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EXPEDITED PROCEDURE UNDER THE INTERNATIONAL CHAMBER OF COMMERCE (ICC) ARBITRATION RULES: CURRENT DEVELOPMENTS AND CHALLENGES

Master Thesis

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LIST OF ABBREVIATIONS

ACICA	Australian Centre for International Commercial Arbitration
AIAC	Asian International Arbitration Centre
CCIRF	Chamber of Commerce and Industry of Russian Federation
CIETAC	China International Economic and Trade Arbitration Commission
DIS	German Arbitration Institute (Deutsche Institution für Schiedsgerichtsbarkeit)
EPP	Expedited Procedure Provisions
HKIAC	Hong Kong International Arbitration Centre
ICAC	International Commercial Arbitration Court
ICC	International Chamber of Commerce
ICDR	International Centre for Dispute Resolution
JCAA	Japan Commercial Arbitration Association
LCIA	London Court of International Arbitration
NYC	New York Convention (Convention on the Recognition and Enforcement of Foreign Arbitral Awards)
SCAI	Swiss Chambers' Arbitration Institution
SCC	Stockholm Chamber of Commerce
SIAC	Singapore International Arbitration Centre
VIAC	Vienna International Arbitral Centre
WIPO	World Intellectual Property Organization

INTRODUCTION

Statement of topic. Although being widely criticized,[1] arbitration remains the most frequently used mechanism of cross-border dispute resolution among international businesses.[2] The reason why parties prefer arbitration is the advantages it has in comparison with litigation. Flexibility, confidentiality, arbitrator's expertise, enforceability, finality, speed and cost-efficiency were always among those features arbitration was praised for. However, nowadays, it became too slow and expensive.[3]

Being the leading arbitral institution worldwide, which has administrated more than 23 000 cases from the date of its creation in 1923, the International Court of Arbitration (further – ICC Court) has long been dealing with exploring practical ways on how to address the problem of time- and cost-efficiency. For this purpose, expedited procedure was introduced into the ICC Arbitration Rules with the amendments became effective on 1 March 2017. However, the application of expedited procedure provisions (further – EPP) can have an adverse effect on the enforceability of arbitral awards that should be considered by the arbitrators before making any procedural step.

Consequently, there is a need to define challenges the arbitral tribunal may face with, if expedited procedure applies, and to propose solutions on how to address them effectively in order to ensure the enforceability of arbitral awards without sacrificing efficiency, which constitute a subject matter of this research.

Research problem. The main problem of the master thesis can be formulated in the following way: "What consideration should be taken into account by arbitral tribunals in order to address the challenges of expedited procedure under the ICC Arbitration Rules?"

To solve the research problem, the following sub questions should be answered: 1) what is the nature of expedited dispute resolution in international arbitration? 2) what are the legal peculiarities of expedited procedure under the ICC Arbitration Rules 3) how the efficiency is balanced with the fundamental principle of party autonomy? 4) does expedited procedure give rise to due process concern?

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1 See: George Gluck, "Great Expectations: Meeting the Challenge of a New Arbitration Paradigm," *The American Review of International Arbitration* 23, 2 (2012): 231, 238-240. Also: Thomas J. Stipanowich, "Arbitration: The "New Litigation"," *University of Illinois Law Review* 2010, 1, (2010): 1-2, 8-9. etc.

2 According to 2015 Internaional Arbitration Survey: Imporvements and Innovations in International Arbitration, 90% of respondents indicated that international arbitration is their preferred dispute resolution mechanism, either as a stand-alone method (56%) or together with other forms of ADR (34%). See: "2015 International Arbitration Survey: Improvements and Innovations in International Arbitration," Queen Mary University of London, White & Case, accessed 2018 April 18, http://www.arbitration.qmul.ac.uk/research/2015/.

3 "2015 International Arbitration Survey: Improvements and Innovations in International Arbitration," Queen Mary University of London, White & Case, accessed 2018 April 18, http://www.arbitration.qmul.ac.uk/research/2015/.

Relevance. Although the idea of expedited (fast-track or accelerated) arbitration is not new[4] and has already been tested by major arbitral institutions,[5] expedited procedure under the ICC Arbitration Rules is applicable only since 1 March 2017, being relatively new development.

Taking into account that it will be automatically applicable to roughly 40% of the ICC cases,[6] the influence of expedited procedure over the ICC arbitration is hard to overestimate. In addition, as of 5 April 2018 the parties submitted 61 requests for expedited procedure application on the opt-in basis,[7] which shows the interest of users in more efficient dispute resolution.

However, in order to ensure the speed of arbitration, the EPP set opt certain mechanisms and procedural limitations that can endanger the enforceability of arbitral awards and due to the fact, the tribunal is granted broad discretionary capacity to handle the case, the role of arbitrators becomes crucial.

Therefore, considering that substantial number of disputes falls within the scope of expedited procedure application, it is vital to provide the arbitral tribunal with the guidance on how to adopt deliberate decisions ensuring the balance between party autonomy, due process and efficiency.

Review of literature. The idea of expedited (or fast-track) arbitration was subject to legal analyzes by many authors.[8] At the same time, legal peculiarities of expedited procedure under the ICC Arbitration Rules were investigated to significantly lesser extent mainly because respective provisions became effective only on 1 March 2017.

The approach taken by the ICC towards expeditious dispute resolution was firstly analyzed by Michael Bühler and Pierre Heitzmann in the article "The 2017 ICC Expedited Rules: From Softball to Hardball?"[9] Despite the fact that authors raised some concerns regarding possible implications of EPP application, practical solutions on how to address them were not proposed. Besides this, in light of expedited procedure, the influence of due process paranoia over the

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4 See: Benjamin G. Davis, Odette Lagacé and Michael Volkovitsch, "When Doctrines Meet – Fast-Track Arbitration and the ICC Experience". In *Journal of International Arbitration* 10, 4 (1993): 69.

5 To name, but a few: ACICA, CIETAC, DIS, HKIAC, ICDR, JCAA, SCC, SCIA, SIAC, VIAC.

6 According to statistical data, in 2016, 40.7% of newly filed ICC cases had an amount in dispute not exceeding USD 2,000,000 (threshold for automatic application of EPP under Article 30 of the ICC Arbitration Rules) – see: "2016 ICC Dispute Resolution Statistics," in *ICC Dispute Resolution Bulletin* 2 (2017): 113.

7 Considering that at the time of drafting of this research there was no official statistics available in this respect, the author wrote a letter to the ICC with the request to provide data regarding expedited procedure application. In the answer to author's letter, respective number was indicated (see – Annex).

8 See: Irene Welser and Christian Klausegger, "Chapter II: The Arbitrator and the Arbitration Procedure - Fast Track Arbitration: Just fast or something different?", in *Austrian Arbitration Yearbook 2009*, Christian Klausegger et al., (Vienna: Manz'sche Verlags- und Universitätsbuchhandlung, 2009), 259. Also: Rudolf Fiebinger and Christian Gregorich, "Chapter III: The Arbitration Procedure - Arbitration on Acid: Fast Track Arbitration in Austria from a Practical Perspective", in *Austrian Arbitration Yearbook 2009*, Christian Klausegger et al., (Vienna: Manz'sche Verlags- und Universitätsbuchhandlung, 2008), 237. Also: Eva Müller, "Fast-Track Arbitration: Meeting the Demands of the Next Millennium," *Journal of International Arbitration* 15, 3 (1998): 6-8. etc.

9 Michael Bühler and Pierre Heitzmann, "The 2017 ICC Expedited Rules: From Softball to Hardball?", *Journal of International Arbitration* 34, 2 (2017): 121.

conduct of arbitral proceedings was not examined. On the same premise, the article prepared by Javier Tarjuelo does not suffice as a comprehensive research on this matter.[10]

Further attempt to analyze the features of EPP was made in the Dossiers "Expedited Procedures in International Arbitration" prepared by the ICC Institute of World Business Law.[11] Although the authors have identified the challenges of expedited procedure under the ICC Arbitration Rules, the ways on how to overcome (or at least to minimize) their adverse effect, remained out of the discussion.

Finally, some guidelines for the arbitrators can be reasonably expected from the ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration as of 30 November 2017. However, besides imposing an obligation to "act fairly and impartially and ensure that each party has a reasonable opportunity to present its case",[12] it provides no further guidance on how to ensure the enforceability of arbitral awards without sacrificing efficiency, notably when parties are willing to incur additional costs in the pursuit of the victory.

Scientific novelty. Since the challenges of expedited procedure under the ICC Arbitration Rules were assessed by different authors only fragmentally without defining the solutions, this research aims to fill this gap by making comprehensive analysis of these challenges and to propose recommendations on how to address them having regard to the nature of expedited dispute resolution in international arbitration.

Practical significance. It is anticipated that expedited procedure under the ICC Arbitration Rules will become widely used among international businesses. While its application can be challenging, there are no "best practices" developed regarding the conduct of arbitration within expedited procedure. The arbitrators have no guidance on what should be done in order to ensure the enforceability of arbitral awards without sacrificing efficiency. Therefore, this research will be of an utmost importance for the arbitrators and the counsel. However, it can also be of

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[10] See: Tarjuelo, Javier, "Fast Track Procedures: A New Trend in Institutional Arbitration," *Dispute Resolution International* 11, 2 (2017): 105-116, https://www.perezllorca.com/es/actualidadPublicaciones/ArticuloJuridico/Documents/Javier%20Tarjuelo%20article.pdf.

[11] See: Yas Banifatemi, "Chapter 1: Expedited Proceedings in International Arbitration," in *Expedited Procedures in International Arbitration*, Laurent Lévy, Michael Polkinghorne (eds), (Paris: International Chamber of Commerce (ICC), 2017), 9-33. Christophe Seraglini and Patrick Baeten, "Chapter 2: Expedited Rules and the Possibility of Immediate Measures once a Tribunal is Constituted," in *Expedited Procedures in International Arbitration*, Laurent Lévy, Michael Polkinghorne (eds) (Paris: International Chamber of Commerce (ICC), 2017), 34-69. Mohamad Salahudine Abdel Wahab, "Chapter 6: Expedited Institutional Arbitral Proceedings Between Autonomy and Regulation", in *Expedited Procedures in International Arbitration*, Laurent Lévy, Michael Polkinghorne (eds), (Paris: International Chamber of Commerce (ICC), 2017), 133-157.

[12] "Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration," accessed 2018 April 19, https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf, para 87.

interest to arbitral institutions, legal scholars, law students and international businesses, who may consider choosing the ICC arbitration in their contracts.

Aim. The aim of this research is to analyze current developments of expedited procedure under the ICC Arbitration Rules in order to define the challenges it creates and to propose recommendations on how to eliminate (or at least minimize) the adverse effect of expedited procedure application on the enforceability of arbitral awards.

Research objectives. In order to achieve established goal, the following objectives have to be carried out:

1) To analyze the idea of expedited dispute resolution in international arbitration.
2) To scrutinize legal peculiarities of expedited procedure under the ICC Arbitration Rules.
3) To assess the balance established between party autonomy and efficiency.
4) To examine due process concern in expedited procedure.
5) To make the conclusions regarding current developments and challenges of expedited procedure under the ICC Arbitration Rules.
6) To propose the recommendations on how arbitral tribunal should address those challenges and what provisions should be adopted in order eliminate their adverse effect.

Methods. The following methods were used in order to achieve the aim of master thesis:

1. Logical method was applied in order to assess scientific literature and the provisions of legal acts dealing with expedited procedure. In particular, method of induction was used making the conclusions, whereas method of deduction – proposing recommendations.

2. Historical method was employed in order to establish how the idea of expedited dispute resolution has developed in international arbitration.

3. Comparative method was important due to the necessity to define legal peculiarities of expedited procedure under the ICC Arbitration Rules in comparison with similar procedures under rules of other major arbitral institutions.

4. Since expedited procedure is a complex legal category, in order to determine the challenges it can create, systematic method was used. More specifically, method of analysis was employed in order to investigate the features of expedited procedure, whereas method of synthesis – in order to define the impact it has on the enforceability of arbitral awards.

5. Teleological method was applied in order to understand policy reasons for the introduction of expedited procedure into the ICC Arbitration Rules.

6. Linguistic method was important determining the content of EPP established by different arbitral institutions worldwide.

7. Hermeneutical method was used in order to interpret the provisions on expedited procedure considering the guidelines provided by the ICC.

However, it should be noted that none of the above-mentioned methods prevails over the other and all of them were applied in complex for the purpose of the detailed analysis of the subject matter of master thesis.

The structure of the Master thesis. This research consists of the introduction, two chapters, where each comprises of two subchapters, which are divided into two sections, and conclusions with recommendations.

In the first chapter, current developments of expedited procedure under the ICC Arbitration Rules are analyzed. Thus, in the first subchapter the history of expedited dispute resolution in international arbitration is examined. In particular, the first section is dedicated to policy reasons for introduction of the expedited procedure into the ICC Arbitration Rules, whereas the second section explains how the idea of expedited dispute resolution has evolved. At the same, time, in the second subchapter, legal peculiarities of expedited procedure under the ICC Arbitration Rules are scrutinized. More specifically, the first section explains the scope of EPP application, whereas the second section analyzes the features of expedited procedure under the ICC Arbitration Rules.

Based on findings made in the previous chapter, the second chapter defines and analyzes the challenges of expedited procedure under the ICC Arbitration Rules. Thus, in the first subchapter the balance between party autonomy and efficiency is assessed. In particular, in the first section, overriding effect of EPP is examined, whereas in the second section the problem of mandatory appointment of a sole arbitrator is investigated. At the same time, the second subchapter examines due process concern in expedited procedure. More specifically, the first section assesses how to ensure reasonable opportunity to present the case pending within expedited procedure, whereas the second section explains the complexities in meeting the deadlines.

Defence statement. In order to address the challenges of expedited procedure application, adopting any procedural decision, arbitral tribunals should carefully balance party autonomy, due process and efficiency seeking to ensure the enforceability of awards without sacrificing the latter.

1. CURRENT DEVELOPMENTS OF EXPEDITED PROCEDURE UNDER THE ICC ARBITRATION RULES

Defining problematic aspects that may arise while applying any legal rules and, *a fortiori*, proposing recommendations on how to resolve them, it is necessary to analyze the content of such rules and respective practice of their application upfront. In this regard, the rules on expedited procedure are not exception.

Provided considerations bring the necessity to scrutinize legal peculiarities of expedited procedure under the ICC Arbitration Rules, in particular, the scope of its application and the distinctive features it has in comparison with "ordinary" procedure.

However, in order to make comprehensive legal analysis it would not be sufficient to examine the mere wording of expedited procedure provisions. Such approach requires understanding of their spirit and endorses the need to track how the idea of expedited proceedings in international arbitration has evolved and by what considerations the developers of EPP were driven while drafting them.

Therefore, this chapter aims at providing comprehensive analysis of current developments of expedited procedure under the ICC Arbitration Rules taking into account policy reasons for its adoption and the evolution of the idea of expedited dispute resolution in international arbitration.

1.1. Expedited Dispute Resolution in International Arbitration

Practice shows that before proceeding with the analysis of substance, it is essential to define the concept of expedited procedure. In this respect, referring to more expeditious dispute resolution, different terms are being used in international arbitration, such as: fast-track arbitration, accelerated arbitration and expedited arbitration.

Accurate summary regarding correlation between these terms was made by Yas Banifatemi.[13] Thus, fast-track arbitration is an arbitration where the parties agree in advance that in case certain type of disputes arises, "it will be resolved within a non-extendable time-limit".[14] At the same time, in expedited arbitration the parties "agree to have disputes under a contract resolved pursuant to the set of expedited arbitration rules of an institution",[15] whereas in

[13] See: Yas Banifatemi, "Chapter 1: Expedited Proceedings in International Arbitration," in *Expedited Procedures in International Arbitration*, Laurent Lévy, Michael Polkinghorne (eds), (Paris: International Chamber of Commerce (ICC), 2017), 9.

[14] Ibid.

[15] Ibid.

accelerated arbitration the parties, having a general arbitration clause, after the dispute has arisen, agreed that "arbitration proceeds at an "accelerated" pace".[16]

This summary clearly shows that although the distinction between all three types of proceedings is based solely on technical criteria (the way parties agreed to boost the proceedings), the idea remains the same: to achieve more expeditious dispute resolution in comparison with "conventional" arbitration. Notably, the means by which parties reach this effect are also the same: shortened time-limits, limited number and length of submissions, conduct of single hearing (or none at all), limited document production etc. Therefore, setting aside the way parties agreed to boost the proceedings, the terms "fast-track arbitration", "accelerated arbitration" and "expedited arbitration" are considered synonyms.[17]

It is important to note that the ICC Arbitration Rules contain none of these terms. Instead, the notion "expedited procedure" is used,[18] which seems to be more accurate, because unlike "expedited arbitration", the word "procedure" clearly underlines the fact that it "is not a distinct system of arbitration, but rather a general characterization for an accelerated arbitral procedure".[19]

In addition, one should not forget that besides boosting effect expedited procedure brings, it simultaneously reduces the costs of arbitral proceedings that is another important thing businesses consider before choosing arbitration.

Summing up, expedited dispute resolution in international arbitration refers to a special form of arbitral proceedings conduct, which due to certain limitations imposed, stands for more expeditious and, therefore, more cost-efficient dispute resolution in comparison with "conventional" arbitration.

1.1.1. Policy Reasons for Introduction

Speaking about expedited procedure in international arbitration, one can reasonably object that following such logic it is possible to claim that water is wet and salt is salty. Indeed, by its nature, arbitration is an alternative dispute resolution (ADR) mechanism and although it has adjudicative character,[20] it was created in contrast to litigation. Therefore, arbitration should be expeditious and cost-effective by definition. Unfortunately, it is no longer the case.

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16 Ibid.
17 Ibid.
18 See: Appendix 6 to the ICC Arbitration Rules as of 1 March 2017.
19 Irene Welser and Christian Klausegger, "Chapter II: The Arbitrator and the Arbitration Procedure - Fast Track Arbitration: Just fast or something different?", in *Austrian Arbitration Yearbook 2009*, Christian Klausegger et al., (Vienna: Manz'sche Verlags- und Universitätsbuchhandlung, 2009), 259
20 Gary B. Born, *International Commercial Arbitration (Second Edition)* (Alphen aan den Rijn, the Netherlands: Kluwer Law International, 2014), 2127.

Although arbitration remains the most preferred method of international dispute resolution,[21] it no longer meets parties' expectations as an affordable and fast dispute resolution mechanism.[22] In this respect, the findings of Krogerus[23] statistical analysis, based on the responses from 23 Finnish companies, are indicative: only 6% of respondents[24] treated arbitration as faster and more affordable than litigation, whereas for 72% of respondents arbitration is faster, but more expensive alternative to litigation.[25] In addition, it is important to note that for almost 50% of respondents arbitral proceedings take on average over 12 months,[26] which makes arbitration inappropriate, especially for those cases, where fast dispute resolution is of crucial importance.[27]

Indeed, the fact that nowadays arbitration became costly and slow is without controversy. Thus, according to the findings of 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration respondents named cost (68%) and lack of speed (36%) among the worst features of international arbitration.[28]

Defining the reasons for this tendency, authors indicate several factors. Firstly, it is so called "guerrilla tactics",[29] employed by the parties (most frequently, by the respondents) with the single aim to delay the proceedings. It can be realized by broad document production, extensive submissions with endless exhibits, requests for extension of time limits etc., which parties can always justify by reference to the principle of equal treatment and possibility to present the case. Secondly, unlike state judges that usually have only general competence, arbitrators have greater expertise regarding the matter in dispute and the reputation to lose. Therefore, parties tend to submit much more detailed information than they would do in judicial proceedings. Thirdly, arbitration is a creature of parties' consent, by which arbitrators are empowered to resolve the

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21 According to the findings of 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration made by Queen Mary University of London and White & Case, 90% of respondents mentioned internaional arbitration as their preferred dispute resolution mechanism, either as a stand-alone method (56%) or together with other ADR (34%). See: "2015 International Arbitration Survey: Improvements and Innovations in International Arbitration," Queen Mary University of London, White & Case, accessed 2018 April 18, http://www.arbitration.qmul.ac.uk/research/2015/.

22 "Improving the Efficiency of Arbitration," accessed: 2018 April 20, https://www.krogerus.com/images/uploads/pdf/Improving-the-Efficiency-of-Arbitration.pdf

23 Business law firm in Finland.

24 Speaking about surveys findings, the term "respondent" is used in the meaning of "interviewee".

25 "Improving the Efficiency of Arbitration," accessed: 2018 April 20, https://www.krogerus.com/images/uploads/pdf/Improving-the-Efficiency-of-Arbitration.pdf

26 Ibid.

27 For example, in disputes that arise between signing and closing of M&A transaction, where non of the parties feels responsible for the operation of traget that can be highly detrimental to its business and can lead to the decrease in target's value. *See*: Eliane Fischer and Michael Walbert, "Chapter I: The Arbitration Agreement and Arbitrability, Efficient and Expeditious Dispute Resolution in M&A Transactions", in *Austrian Yearbook on International Arbitration 2017*, Christian Klausegger et al., (Vienna: Manz'sche Verlags- und Universitätsbuchhandlung, 2017), 32.

28 "2015 International Arbitration Survey: Improvements and Innovations in International Arbitration," Queen Mary University of London, White & Case, accessed 2018 April 18, http://www.arbitration.qmul.ac.uk/research/2015/.

29 Günther J. Horvath and Stephan Wilske, *Guerrilla Tactics in International Arbitration* (Alphen aan den Rijn, the Netherlands: Kluwer Law International, 2013), 3.

dispute. In addition, arbitrators are being paid by the parties and, therefore, they are often expected to review extensive submissions, despite the fact that "the case could have been presented in a shorter and more precise manner without sacrificing quality".[30]

However, despite seeming paradoxical, the main contributor to the time and cost in arbitral proceedings is a fundamental principle of party autonomy. The flexibility it brings provides not only the freedom to employ more efficient, expeditious and cost-effective proceedings, but also the possibility to elaborate more "judicial" procedures, if parties consider it appropriate for handling the case.[31] Practice shows that although being not efficient (or even detrimental), generally parties tend to choose the latter option and there is a purely psychological reason for this.

Negotiating the contract, parties are being excited about future cooperation, they treat each other as reliable contractors, so that they do not invest too much attention into carefully drafting arbitration clauses with the intention to ensure the efficiency of dispute resolution. Moreover, at that stage, it is difficult to predict what issues may give rise to future disputes, making worthless the process of defining non-extendable procedural deadlines in advance.

At the same time, when parties have already submitted the dispute to an arbitration, it means that amicable ways of dispute settlement already failed to succeed and the confrontation between former business partners reached its extreme. In such circumstances, it is very unlikely that the parties will cooperate during the proceedings and will reach mutual agreement regarding efficient conduct of the proceedings. Obviously, here is a time for counsel to intervene and to take care about the efficiency of arbitration. However, it does not happen as well.

Counsel are reluctant to put themselves into any procedural limitations, by which they may be captured afterwards. Moreover, expeditious proceedings requires making particular dispute a priority by postponing any other work. In addition, it should not be forgotten that usually counsel are being paid according to hourly rates spent on the case, which means that the faster dispute resolution will be, the less fee counsel will get.

