432 Delhi (Delhi High Ct.).

⁹⁶⁴ *Dansk Møller Indus. AS v. Bentex Minerals Co.*, [2007] 1B

C.L.R. 692 (Cypriot S.Ct.).

⁹⁶⁵ *Indian Oil Corp. Ltd v. Atv. Projects India Ltd*, [2004] 2 ARBLR 432 Delhi (Delhi High Ct.) (inquiring into reason for party's default). This approach implies that the tribunal should give a reasonable opportunity to the defaulting party to explain its default.

⁹⁶⁶ Of course, even before "deliberations" begin the arbitrators will be developing and exchanging views. See, e.g., Bishop, *Advocacy in International Commercial Arbitration: United States*, in R. Bishop & E. Kehoe (eds.), *The Art of Advocacy in International Arbitration* 519, 543 (2d ed. 2010) ("Arbitrators may come to the evidentiary hearing with only tentatively formed impressions from their reading of the witness statements and materials, strive to keep an open mind through the entire evidentiary process and certainly listen to all of the evidence presented; but they develop impressions and even reach tentative conclusions with each witness presented. Many arbitrators will discuss the most recent witnesses and evidence at lunch breaks. From day-to-day, their conclusions may be refined and sometimes even changed significantly, but often what is heard at an earlier point is of disproportionately greater persuasive value.").

⁹⁶⁷ See [§25.04\[B\]\[4\]](#); [§26.05\[C\]\[3\]\[d\]](#) for discussions of annulment and non-recognition of awards based on inadequate or no deliberations.

⁹⁶⁸ *Judgment of 16 January 2003*, 2004 Rev. arb. 369, 380 (Paris Cour d'appel).

⁹⁶⁹ See [§13.03\[D\]](#); [§20.06](#).

⁹⁷⁰ Some national legal systems prescribe specific requirements for the process of arbitral deliberations, including establishing a date on which the deliberations will formally begin. [French New Code of Civil Procedure, Arts. 1476-77](#).

⁹⁷¹ There are many ways of structuring and running such discussions. Reymond, *The President of the Arbitral Tribunal*, 9 ICSID Rev. 1, 13 (1994).

⁹⁷² This does not always occur as envisaged. Tschanz, *Advocacy in International Commercial Arbitration: Switzerland*, in R. Bishop & E. Kehoe (eds.), *The Art of Advocacy in International Arbitration* 195, 208 (2d ed. 2010) ("Some arbitrators are a law unto themselves....Even their co-arbitrators can be taken by surprise. Whether they express their opinions or not, it is then often too late (counterproductive) to argue about it.").

⁹⁷³ See [§23.04](#).

⁹⁷⁴ Reymond, *The President of the Arbitral Tribunal*, 9 ICSID Rev. 1, 11 (1994). See also D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 704-08 (2d ed. 2013) (describing process of deliberations in Iran-US Claims Tribunal).

⁹⁷⁵ See [§13.07\[A\]\[3\]](#); [§23.04](#).

⁹⁷⁶ See [§13.07\[A\]\[3\]](#); [§23.04](#).

⁹⁷⁷ There will also be cases in which the two co-arbitrators agree with a particular result, and the chairman does not. This occurs more frequently than commentary sometimes acknowledges. See, e.g., *Tokio Tokelés v. Ukraine, Dissenting Opinion of Chairman Prosper Weil* in ICSID Case No. ARB/02/18 of 29 April 2004.

⁹⁷⁸ See [§23.05\[B\]](#).

⁹⁷⁹ In very rare cases, by reason of the parties' agreement or otherwise, a unanimous award may be necessary. In these circumstances, it will be necessary to obtain agreement between both co-arbitrators. See [§23.04\[A\]](#).

⁹⁸⁰ See [§23.06\[A\]](#), p. 3062; *Deiulemar Compagnia di Navigazione, SpA v. Transocean Coal Co.*, 2004 U.S. Dist. LEXIS 23948 (S.D.N.Y.) (rejecting application to vacate award based on majority's alleged exclusion of dissenting arbitrator from deliberations); *Judgment of 15 May 2003, Czech Repub. v. CME Czech Repub. BV*, Case No. T 8735-01 (Svea Ct. App.), reprinted and discussed in S. Jarvin & A. Magnusson (eds.), *International Arbitration Court Decisions* 663, 678-79 (2006) ("[W]hen two arbitrators are agreed upon the outcome of the dispute, the third arbitrator cannot prolong the deliberations by demanding continued discussions in an attempt to persuade the others as to the correctness of his opinion. The dissenting arbitrator is thus not afforded any opportunity to delay the writing of the award."). See also Reymond, *The President of the Arbitral Tribunal*, 9 ICSID Rev. 1, 12-13 (1994).

⁹⁸¹ In doing so, the tribunal does not deny the parties an opportunity to be heard. See *Judgment of 14 March 2011*, 2011 SchiedsVZ 159 (Oberlandesgericht München) (right to be heard does not require arbitral tribunal to inform parties about its legal conclusions prior to making award).

