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Right to be heard as a part of due process of law in arbitration proceedings: current challenges and lessons for Ukraine

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Abstract: International commercial arbitration as a type of alternative dispute resolution is gaining popularity quite rapidly and its use is not the result of a lack of trust in national courts, but a desire to resolve a dispute as soon as possible with the least amount of time and the ability to manage the process independently. This can be considered one of the most important reasons for choosing arbitration, as the events of the last 5 years in the world (such as the Pandemic, Climate change) have demonstrated to everyone the importance of prompt communication and, as a result, the importance of introducing various forms of arbitration proceedings. Such forms include direct (traditional) consideration of the case in the arbitration courtroom, online and hybrid forms. And in this aspect, a fairly reasonable question arises as to whether such forms of arbitration proceedings comply with the due process of law. The article will analyze the doctrinal approaches of both Ukrainian and foreign legal schools and examples of the law enforcement practice of national courts on this problematic issue. In addition, the article will analyze the Ukrainian legislation on the compliance of arbitration proceedings with due process of law and propose amendments to the current legislation.

The article consists of 3 main parts which are logically interrelated and methodologically structured. The first part is devoted to the analysis of the main approaches to due process of law, which is revealed through the prism of comparative legal analysis of doctrinal concepts and analysis of law enforcement practice of national and arbitration courts. The second part reveals the essence of such a structural element of the due process of law in arbitration proceedings as the right to be heard, which plays a key role not only in the course of international commercial arbitration proceedings, but also in the procedure for recognition and enforcement of international commercial arbitration awards by national courts. The last section reveals the peculiarities of due process in virtual arbitration as a specific mechanism of alternative dispute resolution. Using a comparative legal analysis of arbitration practice and the current rules of the leading arbitration institutions, the author concludes that the introduction of online mechanisms in arbitration proceedings is effective.

Keywords: Due Process of Law. Arbitration Agreement. International Commercial Arbitration.

I Introduction

Despite the attractiveness of the varied forms of arbitration hearings, not all of the international community was optimistic about this innovation. Of course, in cases where the will of the two parties to the dispute was available, no questions arose, as there was a clear observance of due process as a mechanism for the realization of "autonomy of will". However, as previously mentioned, problematic issues arise when any party to the case objects to the hybrid form of arbitration and insists on the arbitration proceedings being held in person. That is why it can be concluded that there is a discrepancy between the discretionary powers of international commercial arbitration and, accordingly, the rights of the parties to the dispute who object to the hybrid arbitration to due process (the right to be heard during a fair arbitration).

This inconsistency can be seen most clearly in the views expressed by Turkey during the discussion of amendments to the ICSID Rules. Thus, Turkey proposed that the form of hearings should be determined by agreement of the parties. In other words, if one party does not agree to the method proposed by the other party or the arbitral tribunal, the proposed method of arbitration should not be applied. This position is more appropriate than delegating powers to the arbitral tribunal, taking into account the parties' right to a fair trial and due process. That is why Turkey proposed to add to Article 32 of the ICSID Rules a rule requiring that hearings be held in person unless the parties agree otherwise, except in exceptional circumstances.[1] However, Turkey's suggestion regarding the proposed amendments to the ICSID Rules was rejected on the grounds that there may be circumstances in which the arbitral tribunal may, at its own discretion, decide on the advisability of choosing the form of arbitration (in person or remotely).[2]

II General Doctrinal Approaches to Due Process of Law

Speaking of due process of law, we can say with certainty that its guarantees have existed for several centuries.[3] However, the analysis of scientific points of view and law enforcement practice on this issue gives us grounds to assert

1 "Compendium of Comments for Working Paper # 4 relating to Proposed Amendments to the ICSIO Arbitration Rules," ICSID, March 23 2021. URL: https://icsid.worldbank.org/sites/default/files/amendments/Compendium%20of%20State%20Comments%20on%20Proposed%20Amendments%20to%20the%20ICSID%20Rules%20– WP%20%23%204%20– %20As%20of%202021.03.23.pdf.

2 Proposals for Amendment to ICSID Hides – Working Paper # 5, ICSID, June 15, 2021, para. 62 URL: https://icsid.worldbank.org/sites/default/files/publications/WP%205– Volume1– ENG– FINAL.pdf.

3 Franco Ferrari, Friedrich Jakob Rosenfeld, et al., 'Chapter 1: General Report', Due Process as a Limit to Discretion in International Commercial Arbitration, (© Kluwer Law International; Kluwer Law International 2020) p. 1.

that there are no clear boundaries of what constitutes due process. Frederick Schauer believes that the concept of due process of law has its roots in the origins (principles) of natural justice. In addition, as the scholar notes, the principles of natural justice consist of two interrelated rights – the right to be heard and the right to an impartial court.[4]

The abovementioned doctrinal aspects are reflected in the law enforcement practice of national courts. Attention should be drawn to the judgment of the Singapore Court of Appeal in the case *Gas and Fuel Corporation of Victoria v. Wood Hall Ltd and Leonard Pipeline Contractors Ltd*, which became the basis for the development of a consistent case law and further implementation of the *res judicata* principle. Thus, the judgment sets out two basic principles of natural justice:

- the obligation of the court to be independent and impartial (Latin: Nemo judex in causa sua – "*no one can be a judge in his own case*");
- the obligation to give due notification of the parties to the case and the right to be heard (Latin: audi alteram partem – "listen to the other side").