In order to confirm expressed allegations, the reference can be made to the findings of 2010 International Arbitration Survey: Choices in International Arbitration, according to which respondents considered disclosure of documents (24%), written submissions (18%), constitution of the tribunal (17%) and hearings (15%) as the main procedural stages contributing to the delay.[32]

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30 Irene Welser and Christian Klausegger, "Chapter II: The Arbitrator and the Arbitration Procedure – Fast Track Arbitration: Just fast or something different?", in *Austrian Arbitration Yearbook 2009*, Christian Klausegger et al., (Vienna, Austria: Manz'sche Verlags- und Universitätsbuchhandlung, 2009), 260.

31 Gary B. Born, *International Commercial Arbitration (Second Edition)* (Alphen aan den Rijn, the Netherlands: Kluwer Law International, 2014), 2127-2128.

32 "2010 International Arbitration Survey: Choices in International Arbitration." Queen Mary University of London, White & Case. Accessed 2018 April 22, http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2010_InternationalArbitrationSurveyReport.pdf.

Bearing in mind that these factors are very much within the control of the parties,[33] it seems reasonable to conclude that it is the parties themselves who contribute most to the length of proceedings governed by the principle of party autonomy.

In spite of parties' awareness of this fact,[34] they think that it is the responsibility of the tribunal and arbitration institution to ensure expeditious conduct of the proceedings by exercising control over the procedure.[35] As a result, despite the fact users should blame only themselves for having costly and excessively long proceedings, they flag that arbitration "must become more streamlined and disciplined to provide an entirely effective form of dispute resolution".[36]

Speaking about the costs in international arbitration, it is necessary to note the following. Before publishing the report on controlling time and costs in arbitration, the ICC Commission on Arbitration made a research, which revealed that 82% of the costs of an arbitration were party costs, including lawyers' fees and expenses, expenses related to witness and expert evidence, and other costs incurred by the parties for the arbitration, whereas only 18% of costs covered arbitrators fees and expenses as well as the ICC administrative expenses.[37] These findings explicitly show that overwhelming majority of costs are born by the parties themselves and, therefore, in order to minimize the costs of arbitration special emphasis should be made on the reduction of costs connected with the parties' presentation of the case.[38] On this premise, it seems unjustifiable to blame arbitration for being expensive.

However, the paradox, applicable to the question of time in international arbitration, is reserved in relation to the matter of costs: although excessive costs of arbitration is not the fault of either the tribunals or arbitration institutions, it is their responsibility to define the solution on how to address this challenge. The reason for such situation derives from the very nature of arbitration. As far as in the essence it constitutes a dispute resolution *service*, apparently, it obeys to all laws of the market and one on them is a competition: not only from the side of litigation, but also from other ADR mechanisms and, notably, between different arbitration institutions worldwide.

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33 Ibid.

34 In this respect, it should be noted that 31% of respondents consider that parties are the main contributors to the length of proceedings. See: "2010 International Arbitration Survey: Choices in International Arbitration." Queen Mary University of London, White & Case. Accessed 2018 April 22, http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2010_InternationalArbitrationSurveyReport.pdf.

35 According to 2010 International Arbitration Survey: Choices in International Arbitration 59% of respondents support the idea that it is either the tribunal or the arbitration institution, who is in the best position to render arbitration expeditious.

36 "2010 International Arbitration Survey: Choices in International Arbitration." Queen Mary University of London, White & Case. Accessed 2018 April 22, http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2010_InternationalArbitrationSurveyReport.pdf.

37 "Effective Management of Arbitration A Guide for In-House Counsel and Other Party Representatives," accessed: 2018 April 24, https://cdn.iccwbo.org/content/uploads/sites/3/2017/05/effective-management-of-arbitration-icc-guide-english-version.pdf.

38 Ibid.

In order to increase the competitiveness of arbitration, it was necessary to address the issue of its efficiency by exercising effective control over the time and costs. Thus, the idea of expedited procedure in international arbitration was developed.

Apparently, this solution was also found referring to the nature of arbitration that initially was created as fast and affordable dispute resolution mechanism.[39] In this respect, it seems reasonable to claim that expedited procedure is a move to the "basics" of arbitration.[40]

However, nowadays this term is used as opposing so-called "conventional" arbitration.[41] Such terms allocation can be subject to the debate. As previous analysis shows, in the essence, it is expedited procedure that is "conventional", because it is based on the ideas that were attributed to an arbitration from the outset. On this premise, one might allege that it is expedited procedure that should be called "conventional", whereas current proceedings should refer to "judicialized", "procedurally laborious" or "delayed" arbitration. Indeed, it would be justifiable to use respective terms. However, existing inaccuracy can also be eliminated by simple presumption that "conventional" arbitration does not refer to an arbitration people had twenty years ago,[42] but to the arbitration the parties used to have now: expensive and time-consuming.

Finally, it is important to note that despite raising deep concern regarding time and cost in international arbitration, the utmost efficiency is not a thing the parties want most.[43] Indeed, when parties are already in dispute, the only thing that matters is winning the case rather than cheap and fast dispute resolution.[44] As a result, the problem of balancing so-called "magic triangle" between efficiency, party autonomy and due process arises, being still unresolved. This problem will be discussed in Chapter 2 of this research in more detail.

To sum up, expedited procedure was developed in order to increase the efficiency of arbitral proceedings, in particular, by solving the issues of time and cost, which were treated by the users among the worst features of international arbitration and constitute the policy reasons for its introduction.

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39 See: Irene Welser, "Fast Track Proceedings, Expedited Procedure and Emergency Arbitrator – Pros and Cons," in *The Challenges and the Future of Commercial and Investment Arbitration*, Beata Gessel-Kalinowska vel Kalisz (Warsaw: Lewiatan Court of Arbitration, 2015), 215.

40 Yas Banifatemi, "Chapter 1: Expedited Proceedings in International Arbitration," in *Expedited Procedures in International Arbitration*, Laurent Lévy, Michael Polkinghorne (eds), (Paris: International Chamber of Commerce (ICC), 2017), 22.

41 Eliane Fischer and Michael Walbert, "Chapter I: The Arbitration Agreement and Arbitrability, Efficient and Expeditious Dispute Resolution in M&A Transactions", in *Austrian Yearbook on International Arbitration 2017*, Christian Klausegger et al., (Vienna: Manz'sche Verlags- und Universitätsbuchhandlung, 2017), 24.

42 Irene Welser and Christian Klausegger, "Chapter II: The Arbitrator and the Arbitration Procedure - Fast Track Arbitration: Just fast or something different?", in *Austrian Arbitration Yearbook 2009*, Christian Klausegger et al., (Vienna: Manz'sche Verlags- und Universitätsbuchhandlung, 2009), 260.

43 Christopher Newmark, "Chapter 6: Controlling Time and Costs in Arbitration," in *The Leading Arbitrators' Guide to International Arbitration*, Lawrence W. Newman, Richard D. Hill (New York, NY: Juris Publishing, 2008), 81.

44 Ibid.

1.1.2. Moving from Softball to Hardball rule

Although expedited procedure as such was introduced into the ICC Arbitration Rules only with the amendments adopted on 20 October 2016, which entered into force on 1 March 2017,[45] the idea of expedited dispute resolution does not constitute a new trend either worldwide or within the ICC arbitration.[46]

Indeed, the ICC has long been dealing with exploring practical ways to reduce time and costs in international arbitration. Meticulous analysis of the developments, made by the ICC in this respect, shows that during its evolution the idea of expedited dispute resolution went through four stages. Therefore, examining the movement from softball to hardball rule with respect to expedited procedure, it seems reasonable to keep referred separation.

First stage (1992-1998): absence of regulation.

The ICC developments regarding expedited dispute resolution may be tracked from the beginning of the 1990th.[47] Although this stage is characterized by the absence of any reference to the expeditious dispute resolution in the Arbitration Rules,[48] already at that time the ICC had the opportunity to administrate so-called fast-track arbitrations though on case-by-case basis. In this regard, the reference can be made to famous Panhandle case[49] and Formula One Racing case,[50] which were rather exceptions.

To introduce briefly, in Panhandle case the contract regarding long-term gas supply between Canada and the United States provided the possibility to resolve a dispute regarding price determination within two months. After the dispute arose, the parties extended this time limit by one week and the final award was issued within nine weeks after the submission of the request for arbitration.

It became possible for two reasons. Firstly, the tribunal limited itself solely to the matters of price determination, to which fast-track procedure was applicable, and did not investigate other issues such as the validity of the contract, which were not subject to this procedure under the arbitration clause. Secondly, during the proceedings, the parties treated the deadlines with utmost respect and, therefore, have never asked the tribunal about time extensions.

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45 See: Article 30 and Appedix VI to the ICC Arbitration Rules as of 1 March 2017.

46 Christophe Seraglini and Patrick Baeten, "Chapter 2: Expedited Rules and the Possibility of Immediate Measures once a Tribunal is Constituted," in *Expedited Procedures in International Arbitration*, Laurent Lévy, Michael Polkinghorne (eds) (Paris: International Chamber of Commerce (ICC), 2017), 35.

47 Benjamin G. Davis, Odette Lagacé and Michael Volkovitsch, "When Doctrines Meet – Fast-Track Arbitration and the ICC Experience". In *Journal of International Arbitration* 10, 4 (1993): 69.

48 "International Chamber of Commerce: Rules for the ICC Court of Arbitration, (1975 Revision)," *International Legal Materials*, 15, 2 (1976).

49 Case 7385/7402 (1992), *ICC International Court of Arbitration Bulletin* 8, 1 (1997): 56.

50 Nigel Blackaby et al., *Redfern and Hunter on International Arbitration*. (Oxford: Oxford University Press, 2015), 364.

In this regard, Formula One Racing case is even more striking. The name of the case reflects very accurately not only the fact that the dispute was regarding the paint of Formula One racing cars, but also it underlines the speed of an arbitration conduct that took roughly 1 months. In this case, the parties exchanged submissions within seven-day intervals, whereas the draft award was finalized by the tribunal within 48 hours after the hearing and was approved by the ICC Court on the same day at an emergency session. However, what surprises most is that three-member tribunal was constituted during 7 days from the submission of the request for arbitration, which coincided with Christmas holidays (25 December 1992 – 1 January 1993).

These cases show that it is possible to achieve utmost efficiency in arbitration without detailed rules on expedited procedure. Nevertheless, it is necessary to admit that expeditious character of the disputes at issue was achieved due to cooperative attitude from all sides: parties, their counsel, the ICC and arbitral tribunal. Unfortunately, practice shows that such collaboration does not happen frequently and, therefore, these cases are rather exceptions. At the same time, after this success, the need to tackle the problem of time and costs in international arbitration became obvious.

Second stage (1998-2012): modifying time limits.

The development of technologies permitting almost instantaneous communication between international businesses throughout the world increased the pressure for fast dispute resolution.[51] Therefore, in order to enhance the satisfaction of users, the ICC decided to revise its rules on arbitration. The introduced amendments came into force in 1998 and first ever reflected the idea of expeditious dispute resolution.

Although under the ICC Arbitration Rules 1998 expedited procedure was not regulated in detail, the possibility to modify time limits was expressly provided. Thus, according to Article 32 parties might expedite proceedings by shortening time limits set out by the Rules.[52]

Speaking about the reasons why fast-track arbitration was regulated to the extent set out in Article 32, authors indicate the following two factors.[53] Firstly, it seemed too difficult to create a standardized expedited procedure for all categories of disputes that may arise considering fairness, due process and the Court's supervisory responsibilities. Secondly, the ICC Arbitration Rules already contained relatively stringent procedural time limits.[54] Therefore, due to the freedom

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51 Rudolf Fiebinger and Christian Gregorich, "Chapter III: The Arbitration Procedure - Arbitration on Acid: Fast Track Arbitration in Austria from a Practical Perspective", in *Austrian Arbitration Yearbook 2009*, Christian Klausegger et al. (Vienna: Manz'sche Verlags- und Universitätsbuchhandlung, 2008), 239.

52 "Rules of Arbitration of the International Chamber of Commerce (1998 Revision)," accessed: 2018 April 26, https://www.trans-lex.org/750200/_/icc-arbitration-rules-1998/#head_40

53 Rudolf Fiebinger and Christian Gregorich, "Chapter III: The Arbitration Procedure - Arbitration on Acid: Fast Track Arbitration in Austria from a Practical Perspective", in *Austrian Arbitration Yearbook 2009*, Christian Klausegger et al. (Vienna: Manz'sche Verlags- und Universitätsbuchhandlung, 2008), 239-240.

54 For example, 30 days for filling the Answer (Article 5), six months for rendering an award (Article 24) etc.

of parties to tailor-make the proceedings as they consider appropriate, there was no need to adopt special rules on expedited procedure.

In addition, it is important to note that the right to modify time limits under Article 32 had certain limitations. In case the parties agreed to shortened deadlines before the constitution of the tribunal, such changes were considered valid, although the ICC Court could extend these deadlines, if it was necessary in order for the Court and the tribunal to fulfill their responsibilities. At the same time, if parties have agreed to expedite the proceedings after the tribunal was constituted, such changes did not become valid automatically being subject to the tribunal's approval.

There were two reasons for the introduction of these "backdoor" provisions. Firstly, once the parties have agreed to shortened deadlines in advance, the dispute may appear unsuitable for fast proceedings due to its complexity or specificity, whereas after the commencement of an arbitration it is unlikely that the parties will reach an agreement to turn back to the ordinary procedure. Secondly, even if it seems reasonable to resolve a dispute within fast proceedings, the deadlines agreed by the parties can be so shortened that makes impossible for the tribunal to meet them without sacrificing the quality of an award.[55]

To summarize, the idea of fast dispute resolution dominating at this stage can be formulated as follows: subject to some limitations, arbitral proceedings are as expeditious as the parties wish them to be.

Unfortunately, this approach has not succeeded. The provisions of Article 32 did not eliminate the problem of time and costs in international arbitration and, therefore, did not remove the critics. Due to the fact, the rules on arbitration "contained procedural safeguards, which recalcitrant parties could exploit to cause delay and disruption"[56] (e.g. part 2 of Article 5),[57] the users and national committees requested the ICC to adopt so-called "simplified" procedure for "small" claims in order to prevent the parties from abusing their rights.

To respond to this concern, already in 2001, the ICC Court formed a Task Force comprised of nearly 60 representatives from different countries. Although the Task Force faced great difficulty in defining what constitutes a "small claim", with suggestions varying from 5,000

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55 E.g. to render an award on the same day the hearings were closed.

56 Lucja Nowak and Nata Ghibradze, "The ICC Expedited Procedure Rules – Strengthening the Court's Powers", Kluwer Arbitration Blog, 2016, http://arbitrationblog.kluwerarbitration.com/2016/12/13/reserved-for-13-december-the-icc-expeditedprocedure-rules-strengthening-the-courts-powers/.

57 Part 2 of Article 5 of the ICC Arbitration Rules 1998 provided the Secretariat's power to extend 30-day time limit for submission of an Answer to the Request for Arbitration, if Respondent's application for the extension contains the comments concerning the number of arbitrators and their choice. Apparently, the respondents can use this opportunity by intentonally commenting these facts in order to get an extension and, therefore, to delay the proceedings. See: "Rules of Arbitration of the International Chamber of Commerce (1998 Revision)," accessed: 2018 April 26, https://www.trans-lex.org/750200/_/icc-arbitration-rules-1998/#head_40

USD to 5 million USD, it produced the Guidelines for Arbitrating Small Claims under the ICC Rules of Arbitration, published in March 2003.[58]

In parallel, in 2002 the ICC Secretariat issued a practical "Note on Expedited ICC Arbitration Procedure", in which it reminded that "expedited or fast-track arbitration proceedings have always been possible under the ICC Rules",[59] and if the parties want to boost dispute resolution, they can do it pursuant to the procedure set out in Article 32.

Further, in 2007 the ICC Arbitration Commission published the report "Techniques for Controlling Time and Costs in Arbitration",[60] where the emphasis has been switched from simple reminder to the encouragement of the parties to consider fast-track procedures when drafting arbitration clause.[61] In addition, the arbitral tribunals were advised to examine whether the hearing is necessary or it is possible to decide the case based on documents alone in order to "save significant costs and time".[62] Apparently, similar to previous acts, the report had only recommendatory character. Thus, it was up to the users to decide whether to follow its provisions.

Although the ICC Arbitration Rules enabled the parties to tailor-make the procedure according to their specific needs, the Commission found that usually parties do not use this opportunity, but rather "apply boilerplate solutions or simply decide procedural matters piecemeal as the case progresses",[63] which has been seen as a cause for the increase of time and cost in many arbitrations.

Therefore, due to ineffectiveness of Article 32 provisions and in order to improve the time- and cost-efficiency of arbitral proceedings, the Commission began the revision of the ICC Arbitration Rules in 2009. The revised rules came into force on 1 January 2012 and introduced new approach towards expedited dispute resolution, thus, flagging the start of the next stage.

Third stage (2012-2017): from a right to an obligation.

Speaking about the ICC Arbitration Rules 2012 it is important to note that although the parties' right to modify time limits was reserved,[64] further developments were made aimed at

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58 Louise Barrington, "ICC's New Guidelines for Arbitrating "Small" Claims: A View from Behind the Scenes in a Global Task Force," *LAWASIA* (May 2003), 11. http://www.aculextransnational.com/pdf/LB_2003_01_ICCs_New_Guidelines_for_Arbitrating_Small_Claims.pdf.

59 Christophe Seraglini and Patrick Baeten, "Chapter 2: Expedited Rules and the Possibility of Immediate Measures once a Tribunal is Constituted," in *Expedited Procedures in International Arbitration*, Laurent Lévy, Michael Polkinghorne (eds) (Paris: International Chamber of Commerce (ICC), 2017), 35.

60 "Techniques for Controlling Time and Costs in Arbitration". ICC Publication No. 843. Accessed 2018 April 26. http://gjpi.org/wp-content/uploads/icc-controlling-time-and-cost.pdf

61 Ibid, para 6.

62 Ibid, para 36.

63 "Effective Management of Arbitration A Guide for In-House Counsel and Other Party Representatives," 4, accessed: 2018 April 24, https://cdn.iccwbo.org/content/uploads/sites/3/2017/05/effective-management-of-arbitration-icc-guide-english-version.pdf.

64 The provisions of Article 32 of the ICC Arbitration Rules 1998 were simply paraphrased in Article 38 without any change of their content.

ensuring efficiency of arbitration conduct. Thus, new provisions imposed a formal obligation on the parties and, notably, the tribunal to "make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute".[65]

Apparently, this obligation aimed at ensuring the application of tailor-making process before resolving each dispute as far as previously it was employed by the users as an exception.[66] At the same time, the emphasis has been switched from the parties alone, who were responsible for expeditious dispute resolution before,[67] to both the parties and arbitral tribunal. In fact, this change was not accidental. Already in 2010 the users have seen arbitrators' proactivity as an effective mechanism to limit cost and delay, on the one hand, and to reduce the risks of later award's challenge, on the other.[68] Imposing an obligation to conduct the proceedings expeditiously and cost-effectively, the ICC, thus, embodied active involvement of an arbitrator into the procedure and leaving the flexibility on how to best address the issues in each case.[69]

At the same time, it is necessary to admit that already prior to the adoption of the ICC Arbitration Rules 2012 careful consideration was given to the introduction of simplified procedure for small claims. However, this idea was not retained due to the same reasons as before: uncertainty regarding the issue whether such proceedings be should mandatory or optional, difficulty in defining what constitutes "small" claims (in particular, whether the amount in dispute should matter and if yes, what should be the threshold) and fear of the awards being set aside due to peculiarities of the proceedings conduct.[70]

Despite these considerations, shortly after the ICC Arbitration Rules 2012 were introduced, the overwhelming majority of users explicitly demonstrated a wish to have simplified procedures for small claims included in institutional rules[71] that predefined further ICC developments in this respect.

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65 Part 1 Article 22 of the ICC Arbitration Rules 2012.

66 "Effective Management of Arbitration A Guide for In-House Counsel and Other Party Representatives," 4, accessed: 2018 April 24, https://cdn.iccwbo.org/content/uploads/sites/3/2017/05/effective-management-of-arbitration-icc-guide-english-version.pdf.

67 See: Article 32 of the ICC Arbitration Rules 1998.

68 In this respect, the reference should be made to the findings of 2010 International Arbitration Survey: Choices in International Arbitration, according to which parties prefer a pro-active case management style rather than a deferential or reactive style (43% vs. 21%). Moreover, the surveey showed that on of the top reasons why parties were being disappointed with an arbitrator was excessive flexibility (failure to control the process) – 12%.

69 Thus, part 1 Article 24 of the ICC Arbitration Rules 2012 required from the tribunal to convene a case management conference at the outset of arbitration and to consult the parties on procedural measures, including those case management techniques listed in Appendix IV. At the same time, part 2 Article 22 left on a tribunal's discretion the adoption of any procedural measures unless they are contrary to any agreement of the parties.

70 Michael Bühler and Pierre Heitzmann, "The 2017 ICC Expedited Rules: From Softball to Hardball?", *Journal of International Arbitration* 34, 2 (2017): 125.

71 The findings of 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration showed that 92% of respondents favored the inclusion of simplified procedures in institutional rules for claims under a certain value either as a mandatory (33%) or as an optional feature (59%) – "2015 International Arbitration Survey: Improvements and Innovations in International Arbitration," Queen Mary University of London, White & Case, accessed 2018 April 18, http://www.arbitration.qmul.ac.uk/research/2015/.

Fourth stage (2017-today): expedited procedure comes into play.

In order to meet parties' demand for streamlined arbitration, the ICC introduced the amendments into the Arbitration Rules, which came into force on 1 March 2017 and first ever incorporated the set of rules regarding the expedited procedure conduct.[72]

Apparently, by doing so, the approach towards the problem of time and costs in arbitration has been radically changed. Taking into account that the emphasis on the parties' flexibility in ensuring efficiency of arbitral proceedings by using case management techniques defined in the 2012 Rules has failed to bring the intended result, the ICC decided (or even was forced) to set up predetermined procedural rules applicable to certain categories of disputes, thus, releasing the parties from tailor-making the proceedings. This development indicated the shift towards "hardball" approach regarding the efficiency of arbitration conduct as oppose to "softball" approach, which existed before.[73]

However, it is important to note that besides increasing the efficiency of the proceedings, authors indicate at least three other aims of expedited procedure under the ICC Arbitration Rules: to maintain the quality of awards, to protect party autonomy and to ensure the enforceability of awards by avoiding to jeopardise due process and the right to a fair trial.[74]

In order to assess whether existing rules provide the effective tools required to achieve these goals and to define what additional safeguards should be employed by arbitrators, closer look should be given to legal peculiarities of expedited procedure under the ICC Arbitration Rules, which will be examined in the next subchapter of this research.

In conclusion, it is worth mentioning that the idea of expedited dispute resolution has long been discussed within the ICC, which can be tracked through the changes made to its rules on arbitration. For a long time the emphasis was made on the parties' ability to tailor-make the proceedings to their needs using specific guidelines. Eventually, this approach proved to be ineffective in dealing with efficiency during the arbitral proceedings. Therefore, with the amendments to its Arbitration Rules as of 1 March 2017, the ICC shifted to so-called "hardball" rule by introducing self-designed expedited procedure.

