

Emerging tools to attract and increase the use of international arbitration

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Abstract

In the last decade, a constant concern became the extent to which arbitration is and can be characterized as an efficient process. Among the arbitration advantages, the speed and the reduced costs of this alternative method of dispute resolution were always mentioned, as an incentive in promoting and attracting users. One of the ongoing debates in international arbitration is whether the arbitration procedure could be faster and cheaper than litigation in front of the state courts and how to increase the recourse to arbitration by promoting a more efficient conduct of the proceedings. This article mainly describes how the arbitration specialists (institutions, arbitrators, parties and counsels), by respecting and adopting innovative instruments in the field, can contribute to the fairness and efficiency of the international arbitration process in which they are involved, in order to respond to the arbitration community most recent requirements related to transparency, predictability, security, accuracy, compliance and diversity. This contribution enumerates and stops on some current and interesting instruments which contribute to the efficiency of the arbitration, promoted by the arbitration community based on the practice in the field and which arouses the interest of the specialists. Some of those are not sufficiently convinced that these tools will be able to contribute in the long-term to the achievement of the cherished efficiency without affecting the advantages and the basic principles of the arbitration.

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JEL Classification: K33, K41

1. Preamble

Trends in international arbitration show that disputes are becoming more complicated and complex, often leading to increasing costs and longer procedures, which are major contributors to the dissatisfaction of its users. While flexibility is one of the inherent features of arbitration, it has been transformed into one of its shortcomings, allowing litigation to take place over several years and at great cost to the parties.

One of the ongoing debates in the last decade in international arbitration is whether the arbitration procedure would be faster and cheaper than litigation before state courts.² The reasons for including an arbitration agreement in a contract

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² David Earnest, Raul Gallardo, Gardar Vidir Gunnarsson, Tobiasz Kaczor, "Four Ways to Sharpen the Sword of Efficiency in International Arbitration", (2013), accessed April 1, 2020,

between the parties from different countries are not based solely on the supposed cost and time savings, but on the advantages conferred by the arbitration for the settlement of disputes. The most important two reasons would be that the arbitration provides a neutral forum for the settlement of international disputes, as compared to the national courts of one of the parties to the contract, and international arbitration decisions are easier to apply and recognized internationally than the decisions of national courts.³

Consequently, international arbitration can offer significant advantages to parties in cross-border disputes, such as choosing a neutral forum, contributing to the selection of the decision-making factor and the almost worldwide applicability of the decisions. However, with increasing frequency, the parties to international arbitration express concern about the length and cost of the arbitration process. These concerns have led some parties to question the international value of arbitration as an effective dispute settlement mechanism.⁴

The arbitration is based on the consensual autonomy and cooperative approaches of the parties. Consequently, the common intention of the parties should prevail, unless a deadlock or an incident in the arbitration procedure requires the intervention of the arbitration institution to which the parties appeal for case management. At the same time, the introduction of modern, clear and strict rules and measures that correspond to the needs and expectations of the arbitration users is favored, among which efficiency comes first. In spite of certain complaints

https://www.arbitration-icca.org/media/0/13630881906410/four_ways_to_sharpen_the_sword_of_efficiency_icca_group_paper.pdf; Cristina Florescu, "Towards Achieving Efficiency in International Arbitration", *Austrian Yearbook Int'l Arb.*, (2015): 51-71; Cristina Florescu, "Excessive Judicialization, an Obstacle to Efficiency in Arbitration", *CYArb (Czech & Central European) Yearbook of Arbitration, vol. V, Interaction Of Arbitration and Courts*, (USA: JurisNet, LLC, 2015), 87-114; Michael McIlwrath, "Faster, Cheaper: Global Initiatives to Promote Efficiency in International Arbitration", *Arbitration* 76 (2010): 532-537; Michael Moser, "The 'Pre-Hearing Checklist' – A Technique for Enhancing Efficiency in International Arbitral Proceedings", *J. Int'l Arb.* 30, no. 2 (2013): 155-159; Christopher Newmark, "Controlling Time and Costs in Arbitration", in *The Leading Arbitrators' Guide to International Arbitration*, eds. Newman and Hill (New York: Juris, 2008), 81-96; Veit Öhlberger and Jarred Pinkston, "The Arbitrator and the Arbitration Procedure, Iura Novit Curia and the Non-Passive Arbitrator: A Question of Efficiency, Cultural Blindness and Misplaced Concerns About Impartiality", *Austrian Yearbook Int'l Arb.* (2016): 101-117; Wilson Pimentel, "Efficiency and Equilibrium in the Allocation of Costs", *Revista Brasileira de Arbitragem XII* (2015): 59-67; Andreas Respondek, "Five Proposals to Further Increase the Efficiency of International Arbitration Proceedings", *J. Int'l Arb.* 31, no. 4 (2014): 507-513; Jorg Risse, "Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings" *Arb. Int'l* 23, no. 3 (2013): 5; Anne-Veronique Schlöpfer and Marily Paralika, "Striking the Right Balance: The Roles of Arbitral Institutions, Parties and Tribunals in Achieving Efficiency in International Arbitration", *BCDR Int'l Arb. Rev.* 2, no. 2 (2015): 329-342; Irene Welsch, "Efficiency – Today's Challenge in Arbitration Proceedings", *Austrian Yearbook Int'l Arb.* (2014): 151-166.

³ John Fellas, "A Fair and Efficient International Arbitration Process", *Dispute Resolution Journal*, Feb-Apr 2004, accessed April 1, 2020, <https://arbitrationlaw.com/library/fair-and-efficient-international-arbitration-process-dispute-resolution-journal-vol-59-no-1> or <https://www.hughes-hubbard.com/news/a-fair-and-efficient-international-arbitration-process>.

⁴ Jennifer Kirby, "Efficiency in International Arbitration: Whose Duty Is It?", accessed April 1, 2020, <https://arbitration.fi/wp-content/uploads/sites/22/2016/12/efficiency-in-international-arbitration.pdf>.

regarding the increase of the judicialization of the arbitration procedure, the introduction of new procedural rules and instruments is necessary in most cases that aimed at improving the efficiency in arbitration.

2. The pro-active role of the arbitrators - significant tool to streamline the procedure

Arbitrators are the main guardians as to the conduct of the proceedings. They are called to keep the procedure within the normal limits, to set the framework, to lead the smooth path of the proceedings to unfold without incidents and to decide on every possible aspect that could arise in the conduct of the arbitration case.

All major arbitration rules give arbitrators broad powers to decide how arbitration should be conducted when the parties disagree and this is often the most common situation. Consequently, it is not uncommon for arbitrators to decide whether jurisdiction or any other potentially positive issue should be decided in the first instance (as an exception or by bifurcation). Or to decide how many rounds of written memoranda will be submitted by the parties and when, how long they will be and to which issues they will refer in particular. Or whether to allow requests for evidence and, if so, to what extent. Also, the arbitrators decide on the organization and duration of the hearings and, sometimes, if a hearing is necessary and where it will take place, as this may take place in another location, which could be different from the official seat of the arbitration. In short, if arbitration really wants to be effective, all these issues usually fall to the arbitrator, it can be said that they are already part of the job description, so that his pro-active role is one of those more significant aspects when it comes to procedural efficiency.

