

Do the Rules of Europe’s Leading Institutional Arbitration Courts and the UNCITRAL Arbitration Rules Need to Be Revised? Assessment from the Perspective of 2023

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Abstract: While some issues (e.g. the principles of service, the expedited procedure for resolving cases and the admissibility of securing a claim before initiating proceedings) are regulated in a manner that satisfies the requirements of 2023, other issues (e.g. the rules of holding remote hearings or the consequences of failing to meet deadlines in arbitration, in particular the deadlines for issuing an award) would require a number of modifications and improvements. This suggests that a postulate should be presented for a broader discussion within the community – both in Poland and abroad – on the shape of the regulations in this area that would be the most comfortable for the parties to the proceedings, the arbitral tribunals and the arbitral institutions, while respecting the basic (universal) arbitration rules.

1. Preliminary Remarks

Recent years have doubtlessly been extremely unsettled. The world was shaken in late 2019 by the rapidly spreading Covid-19 pandemic and then – in February 2022 – by Russia’s unprecedented aggression against Ukraine. The reality around us changed beyond recognition almost in the blink of an eye. While the course and effects of the pandemic can already be considered relatively predictable (at the beginning of 2023), the consequences of Russia starting the first war of such a scale in Europe in almost 80 years will remain unknown for a long time. However, it is already clear that

the Russian invasion has not only caused tragedy and suffering for millions of innocent people in Ukraine, but has also destabilized markets, disrupted supply chains, prevented the appropriate performance of thousands of previously concluded contracts and caused a huge amount of economic turbulence.

All of these circumstances have a direct impact on the assertion of claims by parties to contractual relations and, therefore, also on the organization of both institutional and *ad hoc* arbitration courts. The broadly understood judiciary (encompassing both state and arbitration courts) has faced entirely new challenges that need to be dealt with in order to ensure that disputes are resolved as efficiently and as fairly as possible.

The adaptation of the state judiciary to the new challenges is a relatively long-term process because it requires not only the adoption and implementation of legislative changes, but also a change in the organization and functioning of the courts of all instances. However, the process of adaptation of the arbitration courts to the new challenges is much faster: it can often be sufficient to make only minor modifications to the rules of handling the proceedings by the arbitrator or the tribunal resolving the dispute. Meanwhile, even if modifications need to be made to the rules of the arbitration court, this can be done quickly, without a lengthy legislative process.

The objective of this article is to attempt to consider whether the UNCITRAL Arbitration Rules (which are the leading international regulations for dispute resolution by *ad hoc* arbitration courts) and the rules of selected institutional arbitration courts remain appropriate to the challenges that have arisen in recent years, or whether they need to be amended and supplemented. A positive answer to the latter question will, of course, also require the identification of the areas in which such changes are particularly important and urgent.

2. Subject matter of the article

This article presents an analysis of the UNCITRAL Arbitration Rules¹ and the rules of the leading European arbitration courts, namely the Rules of

¹ “UNCITRAL Arbitration Rules,” United Nations, <https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration>.

the London Court of International Arbitration (“LCIA”),² the Rules of the International Court of Arbitration of the International Chamber of Commerce (“ICC”),³ the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (“SCC”)⁴ and the Rules of the Deutsche Institution für Schiedsgerichtsbarkeit (“DIS”),⁵ as well as the rules of the leading Polish institutional arbitration courts, i.e. the Lewiatan Court of Arbitration (“SAKL”)⁶ and the Court of Arbitration at the Polish Chamber of Commerce in Warsaw (“SAKIG”).⁷ The objective of this article is not to provide a detailed analysis of individual (all) provisions of each of these rules (as such a task would require the preparation of a separate monograph), but to attempt to identify key issues which play (or could play) a particularly important role in handling and resolving disputes in arbitration in accordance with these rules.

In the author’s subjective view, it is primarily the following issues that should be included in this category: the principles of holding remote hearings, the principles of service of pleadings and procedural correspondence, the deadlines to be met by the parties to the arbitration proceedings (and the arbitral tribunal) and the consequences of failing to meet them, the principles of applying the expedited procedure, and the admissibility of requesting security for a claim before arbitration proceedings are initiated.

The choice of the key issues proposed above is, in fact, subjective (and is limited by the modest amount of space allocated to the article), which can consequently give rise to comments from other arbitration theorists or practitioners. The author’s intention is for there to be as many

² “LCIA Arbitration Rules,” London Court of International Arbitration, https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx.

³ “Arbitration,” International Chamber of Commerce, <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration>.