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[72] See: Article 30 and Appedix VI to the ICC Arbitration Rules as of 1 March 2017.

[73] The distinction between "softball" and "hardball" approaches towards the problem of time and costs in international arbitration was made by Michael Bühler and Pierre Heitzmann. Thus, according to the authors, "softball" approach leaves at the parties' and/or arbitrator's discretion the issue on how to best address the problem of time and costs, based on the trust in their ability to tailor-make the process to own needs. At the same time, "hardball" approach is characterized by the existence of predetermined procedural rules that should be applicable in case the dispute falls within the scope of their application and which, therefore, limit parties' flexibility. See: Michael Bühler and Pierre Heitzmann, "The 2017 ICC Expedited Rules: From Softball to Hardball?", *Journal of International Arbitration* 34, 2 (2017): 124.

[74] Christophe Seraglini and Patrick Baeten, "Chapter 2: Expedited Rules and the Possibility of Immediate Measures once a Tribunal is Constituted," in *Expedited Procedures in International Arbitration*, Laurent Lévy, Michael Polkinghorne (eds) (Paris: International Chamber of Commerce (ICC), 2017), 37.

1.2. Legal Peculiarities of Expedited Procedure under the ICC Arbitration Rules

Nowadays, almost all major arbitral institutions have adopted the rules on expedited procedure. In this regard, LCIA Arbitration Rules as of 1 October 2014 constitute a notable exception.

However, it is necessary to admit that although these rules do not contain specific provisions regarding expedited procedure, the possibility of the parties to faster the process is reserved.[75] It means that LCIA continues to stick to "softball" approach[76] towards the issue of time and costs by ensuring parties' flexibility to customize the proceedings, on the one hand, and imposing an obligation to conduct the proceedings in efficient and expeditious manner,[77] on the other.

Although this approach is very similar to those employed by the ICC Arbitration Rules 2012,[78] which proved to be ineffective,[79] its usage can be justified by at least two reasons derived from the roots of English legal tradition. Firstly, it is a sanctity of the principle of party autonomy.[80] Drafting an arbitration clause, parties consent to the institutional rules by adhesion, therefore, to set up the special procedure for expedited dispute resolution would mean to limit parties' flexibility in defining the means on how to diminish time and costs. In this respect, it is also doubtful that arbitral institutions are better aware of parties' interests and their view on what is considered efficient during the proceedings. Secondly, the provisions regarding expedited procedure, as defined by different arbitration rules, limit document production and conduct of the hearing (as the most time-consuming stages of arbitration),[81] which is incompatible with the tradition of full disclosure and detailed witness examination attributed to English legal system.

Notwithstanding the provisions of LCIA Arbitration Rules 2014, it seems reasonable to claim that the adoption of the rules on expedited procedure has become a trend among arbitral institutions. However, it should be noted that although expedited procedure aims at making arbitral proceedings more efficient, the ways of its introduction substantially differ.

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75 "Frequently Asked Questions," London Court of International Arbitration, accessed 2018 April 27, http://www.lcia.org/Frequently_Asked_Questions.aspx#Fast-Track.

76 The difference between "softball" and "hardball" approach towards the issue of time and costs in arbitration was explained in Section 1.1.2.

77 Paras 14.4-14.5 of LCIA Arbitration Rules 2014 (See: "LCIA Arbitration Rules (2014)," accessed 2018 April 27, http://www.lcia.org/dispute_resolution_services/lcia-arbitration-rules-2014.aspx).

78 Articles 22, 24 and 38 of the ICC Arbitration Rules 2012 (See: "Rules of Arbitration of the International Chamber of Commerce (as of 1 January 2012)," ICC Publication 850 E, accessed 2018 April 27, http://www.lalive.ch/data/document/Arbitration_and_ADR_Rules_ENGLISH.pdf)

79 This issue was discussed in detail in Section 1.1.2.

80 More generally, freedom of contract.

81 "2010 International Arbitration Survey: Choices in International Arbitration." Queen Mary University of London, White & Case. Accessed 2018 April 22, http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2010_InternationalArbitrationSurveyReport.pdf.

Thus, some arbitral institutions, such as SCC, [82] ACICA,[83] AIAC[84] (formerly known as KLRCA)[85] and WIPO,[86] adopted a separate set of rules for expedited procedure, whereas others (e.g. DIS,[87] ICDR,[88] VIAC,[89] SCAI,[90] ICAC,[91] CCIRF,[92] SIAC,[93] CIETAC,[94] HKIAC,[95] JCAA[96] etc.) preferred to incorporate respective provisions into the existing rules on arbitration.

In this respect, the ICC took a later approach defining the basic principles of expedited procedure applicability in Article 30 and providing detailed rules governing its conduct in Appendix VI of the Arbitration Rules, which collectively refer to as "Expedited Procedure Provisions" (EPP).[97]

Apparently, regardless of the method of introduction, expedited procedure administrated by each arbitral institution has other legal peculiarities, which comprise from a different scope of

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[82] See: "2017 Rules for Expedited Arbitrations of Arbitration Institute of the Stockholm Chamber of Commerce," accessed 2018 April 27, http://www.sccinstitute.com/media/178161/expedited_arbitration_rules_17_eng__web.pdf

[83] See: "ACICA Expedited Arbitration Rules (2016)," accessed 2018 April 27, https://acica.org.au/wp-content/uploads/Rules/2016/ACICA-Expedited-Arbitration-Rules-2016.pdf

[84] See: "Fast Track Arbitration Rules of Asian International Arbitration Centre (2018)," accessed 2018 April 27, https://aiac.world/wp-content/arbitration/AIAC-Fast-Track-Arbitration-Rules-v3.pdf

[85] Kuala Lumpur Regional Centre for Arbitration.

[86] See: "WIPO Expedited Arbitration Rules (2014)," accessed 2018 April 27, http://www.wipo.int/edocs/pubdocs/en/wipo_pub_446.pdf

[87] Speaking about DIS, it should be noted that this arbitral institution has shifted from having a separate set of rules on expedited procedure (DIS-Supplementary Rules for Expedited Proceedings as of April 2008) to incorporating them into Annex 4 of the Arbitration Rules as of 1 March 2018 (See: "2018 DIS Arbitration Rules," accessed 2018 April 27, http://www.disarb.org/upload/bgbl/2018-DIS-Arbitration-Rules.pdf).

[88] Articles E-1–E-10 of ICDR International Arbitration Rules as of 1 June 2014 (See: "ICDR International Arbitration Rules," accessed 2018 April 27, https://www.adr.org/sites/default/files/ICDR%20Rules_0.pdf).

[89] Article 45 of Vienna Rules 2018 (See: "Rules of Arbitration of Vienna International Arbitral Centre," accessed 2018 April 27, http://www.viac.eu/images/Wiener_Regeln_2018_Brosch%C3%BCre_en_Onlinefassung_Einzelseiten_20171219.pdf).

[90] Article 42 of Swiss Rules 2012 (See: "Swiss Rules of International Arbitration," accessed 2018 April 27, https://www.swissarbitration.org/files/33/Swiss-Rules/SRIA_EN_2017.pdf).

[91] "Rules of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry," accessed 2018 April 27, https://icac.org.ua/wp-content/uploads/Rules-of-the-ICAC-at-the-UCCI.pdf

[92] Article 33 of the Rules of Arbitration of International Commercial Disputes adopted by Chamber of Commerce and Industry of Russian Federation (See: "The Rules of Arbitration of International Commercial Disputes," accessed 2018 April 27, http://mkas.tpprf.ru/en/documents/)

[93] Article 5 of SIAC Rules 2016 (See: "Arbitration Rules of the Singapore International Arbitration Centre (2016)," accessed 2018 April 27, http://www.siac.org.sg/images/stories/articles/rules/2016/SIAC%20Rules%202016%20English_28%20Feb%2017.pdf)

[94] Chapter IV of CIETAC Arbitration Rules 2015 (See: "China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules," accessed 2018 April 27, http://www.cietac.org/Uploads/201703/58c0fe0c7337a.pdf)

[95] Article 41 of HKIAC Arbitration Rules 2013 (See: "Administered Arbitration Rules of Hong Kong International Arbitration Centre," accessed 2018 April 27, http://www.hkiac.org/sites/default/files/ck_filebrowser/PDF/arbitration/2013_hkiac_rules.pdf)

[96] Chapter VI of JCAA Commercial Arbitration Rules 2014 (See: "Commercial Arbitration Rules of the Japan Commercial Arbitration Association," accessed 2018 April 27, http://www.jcaa.or.jp/e/arbitration/Arbitration_Rules_2015e.pdf)

[97] "Arbitration Rules of the International Chamber of Commerce," ICC Publication 880-4 ENG, accessed 2018 April 19, https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf.pdf

its application and specific characteristics attributed to the conduct of arbitral proceedings. Therefore, these aspects will be analyzed further with respect to the ICC Arbitration Rules.

Summary, overwhelming majority of arbitral institutions has introduced expedited procedure by either adopting a separate set of rules or incorporating respective provisions into the rules on arbitration. The ICC defined the peculiarities of expedited procedure in Article 30 and Appendix VI, which constitute an integral part of its Arbitration Rules.

1.2.1. Scope of application

Complex analysis of EPP shows that expedited procedure under the ICC Arbitration Rules applies in two cases:

1) when following conditions are met:
    a. the arbitration agreement was concluded after 1 March 2017;
    b. parties have not agreed to opt-out of EPP;
    c. given the circumstances the ICC Court finds appropriate to apply EPP and
    d. the amount in dispute does not exceed USD 2,000,000 at the time the Secretariat informs the parties about EPP application;

or

2) when the parties so agreed.

It means that, as a default rule, the ICC sets up an opt-out mechanism for EPP application: if the conditions are met, expedited procedure applies automatically unless the parties explicitly agreed otherwise. Although prior to the introduction of EPP this approach was not supported by the majority of users,[98] there were valid policy reasons behind its adoption.

Practice showed that despite the fact party autonomy is a fundamental principle in arbitration, though not absolute, it is being rarely used by the parties in order to increase the efficiency of arbitral proceedings.[99] If the opposite holds true, the problem of time and cost would not exist in arbitration. Therefore, despite the parties' awareness of all the benefits expedited procedure brings, they rarely reach an agreement to opt-in the proceedings due to the fact that negotiating the contract parties are not aware about the complexity of future dispute, whereas after

[98] To remind, according to the findings of 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration only 33% of respondents favored the inclusion of simplified procedures in institutional rules on a mandatory basis, whereas 59% of users wished them to be optional. (See: "2015 International Arbitration Survey: Improvements and Innovations in International Arbitration," Queen Mary University of London, White & Case, accessed 2018 April 18, http://www.arbitration.qmul.ac.uk/research/2015/).

[99] Notable exceptions: Panhandle case and Formula One Racing case that were analyzed in Section 1.1.2.

the dispute has arisen, they are more concerned about due process rather than efficiency of the proceedings.[100]

To illustrate this paradox, the reference can be made to the findings of Krogerus Study "Improving the Efficiency of Arbitration" that was released prior to the introduction of EPP into the ICC Arbitration Rules. This research showed that although the Rules for Expedited Arbitration, based on opt-in mechanism, was issued by the Arbitration Institute of the Finland Chamber of Commerce already in 2004,[101] the popularity of expedited arbitration has remained relatively low. Thus, despite the fact the majority of respondents admitted their awareness of the rules for expedited arbitration (89%) and believed that expedited arbitration is faster and cheaper than ordinary proceedings (94%), only 17% has chosen the Rules for Expedited Arbitration in their contracts.[102] As for the possibility to agree on methods for improving the efficiency of the process after the dispute has arisen, respondents were quite realistic: 72% of them answered "never or rarely", whereas 22% marked "occasionally".[103] Apparently, the ICC Commission on Arbitration took into account these considerations when deciding what mechanism of expedited procedure application should be reflected in the Arbitration Rules.

It is important to note that although opt-out approach towards expedited procedure application is not dominating among the arbitral institutions, in this respect the ICC is not an exception. The decision to implement the opt-out mechanism was also taken by SCAI,[104] ICDR,[105] CCIRF,[106] CIETAC[107] and JCAA,[108] which rules on arbitration stand for an automatic application of expedited procedure to the disputes under different thresholds.

Speaking about the amount in dispute it is necessary to note the following. Initially, expedited procedure was intended for so-called "small" claims. However, the debates regarding the issue on what claims are considered "small" and what criteria should be used in order to make

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[100] Michael Bühler and Pierre Heitzmann, "The 2017 ICC Expedited Rules: From Softball to Hardball?", *Journal of International Arbitration* 34, 2 (2017): 130.

[101] "Rules for Expedited Arbitration of the Arbitration Institute of the Finland Chamber of Commerce," accessed: 2018 April 20, https://arbitration.fi/wp-content/uploads/sites/22/2013/05/rules-for-expedited-arbitration2.pdf

[102] "Improving the Efficiency of Arbitration," accessed: 2018 April 20, https://www.krogerus.com/images/uploads/pdf/Improving-the-Efficiency-of-Arbitration.pdf

[103] Ibid.

[104] Article 42 (2) of Swiss Rules 2012 (See: "Swiss Rules of International Arbitration," accessed 2018 April 27, https://www.swissarbitration.org/files/33/Swiss-Rules/SRIA_EN_2017.pdf)

[105] Article 1(4) of ICDR International Arbitration Rules 2014 (See: "ICDR International Arbitration Rules," accessed 2018 April 27, https://www.adr.org/sites/default/files/ICDR%20Rules_0.pdf)

[106] Para 33 of the Rules of Arbitration of International Commercial Disputes adopted by Chamber of Commerce and Industry of Russian Federation (See: "The Rules of Arbitration of International Commercial Disputes," accessed 2018 April 27, http://mkas.tpprf.ru/en/documents/)

[107] Article 56 of CIETAC Arbitration Rules 2015 (See: "China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules," accessed 2018 April 27, http://www.cietac.org/Uploads/201703/58c0fe0c7337a.pdf)

[108] Article 75(2) JCAA Commercial Arbitration Rules 2014 (See: "Commercial Arbitration Rules of the Japan Commercial Arbitration Association," accessed 2018 April 27, http://www.jcaa.or.jp/e/arbitration/Arbitration_Rules_2015e.pdf)

this assessment were always opened.[109] Thus, although the proposals were made that small claims should have certain ceiling regarding the amount in dispute, already in 2007 the ICC Commission Task Force on Reducing Time and Costs in Arbitration has observed that small cases (in terms of monetary value) "could turn on complex legal questions and had the potential to bear upon similar future cases".[110]

Indeed, it is doubtful that the complexity of the case should be defined solely by the value at stake. Moreover, in 2014 the ICC itself highlighted that the time and cost that a party is ready to dedicate to arbitral proceedings depends not only on the value in dispute, but also on the importance and complexity of the case.[111] In this respect, some authors went even further and while analyzing fast track arbitration clearly stated that the amount in question does not reflect the complexity of the case and should not matter at all.[112]

Notwithstanding this, the ICC provided that expedited procedure applies automatically if the amount in dispute does not exceed USD 2,000,000.[113] However, it remains questionable why this particular threshold was chosen, especially taking into account that already in 2015 the findings of International Arbitration Survey: Improvements and Innovations in International Arbitration showed that 94% of respondents believe that disputes exceeding USD 1,000,000 should fall outside the scope of expedited procedure application.[114]

Explaining the reasons why it was decided to set up the threshold at USD 2,000,000, the developers of the ICC Arbitration Rules underlined that the ICC Court's decision was "based on its experience and taking into account the average complexity of these types of arbitrations"[115] without providing any further detail in this regard. However, one fact remains without controversy: the higher threshold, the more disputes fall within the scope of expedited procedure application, which seems to be the main cause justified the limit at USD 2,000,000.

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[109] Michael Bühler and Pierre Heitzmann, "The 2017 ICC Expedited Rules: From Softball to Hardball?", *Journal of International Arbitration* 34, 2 (2017): 125.

[110] See: Yas Banifatemi, "Chapter 1: Expedited Proceedings in International Arbitration," in *Expedited Procedures in International Arbitration*, Laurent Lévy, Michael Polkinghorne (eds), (Paris: International Chamber of Commerce (ICC), 2017), 11.

[111] "The time and cost that a party should be willing to devote to that end will vary according to the importance, complexity and value of the dispute". (See: "Effective Management of Arbitration A Guide for In-House Counsel and Other Party Representatives," 4, accessed: 2018 April 24, https://cdn.iccwbo.org/content/uploads/sites/3/2017/05/effective-management-of-arbitration-icc-guide-english-version.pdf).

[112] Rudolf Fiebinger and Christian Gregorich, "Chapter III: The Arbitration Procedure - Arbitration on Acid: Fast Track Arbitration in Austria from a Practical Perspective", in *Austrian Arbitration Yearbook 2009*, Christian Klausegger et al. (Vienna: Manz'sche Verlags- und Universitätsbuchhandlung, 2008), 254

[113] Article 1 of Appendix VI to the ICC Arbitration Rules.

[114] 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration," Queen Mary University of London, White & Case, accessed 2018 April 18, http://www.arbitration.qmul.ac.uk/research/2015/.

[115] José R. Feris, "The 2017 ICC Rules of Arbitration and the New Expedited Procedure Provisions: A view from Inside the Institution," in *ICC Dispute Resolution Bulletin* 1 (2017): 66.

Indeed, expedited procedure should make rather significant influence on the ICC Arbitration. Thus, according to statistical data, in 2016, more than one third of the newly filed ICC cases (40.7%) had an amount in dispute not exceeding USD 2,000,000.[116]

Notwithstanding this, taking into account the diversity of users of the ICC Arbitration Rules some authors claim that it is rather arbitrary to set up any monetary thresholds for EPP application.[117] However, as far as this research does not aim at criticism towards current developments of expedited procedure under the ICC Arbitration Rules, but rather defines practical solutions on how to overcome the challenges it brings, the discussion regarding alternative criteria is closed at this point.

At the same time, for the purpose of comparison, it seems reasonable to investigate what are the thresholds set up by different arbitral institutions, whose rules on expedited procedure are based on opt-out mechanism (see – Table).[118]

Table: Thresholds required for expedited procedure application on the opt-out basis

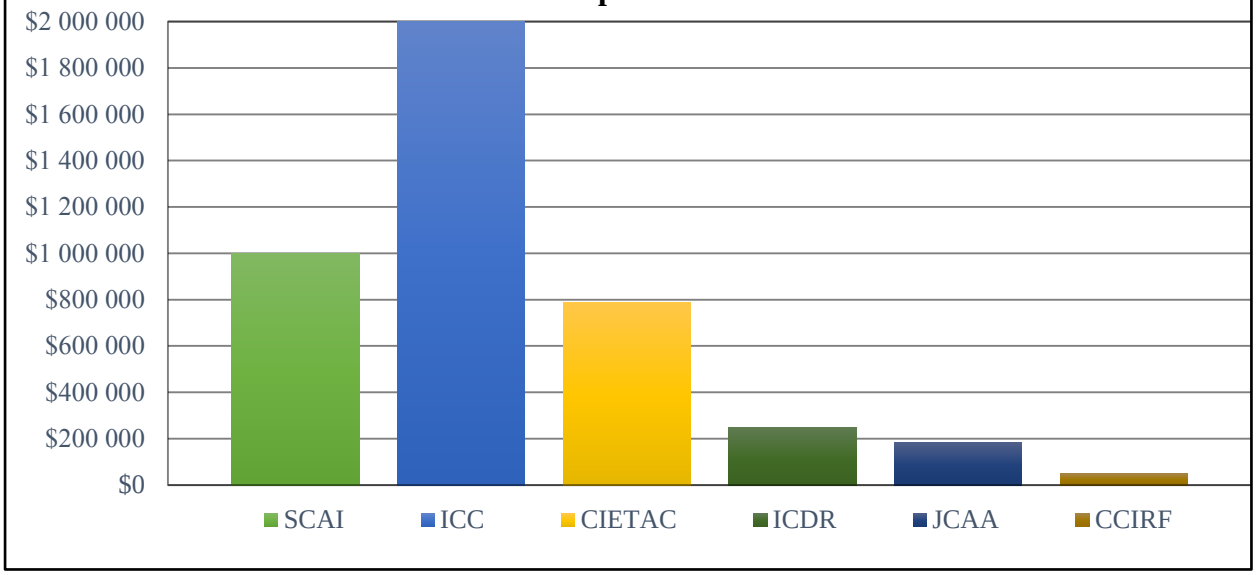

Table shows that there is no consensus among arbitral institutions regarding the amount in dispute necessary for expedited procedure application. However, one may reasonably claim that it is not enough to set up a threshold – what matters is how the amount at stake is determined. In this respect, it should be noted that although the ICC Arbitration Rules do not provide detailed norms regarding the determination of the amount in dispute, some explanations are contained in

116 "2016 ICC Dispute Resolution Statistics," in *ICC Dispute Resolution Bulletin* 2 (2017): 113.

117 Michael Bühler and Pierre Heitzmann, "The 2017 ICC Expedited Rules: From Softball to Hardball?", *Journal of International Arbitration* 34, 2 (2017): 125.

118 In the following table, the amounts are defined in USD for the sake of clarity based on exchange rates as of 6 May 2018. The amounts in original currencies are the following: SCAI – CHF 1,000,000; CIETAC – RMB 5,000,000; JCAA – JPY 20,000,000.

the ICC Note of 30 October 2017.[119] Thus, to define the value at stake, all quantified[120] claims, counterclaims, cross-claims, claims filed by or against additional parties (Article 7) and claims between multiple parties (Article 8) should be taken into account, whereas claims for interest and costs should not be considered.[121] At the same time, expedited procedure will not apply to declaratory or non-monetary claims, which value cannot be estimated, provided that such claims do not merely support a monetary claim or that they significantly contribute to the complexity of the dispute.[122]

Notwithstanding the forgoing, it remains unclear whether or not the claims for set-off should be considered for the purposes of Article 30. In this respect, authors reasonably assert that in the absence of contrary provision, set-off claims should not be taken into account assessing the amount in dispute.[123] However, they also caution that, pursuant to Article 30(3)(c), in special cases "set-off claims may prompt the ICA to decide that it is 'inappropriate in the circumstances to apply the Expedited Procedure Provisions'."[124]

Indeed, the power of the ICC Court provided under Article 30(3)(c) is of crucial importance. Firstly, it precludes lengthy discussions of whether the case should be conducted within expedited procedure or not.[125] Secondly, it provides the answer to the critics the opt-out mechanism brings, creating a useful safeguard for expedited procedure application. Thus, in case the amount at stake does not exceed required threshold, but the dispute is of high complexity, the ICC Court can exercise its powers under Article 30(3)(c) and decide that the application of EPP is inappropriate. Although it requires substantial evaluation of the case file, which can be impossible at the early stage of the proceedings, the ICC Court reserves the right to reroute to the ordinary procedure at any stage, even after the arbitral tribunal is already in place.[126]

Finally, the parties themselves may trigger the expedited procedure application "irrespective of the date of conclusion of the arbitration agreement or the amount in dispute",[127]

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[119] "Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration," accessed 2018 April 19, https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf

[120] According to the ICC Arbitration Rules, parties are required to quantify their claims and to provide an estimate of the value of any non-monetary claims. However, such quantifications or estimates will be only "considered" by the Secretariat and in case arbitral tribunal finds that the party by artificially inflated its claims, it may consider this, when deciding as to the costs allocation.