The inherent powers and authority can be defined as those powers which are not expressly granted to the arbitrators, but which they must benefit from in order to ensure the performance of their dispute resolution function.⁵ Powers, which are not expressly granted (or only rarely), are of two types: investigative powers and the power to sanction the behavior of the parties.⁶ In general, the arbitrators (and not only them, but also institutions and parties, but the parties challenge when they have another interest) consider that there are prerogatives they must fulfill in order to carry out their mission, even if they are not expressly mentioned in the rules.

Regarding the sanctioning power⁷ that the arbitrator can dispose of, this is

⁵ Pierre Mayer, "The arbitrator's Initiative: Its Foundation and Its Limits", in "The Arbitrators' Initiative: When, Why and How Should It Be Used?", Chapter 1, *ASA Special Series* no. 45, (New York: Juris, 2016), 3.

⁶ Marine Koenig, "A Report on the Delos Paris Inaugural Event (April 2018) – Powers of the Arbitrator: How Far is too Far?", May 28, 2019, accessed April 1, 2020, <http://arbitrationblog.kluwerarbitration.com/2019/05/28/a-report-on-the-delos-paris-inaugural-event-april-2018-powers-of-the-arbitrator-how-far-is-too-far/>.

⁷ Cristina Florescu, "Introducere în probleme de etică privind arbitrii și avocații în arbitrajul internațional", *Revista Română de Drept al Afacerilor (RRDA)* no. 1 (2016): 106-118; Cristina Florescu, "Arbitral

a sensitive issue, which is not yet completely elucidated and for which various opinions and methods of treatment have been issued. In the event that a party fails or refuses to comply with the rules or order, direction or partial decision of the arbitral tribunal, or to attend a meeting or hearing, the tribunal has the power to impose such sanctions as it deems appropriate in connection with such failure or refusal.

Another sanctioning power refers to the allocation of additional arbitration costs in the final award to the party who did not comply with the requirements for maintaining efficiency or who generally contributed to delaying the procedure by various dilatory or guerrilla tactical methods. But this is a problem that does not necessarily find its right treatment, because it fails to prevent their production, but only to sanction it later, finally evaluating the extent of the damage created to the procedure and to the other party.

There is a point of view in the arbitration community that the allocation of the costs in the arbitration process can be used as a tool to improve international arbitration efficiency in general. Such adverse costs decisions are expected to be incentives for parties and especially counsels to act more diligently and efficiently. Though, there are certain restraints to this approach, deriving from the possible lack of predictability, the applicable cost allocation requirements, and the party to whom these sanctions are provided for.⁸

In conclusion, the best way to deal with procedural digressions is to use, first of all, robust, solid and forceful case management. Other sanctioning actions would be to reject requests that have the character of delaying *maneuvers and guerilla tactics*, since the subsequent sanction cannot retroactively correct the damage brought to the proceedings.⁹

Regarding the quite exceptional circumstances in which substantial deviations occur, they can be best treated by using the inherent powers of the arbitrators, but used only when there is no other way to deal with a situation.

Therefore, for a wisely performance, the exercise of these powers is advisable to save time and money, while ensuring that the decision will be both fair

Tribunal Power to Disqualify Unethical Counsel”, *Procedia of Economics and Business Administration*, (Bucharest: 2015), 74-81 and in *Journal of Economic Development, Environment and People* no. 4 (2015): 15-30, http://jedep.spiruharet.ro/RePEc/sph/rjedep/JEDEP15_2Florescu_p15-30.pdf; Cristina Florescu, “Rolul pro-activ al arbitrilor in managementul eficient al arbitrajului”, *Revista Română de Drept al Afacerilor (RRDA)* no. 6 (2015): 15-24; Cristina Florescu, “Towards Achieving Efficiency in International Arbitration”, *Austrian Yearbook Int’l Arb.*, (2015): 51-71; Cristina Florescu, “Excessive Judicialization, an Obstacle to Efficiency in Arbitration”, in *CYArb (Czech & Central European Yearbook of Arbitration, vol. V, Interaction Of Arbitration and Courts*, (USA: JurisNet, LLC, 2015), 87-114.

⁸ Patricia Živković, “The Impact of Cost Decisions on the Efficiency of Arbitral Proceedings”, *TDM* no. 4 (2018), Time and Cost Issues in International Arbitration, accessed April 1, 2020, <https://www.transnational-dispute-management.com/article.asp?key=2578>.

⁹ Lucy Reed, “Sanctions Available for Arbitrators to Curtail Guerilla Tactics”, Chapter 2 in *Guerilla Tactics in International Arbitration*, eds. Günther Horvath and Stephan Wilske, (Wolters Kluwer: 2013), 93, 99; Maxi Scherer, “Inherent Powers to Sanction Party Conduct”, Chapter 4 in *Inherent Powers of Arbitrators*, ed. Diego P. Fernandez Arroyo, (Wolters Kluwer: Juris, 2018), 9.

and enforceable, which is not always an easy task. It has not been accidentally stated that it is rather an art than a science in order to reach this balance, especially in the context in which information is incomplete, conflicting and evolving. In light of this, we should stop putting so much pressure on the arbitrators' shoulders and remember that we have to face an issue of excessive judicialization that was generated by the parties, counsels and the evolution of the application in arbitration of the guerrilla tactics imported from the litigation, the process before the state courts.

So it is necessary to find and develop other tools that will meet the arbitral tribunal's needs and help it to apply easier innovative real measures so that it can cope with the efficiency - *due process paranoia*¹⁰ dilemma.¹¹ Awards could be, even it is not very often, set aside or denied enforcement because the tribunal had violated the parties' due process rights, meaning the right to an equal and reasonable opportunity to present one's case. Courts in most jurisdictions typically defer to arbitrators' discretion when reviewing procedural decisions. Yet, it is generally recognized that arbitrators are hesitant to say no when parties make procedural requests that counteract efficiency. This *due process paranoia* leads arbitrators to grant parties' additional time, accepting belated introduction of new claims or defences, or holding unnecessarily long hearings - even where doing so is against the principle of efficiency enshrined in the arbitral rules.¹²

Considering also the new form of Industrial Revolution, new forms of value chains and economic ecosystem and this new IT era – a new perspective stemming from technology, it seems the arbitrators have to develop and improve new skills and techniques in order to become more inquisitive, experienced, qualified in knowledge and pragmatism, predictive justice and risk assessment algorithms, Artificial Intelligence and e-discovery, cybersecurity and GDPR

¹⁰ Lukas Lim (CMS Cameron McKenna Nabarro Olswang LLP), "Undue paranoia over due process, Twin duties of fairness and efficiency", August 21, 2019, accessed April 1, 2020, https://www.lexology.com/library/detail.aspx?g=de47bfa4-1a17-421d-aff8-3e2206fb5b78&utm_source=Lexology+Daily+Newsfeed&utm_medium=HTML+email++Body++General+section&utm_campaign=Lexology+subscriber+daily+feed&utm_content=Lexology+Daily+Newsfeed+2019-08-28&utm_term=; Remy Gerbay (MoloLamken LLP), "Due Process Paranoia", June 6, 2016, accessed April 1, 2020, <http://arbitrationblog.kluwerarbitration.com/2016/06/06/due-process-paranoia/>; Klaus Peter Berger, J. Ole Jensen, "Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators", *Arbitration International* 32, no. 3 (September 2016): 415–435; Albert Bates Jr. and R. Zachary Torres-Fowler, "Abuse of due process in international arbitration: is due process paranoia irrational?", *American Journal of Construction Arbitration & ADR (AJCA)* 1, no. 2 (December, 2017): 245-272; Eric Tuchmann, "Due process paranoia in international arbitration: a valid concern?", November 26, 2018, accessed April 1, 2020, <https://www.cdr-news.com/categories/arbitration-and-adr/8813-due-process-paranoia-in-international-arbitration-a-valid-concern>; Francesca Albert, "Curing due process paranoia", November 2, 2016, accessed April 1, 2020, <http://arbitrationblog.practicallaw.com/curing-due-process-paranoia/>.