⁴ “Arbitration Rules,” Arbitration Institute of the Stockholm Chamber of Commerce, https://sccarbitrationinstitute.se/sites/default/files/2022-11/arbitrationrules_eng_2020.pdf.

⁵ “Arbitration,” DIS. German Arbitration Institute, <https://www.disarb.org/en/arbitration-and-alternative-dispute-resolution/arbitration>.

⁶ “Rules of the Court of Arbitration,” Court of Arbitration at the Confederation of Lewiatan, <https://sadarbitrazowoy.org.pl/en/arbitration/rules-of-the-court-of-arbitration>.

⁷ “Rules,” Court of Arbitration at the Polish Chamber of Commerce in Warsaw, <https://sakig.pl/en/regulations-and-tariff/arbitration/rules>.

such comments as possible because any modifications and improvements to the legal institutions provided for in the respective rules of arbitration should be preceded by the broadest possible discussion within the community.

3. Remote Hearings

In March 2020, together with the implementation of lockdowns throughout the world related to the spread of the Covid-19 pandemic, the whole arbitration world was confronted – virtually overnight – with the need to immediately change the organization of its arbitration proceedings, which resulted in the emergence of a number of procedural and organizational problems that were previously completely unknown in arbitration.⁸ Although the change was not as painful as in the case of the ordinary courts, which – both in Poland and abroad – were usually unsuited to conduct proceedings in a procedure other than in the courtroom, it still required the rapid introduction of new systemic solutions.

Videoconferencing was already frequently used in arbitration proceedings, primarily in connection with holding organizational meetings (where participants agree on the procedure and details of the proceedings) and procedural meetings (at which selected procedural issues are resolved), whereas it was used far less frequently for holding hearings.⁹ Meanwhile, the different from the customary and applied method of proceeding

⁸ See, among others: “Announcement of Particular Procedural Features for the Administration of Arbitrations in View of the Covid-19 Pandemic,” DIS. German Arbitration Institute, https://www.disarb.org/fileadmin/user_upload/Ueber_uns/Second_Edition_-_DIS_Announcement_Particular_Procedural_Features_Covid-19.pdf, p. 1 et seq.; P. Solowij, “Wpływ pandemii COVID-19 na funkcjonowanie arbitrażu,” in *Polski i amerykański wymiar sprawiedliwości w czasie i po pandemii Covid-19*, ed. (Toruń: , 2022), 15 et seq.; “2021 International Arbitration Survey: Adapting arbitration to a changing world,” Queen Mary University of London, <https://arbitration.qmul.ac.uk/research/2021-international-arbitration-survey/>; “International Arbitration in the Time of Covid-19: Navigating the Evolving Procedural Features and Practices of Leading Arbitral Institutions,” Cleary Gottlieb Steen & Hamilton LLP, <https://www.clearygottlieb.com/-/media/files/alert-memos-2020/international-arbitration-in-the-time-of-covid19.pdf>.

⁹ Sabina Kubsik and Zbigniew Drzewiecki, “Rozprawy zdalne – nowa rzeczywistość polskiej i międzynarodowej praktyki arbitrażowej,” *Monitor Prawniczy* (supplement), no. 20 (2020): 98–99.

required and requires the reconciliation of differing legal traditions (especially in international arbitration), as well as the unconditional assurance of equal treatment of the parties, so that the award does not then encounter difficulties in its later recognition or declaration of enforceability (cf., for instance, Article V, sec. 2 (b) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed in New York in 1958), and that there are no grounds for an action being filed later for its annulment (cf. Article 1206, para. 2, item 2 of the Polish Civil Procedure Code – CPC). In this light, both the existing regulatory framework in this respect in the individual institutional arbitration courts, as well as the scale of their possible (necessary) amendments need to be examined. At the same time, it should be emphasized that – as is sometimes aptly argued in the international literature – although the right to be heard (to present one's case) is one of the key principles of arbitration, it is not equivalent to the right to be heard in person.¹⁰ In other words, it should therefore be assumed that the acceptance by the arbitration court (under the relevant provisions of the Rules) or by the arbitral tribunal (under the relevant order) that the hearing, or part thereof, will be conducted remotely does not limit the procedural rights of the parties to the proceedings in any way.

Article 28.4 of the UNCITRAL Arbitration Rules stipulates that “the arbitral tribunal may direct that witnesses, including expert witnesses, be examined through means of telecommunication that do not require their physical presence at the hearing (such as videoconference).” However, these Rules do not settle whether the physical presence of the parties and their attorneys is necessary throughout the proceedings (at the hearings) or whether hearings and sessions may be held remotely.