[121] Ibid, para 70.

[122] Ibid, para 73.

[123] Andreas Reiner, Jurgita Petkutė and Carsten Kern, "Commentary on the ICC Arbitration Rules," in *Schütze* (ed), *[to be published]*.

[124] Ibid.

[125] Ibid.

[126] Article 1 (4) of Appendix VI to the ICC Arbitration Rules.

[127] Para 68 of "Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration," accessed 2018 April 19, https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf

while the right to opt-out is also reserved.[128] However, taking into account that Article 30(1) of the ICC Arbitration Rules provides the supremacy of EPP over any contrary terms of the arbitration agreement, it is questionable whether the parties can adjust the ceiling for expedited procedure application.

Surprisingly, the possibility of parties to set up higher ceiling for the expedited procedure application is expressly provided in "Arbitration Clauses" attached to the ICC Arbitration Rules. Apparently, enlargement of the ceiling will broaden the scope of expedited procedure application, which is in line with the ICC policy in this regard. However, there is no special model clause for reducing the ceiling. Nevertheless, commentators of the ICC Arbitration Rules wisely affirm that "[i]f the parties are able to entirely rule out the expedited procedure […], then *a fortiori* they must be permitted also to reduce the ceiling amount," which means that "the ceiling is adjustable in either direction".[129]

To conclude, expedited procedure under the ICC Arbitration Rules applies automatically where the amount in dispute does not exceed USD 2,000,000 and the arbitration agreement was concluded after 1 March 2017. If these conditions are fulfilled, the ICC Court is empowered to decide on the appropriateness of expedited procedure application at any stage of arbitration.

Regardless of the date of conclusion of the arbitration agreement or the amount in dispute, the parties are entitled to opt in to the EPP. Although under Article 30 expedited procedure provisions have a supremacy over the terms of arbitration agreements, the parties can adjust the ceiling for expedited procedure application in either direction, whereas the possibility to opt-out is explicitly reserved.

1.2.2. Features of Expedited Procedure

Considering specific characteristics of expedited procedure, it is necessary to indicate that they are derived from the purpose, for which it was developed. Taking into account that expedited procedure aims at more time and cost efficient dispute resolution in comparison with ordinary proceedings,[130] it employs certain mechanisms for improving efficiency, which may differ depending on the provisions of institutional rules.

The features of expedited procedure administered by the ICC are defined in Articles 2 to 4 of Appendix VI to the Arbitration Rules and can be summarized as follows.

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[128] Article 30 (2)(b) of the ICC Arbitration Rules.

[129] Andreas Reiner, Jurgita Petkutė and Carsten Kern, "Commentary on the ICC Arbitration Rules," in *Schütze* (ed), *[to be published]*.

[130] Speaking about the purpose of expedited procedure, the reference is made to the Section 1.1.1 of this research, where respective issue was discussed in detail.

1) Mandatory appointment of a sole arbitrator.

Taking into account that constitution of the tribunal is one of the main stages of the arbitral process contributing to the delay[131] and that for three-member tribunals it usually takes longer to resolve the dispute,[132] the ICC Court is granted a power to appoint a sole arbitrator notwithstanding any contrary provision of the arbitration agreement.[133] Apparently, this provision derives from the principle of supremacy of EPP over any contrary terms of the arbitration agreement provided in Article 30(1). Therefore, by submitting the dispute to the arbitration under the ICC Arbitration Rules "the parties agree that any reference of disputes to three arbitrators in their arbitration agreement is subject to the Court's discretion to appoint a sole arbitrator if the Expedited Procedure Provisions apply".[134]

It is important to note that although Article 2(1) of Appendix VI does not oblige the ICC Court to appoint a sole arbitrator, it will normally do so in order to ensure time- and cost-efficiency of the proceedings.[135] However, before exercising the Court's discretion, parties themselves are entitled to nominate a sole arbitrator within the time limits established by the Secretariat of the ICC.

Commentators caution that if after analyzing the circumstances of the case, the ICC Court finds the appointment of three-member tribunal appropriate, it should also consider whether the application of EPP is appropriate at all.[136] If pursuant to Article 1(4) of the Appendix VI the ICC Court decides that expedited procedure shall no longer apply, the arbitral tribunal will normally remain in place, unless the ICC Court finds it inappropriate. In the latter case, it "may consider appointing the individual that was acting as sole arbitrator as president of the arbitral tribunal".[137]

2) Absence of the Terms of Reference.

Although the Terms of Reference are widely regarded as a distinctive feature of the ICC arbitration, in order to save time EPP have explicitly excluded (though not prohibited) their

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131 "2010 International Arbitration Survey: Choices in International Arbitration." Queen Mary University of London, White & Case. Accessed 2018 April 22, http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2010_InternationalArbitrationSurveyReport.pdf.

132 Firstly, because of the necessity to schedule availability of each arbitrator and, secondly, because the process of decision-making retards when the issue is being considered collectively. In this regard, an example can be found in the rules that existed in Ancient Rome. According to them, in case of extreme urgency the powers to govern the society were transferred to a single person (dictator) for the period up to six months (which is similar to the powers of arbitral tribunals to resolve the dispute that lapse after 6 months from the case management conference).

133 Article 2 (1) of Appendix VI to the ICC Arbitration Rules.

134 "Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration," accessed 2018 April 19, https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf, para 83.

135 Ibid, para 84.

136 Andreas Reiner, Jurgita Petkutė and Carsten Kern, "Commentary on the ICC Arbitration Rules," in *Schütze* (ed), *[to be published]*.

137 "Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration," accessed 2018 April 19, https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf, para 86.

establishment.[138] Developers of the ICC Arbitration Rules justified this approach by claiming that the "arbitrations valued at less than US$ 2 million normally involve limited issues and claims, making Terms of Reference less necessary for the organisation of the procedure".[139] Nevertheless, some authors underlines that the Terms of Reference "are generally a helpful document" and, therefore, "arbitrators may still want to fix some of the points that are typically covered by TOR in writing, and require the parties' signature of such a document".[140]

3) Prohibition of new claims after the constitution of arbitral tribunal.

As far as under the expedited procedure no Terms of Reference are prepared, the deadline for submission of new claims has been moved to the date of the arbitral tribunal constitution.[141] Therefore, claims, not included in the Request for Arbitration, the Answer or any other submission filed before the constitution of the tribunal, as a general rule, will not be considered.[142]

Similar to ordinary arbitration, the tribunal retains the right to authorise the parties to submit new claims at the later stage of the proceedings. However, if expedited procedure applies, besides considering the nature of new claims, the stage of arbitration and other relevant circumstances, it is specifically required from tribunal to take into account cost implications.[143]

In addition, some authors reasonably indicate that the arbitral tribunals will be reluctant to accept the submission of new claims, because firstly, they can pierce the ceiling of USD 2,000,000 preventing automatic application of expedited procedure and, secondly, due to strict time limit to issue a final award.[144]

4) Shortened time limit for the conduct of case management conference.

Despite the fact that the conduct of case management conference within expedited procedure is regulated pursuant to Article 24 of the ICC Arbitration Rules, applicable to ordinary procedure, its convocation should be made no later than fifteen days after the date of transmission of file to the arbitral tribunal.[145] However, there may be serious impediments to conducting case

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[138] Article 3(1) of Appendix VI to the ICC Arbitration Rules.

[139] José R. Feris, "The 2017 ICC Rules of Arbitration and the New Expedited Procedure Provisions: A view from Inside the Institution," in *ICC Dispute Resolution Bulletin* 1 (2017): 72.

[140] Michael Bühler and Pierre Heitzmann, "The 2017 ICC Expedited Rules: From Softball to Hardball?", *Journal of International Arbitration* 34, 2 (2017): 133.

[141] Under the ordinary procedure, the parties are prohibited to submit new claims after the Terms of Reference have been signed or approved by the ICC Court, unless it is authorized by the arbitral tribunal (Article 23(4) of the ICC Arbitration Rules)

[142] Based on these considerations, the Request for Arbitration should be not only the document that triggers arbitral proceedings, it should constitute the full Statement of Claim. In literature, this practice is called "case frontloading". See: Yas Banifatemi, "Chapter 1: Expedited Proceedings in International Arbitration," in *Expedited Procedures in International Arbitration*, Laurent Lévy, Michael Polkinghorne (eds), (Paris: International Chamber of Commerce (ICC), 2017), 13-14.

[143] Article 3(2) of Appendix VI to the ICC Arbitration Rules.

[144] Michael Bühler and Pierre Heitzmann, "The 2017 ICC Expedited Rules: From Softball to Hardball?", *Journal of International Arbitration* 34, 2 (2017): 134.

[145] Article 3(3) of Appendix VI to the ICC Arbitration Rules.

management conference in so tight deadlines, notably when fifteen-day period coincides with public and religious holidays or prior professional commitments. For such cases, the ICC Court is empowered to extend this time limit by its own motion or pursuant to a reasoned request from the arbitral tribunal.[146]

5) Broad powers of the arbitral tribunal.

Article 3(4) of the Appendix VI to the ICC Arbitration Rules confirms that, similar to ordinary arbitration, within expedited procedure the tribunal has discretion to adopt such procedural measures as it considers appropriate. However, EEP are more specific in this respect, containing non-exhaustive list of measures that can be employed by the tribunal in order to ensure the efficiency of the proceedings. Thus, the arbitrator(s) "may, after the consultation with the parties, decide not to allow requests for document production or to limit the number, length and scope of written submissions and written witness evidence (both fact witnesses and experts)".[147]

Although the ICC sets out a discretionary capacity ("may"), rather than an obligation, the arbitral tribunals will normally use it for the sake of time- and cost-efficiency.[148]

It should also be noted that pursuant to Article 22(2) of the ICC Arbitration Rules the arbitral tribunal cannot adopt the procedural measures, which are contrary to any agreement of the parties. Conversely, there is no similar limitation in expedited procedure and, thus, deciding on procedural measures the arbitral tribunal is not limited by parties' agreement, which is in line with the principle of supremacy of EPP set out in Article 30(1).

Another useful power that the arbitrators may exercise in order to increase the efficiency of the proceedings is provided in Article 3(5) of Appendix VI, according to which the arbitral tribunal may decide the dispute solely on the basis of the documents, submitted by the parties, with no hearing and no examination of witnesses or experts. In such cases, prior consultation with the parties is required.

Consequently, in contrast to ordinary arbitration, where the case can be resolved on the basis of documents only if neither party requests hearing,[149] in expedited procedure the decision whether or not to hold an oral hearing is within the discretion of the arbitral tribunal. In addition, the possibility to conduct the hearing by videoconference, telephone or similar means of communication is explicitly reserved.[150]

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146 Ibid.

147 Article 3(4) of Appendix VI to the ICC Arbitration Rules.

148 Likewise, according to the guidance provided in para 84 of the Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration it is anticipated that normally the ICC Court will exercise its discretionary capacity and appoint a sole arbitrator pursuant to Article 2(1) of Appendix VI.

149 Article 25(6) of the ICC Arbitration Rules.

150 According to Case Management Techniques, contained in Appendix IV to the ICC Arbitration Rules, if ordinary procedure applies, it is also possible to conduct the hearings by telephone or video conferencing, but only in cases where the attendance in person is not essential. On the contrary, there is no such limitation under EPP.

6) Stricter time limits for rendering final award.

Although practice showed that the six-month period for rendering final award has been rarely met,[151] EPP set out similar time limit with the difference that it starts from the date of the case management conference considering that no Terms of Reference is usually established within expedited procedure.

Nevertheless, taking into account that the compliance with the six-month time limit constitutes the essence of expedited procedure,[152] it is anticipated that the ICC Court will strictly enforce it. Thus, although the ICC Court is empowered to extend this time limit, it indents to use this capacity only "in limited and justified circumstances".[153]

Apparently, the six-month time limit for rendering the final award has significant influence on the proceedings. In particular, it requires the adoption of procedural timetable during the case management conference, limiting the number of written submissions on the merits to a single exchange, careful consideration on whether to allow new claims and requests for document production etc.

In addition, it is important to note that this period includes the time for scrutiny and approval of final award, which the tribunal is expected to submit within five months from the case management conference.[154]

7) Reduced scale of arbitrator's fees.

While administrative expenses remain the same, pursuant to Article 4(2) of Appendix VI arbitrator's fees, applicable in expedited procedure, are reduced on 20% in comparison with general scales[155] "in view of the simplified nature of the procedure".[156] However, this decision is questionable being subject to extensive debates within arbitral community.[157]

Indeed, due to shortened time limits expedited procedure will require from an arbitrator the adoption of prompt and deliberate decisions, making its commitment to the case more "intense".[158] In particular, to draft procedural timetable shortly after the transmission of the file,

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[151] Michael Bühler and Pierre Heitzmann, "The 2017 ICC Expedited Rules: From Softball to Hardball?", *Journal of International Arbitration* 34, 2 (2017): 140.

[152] "Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration," accessed 2018 April 19, https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf, para 97.

[153] Ibid, para 96.

[154] Ibid, para 98.

[155] Ibid, para 78.

[156] José R. Feris, "The 2017 ICC Rules of Arbitration and the New Expedited Procedure Provisions: A view from Inside the Institution," in *ICC Dispute Resolution Bulletin* 1 (2017): 73.

[157] Nikolaus Pitkowitz and Alice Fremuth-Wolf, "Chapter VI. The Vienna Repositioning Propositions, The Vienna Repositioning Propositions Repositioning Actors And Actions In International Arbitration", in *Austrian Yearbook on International Arbitration 2018*, Christian Klausegger et al., (Vienna: Manz'sche Verlags- und Universitätsbuchhandlung, 2018), 253 – 254.

[158] Ibid.

to consider how the balance between efficiency and due process should be achieved when deciding on length, scope and number of written submissions, whether to allow the requests for document production and the hearing conduct, to summarize parties positions in a concise manner when drafting an award. Finally, in order to meet the deadlines, arbitrators should ensure the priority of the case pending within expedited procedure by postponing any other work.[159]

Considering these factors, some authors wisely note that the arbitrators "should rather be paid more than less",[160] especially taking into account that their fees and expenses constitute only 16% of total cost of the ICC arbitration.[161]

To conclude, in comparison with ordinary arbitration, expedited procedure under the ICC Arbitration Rules has the following features: mandatory appointment of a sole arbitrator, absence of the Terms of Reference, prohibition of new claims after the constitution of arbitral tribunal, shortened time limit for the conduct of case management conference, broad powers of the arbitral tribunal (in particular, to deny the requests for document production, to limit the number, length and scope of written submissions and written evidence, to decide the case without the hearing even if the parties request it), stricter time limits for rendering final award and, finally, reduced scale of arbitrator's fees.

[159] Ibid.

[160] Michael Bühler and Pierre Heitzmann, "The 2017 ICC Expedited Rules: From Softball to Hardball?", *Journal of International Arbitration* 34, 2 (2017): 143.

[161] "Effective Management of Arbitration A Guide for In-House Counsel and Other Party Representatives," accessed: 2018 April 24, https://cdn.iccwbo.org/content/uploads/sites/3/2017/05/effective-management-of-arbitration-icc-guide-english-version.pdf.

2. CHALLENGES OF EXPEDITED PROCEDURE UNDER THE ICC ARBITRATION RULES

Practice suggests that when both parties show cooperative attitude towards arbitral proceedings, the efficiency is achieved *ipso facto*.[162] However, nowadays it is rather an exception. Considering the extent of critics arbitration received with respect to efficiency of the proceedings, it is reasonable to presume that in the majority of disputes at least one party employs adversarial behavior. In this respect, Christopher Newmark[163] states that once "both parties are ready and willing to incur the time and cost in the pursuit of victory, it is futile and inappropriate for arbitrators to be overly concerned about whether there might be a cheaper or a quicker way".[164]

Notwithstanding this, automatic application of EPP to disputes with the amount not exceeding USD 2,000,000 presupposes the inclusion of hostile parties into expedited procedure, which can create two potential situations. In case, where both parties show adversarial attitude towards the proceedings after the tribunal has been constituted, it should be suggested that the ICC Court has to exercise its capacity pursuant to Article 1(4) of Appendix VI and to decide that expedited procedure shall no longer apply. On the contrary, if only one party tries to delay the proceedings, whereas other favors expedited dispute resolution, the tribunal should proceed at an accelerated pace.

Although this solution corresponds to the idea of expedited procedure, it may be employed by hostile party in order to destroy the proceedings, in particular through raising challenges to enforceability of the award rendered in the course of expedited procedure. One may claim that dissatisfied party can always try to set aside (or challenge the enforceability) of an award, even those that was issued under ordinary procedure. However, the findings, made in previous chapter, show that in order to ensure time- and cost-efficiency, EPP contain several procedural mechanisms that can increase the risk of a successful challenge.

In this respect, it seems reasonable to remind that besides an obligation to conduct the arbitration "in an expeditious and cost-effective manner",[165] the tribunals should ensure enforceability of the awards.[166] Unfortunately, not everything that contributes to the efficiency of arbitration, favors enforceability and vice versa. If a conflict arise, arbitrators firstly ensure that an

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[162] In this respect, the reference can be made to exemplary Panhandle case and Formula One Racing case that were analyzed in Section 1.1.2.

[163] The developer of the report "Techniques for Controlling Time and Costs in Arbitration". (See: "Techniques for Controlling Time and Costs in Arbitration". ICC Publication No. 843. Accessed 2018 April 26. http://gjpi.org/wp-content/uploads/icc-controlling-time-and-cost.pdf).

[164] Christopher Newmark, "Chapter 6: Controlling Time and Costs in Arbitration," in *The Leading Arbitrators' Guide to International Arbitration*, Lawrence W. Newman, Richard D. Hill (New York, NY: Juris Publishing, 2008), 96

[165] Article 22(1) of the ICC Arbitration Rules.

[166] Article 42 of the ICC Arbitration Rules.

award is enforceable at law, rather than care about the efficiency. Although expedited procedure explicitly puts emphasis on the latter, arbitrators' preferences in this respect remain the same. The mere fact that the award has been set aside, means that the efficiency of such arbitral proceedings was zero despite the fact that arbitrators put best efforts in order to achieve it.

In addition, one should not forget that extensive practice of successful challenges to the enforceability of arbitral awards rendered in the course of expedited procedure could undermine the very purpose of its introduction by making the arbitral tribunals reluctant in exercising broad powers granted to them under the EPP and, thus, not contributing to the efficiency.

Therefore, this chapter aims at defining what challenges to the enforceability of arbitral awards can be generated by the application of expedited procedure under the ICC Arbitration Rules. Firstly, the assessment will be made how the principle of party autonomy is balanced with the efficiency and, secondly, due process concern in expedited procedure will be examined.

2.1. Expedited Procedure and Restraints of Party Autonomy

The fact that party autonomy is a fundamental principle of arbitration is without controversy. Being a "core" of the system, it grants flexibility, which is perceived as one of the main advantages of arbitration.[167]

However, it should be noted that this principle is not absolute, which means that there are certain limitations imposed on the parties' discretion with regard to the ways on how the proceedings shall be conducted.

First limitation is derived from another advantage of arbitration – enforceability. In order to make an award enforceable at law, arbitral proceedings should comply with the requirements set out in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (further – NYC).[168] In particular, the award should not be contrary to public policy of the state where the enforcement is sought and the opportunity to present the case should be provided to both parties.[169] It means that in order to achieve enforceability of an award "a reasonable degree of prudent regulation"[170] is necessary that makes parties' choice less arbitrary already at this stage.

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[167] Irene Welser and Christian Klausegger, "Chapter II: The Arbitrator and the Arbitration Procedure - Fast Track Arbitration: Just fast or something different?", in *Austrian Arbitration Yearbook 2009*, Christian Klausegger et al., (Vienna: Manz'sche Verlags- und Universitätsbuchhandlung, 2009), 262.

[168] Although not all states (but the majority) have ratified this convention, the grounds for refusal to recognize and enforce foreign arbitral awards are considered as universal.

[169] Article V(2)(b) and Article V(1)(b) of the NYC respectively. (See: "Convention on the Recognition and Enforcement of Foreign Arbitral Awards," accessed 2018 April 28, http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf).

[170] Mohamad Salahudine Abdel Wahab, "Chapter 6: Expedited Institutional Arbitral Proceedings Between Autonomy and Regulation", in *Expedited Procedures in International Arbitration*, Laurent Lévy, Michael Polkinghorne (eds), (Paris: International Chamber of Commerce (ICC), 2017), 134.

Second limitation is defined by the parties' choice, usually expressed in the arbitration clause, regarding the form of arbitral proceedings conduct: whether they decided in favour of ad hoc arbitration or institutional one. Apparently, in ad hoc arbitration the parties will enjoy much broader autonomy in constructing the proceedings. However, in most cases the parties voluntarily limit their autonomy referring to different arbitral institutions. The reason for this is two-fold: firstly, it is the assistance parties get from arbitral institutions, which are responsible for administrating the disputes, and, secondly, due to the existence of pre-determined set of procedural rules that was tested by the extensive practice of its application.

It remains questionable whether parties can depart from the provisions of chosen institutional rules if the latter do not explicitly authorize to do this. Following the autonomous nature of arbitration, parties' express choice should supersede any contrary provision of institutional rules. However, some reservations should be made in this respect.

Having regard to the nature of arbitration as a dispute resolution *service*, it seems relevant to refer to old business rule: no money paid, no service made. In practice, it means that parties are not allowed to derogate from certain provisions (e.g. rules regarding the advance on costs),[171] otherwise dispute resolution services will not be provided.

In addition, institutional rules contain some mechanisms that ensure the enforceability of arbitral awards and facilitate the efficient administration of dispute from the side of arbitral institution. Based on these considerations, some arbitral institutions specifically provided that the rules on arbitration should take precedence over any contrary party agreement regarding the conduct of the proceedings.

It is worth mentioning that the ICC Court has followed this approach by stating in Article 19 that the proceedings before the arbitral tribunal should be governed by the Arbitration Rules and only in cases when they are silent – by any other rules including those set out by parties' agreement.[172] It means that pursuant to the ICC Arbitration Rules even within ordinary procedure there are significant restrains imposed on party autonomy.

Although introducing expedited procedure the developers were driven by users' desire to make arbitration more streamlined and, notably, by party autonomy, EPP *per se* contravene the latter by imposing on it an additional "layer" of restrictions, which constitute the subject matter of further analysis.

To sum up, party autonomy remains fundamental, though limited, principle of international arbitration. In ad hoc arbitration, parties enjoy broader freedom in defining the rules

[171] Article 37 of the ICC Arbitration Rules.

[172] "Arbitration Rules of the International Chamber of Commerce," ICC Publication 880-4 ENG, accessed 2018 April 19, https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf.pdf

governing the procedure than in institutional arbitration, where established procedural rules supersede any contrary agreement between the parties. Similar to ordinary arbitration, EPP impose restrictions on party autotomy, although due to the nature of expedited procedure, the extent of such restrictions is broader.