¹¹ For several studies regarding this issue please see https://academic.oup.com/arbitration/pages/due_process_and_efficiency, accessed April 1, 2020.

¹² SCC Arbitration Institute, "Efficiency vs. due process paranoia", January 23, 2019, accessed April 1, 2020, <https://sccinstitute.com/about-the-scc/news/2019/efficiency-vs-due-process-paranoia/>.

compliance, confidentiality, blockchain, smart contracts and new age of ODR, project management, and police of the proceedings, to enumerate a few of the latest challenges an arbitrator have to learn and face it. So, in this pursuit of efficiency, it became imperative for the arbitrators and all the arbitration players to be aware of what is going on around, learn and implement new tools.

3. Tools for generating efficiency during the arbitral proceedings

Therefore, in view of the increasing demand for efficiency, the arbitration community has developed and proposed various tools for the success of its implementation on a global level.

To address these concerns, international arbitration practitioners have developed innovative ideas to promote the efficiency of international arbitration.¹³ Certain aspects and procedures that generally make arbitrage more efficient can be identified. In each arbitration, however, the parties, lawyers, counsels and arbitrators should take full advantage of the flexibility inherent in international arbitration and should use only the procedures that are justified in the case.

Thus, regarding the *constitution of the arbitral tribunal*, before appointing the arbitrators, they are required to complete a declaration on independence and impartiality and to confirm their availability for hearings and for the administration of a fast procedural timetable, in accordance with the requirements of the parties and the institution which organize the arbitration. Of course, it is necessary the collaboration between the counsels of the parties and if it proves useful, even agreeing to appoint a single arbitrator for the smaller litigation or in case of not a complex, high value litigation and that would not require the analysis of three arbitrators.

In order to establish the case and the procedure, it is encouraged to *consolidate* and bring together the parties and disputes to avoid multiple procedures, of course when possible and the necessary terms and conditions are met.

As regards the rapid roll-out, the claimant is advised, as far as possible, to include from the outset in its arbitration request all the details so that the other party is already informed, can respond complete and can start the procedure immediately after the procedural timetable is established (so *arbitration requests* as *complete* as possible).

In this respect, applying the principle of autonomy of the parties to the arbitration, in order to make the *procedure more flexible*, the arbitral tribunal is encouraged to use its experience and to adopt appropriate and tailor procedures, customized to each particular case, in order to lead to an efficient resolution.

It has also become a paramount requirement for the arbitral tribunal to hold

¹³ Loukas Mistelis, "Efficiency. What Else? Efficiency as the Emerging Defining Value of International Arbitration: between Systems theories and party autonomy", Queen Mary University of London, School of Law Legal Studies Research Paper No. 313 (2019), accessed April 1, 2020, <https://ssrn.com/abstract=3372341>.

an *early procedural conference* (case management conference), through a personal meeting if possible, which, although it may cost more due to travel time and expenses, may ultimately save money, allowing a more thorough discussion of the procedural issues that may arise. The date of the hearing, as well as all other procedural deadlines, are set to take place in this first procedural conference. Therefore, it is desirable that the parties, usually through their counsels, attend any procedural meetings and hearings with the arbitral tribunal so that they can make a significant contribution to the procedures adopted and thus consider what is best for that moment. Accordingly, depending on the needs of the case, a fast timetable with fixed deadlines will be considered.

Another important assessment that can be made by the parties or the tribunal, is whether the *bifurcation* of the procedure or a determination of the preliminary issues can lead to a faster and more effective decision.

Witness statements need to be made in writing, as a direct testimony, in order to concentrate evidence and what was discussed during the hearings, but it is avoided for many witnesses to testify about the same facts.

Expert meetings, either before or after drafting reports, are encouraged to identify points of interest and to narrow the disagreements before the meeting. One method considered effective for clarifying and bringing experts to a common denominator is *hot tubbing*, which is a technique in which two or more expert witnesses, presented by one or more parties, are questioned together on specific issues by the arbitral tribunal and possibly by counsels. In general, it is advisable for the parties to discuss legal issues and consider presenting experts on legal issues only when the court and counsels are not qualified to act under the law.

It is noticed the tendency to use video conferences for the testimonies of the witnesses or experts who are far from hearing and whose testimony is expected to be less than two hours, which is already a fairly common technique used in international arbitration.

Regarding the *post-hearing briefs*, they should not always be used, but the parties and the tribunal will in each case evaluate whether they will be useful in promoting effective problem solving. If post-hearing briefs are agreed, the parties would be useful to ask the arbitral tribunal or this to take the initiative to identify important issues that need to be deepened and then try to limit information on such issues so they will not be resumed again, especially when it comes to issues already exposed and which no longer need further clarification. It is thus advisable to use alternative briefing formats, such as the detailed outline of the problems identified, rather than short narratives, but to focus on the issues and to bring to the tribunal more clarity, relevance and usefulness.

The use of *hyperlinks* for easier direct accessibility of evidence, samples and their references in memoranda is appreciated.

Regarding the *evidence*, the tendencies would be of limitation,

concentration and speed of requests for the document production.¹⁴ The standards set out in the IBA Rules dedicated to the administration of evidence in international arbitration (IBA Rules on Taking of Evidence in International Arbitration)¹⁵ generally provide an adequate balance of interests. In order to be able to apply these practical considerations that could effectively contribute to a more flexible, smooth and efficient procedure from all points of view, we will insist on some considerations related to a recent innovation, namely the launch of a new set of best practices on efficiency of the arbitration process, the Prague Rules.

4. The Prague Rules

These Rules¹⁶ appeared at the end of 2018¹⁷ as a new set of soft rules, dedicated to evidence and efficient proceedings in international arbitration, but which contains a wider spectrum of instruments to streamline arbitration procedures.¹⁸ The Prague Rules won the award of Best innovation by an organization or individual at the GAR Awards 2019.

The authors of the Prague Rules¹⁹ consider that the development of a new set of rules for the efficient administration of evidence based on the model of

¹⁴ Matthias Scherer, "The Limits of the IBA Rules on the Taking of Evidence in International Arbitration: Document Production Based on Contractual or Statutory Rights", *Int'l Arb. Law Rev.* 13, no. 5 (2010): 195-200.

¹⁵ "IBA Rules on the Taking of Evidence in International Arbitration, Adopted by a resolution of the IBA Council 29 May 2010", International Bar Association, accessed April 1, 2020, <https://www.ibanet.org/Document/Default.aspx?DocumentUid=68336C49-4106-46BF-A1C6-A8F0880444DC>.

