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STRATEGY FOR PROVIDING EFFICIENCY IN RESOLUTION OF BUSINESS DISPUTES*

Strategija obezbeđenja efikasnosti u rešavanju
privrednih sporova

Abstract

The paper presents an overview of the most important steps of the strategy for providing efficiency in resolution of business disputes. The author examines the advantages of arbitration over state courts, provides readers with drafting considerations for arbitration agreement, analyses the procedure of selection and appointment of arbitrators, suggests tools and techniques for effective case management and explores the advantages and potential risks of fast track arbitration. The analysis is made in light of contemporary arbitration trends with special emphasis laid on the appropriate rules and best practices of the world's major arbitration institutions, endeavouring to acquaint readers with the best solutions for achieving efficiency in resolution of business disputes.

Keywords: *strategy, efficiency, arbitration, proceedings, business dispute.*

Sažetak

Predmet rada posvećen je analizi najznačajnijih koraka strategije obezbeđenja efikasnosti u rešavanju privrednih sporova. U tom smislu, autor izlaže prednosti arbitraže u odnosu na državni sud, bavi se pitanjem formulisanja arbitražnog ugovora, razmatra postupak izbora i imenovanja arbitara, sugeriše sredstva i tehnike koje treba primeniti u cilju efikasnog upravljanja postupkom i analizira prednosti i potencijalne rizike „fast track“ arbitraže. Analiza je učinjena u svetlu vladajućih tendencija u savremenom arbitražnom pravu, pri čemu je posebna pažnja posvećena odgovarajućim pravilima i praksi najznačajnijih međunarodnih arbitražnih institucija, u nastojanju da čitaocu sugeriše optimalna rešenja u pravcu postizanja efikasnosti u rešavanju privrednih sporova.

Ključne reči: *strategija, efikasnost, arbitraža, postupak, privredni spor.*

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Introduction

Non-performance of contractual obligations often results in economic losses and leads up to a dispute. This is especially significant for business contracts, which are usually more complex and often of a higher value, so the economic losses due to a breach of contract are likewise higher, involving more difficult and complex disputes. The formal requirements and sometimes unnecessary complication of the proceedings seem to be the main reason for the long duration and high cost of many disputes. For these reasons, for businesses, it is extremely important to ensure an efficient and cost-effective settlement of disputes. This can be achieved by carefully developing a strategy involving steps to be taken in the event of a dispute.

A strategy to ensure efficiency in resolution of commercial disputes needs to be developed before a dispute has arisen, already at the time of concluding a contract, bearing in mind that, once a dispute has arisen, it may be too late for planning. The first step towards developing a strategy is to determine a forum which will be in charge of resolving disputes that may arise from the contract. In that regard, parties are well advised to *select the arbitration* due to its adaptability to the needs of business community and advantages over litigation before national courts. The main prerequisite for arbitration proceedings to take place is to have a valid *agreement* by the parties to submit their current or future dispute in respect of their business transaction to arbitration. A well drafted arbitration agreement will save parties time and money by avoiding disputes over the issues related to the jurisdiction of arbitration. After a dispute has arisen, one should take into consideration that appropriate *selection and appointment of arbitrators* may speed up the dispute resolution process. Once the arbitral tribunal has been constituted, it is of crucial importance to establish the appropriate framework of the arbitral proceedings and to provide conditions for *effective case management*. There are many different tools that can be used in that respect, such as the terms of reference, the case management conference, the procedural timetable providing, among other things, for a time limit for rendering the award after the conclusion of a hearing. Finally, an expedited procedure

such as *fast track* arbitration can be an effective way to speed up the resolution of a business dispute.

The paper contains a brief overview of each particular step of the strategy in light of contemporary arbitration trends with special emphasis on the appropriate rules and best practices of the world's major arbitration institutions, endeavouring to suggest the best solutions for achieving efficiency in resolution of business disputes.

What are the advantages of arbitration over state courts?

In the past few decades, arbitration has received increased popularity and global recognition as the 'ordinary and normal method' of resolving commercial and investment disputes, in particular those of international character.¹ This is due to its adaptability to the needs of business community and its multi-faceted advantages over litigation before national courts.² One of the key advantages of arbitration over state court proceedings lies in a *more efficient, speedier and less formal* procedure. In addition, arbitration is distinguished by the following features: *neutrality of arbitrators* – the arbitrators are individuals selected by the parties, independent from national governmental and judicial hierarchy; *expertise* – settlement of disputes by arbitration is characterized by a high degree of expertise and professionalism; *party autonomy* – as one of the fundamental principles of arbitration, based on which the parties are free to establish the rules related to arbitration, including the place of arbitration, number and qualifications of arbitrators, language of the proceedings, the applicable procedural law and other details of the proceedings; for these reasons, arbitral proceedings are to a large extent tailored by the parties; *confidentiality* – arbitration hearings, as a rule, are held in private

1 According to the doctrine, "International arbitration has become the principal method of resolving disputes between States, individuals, and corporations in almost every aspect of international trade, commerce, and investment" [1, p. 1].