But, analyzing these principles, the Court states that each of them has its own extension or addition, and accordingly, the addition of the first principle is that justice must not only be done but also appear to be done; and the addition of the second principle is that each party must be guaranteed the right to a fair trial and a fair opportunity to provide explanations in the case. However, regardless of the extensive understanding of this concept, its main postulates are fairness and the adoption of a court decision only after a full and impartial consideration of the case.[5] This approach has been repeatedly used in similar cases in the national courts of Singapore to set aside an international commercial arbitration award, in which one of the parties claimed a violation of natural justice during the arbitration proceedings.[6]

Based on the foregoing, it is quite reasonable to conduct an analytical study of both case law and doctrinal approaches to the interpretation of the "right to a fair trial" and the "right to provide explanations in the case" in the context of disputes in international commercial arbitration.

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4 Frederick F. Shauer, English Natural Justice and American Due Process: An Analytical Comparison, 18 Wm. & Mary L. Rev. 47 (1976), URL: https://scholarship.law.wm.edu/wmlr/vol18/ iss1/3.

5 Gas & Fuel Corporation of Victoria v Wood Hall Ltd & Leonard Pipeline Contractors Ltd [1978] URL: https://doylesarbitrationlawyers.com/gas– and– fuel– corporation– of– victoria– v– wood– hall– ltd– and– leonard– pipeline– contractors– ltd– 1978– vicrp– 41– 1978– vr– 385– 11– april– 1978/.

6 CA 100/2006, Soh Beng Tee & Co Pte Ltd. v Fairmount Development Pte Ltd URL: https://documents– dds– ny.un.org/doc/UNDOC/GEN/V07/881/97/PDF/V0788197.pdf?OpenElement.

For example, a party to an arbitration proceeding, having received an award not in its favor, tried to appeal it to a national court. The main motivation for setting aside the award was that the arbitration did not provide an opportunity to present evidence beyond the time limits agreed between the parties and the arbitrator at the preliminary hearing. The Court of Appeal of Singapore, considering this application, came to the conclusion that the basic prerequisite for procedural fairness is to provide the parties to the dispute with a "reasonable opportunity to present their case", and not the obligation of the arbitral tribunal to ensure that the parties use the full opportunity to present their case to which they are entitled. A full opportunity to present its case does not entitle a party to obstruct the proceedings by using delaying tactics by filing any complaints, motions, or additions on the eve of the arbitration.[7] Similar approaches are also reflected in the decision of the High Court of Australia in the case of *the Association of Architects of Australia ex parte Municipal Officers Association of Australia.*[8]

In this context, the point of view of Professor Lucy Reed, who analyzed the due process of arbitration through the prism of reforming the international legal regulation of arbitration, is quite useful:

- according to article 18 of the UNCITRAL Model Law (both in 2006 and 1986 versions), the parties shall be treated equally and each party shall be given every opportunity to present its position;
- in turn, Article 17(1) of the UNCITRAL Arbitration Rules (as amended in 2012) provides that the arbitral tribunal may conduct the proceedings in such manner as it considers appropriate, provided that the parties are treated equally and each party is given a reasonable opportunity at the appropriate stage of the proceedings to present its case. The arbitral tribunal shall exercise its discretion in conducting the proceedings in an effort to avoid unnecessary delay and expense and to ensure a fair and efficient dispute resolution process between the parties. It should be noted at the outset that the previous version of this rule referred specifically to the provision of a full opportunity for each party to present its position at any stage of the proceedings.

The author draws the following reasonable conclusions: the modified regulation of the proper arbitration procedure emphasizes the boundary between the ordinary and proper procedures; national arbitration laws and regulations cannot cover specific details of arbitration proceedings (such as the duration of the case, the number

[7] Triulzi Cesaresiu, v. Xinyi Group (Glass) Co Ltd, [2014] SGHC 220. URL: https://www.uncitral.org/docs/clout/SGP/SGP_301014_FT.pdf#.