⁹⁸² [Scottish Arbitration Act, 2010, Schedule 1, Rule 55](#) ("Before making an award, the tribunal (a) may send a draft of its proposed award to the parties, and (b) if it does so, must consider any representations from the parties about the draft which the tribunal receives by such time as it specifies."). See also United States Model Bilateral Investment Treaty, 2012, Art. 28(9)(a) ("In any arbitration conducted under this Section, at the request of a disputing party, a tribunal shall, before issuing a decision or award on liability, transmit its proposed decision or award to the disputing parties and to the non-disputing Party. Within 60 days after the tribunal transmits its proposed decision or award, the disputing parties may submit written comments to the tribunal concerning any aspect of its proposed decision or award. The tribunal shall consider any such comments and issue its decision or award no later than 45 days after the expiration of the 60-day comment period.").

⁹⁸³ Formal requirements for arbitral awards under national law (e.g., that the award generally be written, signed, dated, reasoned) are discussed below. See [§23.02\[B\]](#).

⁹⁸⁴ See [§§23.02\[A\]-\[B\]](#).

⁹⁸⁵ See [§23.02\[B\]](#).

⁹⁸⁶ See [§23.06\[C\]](#), p. 3068. As discussed below, noncompliance with these formalities may result in annulment of the award (see [§25.05\[C\]](#), pp. 3360-61) or may prevent it from becoming "binding" or "final," thus impeding recognition. See [§26.05\[C\]\[7\]](#), p. 3606.

⁹⁸⁷ 2012 ICC Rules, Art. 33. See also 2012 CIETAC Rules, Art. 49; 2013 SIAC Rules, Art. 28(2). See J. Fry, S. Greenberg & F. Mazza, *The Secretariat's Guide to ICC Arbitration* ¶13-1181 (2012) ("The Court's scrutiny of all draft awards is a distinctive feature of ICC arbitration. It serves primarily to maximize the legal effectiveness of an award by identifying any defects that could be used in an attempt to have it set aside at the place of the arbitration or resist its enforcement elsewhere.").

⁹⁸⁸ See [§24.01](#).