2 In that respect studies have shown that: a majority of users believe arbitration is better, cheaper and faster than litigation; arbitration is perceived to be a "more just process" with 80% of business people reporting that arbitration is a fair and just process; the majority of parties find arbitrators to be more likely to understand the subject of arbitration than judges; 86% of corporate counsel are satisfied with international arbitration; the rate of voluntary compliance with awards is over 90%, etc. [16].

settings and are attended only by persons designated by the parties and their counsel; *arbitral award is final and binding* – arbitration provides for a ‘one-stop shopping’, i.e. it eliminates the need for a two or three-tiered dispute resolution mechanism – an arbitral award is a final and binding decision that cannot be appealed to a higher-level court [14, pp. 238-239]; *enforcement* – arbitral award is enforceable on international level.³ It is also important to consider that arbitration can be combined with other forms of alternative dispute resolution (ADR),⁴ such as mediation, conciliation, mini-trial, expertise, neutral evaluation, etc.⁵

According to the doctrine, arbitration contributes not only to an increase of competitiveness of a business exposed to arbitration, but also adds to expansion of international trade, which subsequently positively affects the domestic market where such business is located and unburdens the judiciary [3]. On a more local level, arbitration contributes to the local economy as it generates a variety of accompanying economic activities, from use of local counsel, experts and arbitrators, to use of local legal support and venues, local hotels and restaurants [4].

In terms of comparison of arbitration with the state court, it is especially important to consider that, due to the formal and multi-tiered nature of state courts, proceedings before state courts are slower and generally last longer than arbitration proceedings. In addition, state courts generally apply strict procedural rules, and do not have the flexibility that would enable the parties to tailor the procedure that they consider suitable for their case, particularly taking into account the need for efficiency and reduction of costs. When it comes to the courts in Serbia, one should bear in mind the data from the 2016 World Bank Doing Business Survey, based on which it takes 635 days to enforce a contract before the court in Serbia at the costs amounting to 40.8% of the claim; the

trial itself lasts on average 495 days, whereas it takes 110 days to enforce a judgment [7].

Table 1: Efficiency of contract enforcement

DB 2017 Rank	61
DB 2016 Rank	53
Change in Rank	8↓
Time (days)	635
Filing and service	30
Trial and judgment	495
Enforcement of judgment	110
Cost (% of claim)	40.8
Attorney fees	14.5
Court fees	13.9
Enforcement fees	12.4

Source: [7]

Consequently, by agreeing on arbitral dispute resolution, Serbian businesses would not only avail themselves of the recourse to a faster and in most cases less costly and more efficient dispute resolution mechanism, but would also significantly contribute to enhancement of overall business climate in Serbia.

Well drafted arbitration agreement can save parties time and money

Agreement by the parties to submit their current or future dispute in respect of a defined legal relationship to arbitration is called an arbitration agreement. A valid arbitration agreement is thus a mandatory requirement for the establishment of jurisdiction of arbitration and a constituent basis for derogation of the state court jurisdiction. Arbitration agreement appears in two forms, depending on whether the arbitration is envisaged for all future disputes that may arise from the defined legal relationship between the parties or for the already existing dispute. The former is usually referred to as an arbitration clause (*clause compromissoire*), and the latter as an arbitration compromise (submission agreement, *compromis d'arbitrage*) [12, pp. 51-57].

The arbitration clause is a usual clause in international commercial contracts. Parties employ this clause to provide for the arbitration that will be competent for resolution of all disputes that may arise from their business relations. It is usually contained at the end of the contract and is often combined with a choice of the law clause [13, p.

3 See Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention).

4 For details on ADR [10].

5 Thus, for example, the International Chamber of Commerce (ICC) offers various sets of rules that can be used either separately from or in conjunction with litigation or arbitration, namely: ICC Amicable Dispute Resolution Rules (ADR), ICC Rules for Documentary Instruments Dispute Resolution Expertise (DOCDEX Rules), ICC Rules for Expertise (Expertise Rules), ICC Dispute Board Rules (DB Rules).

190]. In international business practice the arbitration compromise has been less frequently used, which is not surprising given that once the dispute has arisen it is less likely for the parties to reach an agreement on any aspect of the dispute, including the dispute resolution mechanism. The differentiation between the arbitration clause and the arbitration compromise does not bear a significant practical relevance, given that the contemporary sources of arbitration law treat both forms of arbitration agreement equally.

Arbitration agreement, if well drafted, can save parties time and money by helping to avoid disagreements over procedures at the outset of a dispute [9, p. 447]. In that respect, parties to the arbitration agreement should particularly: 1) exhibit a clear intent to submit disputes to arbitration, so that there is no room for doubt with respect to the intention of the parties to entrust the arbitration with the power to resolve their dispute and to their decision to recognize the resulting arbitration award as final and binding; 2) correctly name the institutional arbitration and its rules or, if they opt for an ad hoc arbitration, clearly express intent to submit disputes to ad hoc arbitration; 3) precisely identify the scope of disputes covered by the arbitration agreement (e.g. all disputes “arising out of or in connection with the contract”). In addition to the above elements, parties to an arbitration agreement often specify the number of arbitrators and indicate the governing law, the place of arbitration and the language of arbitration.