Article 32 of the SCC Rules has a relatively similar structure in this respect. Although Article 32.1 limits the purposefulness of holding a hearing in any proceedings (“a hearing shall be held if requested by a party, or if the Arbitral Tribunal deems it appropriate”), Article 32.2 stipulates that (if a hearing is ordered), “the Arbitral Tribunal shall, in consultation with the parties, determine the date, time and location of any hearing and shall

¹⁰ See more in: Bjorn Arp and Edwin Nemesio, “The Practice of Virtual Hearings during Covid-19 in Investment Arbitration Proceedings,” in *The Impact of Covid on International Disputes*, ed. Shaheez Lalani and Steven Shapiro (The Hague: Brill, 2022).

provide the parties with reasonable notice thereof.” It should be accepted on this basis that, since the arbitral tribunal is authorized to (among other things) freely specify the place of the hearing, it can also order the hearing to be held remotely (although this conclusion can give rise to doubts because of the reference in Article 32.2 *in fine* of the SCC Rules to the “location,” and in the case of a remote hearing it is difficult to speak of a “location” *per se*).

A conservative legal solution has also been adopted in the ICC Rules, which, while allowing case management conferences to be held “through a meeting in person, by video conference, telephone or similar means of communication” (Article 24.4), do not allow the free choice of the form in which the case management proceedings are to be conducted (unless by consent of the parties – first sentence of Article 22.2). However, this regulation has been made slightly more flexible by the provision in Appendix IV, sec. f), which allows “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,” as one of the case management techniques.

A different solution is adopted in Article 19.2 of the LCIA Rules, which states that:

The Arbitral Tribunal shall have the fullest authority under the Arbitration Agreement to establish the conduct of a hearing, including its date, duration, form, content, procedure, time-limits and geographical place (if applicable). As to form, a hearing may take place in person, or virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places (or in a combined form).

Therefore, such a regulation does not, in principle, restrict the arbitral tribunal in conducting the arbitration as it deems fit (assuming that this is in compliance with the Arbitration Agreement).

In turn, the DIS Rules do not contain any provisions regarding this issue. However, given the regulation contained in Article 21.3 thereof (stating that “when the Rules are silent as to the procedure to be applied in the proceedings before the arbitral tribunal, such procedure shall be determined by agreement of the parties, in the absence of which the arbitral

tribunal in its discretion shall decide upon the procedure, after consultation with the parties”), it can be concluded that the arbitral tribunal is awarded a reasonably far-reaching right to freely shape the rules for conducting the proceedings. It should be accepted that – within this right – the arbitral tribunal may also consider it advisable to hold the hearings (or parts thereof) remotely, although, under no circumstances may this breach the equal treatment of the parties, including their right to be heard (Article 21.1 of the DIS Rules).

A similar solution is adopted in § 22.2 of the SAKL Rules, according to which “unless the parties agree otherwise, the arbitral tribunal shall conduct proceedings in accordance with the Rules and in such manner as it considers appropriate, provided that the parties should be treated with equality and each party is given an opportunity to present its case.” This type of legal structure – as in the case of the regulation of the DIS Rules mentioned above – gives the arbitral tribunal extensive discretion with regard to the method of organizing the arbitration proceedings (and the rules for holding hearings).

A relatively archaic solution – compared to those analyzed above – is the regulation adopted in the SAKIG Rules. While these Rules do not contain provisions on the principles of holding remote hearings, they do contain the second sentence of Article 31.2, according to which “an organizational session may also be conducted using telecommunications.” Consequently, it should be concluded that – *a contrario* – no other sessions (including a hearing) can be conducted remotely. Such a concept is also supported by an analysis of § 34 of the SAKIG Rules (which lays down the rules for holding a hearing), which only states that “the Arbitral Tribunal shall consider the dispute at a hearing,” but does not specify the form in which the hearing should be held.

The above comparison of the rules on remote hearings adopted in the individual rules of the institutional arbitration courts leads to several conclusions. Firstly, in the current state of affairs, essentially none of the rules examined contain a comprehensive regulation of the issue in question. Secondly, basically none of the rules examined has been significantly modified (updated) so far with respect to the solutions adopted and applied before the Covid-19 pandemic. Thirdly, however, the Rules that grant (sanction) the arbitral tribunal the freedom as to the choice of the form

in which the proceedings are conducted (such as the LCIA Rules, the DIS Rules and the SAKL Rules) allow the proceedings (or their substantial part) to be conducted remotely.