- ⁹⁸⁹ See [§23.06\[B\]](#).
- ⁹⁹⁰ *Kanto Yakin Kogyo Kabushiki-Kaisha v. Can-Eng Mfg Ltd.*, (1992) 7 O.R.3d (Ontario Super. Ct.) (rejecting argument that delivery of award should be made in accordance with Hague Service Convention).
- ⁹⁹¹ The substantive and choice-of-law standards applicable in costs decisions are discussed below. See [§23.08\[D\]](#); [Power & Konrad, Costs in International Commercial Arbitration – A Comparative Overview of Civil and Common Law Doctrines](#), 2007 Austrian Arb. Y.B. 261.
- ⁹⁹² ICC, *Controlling Time and Costs in International Arbitration* 15 (2d ed. 2012).
- ⁹⁹³ Failure to provide the parties with an opportunity to be heard on the issue of costs will expose the award to annulment or non-recognition (at least insofar as the award of costs is concerned). See [§25.04\[B\]\[4\]](#), p. 3244; [§26.05\[C\]\[3\]\[d\]](#), p. 3530; *Gbangbola v. Smith & Sheriff Ltd* [1998] 3 All ER 730 (QB) (English High Ct.) (award annulled because arbitrator did not permit party to make submissions regarding costs); *Gen. Distrib. Ltd v. Casata Ltd*, [2006] 2 NZLR 721 (New Zealand S.Ct.) (arbitral tribunals are obliged to consider costs even if no party has expressly presented a claim as to costs; failure to do so constitutes omission under [Article 33\(3\) of Schedule 1 of New Zealand Arbitration Act 1996](#) (based on Article 33(3) of the Model Law), enabling tribunal to make additional award in respect of costs).
- ⁹⁹⁴ For commentary, see *Special Section: Fast-Track Arbitration*, 2 Am. Rev. Int'l Arb. 137 (1991); Ackerman, *Rules for Expedited Arbitration Procedure*, 6 Am. Rev. Int'l Arb. 301 (1995); Bagnier, *Expedited Arbitration Rules: Stockholm and WIPO*, 13 Arb. Int'l 193 (1997); Beerbower, *International Arbitration: Can We Realise the Potential?*, 27 Arb. Int'l 75 (2011); Davis, *ICC Fast-Track Arbitration: Different Perspectives*, 3(2) ICC Ct. Bull. 4 (1992); Freyer, *Getting "Fast-Track" Arbitration: Pre-Dispute Agreements and Post-Dispute Techniques*, in *Liber Amicorum Michel Gaudet* 104 (1999); Gaillard, *Fast-Track Arbitration and Beyond: Is There Emerging A New Need for Speed in International Commercial Arbitration?*, in *Liber Amicorum Michel Gaudet* 28 (1999); [Mustill, Comments on Fast-Track Arbitration](#), 10(4) J. Int'l Arb. 121 (1993); [Welser & Klaussegger, The Arbitrator and the Arbitration Procedure – Fast Track Arbitration: Just Fast or Something Different?](#), 2009 Austrian Arb. Y.B. 259.
- ⁹⁹⁵ See 2012 Swiss Rules, Art. 42(d) ("The award shall be made within six months from the date on which the Secretariat transmitted the file to the arbitral tribunal."); 2008 DIS Supplementary Rules for Expedited Proceedings (expedited rules designed to allow decision for six months for sole arbitrator, and nine months for three-person tribunal); 1999 SCC Rules for Expedited Arbitrations (expedited rules designed to allow a decision within three months).
- ⁹⁹⁶ Beerbower, *International Arbitration: Can We Realise the Potential?*, 27 Arb. Int'l 75 (2011).
- ⁹⁹⁷ D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 555 (2d ed. 2013) ("The expectation of parties from different legal systems are never so likely to conflict as with questions of evidence."; "Questions of evidence are among the most problematic aspects of any regulation of international arbitration."). Issues of privilege are discussed below. See [§16.02\[E\]\[6\]](#).
- ⁹⁹⁸ [UNCITRAL Model Law, Art. 19\(2\)](#). See also D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 558 (2d ed. 2013) (¹²⁹ [2010 UNCITRAL Rules, Art. 27\(4\)](#) "gives the arbitral tribunal wide discretion to determine freely" weight of evidence); H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 556-67 (1989) ("The provision regarding evidence in Article 19(2) was modeled on Article 25(6) of the UNCITRAL Arbitration Rules [1976].... This was the clear intent of the drafters: the Working Group's initial instructions on the point were that 'the model law should empower the arbitral tribunal to adopt its own rules of evidence subject to contrary stipulation by the parties'; this view was never contradicted; and it was the Secretariat's understanding of the provision.") (emphasis in original).
- ⁹⁹⁹ ¹³⁰ [UNCITRAL, Report of the Secretary-General on the Preliminary Draft Set of Arbitration Rules, for Optional Use in Ad Hoc Arbitration Relating to International Trade, Eighth Session, U.N. Doc. A/CN.9/97. VI UNCITRAL Y.B. 163, 176 \(1975\)](#).
- ¹⁰⁰⁰ Revised Uniform Arbitration Act, §15 (2000) ("The authority conferred upon the arbitrator includes the power to...determine the admissibility, relevance, materiality and weight of any evidence."); [English Arbitration Act, 1996, §34\(1\)](#), (2) ("It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter"; "evidential matters" include "whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance, or weight of any material (oral, written or other) sought to be tendered on any matters of fact and opinion"); [French Code of Civil Procedure, Art. 1467](#) ("The arbitral tribunal shall take all necessary steps concerning evidentiary and procedural matter, unless the parties authorize it to delegate such tasks to one of its members. The arbitral tribunal may call upon any person to provide testimony."); German ZPO, §1042(4); Austrian ZPO, §599(1); [Hong Kong Arbitration Ordinance, 2013, §47\(3\)](#) ("When conducting arbitral proceedings, an arbitral tribunal is not bound by rules of evidence and may receive any evidence that it considers relevant to the arbitral proceedings, but it must give the weight that it considers appropriate to the evidence adduced in the arbitral proceedings."); [Japanese Arbitration Law, Art. 26\(3\)](#); [Korean Arbitration Act, Art. 20\(2\)](#); [Costa Rican Arbitration Law, 2011, Art. 19\(2\)](#).
- ¹⁰⁰¹ See, e.g., *Wallace v. Buttar*, ¹³¹ [378 F.3d 182](#), 193 (2d Cir. 2004) ("great deference"...must be paid to arbitral panels by federal courts"); *Compania Panemena Maritima San Gerassimo, SA v. J.E. Hurley Lumber Co.*, ¹³² [244 F.2d 286](#) (2d Cir. 1957); *Popkave v. John Hancock Distrib. LLC*, ¹³³ [768 F.Supp.2d 785](#) (E.D. Pa. 2011); *Rai v. Barclays Capital Inc.*, ¹³⁴ [739 F.Supp.2d 364](#), 375 (S.D.N.Y. 2010) ("So long as there is a 'barely colorable' explanation for the Panel's [evidentiary] decision, the arbitration award must be confirmed."); *Supreme Oil Co., Inc. v. Abondolo*, ¹³⁵ [568 F.Supp.2d 401](#), 408 (S.D.N.Y. 2008) ("[a]rbitrators possess great latitude to determine the procedures governing their proceedings and to restrict or control evidentiary submissions"); *Reichman v. Creative Real Estate Consultants, Inc.*, ¹³⁶ [476 F.Supp. 1276](#) (S.D.N.Y. 1979).
- ¹⁰⁰² *Int'l Chem. Workers Union v. Columbian Chem. Co.*, ¹³⁷ [331](#)

[F.3d 491](#), 497 (5th Cir. 2003).

¹⁰⁰³ *Generica Ltd v. Pharm. Basics, Inc.*, [125 F.3d 1123](#), 1130 (7th Cir. 1997).

¹⁰⁰⁴ *Petroleum Separating Co. v. Interam. Refining Corp.*, [296 F.2d 124](#), 124 (2d Cir. 1961).

¹⁰⁰⁵ D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 572 (2d ed. 2013) ("nothing in Article 27(4) prevents the arbitral tribunal from following the formal rules of evidence of a national system familiar to both parties").