¹⁶ "The Prague Rules", accessed April 1, 2020, <http://www.praguerules.com/upload/medialibrary/b2e/b2e26123ac310b644b26d4cd11dc67d8.pdf>.

¹⁷ Official Launch of Prague Rules in cooperation with Global Arbitration Review, accessed April 1, 2020, <https://www.praguerules.com/events/the-prague-rules-on-the-taking-of-evidence-is-it-an-alternative-to-the-iba-rules-prague/>.

¹⁸ Cristina Ioana Florescu, "Regulile de la Praga, alternativă la Regulamentul IBA privind administrarea probatoriului în arbitrajul internațional", *Revista Română de Drept al Afacerilor (RRDA)* no. 3 (2018): 35-49; Cristina Ioana Florescu, "In Pursuit of the Cherished Notion of Efficiency Through the New Prague Rules", *Revista Română de Arbitraj (RRA)* no. 2 (2019): 38-63; Klaus Peter Berger, "Common law vs. Civil law in international arbitration: the beginning or the end?", in *New Horizons of International Arbitration*, Issue 5, Collection of Articles/Academic Editors A. V. Asoskov, A. N. Zhiltsov, R. M. Khodykin, Russian Institute of Modern Arbitration, (Moscow: 2019), 215, 216 (200-224); Luiza Lins Silva e Dutra, "Taking of Evidence in International Arbitration: IBA Rules v. Prague Rules?", December 19, 2018, accessed April 1, 2020, <https://www.changing-perspectives.legal/taking-of-evidence-in-international-arbitration-iba-rules-v-prague-rules/>; Scott Stiegler and Harriet Foster (Vinson & Elkins LLP), "The Prague Rules on the Efficient Conduct Of Proceedings in International Arbitration - Restriction to Achieve Efficiency?", April 25, 2019, accessed April 1, 2020, <https://www.lexology.com/library/detail.aspx?g=7b219f48-0382-45ba-b174-93ea3d493042>; Collection of Publications on the issue of The Prague Rules, accessed April 1, 2020, <https://praguerules.com/publications/>.

¹⁹ Note of the Working Group of The Prague Rules, accessed April 1, 2020, <https://www.praguerules.com/upload/medialibrary/9dc/9dc31ba7799e26473d92961d926948c9.pdf>. I had the honour and the privilege to be part of this Working Group, https://www.praguerules.com/working_group/.

investigative (inquisitorial) procedure and the efficiency of the procedure in general, would enhance the more active role of the arbitral tribunals. At the same time, by adopting a more incisive approach of the arbitral tribunal, the new rules would assist the parties and the arbitral tribunals to reduce the duration and costs of the arbitration.

Although initially the Prague Rules were conceived only as a set of evidence management based exclusively on the civil law inquisitorial model, the project later evolved to favor the pro-active role of the arbitrator, the implementation of various modern techniques for efficient case management, which are already being used successfully in international arbitration, including, for example, settlement facilitation by arbitrators and an ARB-MED system. Of course, all of this is not completely new and it is acknowledged that an unheard of or completely innovative set of rules was not intended. Indeed, the model proposed by the Prague Rules is largely based on the civil law procedural tradition and the way in which arbitration proceedings are conducted in non-common law jurisdictions. However, the techniques enshrined in the Rules are known to most arbitration practitioners, regardless of their legal culture. But it is significant that the Prague Rules simply assemble or code these techniques into one document, initiating a new soft law regulation.

Given that they mainly deal with the issue of taking of evidence in international arbitration, it is important to understand that the Prague Rules were not meant to simply replace the IBA Rules or to suggest better ways to organize and conduct an arbitration than those already used in practice. The innovative idea is that the Rules have succeeded in robustly assembling good practices in ensuring the efficiency of the arbitration procedure within a single set of such techniques, which is particularly welcome to supplement the applicable rules of procedure when they are not yet updated accordingly to the current trends on efficiency.

5. Guidelines (*soft law*) - tools for improving efficiency

This article intends to make also a brief representation of the nature of the soft law guides (good practices) as supportive tools that are issued by several institutions specialized in arbitration in pursuit of efficiency, issued in order to contribute to the arbitration users' satisfaction who claim that arbitration is no longer a procedure as effective as it was once perceived.

A soft law is a set of good practices and to avoid any misunderstandings on their legal regime, we emphasize that these standards should not be perceived as hard law, they are suppletive, supplementary without legal nature, issued to be used in addition to the applicable arbitral laws and institutional rules. Despite their private nature, the standards of good practices assume the quality of soft law, that is to say soft normativity, with an effect similar to the norm in practice and with the appearance of legality.

However, good practices (guides or guidelines) have some advantages over the law, because they are based on the consent of users from different legal systems, they have the best potential for merging different procedures and cultures,

thus developing a truly global arbitration practice and sets a procedural standard for parties from different legal traditions. At the same time, the practices establish a high level of basic principles, which are achieved by the global international consensus, they offer greater predictability and legal certainty for the conduct of the arbitration procedure. Moreover, the best practices facilitate the activity of the arbitrators, saving their effort to look for solutions on the procedural problems for which there is already practice in that sense. Good practices ensure the legitimacy of the arbitration process, as self-regulation by standards of good practice, and can provide a means to avoid more invasive forms of external regulation that may be imposed by internal legislators and other 'outsiders' less informed with less benevolent intentions.²⁰

As an opposition to the benefits described above, certain disadvantages²¹ are related to their restrictive effect due to the pre-formulated detailed texts that could narrow the independent and free judicial approach of the arbitrators,²² limiting flexibility and tailoring the proceedings to each particular case. In the same time, excessive regulation caused by a large number of good practices, covering almost every area of the arbitration procedure, together with their code effect, are considered as a driving force for increasing judicialization²³ and undue formalism in the field of international arbitration.

The worldwide accepted advantage of international arbitration is the benefit of not applying a certain system of law, no framework of national rules and a national procedural law that neither or any of the parties doing business at international level know, and thus allowing an efficient alternative private justice,

²⁰ Klaus Peter Berger, "Common law vs. Civil law in international arbitration: the beginning or the end?", in *New Horizons of International Arbitration*, Issue 5, Collection of Articles/Academic Editors A. V. Asoskov, A. N. Zhiltsov, R. M. Khodykin, Russian Institute of Modern Arbitration, (Moscow: 2019), 213-215 (p. 200-224).

²¹ D. Greineder, "The Limitations of Soft Law Instruments and Good Practice Protocols in International Commercial Arbitration", *ASA Bulletin* 36 no. 4 (2018): 908; W.W. Park, "Explaining Arbitration Law", in: *Defining Issues in International Arbitration: Celebrating 100 Years of the Chartered Institute of Arbitrators*, ed. J.C. Betancourt, (Oxford University Press: 2016), para. 1.12; W.M. Reisman, "Soft Law and Law Jobs", *Journal of International Dispute Settlement*, 2 no. 1 (2011): 30, <https://doi.org/10.1093/jnlids/idq014>.