2.1.1. Overriding Effect of Expedited Procedure Provisions

Speaking about the balance between autonomy and regulation achieved in expedited procedure, the reference should be made to Article 30 of the ICC Arbitration Rules, which states that "[b]y agreeing to arbitration under the Rules, the parties agree that […] the *'Expedited Procedure Provisions'* […] *shall take precedence over any contrary terms of the arbitration agreement* (*emphasis added*)". It means that although the right to exclude the application of expedited procedure is preserved,[173] parties are not entitled to contractually derogate from EPP as long as they are applicable to the dispute. In case, the terms of arbitration agreement contradict Article 30 and (or) Appendix VI to the ICC Arbitration Rules, the provisions on expedited procedure will supersede parties' express choice set out in the arbitration agreement.

The provisions of Article 30 are of paramount importance. Firstly, the overriding effect, they bring, helps to achieve efficiency of the proceedings, more specifically – compliance with six-month time limit for rendering an award that constitutes "the essence"[174] of expedited procedure. Secondly, they emphasise that by agreeing to arbitration under the ICC Arbitration Rules, parties *"agree"* with the supremacy of EPP over the provisions of arbitration agreement. In other words – parties consented to the restraints of party autonomy by exercising the very same autonomy (i.e. choosing respective institutional rules to govern the procedure).[175]

Apparently, the approach realized in Article 30 gives the answer to more fundamental question regarding the nature of institutional rules: whether they constitute a contract of adhesion or just a template (more specifically – whether they are considered as an offer or just as an invitation to treat).

Currently, there is no consistent practice formed regarding this issue. National courts of some jurisdictions[176] treat institutional rules as a template rather than contract of adhesion. Thus,

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[173] See: Article 30(2)(b) of the ICC Arbitration Rules.

[174] "Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration," accessed 2018 April 19, https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf, para 97.

[175] This approach safeguards the enforceability of arbitral awards in light of the provisions of Article V(1)(d) of NYC.

[176] E.g. in Middle East and North Africa. See: Mohamad Salahudine Abdel Wahab, "Chapter 6: Expedited Institutional Arbitral Proceedings Between Autonomy and Regulation", in *Expedited Procedures in International Arbitration*, Laurent Lévy, Michael Polkinghorne (eds), (Paris: International Chamber of Commerce (ICC), 2017), 137.

after examining court practice in Egypt, Mohamad Wahab reaches the conclusion that although this approach remains questionable, national judicial system considers that when parties resort a dispute to an arbitral institution, they explicitly consent to the application of its rules of procedure to the extant parties have not amended or supplemented these rules.[177]

At the same time, the Supreme Court of Singapore in case *"AQZ v. ARA"*[178] upheld an arbitral award rendered by a sole arbitrator in expedited procedure under SIAC Arbitration Rules (2010), despite the fact the parties stipulated in the arbitration agreement that the dispute should be resolved by three-member tribunal.[179] In this decision, the court established that if "the parties had expressly chosen a version of the SIAC Rules that contained the Expedited Procedure provision [...] it was consistent with party autonomy for the Expedited Procedure provision to override their agreement for arbitration before three arbitrators".[180]

Indeed, it seems reasonable to treat institutional rules as a contract of adhesion rather than a template. Such approach preserves the difference between ad hoc and institutional arbitration as well as helps to maintain uniform practice of institutional rules application ensuring legal certainty for the users.[181]

Therefore, the approach taken by the ICC is very prudent: although expedited procedure inevitably imposes certain restraints on party autonomy, Article 30(1) provides that parties are contractually bound by such restraints since they have voluntarily agreed to them and waived the right to vary the provisions of agreed rules for the sake of efficiency in the resolution of their dispute.

Apparently, such interpretation of EPP ensures the enforceability of arbitral award rendered in expedited procedure, reducing the risk of their successful challenge. In addition, it creates a useful safeguard for the integrity of the proceedings and prevents long-lasting deliberations between the parties as to the content of the applicable rules on procedure.

The provisions of Article 30(1) of the ICC Arbitration Rules serve as an example on how the balance between party autonomy and efficiency is achieved in expedited procedure (not surprisingly, in favour of the latter).

Notwithstanding this, some authors indicate that the wording of Article 30(1) is not so straightforward and does not solve all potential problems parties and arbitrators may face when

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177 Ibid.

178 This decision will be analyzed in more detail in Section 2.1.2.

179 Supreme Court of Singapore, High Court, "AQZ v. ARA, 13 February 2015", accessed 2018 April 27, http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law/high-court-judgments/15914-aqz-v-ara-2015-sghc-49

180 Ibid, para 131.

181 Mohamad Salahudine Abdel Wahab, "Chapter 6: Expedited Institutional Arbitral Proceedings Between Autonomy and Regulation", in *Expedited Procedures in International Arbitration*, Laurent Lévy, Michael Polkinghorne (eds), (Paris: International Chamber of Commerce (ICC), 2017), 137.

deciding whether institutional rules or the provisions of arbitration agreements should prevail. Thus, Christophe Seraglini and Patrick Baeten propose to consider two aspects: 1) if at the time, when parties agree to the arbitration, they are not aware of the existence of EPP and, notably, about the scope of their applicability, whether such consent will be sufficient in terms of Article 30(1)? and 2) if the parties explicitly derogated from EPP in the arbitration agreement, whether it can amount to non-consent?[182]

Speaking about the first aspect, it should be noted that, in overwhelming majority, the users of the ICC arbitration services are international businesses, which, in particular, have a "duty to read" the contract.[183] If the parties do not exercise "due diligence" that a reasonable person would do in this circumstances, they have only themselves to blame for it. Therefore, in case parties agreed to the ICC Arbitration Rules without proper (or even any) knowledge about the existence of EPP, such actions would mean that they consented to the whole set of rules in its integrity, and if parties have not opted-out from EPP, it means they tacitly accepted the application of expedited procedure to their disputes.

In addition, it is worth mentioning that similar issue was discussed during Vienna Arbitration Days 2018, where the participants, speaking about the opt-out mechanism of expedited procedure application, reached the conclusion that although automatic application may become surprising for some users, notably small-size companies or companies without own legal departments, it can produce an "educative effect" by giving "everyone involved in the arbitration process ample opportunity to draw lessons on how to conduct arbitration proceedings of all kinds […] in a cost- and time efficient manner".[184]

As regards to the second aspect, indeed, Article 30(1) does not provide univocal answer. However, authors generally consider that explicit derogations from EPP made by the parties in the arbitration agreement should supersede the provisions of institutional rules, notwithstanding Article 30 (1).

Thus, in order to have three-member tribunal even when expedited procedure applies, Michael Bühler and Pierre Heitzmann propose to include into the arbitration agreement the following clause "all disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by three

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[182] Christophe Seraglini and Patrick Baeten, "Chapter 2: Expedited Rules and the Possibility of Immediate Measures once a Tribunal is Constituted," in *Expedited Procedures in International Arbitration*, Laurent Lévy, Michael Polkinghorne (eds) (Paris: International Chamber of Commerce (ICC), 2017), 41.

[183] In other words – to be aware of the provisions, to which they contractually agree.

[184] Pitkowitz, Nikolaus, and Alice Fremuth-Wolf, "Chapter VI. The Vienna Repositioning Propositions, The Vienna Repositioning Propositions Repositioning Actors And Actions In International Arbitration," in *Austrian Yearbook on International Arbitration 2018*, Christian Klausegger et al. (Vienna: Manz'sche Verlags- und Universitätsbuchhandlung, 2018), 251, 255.

arbitrators appointed in accordance with the said Rules, including in cases where the Expedited Procedure Provisions of Appendix VI apply".[185] In this case, according to the authors, "[p]arty autonomy will […] prevail".[186]

Although Mohamad Wahab does not express the same idea directly, this author also supports it by stating that "[p]ursuant to Article 2.1 of the EPP, a sole arbitrator may be appointed by the ICC Court, even if the arbitration agreement refers *generally* to the ICC Rules and *specifically* provides for a three-member tribunal […]".[187] In other words, it means that if parties have derogated from EPP in the arbitration clause and explicitly agreed that in case expedited procedure applies the dispute shall be resolved by a three-member tribunal, parties' choice should override the provisions of Article 30(1) and Article 2(1) of Appendix VI.

At the same time, none of these articles makes a distinction between "general" reference to the ICC Arbitration Rules and "specific" one, addressed to the EPP. The wording suggests that EPP should prevail over *any* contrary provision of the arbitration agreement, notwithstanding subject matter of the contradiction.[188]

In this respect, one may argue that if parties are allowed to opt-out from the expedited procedure as a whole, they should have a right to derogate from any of its provision *a fortiori*. However, it is questionable whether such derogations will preserve the speed of the proceedings and whether for an arbitral tribunal it will be possible to reach the "essence" of expedited procedure, which is to render an award within six-month time limit.[189]

Therefore, it remains ambiguous whether EPP can be applicable only "in bulk" (as an integral system) in order to ensure efficiency of the proceedings or the parties, following the principle of autonomy, can employ "cherry-picking" by derogating from those provisions that they consider too restrictive.

Christophe Seraglini and Patrick Baeten wisely suggest that it is within the capacity of the ICC Court[190] to decide whether diverging provisions in the arbitration clause amount to a consent or rather constitute non-consent and, thus, whether expedited procedure should apply.[191]

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[185] Michael Bühler and Pierre Heitzmann, "The 2017 ICC Expedited Rules: From Softball to Hardball?", *Journal of International Arbitration* 34, 2 (2017): 131-132.

[186] Ibid.

[187] Mohamad Salahudine Abdel Wahab, "Chapter 6: Expedited Institutional Arbitral Proceedings Between Autonomy and Regulation", in *Expedited Procedures in International Arbitration*, Laurent Lévy, Michael Polkinghorne (eds), (Paris: International Chamber of Commerce (ICC), 2017), 139-140.

[188] See: Article 30(1) and Article 2(1) of Appendix VI to the ICC Arbitration Rules.

[189] "Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration," accessed 2018 April 19, https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf, para 97.

[190] See: Article 30(3)(c) and Article 1(4) of Appendix VI to the ICC Arbitration Rules.

[191] Christophe Seraglini and Patrick Baeten, "Chapter 2: Expedited Rules and the Possibility of Immediate Measures once a Tribunal is Constituted," in *Expedited Procedures in International Arbitration*, Laurent Lévy, Michael Polkinghorne (eds) (Paris: International Chamber of Commerce (ICC), 2017), 41.

However, if the ICC Court concludes in favour of expedited procedure application, the follow up question will be whether expedited procedure should be applicable on the "initial" conditions set out in the ICC Arbitration Rules or on the conditions "amended" by parties? At this stage, the ICC Court is no longer empowered to decide and may only provide the tribunal with the recommendations on how to proceed in given situation.

Considering the overriding effect of EPP, it seems reasonable to analyze what additional restraints on party autonomy are imposed in expedited procedure in comparison with ordinary arbitration. However, it should be noted that since these restraints derive from the features of expedited procedure, which were defined in Section 1.2.2, they will be introduced here in brief.

Firstly, as opposed to ordinary arbitration, in expedited procedure the arbitrator's discretion to adopt any procedural measures, as it considers appropriate, is not restricted by parties' agreement.[192] It means that even if parties explicitly stipulated in the arbitration agreement that the number, length and scope of submissions cannot be limited or requests for document production can be denied only in exceptional circumstances, such limitations will be contrary to Article 3(4) of Appendix VI and, thus, having regard to Article 30, provisions of the ICC Arbitration Rules will prevail.

Secondly, in expedited procedure the tribunal may decide the dispute solely on the basis of the documents submitted by the parties, with no hearing and no examination of witnesses or experts even if one of the parties (or both) requests such a hearing or witness/expert examination,[193] whereas in ordinary arbitration the tribunal is entitled to do so only if neither party requests the conduct of respective proceedings.[194]

Thirdly, in comparison with ordinary arbitration,[195] in expedited procedure the time limit for submission of new claims is shortened to the date of the tribunal' constitution.[196] However, the capacity to extend this deadline is reserved by the ICC Court.[197]

Forthly, EPP impose extendable fifteen-day time limit for the conduct of case management conference,[198] whereas in ordinary arbitration this deadline is not strict.[199]

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[192] Article 22(2) of the ICC Arbitration Rules says that "the arbitral tribunal […] may adopt such procedural measures as it considers appropriate provided that they are not contrary to any agreement of the parties", whereas Article 3(4) of Appendix VI does not contain such limitation.

[193] Article 3(5) of Appendix VI to the ICC Arbitration Rules. (See: "Arbitration Rules of the International Chamber of Commerce." ICC Publication 880-4 ENG. Accessed 2018 April 19. https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf.pdf).

[194] Ibid, Article 25(6).

[195] Ibid, Article 23(4).

[196] Ibid, Article 3(2) of Appendix VI.

[197] Ibid.

[198] Ibid, Article 3(3) of Appendix VI.

[199] Ibid, Article 24(1).

Fifthly, although the six-month time limit for rendering final award is applicable to both procedures, under the EPP this deadline is essential[200] and can be extended "only in limited and justified circumstances",[201] whereas in ordinary arbitration the ICC Court may fix different time limit simply based on procedural timetable established by the parties.[202]

Finally, in expedited procedure the ICC Court will normally[203] exercise its capacity to appoint a sole arbitrator, notwithstanding any contrary provision of the arbitration agreement,[204] whereas in ordinary arbitration the principle of party autonomy prevails.[205] Due to its significance, this restrain will be subject to detailed analysis in Section 2.1.2.

However, it should be noted that by imposing a number of additional limitations, expedited procedure provides certain safeguards of party autonomy, which were accurately summarized by Christophe Seraglini and Patrick Baeten.

In particular, authors indicate the following safeguards: 1) right of the parties to opt-out from expedited procedure application provided by Article 30(2)(b); 2) powers of the ICC Court to decide regarding the appropriateness of expedited procedure conduct before the tribunal has been constituted (Article 30(3)(c)) as well as at any time during the proceedings (Article 1(4) of Appendix VI); 3) tribunal's obligation to consult the parties prior to the adoption of procedural measure stipulated in Articles 3(4) and 3(5) of Appendix VI.[206]

In addition, the authors consider the provisions of Article 22(2) as a potential safeguard to party autonomy.[207] However, as was already stated in this research, pursuant Article 1(1) of Appendix VI, the provisions of Article 3(4) of Appendix VI, which do not contain such limitation, should prevail. Therefore, it should be suggested that Article 22(2) does not constitute a safeguard to the principle of party autonomy in expedited procedure, although the fact that the tribunals will take into account respective provisions of arbitration agreements is without controversy.

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200 "Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration," accessed 2018 April 19, https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf, para 97.

201 Ibid, 96.

202 Article 31(1). (See: "Arbitration Rules of the International Chamber of Commerce," ICC Publication 880-4 ENG, accessed 2018 April 19, https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf.pdf).

203 "Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration," accessed 2018 April 19, https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf, para 84.

204 Article 2(1) of Appendix VI. (See: "Arbitration Rules of the International Chamber of Commerce," ICC Publication 880-4 ENG, accessed 2018 April 19, https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf.pdf).

205 Ibid, Article 11(6).

206 Christophe Seraglini and Patrick Baeten, "Chapter 2: Expedited Rules and the Possibility of Immediate Measures once a Tribunal is Constituted," in *Expedited Procedures in International Arbitration*, Laurent Lévy, Michael Polkinghorne (eds) (Paris: International Chamber of Commerce (ICC), 2017), 42.

207 According to Article 22(2) the tribunal cannot adopt procedural measures, which are contrary to the agreement between parties.

Finally, it is necessary to indicate that overriding effect of EPP is not a distinctive feature of the ICC arbitration. Thus, Article 5(3) of SIAC Rules 2016 provides that by agreeing to the arbitration under SIAC Rules, the parties agree that EPP "shall apply even in cases where the arbitration agreement contains contrary terms".[208] However, it is worth mentioning that under the SIAC Rules 2016 expedited procedure is applicable solely on opt-in basis, which makes overriding effect of EPP less detrimental in comparison with the ICC arbitration.

To conclude, pursuant to Article 30 of the ICC Arbitration Rules EPP override any contrary terms of the arbitration agreement. Parties are contractually bound by such restraint since they have voluntarily agreed to it when consenting to the ICC arbitration and, thus, waived the right to vary the provisions of established rules for the sake of efficiency in the resolution of their dispute. However, it remains unclear whether explicit derogation from EPP in the agreement constitutes valid consent to the ICC Arbitration or rather not and, if the answer on this question is affirmative, whether overriding effect of EPP is preserved over such derogations.

2.1.2. Mandatory Appointment of a Sole Arbitrator

As was previously discussed, one of the features of expedited procedure under the ICC Arbitration, which impose a restraint on the principle of party autonomy, is a mandatory appointment of a sole arbitrator.

However, it is necessary to admit that resolution of a dispute by a sole arbitrator is a widely regarded tool for reducing time and costs in arbitration, and which was employed by many arbitral institutions.[209] At the same time, the way, how the application of this tool is triggered, substantially differs.

Thus, under the ICAC Rules 2018 expedited arbitral proceedings are conducted by a sole arbitrator unless parties otherwise agreed.[210] Similar approach was adopted by SCC.[211] Although

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[208] "Arbitration Rules of the Singapore International Arbitration Centre (2016)," accessed 2018 April 27, http://www.siac.org.sg/images/stories/articles/rules/2016/SIAC%20Rules%202016%20English_28%20Feb%2017.pdf

[209] In this respect, DIS Arbitration Rules 2018 constitute a notable exception. According to the provisions on expedited procedure (Annex 4), there is no rule that would set up a preference in favour of dispute resolution by a sole arbitrator in the absence of contrary agreement between the parties. Therefore, the provisions of Article 10(2) will apply, which stipulate that in case parties have not reached an agreement regarding the number of arbitrators and if neither party requests the appointment of sole arbitrator, the dispute will be solved by three-member tribunal. See: "2018 DIS Arbitration Rules," accessed 2018 April 27, http://www.disarb.org/upload/bgbl/2018-DIS-Arbitration-Rules.pdf.

[210] "Rules of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry," accessed 2018 April 27, https://icac.org.ua/wp-content/uploads/Rules-of-the-ICAC-at-the-UCCI.pdf, Article 45(6).

[211] "2017 Rules for Expedited Arbitrations of Arbitration Institute of the Stockholm Chamber of Commerce," accessed 2018 April 27, http://www.sccinstitute.com/media/178161/expedited_arbitration_rules_17_eng__web.pdf

Article 17 of 2017 Rules for Expedited Arbitrations provides that arbitration shall be decided by a sole arbitrator, according to the preamble, parties' agreement to the contrary will prevail.

In this respect, HKIAC employs slightly different mechanism: if the arbitration agreement provides for three arbitrators, the HKIAC shall *invite* the parties to agree to refer the case to a sole arbitrator.[212] However, in the absence of such agreement, the case shall be referred to three arbitrators.[213]

At the same time, in the ACICA Expedited Arbitration Rules there is no reference to "arbitral tribunal". Instead, Article 8 expressly stipulates that in expedited procedure "there shall be one Arbitrator" that pursuant to Article 3 should apply "overriding objective" of ACICA Expedited Arbitration Rules, which is "to provide arbitration that is quick, cost effective and fair".[214]

Special attention should be given to the provisions of SIAC Rules, which state that if expedited procedure applies, the case shall be referred to a sole arbitrator, unless the President determines otherwise.[215] As was indicated in the previous section of this research, similar to the ICC Arbitration, under SIAC Rules the provisions on expedited procedure override any contrary terms of the arbitration agreement,[216] which means that notwithstanding parties' choice, a sole arbitrator will be appointed to decide the case.

This approach is very similar to those, employed by the ICC, although not identical. Thus, pursuant to Article 2(1) of Appendix VI the ICC Court "may, notwithstanding any contrary provision of the arbitration agreement, appoint a sole arbitrator".[217] It means that under the ICC Arbitration the appointing authority is actively involved in the process, whereas under SIAC Rules there is an "automatic switch" to a sole arbitrator without the need to receive President's endorsement in each particular case.[218] In addition, it should be noted that contrary to the ICC Arbitration Rules, SIAC stands for an opt-in mechanism of expedited procedure application, which makes it approach regarding mandatory appointment of a sole arbitration less restrictive.

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[212] "Administered Arbitration Rules of Hong Kong International Arbitration Centre," accessed 2018 April 27, http://www.hkiac.org/sites/default/files/ck_filebrowser/PDF/arbitration/2013_hkiac_rules.pdf, Article 41.2(b).

[213] Ibid.

[214] "ACICA Expedited Arbitration Rules (2016)," accessed 2018 April 27, https://acica.org.au/wp-content/uploads/Rules/2016/ACICA-Expedited-Arbitration-Rules-2016.pdf.

[215] "Arbitration Rules of the Singapore International Arbitration Centre (2016)," accessed 2018 April 27, http://www.siac.org.sg/images/stories/articles/rules/2016/SIAC%20Rules%202016%20English_28%20Feb%202017.pdf, Article 5(2).

[216] Ibid, Article 5(3).

[217] "Arbitration Rules of the International Chamber of Commerce." ICC Publication 880-4 ENG. Accessed 2018 April 19. https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf.pdf

[218] Lucja Nowak and Nata Ghibradze, "The ICC Expedited Procedure Rules – Strengthening the Court's Powers", Kluwer Arbitration Blog, 2016, http://arbitrationblog.kluwerarbitration.com/2016/12/13/reserved-for-13-december-the-icc-expeditedprocedure-rules-strengthening-the-courts-powers/.

Speaking about arbitral institutions, which support opt-out system, it is necessary to indicate the following.

Under both Swiss Rules[219] and CIETAC Arbitration Rules[220] if expedited procedure applies, the case is referred to a sole arbitrator, unless the arbitration agreement provides for more than one arbitrator. However, similar to HKIAC, according to Swiss Rules if the arbitration agreement provides for an arbitral tribunal composed of more than one arbitrator, the Secretariat shall *invite* the parties to agree to refer the case to a sole arbitrator.[221] In the absence of such agreement, the case shall be referred to three arbitrators, although arbitrator's fees will be reduced.[222]

At the same, the provisions of ICDR Arbitration Rules and CCIRF Rules regarding the appointment of sole arbitrator are not so clear. Thus, under CCIRF Rules, "as a rule, a case is settled by a sole arbitrator" without specifying what are the exceptions and whether parties' agreement regarding another composition of the tribunal will suffice.[223] In this respect, ICDR Arbitration Rules is even less clear. Article E-6 specifies that in expedited procedure a sole arbitrator shall be appointed.[224] Moreover, the title of this Article ("Appointment and Qualifications of the Arbitrator") suggests that there should be only one person entitled by decide the dispute. However, Article 1 provides that ICDR Arbitration Rules are applicable "subject to modifications that the parties may adopt in writing",[225] which may be interpreted as allowing parties to appoint the three-member tribunal.