[8] Association of Architects of Australia; ex parte Municipal Officers Association of Australia [1989] HCA 13 (21 February 1989) (Brennan, Dawson and Gaudron JJ.) URL: https://jade.io/article/67484?at.p=index.

of witnesses that may be involved, etc.), but they can act as a kind of qualitative catalyst between the ordinary and proper arbitration procedures.[9]

We should agree with the opinion of Tetiana Tsuvina, who considers that the principle of the right to be heard is one of the fundamental principles of civil procedure, which provides for the existence of a number of procedural guarantees, which are enshrined in paragraph 1 of Art. 6 ECHR constituting the concept of a fair hearing and is associated with three groups of guarantees: a) guarantees that are a prerequisite for the realization of the right to be heard (proper notification of the person about the date, time and place of the hearing); b) guarantees that form the core of the understanding of the right to be heard and are implemented during the proceedings (oral hearing; opportunity to participate in the hearing; the principle of "equal arms" and adversarial trial); c) guarantees that are implemented after the hearing ("reasoned judgment").[10]

Ukrainian case law does not provide a clear answer to this question. However, by applying the method of legal analogy, one can see attempts to interpret such definitional constructs as "due process" and "legal procedure" within the framework of administrative justice. Thus, in its decision, the Fifth Administrative Court of Appeal notes that the principles of legal procedure have already become universal due to the decisions of the European Court of Human Rights and apply to both procedural proceedings and legal procedures that must be followed by public authorities when adopting relevant acts regarding human rights, freedoms and legitimate interests.

However, as the court notes, the mentioned doctrine of legal procedure has been essentially used in the practice of the Constitutional Court of Ukraine. In the decisions of February 28, 2018, on the recognition of the law on language as unconstitutional and of April 26, 2018, on the recognition of the Law on Referendum as unconstitutional, the Constitutional Court of Ukraine, pointing to the direct connection between the observance of "due process" and guarantees of the rights and legitimate interests of man and citizen, actually gave procedural principles a binding value. That is, if the due process of law has been violated in the Parliament or in any other public authority, there is no point in checking the content of the relevant act, since it is null and void. The above allows us to use the concept

[9] Lucy Reed, Ab(use) of due process: sword vs shield, Arbitration International, Volume 33, Issue 3, September 2017, Pages 361–377, https://doi.org/10.1093/arbint/aix022.

[10] Tsuvina T.A. Principle of the Right to Be Heard in Civil Procedure: ELI/UNIDROIT Model European Rules of Civil Procedure, Case Law of the ECtHR and National Context. Bull. Taras Shevchenko Nat'l U. Kyiv Legal Stud. 2022. № 2(121). С. 88– 96.

of “due legal procedure”, which is fully covered by the understanding of the rule of law – the principle of the rule of law (or the measure of the rule of law).[11]

In addition, the Resolution of the Administrative Court of Cassation notes that the legal procedure is a component of the principle of legality and the rule of law and provides for legal requirements for the proper adoption of acts by public authorities. The panel of judges notes that the established legal procedure as a component of the principle of legality and the rule of law is an important guarantee of preventing abuse by public authorities in making decisions and performing actions that should ensure fair treatment of a person.[12]

In addition, it is worth noting that since the main purpose of international commercial arbitration is to enable the recognition and enforcement of arbitral awards, the arbitration proceedings must be conducted in compliance with all due process for the losing party. The historical development of arbitration legislation in this context has also undergone modifications. Art. 2(b) of the 1927 Geneva Convention on the Recognition and Enforcement of Foreign Arbitral Awards stipulates that recognition and enforcement of an arbitral award may be refused if it is established that a party to the dispute was not notified of the arbitration proceedings in sufficient time to allow it to present its position.[13] In turn, Art. V(1)(b) of the New York Convention of 1958[14] provides that the recognition and enforcement of an arbitral award may be refused if the party against whom the award is made was not duly notified of the appointment of the arbitrator or the arbitration proceedings or was otherwise unable to submit its explanations.[15] The use of the word “other” allows national courts to arbitrarily interpret this ground for refusing to recognize and enforce an arbitral award, relying solely on the provisions of domestic law.

For a deeper understanding of the issue of compliance with due process during arbitration proceedings, we consider it appropriate to focus on the judgment of the Court of Appeal of Singapore in case *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another*. According to this judgment, the Court makes the following conclusions:

11 Judgment of the Fifth Administrative Court of Appeal of 08.02.2022 in case 420/13647/21. URL: https://reyestr.court.gov.ua/Review/103202606.

12 Judgment of the Administrative Court of Cassation dated 25.07.2019 in case No. 826/13000/18. URL: https://reyestr.court.gov.ua/Review/83331117.

13 Convention on the Execution of Foreign Arbitral Awards. Geneva, 26 September 1927. URL: https://treaties.un.org/doc/Publication/UNTS/LON/Volume%2092/v92.pdf.

14 See DRAHOZAL, Christopher R. The New York Convention and the American Federal System. Revista Brasileira de Alternative Dispute Resolution, vol. 1, nº 1, pp. 37– 53, 2019.

15 The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958. URL: https://icac.org.ua/wp– content/uploads/Text– of– UN– Convention_New– York– 1958– 4.pdf.