²² M.E. Schneider, "The Essential Guidelines for the preparation of Guidelines Directives Notes, Protocols and other methods intended to help international arbitration practitioners to avoid the need for independent thinking and to promote the transformation of errors into best practices", in *Liber Amicorum en l'honneur de Serge Lazareff*, ed. L. Lévy & Y. Derains, (Pedone: 2011), 567: "Progressively, the reflex of turning to the guidelines overcomes any residual reflexes of independent thinking. <...> If the process of guideline production continues, all aspects of arbitration will be fully covered by guidelines which are accepted as 'best practices' and 'state of the art'. When this happy moment is reached, the international arbitration community need not think any more".

²³ Natalie Voser, "Best Practices: What Has Been Achieved and What Remains to Be Done?" in "Best Practices in International Arbitration", *ASA Special Series* 26, no. 1 (2006): 17 ("Based on the justified concern of over-judicialization of the arbitration process, the formulation and establishing of general Best Practices is in my opinion only justified where the parties could otherwise be taken by surprise or where there is an inherent risk of unequal treatment due to the parties' varied legal backgrounds").

in a truly transnational procedural framework, with maximum possibilities of parties' autonomy and minimal state judicial intervention. That is why all the arbitration institutions are trying to update themselves, modernize them, truly becoming as international as possible, by adopting a set of rules that correspond to the requirements and the tendencies in the matter, which include the broadest palette of the best practices that have occurred, developed to meet the needs of the users on whom their very existence depends.

In connection with this aspect of a current regulatory framework, considerable modernization efforts have been lately made throughout the world. On the international level, we notice the massive reform that has taken place in the last two years in updating and modernizing the arbitration rules by the most well-known arbitration institutions, leaders of the moment. And on the national level, the best example is the reform of the International Commercial Arbitration Court attached to the Chamber of Commerce and Industry of Romania, the most famous, reliable and old permanent arbitration institution in Romania, which has changed its rules since 1 January 2018. The new rules strive to consistently promote Bucharest as a modern arbitration center and have a strong, modern, international, flexible and supple focus, being developed in accordance with current best practices and trends in the field.²⁴

With regard to the guides and guidelines issued by various institutions in the field, which obviously make a considerable contribution by choosing their application to guarantee the predictability of the procedure, the general perception has proved positive, as there would be an adequate amount of regulations (although around one third of those polled in various surveys²⁵ considered that the regulation is quite excessive). The most appreciated and used guidelines are IBA Rules on Taking of Evidence, IBA Guidelines on Conflicts of Interest, UNCITRAL Notes

²⁴ Cristina Florescu, "Tendințe de eficientizare în lumina noilor reguli române de procedură arbitrală, Dreptul românesc la 100 de ani de la Marea Unire. Dimensiuni și tendințe", (Universul Juridic: 2018), 121-126; Cristina Florescu, "A Century of Romanian Arbitration: A Historical Milestone, From Tradition to Modernity", *Law Review* VIII no. 2, (Jul-Dec 2018): 236-255; Cristina Florescu, "A Time For Change: Internationalizing Romanian Institutional Arbitration Rules", in "Proceedings of Conference Legal, Political and Administrative Consequences of Romania's Accession to the European Union 17-18 May 2018", *Legal and Administrative Studies* no. 1 (Pro Universitaria: 2018), 98-111; D. M. Șandru, "Elemente esențiale ale noilor Reguli de procedură ale Curții de Arbitraj Comercial Internațional de pe lângă CCIR", *Revista Română de Drept al Afacerilor (RRDA)* no. 6 (2017): 41-48; "Numirea arbitrului – pilon fundamental al procedurii. Observații privind noile Reguli de procedură arbitrală ale Curții de Arbitraj Comercial Internațional de pe lângă Camera de Comerț și Industrie a României", *Revista Română de Drept al Afacerilor (RRDA)* no. 2 (2018): 73-84.

²⁵ "2018 International Arbitration Survey: The Evolution of International Arbitration", accessed April 1, 2020 <http://www.arbitration.qmul.ac.uk/research/2018/>. This is the eighth international empirical study on arbitration conducted by the International Arbitration School at Queen Mary University in London. The study analyzes the evolution of international arbitration as a system: past, present and future. The survey aims to investigate the sentiment of the international arbitration community as a whole, and not just the opinions of a particular group within it. See also "2015 International Arbitration Survey undertaken by the School of International Arbitration", Queen Mary University of London, p. 22, <http://www.arbitration.qmul.ac.uk/docs/164761.pdf>.

on Organizing Arbitration Proceedings, IBA Guidelines on Party Representation, ICC In-House Guide on Effective Arbitration Management, ICC Note to Parties and Arbitral Tribunals on Conduct of the Arbitration together with various reports focusing on current issues and interests, issued by ICC, such as ICC Report on Managing e-document production (2016), ICC Report on Decisions on Costs in International Arbitration (2015), ICC Report on Controlling Time and Costs in International Arbitration (2007 revised 2018), ICC Report on Financial Institutions and International Arbitration (2016) and Supplement Materials (2018), ICC Report on IT in International Arbitration (2017), ICC Report on State Entities and ICC Arbitration (2015 revised 2017), ICC Report on Emergency Arbitrator Proceedings (2019), ICC Report on Construction Industry Arbitrations: Recommended Tools and Techniques for Effective Management (2001 revised 2019).

6. Emergency arbitrator procedure

The procedure of the Emergency Arbitrator (EA)²⁶ is meant to contribute to the efficiency of the arbitration and to respond to the needs of the users who want to implement in the arbitration provisional and conservative measures as urgent as possible.

The institution of the Emergency Arbitrator²⁷ appears in response to the parties' needs to access the provisional measures before the establishment of the arbitral tribunal, which may be too long due to their urgent need to take certain measures. This new and innovative procedure is relatively similar to the procedures used in the judicial systems,²⁸ but adapted to the specificity of a more flexible, fast

²⁶ Cristina Florescu, "Pros and Cons on the Opportunity to Use the Emergency Arbitrator Procedure", LSO Constanta (USH), (Sitech: 20-21 October 2017), 33, 34; Fabio G. Santacrose, "The Emergency Arbitrator: A Full-Fledged Arbitrator Rendering An Enforceable Decision?", *Arbitration International* 31, no. 2 (2015): 283-312, <https://doi.org/10.1093/arbint/aiv012>; Ank Santens and Jaroslav Kudrna, "The State of Play of Enforcement of Emergency Arbitrator Decisions", *Journal of International Arbitration* 34, no. 1 (2017): 1-15; Mika Savola, "Interim Measures and Emergency Arbitrator Proceedings", Presentation at the 23rd Croatian Arbitration Days: Access to Arbitral Justice Part IV: Time Aspects of Access to Arbitral Justice Zagreb, 3-4 December 2015, accessed April 1, 2020, <https://arbitration.fi/wp-content/uploads/sites/22/2016/04/23-cad-savola-interim-measures-and-emergency-arbitrator-proceedings.pdf>; Gordon Smith, "The Emergence of Emergency Arbitrations", 2016, accessed April 1, 2020 [http://www.gordon-smithlegal.com.au/resources/Emergency%20Arbitrations%20\(12082016\).pdf](http://www.gordon-smithlegal.com.au/resources/Emergency%20Arbitrations%20(12082016).pdf); Craig Tevendale, Hannah Ambrose, Vanessa Naish, "2016 ICC Dispute Resolution Statistics: Record Year for the ICC", 2017, accessed April 1, 2020, <https://hsfnotes.com/arbitration/2017/09/15/2016-icc-dispute-resolution-statistics-record-year-for-the-icc/>; Alessandro Villani and Manuela Caccialanza, "Interim Relief through Emergency Arbitration: An Upcoming Goal or Still an Illusion?", 2017, accessed April 1, 2020 <http://arbitrationblog.kluwerarbitration.com/2017/07/14/interim-relief-emergency-arbitration-upcoming-goal-still-illusion/>.

