

Arbitration Proceedings I

International Commercial Arbitration and International Sales Law

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Schedule

International Arbitration

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- 29.11 **Arbitration proceedings I**
- 06.12 Arbitration proceedings II
- 13.12 Challenge, recognition and enforcement of an award
- 17.01 Specific types of arbitration

Establishment of an Arbitral Tribunal

1. By agreement of the Parties
2. When one Party is in default:
 - ad hoc arbitration:
 - under UNCITRAL AR – a default option for designation an appointing authority – the Secretary-General of the PCA
 - other – a national court
 - institutional arbitration:
 - under institutional rules

The Permanent Court of Arbitration



Establishment of an Arbitral Tribunal

Time limits:

- as a matter of procedural or substantive law
- when not complied with, the award may be set aside

Date of commencement of arbitration:

- when a request is received by the Secretariat (ICC Rules)
- when a notice is received by Respondent (UNCITRAL Rules, ZPO)
- when the parties are notified that all the arbitrators have accepted their appointments (ICSID Rules)

Selection of arbitrators

Number of arbitrators: uneven. Default options under different AR:

- a sole arbitrator: LCIA, International Centre for Dispute Resolution (ICDR), unless it is more appropriate to have 3
- three arbitrators: UNCITRAL, also ML

Methods of appointing:

- by agreement of the parties;
- the chair by existing co-arbitrators;
- through a list system;
- by an appointing authority.

Legal relations of the parties and the arbitrators/arbitral institutions

ARBITRATORS:

Contractual vs. status school

in Germany: an agency contract, does not depend on the validity of AA

ARBITRAL INSTITUTIONS:

Contractual, but: subject to a general contractual liability vs. immunity

in Germany: a contract of services

Qualities, powers and duties of arbitrators

Sources:

-agreement of the parties

-lex arbitri

Qualities of arbitrators

Examples:

- experience, education, language
- nationality
 - UNCITRAL AR: *advisability of appointing an arbitrator of a nationality other than the nationalities of the parties*
 - ICC, LCIA: shall not be of a nationality of one of the parties, unless the parties agree otherwise
- **impartiality and independence**
 - ICC: *every arbitrator must be and remain impartial and independent of the parties involved in the arbitration.*

Impartiality and independence

a subjective and an objective test

2014 IBA Guidelines on Conflicts of Interest in Int'l Commercial Arbitration

- Part I: General Standards (GSs)

(a continuing) duty to disclose: any **doubts in the eyes of a party** as to the arbitrator's im or ind.

BUT: stage of proceedings, advance declarations

a duty to resign: the arbitrator has **doubts** or a knowledgeable reasonable 3rd person has **justifiable doubts** = there is a **likelihood that the arbitrator may be influenced by factors other than the merits of the case.**

- Part II: Practical Application of the GSs: **Red**, **Orange** and **Green** Lists

Non-Waivable Red List

an objective conflict of interest, an arbitrator cannot act

1.1 There is an identity between a party and the arbitrator...

Waivable Red List

a serious conflict, can be cured only by unanimous agreement of all the stakeholders

2.3.6 The arbitrator's law firm currently has a significant commercial relationship with one of the parties, or an affiliate of one of the parties.

Orange List

the arbitrator has a duty to disclose but can nonetheless act unless the parties make a timely objection

3.2.1 The arbitrator's law firm is currently rendering services to one of the parties, or to an affiliate of one of the parties, without creating a significant commercial relationship for the law firm and without the involvement of the arbitrator.

3.5.2 The arbitrator has publicly advocated a position on the case.

Green List

objectively no conflicts of interest, no disclosure is necessary

4.1.1 The arbitrator has previously expressed a legal opinion (such as in a law review article or public lecture) concerning an issue that also arises in the arbitration (but this opinion is not focused on the case).

Challenge of arbitrators

Sources:

- arbitration rules
- lex arbitri

Procedure:

- lodged with an AT itself, an AI or a court
- time-limits run from the appointment or when that party became aware of the circumstances (disclosure). Otherwise: a waiver?

Outcome of a successful challenge:

- filling the vacancy
- proceeding as a truncated tribunal (e.g. two instead of three arbitrators)

Grounds for disclosure

UNCITRAL: any circumstances likely to give rise to justifiable doubts as to his or her im or ind

ICC: any facts or circumstances which might be of such a nature as to call into ? the arbitrator's ind in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's im

LCIA: any circumstances which are likely to give rise in the mind of any party to any justifiable doubts as to his or her im or ind

Grounds for challenge

if circumstances exist that give rise to justifiable doubts as to the arbitrator's im or ind

an alleged lack of im or ind, or otherwise

does not act fairly or impartially as between the parties

An alternative approach

1. Connection: an arbitrator - a party (ICSID approach)
 - proximity
 - intensity
 - dependence
 - materiality
2. Issue conflict: arbitrator = counsel advocating the opposite position
3. Prejudgment

Powers and duties of arbitrators

to determine:

- the seat, language, applicable procedural law, including evidence
- applicable substantive law

to order:

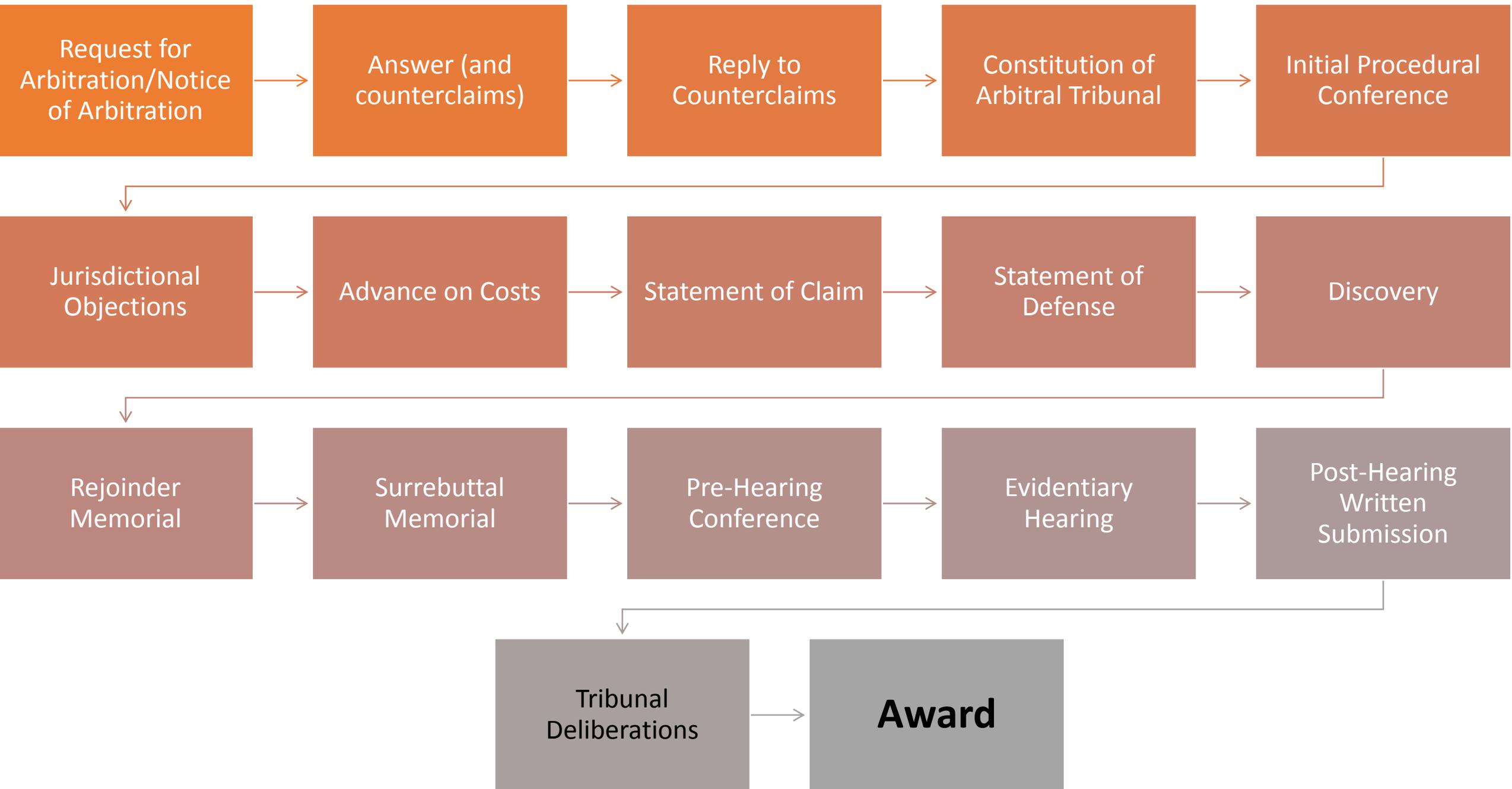
- an interim measure
- a preliminary relief
- security for costs

to award the prevailing party the costs of arbitration

e.g. to make an award within a limited period of time

to act

- with due care
- promptly
- judicially
- ethically



Procedure

principle of disposition (the parties are active) or principle of inquisition (the AT is active)

UNCITRAL AR: right of the AT to conduct arbitration in such manner it considers appropriate, provided that the parties are treated with equality and at any stage of the proceedings each party is given a full opportunity of presenting his case

Art. 19(2) ML, Art. 9(1) IBA Rules: freedom of the AT to determine the admissibility, relevance, materiality and weight of any evidence

2010 IBA Rules on the Taking of Evidence in International Arbitration

- are applicable when the parties agree or when AT so decides
- prevail over AR unless the Parties agree otherwise

Principles:

- good faith
- each Party is entitled to know, reasonably in advance, about evidence of another Party

Means of proof: documents, witness statements, (party-appointed or tribunal-appointed) expert reports, inspection

Admissibility of evidence

Art. 9 IBA Rules: Reasons to exclude from evidence or production:

- (a) lack of sufficient relevance or materiality;
- (b) legal impediment or privilege;
- (c) unreasonable burden to produce;
- (d) loss or destruction;
- (e) confidentiality;
- (f) political or institutional sensitivity; or
- (g) considerations of procedural economy, proportionality, fairness or equality.