¹⁰⁰⁶ See, e.g., *Soh Beng Tee & Co. Pte Ltd v. Fairmount Dev. Pte Ltd*, [2007] SGCA 28, ¶60 (Singapore Ct. App.) ("This judicial philosophy of minimal interference is not only manifested in relation to an arbitrator's obligation to adhere to the principles of natural justice, but is also adhered to by our courts in addressing other types of challenges to arbitral awards."); *Judgment of 10 March 1981, Arkhbaieff v. Entreprise roumaine d'Etat pour le commerce extérieur Arpimex*, 1981 Bull. civ. No. 82, 69 (French Cour de cassation civ. 1e); *Judgment of 12 April 2011*, 2011 SchiedsVZ 230, 232 (Oberlandesgericht München) ("According to [the applicable institutional rules], an arbitrator may dismiss a motion for the taking of evidence at his discretion. While a dismissal of a motion for the taking of evidence could per se lead to a violation of the right to be heard, an arbitrator is not obliged to grant such a motion, if he is of the view that the assertion in relation to which evidence is being offered has no relevance to the outcome of the case."); *Vianini Lavori SpA v. H.K. Housing Auth.*, [1992] HKCFI 172, ¶44 (H.K. High Ct.).

¹⁰⁰⁷ *Jivraj v. Hashwani* [2011] UKSC 40, ¶62 (U.K. S.Ct.).

¹⁰⁰⁸ *Arbitration Application No. 3 of 2011*, [2011] CSOH 164, ¶29 (Scottish Ct. Sess.).

¹⁰⁰⁹ *Judgment of 29 June 2007, Case No. R06/005HR (Dutch Hoge Raad)*. See also *Judgment of 28 February 2013*, DFT 4A_576/2012, ¶4.2.2 (Swiss Federal Tribunal) (tribunal has authority to exclude evidence submitted late in arbitral proceeding: "right to adduce evidence, which constitutes one of the elements of the right to be heard, is not violated when evidence was not requested in a timely manner").

¹⁰¹⁰ 2012 ICC Rules, Art. 22(2).

¹⁰¹¹ See, e.g., ICDR Rules, Art. 20(6); 2012 Swiss Rules, Art. 24(2); 2013 HKIAC Rules, Art. 22(2); 2010 SCC Rules, Art. 26(1); 2013 SIAC Rules, Art. 16(2). Compare 1958 ILC Model Rules on Arbitral Procedure, Art. 18(1).

¹⁰¹² UNCITRAL Rules, Art. 27(4). See also D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 572 (2d ed. 2013) (Article 27(4) "confers discretion on the tribunal with respect to all forms of evidence") (emphasis in original); T. Webster, *Handbook of UNCITRAL Arbitration* ¶¶27-107 to 27-115 (2010).

¹⁰¹³ LCIA Rules, Arts. 20(2), 22(1)(f).

¹⁰¹⁴ 2010 IBA Rules on the Taking of Evidence, Art. 9(1). See Strong & Dies, *Witness Statements Under the IBA Rules of Evidence: What to Do About Hear-Say?*, 21 Arb. Int'l 301, [304 \(2005\)](#).

¹⁰¹⁵ See, e.g., [§25.04\[B\]\[4\]](#); Pietrowski, *Evidence in International Arbitration*, 22 Arb. Int'l 373, [374, 378-79 \(2006\)](#); Strong & Dies, *Witness Statements Under the IBA Rules of Evidence: What to Do About Hear-Say?*, 21 Arb. Int'l 301 (2005).

¹⁰¹⁶ See, e.g., B. Berger & F. Kellerhals, *Internationale und interne Schiedsgerichtsbarkeit in der Schweiz* ¶1205 (2006); Brower, *Anatomy of Fact-Finding Before International Tribunals: An Analysis and A Proposal Concerning the Evaluation of Evidence*, in R. Lillich (ed.), *Fact-Finding Before International Tribunals* 147 (1992); Buxton, *The Rules of Evidence as Applied to Arbitration*, 58 Arb. 229, 229 (1993) ("Contrary to what is generally believed to be the law, the technical rules of evidence have never applied in arbitrations subject to English law."); Cremades, *Powers of the Arbitrators to Decide on the Admissibility of Evidence and to Organize the Production of Evidence*, 10(1) ICC Ct. Bull. 49 (1999); Gelinás, *Evidence Through Witnesses*, in L. Lévy & V. Veeder (eds.), *Arbitration and Oral Evidence* 29, 37 (2004) ("arbitral tribunal is not obliged to hear all the evidence offered especially when it becomes repetitive and irrelevant"); Pietrowski, *Evidence in International Arbitration*, 22 Arb. Int'l 373, [374, 378-79 \(2006\)](#). See also [§15.02\[E\]; §15.03](#).

¹⁰¹⁷ Arbitral tribunals frequently apply "international" principles to issues concerning the admissibility and weight of evidence. See, e.g., Pietrowski, *Evidence in International Arbitration*, 22 Arb. Int'l 373, [374 passim \(2006\)](#) ("there are a number of principles and rules of evidence that are generally applicable in all international arbitrations irrespective of the parties and the law governing the conduct of the arbitration"); [UNCITRAL, Report of the Secretary-General on the Preliminary Draft Set of Arbitration Rules for Optional Use in Ad Hoc Arbitration Relating to International Trade, Eighth Session, U.N. Doc. A/CN.9/97.VI UNCITRAL Y.B. 163, 176 \(1975\)](#) (arbitrators are "freed from having to observe the strict rules of evidence" under domestic legal regimes).

¹⁰¹⁸ See [§15.01\[B\]](#).