²⁷ Diana Paraguacuto-Mahe and Christine Lecuyer-Thieffry, "Emergency Arbitrator: A New Player in The Field - The French Perspective", *Fordham International Law Journal*, 40, no. 3, (2017): 750-778, <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2648&context=ilj>.

²⁸ Ezgi Babur, "Turkey: Enforcement Of Interim And Conservatory Measures Ordered By Arbitrators", 2015, accessed April 1, 2020, <http://www.mondaq.com/turkey/x/430394/>

and responsive procedure, necessary for the parties to be able to request temporary measures to solve the problems that cannot afford any delay until the arbitral tribunal is set up.

The need for emergency interim measures often arises before or simultaneously with the dispute, perhaps even until the arbitration request is drafted and sent to the arbitration institution so that it can begin to organize the case, including the appointment and constitution of the arbitral tribunal. This is because, in practice, it may take weeks or months to designate an arbitral tribunal. If a party is in need of emergency assistance during this period, it may apply to local courts only for interim measures, unless the parties' arbitration agreement includes provisions for the appointment of such emergency arbitrator. This has been overcome and achieved by the institutional incorporation of the emergency arbitrator rules in their arbitration procedural rules, expressly specifying how such a procedure should be carried out.

The jurisdiction of an emergency arbitrator shall be limited to decisions on interim measures and shall not extend to any decision as to the substance of the case. In addition, the decision of an emergency arbitrator does not bind the ordinary arbitrators and they may modify, suspend or denounce any conclusion granted by the emergency arbitrator, which has a temporary effect until the final award is rendered by the tribunal to be constituted. The rules of this special institution of the emergency arbitrator are automatically applied once the agreement of the parties refers to the Rules, so that the derogation from them has an opt-out (renunciation) regime, that is to say, if the parties expressly state that they do not want to apply them and agree otherwise these EA Rules are not applicable. The urgency is obvious, given that it is proposed within 48 hours by the institution and is called to rule within 10 days of its appointment, in light of the provisions of the Arbitration Rules of the International Commercial Arbitration Court attached to the Chamber of Commerce and Industry of Romania. Also internationally it is running fast, statistics showing an interval between 10-18 days.

A special good practices guide has not yet been specifically developed, but since the SCC²⁹ and SIAC measure was implemented in 2010, taken up by the ICC in 2012 and 2013 by HKIAC, statistics³⁰ and reports on cases resolved according to this type of special procedure have been published, the latest being the ICC Report on Emergency Arbitrator Proceedings in April 2019,³¹ which contributes to a better

Arbitration+Dispute+Resolution/Enforcement+Of+Interim+And+Conservatory+Measures+Ordered+By+

²⁹ Anja Havedal Ipp, "SCC Practice Note Emergency Arbitrator Decisions Rendered 2015-2016", 2017, accessed April 1, 2020, <http://www.sccinstitute.com/media/194250/ea-practice-note-emergency-arbitrator-decisions-rendered-2015-2016.pdf>.

³⁰ Singapore International Arbitration Centre (SIAC), "The Emergency Arbitrator and the Expedited Procedure in SIAC: A New Direction for Arbitration in Asia", Special Report, Dispute Resolution 12, no. 10 (2015): 39, 40.

³¹ ICC "Emergency Arbitrator Proceedings" – ICC Commission Report, April 2019, accessed April 1, 2020, <https://iccwbo.org/publication/emergency-arbitrator-proceedings-icc-arbitration-and-adr-commission-report/>; Rebecca Ardagh (Fenwick Elliott Solicitors), "International Quarterly- Issue

understanding and application of these provisions.

Coming back to the Romanian experience in this regard, the current 2018 Romanian Arbitration Court Rules are ensuring a greater opportunity to assist and boost, by their content and nonetheless by their proper interpretation and implementation, the updated modern standards of international practice applied in arbitration, proving the goal of Romanian institution to be aligned with and part of the international arbitration community. The institution of the EA in the new Romanian Rules is a whole institution, a juridical creation, developed and taken over from the leaders on the arbitration market. It is an advanced regulation, which absorbed the aspects of the main international arbitration institutions rules. The Romanian procedure is line with the international approach: the EA orders the same types of measures such as the arbitral tribunal and the procedure provides for short deadlines, ensuring the speed inherent in such an urgent method. The main shortcoming resides in the one valid for most of the arbitral institution at the global level, the lack of direct enforcement of the EA order. And like other jurisdictions, Romanian national law does not confer an executory character (enforceability) to the EA decision, thus limiting the purpose of the procedure. Therefore, it is our belief that the EA institution is recommendable to be correctly duplicated by an appropriate regulation of the law (Procedural Civil Code) and practice to support this procedure's enforceability, otherwise its benefits are restrained, even pulled back.

In the opposite line of the above recommendation is the recent Civil Decision no. 76 of July 25th, 2019 rendered by the Bucharest Court of Appeals.³² By this Decision, the EA order in favour of Claimant, granting the provisional measures, was subsequently set aside by the Bucharest Court of Appeals due to an alleged violation by the Romanian Arbitration Court Rules of public policy and imperative procedural norms. The state judge concluded that Art. 40 para. 3 and Annex II of the Romanian Arbitration Court Rules providing for the EA procedure infringe upon the imperative provisions of public policy under the Civil Procedure Code, which allegedly were considered to grant national Courts exclusive jurisdiction to hear requests for provisional measures and interim relief prior to the start of an arbitration. The judge relies upon the reasons that Parties are generally free to establish procedural rules for the conducting of an arbitration, as long as they do not conflict or undermine imperative legal provisions or public policy.

But the interpretation given by the judge of Art. 585 of the Romanian Civil

26 - August 2019: ICC Emergency Arbitrator Proceedings", August 25, 2019, accessed April 1, 2020, https://www.lexology.com/library/detail.aspx?g=dd70898e-6ae8-4e6a-bf34-5db6730665dd&utm_source=lexology+daily+newsletter&utm_medium=email+-+body+-+general+section&utm_campaign=lexology+subscriber+daily+feed&utm_content=lexology+daily+newsletter+2019-08-28&utm_term=

³² Sorina Olaru and Cristina Badea (Nestor Nestor Diculescu Kingston Petersen), "Emergency Arbitration in Romania - The Perilous Path away from Progress", October 1, 2019, accessed April 1, 2020m https://www.lexology.com/library/detail.aspx?g=11fe9916-c43b-4f3e-9eab-8bef9921ad5c&utm_source=lexology+daily+newsletter&utm_medium=email&utm_campaign=lexology+subscriber+daily+feed&utm_content=lexology+daily+newsletter+2019-10-09&utm_term=

Procedure Code was that the national tribunal in whose jurisdiction the arbitral tribunal is seated has the jurisdiction, this being the competent Court to hear requests for provisional measures or interim relief before or during the arbitration procedure (based on Art 585 para.1). As regards the jurisdiction during the arbitration procedure, it was mentioned that such requests can be heard also by the arbitral tribunal (Art 585 para. 4), but EA was not categorized and recognized as such.