If the parties opt for an institutional arbitration, it suffices to agree on the rules of that arbitration for the constitution of arbitral jurisdiction. Every institutional arbitration has its rules; they are drafted in the form of short codes of arbitral procedure with the aim of reflecting practical experience of proceedings and the needs of potential parties to arbitration. Arbitration rules apply to the organisation and jurisdiction of arbitration, constitution of the arbitration tribunal, arbitration proceedings, arbitration award, costs of arbitration, and other. It is considered that the parties by agreeing on institutional arbitration at the same time accept the rules of that arbitration to be applicable to the arbitration proceedings, and vice versa. In addition to arbitration rules, institutional arbitrations

also offer standard arbitration clauses which the parties are recommended to enter into the contract.⁶

Thus, for example, the International Chamber of Commerce (hereinafter referred to as the ICC) in its 2012 Rules of Arbitration (hereinafter referred to as the ICC Rules) provides standard arbitration clauses,⁷ which may be used by the parties without modification or modified as may be required by any applicable law or according to the parties’ preferences: “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 one or more arbitrators appointed in accordance with the said Rules.” If the parties do not want the Emergency Arbitrator Provisions of the 2012 ICC Rules to apply, they must expressly opt out by using the following arbitration 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 one or more arbitrators appointed in accordance with the said Rules. The Emergency Arbitrator Provisions shall not apply.” The parties may also wish to stipulate in the arbitration clause the law governing the contract, the number of arbitrators, the place of arbitration and/or the language of arbitration. In principle, parties should also always ensure that the arbitration agreement is in writing and carefully and clearly drafted. The standard clause can be modified in order to take account of the requirements of national laws and any other special requirements that parties may have. In particular, parties should always check for any mandatory requirements at the place of arbitration and potential place(s) of enforcement; make

6 Existing arbitration institutions in Serbia - Permanent Arbitration attached to the Serbian Chamber of Commerce and Belgrade Arbitration Center (BAC) - provide for the recommended arbitration clauses. Thus, for example, Belgrade Arbitration Center (BAC) offers the following clause: “All disputes arising out of or in connection with the present contract shall be finally settled by arbitration organised in accordance with the Rules of the Belgrade Arbitration Center (Belgrade Rules). Parties may consider adding the following: The number of arbitrators shall be (specify: one or three). The place of arbitration shall be (specify: town and state). The language to be used in the arbitral proceedings shall be (specify preferably only one language). The applicable substantive law shall be (specify the applicable law)”. Available at: <http://www.arbitrationassociation.org/en/belgrade-arbitration-center/recommended-clause/>.

7 The ICC offers a range of standard clauses for different combinations of procedures. All standard and suggested dispute resolution clauses recommended by the ICC can be found at: www.iccarbitration.org.

special arrangements where the contract or transaction involves more than two parties; combine several ICC dispute resolution services. Combined and multi-tiered dispute resolution clauses may help to facilitate dispute management and reduce time and costs. Arbitration can be combined with pre-arbitral referee procedure, mediation, expertise, dispute Boards and virtually any other form of ADR [9, pp. 448-449].

Unlike the institutional setting, ad hoc arbitration⁸ does not have its rules or permanent organisation, offices, administration, and the list of arbitrators. Thus, it is necessary that the parties, which opt for ad hoc arbitration, define in the arbitration agreement all the matters relevant for the constitution of jurisdiction and the conduct of the proceedings. If they fail to do so, and the seat of ad hoc arbitration is in Serbia, provisions of the Serbian Law on Arbitration would apply by default, filling in the gaps within the agreement of the parties. A full ad hoc arbitration clause should provide for the rules of the procedure (usually UNCITRAL Arbitration Rules), number of arbitrators (typically sole arbitrator or a three-member arbitral tribunal) and the procedure of their appointment, place of arbitration, language of the proceedings as well as the appointing authority. For jurisdiction of ad hoc arbitration to be constituted, it is not necessary that the clause should contain all of the above elements, but only those unambiguously demonstrating the intention of the parties to entrust the settlement of disputes to ad hoc arbitration.

The standard arbitration clauses of international institutional arbitration and the model clauses contracting ad hoc arbitration drafted by international organisations,⁹ are a reflection of what is considered as a recommendable solution at the international level. For these reasons, and particularly bearing in mind the risk of vague, imprecise and contradictory formulations of arbitration clauses, the standard and model arbitration clauses represent the optimum solution to be kept in mind when drafting an arbitration clause in each specific case.

⁸ On differences between institutional and ad hoc arbitration [12, pp. 23-24], [14, pp. 239-241].

⁹ See, for example, the model arbitration clause published by the International Trade Centre [11].

Appropriate selection and appointment of arbitrators may speed up the dispute resolution process

After a dispute has arisen, the parties are advised to make sufficient enquires to ensure that they will make the appropriate selection and appointment of arbitrator/arbitrators who will resolve their dispute. From the perspective of the need to provide an efficient and cost-effective procedure, the first recommendation in that regard is to select experienced arbitrators with available time, arbitrators with strong case management skills, arbitrators who will render the award in a timely manner [15]. Further questions which must be addressed by the parties in the context of constitution of the arbitral tribunal are related to the number of arbitrators, method of their appointment, qualifications of the arbitrators and the appointing authority in ad hoc arbitration.

Parties often provide in arbitration clauses for the number of arbitrators in charge of resolving their dispute. As a rule, an odd number of arbitrators is required,¹⁰ above all in order to avoid deadlocks in rendering the award [1, pp. 247-251]. Other than this limitation, parties are free to determine the number of arbitrators by mutual agreement. Should they fail to determine the number of arbitrators, it is to be determined in accordance with the rules of institutional arbitration or by the relevant appointing authority in ad hoc arbitration.

