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ARTICLE 17—FURTHER WRITTEN STATEMENTS

ARTICLE 17

1. *The tribunal may decide whether the parties shall present any written statements in addition to statements of claims and counterclaims and statements of defense, and it shall fix the periods of time for submitting any such statements.*
2. *The periods of time fixed by the tribunal for the communication of such written statements should not exceed 45 days. However, the tribunal may extend such time limits if it considers such an extension justified.*

I. Introduction

Article 17 explains that written statements beyond the statements of claims and counterclaims and statements of defence may be submitted only at the discretion of the tribunal. Such statements might include a claimant's reply to the statement of defence, a respondent's rejoinder to the claimant's reply, pre-hearing and/or post-hearing briefs, submitted by the parties either simultaneously or consecutively. Article 17(2) sets an aspirational time limit of 45 days for the parties to submit such statements, but the arbitration tribunal may extend that time limit in circumstances that it deems justified. When combined with the tribunal's discretion to order the time and scope of any additional written statements, 45 days suggests a reasonable, but flexible, time limit within which to make any further submissions. **17.01**

II. Textual commentary

A. Additional written statements (Article 17(1))

Article 17(1)

The tribunal may decide whether the parties shall present any written statements in addition to statements of claims and counterclaims and statements of defense, and it shall fix the periods of time for submitting any such statements.

17.02 There is a clear trend in current arbitration practice to focus heavily on written materials in order to enhance efficiency.[1] Thus, almost invariably, tribunals include further written statements such as a reply, rejoinder, and post-hearing briefs within arbitration procedural schedules.

17.03 Requiring the parties to submit written statements of claim, defence, and counterclaim, as the ICDR Rules do in Articles 2 and 3, and providing the tribunal the discretion to order submission of further written statements, as in Article 17, avoids the costs and inefficiencies that would result from bringing the parties, witnesses, experts, and their lawyers, often all from different countries, together for a lengthy, in-person meeting without the tribunal having the benefit of detailed briefing on the law and the facts.

17.04 Article 17 assumes that, normally, the claimant and respondent will file only a statement of claims, and a statement of defence and counterclaims, respectively. The tribunal has to approve the filing of additional submissions, re-emphasizing the rationale of Article 16(2) to ensure streamlined proceedings. In practice, in particular in larger cases, the parties will normally file further written submissions with the tribunal,[2] in addition to the statement of claims and the memorandum

[1] D Caron, L Caplan, and M Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary* (Oxford University Press, Oxford, 2006) 392 ('In an overwhelming majority of cases, the arbitral procedure begins with an exchange of written submissions. Written pleadings are often given primary emphasis throughout the proceedings, with a short oral hearing or no hearing at all'); J Crawford, 'Advocacy Before the International Court of Justice and Other International Tribunals in State-to-state Cases', in RD Bishop (ed) *The Art of Advocacy in International Arbitration* (Juris Publishing, Huntington, NY, 2004) 11, 28.

[2] *See* the *UNCITRAL Report of the Secretary-General on the Revised Draft Set of Arbitration Rules*, Ninth Session, Addendum 1 (Commentary), UN Doc A/CN.9/112/Add 1 (1975), (1976) VII UNCITRAL YB 166, 173 (1976) (under Art 19(2), the respondent's defence is 'without prejudice to his right to present additional or substitute documents at a later stage in the arbitral proceeding'); Caron, Caplan, and Pellonpää, op cit, 498 ('In most international arbitrations, further written submissions are likely to be useful, unless the case is disposed of on jurisdictional or other preliminary grounds. Provision should therefore usually be made for a second round of written pleadings, consisting of a reply (replique) by the claimant to the statement of defence (and any counterclaim) and a rejoinder (duplique) to this by the respondent'); W Wilberforce, 'Written Briefs and Oral Advocacy', 5(4) Arb Intl 348 (1989).

in reply. This can be efficient, as well, if these submissions properly prepare the case to the fullest extent, and thus reduce the need for, and ultimately the length of, any oral hearing. Such written submissions will typically contain a detailed description of the factual allegations and will elaborate in detail on the applicable substantive law.

17.05 Written submissions are important for several reasons. First, hearings frequently focus on evidentiary matters as opposed to oral argument;[3] thus, it is vital that the arguments have been laid out clearly before any oral hearing, so that the context of the witness and expert examination is well framed for the arbitration tribunal. Second, comprehensive and responsive statements may eliminate or reduce the need for, or the length of, oral hearings. Some parties choose to conduct a 'document-only' arbitration process in which arbitration is conducted without hearings.[4] In certain disputes, such as those in which witness and expert testimony may play less of a role, this can be a timely and cost-effective mode of achieving a satisfactory resolution. Written submissions are, therefore, of central importance in international arbitration.[5]

17.06 Written statements are usually submitted consecutively, meaning that each party has the opportunity to read and review the opposing party's last statement before responding.[6] Sometimes, written briefs are not submitted consecutively, but simultaneously by both parties.[7] This is often done to expedite the arbitration, but exchanging the parties' written briefs on the same day means that neither party can properly respond to the other side's case.[8] Because of this, sequential pre-hearing written filings are usually preferable,[9] with the claimant making the first submission.[10] For this

[3] M McIlwrath and J Savage, *International Arbitration and Mediation: A Practical Guide* (Kluwer Law International, The Hague, 2010) para 5-161.