¹⁰¹⁹ *Parker v. United Mexican States, Award in U.S. & Mexico General Claims Commission of 31 March 1926*, IV R.I.A.A. 35, 39 (1952); *Award in AAA Case No. 1310-0417-78 of 4 January 1980*, VIII Y.B. Comm. Arb. 166, 168 (1983) ("[A]n arbitration proceeding is not governed by strict evidentiary requirements. Section 30 of the [AAA Rules] makes it clear that: '[T]he Arbitrator shall be the judge of the relevancy and materiality of the evidence offered and conformity to the legal rules of evidence shall not be required.'"); D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 573 (2d ed. 2013) ("a liberal attitude towards admissibility, with objections restricted to the 'relevance, materiality and weight of the evidence offered,' accords best with both the spirit of Article 27(4) [of the UNCITRAL Rules] and arbitral practice in general"); D. Sandifer, *Evidence Before International Tribunals* 197 (1975).

¹⁰²⁰ *Parker v. United Mexican States, Award in U.S. & Mexico General Claims Commission of 31 March 1926*, IV R.I.A.A. 35, 39 (1952) ("As an international tribunal, the Commission denies the existence in international procedure of rules governing the burden of proof borrowed from municipal procedure."). See also D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 573 (2d ed. 2013) ("there is, in principle, no prohibition of what is known in common law as 'hearsay evidence'").

¹⁰²¹ 2010 IBA Rules on the Taking of Evidence, Art. 8(2).

¹⁰²² 2010 IBA Rules on the Taking of Evidence, Art. 9(2). This

relates to both the content of a witness statement and the production of documents (including requests for document production).

¹⁰²³ See [§15.04](#); [§§25.04\[A\]-\[B\]](#); [§26.05\[C\]](#).

¹⁰²⁴ See, e.g., Böckstiegel, *Presenting Evidence in International Arbitration*, 16 ICSID Rev. 1, 8 (2001); Bühler & Dorgan, *Witness Testimony Pursuant to the 1999 IBA Rules of Evidence in International Commercial Arbitration – Novel or Tested Standards?*, 17(1) J. Int'l Arb. 3, 17 (2000); Hunter, *The Procedural Powers of Arbitrators Under the English 1996 Act*, 13 Arb. Int'l 345, 352 (1997). See also *Methanex Corp. v. U.S.A., Partial Award on Jurisdiction in NAFTA Case of 7 August 2002*, 14(6) WTAM 109, ¶¶167-68 (2002) ("Tribunal cannot continue what has become an impossible forensic exercise, composing a jigsaw of assumed facts and inferences with too many missing and incomplete pieces").

¹⁰²⁵ *Sylvania Technical Sys., Inc. v. Islamic Repub. of Iran, Award in IUSCT Case No. 180-64-1 of 27 June 1985*, 8 Iran-US C.T.R. 298, 300 (1985).

¹⁰²⁶ See *Corfu Channel Case*, [1949] I.C.J. Rep. 4, 18 (I.C.J.) (permitting "more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law and its use is recognized by international decisions.").

¹⁰²⁷ See [§16.02\[F\]\[3\]](#); *Sedco, Inc. v. Islamic Repub. of Iran, Award in IUSCT Case No. 309-129-3 of 7 July 1987*, 15 Iran-US C.T.R. 23, 55 (1987); *Computer Sciences Corp. v. Islamic Repub. of Iran, Award in IUSCT Case No. 221-65-1 of 16 April 1986*, 10 Iran-US C.T.R. 269, 302 (1986). See also 2010 IBA Rules on the Taking of Evidence, Arts. 9(4), (5).

¹⁰²⁸ See, e.g., *Feldman v. Mexico, Award in ICSID Case No. ARB(AF)/99/1 of 16 December 2002*, 18 ICSID Rev. 488, 559 (2003) ("Why would any rational party have taken this approach...if it had information in its possession that would have shown that the Mexican owned cigarette exporters were being treated in the same manner as the Claimant?"); *INA Corp. v. Islamic Repub. of Iran, Award in IUSCT Case No. 184-161-1 of 13 August 1985*, 8 Iran-US C.T.R. 373, 382 (1985) ("The Tribunal must draw negative inferences from the Respondent's failure to submit the documents which it was ordered to produce."); Raeschke-Kessler, *The Production of Documents in International Arbitration – A Commentary on Article 3 of the New IBA Rules of Evidence*, 18 Arb. Int'l 411, 425 (2002); Sharpe, *Drawing Adverse Inferences From the Non-Production of Evidence*, 22 Arb. Int'l 549 (2006).

¹⁰²⁹ Veeder, *The Lawyer's Duty to Arbitrate in Good Faith*, in L. Lévy & V. Veeder (eds.), *Arbitration and Oral Evidence* 115, 135 (2004) ("international arbitrators should more readily complain at a party's delinquent conduct, to the extent of drawing expressly an adverse inference on the merits from procedural delinquency").

¹⁰³⁰ See, e.g., *Behring Int'l, Inc. v. Islamic Repub. of Iran, Award in IUSCT Case No. 523-382-3 of 29 October 1991*, 27 Iran-US C.T.R. 218, 234 (1991); *Houston Contracting Co. v. Nat'l Iranian Oil Co., Award in IUSCT Case No. 378-173-3 of 22 July 1988*, 20 Iran-US C.T.R. 3, 24-25 (1988); *Lockheed Corp. v. Islamic Repub. of Iran, Award in IUSCT Case No. 367-829-2 of 9 June 1988*, 18 Iran-US C.T.R. 292, 308 (1988); *DIC of Delaware, Inc. v. Tehran Redev. Corp., Award in IUSCT Case No. 176-255-3 of 26 April 1985*, 8 Iran-US C.T.R. 144, 164 (1985).