Solutions with respect to the number of arbitrators in comparative law vary according to whether the sole arbitrator or arbitral tribunal is the first choice.¹¹ The main

¹⁰ This is also a mandatory requirement under the Serbian Law on Arbitration (Art. 16.2)

¹¹ Thus, for example, according to the ICC Rules, the disputes shall be decided by a sole arbitrator or by three arbitrators (Art. 12.1), and where the parties have not agreed upon the number of arbitrators, the Court shall appoint a sole arbitrator, save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators (Art. 12.2). Swiss Rules of International Arbitration (hereinafter referred to as Swiss Rules) contain a similar rule, providing that if the parties have not agreed upon the number of arbitrators, as a rule, the Court shall refer the case to a sole arbitrator, unless the complexity of the subject matter and/or the amount in dispute justify that the case be referred to a three-member arbitral tribunal. On the other hand, the Belgrade Rules provide that parties may agree that their dispute shall be resolved by a three-member arbitral panel or by a sole arbitrator (Art. 15.1). If the parties have not agreed on the number of arbitrators, the Board shall determine the number of arbitrators taking into account the circumstances of the dispute. Where the amount in dispute does not exceed 50,000 EUR, the dispute shall be resolved by a sole arbitrator (Art. 15.2).

argument in favour of opting for sole arbitrator is that the sole arbitrator usually brings significant cost savings and may be quicker. On the other hand, it is argued in favour of arbitral tribunal that in case of serious disputes, a sole arbitrator feels a sense of heavy responsibility; when opting for a sole arbitrator, parties ought to be aware of the fact that the outcome of arbitration will be determined by one person alone. Arbitrators as a rule feel “more comfortable” when they form part of a collegial body where they can exchange opinions about the case and discuss issues relevant to rendering the award. One of the most important arguments in favour of a three-member tribunal is that it gives each party the possibility of nominating a member of the tribunal, which tends to increase their confidence in the process [9, p. 137]. This is particularly supported by the fact that the procedure of constituting an arbitral tribunal is typically quick and simple. Finally, in international arbitration, it is assumed that parties in a foreign country will have more confidence in a collegial forum rather than in a sole arbitrator [5, pp. 309-311]. When parties opt for arbitral tribunal, they usually provide for three arbitrators. In principle, it is possible to provide for a greater number of arbitrators (for example five), but this would normally involve higher costs and possibly a slower procedure.

As for the choice between sole arbitrator and a three-member arbitral tribunal in international commercial arbitration, from the table below it can be noted that in the ICC International Court of Arbitration, which plays a major role in international institutional arbitration, the option in favour of arbitral tribunal is preferred to a sole arbitrator.

Table 2: Size of arbitral tribunals in cases submitted to the ICC International Court of Arbitration, 2007-2011

	Three-member arbitral tribunal	Sole arbitrator
Number of cases	1,691 (60%)	1,144 (40%)

Source: [9, p. 137]

Appointment of arbitrators and determination of their number are subject to party autonomy, as one of the fundamental principles of arbitration. In comparative arbitration law, it is widely accepted that agreement between the parties regarding the constitution of the

arbitral tribunal takes precedence over the provisions of the applicable default rules of arbitration. In this regard, parties may themselves specify the procedure to be applied in appointing arbitrators.¹² Mechanism for appointing the arbitrators is usually specified by the parties in the arbitration clause by which they generally define the procedure for appointing the arbitrators in case the dispute arises from their contract. Where the parties fail to specify the mechanism for appointing the arbitrators in the arbitration clause, they are free to agree on it subsequently, after the dispute arises. Only where the parties have not agreed upon the procedure of appointment of arbitrators, will this matter be resolved by the arbitral institution or as provided in the rules applicable to ad hoc arbitration.¹³

Table 3: Method of determining size of arbitral tribunal in cases submitted to the ICC International Court of Arbitration, 2007-2011

	Three-member arbitral tribunal	Sole arbitrator	Total
Specified in arbitration clause	1,283 cases (82%)	286 cases (18%)	1,569 cases (100%)
Subsequently agreed by the parties	318 cases (39%)	495 cases (61%)	813 cases (100%)
Fixed by the Court	90 cases (20%)	363 cases (80%)	453 cases (100%)

Source: [9, p. 139]

There are many different appointment mechanisms in international arbitral practice.¹⁴ However, one can note that, in the case of a sole arbitrator, it is most often provided that the parties shall make their appointment by mutual agreement, and if they fail to do so, the arbitrator will be nominated by the arbitral institution or by an appointing

12 This principle is also accepted in the Serbian Law on Arbitration providing that parties may agree on the nomination procedure for the arbitrators, and if this is not envisaged by the agreement, the arbitrators shall be nominated pursuant to that Law (Art. 17.1).

13 With regard to the mechanism of appointing arbitrators, one should take into consideration a distinction between institutional arbitration and ad hoc arbitration. In institutional arbitration, if the parties fail to provide for the number of arbitrators and the mechanism of their appointment, such issues are resolved in accordance with the rules of the selected arbitral institution which determines the composition of the arbitral tribunal and organises the proceedings. This is in contrast with ad hoc arbitration, where there are no arbitral institutions, thus all issues related to the procedure, including the appointment of arbitrators, are organised by the parties themselves.