Peculiar approach was incorporated into JCAA Commercial Arbitration Rules 2014. Pursuant to Rule 79(1), expedited procedure shall be conducted by a sole arbitrator,[226] whereas the provisions of Rule 25(1), which provides for the possibility of parties to appoint the arbitrator(s), is explicitly excluded.[227] However, if parties reached an agreement that "there will be more than one arbitrator", expedited procedure cannot be applied based on opt-out mechanism,[228] which means that party autonomy overcomes the advantages of expedited dispute resolution.

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219 "Swiss Rules of International Arbitration," accessed 2018 April 27, https://www.swissarbitration.org/files/33/Swiss-Rules/SRIA_EN_2017.pdf, Article 42(2)(b).

220 "China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules," accessed 2018 April 27, http://www.cietac.org/Uploads/201703/58c0fe0c7337a.pdf, Article 58.

221 "Swiss Rules of International Arbitration," accessed 2018 April 27, https://www.swissarbitration.org/files/33/Swiss-Rules/SRIA_EN_2017.pdf, Article 42(2)(c).

222 Ibid.

223 "The Rules of Arbitration of International Commercial Disputes," accessed 2018 April 27, http://mkas.tpprf.ru/en/documents/, Para 33(2).

224 "ICDR International Arbitration Rules," accessed 2018 April 27, https://www.adr.org/sites/default/files/ICDR%20Rules_0.pdf.

225 Ibid.

226 "Commercial Arbitration Rules of the Japan Commercial Arbitration Association," accessed 2018 April 27, http://www.jcaa.or.jp/e/arbitration/Arbitration_Rules_2015e.pdf.

227 Ibid, Rule 79(5).

228 Ibid, Rule 72(2)(2).

Respective analysis shows that there is no consensus among arbitral institution as regards to the mechanism, how the dispute should be referred to a sole arbitrator, if expedited procedure applies. What remains clear is that the approach taken by the ICC in favour of mandatory appointment of a sole arbitrator, even in disputes when expedited procedure is applicable automatically, is suggested to be the most restrictive in relation to the principle of party autonomy.

It should be noted that many authors perceive the provision of Article 2(1) of Appendix VI to the ICC Arbitration Rules as one of the most controversial.[229] This is because respective mechanism can endanger the enforceability of arbitral awards rendered in the course of expedited procedure application by a sole arbitrator, appointed contrary to the agreement of parties.

According to Article V(1)(d) of NYC,[230] recognition and enforcement of the award may be refused, in particular, if "[t]he composition of the arbitral authority […] was not in accordance with the agreement of the parties".

Therefore, the question arise whether an award, rendered in the course of expedited procedure by a sole arbitrator, which was appointed contrary to parties' agreement, can be set aside or the enforcement of such award can be refused by national courts based on the provisions of Article V(1)(d) NYC?

Mohamad Wahab wisely indicates that in order to avoid adverse effect, Article 2(1) brings, the ICC "has prudently ring-fenced the enforceability of […] the awards rendered under its EPP".[231] Indeed, Arbitration Rules provide two important safeguards aiming at ensuring the enforceability.

Firstly, it is a provision of Article 30(1), according to which by agreeing to the ICC Arbitration Rules, parties agree that EPP override any contrary terms in the arbitration agreement.[232] In light of Article 2(1) of Appendix VI, it means that resorting the dispute to the ICC Arbitration, parties have consented to the powers of the ICC Court to appoint a sole arbitrator regardless of their choice.[233]

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[229] See: Lucja Nowak and Nata Ghibradze, "The ICC Expedited Procedure Rules – Strengthening the Court's Powers", Kluwer Arbitration Blog, 2016, http://arbitrationblog.kluwerarbitration.com/2016/12/13/reserved-for-13-december-the-icc-expeditedprocedure-rules-strengthening-the-courts-powers/; Tarjuelo, Javier, "Fast Track Procedures: A New Trend in Institutional Arbitration," *Dispute Resolution International* 11, 2 (2017): 110. https://www.perezllorca.com/es/actualidadPublicaciones/ArticuloJuridico/Documents/Javier%20Tarjuelo%20article.pdf.

[230] "Convention on the Recognition and Enforcement of Foreign Arbitral Awards," accessed 2018 April 28, http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf

[231] Mohamad Salahudine Abdel Wahab, "Chapter 6: Expedited Institutional Arbitral Proceedings Between Autonomy and Regulation", in *Expedited Procedures in International Arbitration*, Laurent Lévy, Michael Polkinghorne (eds), (Paris: International Chamber of Commerce (ICC), 2017), 140.

[232] The provisions of Article 30(1) were analyzed in detail in Section 2.1.1.

[233] "Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration," accessed 2018 April 19, https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf, para 83.

This argument should become of paramount importance for the national courts when deciding whether the composition of the tribunal was "in accordance with the agreement of the parties"[234] or not. Taking into account that consenting to the ICC Arbitration Rules, parties incorporate respective provisions into their arbitration agreement,[235] it seems reasonable to conclude that formation of the tribunal in accordance with Article 2(1) of Appendix VI corresponds to what parties have agreed *in the arbitration agreement*. This interpretation of respective provisions will allow national court to uphold the awards rendered in expedited procedure by a sole arbitration, appointed pursuant to Article 2(1) of Appendix VI.

However, two reservations should be made in this respect. Firstly, as far as Article 30(1) is based on the concept of "implied consent", in some jurisdictions it may be prohibited to impliedly consent to the restriction of rights and, therefore, such restrictions will be considered invalid.[236] Secondly, notwithstanding the provisions of Article 30(1), some jurisdictions may give a precedence to the parties' express choice over the provisions of institutional rules based on the principle *generalia specialibus non derogant*.[237] As a result, in both cases the likelihood of refusal in enforcement or setting aside of respective awards substantially increases.

In order to prevent such situation, the ICC Arbitration Rules provide the second safeguard that should reduce the risk of successful challenge. As was stated in previous section of this research, Article 2(1) sets out a *discretionary capacity* ("may"), rather than an obligation of the ICC Court do decide whether to appoint a sole arbitrator contrary to the agreement between parties or not.[238] At the same time, similar to arbitral tribunal, the ICC Court "shall make every effort" in order to ensure the enforceability of arbitral award.[239] Therefore, although it would "normally"[240] exercise its discretion and appoint a sole arbitrator, prior to making such decision, the ICC Court should carefully consider whether the award will be enforceable at law: not only at the seat of arbitration, but also at any other jurisdictions, where the enforceability can be sought.

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234 In terms of Article V(1)(d) of NYC.

235 Court of Appeals for the Second Circuit, "Idea Nuova, Inc. v. GM Licensing Group, Inc., 617 F.3d 177," accessed 2018 April 28, https://www.courtlistener.com/opinion/152511/idea-nuova-inc-v-gm-licensing-group-inc/.

236 Fabian Bonke, "Overriding an Explicit Agreement on the Number of Arbitrators – One Step Too Far under the New ICC Expedited Procedure Rules?", Kluwer Arbitration Blog, 2017, http://arbitrationblog.kluwerarbitration.com/2017/05/22/overriding-an-explicit-agreement-on-the-number-of-arbitrators-one-step-too-far-under-the-new-icc-expedited-procedure-rules/

237 Mohamad Salahudine Abdel Wahab, "Chapter 6: Expedited Institutional Arbitral Proceedings Between Autonomy and Regulation", in *Expedited Procedures in International Arbitration*, Laurent Lévy, Michael Polkinghorne (eds), (Paris: International Chamber of Commerce (ICC), 2017), 137, 140.

238 See: Section 2.1.1 of this research.

239 "Arbitration Rules of the International Chamber of Commerce," ICC Publication 880-4 ENG, accessed 2018 April 19, https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf.pdf, Article 42.

240 "Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration," accessed 2018 April 19, https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf, para 97.

In addition, it should be suggested that deciding whether to appoint a sole arbitrator, the ICC Court requests the parties to comment this issue in order to know their views,[241] which could serve as a useful tool for preserving enforceability.

In this respect, the reference can be made to the decision of Intermediate People's Court of Ningbo in case *"Hyundai Glovis Co. Ltd. v. Zhejing Qiying Energy Chemicals Co., Ltd."*,[242] by which SIAC arbitral award, rendered in Case No.004 of 2015, was upheld despite the fact contrary to the provisions of arbitration agreement to resort a dispute to a three-member tribunal, the award was rendered by a sole arbitrator in accordance with EPP under SIAC Rules.

When deciding whether the formation of arbitral tribunal corresponded to agreement between parties, Court of Ningbo considered the following: 1) claimant[243] *was invited to comment* regarding applicable law and *did not raise an objection*; 2) it also *did not object* to expedited procedure application; 3) dispute falls within the scope of expedited procedure under SIAC Rules; 4) claimant replied by email to SIAC that it disagreed with respondent's appointment of arbitrator and *requested Chairman* of SIAC to appoint one. Based on these facts, the Court of Ningbo reached the conclusion that constitution of the tribunal was in accordance with parties' agreement.

On the same premise, it is anticipated that if the ICC Court asks parties to comment the application of EPP (notably, the appointment of a sole arbitrator) and neither party objects, it may be interpreted as parties' agreement regarding (or at least absence of disagreement with) respective issues and, thus, waiver of the right to challenge an award on the basis of improper composition of the tribunal.

Having regard to the fact that provisions on overriding effect of expedited procedure[244] and mandatory appointment of a sole arbitrator[245] under SIAC Rules 2016 are similar to those in the ICC arbitration, it seems reasonable to examine how national courts interpret respective provisions of SIAC Rules.

In case *"AQZ v. ARA"*[246] the dispute arose regarding the existence of second contract for the sale of 50,000 metric tons of coal, which stipulated in Clause 16 that disputes should be resolved in accordance with SIAC Rule by three arbitrators. However, one party requested the application of expedited procedure and, although other party challenged both suitability and the

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[241] Despite the fact that Article 2(1) of Appendix VI does not require from the ICC Court to consult the parties.

[242] Arthur X. Dong, "Hyundai Glovis Co. Ltd. v. Zhejing Qiying Energy Chemicals Co., Ltd.", Intermediate People's Court of Ningbo, *Zhe Yong Zhong Que Zi*, 3 (2017).

[243] In the proceedings for non-enforcement.

[244] "Arbitration Rules of the Singapore International Arbitration Centre (2016)," accessed 2018 April 27, http://www.siac.org.sg/images/stories/articles/rules/2016/SIAC%20Rules%202016%20English_28%20Feb%202017.pdf, Article 5(3).

[245] Ibid, Article 5(2)(b).

[246] Supreme Court of Singapore, High Court, "AQZ v. ARA, 13 February 2015", accessed 2018 April 27, http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law/high-court-judgments/15914-aqz-v-ara-2015-sghc-49.

existence of an arbitration agreement regarding this issue, the SIAC President allowed EPP application and appointed a sole arbitrator. After partial award regarding the matters of jurisdiction was issued, dissatisfied party initiated setting aside procedure.

Deciding whether the constitution of arbitral tribunal was in accordance with parties' agreement, Supreme Court of Singapore stated the following:

> [T]he parties had expressly chosen a version of the SIAC Rules that contained the Expedited Procedure provision. Therefore, it was consistent with party autonomy for the Expedited Procedure provision to override their agreement for arbitration before three arbitrators. […] '[E]xpress assent' in the sense contemplated by *NCC International* is not necessary for the Expedited Procedure provision to override the parties' agreement for arbitration before three arbitrators. […] SIAC Rules 2010 have been incorporated into the Parties' contract and therefore as stated in *NCC International* at ([37]), the rules together with the rest of the contract must be interpreted purposively. […] A commercially sensible approach to interpreting the parties' arbitration agreement would be to recognise that the SIAC President does have the discretion to appoint a sole arbitrator. Otherwise, regardless of the complexity of the dispute or the quantum involved, a sole arbitrator can never be appointed to hear the dispute notwithstanding the incorporation of the SIAC Rules 2010 which provide for the tribunal to be constituted by a sole arbitrator when the Expedited Procedure is invoked.[247]

Based on these considerations, the court found that arbitral tribunal was formed in accordance with parties' agreement and, thus, upheld an award rendered by a sole arbitrator.

The decision of Singapore's Supreme Court is essential in three respects. Firstly, it confirmed that incorporating institutional rules, parties agree to the overriding effect of EPP over any contrary term in the arbitration agreement and, secondly, that implied consent would be sufficient to that effect. Finally, it is a "commercially sensible approach" taken by a judge in order to interpret parties' arbitration agreement, placing emphasis on President's role in the appointment of arbitrator under the institutional rules.

Due to similarities between the provisions of the ICC Arbitration Rules and SIAC Rules, it is anticipated that the approach employed by Supreme Court of Singapore "will set a high bar for future challenges to awards"[248] issued in expedited procedure. If the ICC Court took a decision considering the complexity and importance of the case as well as value in dispute,[249] mandatory appointment of a sole arbitrator, regardless of what was stipulated in the arbitration agreement, would not be sufficient ground for a challenge of the awards rendered in expedited procedure.

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[247] Ibid, para 131-132.

[248] Gary B. Born and Jonathan W. Lim, "AQZ v ARA: Singapore High Court Upholds Award Made under SIAC Expedited Procedure", Kluwer Arbitration Blog, 2015, http://arbitrationblog.kluwerarbitration.com/2015/03/09/aqz-v-ara-singapore-high-court-upholds-awar d-made-under-siac-expedited-procedure/

[249] As defined in the following ICC publication: "Effective Management of Arbitration A Guide for In-House Counsel and Other Party Representatives," 4, accessed: 2018 April 24, https://cdn.iccwbo.org/content/uploads/sites/3/2017/05/effective-management-of-arbitration-icc-guide-english-version.pdf

Another noteworthy decision in this respect was issued by Shanghai No. 1 Intermediate People's Court in case *"China No. 15, Noble Resources International Pte. Ltd. v. Shanghai Xintai International Trade Co. Ltd"*.[250] According to the file, the dispute arose from the sale-purchase of iron ore, performed on the basis of Standard Iron Ore Trading Agreement (SIOTA), which stipulated that any dispute or claim shall be submitted to SIAC and that the arbitral tribunal shall consist of three arbitrators.

However, claimant submitted an application for expedited procedure and although respondent objected to it by stating that the matter was complicated, the President approved this application and decided that the arbitration should be conducted on an expedited basis by a sole arbitrator. Respondent notified SIAC that in case dispute is heard by a sole arbitrator, it would refuse to participate in the arbitration. Notwithstanding this, the President appointed a sole arbitrator, which rendered a final award after the proceedings have been finished.

Claimant brought an action before Shanghai No. 1 Intermediate People's Court in order to enforce respective award. However, the court found that SIAC's decision to appoint a sole arbitrator was not in accordance with the agreement of the parties in terms of Article V(1)(d) of NYC and, therefore, refused to recognize and enforce it.

The decision of the court was based on the following grounds:

1) SIAC Rules 2013 have neither excluded other forms of the tribunal's constitution if expedited procedure applies, nor specified that the President of SIAC is still entitled to appoint a sole arbitrator even if parties have agreed about other form of the tribunal's constitution;[251]
2) Party autonomy is a "cornerstone" of arbitration and the formation of arbitral tribunal constitutes its "fundamental procedure". It means that exercising the discretion whether to appoint a sole arbitrator or not, the President of SIAC "shall fully respect the agreement of the parties as to the constitution of the Arbitral Tribunal in order to protect the autonomy of the parties";[252]
3) Taking into account that parties have expressly agreed as to the form of tribunal's constitution that was not excluded by EPP, the application of expedited procedure "shall not affect the basic procedural right of the parties" to have the arbitration conducted as they have agreed.[253]

[250] Shanghai No. 1 Intermediate People's Court. "China No. 15, Noble Resources International Pte. Ltd. v. Shanghai Xintai International Trade Co. Ltd., 11 August 2017". In *Yearbook Commercial Arbitration Volume 42*, Albert Jan van den Berg, 367-369. Alphen aan den Rijn, the Netherlands: Kluwer Law International, 2017.
[251] Ibid, para 8.
[252] Ibid, para 9.
[253] Ibid, para 10.

Although it may seem that the approach, employed by the judges in this case, can endanger the enforceability of arbitral awards rendered by a sole arbitrator in expedited procedure, some reservations should be made in this respect.

Firstly, the court acknowledged the powers of SIAC's President to decide regarding the applicability of expedited procedure and the appointment of a sole arbitrator pursuant to Article 5(2)(b) of SIAC Rules 2013. It means that *de facto* Shanghai Court endorsed the idea of implied consent to the provisions of institutional rules at the time, when parties resort a dispute to an arbitration. In particular, the court found that SIAC Rules 2013 have not excluded any another forms of the tribunal's constitution, which means that if institutional rules provide that expedited procedure shall be conducted exclusively by a sole arbitrator, it would prevent the parties from resorting a dispute to expedited procedure in case they wish to have three-member panel.

Secondly, when deciding to refuse recognition and enforcement, the court relied on the absence of specific provision that would give precedence to the President's decision over parties' agreement regarding the constitution of arbitral tribunal.[254] Indeed, contrary to the ICC Arbitration Rules 2017[255] or SIAC Rules 2016,[256] SIAC Rules 2013 did not grant overriding effect to expedited procedure, notably, to the powers of the President to appoint a sole arbitrator, notwithstanding any contrary agreement of the parties. If such provision existed, it seems very likely that Shanghai Court would reach an opposite conclusion considering that parties consented to overriding effect of the President's decision.

Therefore, it is suggested that the provisions of Article 30(1) and Article 2(1) of Appendix VI to the ICC Arbitration Rules will persuade national courts that the constitution of arbitral tribunal by way of mandatory appointment of a sole arbitrator in expedited procedure should be interpreted as made "in accordance with the agreement of the parties",[257] which will preserve the enforceability of arbitral awards.

Notwithstanding this, authors indicate that in some jurisdictions national courts can give precedence to a specific agreement between the parties by interpreting it narrowly and disregarding general provisions of institutional rules.[258] On this premise, they advise the parties who prefer to have three-member tribunal to opt out expressly from the provisions of Article 2(1).

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[254] Ibid, para 8.

[255] "Arbitration Rules of the International Chamber of Commerce," ICC Publication 880-4 ENG, accessed 2018 April 19, https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf.pdf, Article 30(1).

[256] "Arbitration Rules of the Singapore International Arbitration Centre (2016)," accessed 2018 April 27, http://www.siac.org.sg/images/stories/articles/rules/2016/SIAC%20Rules%202016%20English_28%20Feb%202017.pdf, Article 5(3).

[257] In terms of Article V(1)(d) NYC.

[258] Mohamad Salahudine Abdel Wahab, "Chapter 6: Expedited Institutional Arbitral Proceedings Between Autonomy and Regulation", in *Expedited Procedures in International Arbitration*, Laurent Lévy, Michael Polkinghorne (eds), (Paris: International Chamber of Commerce (ICC), 2017), 143.

To sum up, although mandatory appointment of a sole arbitrator is not a distinctive feature of the ICC Arbitration, this mechanism inevitably confront with the principle of party autonomy. It creates a risk of successful challenge to the enforceability or setting aside of arbitral awards rendered by a sole arbitrator on the basis that arbitral authority was constituted not in accordance with the parties' agreement. In order to escape this situation, the ICC ring-fenced the enforceability of arbitral awards in two ways: firstly, by granting precedence to EPP over any contrary terms of the arbitration agreement, and, secondly, by explicitly providing the ICC Court with a discretionary capacity to disregard parties' express choice in the arbitration agreement and to appoint a sole arbitrator.

Recent case law shows that respective provisions should be sufficient to ensure the enforceability of arbitral award rendered by a sole arbitrator in expedited procedure. Notwithstanding this, some jurisdictions may still give precedence to a specific parties' agreement expressed in the arbitration clause, rather than to the institutional rules. Therefore, when deciding regarding the appointment of a sole arbitrator, the ICC Court should give careful consideration whether the award will be enforceable at law both at the seat of arbitration and in the jurisdictions where the enforcement can be sought.

2.2. Due Process Concern in Expedited Procedure

Similar to the principle of party autonomy, due process is considered as a cornerstone of international arbitration.[259] It ensures that each party should have a right to a fair trial and mainly refers to reasonable opportunity to present the case, equal treatment and the right to be heard.[260] Compliance with due process is a mandatory requirement for the conduct of arbitral proceedings, since failure to do so will endanger the enforceability of arbitral awards.

Thus, according to Article V(1)(b) of NYC, recognition and enforcement of the award may be refused, in particular, if the party was unable to present its case.[261]

In addition, it should be noted that due process may also be invoked as an element of public policy.[262] In this case, the provisions of Article V(2)(b) of NYC will be applicable, with the single difference that if inability to present the case may be invoked only by the party against

[259] Charles Nairac, "Due Process Considerations in the Constitution of Arbitral Tribunals," *International Arbitration and the Rule of Law: Contribution and Conformity*, 19 (2017): 119.

[260] Andrés Jana L., Angie Armer and Johanna Klein Kranenberg, "Article V(1)(b)", in *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, Herbert Kronke, Patricia Nacimiento et al. (Alphen aan den Rijn: Kluwer Law International, 2010), 233-234.

[261] "Convention on the Recognition and Enforcement of Foreign Arbitral Awards," accessed 2018 April 28, http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf

[262] Charles Nairac, "Due Process Considerations in the Constitution of Arbitral Tribunals," *International Arbitration and the Rule of Law: Contribution and Conformity*, 19 (2017): 122.

whom the award in rendered, grounds of public policy can be applied by national courts *ex officio*.[263]

Apparently, in order to reach time- and cost-efficiency, EPP impose certain procedural limitations on parties' rights that creates a concern as to whether in expedited procedure the requirements of due process are fulfilled.

In this regard, one may claim that by agreeing to institutional rules, similar to the restraints of party autonomy,[264] parties have agreed with those procedural limitations and, thus, waived certain rights for the sake of efficient dispute resolution. Nevertheless, some authors state that "[i]t would be incorrect to assume that the parties who agreed to fast track arbitration also agreed to a limitation of their procedural rights".[265] Having regard to the importance of this issue, it seems necessary to consider it more carefully.

To start with, the reference can be made to a famous decision rendered in 1992 by Paris Court of Appeal in case "Société Guangzhou Ocean Shipping Company v. Société Générale des Farines".[266] The court found that the need to respect due process[267] cannot be overridden by the principle of party autonomy and, therefore, parties' right to regulate the procedure (directly or by reference to arbitration rules) cannot lead to a breach of the fundamental requirements of justice.[268]

In addition, Paris Court of Appeal stated that respect to due process should be considered as an integral part of the general principles of procedure, which the arbitrator – in any event – must respect, whereas parties should adopt such rules that are sufficient for the protection of their own rights.[269]

This decision confirms that parties cannot limit their procedural rights (either directly or by reference to the institutional rules) to the extent that such limitations violate the requirements of due process and even if the parties provided such limitations, the tribunal shall disregard them by giving precedence to due process over party autonomy.

Apparently, not all limitations of procedural rights amount to due process violation. If certain restraints do not give raise to such an effect, parties are allowed to agree on them, notably by implicitly consenting to such limitations pursuant to Article 30 (1) of the ICC Arbitration Rules.