- The concept of due process is an integral part of the basic guarantee of procedural fairness of the proceedings and reveals its essence through the right of each party to the proceedings to be duly notified of the case in which it is involved and to have a fair opportunity to prepare and present its arguments and objections before a neutral and impartial decision– making body. It is the combination of these two components that ensures the right to a fair trial, which is an integral part of its legitimacy for all parties to the case.
- Guarantees of procedural fairness may be of particular importance in international commercial arbitration since violation of the parties' rights to due process is one of the exhaustive list of grounds for setting aside or refusing to recognize and enforce an international commercial arbitral award.
- While the arbitral tribunal has discretionary powers to determine its procedure and to allow the parties to the dispute to determine the "rules of the game" in the arbitration, the requirement of due process is a significant limitation of such expanded autonomy.
- The arbitral tribunal must carefully review all components of due process to prevent abuse of the rights granted to the parties to the dispute. For example, filing unfounded complaints regarding violation of due process may not only increase the time and cost of the case but may also compromise the legitimacy of arbitration in general and its role as one of the effective alternative dispute resolution methods with binding awards.
- Since most complaints of violation of the legal procedure relate to the organization of the arbitral proceedings (extension of the time limits for consideration of the case, the possibility of submitting additional evidence outside the established time limits, etc.), the arbitral tribunal, which is empowered to consider them, must balance two opposed criteria – the need to clearly define the due process rights of the parties and the importance of understanding the clear limits of of the arbitral tribunal's discretionary powers in resolving all procedural issues of the arbitration.[16]

Based on the analysis of this judgment, we can confidently agree with its main theses, since the main problem faced by both arbitrators and national courts when considering motions to set aside or recognize and enforce international commercial

[16] Jaguar Energy Guatemala LLC and AEI Guatemala Jaguar Ltd v. China Machine New Energy Corporation, ICC Case No. 20013/CYK, Judgment of the Court of Appeal of Singapore [2020] SGCA 12, 28 février 2020.

arbitration awards is the attempt of a party to the arbitration proceedings, which is at a disadvantage, to take actions that, although they may be considered the exercise of the right to fair procedure, are in fact nothing more than an abuse of its procedural rights.

The Ukrainian arbitration legislation (Article 36(1)(1) of the Law of Ukraine "On International Commercial Arbitration", subpara. "b", para. 1, part 1, Art. 478 of the Civil Procedure Code of Ukraine), although it has chosen the path of adaptation to international standards, it does not deprive the law enforcement practice of examples of such abuse of procedural rights by the parties to the arbitration proceedings. Thus, when dismissing a petition for recognition and enforcement of an international commercial arbitration award of the Portland, Oregon Arbitration Service, the Kyiv Court of Appeal as the court of first instance noted that the respondent's refusal to participate in the arbitration proceedings and refusal to receive any notices from the arbitration is an undeniable violation of a fair arbitration proceeding. Disagreeing with this position, the Civil Court of Cassation, in reversing the judgment of the court of first instance, concludes that since the Arbitration Rules provide that the refusal or inability of any party to participate in the arbitration proceedings or to attend the hearing or any part thereof or the failure of a party to seek an adjournment or postponement of the hearing or any part thereof after due notice by the ASP Rule shall not prevent the appointment of the arbitrator(s) or the continuation of the arbitration, nor shall it prevent the scheduling or conduct of the hearing, nor shall it prevent the conduct of the prima facie hearing or the rendering of the award. However, the arbitrator (arbitrators) shall not be entitled to make an award unless the evidence provided or presented at the hearing is sufficient to support the award.[17] Thus, as we can see, in this case, the Civil Court of Cassation comes to its interpretation of the international arbitration rules, considering the arbitral tribunal's discretionary powers regarding the proper arbitration procedure to be expanded.

Based on the above doctrinal approaches, analysis of international legal regulation of arbitration proceedings and national law enforcement practice regarding the due process of arbitration and general theoretical approaches to the right to be heard, the following conclusions can be made:

- Art. 17(1) of the UNCITRAL Arbitration Rules, unlike other international legal acts, reflects the current global trends in effective dispute resolution and, in our opinion, this rule should be reflected in national arbitration laws;

[17] Judgment of the Civil Court of Cassation of 26.01.2023 in case No. 824/253/21. URL: https://reyestr.court.gov.ua/Review/108686078.

– The mandatory provision by the arbitral tribunal of procedural guarantees for the parties to the arbitration by setting certain limits (deadlines for filing a response, motions, additions, etc.) falls within the category of "reasonable opportunity to provide explanations" and cannot be considered a violation of the right to a fair trial;
– The imperfection of Ukrainian procedural and arbitration legislation allows the Kyiv Court of Appeal and the Civil Court of Cassation to use their own judicial discretion without any justification of their legal positions.

III The Right to be Heard as an Integral Part of Effective Arbitration Proceedings

The analysis of the above reasoning for the right of a party to a dispute to be heard as an integral element of the right to a fair trial gives grounds to highlight another doctrinal issue which is the subject of active debate – does the right to be heard imply the obligation of the personal and direct presence of a party to a dispute during arbitration proceedings?