14 Comparative law analysis of this matter [8, p. 460 et seq.].

authority (or other pre-determined third party) in ad hoc arbitration. On the other hand, where there are three arbitrators to be appointed, usually each party nominates one arbitrator and the third arbitrator is chosen either by those two arbitrators, by the arbitral institution, or by appointing authority (or other pre-determined third party) in ad hoc arbitration.¹⁵ According to the ICC Rules, where the parties have agreed that the dispute shall be resolved by a sole arbitrator, they may, by agreement, nominate a sole arbitrator for confirmation. If the parties fail to nominate a sole arbitrator within 30 days from the date when the claimant's request for arbitration has been received by the other party, or within such additional time as may be allowed by the ICC Secretariat, the sole arbitrator shall be appointed by the ICC Court (Art. 12.3).

Table 4: Selection process for sole arbitrators in cases submitted to the ICC International Court of Arbitration, 2007-2011

Joint nomination by the parties	Appointment by the Court	Other
251 (22%)	871 (77%)	15 (1%)

Source: [9, p. 142]

In certain cases, parties use the arbitration clause to provide for certain qualifications or qualities required of arbitrators. Thus, it is sometimes provided that arbitrators (or only the presiding arbitrator) must be “professional lawyers” or “highly qualified lawyers in the field of international trade” or that the presiding arbitrator “must not be from the country of either of the parties”, i.e. that he/she must come from “a third country”. On the other hand, in certain complex disputes relating to specific areas, parties may provide in arbitration clauses for a whole list of qualifications required of arbitrators. Certain clauses, furthermore, provide for different qualifications for each member of the panel. Thus, the arbitration clause contained in international technology transfer contracts may, for example, provide that an arbitrator must be an expert with international experience in the field of accounting, whilst the other must be a lawyer specializing in intellectual

¹⁵ Such appointment procedure is provided also by the Serbian Law on Arbitration (Art. 17), as well as by the rules of the existing arbitral institutions in Serbia (Rules of the Permanent Arbitration at the Chamber of Commerce and Industry of Serbia, Arts. 18-19, Belgrade Rules, Arts. 16 and 17).

property law, and the third must be a former judge or professor in the relevant area of law, etc. [6, pp. 61-62].

The ad hoc arbitration clauses often provide for the appointing authority. It is a person or institution to be in charge of the appointment of arbitrators in case parties fail to agree on that point. The appointing authority appoints a sole arbitrator when parties are unable to agree on the arbitrator, as well as the presiding arbitrator when the arbitrators appointed by the parties fail to agree on the former. In the practice of international business transactions, the appointing authority is selected, for example, from among presidents of commercial or other state courts responsible for resolving commercial disputes in the place of arbitration, presidents of the relevant chamber of commerce, etc. A simple way of resolving this issue may be to agree on application of UNCITRAL Arbitration Rules (dated 15 December 1976, and revised in 2010) adapted specifically to ad hoc arbitration, setting forth in detail the rules for designating and appointing authorities in arbitration proceedings (Arts. 6 and 8-10).

How to provide effective case management?

It has been widely accepted in comparative arbitration law and international arbitral practice that arbitral tribunal may conduct the proceedings in any manner it considers appropriate,¹⁶ ensuring the equal treatment of the parties and affording each party a reasonable opportunity to present its case and the evidence supporting it.¹⁷ The arbitrators and the parties are expected to make every effort to conduct the arbitration in an expeditious and cost-effective manner, taking into consideration the complexity and value of the dispute.¹⁸

There are certain requirements and recommendations in international arbitral practice, relating to the general duty of arbitrators and parties to control the time and costs of the proceedings. Thus, for example, the ICC Rules require from the arbitral tribunal the following *three steps* in organisation

¹⁶ Provided that it is not contrary to the agreement of the parties.

¹⁷ Fair and impartial treatment of the parties is a fundamental principle of arbitration adopted in international conventions relating to arbitration and in all national arbitration laws and arbitration rules.

¹⁸ See, for example, Art. 22.1 of the ICC Rules.

of the proceedings: to draft the *terms of reference* (Art. 23), to organise and hold a *case management conference* (Art. 24.1) and to prepare a *procedural time-table* (Art. 24.2).

Terms of reference consist of a document signed by the parties and arbitrators with the purpose to set out the parties' claims, identify the issues which the arbitrators must resolve, and determine the main procedural rules applicable to the arbitral proceedings. Drafting of the terms of reference is explicitly required of the arbitral tribunal only in the ICC Rules (Art. 23).¹⁹ However, it has been widely accepted in the practice of civil law-style institutional and ad hoc arbitration that the arbitrators, at the outset of the arbitration procedure, in cooperation with the parties, should draw up the terms of reference on the basis of the case documents and in light of the submissions of the parties. By summarizing the merits of the dispute and setting out the applicable procedural rules, terms of reference serve as an important guide for arbitrators and parties, which significantly improves the efficiency of the proceedings [8, pp. 665-674].