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[263] Andrés Jana L., Angie Armer and Johanna Klein Kranenberg, "Article V(1)(b)", in *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, Herbert Kronke, Patricia Nacimiento et al. (Alphen aan den Rijn: Kluwer Law International, 2010), 234.

[264] This argument was considered in Section 2.1.1 of this research.

[265] Irene Welser and Christian Klausegger, "Chapter II: The Arbitrator and the Arbitration Procedure – Fast Track Arbitration: Just fast or something different?", in *Austrian Arbitration Yearbook 2009*, Christian Klausegger et al., (Vienna, Austria: Manz'sche Verlags- und Universitätsbuchhandlung, 2009), 265.

[266] Paris Court of Appeal (1Ch. suppl.), "Société Guangzhou Ocean Shipping Company v. Société Générale des Farines, 17 January 1992", Revue de l'Arbitrage 4 (1992): 625 – 684.

[267] In France, it is called "principe du contradictoire" or "principe de la contradiction".

[268] In the original – "bonne justice".

[269] Ibid.

Therefore, a fundamental question arise whether procedural restraints contained in EPP constitute by itself or can potentially lead to a violation of due process?

Considering that due process implies both the possibility to present the case and reasonable time limit for doing so,[270] these issues will be addressed separately in this research.

To conclude, due process constitutes a cornerstone of arbitration and implies reasonable opportunity to present the case, equal treatment and the right to be heard. In case of failure to comply with these requirements, the enforceability of arbitral awards can be challenged on the basis of parties' inability to present the case or on the grounds of public policy.

In order to make the proceedings time- and cost-efficient, EPP impose certain procedural limitations on parties' rights, which gives raise to due process concern. Although parties agreed with such limitations by consenting to the ICC Arbitration Rules, due process take precedence over the principle of party autonomy and should be ensured in any case.

2.2.1. Ensuring Reasonable Opportunity to Present the Case

Before proceeding with the analysis whether there is a due process violation, it is necessary to establish what standard is used in order to reach the conclusion that party was unable to present the case.[271]

It is worth mentioning that among different jurisdictions there is no consensus on this matter. Summarizing the provisions of national laws, Mohamad Wahab proposes to separate respective standards into three groups: (1) "reasonable/adequate/fair opportunity" to present the case; (2) "full opportunity" to present the case; and (3) "opportunity" to present the case.[272] Apparently, the higher standard is, the less number of procedural limitations is allowed in order not to pose the enforceability risk.

This diversity puts an additional pressure on the arbitrators, which should ensure that an award is enforceable at law[273] and, thus, should give a careful consideration to the standard, used at the place of a seat of arbitral tribunal as well as in the jurisdictions where the enforcement may be potentially sought.

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[270] Christophe Seraglini and Patrick Baeten, "Chapter 2: Expedited Rules and the Possibility of Immediate Measures once a Tribunal is Constituted," in *Expedited Procedures in International Arbitration*, Laurent Lévy, Michael Polkinghorne (eds) (Paris: International Chamber of Commerce (ICC), 2017), 43.

[271] Article V(1)(b) of NYC intentionally does not contain such criteria, leaving it up to national jurisdictions to set out respective standard.

[272] Mohamad Salahudine Abdel Wahab, "Chapter 6: Expedited Institutional Arbitral Proceedings Between Autonomy and Regulation", in *Expedited Procedures in International Arbitration*, Laurent Lévy, Michael Polkinghorne (eds), (Paris: International Chamber of Commerce (ICC), 2017), 143.

[273] Pursuant to Article 42 of the ICC Arbitration Rules.

At the same time, it is necessary to admit that although due process violation is the most frequently invoked ground for challenge to the enforceability or setting aside procedure,[274] in the majority of jurisdictions it remains difficult to rebut the presumption of the validity of arbitral awards. To illustrate this tendency, the reference can be made to the survey of 136 reported court decisions, in which a party invoked Article V(1)(b) NYC. According to its findings, national courts established that the possibility to present the case was not ensured only in fourteen cases (approximately 10%),[275] which suggests that judges tend to narrowly interpret due process exception in order "to encourage recognition and enforcement of awards in the greatest number of cases as possible".[276]

Thus, in 2008, Federal Tribunal of Switzerland stated that the right to be heard is violated when due to "manifest oversight" from the side of the tribunal, it did not take into consideration "some elements which one of the parties submitted" to it and, as a result, the party was not heard "on an important point".[277] Since "manifest oversight" was not proven, the court found that the right to be heard was provided and upheld the award. It shows that in Switzerland the mere limitation of procedural rights would not be sufficient to establish the violation of due process, which increases the burden of prove on the applicants.

In some jurisdictions, national laws explicitly provide additional criteria for assessment whether the possibility to present the case was not provided. In particular, Section 68 of Arbitration Act 1996 (the UK) stipulates that in order to challenge the award, applicants should prove that there was a "*serious irregularity*", which has caused or will cause "*substantial injustice*" to the party.[278]

In addition, some courts favour an idea that if during arbitral proceedings dissatisfied party did not raise an objection regarding particular actions that, in party's opinion, prevented it from the possibility to present the case, such party waives the right to invoke due process arguments at the stage of enforcement.

Thus, in case "*Chrome Resources S.A. v. Léopold Lazarus Ltd.*" Federal Tribunal of Switzerland upheld an award, that was challenged based on the violation of due process, having regard to the fact that during the proceedings appellant did not object to the tribunal's

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[274] Andrés Jana L., Angie Armer and Johanna Klein Kranenberg, "Article V(1)(b)", in *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, Herbert Kronke, Patricia Nacimiento et al. (Alphen aan den Rijn: Kluwer Law International, 2010), 232.

[275] Andrés Jana L., Angie Armer and Johanna Klein Kranenberg, "Article V(1)(b)", in *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, Herbert Kronke, Patricia Nacimiento et al. (Alphen aan den Rijn: Kluwer Law International, 2010), 232.

[276] "Convention on the Recognition and Enforcement of Foreign Arbitral Awards," accessed 2018 April 28, http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf.

[277] Federal Tribunal of Switzerland, "X. v Y., 4A_294/2008", *Swiss International Arbitration Reports* (2008), 495.

[278] "Arbitration Act 1996," accessed 2018 April 28, http://www.legislation.gov.uk/ukpga/1996/23/data.pdf

communication with an expert in the absence of the parties and raised this argument only at the stage of enforcement, which showed "[a]ppellant's bad faith" and "abuse of rights".[279]

The same approach was endorsed by High Court of Justice (the UK) in case "*O'Donoghue v Enterprise Inns Plc [2008] EWHC 2273 (Ch)*". The court found that as far as Mr O'Donoghue did not object to the decision not to hold an oral hearing, he "permitted the Arbitrator to deliberate and to make the award" and "has lost the right to object".[280]

Based on these considerations, it seems reasonable to define whether procedural limitations imposed on the parties pursuant to EPP can be invoked as violating due process or it is just a paranoia.[281]

Considering the features of expedited procedure under the ICC Arbitration Rules,[282] it is suggested that parties' procedural rights are subject to following limitations: 1) inadmissibility of new claims made after the tribunal has been constituted;[283] 2) denial of the requests for document production; 3) limited number, length and scope of written submissions and written witness evidence;[284] 4) resolution of a dispute solely on the basis of documents with no hearing and no examination of witnesses or experts.[285]

However, before proceeding with the analysis of each particular limitation and the effect they produce on due process, two important factors should be taken into account.

Firstly, the mere fact that the dispute is referred to expedited procedure does not necessarily mean that these procedural restraints will be invoked. In this respect, the position of arbitral tribunal is decisive, since it reserves the power to allow new claims and has a discretionary capacity to decide whether to impose other procedural limitations with an obligation to consult parties beforehand.

Secondly, conducting arbitral proceedings, the tribunal shall ensure that each party has a *reasonable opportunity* to present the case[286] and the award is enforceable at law,[287] which implies that when the tribunal decides regarding the appropriateness of certain procedural restrains, it

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[279] Federal Tribunal of Switzerland, "Switzerland No. 10, Chrome Resources S.A. v. Léopold Lazarus Ltd., 8 February 1978," in *Yearbook Commercial Arbitration 1986*, Albert Jan van den Berg (Alphen aan den Rijn: Kluwer Law International, 1986), 541-542.

[280] High Court of Justice, "O'Donoghue v Enterprise Inns Plc [2008] EWHC 2273 (Ch)", accessed 2018 April 28, http://www.bailii.org/ew/cases/EWHC/Ch/2008/2273.html, para 55-56.

[281] Remy Gerbay, "Due Process Paranoia", Kluwer Arbitration Blog, 2016, http://arbitrationblog.kluwerarbitration.com/2016/06/06/due-process-paranoia/

[282] Regarding this issue, detailed analysis was made in Section 1.2.2 of this research.

[283] "Arbitration Rules of the International Chamber of Commerce," ICC Publication 880-4 ENG, accessed 2018 April 19, https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf.pdf, Article 3(2) of Appendix VI.

[284] Ibid, Article 3(4) of Appendix VI.

[285] Ibid, Article 3(5) of Appendix VI.

[286] Ibid, Article 22(4).

[287] Ibid, Article 42.

should assess whether they can prevent the parties from presenting the case and, thus, endanger the enforceability of the awards based on the violation of due process.

These reservations should be kept in mind during further assessment.

1) Inadmissibility of new claims made after the tribunal has been constituted.

Although it is a basic procedural principle that after certain stage parties are not allowed to submit new claims, in expedited procedure this period is extremely short. According to Article 3(2) of Appendix VI after the arbitral tribunal has been constituted, no party shall make new claims, unless it has been authorized to do so by the arbitral tribunal.[288]

Apparently, this limitation does not detriment to claimant since it decides when to submit a request for arbitration and, therefore, can frontload the case. On the contrary, respondent will face strict time limits from the outset of the proceedings and may be willing not only to rebut claimant's submission, but also to make counterclaims that may require substantial preparation.

It can create a risk of challenges on the basis of violation of parties' right to equal treatment, which constitutes an inherent part of due process. However, one may allege that 1) usually before resorting a dispute to an arbitration, parties went through the stage of seeking amicable settlement and, therefore, they already have the understanding what will be a subject matter of a dispute and what arguments are invoked; 2) it is not required from the respondent to substantiate its claims, but only to raise them.

Indeed, before the initiation of the proceedings, parties can already be aware about the subject matter of a dispute. Nevertheless, usually parties reveal legal basis for the claims and respective argumentation only with their submissions. Therefore, it seems to be difficult (if not impossible) for the respondent to frontload the case to the extent similar to those made by claimant.

In addition, the ICC Arbitration Rules provides that counterclaims should satisfy certain requirements, notably, they should contain a statement of relief sought together with the quantification of claims,[289] which will require substantial preparation from the side of respondent.

Some authors indicate that impossibility to make to new claims after the constitution of the tribunal can also be detrimental for claimant that "can be unaware of the expedited nature of the arbitration it intends to start". [290]

However, in contrast to the respondent, whose rights are limited due to the nature of the proceedings, if claimants are caught by such restraints, they have only themselves to blame, since they should have exercised due diligence before submitting a request for arbitration.

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[288] Ibid, Article 3(2) of Appendix VI.

[289] Ibid, Article 5(5).

[290] Christophe Seraglini and Patrick Baeten, "Chapter 2: Expedited Rules and the Possibility of Immediate Measures once a Tribunal is Constituted," in *Expedited Procedures in International Arbitration*, Laurent Lévy, Michael Polkinghorne (eds) (Paris: International Chamber of Commerce (ICC), 2017), 44.

Apparently, it creates inequality between the parties whose rights should be rebalanced by the tribunal. Notwithstanding this, arbitrators may be reluctant to accept new claims at a later stage trying to comply with the six-month period for rendering final award, which is considered as an "essence" of expedited procedure.[291] Although the refusal to accept new claims constitutes a mechanism for increasing efficiency of arbitral proceedings, it is doubtful whether this aim will be achieved if, due to such refusal, parties will be forced to commence separate arbitration, which will be complicated by possible *res judicata* effect.

Therefore, when deciding whether to allow new claims, arbitral tribunals should not only consider "the nature of such new claims, the stage of the arbitration, any cost implications",[292] they should also be guided by requirements of due process, fairness and efficiency of the proceedings.

2) Denial of the requests for document production.

Disclose of documents can be treated as an essential stage of the proceedings in some jurisdictions (such as, the UK and the USA), whereas in others it can be a matter of parties' preferences. However, it does not mean that parties do not seek to annul an award based on the disclosure rulings, although, in most cases, unsuccessfully, even in common law jurisdictions.[293] In this respect, the reference can be made to the case "*Anthony N. LaPine (US) v. Kyocera Corporation (Japan)*", where the claimant invoked a violation of due process since the tribunal rendered an award despite the fact that defendant did not to produce all documents (28 out of 36) required by claimant. Northern District of California has not found any violation of due process and rejected an application.[294]

However, it should be noted that there is substantial difference between failure to comply with certain disclosure rules and complete denial of document production as a stage of arbitral proceedings. Pursuant to Article 3(4) of Appendix VI, after the consultations with the parties, arbitrators are empowered *not to allow* requests for document production. It is anticipated that arbitral tribunals will normally exercise this power since disclose of documents contributes most to the length of the proceedings.[295]

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[291] "Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration," accessed 2018 April 19, https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf, para 97.

[292] "Arbitration Rules of the International Chamber of Commerce," ICC Publication 880-4 ENG, accessed 2018 April 19, https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf.pdf, Article 3(2) of Appendix VI.

[293] Gary B. Born, *International Commercial Arbitration (Second Edition)* (Alphen aan den Rijn, the Netherlands: Kluwer Law International, 2014), 3242.

[294] United States District Court, Northern District of California, "US No. 654, Anthony N. LaPine (US) v. Kyocera Corporation (Japan), 23 May 2008", in *Yearbook Commercial Arbitration 2009*, Albert Jan van den Berg, (Alphen aan den Rijn: Kluwer Law International, 2009), 960.

[295] "2010 International Arbitration Survey: Choices in International Arbitration." Queen Mary University of London, White & Case. Accessed 2018 April 22, http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2010_InternationalArbitrationSurveyReport.pdf.

The question whether the denial of document production can challenge the enforceability of arbitral awards on the basis of due process violation was comprehensively analyzed by Reto Marghitola. Thus, after scrutinizing national case law, the author reaches the conclusion that in Austria the denial of document production cannot lead to the annulment of arbitral awards,[296] whereas in Switzerland it can be treated as a violation of the right to be heard and, therefore, lead to the refusal in enforcement.[297]

Indeed, in some cases the production of documents can be essential for the parties in order to argue the case. In this regard, famous French arbitrator Yves Derains noted that if a party demonstrates that it will not be able to discharge its burden of proof unless certain documents are produced, the arbitrators have a duty to order the production of those documents. Otherwise, justice will not be done and the finality of award may be at stake.[298]

In addition, it should be noted that when arbitral tribunal decides not to allow document production, this limitation should be applied to the same extent to both parties. Otherwise, principle of equal treatment, which constitutes an integral part of due process, will be endangered.

To sum up, denial of the requests for document production, applied to both parties on equal conditions, cannot constitute a violation of due process, unless the documents are so important, that the refusal to grant them does not allow the parties to argue the case.

3) Limiting number, length and scope of written submissions and written witness evidence

Pursuant to Article 3(4) of Appendix VI, the arbitral tribunal may, after consultation with the parties, decide to limit the number, length and scope of written submissions and written witness evidence (both fact witnesses and experts). Apparently, this can lead to the tensions between at least one of the parties, which will argue that such limitations are against due process, since they prevent the parties from the possibility to present the case.[299]

Similar to the limitations that were previously discussed, there is no consistent case law regarding this issue. Apparently, in jurisdictions, where the standard of "reasonable" opportunity to present the case is established, there should be no difficulties with enforcement of arbitral awards rendered with such procedural limitations, whereas in countries, where it is necessary to ensure "full" opportunity, it may give raise to a concern.[300]

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[296] Reto Marghitola, *Document Production in International Arbitration* (Alphen aan den Rijn: Kluwer Law International, 2015), 207.

[297] Ibid, 210.

[298] Yves Derains, "Towards Greater Efficiency in Document Production before Arbitral Tribunals-A Continental Viewpoint", in *ICC Dispute Resolution Bulletin Special Supplement 'Document Production in International Arbitration'* (2006): 87.

[299] Michael Bühler and Pierre Heitzmann, "The 2017 ICC Expedited Rules: From Softball to Hardball?", *Journal of International Arbitration* 34, 2 (2017): 125.

[300] Mohamad Salahudine Abdel Wahab, "Chapter 6: Expedited Institutional Arbitral Proceedings Between Autonomy and Regulation", in *Expedited Procedures in International Arbitration*, Laurent Lévy, Michael Polkinghorne (eds), (Paris: International Chamber of Commerce (ICC), 2017), 143.

However, it should be noted that there is no direct interconnection between the number or length of submission and the possibility to present the case. If parties provide extensive documents with hundreds of exhibits, it does not necessarily mean that such submission is better than those, in which factual and legal basis are described in clear and concise manner, but rather vice versa. In addition, preparation of concise submission requires from the parties more efforts, although it will be highly appreciated by arbitrators. Therefore, it is suggested that imposition of limitations as to the number and length of parties' submissions will not detriment due process, provided that they are made to a reasonable extent.

In this respect, limitation as regards to the scope of parties' submissions seems to be more controversial, since it will require from an arbitrator to reveal its position regarding the case by making preliminary assessment of merits at the outset of the proceedings. Although this proactivity can substantially decrease the length of arbitration, parties may seek to annul the award due to the lack of impartiality and independence from the side of an arbitrator, which aim at preserving fairness of the proceedings.

This risk was considered during Vienna Arbitration Days 2018, where the majority of the participants reached the consensus that in order to eliminate adverse effect, which tribunal's proactivity can pose on enforceability of arbitral awards, institutional rules should explicitly grant arbitrators the power to disclose its preliminary assessment of merits by identifying disputed facts and legal questions.[301] Currently, the ICC Arbitration Rules do not contain respective provision, which means that dissatisfied party can raise the arguments regarding impartiality and independence when the tribunal decides to limit the scope of parties' submission to a certain legal or factual issue.

4) Deciding the case on the basis of documents with no hearing and no examination of witnesses or experts.

The fact that heading constitutes an important stage of arbitral proceedings is without controversy. However, contrary to ordinary arbitration,[302] where the arbitral tribunal may decide not to hold a hearing if neither party requests, in expedited procedure the arbitrators are entitled to do so notwithstanding parties' requests, although their position should be taken into account.[303] Since in some jurisdiction the hearing is considered as an essential guarantee of the right to be

[301] Pitkowitz, Nikolaus, and Alice Fremuth-Wolf, "Chapter VI. The Vienna Repositioning Propositions, The Vienna Repositioning Propositions Repositioning Actors And Actions In International Arbitration," in *Austrian Yearbook on International Arbitration 2018*, Christian Klausegger et al. (Vienna: Manz'sche Verlags- und Universitätsbuchhandlung, 2018), 253.

[302] Ordinary arbitral procedure under the ICC Arbitration Rules.

[303] "Arbitration Rules of the International Chamber of Commerce," ICC Publication 880-4 ENG, accessed 2018 April 19, https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf.pdf, Article 3(5) of Appendix VI.

heard, its conduct can be mandatory in order to meet the requirement of due process. Apparently, if party tries to seek the enforcement of an award, which was rendered with no hearing, in such jurisdiction it would risk receiving refusal on the basis of public policy (even if party against whom the award is invoked would not raise objection regarding inability to present the case).

In this regard, the reference can be made to the judgement of the Supreme Court of Austria in case 1442 dated 30 June 2010.[304] The dispute arose regarding the setting aside of arbitral award rendered in favour of respondent. Besides partiality of an arbitrator, claimant invoked violation of the right to be heard, the principle of fair trial and public order, since its request for an oral hearing had been rejected by the arbitrator. The court applied the provisions of Section 598 of Austrian Code of Civil Procedure (ZPO), according to which if the parties have not excluded an oral hearing, the arbitral tribunal shall hold such hearing if so requested by a party.[305] Since the arbitrator has refused conduct the hearing regardless of claimant's request, the Supreme Court of Austria found the violation of the right to be heard and set aside the award.

At the same time, in Sweden refusal to conduct a hearing would not amount to due process violation. Thus, in 2012 Svea Court of Appel heard a dispute where the appellant challenged an award rendered in expedited procedure, where a sole arbitrator refused to conduct a hearing upon appellant's request, which prevented the party from the possibility to present the case. The court applied Article 27(1) of SCC Rules for Expedited Arbitrations (2010), according to which a hearing is held if requested by a party and if deemed necessary by the Arbitrator.[306] Therefore, the court found that it was at the tribunal's discretion to decide regarding the hearing conduct and since the sole arbitrator's has considered parties' submissions and written witness statements when drafting an award, the opportunity to present the case was provided.[307]

As regards to English case law, it seems reasonable to refer to the judgement in *O'Donoghue v Enterprise Inns Plc [2008] EWHC 2273 (Ch)*. In this case, High Court of Justice agreed with appellant's allegation that if there had been an oral hearing, the tribunal would have reached a different result. However, the court did not accept that the possibility of a different result amounts to substantial injustice within Section 68 of Arbitration Act 1996 and, therefore, refused to set aside an award based on due process violation.[308]

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[304] Supreme Court of Austria, "Case 1442: 7 Ob 111/10i (30 June 2010)", *Case Law on UNCITRAL Texts (CLOUT)*, United Nations Commission on International Trade Law (2015), 3.

[305] "Austrian Code of Civil Procedure," accessed 2018 April 28, http://www.viac.eu/images/ZPO_Schiedsrecht_2014_en_im_VIAC_Layout.pdf

[306] "2010 Rules for Expedited Arbitrations of Arbitration Institute of the Stockholm Chamber of Commerce," accessed 2018 April 27, http://www.sccinstitute.com/media/40124/expeditedrules_eng_webbversion.pdf

[307] Svea Court of Appeal, "Case No. T 6238-10, 24 February 2012," accessed 2018 April 28, https://www.arbitration.sccinstitute.com/views/pages/getfile.ashx?portalId=89&docId=1767474&propId=1578

[308] High Court of Justice, "O'Donoghue v Enterprise Inns Plc [2008] EWHC 2273 (Ch)", accessed 2018 April 28, http://www.bailii.org/ew/cases/EWHC/Ch/2008/2273.html, para 53.

Respective case law analysis suggests that when arbitrators decide regarding the conduct of the hearing, they should be mindful to consider whether in the jurisdiction at the seat of arbitration and in the places of potential enforcement, the refusal to hold a hearing upon the request of the party would amount to the violation of due process.

To summarize, EPP empower an arbitral tribunal to impose certain limitations on parties' procedural rights, although by doing so arbitrators should ensure that each party has a reasonable opportunity to present its case. Despite the fact that due process violation is the most frequently invoked ground for the challenge to enforceability or setting aside procedure, judges tend to narrowly interpret this concept in order to encourage recognition and enforcement of arbitral awards.