Before proceeding to the scientific study of this issue, it is worth noting that, firstly, a clear answer to this question cannot be given unequivocally, since, as follows from the law enforcement practice of both national and international judicial institutions and pro– arbitration scientific views, the right to be heard, as well as the right to a fair trial itself, are rather flexible definitional constructions. In support of this thesis, the Court of Appeal of Singapore in the case of Triulzi Cesare SRL V. Xinyi Group (Glass) Co Ltd. quite rightly noted that the content of the fair trial rule may differ significantly from case to case depending on the circumstances of each case since what may be considered a violation in one case may not be so in another.[18]

Secondly, it is only in the national legislation of the place of arbitration that one can see the approaches of different legal systems to this issue.

For example, Article 18 of the UNCITRAL Model Law on International Commercial Arbitration provides that the parties shall be treated equally and given every opportunity to present their positions. It is further explained that, subject to the provisions of this Law, the parties may, at their own discretion, agree on the procedure for conducting arbitration proceedings. However, when disclosing the forms of organization of the arbitral proceedings, Article 24 of the UNCITRAL Model Law states that, subject to any agreement of the parties, the arbitral tribunal shall decide whether to hold an oral hearing or to proceed only on the basis of documents and other materials.

[18] Singapore / 30 October 2014 / Singapore, High Court / Triulzi Cesare SRL v. Xinyi Group (Glass) Co Ltd / [2014] SGHC 220.

However, if the parties do not agree not to hold an oral hearing, the arbitral tribunal shall hold such a hearing at an appropriate stage of the proceedings at the request of either party.

This legal act clearly demonstrates the expanded discretionary powers of the arbitral tribunal regarding the procedure for conducting arbitral proceedings. Thus, on the one hand, the right of the parties to the dispute to choose the procedure and method of dispute resolution remains an undisputed manifestation of their autonomy of will, but on the other hand, their rights may be limited or narrowed by procedural decisions of the arbitral tribunal that will hear the case (in the absence of a request for an oral hearing, the arbitral tribunal may not hold an oral hearing).

Some national arbitration laws and the enforcement activities of national courts favor more discretionary powers of international commercial arbitration. For example, §1047(3) of the German Code of Civil Procedure provides a general idea of the format of the proceedings, stating that each party must be familiarized with any procedural documents of the arbitration proceedings. Based on this abstract definition, German courts have interpreted this provision in different ways.

Thus, in one of the cases, the party against whom the arbitral award was rendered filed a motion to set aside the arbitral award with the Frankfurt Court of Appeal, arguing that the arbitral tribunal did not hold oral hearings and that this violated its rights. The court, while not accepting the applicant's arguments, noted that since the respondent did not provide a response to the claim and no evidence during the arbitration proceedings, it cannot be recognized that an oral hearing could have contributed to clarifying the circumstances of the case or to the arbitral award. In conclusion, the Frankfurt Court of Appeal notes that the oral hearing in the arbitral tribunal is not a key stage of the arbitral proceedings, and to some extent its necessity remains at the discretion of the arbitral tribunal.[19]

This issue is explained in more detail in the Judgment of the Frankfurt Court of Appeal (2022). Thus, when considering a motion for the recognition and enforcement of an international commercial arbitration award, the defendant argued that the right to be heard was violated during the proceedings. Rejecting the defendant's arguments, the court comes to the following conclusions:

- Violation of the right to be heard (Articles 1066,1042 of the German Code of Civil Procedure) is an undeniable violation of the national procedural legal order;
- With regard to the constitutional guarantee to be heard, the principle that international commercial arbitration should provide the parties to the

[19] OLG Frankfurt, Beschluss vom 16. Januar 2014 – 26 Sch 2/13. URL: https://juris.de/perma?d=KORE561632014.

arbitration proceedings with the same right to be heard and to the same extent as in a state court should be applied in arbitration proceedings;

- The constitutional right of each party to the proceedings to be heard, which is enshrined in Article 103 of the German Constitution, is determined by the obligation of the arbitral tribunal to take note of and consider all procedural documents submitted by the parties to the arbitration. However, this requirement is not absolute and it will not be considered a violation of this principle if the award does not reflect all legal positions of the parties to the dispute, since the requirements to the form and content of the award are not identical to the state court decision;
- The arbitral award cannot be set aside solely on the grounds that oral hearings were not held, since the arbitral tribunal is fully empowered to consider the case in written proceedings on the basis of available documents, and the refusal to hold an oral hearing is not correlated with the causal link of the decision.[20]

A similar point of view is supported by states that have harmonized their national arbitration laws with the UNCITRAL Model Law (Spain,[21] Belgium,[22] Singapore,[23] etc.), as well as by states that have refused to do so (e.g. the United States and Switzerland).

