Formality in International Commercial Arbitration – For Better or for Worse?

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I. Introduction

When signing an arbitration agreement or an arbitration clause, thereby deciding to submit possible future disputes to arbitration, parties are generally motivated by certain expectations about such proceedings. Parties choose arbitration both for its informality and its commercial approach to the determination of their dispute.[1]) The expeditious and informal conduct of the proceedings is clearly mentioned as one the key advantages of arbitration in legal doctrine.[2])

Furthermore, parties frequently expect arbitration proceedings to be quicker[3]) and sometimes also less formal than court proceedings, allowing them to submit documents in a language other than that of the arbitral proceedings, or to present their arguments without the strict time frames set by civil procedural rules[4]). Another reason is cost effectiveness: contrary to litigation proceedings which often require seven or eight hearings with intervals of three or four months and, therefore, run for years, an arbitral tribunal or sole arbitrator will often try to concentrate the oral hearing into a couple of days and thus reduce unnecessary preparation and re-preparation efforts of the parties and their legal counsel. The possibility also exists of choosing arbitrators who are not lawyers, but experts for the factual questions and thus reducing costs which would otherwise be necessary for additional experts. A wish to avoid lengthy witness questioning procedures, especially if witnesses come from different countries and their nomination would, in proceedings before the state court, therefore lead to questioning by way of intercourt assistance, is another important expectation parties may have when choosing arbitration.

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[1]) *R. Goode,* "The Adaptation of English Law to International Commercial Arbitration", 8 Arbitration International (1992) 6.

[2]) *Fasching,* Zivilprozessrecht (1984) 2166.

[3]) See *Fiebinger/Gregorich,* "Arbitration on Acid, Fast Track Arbitration in Austria from a Practical Perspective", below page 237.

[4]) The Austrian Code of Civil Procedure (ACCP), for example, generally only allows written submissions until one week before the first court hearing at the latest, see section 257 para 3 ACCP and gives the judge legal means to exclude evidence or further statements at a later stage (Section 180 para 2 ACCP).

Whilst these arguments for choosing arbitration as a method of dispute resolution still apply in most arbitral proceedings, in some of them arbitrators have shown a tendency to place too much emphasis on formal requirements. Such formality may express itself in very strict form requirements regarding the presentation of evidence by parties and regarding their written submissions, in inflexible insistence on agreed procedures or time limits without taking into account changes in circumstances and in arbitrators being, in comparison to state judges, "more catholic than the pope". Overly regulated arbitral proceedings could be perceived by parties as being even more formal than state court proceedings.

Excessive formality may thus endanger the advantages of higher flexibility and party-friendliness of arbitral proceedings in comparison to court proceedings. Furthermore, even in cases where formalities are genuinely useful in accelerating the speed of the proceedings, they may still violate the parties' interest in fully presenting their case and thus the basic principle of party autonomy.

In the following we will first briefly describe some examples of formalities and evaluate whether their effects are mainly positive or, on the contrary, whether they have an adverse effect on the parties' interests and therefore on the image of arbitration as such. We will then deal with the legal situation in Austria, the UNCITRAL Model Law and the framework according to some important institutional arbitration institutions. In this context, we will also show the boundaries that national law or arbitration rules set for such formalities and whether formalities are actually encouraged by these regulations.

The main aim of this article is to raise awareness about formality in arbitral proceedings and its positive or negative effects on the parties and thus on arbitration as a method of dispute resolution. Such awareness should encourage parties and their counsel to pay specific attention to possible traps or pitfalls at a time early enough to identify them, i.e. at the time of signing the arbitration agreement or at the very least when agreeing the procedural rules with the arbitral tribunal, be it in the course of signing the terms of reference or in the course of a pre-hearing conference.

II. Manifestations and Consequences of Formality

A. Procedural Rules

To begin with, it is vital to point out that, fundamentally, procedural rules, including formalities, are absolutely essential in ensuring the effectiveness of arbitration proceedings. Included amongst these are

1. Procedural rules regarding submissions:

- Formal aspects of submissions such as language, means of submission and communication tools (registered mail, courier, telecopy or email) and number of addressees;

- Time limits for submissions;
- Number and rounds of submissions (with a possible distinction between submissions on formal aspects such as the competence of the arbitral tribunal and submissions on the merits of the case; how many rounds of submissions are admissible; simultaneous or consecutive submissions);
- A general outline of the scope of the submissions, in particular whether there will – in addition to the statements of claims and defence and eventual further submissions – also be so-called "skeleton submissions" in which all the arguments of each party must be summed up, or "post-hearing briefs" in which each party has to include its final pleadings;
- Specific rules for submitting evidence; certified or uncertified translations of documentary evidence.