The judge astonishing deduction was thus, based on Art. 585 restricted and formal provisions interpretation, it is clear that the will of the legislator was to exclude the competence of the arbitral tribunal to hear requests for provisional measures or interim relief before the commencement of an arbitration. If the legislator also wanted to provide an arbitral tribunal with the competence to hear such requests, it would have included an express provision in this regard. In this regard, Art. 585 is seen as an imperative provision, which establishes express limits between Courts' and arbitral tribunals' jurisdictions, and as a consequence is held that Art. 40 para. 3 and Annex II of the Rules infringe upon Art. 585 of the Romanian Civil Procedure Code and, as such, are illegal. The judge concluded that the EA wrongfully rejected the inadmissibility objection.

Consequently, the national state Court admitted the request for annulment, annulled the EA Order, admitted Respondent's inadmissibility objection and rejected Claimant's request as inadmissible. The judge was confusing the term of 'arbitral tribunal' meant to have different attributes than an EA. This difference is not making less an EA than a fully fledged arbitrator, but only its mission and function are different, as the Arbitration Rules are expressly specifying. EA procedure is developing worldwide and the most trusted and preferred international arbitration institutions provide parties with such a procedure. The judge was not aware of this new evolution in international arbitration and was not even trying to find out what lies beneath the latest approach, to be able to realize that when the Civil Procedure Code was enacted this new philosophy of EA was not envisaged and, therefore, the law is not in line anymore with the current arbitration needs and expectations. We are of opinion that a judge mission resides in aligning this new EA notion to the existent legislation and to interpret the Arbitration Rules in order to give them effect and not to restrict the innovative and advanced arbitral Romanian institutions efforts to put Romania on the international arbitration map.

In the author view, the most disturbing aspect of this state Decision is the judge lack of recent arbitration knowledge, without even trying to research more the domain and to get out of the traditional shell. Only such was possible this outdated conclusion upholding that without the commencement of the arbitration case or a pending case, the preliminary EA procedure from the beginning should be considered illegal and inapplicable.

As the Romanian legislator envisioned a modern and flexible ADR procedure, it is important to note that emergency arbitration is arbitration, and that party autonomy is recognized in Romania, as is the subsidiarity of the Civil Procedure Code when it comes to arbitration. There is also no valid principle or

reason for the Courts to have exclusive jurisdiction to adjudicate requests for interim relief prior to the filing of a request on the merits.³³

The discussion of EA being a fully-fledge arbitrator has been already overpass in the international arbitration landscape, voices raised this questions and the answer was in the sense that it was recognized as such. In this light, the Romanian State Court view could be seen stuck in the old times, without being aligned to the current updates in the field and without considering the understanding and promotion of Romanian arbitration. Without the real support of the national Courts, lawyers, and all the specialists in the arbitration community, the modernization and the step forward of the institutional Romanian arbitration is very difficult to be achieved.

The author opinion is that the EA has to be perceived as a fully-fledge arbitrator and the debate on the EA procedure should from now on be at a higher level of knowledge of this institution. Similar to other rules devoted to EA, the President of the Court (the appointing authority) is nominating an emergency arbitrator. The arbitrators in the Romanian Court of Arbitration, in general, are nominated from a list that contains the persons approved to serve as arbitrators, according to the Regulation of the Court. Therefore, any arbitrator being on the list is considered as a full-fledge arbitrator, EA included, as it will be selected from that list (even more, from a special list of presiding arbitrators),³⁴ so an EA should be categorized as an arbitral tribunal. Art. 585 Romanian Civil Procedure Code is stipulating that during the arbitration, interim and provisional measures, as well as the observation of certain factual circumstances, may also be approved by the arbitral tribunal and in case of opposition, the enforcement of these measures is ordered by the Court. The author considers that the interpretation of the wording 'arbitral tribunal' is that it contains any arbitrator that is appointed under the conditions of the Romanian Court of Arbitration Rules and Regulation, at least as long as the nomination of an arbitrator is made through the list system by the appointing authority. This means that every arbitrator, EA included, is considered a full-fledge arbitrator and the recognition of an EA as such is insured by the list selection process.

7. Expedited procedure

A special procedure is also the simplified, accelerated procedure (Expedited Procedure), whereby the parties can resolve less complex disputes, of a lower value through a reduced procedure, in which not all the standard steps of the procedure are needed, thus reducing costs and time until the award is delivered.

Usually, the Expedited Procedure also has an opt-out regime. That means this procedure applies not with the entry into force of the Rules, but only for the

³³ *Idem*.

³⁴ CCIR "List of arbitrators in force since 1st of January 2019 confirmed during the Management Board Session of the Chamber of Commerce and Industry of Romania" and at page 22 et seq. "List of presiding arbitrators in force since January 1st, 2019", accessed April 1, 2020, <http://arbitration.ccir.ro/wp-content/uploads/2019/09/lista-arbitri-si-supraarbitri-2019-EN.pdf>.

disputes that have as basis the arbitration agreements concluded after the entry into force of the Rules. But the right of option is not limited, the procedure can be used whenever both parties agree to apply it, regardless of the fulfilment of the conditions and the amount in question, insofar as they wish to speed up the procedure for their litigation.

It has been considered that it is more appropriate to set certain threshold conditions for the avoidance of abuses and thus the special rules apply when the value of the arbitration dispute has a certain threshold value and the complexity is lower. It has been established that a single arbitrator will conduct the procedure, this being the general rule adopted, regardless of the parties' agreement, which is suppressed even though it mentions three arbitrators, the provision being also valid for the emergency arbitrator's procedure. The effects of replacement by the arbitration institution of the decision of the parties were highly debated, but for reasons of efficiency and because these procedures are considered special, created just to expedite the procedure, minimize costs (especially those related to a court made up of three members) and shorten the period of drafting the arbitral award, this measure was taken to suppress the autonomy of the parties regarding the number of arbitrators. Moreover, these procedures have been created specifically for and at the request of the parties to find the most appropriate solutions to shorten and really cheapen the procedures that are especially urgent and less complex.

Of course, on the other side, even if *prima facie* the simplified procedure is considered applicable, there is a safety valve to return to the standard procedure. Thus, insofar as it is found that although the value is low and falls in the threshold, the litigation proves to be more complex than expected (i.e. a more comprehensive probation is needed, which includes expertise or disproportionate expenditure in general), and because especially under the auspices of arbitration the principle of finding out the truth must prevail, then a more thorough investigation is needed, which cannot be carried out in the simplified procedure, and thus the case returns to the standard procedure.

8. Early/summary determination

There is also another emerging trend, another special procedure (Early Determination) that encourages summary determination of unmeritorious claims in international arbitration.