¹⁰³¹ *Carlson v. Islamic Repub. of Iran Melli Indus. Group, Award in IUSCT Case No. 509-248-1 of 1 May 1991*, 26 Iran-US C.T.R. 193 (1991).

¹⁰³² See, e.g., *Parker v. United Mexican States, Award in U.S. & Mexico General Claims Commission of 31 March 1926*, IV R.I.A.A. 35, 39 (1952) ("[W]hen the claimant has established a *prima facie* case and the respondent has offered no evidence in rebuttal the latter may not insist that the former pile up evidence to establish its allegations beyond a reasonable doubt without pointing out some reason for doubting.") (emphasis added); D. Sandifer, *Evidence Before International Tribunals* 146 (1975); Sharpe, *Drawing Adverse Inferences From the Non-Production of Evidence*, 22 Arb. Int'l 549, 550-53 (2006).

¹⁰³³ Tschanz, *Advocacy in International Commercial Arbitration: Switzerland*, in R. Bishop & E. Kehoe (eds.), *The Art of Advocacy in International Arbitration* 195, 231 (2d ed. 2010) (negative inferences are permitted, but "the arbitrator would have to give a fair warning to the withholding party as to the impending sanction and the inference must be reasonable").

¹⁰³⁴ See [§15.03](#); [§§15.08\[AA\]\[5\]](#) & [\[11\]](#).

¹⁰³⁵ See [§15.06\[A\]](#).

¹⁰³⁶ See [§25.04\[B\]\[4\]](#); [§26.05\[C\]\[3\]\[d\]](#). See also *Bell Aerospace Co. v. Local 516, Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. (UAW)*, [1500 F.2d 921](#), 923 (2d Cir. 1974) ("in handling evidence an arbitrator need not follow all the niceties observed by the federal courts"); *Essex Cement Co. v. Italmare, SpA*, [763 F.Supp. 55](#), 58 (S.D.N.Y. 1991) ("Arbitrators are not subject to rules of evidence or procedure."); *Judgment of 10 March 1981, Arkhbaieff v. Entreprise roumaine d'Etat pour le commerce extérieur Arpimex*, 1981 Bull. civ. No. 82, 69 (French Cour de cassation civ. 1e).

¹⁰³⁷ Pietrowski, *Evidence in International Arbitration*, 22 Arb. Int'l 373, 374, 379 (2006). See also Bond, *The Standard of Proof in International Commercial Arbitration*, 77 Arb. 304 (2011); M. Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals passim* (1996); Marossi, *Shifting the Burden of Proof in the Practice of the Iran – United States Claims Tribunal*, 28 J. Int'l Arb. 427 (2011).

¹⁰³⁸ See, e.g., ICDR Rules, Art. 19(1); 2012 Swiss Rules, Art. 24(1); 2012 CIETAC Rules, Art. 39(1); 2013 HKIAC Rules, Art. 22(1).

¹⁰³⁹ [2010 UNCITRAL Rules, Art. 27\(1\)](#).

¹⁰⁴⁰ See, e.g., [Report of the UNCITRAL on the Work of Its Ninth Session, U.N. Doc. A/31/17, Annex II, ¶116, VII.Y.B. UNCITRAL 66, 75 \(1976\)](#) ("general principle that each party has the burden of proving the facts on which he relied in his claim or in his defense"); Redfern, *The Practical Distinction Between the Burden of Proof and the Taking of Evidence: An English Perspective*, 10 Arb. Int'l 317, 321 (1994); D. Sandifer, *Evidence Before International Tribunals* 127 (1975).

¹⁰⁴¹ See, e.g., *Frederica Lincoln Riahi v. Islamic Repub. of Iran, Concurring and Dissenting Opinion of J. Brower in Award in IUSCT Case No. 600-485-1 of 27 February 2003*, 37 Iran-US C.T.R. 158,

¶18 (2003) ("It is axiomatic that the burden of proving a claim lies with the party presenting it."); [Antoine Biloune v. Ghana Inv. Ctr. Award on Jurisdiction and Liability of 27 October 1989, XIX Y.B. Comm. Arb. 11, 20 \(1994\)](#) ("each party has the burden of proving the facts upon which it relies for its claim or defence").

¹⁰⁴² [Separate Opinion of Judge Sir Hersch Lauterpacht to Judgment of 6 July 1957, Case Concerning Certain Norwegian Loans, \[1957\] I.C.J. Rep. 9, 34, 39 \(I.C.J.\)](#).

¹⁰⁴³ [Ultrasys, Inc. v. Islamic Repub. of Iran, Award in IUSCT Case No. 27-84-3 of 4 March 1983, Concurring Opinion of R. Mosk, 2 Iran-US C.T.R. 114, 115 \(1983\)](#). See also [Reza Said Malek v. Islamic Repub. of Iran, Award in IUSCT Case No. 534-193-3 of 11 August 1992, 28 Iran-US C.T.R. 246, ¶111 \(1992\)](#) ("It goes without saying that it is the Claimant who carries the initial burden of providing the facts upon which he relies. There is a point, however, at which the Claimant may be considered to have made a sufficient showing to shift the burden of proof to the Respondent.").