In view of the above, it seems reasonable to formulate a proposal to make appropriate modifications to the Rules under review so that they not only directly allow (possibly – in the absence of the express objection of the parties) proceedings to be conducted remotely, but also lay down the detailed rules of conducting them, including technical and organizational solutions that ensure that they are conducted properly.¹¹ It appears that such a solution would relieve the arbitral tribunals of the burden of regulating this issue in detail every time (for each case handled), but would also ensure that the rules for resolving disputes before institutional arbitration courts would be made more flexible. A regulation of this kind would also prevent disputes on how the hearing is to be conducted (i.e. remotely or in person) in cases where there is no agreement in this respect between the parties to the proceedings, or between the parties and the arbitral tribunal.¹² It is also crucial for the arbitral tribunals to be provided with an appropriate set of instruments that will ensure a flexible approach to the expectations of the parties and the circumstances of the given case, and which could be appropriately used in individual cases.¹³

4. Principles of Service

The rapidly changing reality calls into question the advisability of maintaining the principles of service of pleadings and procedural correspondence in arbitration proceedings, which have been generally applied to date. While

¹¹ This applies, in particular, to ensuring that evidence from the testimony of witnesses is taken in such a way as to prevent third parties, who may be in contact with the witnesses, from influencing the content of their testimony. See more in: Małgorzata Judkiewicz, “Wady i zalety zdalnego postępowania arbitrażowego,” *Biuletyn Arbitrażowy*, no. 6 (2020): 3 et seq. In contrast with the earlier preparation of the witness for testifying at a hearing, such a situation should be considered inadmissible. See also: Piotr Bytnerowicz and Emanuel Wanat, “Admissibility of Witness Preparation in Arbitration Proceedings – international and Polish perspectives,” *Arbitration Bulletin, Young Arbitration*, no. 24 (2016): 38.

¹² See also the comments on this topic presented by: Kubsik and Drzewiecki, “Rozprawy zdalne,” 107 et seq.

¹³ Cf. Christopher Chinn, “Some Reflections on Arbitration Hearings in the Covid-19 Era,” *Arbitration Bulletin*, no. 6 (2021): 4–5.

just a dozen or so years ago, pleadings had to be served by the parties and all awards and orders (including organizational orders) had to be served by the arbitral tribunal in the form of hard copies, increasingly more attorneys and arbitrators are currently reducing their use of printouts or abandoning it altogether. This trend is in line with the Campaign for Greener Arbitrations,¹⁴ the signatory of which in Poland is the Lewiatan Court of Arbitration.¹⁵

In this light, the question arises as to whether the regulatory framework of the institutional arbitration courts is appropriately adapted to allow document flow to be exclusively electronic.¹⁶ A general solution in this respect can be found in the UNCITRAL Arbitration Rules, in Article 17.1, which stipulates that:

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.¹⁷

¹⁴ "Driving sustainable change in arbitration," Campaign for Greener Arbitrations, <https://www.greenerarbitrations.com/>.

¹⁵ "Sąd Arbitrażowy przy Konfederacji Lewiatan sygnatariuszem Green Pledge," Sąd Arbitrażowy przy Konfederacji Lewiatan, <https://sadarbitrazowy.org.pl/blog/2021/04/sad-arbitrazowy-przy-konfederacji-lewiatan-sygnatariuszem-green-pledge/>.

¹⁶ An award issued by an arbitration court, which – in order to enable the party (parties) to the arbitration to use it further – must be issued in paper form in any case, is outside the scope of this analysis.

¹⁷ In this context, attention is drawn in the literature to the fact that the arbitral tribunal is bound by the rules of arbitration agreed upon by the parties (including – as should be accepted – the principles of service), which is a right that exists at all times during the proceedings and not just until the arbitral tribunal is constituted; cf. Andrzej Szumański, in *Regulamin Arbitrażowy UNCITRAL. Komentarz*, eds. Piotr Nowaczyk, Andrzej Szumański, and Maria Szymańska (Warsaw: Wydawnictwo C.H. Beck, 2011), 273, nb. 16, together with the quotation therein of; Justyna Szpara and Maciej Łaszczuk, "Czy autonomia stron w ustalaniu reguł postępowania przed sądem polubownym jest ograniczona w czasie?," in *Księga pamiątkowa 60-lecia Sądu Arbitrażowego przy Krajowej Izbie Gospodarczej w Warszawie*, ed. Józef Okolski (Warsaw: Sąd Arbitrażowy, 2010), 280–292.