The case management conference is a useful tool for making arbitral proceedings as expeditious and cost-effective as possible and for ensuring that the procedure is tailored to the circumstances of each particular case. Although in most arbitration rules (with the exception of the ICC Rules) the case management conference is not defined as mandatory, it is often applied in arbitral practice as an initial step in the proceedings, during preparation of the terms of reference or as soon as possible thereafter. With the aim of efficiency and cost reduction, the case management conference is often organised and held by telephone or use of IT that enables communication between the arbitrators and the parties. The main goal of the case management conference is to provide, at the beginning of the proceedings, the opportunity for arbitrators to consult the parties on procedural measures that may be adopted in the course of the proceedings.²⁰

In that respect, the ICC has adopted a non-exhaustive list of *case management techniques* which can be included in procedural measures adopted by the arbitral tribunal upon appropriate consultation with the parties at the case

management conference. The most important of these techniques include: bifurcating the proceedings or rendering one or more partial awards on key issues; identifying issues that can be resolved by agreement between the parties or their experts; identifying issues to be decided solely on the basis of documents rather than through oral evidence or legal argument at a hearing; techniques relating to production of documentary evidence; limiting the length and scope of written submissions and written and oral witness evidence, so as to avoid repetition and maintain focus on key issues; using telephone or video conferencing for procedural and other hearings where attendance in person is not essential and using IT applications that enable online communication; informing the parties that they are free to settle all or part of the dispute either by negotiation or through any form of amicable dispute resolution, etc.²¹

At an early stage of the proceedings, as soon as practicable, usually during or following the case management conference, the arbitrators, in consultation with the parties, prepare a procedural (provisional) timetable for the conduct of the arbitration. The procedural timetable and its eventual modifications are provided to the parties and to the secretariats of institutional arbitration. The preparation of procedural timetable is required as mandatory by most modern arbitration rules²² and has become a usual step in the organisation of arbitral proceedings in arbitral practice. The main purpose of the procedural timetable is that the arbitrators, in cooperation with the parties, should fix the time limits in the proceedings, so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute. Usually, procedural timetables determine all the stages of the arbitration, including the dates for meetings and hearings, deadlines for filing of written submissions, evidence and witness statements as well as deadline for rendering the final award.²³

21 Appendix IV to the ICC Rules of Arbitration. Appendix IV is based on the Report of the ICC Commission on Arbitration *Techniques for Controlling Time and Costs in Arbitration*, available at www.iccwbo.org.

22 See, for example, the ICC Rules, Art. 24.2, UNCITRAL Arbitration Rules, Art. 17.2, Belgrade Rules, Art. 29.4, Swiss Rules, Art. 15.3, Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (Stockholm Rules), Art. 23, etc.

23 For details, see [9, pp. 265-266].

19 On terms of reference with respect to the ICC Rules [9, pp. 239-260].

20 See the ICC Rules, Art. 24.

As for the subsequent procedure for arbitration, it is useful for the parties to take into consideration the points that may assist in reducing the costs and duration of the proceedings.²⁴ Some of the most important points relate to establishing the facts of the case early in the proceedings, organisation of hearings and allocation of the costs of the proceedings.

Fact-finding is one of the most important functions of the arbitrators. The duty of arbitrators to proceed within as short a time as possible to establish the facts of the case is a significant factor for providing expeditious proceedings.²⁵ In doing so, the arbitrators and the parties will better understand the main points of the case at the beginning of the proceedings and avoid wasting the time and money on matters that are undisputed or irrelevant. The arbitrators determine the relevant facts of the case either following the presentation by the parties of documentary and/or oral evidence, or by arbitrators making their own efforts, with the assistance of the parties, to collect the evidence that they consider necessary to establish the relevant facts [1, p. 385]. Since documentary evidence plays a key role in fact-finding in most arbitration disputes, Appendix IV to the ICC Rules on Case Management Techniques provides detailed suggestions in that respect. According to these suggestions, the parties and the arbitrators should consider: 1) requiring the parties to produce with their submissions the documents on which they rely; 2) avoiding requests for document production when appropriate in order to control time and cost; 3) in those cases where requests for document production are considered appropriate, limiting such requests to documents or categories of documents that are relevant and material to the outcome of the case; 4) establishing reasonable time limits for the production of documents; and 5) using a schedule of document production to facilitate the resolution of issues in relation to the production of documents.²⁶ The need for efficiency in arbitral proceedings imposes time limits on the parties to submit documents (usually by procedural orders or procedural timetables) and additional

documentary evidence outside the determined time limits is not allowed [9, p. 270].

All the arbitration rules provide for a hearing to take place at the request of either party, or at the instigation of the arbitral tribunal. A typical provision to that effect is that of UNCITRAL Arbitration Rules, setting out that “Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party” (Art. 24.1). Arbitrators, in consultation with the parties, determine the date, time and location of a hearing(s) and provide the parties with the notice thereof. The general principle in arbitration is that hearings are held in private. The arbitrators are free to organise the hearings as they find appropriate, subject only to compliance with the principles of due process and equal treatment of the parties [8, p. 706], [1, p. 413]. In deciding about the organisation of hearings, arbitrators should bear in mind the requirement to ensure that each party has a reasonable opportunity to present its case, as well as the requirement to conduct the arbitration in an expeditious and cost-effective manner. In view of the fact that hearings are often expensive and time-consuming, one should follow the suggestion of the ICC according to which “If the length and number of hearings requiring the physical attendance of the arbitral tribunal and the parties are minimized, this will significantly reduce the time and costs of the proceedings” [15, p. 13]. It is for these reasons that in modern arbitral practice, whenever possible and whenever suited to the circumstances of the case, hearings are normally held by video conference or other IT applications that enable direct communication between the participants in arbitral proceedings, without physical attendance.