To confirm this position, we can refer to the judgment of the Delhi High Court in the case of Sukhbir Singh v M/S Hindustan Petroleum corporation LTD, according to which the Court concludes that the right to be heard during the oral presentation of one's position and the presentation of evidence must be clearly agreed upon in the arbitration agreement between the parties to the contract, or directly by expressing a joint consent to such hearings. Despite the right granted to the parties to the dispute to determine the format of the arbitration proceedings, the final word remains with the arbitral tribunal, which may consider it inappropriate or such that it will lead to a delay in the consideration of the case by expressing such a position by the parties and make its own decision to conduct the case in written proceedings[24] .

Ukrainian arbitration law, although based on the principles enshrined in the UNCITRAL Model Law on International Commercial Arbitration, has its own

[20] OLG Frankfurt, Beschluss vom 24. Januar 2022 – 26 Sch 14/21 URL: https://juris.de/perma?d=KORE249042022.

[21] Spanish Arbitration Act 2011 URL: https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Act_on_arbitration_%28Ley_60_2003__de_arbitraje%29.PDF.

[22] Belgian Judicial Code https://www.uv.es/medarb/observatorio/leyes– arbitraje/europa– resto/belgica–judicial– code– arbitration– 2013.pdf.

[23] Singapore Arbitration Act 2001 URL: https://sso.agc.gov.sg/Act/AA2001

[24] Sukhbir Singh v. Hindustan Petroleum Corp, 2020 URL: https://indiankanoon.org/doc/86294741/.

interpretation of the right to be heard. The arbitral tribunal's discretionary powers are absolutely unlimited in determining the form of arbitration proceedings.

Pursuant to Article 19 of the Law of Ukraine "On International Commercial Arbitration", subject to the provisions of this Law, the parties may, at their discretion, agree on the procedure for consideration of the case by the arbitral tribunal. In the absence of such an agreement, the arbitral tribunal may, in compliance with the provisions of this Law, conduct the arbitration proceedings in such manner as it deems appropriate. The powers granted to the arbitral tribunal include the power to determine the admissibility, relevance, essentiality and significance of any evidence.

Article 42 of the Rules of the ICAC at the Ukrainian CCI stipulates that, subject to the provisions of the Law of Ukraine "On International Commercial Arbitration" and the general principles of arbitration provided for in these Rules, the parties may, at their discretion, agree on the procedure for consideration of the case by the arbitral tribunal.

In the absence of such an agreement, the arbitral tribunal may, in compliance with the provisions of the Law of Ukraine "On International Commercial Arbitration", conduct the arbitration proceedings in such a manner as it considers appropriate in order to ensure the effective resolution of the dispute, while maintaining equal treatment of the parties and providing each party with equal and reasonable opportunities to protect its interests.

Article 47 of the Rules of the ICAC at the Ukrainian CCI, which was followed by the Arbitral Tribunal in the present case, stipulates that an oral hearing is held to allow the parties to present their positions on the basis of the evidence submitted and to hold oral arguments. The hearing shall be held in a closed session. With the permission of the arbitral tribunal and with the consent of the parties, the hearing may be attended by persons not participating in the arbitration.

A party may request the Arbitral Tribunal to participate in the oral hearing by means of video conferencing systems. Such request shall be considered by the arbitral tribunal taking into account the circumstances of the case and the opinion of the other party. The arbitral tribunal shall have the right to hear witnesses or experts by means of video conferencing systems.

Pursuant to Article 24 of the Law of Ukraine "On International Commercial Arbitration", subject to any other agreement of the parties, the arbitral tribunal shall decide whether to hold an oral hearing for the presentation of evidence or oral arguments or to proceed only on the basis of documents and other materials. However, unless the parties have agreed not to hold an oral hearing, the arbitral tribunal must hold such a hearing at the appropriate stage of the proceedings if requested by either party.

The Ukrainian law enforcement practice tries to adhere to the pro– arbitration policy and actually duplicates the existing views of many legal systems.

Thus, the Kyiv Court of Appeal, analyzing the provisions of the ICAC Rules, concludes that the oral hearing is an integral part of the entire arbitration proceedings, within which the parties submit written documents, in particular, a response to the statement of claim.[25]

We cannot fully agree with this point of view, since the use of such a morphological construction as "an integral part of the entire arbitration proceedings" should be understood to mean that the oral hearing is an obligatory part of it, in the absence of which the arbitral award may be set aside or refused to be recognized and enforced. Thus, in our opinion, such an interpretation of the national arbitration law is erroneous and does not comply with the unified approaches to the form of arbitration proceedings.