At the same time, according to Article 17.4 of the UNCITRAL Arbitration Rules, “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.” Therefore, on this basis, it can be accepted that – if such an order (procedural order) is issued by the arbitral tribunal – service during the proceedings may be limited to electronic service. A similar solution is also provided for in the first sentence of Article 22.2 of the ICC Rules, which states that “in order to ensure effective case management, after consulting the parties, the arbitral tribunal shall adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties” – which also provides far-reaching discretion regarding the subject matter to the arbitration court.

A much more precise (and unambiguous, in terms of the principles of electronic service) regulation is contained in Article 4.1 of the LCIA Arbitration Rules, according to which:

the Claimant shall submit the Request under Article 1.3 and the Respondent the Response under Article 2.3 in electronic form, either by email or other electronic means including via any electronic filing system operated by the LCIA. Prior written approval should be sought from the Registrar, acting on behalf of the LCIA Court, to submit the Request or the Response by any alternative method.

The LCIA Arbitration Rules therefore adopt the principle of electronic service as the prevailing principle, only allowing service in a different form in special circumstances and if the arbitral tribunal agrees.

A similar legal structure is contained in Article 4.1 of the DIS Rules, which provides that:

all Submissions of the parties and the arbitral tribunal to the DIS shall be sent electronically, by email, or on a portable storage device, or by any other means of electronic transmission that has been authorized by the DIS. If electronic transmission is not possible, the Submission shall be sent in paper form.

Here, too, service in a form other than electronic was considered an exception to the generally accepted rule.

A different solution has been adopted in Article 5.2 of the SCC Rules, which states that “any notice or other communication shall be delivered by courier or registered mail, e-mail or any other means that records the sending of the communication.” However, it should be accepted that – even in this case – the arbitral tribunal has the power to order the exchange between the parties of pleadings filed in the case exclusively in electronic form.

The most flexible solution can be considered that stipulated in § 3.1 of the SAKL Rules, according to which:

any written communications, including requests, submissions, correspondence from or to the Lewiatan Arbitration Court or the Arbitral Tribunal, should be delivered in person or by registered mail or courier, by e-mail or by other means of remote communication, which make it possible to obtain a material proof of sending a letter. The Secretary General may order the delivery of all pleadings and correspondence in the proceedings only by electronic means.

A decidedly more traditional solution is adopted in the first sentence of § 11.6 of the SAKIG Rules, as it provides that “during the course of the proceeding, a party shall file a written communication with the Court of Arbitration with copies for the arbitrators and shall serve a copy of the written communication with enclosures directly on the opposing party.” At the same time, however:

the Arbitral Tribunal may order service of written communications during the course of the proceeding in some other way. More specifically, the Arbitral Tribunal may order that written communications be served additionally, or at the consent of the parties exclusively, by email. Service using telecommunications such as email or fax may be made only to the address indicated for such service” (§ 11.7 of the SAKIG Rules).¹⁸

¹⁸ Electronic communication – as a supplementary form of communication during the proceedings – was widely used in international arbitration even before the Covid-19 epidemic. See more in: Rafał Morek, in *Regulamin Arbitrażowy Sądu Arbitrażowego przy KIG. Komentarz*, eds. Maciej Łaszczuk and Andrzej Szumański (Warsaw: C.H. Beck, 2017), 145, nb. 23 et seq.

The above analysis of the regulations adopted in the individual rules of the institutional arbitration courts with regard to the principles of service of submissions in the course of proceedings therefore indicates a rather diverse approach in this respect on the part of the individual arbitral institutions. However, the majority of the rules analyzed enable submissions to be limited to just the electronic form, although, in some cases (e.g. LCIA and DIS) this is the basic rule, whereas in other cases (e.g. SAKIG) such a solution constitutes a derogation from the principle of serving hard copies. Consequently, it should be accepted that – other than the presentation of a proposal to make the solutions adopted, e.g. in the SAKIG Rules, more flexible – the regulation under review does not require any significant changes and (while retaining the differences related to the specific nature of individual arbitral institutions) remains adapted to the conditions in 2023.¹⁹

5. Deadlines

The matter of deadlines is undoubtedly of fundamental importance in proceedings before the state courts, primarily for the parties to the proceedings and their attorneys (to a lesser extent for the court).²⁰ The possible failure to meet a deadline (either procedural or judicial) usually has unequivocally negative procedural consequences for the party that missed the deadline, and it is only possible to reinstate a deadline in special cases.