¹⁰⁴⁴ See, e.g., D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 561 (2d ed. 2013) ("In general, a 'balance of probability' standard may be said to reflect the arbitral practice and also to accord with Article 27(1)' of UNCITRAL Rules); Hunter, *The Procedural Powers of Arbitrators Under the English 1996 Act*, 13 Arb. Int'l 345, [352 \(1997\)](#); Reiner, *The Standards and Burden of Proof in International Arbitration*, 10 Arb. Int'l 3 (1994); [von Mehren & Salomon, Submitting Evidence in An International Arbitration: The Common Lawyer's Guide, 20 J. Int'l Arb. 285, 289-90 \(2003\)](#).

¹⁰⁴⁵ [Ioannis Kardassopoulos & Ron Fuchs v. Repub. of Georgia, Award in ICSID Case Nos. ARB/05/18 and ARB/07/15 of 3 March 2010, ¶229](#).

¹⁰⁴⁶ See, e.g., [Time Inc. v. Islamic Repub. of Iran, Award in IUSCT Case No. 139-166-2 of 22 June 1984, 7 Iran-US C.T.R. 8 \(1984\)](#) (approval of invoices in ordinary course creates *prima facie* case that they were proper); [Flexi-Van Leasing Inc. v. Islamic Repub. of Iran, Order in IUSCT Case No. 36 of 20 December 1982, 1 Iran-US C.T.R. 455 \(1981-82\)](#) (other arbitral tribunals "have required what they considered to be sufficient evidence and from that have drawn reasonable inferences"); D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 560 (2d ed. 2013) ("*Prima facie* proof may also suffice where the experience of the tribunal leads it to conclude that the evidence indicates the probable existence of a certain state of affairs."). See also D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 559 (2d ed. 2013) ("standard of proof varies according to the circumstances").

¹⁰⁴⁷ See [§15.09\[B\], p. 2315](#) (discussing burden and standard of proof of claims of criminal wrong-doing or fraud).

¹⁰⁴⁸ [Oil Field of Texas, Inc. v. Islamic Repub. of Iran, Award in IUSCT Case No. 258-43-1 of 8 October 1986, 12 Iran-US C.T.R. 308, ¶25 \(1986\)](#).

¹⁰⁴⁹ See, e.g., [Final Award in ICC Case No. 9333, 19 ASA Bull. 757 \(2001\)](#); [Award in ICC Case No. 8891, 127 J.D.I. \(Clunet\) 1076 \(2000\)](#); [Final Award in ICC Case No. 5622, XIX Y.B. Comm. Arb. 105, 112 \(1994\)](#); [Final Award in ICC Case No. 4145, XII Y.B. Comm. Arb. 97 \(1987\)](#); [Vera-Jo Miller Aryeh v. Islamic Repub. of Iran, Award in IUSCT Case No. 581-842/843/844-1 of 22 May 1997, 33 Iran-US C.T.R. 272, 316-17 \(1997\)](#) ("clear and convincing evidence"); [Dedras Int'l v. Islamic Repub. of Iran, Award in IUSCT Case No. 567-213/215-3 of 7 November 1995, 31 Iran-US C.T.R. 127, 162 \(1995\)](#) ("The allegations of forgery in these Cases seem to the Tribunal to be of a character that requires an enhanced standard of proof....The allegation of forgery must be proved with a higher degree of probability than other allegations"); [Abraham Rahman Golshani v. Islamic Repub. of Iran, Award in IUSCT Case No. 546-812-3 of 2 March 1993, 29 Iran-US C.T.R. 78, 93 \(1993\)](#) (party claiming document was forgery was responsible for proving this); [Oil Field of Texas, Inc. v. Islamic Repub. of Iran, Award in IUSCT Case No. 258-43-1 of 8 October 1986, 12 Iran-US C.T.R. 308, 315 \(1986\)](#). See also Rosell & Prager, *Illicit Commissions and International Arbitration: The Question of Proof*, 15 Arb. Int'l 329 (1999).

¹⁰⁵⁰ See, e.g., [French Code of Civil Procedure, Art. 1468](#) ("The arbitral tribunal may order upon the parties any conservatory or provisional measures that it deems appropriate...and, if necessary, attach penalties to such order"); [Belgian Judicial Code, Art. 1700\(4\)](#) ("If a party holds a piece of evidence, the arbitral tribunal may enjoin it to disclose the evidence according to such terms as the arbitral tribunal shall decide and, if necessary, on pain of a penalty payment."); [Netherlands Code of Civil Procedure, Art. 1056](#) ("The arbitral tribunal has the power to impose a penalty for non-compliance in cases where the court has such power.").

¹⁰⁵¹ See, e.g., [Pac. Reins. Mgt. Corp. v. Ohio Reins. Corp.](#), [935 F.2d 1019](#), 1023 (9th Cir. 1991) ("Arbitrators have no power to enforce their decisions. Only courts have that power."); [N. Blackaby et al. \(eds.\), Redfern and Hunter on International Arbitration ¶¶11-104, 5-10 to 5-11 \(5th ed. 2009\)](#); [J. Lew, L. Mistelis & S. Kröll, Comparative International Commercial Arbitration ¶22-95 \(2003\)](#).

¹⁰⁵² See, e.g., [Dep't of Enforcement v. Josephthal & Co.](#), 2001 WL 34031762 (N.A.S.D.R.) (NASD tribunal imposes \$10,000 fine for noncompliance with discovery order).