The costs of arbitration include the arbitrators’ fees, all expenses related to the hearings, fees and expenses of experts engaged by the arbitrators and the administrative expenses of the arbitral institution in institutional arbitrations. For the parties in arbitration, it is important

²⁴ See full list of these points [15, pp. 247-251].

²⁵ See the ICC Rules, Art. 25.1.

²⁶ Appendix IV, point d.

to pay due regard to provisions of the rules applicable to arbitration proceedings which set the allocation of the costs of the proceedings amongst the parties to dispute. While it is often the case that the allocation as per 'success in dispute' is provided, this may not always be the case [14, pp. 252-253]. The ICC Rules are an example of arbitration rules which expressly provide for the allocation of the costs, stating that the final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties (Art. 37.4). Furthermore, it is expressly stated that, in making decisions as to the costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in expeditious and cost-effective manner (Art. 37.5).

It sometimes happens in arbitral practice that the parties, through excessive document requests, excessive legal argument, excessive cross-examination, dilatory tactics, failure to comply with procedural orders, etc., unreasonably slow down the process, or increase costs. For these reasons, arbitrators are recommended to inform the parties at an early stage of the proceedings that they will take into account the manner in which each party has conducted the proceedings and sanction any unreasonable behaviour by a party when deciding on the costs [15, p. 15].

In addition, the arbitrators who do not comply with the requirement to conduct the proceedings in an expeditious and cost-effective manner may themselves be sanctioned. For example, the ICC Rules provide that an arbitrator shall be replaced at the ICC Court's own initiative when he is not fulfilling the arbitrator's functions in accordance with the ICC Rules or within the prescribed time limits (Art. 15.2). These sanctions may also be of a financial nature, due to the fact that the ICC Court takes into consideration the efficient conduct of the arbitration when fixing the arbitrators' fees. Thus, Appendix III to the ICC Rules on Arbitration Costs and Fees states that, in setting an arbitrator's fee, the Court shall take into consideration the diligence and efficiency of the arbitrator, the time spent, the rapidity of the proceedings, the complexity of the dispute and the timeliness of the submission of the draft award (Art. 2.2).

Fast track arbitration guarantees a speedy procedure but also brings certain risks

Fast track arbitration can be an effective way to speed up the dispute resolution process, reduce the costs and encourage the settlement [1, p. 433], as well as an appropriate tool for parties to adapt the proceedings to their particular needs. In broadest terms possible, fast track arbitration may be described as a technique related to the conduct of the proceedings with the tendency to accelerate resolution of business dispute and help the parties to reduce the time taken to reach a solution.²⁷

Fast track arbitration may take place both in institutional and ad hoc arbitrations. Certain number of the rules of international arbitration institutions provide for the specific rules for fast track arbitration. These include: Rules for Expedited Arbitrations of the Stockholm Chamber of Commerce (SCC), German Institution of Arbitration's - DIS - Supplementary Rules for Expedited Proceedings 08 (SREP), Rules for Expedited Procedures of the American Arbitration Association (AAA), Swiss Rules of International Arbitration, Section V, Arbitration Rules of the Japan Commercial Arbitration Association (JCAA), Section V. On the other hand, the ICC Rules contain a general rule on expedited procedure stating that the parties may agree to shorten the various time limits set out in the ICC Rules (Art. 38.1) without providing further specific provisions on fast track arbitration.

There are different approaches to the concept of fast track arbitration under various arbitration rules. However, it is possible to distinguish certain basic elements as general features of fast track arbitration [17, p. 260 et seq.].

In the first place, fast track arbitration must be agreed between the parties. The parties may agree on this kind of arbitration within the arbitration clause by providing in advance for the principle of an expedited arbitration in case of a dispute, or they may do it at any time thereafter, in the course of arbitration. Institutional arbitrations, which provide specific rules for expedited arbitrations, offer to the parties the appropriate model arbitration clauses.

²⁷ On the issue generally [8, pp. 681-682].

Thus for example, the Rules for Expedited Arbitrations of the Stockholm Chamber of Commerce (SCC), contain the following model arbitration clause: “Any dispute, controversy or claim arising out of or in connection with this contract, or the breach, termination or invalidity thereof, shall be finally settled by arbitration in accordance with the Rules for Expedited Arbitrations of the Arbitration Institute of the Stockholm Chamber of Commerce. Recommended additions: The Seat of arbitration shall be (...), The language of arbitration shall be (...), The contract shall be governed by the substantive law of (...)”.²⁸

Another feature of fast track arbitration concerns the limitation of procedural steps. This limitation relates above all to the restriction on the number of written submissions, the organisation and conduct of oral hearings and expedited arbitral awards. Thus, for example, with regard to the expedited award, DIS - Supplementary Rules for Expedited Proceedings 08 (SREP) state that, unless the parties have agreed otherwise, the arbitral tribunal may abstain from stating the facts of the case in the arbitral award (Section 7)²⁹, and under the Rules for Expedited Arbitrations of the Stockholm Chamber of Commerce (SCC), the arbitrator is not obliged to include the reasons for the award, unless one of the parties requests it so no later than at the closing statement (Art. 35.1).³⁰

An important characteristic of fast track arbitration relates to short and strict time limits in the proceedings determined by the parties who wish to reduce the time between the request for arbitration and the issuance of the arbitral award. These time limits may apply to every stage of the proceedings - nomination of the arbitrator/arbitrators, submissions of the parties, signature of terms of reference, organisation of the oral hearings and rendering of the arbitral award.