An equally interesting example of the abuse of arbitral discretion in the course of the proceedings is the consideration of a motion to set aside the award of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry, in which the debtor argued that since the Arbitral Tribunal had rejected its motion to hold an oral hearing directly in the courtroom and had independently chosen the format of the arbitration proceedings via video conferencing, the right to be heard had been violated. Despite such requirements, the Kyiv Court of Appeal dismissed the request and noted that the ICAC Rules and the Law of Ukraine "On International Commercial Arbitration" provide the arbitral tribunal with extensive powers regarding the procedure for conducting arbitration proceedings for the greatest efficiency. Taking into account the requirements of Art. 42 of the Rules, the Arbitral Tribunal considered that the videoconference hearing[26] did not in itself deprive a party of the opportunity to fully present its position and did not violate the adversarial principle, the autonomy of the parties' will and other principles of arbitration. Therefore, the Arbitral Tribunal concluded that it has the authority to conduct arbitration hearings by video conference and that such a format of arbitration will facilitate the effective resolution of the dispute in a pandemic with respect for all procedural rights of the parties.[27]

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[25] Judgment of the Kyiv Court of Appeal of 25.06.2021 in case No. 824/75/21 URL: https://reyestr.court.gov.ua/Review/97910473.

[26] FERREIRA, D.B., GIOVANNINI, C., GROMOVA, E., SCHMIDT, G. Arbitration chambers and trust in technology provider: Impacts of trust in technology intermediated dispute resolution proceedings, Technology in Society 68,101872, 2022. https://doi.org/10.1016/j.techsoc.2022.101872. See also FERREIRA, D.B., GIOVANNINI, C., GROMOVA, E., FERREIRA, J.B. Arbitration chambers and technology: Witness tampering and perceived effectiveness in videoconferenced dispute resolution proceedings. International Journal of Law and Information Technology, vol. 31, nº 1, pp. 75– 90, 2023. https://doi.org/10.1093/ijlit/eaad012.

[27] Judgment of the Kyiv Court of Appeal of 15.11.2021 in case 824/217/21 URL: https://reyestr.court.gov.ua/Review/101806306.

IV Observance of Due Process During Virtual Arbitration Proceedings

The analysis of the above approaches to the right to be heard during arbitration proceedings is of great importance for the further implementation of the procedure for the recognition and enforcement of international commercial arbitration awards, since violation of this right is an indisputable condition for its cancellation. Accordingly, the choice of the form of arbitration proceedings – virtual (online),[28] direct or hybrid – cannot contradict the right of a party to be heard as an integral part of the right of access to court.

The General Report of the International Council for Commercial Arbitration, which was prepared on the basis of reports from 78 countries on the question "Is there a right to a physical hearing in international arbitration?" demonstrates that national arbitration laws very rarely require a hearing to be held directly within the arbitral tribunal or in the personal presence of the parties to the case[29] [26]. Nevertheless, despite the existence of such flexible arbitration legislation regarding the form of arbitration proceedings, the arbitral tribunal cannot independently decide on the virtual format of the arbitration if a party to the dispute insists on holding a direct hearing with the personal participation of the parties or their representatives. The most important thing in this case is that the arbitral tribunal must check all the negative consequences of a possible violation of the right to be heard that may occur for such a party.

Thus, sometimes one can see certain conflicts in the national regulation of international commercial arbitration, since, on the one hand, the national arbitration laws of the place of consideration of the case empower the arbitral tribunal to choose to conduct virtual arbitration, and on the other hand, the autonomy of the parties to the arbitration is preferred, which is realised in the ability to independently determine the form and all further procedural aspects of the arbitration in the arbitration agreement, and in the absence of such a definition in the arbitration agreement, the right to In other words, such contradictions create a quintessential conflict between the arbitral tribunal's discretionary powers to organise the arbitration and the parties' right to due process.

[28] FERREIRA, D.B., GROMOVA, E. FARIAS, B., GIOVANNINI, C. Online Sports Betting in Brazil and conflict solution clauses. Revista Brasileira de Alternative Dispute Resolution – RBADR, vol. 4, nº 7, pp. 75– 87, 2022. See also ELISAVETSKY, A., MARUN, M. La tecnologia aplicada a la resolución de conflictos: su comprensión para la eficiência de las ODR y para su proyección en Latinoamérica. Revista Brasileira de Alternative Dispute Resolution – RBADR, vol. 2, nº 3, pp. 51– 70, 2020.

[29] Does a Right to a Physical Hearing Exist in International Arbitration? https://cdn.arbitration– icca.org/s3fs– public/document/media_document/ICCA_Reports_no_10_Right_to_a_Physical_Hearing_final_amended_7Nov2022.pdf.

It is worth noting that there is no unanimity in resolving this conflict between the arbitral tribunal's authority and the observance of due process rights in the organisation of the arbitral proceedings, as some arbitration institutions prefer the arbitral tribunal's discretionary powers over the right of the parties to the dispute to due process, while others determine the expediency of conducting virtual arbitration exclusively by agreement between the parties to the dispute and the arbitral tribunal.