This aspect is somewhat less important in arbitration proceedings, primarily because of their de-formalization. Similarly, the priority in the case of proceedings before the arbitration courts is for the proceedings to end

¹⁹ Although doubts have been raised in the literature as to the appropriateness of accepting the structure of admissibility of filing pleadings in electronic form, provided that they are later filed as hard copies (cf. Jan Gąsiorowski, “Ograniczenia, możliwości i funkcjonowanie sądownictwa powszechnego i stałych sądów polubownych w sprawach cywilnych podczas trwania epidemii w Polsce”, *ADR. Arbitraż i Mediacja*, no. 2 (2020): 62), especially in light of the general (regardless of the conditions related to the Covid-19 epidemic) trend of allowing (also exclusively) electronic service, these doubts can hardly be considered justified.

²⁰ As rightly emphasized, the speed of the proceedings may even be considered the most attractive feature distinguishing arbitration from proceedings before state courts. See more in: Krzysztof Stefanowicz, in *Postępowanie przed sądem polubownym. Komentarz do Regulaminu Sądu Arbitrażowego przy Konfederacji Lewiatan*, ed. Beata Gessel-Kalinowska vel Kalisz (Warsaw: Wolters Kluwer, 2016): 519, nb. 1.

as quickly as possible,²¹ which, however, may give rise to the temptation for arbitral tribunals, acting on the basis of the relevant rules of the institutional arbitration courts, not to observe the specified deadlines. Such practice can raise legitimate concerns, if only because of the associated risk of unequal treatment of the parties to the proceedings. The role of the arbitral tribunals is therefore to ensure that the proceedings are conducted in such a way that – also from this perspective – the procedural decisions made while resolving a case cannot later constitute the basis for challenging the award that has been issued, whether by way of a complaint submitted to a state court or a plea in proceedings for its recognition or the declaration of its enforceability.

An issue, as it seems, of even greater importance in this context is the question of the deadlines that are applicable to the arbitral tribunals (arbitrators) for ending the arbitration proceedings and for issuing an award in the case, as well as the consequences of the possible failure to meet them. The regulations on this – albeit highly varied – essentially contain all of the rules examined here.²²

The UNCITRAL Arbitration Rules only set a deadline for issuing an award in expedited proceedings. Article 16.1 of the UNCITRAL Expedited Arbitration Rules requires that “the award shall be made within six months from the date of the constitution of the arbitral tribunal unless otherwise agreed by the parties.” At the same time, “the arbitral tribunal may, in exceptional circumstances and after inviting the parties to express their views, extend this period of time. The extended period of time shall not exceed a total of nine months from the date of the constitution of the arbitral tribunal” (Article 16.2). The possible failure to meet the deadlines may only result in the case being considered in the course of the ordinary procedure.²³

²¹ Cf. more in: Marcin Aślanowicz, *Pozycja prawna arbitra w arbitrażu handlowym* (Warsaw: C.H. Beck, 2019), 55–56.

²² The exception is the LCIA Rules, which do not provide for a deadline for issuing an award (conducting the arbitration proceedings).

²³ Cf. Article 16.3 of the UNCITRAL Expedited Arbitration Rules (according to which “if the arbitral tribunal concludes that it is at risk of not rendering an award within nine months from the date of the constitution of the arbitral tribunal, it shall propose a final extended time limit, state the reasons for the proposal, and invite the parties to express

The SCC Rules and the ICC Rules introduce a similar regulation, as, in proceedings conducted in accordance with them, an award should be issued within 6 months. However, the start of the countdown to the deadline is calculated slightly differently: while according to Article 43 of the SCC Rules it starts “from the date the case was referred to the Arbitral Tribunal pursuant to Article 22,” while, in accordance with Article 31.1 of the ICC Rules:

such time limit shall start to run from the date of the last signature by the arbitral tribunal or by the parties of the Terms of Reference or, in the case of application of Article 23(3), the date of the notification to the arbitral tribunal by the Secretariat of the approval of the Terms of Reference by the Court.²⁴

In both cases examined here, the said deadline may be extended (by the Board of the SCC and the ICC, respectively), while the said Rules do not provide for any sanctions for their breach and for issuing an award after the applicable deadline.

Slightly different rules are provided for in the first sentence of Article 37 of the DIS Rules, according to which “the arbitral tribunal shall send the final award to the DIS for review pursuant to Article 39.3, in principle within three months after the last hearing or the last authorized Submission, whichever is later.” However, particular attention should be drawn to the second and third sentences of Article 37, authorizing “the Arbitration Council, in its discretion, to reduce the fee of one or more arbitrators based upon the time taken by the arbitral tribunal to issue its final award. In deciding whether to reduce the fee, the Arbitration Council shall

their views within a fixed period of time. The extension shall be adopted only if all parties express their agreement to the proposal within the fixed period of time”) and Article 16.4 of the UNCITRAL Expedited Arbitration Rules (according to which “if there is no agreement to the extension in paragraph 3, any party may make a request that the Expedited Rules no longer apply to the arbitration. After inviting the parties to express their views, the arbitral tribunal may determine to continue to conduct the arbitration in accordance with the UNCITRAL Arbitration Rules”).