Notwithstanding, however, the obvious advantages of fast track arbitration, it should be noted that this kind of accelerated procedure brings certain risks and disadvantages [2, p. 88]. Thus, for example, agreeing to short time limits may provide ground for challenging the award or resisting

its enforcement,³¹ for example because the arbitral tribunal was deprived of the time and means to consider the case properly or because a party was not able to present its case, which constitutes a breach of *equal treatment* of the parties and *compliance with due process* as the fundamental principles of arbitration. Furthermore, arbitral awards which do not include reasons for the award or fact of the case may become subject for challenging more easily than “classic” awards [17, p. 261]. On the other hand, only certain issues, such as disputes relating to price determination, are warranted and capable of being resolved by fast track arbitration, while, conversely, complex disputes involving addressing a large number of factual and legal issues would be unsuited to an expedited procedure [8, pp. 681-682], [1, p. 435]. Finally, the cooperation between the parties is a key factor for the success of fast track proceedings; if only one party is interested in speed and the other is reluctant to cooperate, the overall success of the fast track proceeding will be endangered. For these reasons, parties are well advised to exercise special caution when agreeing upon a fast track procedure, and to avoid conflict between the need for rapidity and the requirement for due process and legal certainty [17, pp. 275-276].

Conclusion

It has been demonstrated that the key aspects in the development of the strategy for providing efficiency in resolution of business disputes are related to the selection of arbitration as a dispute resolution procedure, drafting arbitration agreement, selection and appointment of arbitrators and establishment of the appropriate framework of the arbitral proceedings by providing conditions for effective case management and implementation of the best techniques controlling time and money. Furthermore, although an expedited procedure such as fast track arbitration can be an effective way to speed up the resolution of a business dispute, parties need to be aware of its disadvantages and potential risks. The strategy for ensuring efficiency in resolution of business disputes needs to be developed timely, already at the time of entering into the contract,

28 Available at www.sccinstitute.com/media

29 Available at www.dis-arb.de/en/16/re

30 Available at www.sccinstitute.com/media

31 See Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention).

rather than at the time a dispute has arisen. Finally, speed and efficiency of the procedure must not undermine the fundamental principles of arbitration such as equal treatment of the parties - due process and fairness, and generally must not be in contravention of the requirement of legal certainty. Serbian business community should pay special attention to all these factors when deciding on a dispute resolution policy for their contracts in order to achieve the optimal solutions.

References

1. Blackaby, N., & Partasides, C., with Redfern, A., & Hunter, M. (2009). *Redfern and Hunter on international arbitration*, fifth edition. Oxford: Oxford University Press.
2. Bühring-Uhle, Ch., and for the Second Edition Kirchhoff, L., Scherer, G. (2006). *Arbitration and mediation in international business*. Kluwer Law International.
3. Casella, A. (1992). *Arbitration in international trade*. NBER Working Paper Series. In working paper no. 4136. Retrieved from <http://www.nber.org/papers/w4136>
4. Charles River Associates. (2012). *Arbitration in Toronto: An economic study*. Retrieved from <http://www.crai.com/uploadedFiles/Publications/Arbitration%20in%20Toronto%202012-09-06.pdf>
5. David, R. (1982). *L'arbitrage dans le commerce international*. Paris: Economica.
6. DiMatteo, L.A. (2009). *Law on international contracting*. Kluwer Law International: Wolters Kluwer Law & Business
7. Doing Business World Bank Survey. (2016). Retrieved from www.doingbusiness.org/methodology
8. Fouchard, Ph., Gaillard, E., & Goldman, B. (1999). *Fouchard, Gaillard, Goldman on international commercial arbitration*. The Hague/Boston/London: Kluwer Law International.
9. Fry, J., Greenberg, S., & Mazza, F. (2012). *The Secretariat's guide to ICC arbitration*. Paris: ICC International Chamber of Commerce, The World business organisation.
10. Knežević, G., & Pavić, V. (2009). *Arbitraža i ADR*. Beograd: Izdavački centar Pravnog fakulteta Univerziteta u Beogradu.
11. Model contracts for small firms – Legal guidance for doing international business. (2010). Geneva: International Trade Centre.
12. Perović, J. (2002). *Ugovor o međunarodnoj trgovinskoj arbitraži*. Beograd: Službeni list SRJ.
13. Perović, J. (2012). *Standardne klauzule u međunarodnim privrednim ugovorima*. Beograd: Centar za izdavačku delatnost Ekonomskog fakulteta.
14. Perović, J., & Đorđević, M. (2013). Resolution of commercial disputes through arbitration as a contributor to improvement of business environment in Serbia. *Ekonomika preduzeća*, 65(3-4), 238-255.
15. Report of the ICC Commission on Arbitration and ADR Task Force on reducing time and costs in arbitration, (2012). *Controlling time and costs in arbitration*. Paris: ICC International Chamber of Commerce.
16. Sussman, E., & Wilkinson, J. (2012). *Benefits of arbitration for commercial disputes*. Retrieved from http://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/March_2012_Sussman_Wilkinson_March_5.authcheckdam.pdf
17. Welser, I., & Klausseger, Ch. (2009). Fast track arbitration: Just fast or something different?. *Austrian Arbitration Yearbook*.



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