Thus, inadmissibility of new claims after the constitution of tribunal does not pose unenforceability risk as long as equal treatment is provided. On the same premise, denial of the requests for document production does not detriment due process, unless the documents are so important, that the refusal to grant them would not allow the parties to argue the case. The imposition of limitations as to the number and length of parties' submissions does not prevent parties from the possibility to present the case, whereas limitations regarding the scope can be used by dissatisfied party in order to challenge the award based on the lack of impartiality and independence from the side of an arbitrator.

Finally, the denial to hold a hearing may constitute due process violation on the condition that its conduct constitutes a mandatory requirement under national laws. Therefore, considering the imposition of particular limitation on parties' procedural rights, arbitrators should be mindful to examine whether such limitations can amount to the violation of due process both at the seat of arbitration as well as at the jurisdictions where the enforcement may be sought.

2.2.2. Complexities in Meeting the Deadlines

Having regard to the nature of expedited procedure, one may reasonably claim that shortened time limits constitute a "core" of the proceedings of such type and the compliance with them is essential for achieving efficiency.

Although there no consensus among arbitral institutions regarding the particular speed of expedited procedure, it seems to be a trend to provide an arbitral tribunal with six-month period to render a final award. In this respect, the reference can be made to the arbitration rules of SCC,[309]

[309] "2017 Rules for Expedited Arbitrations of Arbitration Institute of the Stockholm Chamber of Commerce," acces sed 2018 April 27, http://www.sccinstitute.com/media/178161/expedited_arbitration_rules_17_eng__web.pdf), Article 43.

SIAC,[310] HKIAC,[311] DIS,[312] VIAC[313] etc. The ICC took similar approach by providing in Article 4(1) of Appendix VI that the arbitral tribunal must render its final award within six months from the date of the case management conference.[314]

However, it is important to note that six-month period is not reserved by the parties and arbitrators alone, since the tribunal is expected to submit the draft award within five months from the case management conference, which already shortens the proceedings.[315] The process of drafting of an award is also time-consuming and usually[316] takes at least two weeks.[317] Consequently, starting from the case management conference, parties will have approximately four and a half months to present the case before the closure of the proceedings.

Apparently, parties and arbitral tribunals may face difficulties in meeting this deadline, especially if the proceedings involve disputes over the language of arbitration, jurisdictional challenges or challenges of an arbitrator. In addition, considering the fact that expedited procedure places emphasis on the efficiency, the primal task of arbitral tribunals is to balance "magic triangle"[318] between efficiency (six-month time limit), due process (reasonable opportunity to present the case) and party autonomy (overriding effect of parties' mutual agreement over any attempt of the tribunal to reach efficiency) that was always difficult to do.

Despite the fact that expedited procedure aims at time- and cost-reduction, it is doubtful that in case of a conflict, arbitrators would give a preference to the efficiency over party autonomy and due process, since it could make an award unenforceable or lead to its annulment, which in itself would undermine the efficiency of arbitral proceedings. Therefore, although compliance with six-month time limit constitutes the essence of EPP, the message from the ICC remains clear: adopting any procedural steps aiming at increasing efficiency, the tribunals should also ensure the

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[310] "Arbitration Rules of the Singapore International Arbitration Centre (2016)," accessed 2018 April 27, http://www.siac.org.sg/images/stories/articles/rules/2016/SIAC%20Rules%202016%20English_28%20Feb%2017.pdf, Article 5(2)(d).

[311] "Administered Arbitration Rules of Hong Kong International Arbitration Centre," accessed 2018 April 27, http://www.hkiac.org/sites/default/files/ck_filebrowser/PDF/arbitration/2013_hkiac_rules.pdf, Article 41(2)(f).

[312] "2018 DIS Arbitration Rules," accessed 2018 April 27, http://www.disarb.org/upload/bgbl/2018-DIS-Arbitration-Rules.pdf, Article 1 of Annex 4.

[313] "Arbitration Rules of the International Chamber of Commerce," ICC Publication 880-4 ENG, accessed 2018 April 19, https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf.pdf.

[314] "Rules of Arbitration of Vienna International Arbitral Centre," accessed 2018 April 27, http://www.viac.eu/images/Wiener_Regeln_2018_Brosch%C3%BCre_en_Onlinefassung_Einzelseiten_20171219.pdf, Article 45 (8).

[315] "Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration," accessed 2018 April 19, https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf, para 86.

[316] Noteworthy exception is a famous *Formula One Racing* case, whether the award was issued within 48 hours after the hearing and was approved by the ICC Court on the same day at an emergency session.

[317] Michael Bühler and Pierre Heitzmann, "The 2017 ICC Expedited Rules: From Softball to Hardball?", *Journal of International Arbitration* 34, 2 (2017): 141-142.

[318] Fortese, Fabricio, and Lotta Hemmi. "Procedural Fairness and Efficiency in International Arbitration". In *Groningen Journal of International Law* 3, 1 (2015): 122.

enforceability of arbitral awards[319] and parties' reasonable opportunity to present the case.[320] In other words, it means that efficiency cannot overweight due process[321] and the task of the tribunal is to consider whether the mechanism of enhancing the former would not violate the requirements of the latter.

To illustrate how the efficiency may be confronted with due process, it seems reasonable to refer to the following scenario. In order to be able to submit the evidence to support its position, one of the parties (notably, the respondent that was unable to frontload its case), asks for the extension of the time limit for submission of factual exhibits. If refusal to grant such an extension can prevent the requesting party from the possibility to present its case, it would be reasonable to allow it regardless of the fact that it detriments efficiency. However, such an extension can have significant influence on further conduct of the proceedings: counter-party will definitely ask for an additional time as well in order to be able to comment new exhibits. If the tribunal refuses to grant such an extension, it would fail to ensure equal treatment, which constitutes an integral part of due process. Apparently, these factors can prevent the parties and arbitral tribunal from the compliance with six-month time limit, which would not necessarily mean that the efficiency of the proceedings was not ensured.

Based on these considerations, it is suggested that six-month time limit for rendering final award should constitute a desired outcome, rather than "the essence"[322] of expedited procedure, since failure to comply with this deadline will not undermine the purpose of EPP.

In this respect, it is important to note that at the time, when the provisions of Appendix VI to the ICC Arbitration Rules were drafted, it was already anticipated that the time limit for rendering final award can be too ambitious for the users. Therefore, EPP prudently reserve the power of the ICC Court to extend respective deadline.[323] However, it is doubtful that the ICC Court will exercise this discretionary capacity only "in limited and justified circumstances".[324] In case users failed to meet six-month time limit, the only thing the Court can do is to express regrets and

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[319] "Arbitration Rules of the International Chamber of Commerce," ICC Publication 880-4 ENG, accessed 2018 April 19, https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf.pdf, Article 42.

[320] Ibid, Article 22(4).

[321] Gary B. Born, *International Commercial Arbitration (Second Edition)* (Alphen aan den Rijn, the Netherlands: Kluwer Law International, 2014), 2124.

[322] "Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration," accessed 2018 April 19, https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf, para 97.

[323] "Arbitration Rules of the International Chamber of Commerce," ICC Publication 880-4 ENG, accessed 2018 April 19, https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf.pdf, Article 4 of Appendix VI.

[324] "Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration," accessed 2018 April 19, https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf,, para 96.

to extend the period. Otherwise, the awards will be rendered beyond *ratione temporis* jurisdiction of the tribunal[325] that can mean either that the arbitration agreement in relation to a specific dispute has expired[326] or that the proceedings have not been conducted in accordance with the parties' agreement.[327]

Therefore, it is anticipated that the ICC Court will use its power to extend the time limit for rendering final award in *each case* where the parties and the tribunal are about to miss respective deadline. Apparently, this will require from the ICC Court to make timely interventions into the proceedings in order to ensure that the *ratione temporis* jurisdiction of arbitral tribunals is not overlooked.

Practice confirms that users face difficulties with meeting six-month time limit. Thus, the ICC preliminary statistic shows that although parties have reached an agreement to opt-in to expedited procedure in 10 cases, which by itself means that they were willing to cooperate in order to make the proceedings more efficient, only in 3 of them (30%) the six-month time limit was observed.[328] Therefore, it seems reasonable to presume that in cases where expedited procedure applies automatically, these figures should be even less promising.

At the same time, it is necessary to admit that arbitrators are provided with the set of tools that may be helpful in boosting the procedure. Having regard to the fact that most of these tools and potential implications of their usage were discussed in the previous section, the emphasis should be made on the possibility to shorten the reasoning in the arbitral award.

Although EPP do not contain special rules for drafting an award,[329] under para 90 of the Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration the tribunals are provided with a discretionary capacity to limit the factual and/or procedural sections of the award and state the reasons, upon which it is based, in a concise manner.

The requirement to an award to be reasoned constitutes a basic guarantee of fairness of the proceedings. Therefore, if the award does not contain the reasons upon which it is based, it may be treated as rendered against public policy and, therefore, the recognition and enforcement may be refused.

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[325] Mohamad Salahudine Abdel Wahab, "Chapter 6: Expedited Institutional Arbitral Proceedings Between Autonomy and Regulation", in *Expedited Procedures in International Arbitration*, Laurent Lévy, Michael Polkinghorne (eds), (Paris: International Chamber of Commerce (ICC), 2017), 148.

[326] "Convention on the Recognition and Enforcement of Foreign Arbitral Awards," accessed 2018 April 28, http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf, Article V(1)(a).

[327] Ibid, Article V(1)(d).

[328] "ICC announces 2017 figures confirming global reach and leading position for complex, high-value disputes", International Chamber of Commerce, accessed 2018 April 29, https://iccwbo.org/media-wall/news-speeches/icc-announces-2017-figures-confirming-global-reach-leading-position-complex-high-value-disputes/

[329] Pursuant to Article 32(2), any award shall state the reasons upon which it is based. (See: "Arbitration Rules of the International Chamber of Commerce," ICC Publication 880-4 ENG, accessed 2018 April 19, https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf.pdf).

Thus, by the decision dated 28 September 2016 Supreme Court of Austria set aside interim award as violating public policy based on the fact that it did not contain "sufficient reasoning".[330] The court noted that the standard applicable to arbitral awards is higher than those used for judgements, since in arbitration there is no appellate mechanism, by which legal flaws may be removed. Therefore, an arbitral award is considered sufficiently reasoned when the tribunal justifies the adoption of certain decision by making reference to its position discussed in the course of the proceedings.[331]

At the same time, Federal Tribunal of Switzerland took completely the opposite approach. In this respect, the reference can be made to the decision issued in 2008. In this case, respondent asked the court to set aside the award based on the violation of the right to be heard, in particular, because the award stated "no real reasoning". The court held that the right to be heard does not necessarily require an arbitral award to be reasoned, and even where such an obligation exists, a brief statement of reasons may suffice.[332]

It shows that there is no consistent practice among national courts in different jurisdictions regarding the extent to which the reasons of an award should be stated. As was wisely mentioned by Mohamad Wahab, "reasoning may be made in a concise/summary fashion, but must be sufficiently adequate to sustain trust and confidence in the process at large".[333]

Therefore, when deciding to indicate the reasons in a "concise" manner, it is suggested that the arbitral tribunals should consider whether it would be sufficient for ensuring the compliance with public policy at the seat of arbitration and in the jurisdictions where the enforcement can be sought.

In addition, it should be noted that some authors reasonably consider that shortening factual and/or procedural sections will not reduce the time necessary for arbitrators in order to draft an award, but rather will benefit to the delay, since it takes more time "to prepare a concise summary of the relevant facts and arguments instead of just copying over many pages the parties' submissions".[334]

To sum up, six-month time limit for rendering final award can be challenging to meet, since the compliance with it requires an utmost cooperation from all stakeholders: the parties,

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330 Supreme Court of Austria, "18 OCg 3/16 i (28 September 2016)", accessed 2018 April 28, http://arbitrationblog.kluwerarbitration.com/2016/12/24/austrian-supreme-court-establishes-new-standards-as-regards-the-decisive-underlying-reasoning-of-arbitral-awards/.

331 Ibid.

332 Federal Tribunal of Switzerland. "X. v Y., 4A_294/2008". *Swiss International Arbitration Reports* (2008), 495.

333 Mohamad Salahudine Abdel Wahab, "Chapter 6: Expedited Institutional Arbitral Proceedings Between Autonomy and Regulation", in *Expedited Procedures in International Arbitration*, Laurent Lévy, Michael Polkinghorne (eds), (Paris: International Chamber of Commerce (ICC), 2017), 148.

334 Michael Bühler and Pierre Heitzmann, "The 2017 ICC Expedited Rules: From Softball to Hardball?", *Journal of International Arbitration* 34, 2 (2017): 143.

counsel, arbitrators and institution. Therefore, the ICC Court reserves the power to extend this time limit and contrary to the allegations that it will refer to this power only in limited and justified circumstances, it is anticipated that the ICC Court will frequently exercise its discretionary capacity in order to ensure that the *ratione temporis* jurisdiction of arbitral tribunals is not overlooked.

In order to meet respective deadline, the arbitral tribunal has a number of tools, notably, the power to limit factual and/or procedural sections of the award and state the reasons, upon which it is based, in a concise manner. Since the absence of sufficient reasoning may violate public policy in different jurisdictions, the tribunal should give careful consideration whether "concise" reasoning would be sufficient for ensuring the compliance with public policy at the seat of arbitration and in the jurisdictions where the enforcement can be sought.

CONCLUSIONS

1. Expedited dispute resolution in international arbitration refers to a special form of arbitral proceedings conduct, which aims at increasing their efficiency in comparison with "conventional" arbitration. In particular, this procedure was developed in order to solve the issues of time and cost, which users name among the worst features of international arbitration
2. The idea of expedited dispute resolution has long been discussed within the ICC. At the outset, the emphasis was made on parties' ability to tailor-make the proceedings to their needs using specific guidelines. Since this mechanism failed to ensure the efficiency of arbitral proceedings, the ICC shifted from "softball" to so-called "hardball" approach by introducing self-designed expedited procedure.
3. It applies automatically where the amount in dispute does not exceed USD 2,000,000 and the arbitration agreement was concluded after 1 March 2017, although the right of the parties to opt-in or opt-out regardless of the date of the conclusion of arbitration agreement and the amount in dispute, is explicitly reserved.
4. Expedited procedure has the following features: mandatory appointment of a sole arbitrator, absence of the Terms of Reference, inadmissibility of new claims after the constitution of arbitral tribunal, shortened time limit for the conduct of case management conference, broad powers of the arbitral tribunal, stricter time limits for rendering final award and reduced scale of arbitrator's fees.
5. Some of these features may confront with the principle of party autonomy and due process that can give raise to a challenges to the enforceability or setting aside of the awards rendered in expedited procedure.
6. When balancing between party autonomy and efficiency, EPP give preference to the latter, since pursuant to Article 30 of the ICC Arbitration Rules provisions on expedited procedure override any contrary terms of the arbitration agreement.
7. Although mandatory appointment of a sole arbitrator explicitly contradicts to this principle of party autonomy, the ICC ring-fenced the enforceability of arbitral awards rendered within expedited procedure. Notwithstanding this, in some jurisdictions national courts may still give precedence to a specific parties' agreement expressed in the arbitration clause, rather than to the institutional rules. Therefore, when deciding regarding the appointment of a sole arbitrator, the ICC Court should carefully consider whether mandatory appointment of a sole arbitrator would endanger the enforceability of an arbitral award both at the seat of arbitration and in the jurisdictions where the enforcement can be sought.

8. Since EPP impose certain limitations on parties' procedural rights, it creates a concern whether such restraints violate due process, which encompasses parties' ability to present the case, equal treatment and the right to be heard.
9. Six-month time limit for rendering final award does not detriment due process *per se*. However, users have already faced with the difficulties in meeting this deadline, since it may be too short for the parties in order to be able to present the case. In such situation, the ICC Court should make timely interventions and extend respective time limit in order to ensure that the *ratione temporis* jurisdiction of arbitral tribunals is not overlooked.
10. Inadmissibility of new claims after the constitution of tribunal does not pose unenforceability risk as long as equal treatment is provided. On the same premise, denial of the requests for document production does not detriment due process, unless the documents are so important, that the refusal to grant them would not allow the parties to argue the case.
11. Imposition of limitations as to the number and length of parties' submissions does not prevent them from the possibility to present the case, whereas limitations regarding the scope can be used in order to challenge the award based on the lack of impartiality and independence from the side of an arbitrator. In order to avoid this effect, the ICC Arbitration Rules should grant to an arbitrator the power to disclose preliminary assessment on the merits by identifying disputed facts and legal questions.
12. As regards to the denial to hold a hearing, it may constitute due process violation on the condition that the hearing conduct constitutes a mandatory requirement under national laws.
13. The absence of sufficient reasoning in the award can violate due process. However, whether the statement of reasons in a "concise" manner would be considered sufficient depends mainly on the provisions of national laws.
14. Therefore, in order to address the challenges of expedited procedure application, adopting any procedural decision, arbitral tribunals should carefully balance party autonomy, due process and efficiency seeking to ensure the enforceability of awards without sacrificing the latter.

RECOMMENDATIONS

1. To the ICC – to supplement Arbitration Rules with an article stipulating the following:

   The arbitral tribunal may disclose its preliminary assessment on merits by identifying disputed facts and relevant legal questions. By agreeing to arbitration under the Rules parties waive their right to challenge the impartiality and independence of the arbitral tribunal based on such preliminary assessment.

2. To the ICC Court:
   1) to extend six-month time limit for rendering final award *in each case* in order to preserve the *ratione temporis* jurisdiction of arbitral tribunals.
   2) to ensure that the mandatory appointment of a sole arbitrator would not endanger the enforceability of an arbitral award both at the seat of arbitration and in the jurisdictions where the enforcement can be sought.
3. To the arbitral tribunals – to ensure that the decisions to impose limitation on parties' procedural rights would not endanger the enforceability of arbitral awards on the basis of due process violation both at the seat of arbitration and in the jurisdictions where the enforcement can be sought.

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ABSTRACT

This research is dedicated to the analysis of problematic aspects that arise during the application of expedited procedure under the ICC Arbitration Rules based on the assessment of its legal peculiarities. The master thesis answers the question as regards to the balance achieved in expedited procedure between the principle of party autonomy, efficiency and due process.

In addition, it provides the ICC, the ICC Court and the arbitrators with the recommendations on how to ensure the enforceability of arbitral awards without sacrificing the efficiency of arbitration.

Keywords: *expedited procedure, party autonomy, due process, efficiency, ICC arbitration.*

SUMMARY

EXPEDITED PROCEDURE UNDER THE INTERNATIONAL CHAMBER OF COMMERCE (ICC) ARBITRATION RULES:
CURRENT DEVELOPMENTS AND CHALLENGES

Yevhenii Vasylchenko

The core of this research is to analyze current developments of expedited procedure under the ICC Arbitration Rules in order to define the challenges it creates and to propose recommendations on how to eliminate (or at least minimize) the adverse effect of expedited procedure application on the enforceability of arbitral awards.

During the master thesis, the author tries to find an answer to a fundamental question regarding the considerations that should be taken into account by arbitral tribunals in order to address the challenges of expedited procedure under the ICC Arbitration Rules.

In order to accomplish this aim, the research starts with the analysis of the idea of expedited dispute resolution in international arbitration defining policy reasons for its creation and historical development of the approach taken by the ICC as regards to ensuring efficiency of arbitral proceedings.

Further, legal peculiarities of expedited procedure under the ICC Arbitration Rules are analyzed, placing the emphasis on the scope of its application and on its distinctive features in comparison with expedited procedure provisions adopted by other major arbitral institution worldwide.

Based on the previous analysis, the research distinguishes two separate group of challenges of expedited procedure. First group arises from the tension between party autonomy and efficiency of arbitral proceedings. In this respect, the author investigates the overriding effect of expedited procedure provisions over party autonomy and explains why the mandatory appointment of a sole arbitrator can or cannot endanger the enforceability of arbitral awards.

According to the research, second group of challenges derives from the confrontation between due process and efficiency. The master thesis examines how expedited procedure provisions influence reasonable opportunity of the parties to present the case and analyzes the complexities with meeting procedural deadlines, placing emphasis of the enforceability of arbitral awards as well.

Findings of the research prove its defence statement. Extensive recommendations on how to minimize the adverse effect of expedited procedure application on the enforceability of arbitral awards were provided.

ANNEX

Gmail **Yevhenii Vasylchenko <yevgeniyvasilchenko@gmail.com>**

Statistics regarding expedited proceedings application

Писем: 3

Yevhenii Vasylchenko <yevgeniyvasilchenko@gmail.com> 3 апреля 2018 г., 15:30
Кому: dawn.chardonnal@iccwbo.org

Dear Ms Chardonnal,

I am a student of European and International Business Law programme at the University Savoie Mont Blanc (France) and I am writing master thesis on the following topic: "Expedited procedure under the ICC Arbitration Rules: current developments and challenges".

I bumped into the statistics regarding expedited procedure application at the following link: https://iccwbo.org/media-wall/news-speeches/first-arbitral-tribunals-constituted-icc-expedited-procedures/

However, 7 months have already passed from the date of publication of that information. Therefore, I would like to kindly ask you to share the following statistical information (if available) for the academic purpose (master thesis writing):

1) How many cases were registered under the expedited procedure?

2) How many of them were registered on the basis of para 2(a) of Article 30 (automatic application) and on the basis of para 2(b) of Article 30 (parties' opt in)?

3) In how many cases, registered in the ICC, did the parties opt out from expedited procedure rules by mutual agreement?

4) How many cases governed by expedited procedure are still pending?

5) What is the duration of the cases pending under expedited procedure (up to 3 months, from 3 to 6 months, over 6 months)?

6) How many cases under expedited procedure were resolved by rendering an award and what was the duration of such procedures? Whether the hearings were held? If not, why (due to the fact parties did not ask for the hearing or despite party's request, an arbitrator decided not to hold the hearing)?

7) How many cases are being resolved resolving (or were resolved) by a Sole Arbitrator despite the fact the parties have agreed in the arbitration clause that the dispute should be solved by a Panel?

I do hope for your favourable consideration of my plea. You help will be highly appreciated.

Kind regards,
Yevhenii Vasylchenko.

arb <arb@iccwbo.org> 5 апреля 2018 г., 16:21
Кому: "yevgeniyvasilchenko@gmail.com" <yevgeniyvasilchenko@gmail.com>

Dear Sir,

Thank you for your message.

The statistics which are available are the number of expedited procedure requests: 61

Yours sincerely,

International Court of Arbitration | International Chamber of Commerce

33-43 avenue du Président Wilson, 75116 Paris, France

HONESTY DECLARATION

17/05/2018

Vilnius

I, Yevhenii Vasylchenko , student of
(name, surname)

Mykolas Romeris University (hereinafter referred to University),
Faculty of Law, European and International Business Law programme
(Faculty /Institute, Programme title)

confirm that the Master thesis titled

"Expedited procedure under the International Chamber of Commerce (ICC) Arbitration Rules: current developments and challenges" :

1. Is carried out independently and honestly;
2. Was not presented and defended in another educational institution in Lithuania or abroad;
3. Was written in respect of the academic integrity and after becoming acquainted with methodological guidelines for thesis preparation.

I am informed of the fact that student can be expelled from the University for the breach of the fair competition principle, plagiarism, corresponding to the breach of the academic ethics.

(signature)

Yevhenii Vasylchenko
(name, surname)