²⁴ In proceedings before the ICC, the punctuality of processing by the arbitral tribunal, including meeting the deadline for issuing an award in the case, is of key importance. See more in: Jason Fry, Simon Greenberg, and Francesca Mazza, *The Secretariat’s Guide to ICC Arbitration*, International Court of Arbitration 2012, 121 et seq., https://2go.iccwbo.org/icc-secretariat-s-guide-to-the-new-rules-of-arbitration-config+book_version-eBook.

consult the arbitral tribunal and take into consideration the circumstances of the case.” Therefore, only the DIS Rules (of the rules of the foreign arbitral institutions analyzed here) explicitly lay down potential sanctions for the arbitral tribunal for failing to meet the deadline for issuing an award in a case, although the SAKL Rules – in Poland – contain a similar solution stipulating that “the award shall be issued within 6 months following the constitution of the arbitral tribunal” (the first sentence of § 39.1) and that “the President of the Lewiatan Arbitration Court may, at the request of the arbitral tribunal, extend the time limit for issuing the award in accordance with the circumstances of the case” (the second sentence of § 39.1), while providing that “if the award was not issued within this time limit due to reasons for which the arbitral tribunal or some of its arbitrators are responsible, such default may affect the level of the arbitrators’ fees” (§ 39.2).

Meanwhile, the SAKIG Rules introduce a slightly more “liberal” solution, providing in § 40.2 that:

the award shall be issued within 9 months after commencement of the proceeding and no later than 30 days after closing of the hearing. At the Director General’s own initiative or upon application of the presiding arbitrator, the Director General may extend either of these periods if justified by the complexity of the issues in the dispute or other important considerations.

Therefore, the analysis of the arbitration rules in question demonstrates a significant diversity in the standards regarding deadlines for issuing an award and ending of the initiated arbitration proceedings. Although most of the Rules specify a (6-month, as a rule) deadline for issuing an award (which, however, starts to be counted from different points), only the DIS and SAKL Rules admit the introduction of sanctions (or rather certain inconveniences) for the arbitral panel (arbitrators) for failing to meet them. Meanwhile, such a solution should be considered a model solution, which can constitute a certain point of reference for the other Rules. This is because it would seem that this is the only way of ensuring – in the event of tardiness in the proceedings on the part of the arbitral tribunal (arbitrators) – the fulfillment of the obligation to resolve the dispute arising from the *receptum arbitrii*,²⁵ without the arbitral institution interfering at the same time

²⁵ Cf. Karol Zawiślak, *Receptum arbitrii* (Warsaw: C.H. Beck, 2012), 262 et seq.

with the content of the award issued. However, experience shows that there are cases in which this is the only way to “discipline” passive arbitrators.²⁶

6. Expedited Procedure

Certain types of cases, especially those with a relatively low dispute value, require particularly fast and efficient resolution. This is due both to the need to ensure cost-effectiveness of conducting them and to various business or organizational considerations arising for the entity asserting its claims in arbitration. That is why it is so important for the applicable arbitration rules to provide a legal framework for an expedited resolution of the dispute in the given case. At the same time, not all of the rules analyzed provide for the ability to apply an expedited (simplified) procedure for hearing specific cases: neither the LCIA Rules,²⁷ nor the SCC Rules do.

The Rules that provide for the admissibility of applying the expedited procedure vary widely. According to Annex 4 of the DIS Rules, in a situation of “the parties’ specific interest in accelerating the proceedings,” a simplified procedure is permissible, and in such a case “the arbitral tribunal shall hold only one oral hearing, including for the taking of evidence. An oral hearing may be dispensed with if all parties so agree,” although the Rules do not define the circumstances that can justify hearing the case in this procedure.