¹⁰⁵³ See, e.g., [Certain Underwriters at Lloyd's v. Argonaut Ins. Co.](#), 264 F.Supp.2d 926 (N.D. Cal. 2003).

¹⁰⁵⁴ See, e.g., [Final Award in ICC Case No. 7895, 11\(1\) ICC Ct. Bull. 64, 65 \(2000\)](#) (imposing penalties for each product sold in violation of tribunal's provisional measures); [Century Indem. Co. v. AXA Belgium](#), 2012 WL 4354816, at *8 (S.D.N.Y.) (upholding award of legal costs as sanction for party's failure to "abide by the scheduling order and procedural rules [the tribunal] adopted at the outset of the arbitration"); [N. Shore Constr. & Dev., Inc. v. Lee](#), 2010 WL 8025714 (Mass. Super.) (tribunal ordered legal costs as sanction for "extreme and egregious" behavior).

¹⁰⁵⁵ That is particularly true because in many cases involving awards of legal costs, such costs are not ordinarily available in the jurisdictions concerned (e.g., the United States). These decisions nonetheless suggest that where sanctions going beyond awards of legal costs, tribunals should exercise particular care.

¹⁰⁵⁶ See, e.g., [Relia Star Life Ins. Co. of N.Y. v. EMC Nat'l Life Co.](#), [564 F.3d 81](#), 86 (2d Cir. 2009); [Marshall & Co., Inc. v. Duke](#), [114 F.3d 188](#), 190 (11th Cir. 1997); [Todd Shipyards Corp. v. Cunard Line, Ltd.](#), [943 F.2d 1056](#), 1064 (9th Cir. 1991); [Forsythe Int'l SA v. Gibbs Oil Co.](#), [915 F.2d 1017](#), 1023 (5th Cir. 1990) ("Arbitrators may...devise appropriate sanctions for abuse of the

arbitration process.”); *Century Indem. Co. v. AXA Belgium*, 2012 WL 4354816 (S.D.N.Y.) (upholding award of legal costs as sanction); *Gen. Sec. Nat'l Ins. Co. v. Aequicap Program Admin.*, 785 F.Supp.2d 411 (S.D.N.Y. 2011); *Polin v. Kellwood Co.*, ^[2] [103 F.Supp.2d 238](#) (S.D.N.Y. 2000) (upholding award of legal costs as sanction); *Superadio LP v. Winstar Radio Prods., LLC*, ^[2] [844 N.E.2d 246](#) (Mass. 2006). See also *Bremer Vulkan Schiffbau und Maschinenfabrik v. S. India Shipping Corp. Ltd* [1981] A.C. 909, 986-87 (“[I]t was objected on behalf of Bremer Vulkan that this remedy was ineffectual in arbitrations started before August 1, 1979, to which section 5 of the Arbitration Act 1979 did not apply, because before that Act there were no sanctions that could be imposed for failure to comply with the arbitrator’s directions as to the time within which a party must take a step preparatory to the hearing – such as delivering points of claim or defence or giving discovery....In any event, however, I do not accept that the arbitrator would be wholly impotent in the face of such defiance.”). Compare R. Merkin, *Arbitration Law* ¶14.11 (1991 & Update August 2013) (“An arbitrator cannot, therefore, impose fines on the parties for disregard of his directions or impose a condition on an order for discovery that the claimant honours an earlier award in favour of the respondent.”).

¹⁰⁵⁷ *PaineWebber Inc. v. Bybyk*, ^[2] [81 F.3d 1193](#), 1196, 1199-1200 (2d Cir. 1996); *Gen. Sec. Nat'l Ins. Co. v. Aequicap Program Admin.*, 785 F.Supp.2d 411 (S.D.N.Y. 2011) (expansive language to define disputes to be submitted to arbitration provided tribunal “inherent authority” to award attorney’s fees for bad faith conduct).

¹⁰⁵⁸ See [§23.07\[E\]](#); *Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, ^[2] [619 F.3d 458](#) (5th Cir. 2010) (reversing trial court’s imposition of monetary sanctions against counsel for conduct in arbitration, on grounds that courts lack inherent authority to impose sanctions for counsel’s actions in arbitral proceedings); *Certain Underwriters at Lloyd’s v. Argonaut Ins. Co.*, 264 F.Supp.2d 926 (N.D. Cal. 2003) (vacating arbitrators’ imposition of daily sanctions for noncompliance with interim order on grounds that arbitration agreement did not authorize sanctions of that nature); *Grynberg v. BP Exploration Operating Ltd.*, ^[2] [92 A.D.3d 547](#), 548 (N.Y. App. Div. 2012) (affirming lower court’s ruling vacating tribunal’s award of \$3 million in sanctions because it was punitive in nature and hence violation of New York public policy).

¹⁰⁵⁹ *Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, ^[2] [619 F.3d 458](#), 461-62 (5th Cir. 2010).

¹⁰⁶⁰ [English Arbitration Act, 1996, §42\(1\)](#); *Emmott v. Michael Wilson & Partners* [2009] EWHC 1, ¶59 (Comm) (English High Ct.) (court should not “act as a rubber stamp” for peremptory orders made by tribunal; however, court should not “review the decision made by the tribunal and consider whether the tribunal ought to have made the order in question”) (emphasis added).