[4] J Lew, L Mistelis, and S Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, The Hague, 2003) para 21-44.

[5] Caron, Caplan, and Pellonpää, op cit, 392 ('In an overwhelming majority of cases, the arbitral procedure begins with an exchange of written submissions. Written pleadings are often given primary emphasis throughout the proceedings, with a short oral hearing or no hearing at all'); J Crawford, 'Advocacy Before the International Court of Justice and Other International Tribunals in State-to-state Cases', in RD Bishop (ed) *The Art of Advocacy in International Arbitration* (Juris Publishing, Huntington, NY, 2004) 11, 28.

[6] M McIlwrath and J Savage, *International Arbitration and Mediation: A Practical Guide* (Kluwer Law International, The Hague, 2010) para 5-163; GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 1,824; Lew, Mistelis, and Kröll, op cit, paras 21-50, 21-57.

[7] Lew, Mistelis, and Kröll, op cit, para 21-57.

[8] V Mani, *International Adjudication: Procedural Aspects* (Martinus Nijhoff Publishers, The Hague, 1980) 107 (stating that 'where the plaintiff-defendant relationship is discernible simultaneous presentation is illogical in that it requires the defendants to produce a complete defence without knowing fully in advance of the arguments of the claimant').

[9] Born, op cit, 1,824.

[10] In some arbitrations, a mixed approach is adopted. Even where pre-hearing memorials are submitted in an alternating order by the claimant and the respondent, respectively, post-hearing briefs will be submitted by both parties on the same day.

reason, permitting additional written statements, such as the claimant's reply to the respondent's statement of defence, and the respondent's rejoinder to the claimant's reply, can be an effective manner of refining and clarifying the ultimate issues in dispute before the oral hearing. Instead of, or in addition to, oral closing arguments, written submissions are often also submitted after the hearing (so-called 'post-hearing briefs'). These present the parties with the opportunity to summarize their cases and to apply the facts, as established in their view by the evidence taken throughout the arbitration and specifically at the oral hearing, to the law.[11] Since post-hearing briefs are usually prepared after both sides have heard all of the arguments and seen all of the evidence, the tribunal may direct that the briefs be submitted simultaneously.[12] In some instances, the tribunal may permit the parties to submit replies to the post-hearing briefs as well.

17.07 The ICDR rule on written submissions is similar to Articles 22 and 23 of the 1976 UNCITRAL Rules, but the prescriptive text differs from the broad discretion granted to the arbitral tribunal that exists in the corresponding ICC rule. ICC Article 20(1) very broadly grants the arbitral tribunal the discretion to 'establish the facts of the case by all appropriate means'.[13] This permissive mandate would encompass the discretion to order additional written statements tailored to the needs of the particular dispute and parties. Although textually different, these rules on further written submissions all achieve the same objective: to provide the arbitral tribunal with maximum discretion to order whatever written submissions that might assist in setting forth the facts, law and/or argument to frame a particular dispute properly, and to do so in a short time frame.

B. Time limits (Article 17(2))

Article 17(2)

The periods of time fixed by the tribunal for the communication of such written statements should not exceed 45 days. However, the tribunal may extend such time limits if it considers such an extension justified.

17.08 Article 17(2) provides for a time limit of 45 days for additional written submissions. Those default time limits are designed to expedite the proceedings, but would be considered ambitious in many arbitration proceedings. For that reason, Article 17 provides the necessary flexibility for an arbitration tribunal to craft a schedule that fits the particular dispute before it.

[11] In large arbitrations, the arbitrators increasingly require parties to file very comprehensive post-hearing briefs, which then become the central point of reference (containing all facts, evidentiary conclusions, and legal arguments) for the arbitrators' deliberations.

[12] Born, op cit, 1,824.

[13] ICC Rules, Art 20(1).

17.09 Time limits are set to facilitate efficiency while preserving each party's opportunity to present fully its claims and defences. In many cases, a time limit of 45 days for replies, rejoinders, and/or post-hearing briefs may be fully appropriate. In large arbitrations, written statements are likely to be longer, more complicated, and take more time to produce,[14] which might thus warrant a longer time period than 45 days. The tribunal has the discretion, in such cases or if otherwise appropriate, to provide for a more extended timetable.

17.10 After the tribunal sets the time limits for submissions, if a party wishes to extend a deadline to submit a further written statement and the adverse party or parties do not agree, it would have to request an extension from the arbitration tribunal. The party requesting the extension should support its request with an explanation of why it needs an extension and whether the opposing party or parties would be prejudiced by any such extension.

[14] Born, op cit, 1,823.

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