For example, the International Chamber of Commerce Arbitration Rules 2021, which was amended to take into account the impact of the pandemic on arbitration practice, can be attributed to the first type of institutions, vesting discretionary powers in the arbitral tribunal as to whether a virtual hearing is appropriate. Thus, Art. 26(1) of the Rules provides that the arbitral tribunal, after consulting with the parties and taking into account the relevant facts and circumstances of the case, may decide that any hearing shall be held in person or remotely by videoconference, telephone or other appropriate means of communication.[30] This provision, without any reservations, obliges the arbitral tribunal to consult with the parties to the dispute on the feasibility of holding a virtual hearing, excluding the consent of the parties. Despite such legislative consolidation of the arbitral tribunal's discretionary powers, the Clarifications for the parties and arbitral tribunals on conducting arbitration proceedings under the ICC Arbitration Rules have identified certain concerns that the absence of the parties' consent to the virtual hearing may subsequently lead to the cancellation of the international commercial arbitration award. Pursuant to paragraph 99 of the Explanations, the arbitral tribunal should make any decision to conduct a hearing by remote means of communication instead of physical presence after carefully considering all relevant circumstances, including the nature of the hearing, possible travel restrictions, the expected duration of the hearing, the number of participants and witnesses and experts to be examined, the size and complexity of the case, the need for adequate preparation of the parties for the hearing, the costs that may be expected to be incurred by the use of remote means of communication, the need to ensure that the parties are able to participate in the hearing, and the need to ensure that the arbitral tribunal is able to conduct the hearing in a timely manner. If the arbitral tribunal decides to hold a virtual hearing without the consent of the parties or over their objections, it should carefully consider the relevant circumstances and assess whether the award will be enforceable. Any virtual hearing will require consultation between the arbitral tribunal and the parties to adopt measures – often referred

[30] ICC Arbitration Rules 2021 https://iccwbo.org/dispute– resolution/dispute– resolution– services/arbitration/rules– procedure/2021– arbitration– rules/#block– accordion– 26.

to as a cyber protocol – necessary to comply with any applicable data protection regulations.[31]

Particular attention should be paid to the legal regulation of the possibility of conducting virtual arbitration proceedings in Ukraine. Article 47 of the Rules of the ICAC at the UCCI provides that an oral hearing shall be held for the parties to present their positions on the basis of the evidence submitted and for oral arguments. A party may request the arbitral tribunal to participate in the oral hearing via video conferencing. The Arbitral Tribunal shall consider such request taking into account the circumstances of the case and the opinion of the other party. The arbitral tribunal shall have the right to hear witnesses or experts by means of video conferencing systems. The analysis of this Article does not provide a clear answer on the procedure for determining the format of the hearing. On the one hand, it is determined that an oral hearing is supposedly a mandatory element of the entire arbitration proceedings and only at the request of a party to the dispute the hearing may be scheduled in a variant format. However, Art. 46 of the Rules seems rather contradictory, as it states that the parties may agree to consider the case on the basis of written materials without holding an oral hearing. The Arbitral Tribunal may consider the case on the basis of written submissions even in the absence of such an agreement of the parties, if none of them requests an oral hearing. In other words, a party to the dispute must request an oral hearing, which is in fact a mandatory stage.

The comparative legal analysis of both national arbitration laws and regulations and the law enforcement practice of national courts leads to the conclusion that the rights of the parties to the dispute to choose the format of the arbitration proceedings – virtual or direct participation – may be limited by vesting the arbitral tribunal with exclusively discretionary competence in these matters. And such competence should be clearly provided for in the rules of international commercial arbitration, since it is the arbitral tribunal that can fully determine the feasibility of virtual arbitration, taking into account the complexity of the case, the composition of the parties to the case, the amount of the claim, and the feasibility of using modern technologies for efficient and prompt consideration of the case.

V Conclusions

Analyzing the case law of national courts, we can see a certain discrepancy with the legislative regulation of this issue. Both the Law of Ukraine "On International

[31] Note to parties and arbitral tribunals on the conduct of the arbitration under the ICC Rules of Arbitration https://iccwbo.org/wp– content/uploads/sites/3/2020/12/icc– note– to– parties– and– arbitral– tribunals– on– the– conduct– of– arbitration– english– 2021.pdf.

Commercial Arbitration" and the Rules of the ICAC at the Ukrainian Chamber of Commerce and Industry clearly stipulate that the arbitral tribunal shall schedule the arbitration proceedings in the form of an oral hearing. However, due to the absence of a unified legal position on the definition of the definitional constructions "oral hearing", "arbitral proceedings" and "right to be heard", quite controversial points of view will arise in the future.

In our opinion, it is possible to eliminate contradictions in the law application of these definitions not only by amending the national legislation, but also by forming a consistent law application practice of the Civil Court of Cassation, which currently acts as a court of appeal and by improving the skills of judges of the Kyiv Court of Appeal, commercial courts and judges of the Civil Court of Cassation in the field of international commercial arbitration.

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