Unlike SIAC in 2016, SCC in 2017 and HKIAC in 2018, which amended their Rules to incorporate this early dismissal procedure for unfunded applications, the ICC in 2017 decided not to modify the existing rules at that time. Therefore, it established a distinct procedure for the rapid determination of the merits of claims or defences considered unfounded.³⁵

Instead, the ICC sought to encourage the arbitrators to deal with such

³⁵ Kartikey M. and Rishabh Raheja, "Recognition of Summary Procedures under the ICC Rules: Considerations, Comparisons and Concerns", December 4, 2017, accessed April 1, 2020, <http://arbitrationblog.kluwerarbitration.com/2017/12/04/booked-iccs-new-rules-summary-dismissal-kartikey-mahajan/>.

requests through its Note issued by the ICC Secretariat, to the attention of the parties and the arbitrators, indicating the modalities of management and conduct of the various issues related to the smooth running of an arbitration procedure (ICC Note to the Parties and Arbitral Tribunals on the Conduct of the Arbitration).³⁶

It is provided that any party may refer to the tribunal for prompt determination of one or more claims or in defence, on the grounds that such claims or defences are manifestly unfounded or are manifestly outside the jurisdiction of the arbitral tribunal, as soon as possible after the submission of the relevant applications or defences. Once the application has been filed, the court is free to decide whether to allow the application, taking into account all relevant circumstances, including the need to ensure efficiency. If the arbitral tribunal allows the request, the interested party is given the opportunity to respond, but additional evidence is allowed only exceptionally. Thereafter, the arbitral tribunal is expected to decide on the application as soon as possible, the decision being issued in the form of an order or award.³⁷ In its instructions, the ICC undertakes to examine (scrutinize) any such decision of the tribunal within one week of receipt.³⁸

9. Other institutional mechanisms

Arbitration institutions can be useful in increasing efficiency in various ways, considering they organize the arbitration and are promoters of the respective location as place of arbitration. Especially in recent years, there is a fierce competition between the top (and not only) arbitration institutions in providing rules for streamlining procedures, adopting the latest key trends (proposed by arbitration users and specialists), which have become increasingly popular, more sophisticated and demanding.

Thus, in order to keep on top, the institutions have developed rules and practices that encourage the efficient settlement of disputes, such as underlining the principle of procedural autonomy of the parties and the arbitrators, emphasizing the pro-active role of the latter, introducing a clear boundaries between the written phase and the oral phase of the arbitration process, emphasizing the importance of the written phase, limiting the length of the parties' conclusions and the possibility of the tribunal through the active role of requesting specific details, improving the management and conduct of the case through various methods, by setting the

³⁶ ICC "Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration", January 1, 2019, accessed April 1, 2020, <https://iccwbo.org/publication/note-parties-arbitral-tribunals-conduct-arbitration/>.

³⁷ Craig Tevendale and Charlie Morgan, "ICC publishes note on early dismissal of manifestly unmeritorious claims or defences", November 7, 2017, accessed April 1, 2020, <https://hsfnotes.com/arbitration/2017/11/07/icc-publishes-note-on-early-dismissal-of-manifestly-unmeritorious-claims-or-defences/>.

³⁸ Ed Attenborough, Jonathan Brierley, Alexa Romanelli, "An Emerging Trend: ICC Guidance Further Encourages Summary Determination of Unmeritorious Claims in International Arbitration", November 2017, accessed April 1, 2020, <https://www.whitecase.com/sites/whitecase/files/files/download/publications/icc-guidance-further-encourages-summary-determination.pdf>.

requirement establishing a provisional or complete procedural timetable, the possibility of bifurcating the procedure, facilitating the administration of evidence and appointing experts, regulating a simplified accelerated procedure, introducing the institution of the emergency arbitrator, also launching communication and depository secure digital platform³⁹ for an arbitration case, but especially narrowing the difference of treatment between international and national arbitration.

Thus, users are confronted with new terminologies, tools and procedures that are more than welcomed and useful in conducting the arbitration procedure as closely as possible to the needs of each case and in accordance with international practice already known by more experienced users. It is intended that the new package of arbitration rules be supplemented with guides to good practices related to other topics (such as conflict of interests, representation of parties, sanctioning of guerrilla tactics, financing the procedure through third parties, prior determination, probation administration and efficient management of the procedure) so that through the intertwining of all these aspects the users have sufficient resources gathered in one place, transposed into a flexible, simple and efficient tool for solving commercial disputes.

Also for the overall efficiency of the arbitration procedure, the arbitral institutions have included other clearer provisions regarding the possibility of third parties' participation, as well as the arbitrators' appointment mechanism in the case of multi-party arbitration, the regulation for the consolidation of the procedures, which are increasingly innovative.

In another effort to improve timeliness, the ICC relies on recently implemented delay measures to incentivize arbitrators to draft awards quickly. These measures allow the ICC to reduce arbitrators' fees when awards are not submitted within two months by sole arbitrators or within three months by three-member panels. The ICC reports some success in reducing the number of late awards: While 54% were late in 2016, only 38% were late in 2018.⁴⁰

10. Conclusion

Of course, there are various and other measures that can be discussed, with the aim of contributing to increase efficiency and promote progressive arbitration, tools and methods that respond, in addition to efficiency, also to other current and modern issues, such as transparency, security, the possibility of using third-party financing, diversity, compliance, adoption of modern technologies, predictability –

³⁹ SCC Arbitration Institute, "SCC Platform – Simplifying secure communication from request to award", accessed April 1, 2020, <https://sccinstitute.com/scc-platform/>.

⁴⁰ Adrienne L. Goins (Vinson & Elkins LLP), "ICC Arbitration Statistics Reflect Strong Arbitration Trends Worldwide", July 2, 2019, accessed April 1, 2020, https://www.lexology.com/library/detail.aspx?g=d51c064a-adb1-4c94-9817-351d43a942a5&utm_source=lexology+daily+newsfeed&utm_medium=html+email+-+body+-+general+section&utm_campaign=lexology+subscriber+daily+feed&utm_content=lexology+daily+newsfeed+2019-07-04&utm_term.

all these being other extremely interesting hot topics. We cannot exhaust in one paper the description of the main elements of efficiency of the procedure and their possible treatment, but at least by this contribution the main ideas were presented and they can be further analyzed, depending on the stage of the procedure.

At the same time, institutions can share their vast experience to educate the parties, lawyers and arbitrators on time and cost reduction techniques. This will ensure that all arbitrators have the time and expertise to efficiently manage their files and institutions can accordingly exercise control over the arbitrators' fees and expenses, including the methods of rewarding arbitrators who conduct procedures effectively and penalizing those who do not. Ultimately, however, arbitral institutions are administrative bodies that perform administrative functions. They are not called upon to decide how certain cases should proceed, only the arbitrators being the ones granted with this task. Therefore, the arbitrators are ultimately the guardians who contribute to the efficiency of the arbitration, since the only body who can exercise a certain authority is the arbitral tribunal.

We can expect that these innovations will lead to a general change in the culture of arbitration and to a greater acceptance by all participants. This process of creating special arbitration procedures have been designed to increase the recourse to arbitration by the most varied industries (such as financial institutions) and by users who previously worried that arbitration would not provide a proportionate means of resolving simple disputes. While the full implications of the presented efficiency mechanisms take time to materialize in practice and there are concerns that awards could lead to issues of applicability and enforcement in certain jurisdictions, these special procedures can contribute to their acceptance by encouraging their implementation by more arbitral institutions, arbitrators, counsels and with a sustained learned support of the national state Courts.

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