The Annex to the UNCITRAL Rules – UNCITRAL Expedited Arbitration Rules – gives the parties far-reaching freedom with regard to the application of the expedited procedure. According to its Article 1:

²⁶ In the literature – both Polish and foreign – it is often pointed out that the very fear of losing reputation ensures (should ensure) that arbitrators conduct the proceedings properly. See: Andrzej Szumański, in *Arbitraż handlowy. System Prawa Handlowego*, vol. 8, ed. Andrzej Szumański (Warsaw: C.H. Beck, 2015), 420 et seq.; Aslanowicz, *Pozycja prawna arbitra w arbitrażu handlowym*, 55 et seq. However, this principle is not always applied in practice because there are some arbitrators who do not perform the tasks entrusted to them anyway.

²⁷ However, the LCIA Rules provide for an expedited procedure for choosing the arbitral tribunal, because, according to Article 9.1, “in exceptional urgency, on or after the commencement of the arbitration, any party may apply to the LCIA Court for the expedited formation of the Arbitral Tribunal, including the appointment of any replacement arbitrator under Articles 10 and 11 of these Rules.”

Where 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 Expedited Arbitration Rules ('Expedited Rules'), then such disputes shall be settled in accordance with the UNCITRAL Arbitration Rules, as modified by these Expedited Rules and subject to such modification as the parties may agree.

Article 30.2 of the ICC Rules provides for the admissibility of the expedited procedure (regulated in detail in Annex VI) in the case where: "a) the amount in dispute does not exceed the limit set out in Article 1(2) of Appendix VI at the time of the communication referred to in Article 1(3) of that Appendix; or b) the parties so agree" – and thus, in principle, primarily in cases of a relatively low dispute value. A similar regulation is contained in § 5.1 of the SAKL Rules, according to which "a dispute shall be settled in expedited proceedings if the amount in dispute does not exceed PLN 50,000, unless the parties agree otherwise, in particular by deciding that the dispute is to be settled by an arbitral tribunal composed of three arbitrators," as well as in § 53.1–2 of the SAKIG Rules, according to which "where the amount in dispute does not exceed PLN 80,000.00, a fast-track procedure shall apply to dispute resolution unless the parties have agreed otherwise or unless they have not given consent to it." Furthermore, "the parties may agree that the dispute shall be resolved within the fast-track procedure also where the amount in dispute exceeds PLN 80,000."

Although, as presented above, this regulation differs significantly between the various Rules, it should rather be considered as corresponding to the requirement of the arbitrators. This is because it would not be particularly advisable to admit an expedited procedure in the consideration of cases other than at the express will of the parties in this respect, or in cases of a relatively low dispute value.

7. Securing a Claim before Initiating Proceedings

The inability to secure a claim before the initiation of the proceedings often calls into question the purpose of the later assertion of claims, as satisfaction may ultimately – after the end of the proceedings – prove to be impossible or much more difficult. Although, despite the arbitration clause, the party initiating the proceedings can usually apply to the state court for security, it is fully reasonable to expect that a party will be able (whether in advance,

in parallel or exclusively) to apply for security (also) to the competent arbitration court. Therefore, this issue seems to be all the more important in this era of current economic turbulence and increased risk of insolvency of debtors caused by both the consequences of the Covid-19 epidemic and the war in Ukraine.

The analysis of the selected Rules shows that all of them allow for security before the initiation of the proceedings, as the appropriate basis is contained in Article 26.1 of the UNCITRAL Arbitration Rules, Article 37.1 of the SCC Rules, Article 25.1 of the LCIA Rules, Article 25.1 of the DIS Rules, Article 28.1 of the ICC Rules, § 36.1 of the SAKL Rules and § 30.1 of the SAKIG Rules. Although, understandably, the procedural aspects differ in individual cases,²⁸ it is admissible to obtain appropriate security in any case in arbitration proceedings. It should therefore be acknowledged that, in this respect, there is no need for systemic changes or additions to the regulation in question.

8. Conclusions

The analysis of selected arbitration rules (albeit conducted only to a limited extent for the reasons stated at the beginning) shows that, while some issues (e.g. the principles of service, the expedited procedure for resolving cases and the admissibility of securing a claim before initiating proceedings) are regulated in a manner that satisfies the requirements of 2023, other issues (e.g. the rules of holding remote hearings or the consequences of failing to meet deadlines in arbitration, in particular the deadlines for issuing an award) would require a number of modifications and improvements. This suggests that a postulate should be presented for a broader discussion within the community – both in Poland and abroad – on the shape of the regulations in this area that would be the most comfortable for the parties to the proceedings, the arbitral tribunals and the arbitral institutions, while respecting the basic (universal) arbitration rules.

²⁸ Procedural issues related to proceedings regarding security, including primarily the issue of the admissibility or inadmissibility of the appointment of an emergency arbitrator, will not be examined here, because of the limited amount of space for this article.

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