2. Procedural rules regarding the taking of evidence:

- Will there be only one "condensed" hearing or many consecutive hearings; will there be a pre-hearing conference; place and time of such hearings;
- Will there be opening and/or closing statements and how much time will be reserved for such statements? Experience has shown that there may be vast differences in the expectations of the parties in regard to such issues; whereas, according to Central European understanding, such statements are usually quite short, in some arbitration proceedings, days or even weeks are reserved for them;
- Will there, generally, be time-limits for the taking of evidence or the questioning of witnesses? Some arbitrators or arbitration panels prefer to work according to "chess-clock-principles", thus limiting the questioning time both for each witness and for each party, sometimes regardless of the value in question and the complexity of the issues to be solved.
- Will any specific rules, such as the "IBA Rules on Taking Evidence in International Commercial Arbitration", be applied by the arbitral tribunal? Will there be "discovery and inspection"?
- Will there be written witness statements, counter statements and cross-examination? Will questioning in the oral hearing be limited to facts not contained in the written statements?
- Will there be a verbatim record of the hearing, a court reporter?

Even provisions regarding the location of the hearing may, in effect, turn out to be a formalistic issue, for example if the reservation of a certain hotel or other facilities incurs high costs and strict cancellation policies and therefore makes it economically difficult to postpone or interrupt the hearing even though the case might require it.

Some of the aforementioned items may, at first glance, not seem to be "formalistic", but rather normal issues that arise during every arbitration procedure. They may, however, easily turn into burdensome formalities, if the arbitral tribunal is not as flexible as the case demands. The ability of the arbitral tribunal and the parties, who are the masters of the proceedings to employ the necessary

flexibility is, after all, the magic formula. On the other hand, a certain strictness of the rules[5]) is definitely required in order to avoid filibustering tendencies of the parties and in order to ensure that the parties receive the kind of procedure they chose or at least envisaged when opting for arbitration.

It is common that arbitrators in international commercial arbitration provide a detailed set of rules for the proceedings in addition to the regulations on the conduct of the proceedings in the applicable arbitration law or in the arbitral rules. This approach is generally expedient both for parties as well as for arbitrators as it provides a structure for the proceedings and thus is important in safeguarding procedural discipline and the efficient conduct of the proceedings.

B. Formality in Procedural Rules

However, problems may arise if in such rules, which are often issued in the form of a "Procedural Order", or are contained in the "Terms of Reference" or in later procedural rulings of the arbitrators, excessive formalities are imposed upon the parties. It is therefore essential, both for the parties and the arbitrators, to find the right balance between a strictness that prohibits one party from bringing forward dilatory tactics and a flexibility for the arbitral tribunal that allows it to take into account issues or facts that could not be foreseen, but rather first come to light during the course of the proceedings. Furthermore, there are also some "excessive formalities" that should be avoided altogether.

Excessive formalities within the meaning of this article are to be understood

(i) in the case that arbitrators provide for rigorous formal requirements without any objective justification of the severity of the regulations,
(ii) in the case that arbitrators put undue emphasis on organizational aspects, or
(iii) in the case that the arbitrators apply existing formal regulations with excessive strictness.

In all these cases, formalities may not only increase the costs of the arbitration but may also obstruct parties from properly presenting their case. In severe cases, excessive formalities might even violate the parties' right to be heard as laid down in Section 594 Austrian Code of Civil Procedure (ACCP) or the opportunity to fully present their case (Art 18 UNCITRAL Model Law), a point which will be elaborated on in more detail below.

Examples of legal formalities are manifold, and their effect on the parties differs:

Procedural rules regarding submissions are absolutely indispensable. It may, however, not be necessary to send the same submissions both by courier, telecopy them in advance and email them. One of these three methods of communication

[5]) See *Fiebinger/Gregorich,* "Arbitration on Acid, Fast Track Arbitration in Austria from a Practical Perspective", below page 251 describe this drastically as the "iron fist".

is generally sufficient and helps to keep both parties', counsel's and arbitrators' files slim. An adequate means of communication would, in the world of today, generally be email which allows delivery of submissions to all recipients at the same time and ensures prompt control of whether the time limit has been met. Furthermore, this also helps to speed up proceedings, as no time is lost as is with postal delivery, an aspect of primary importance especially in "fast track" proceedings.

Time limits for submissions are another necessary formalism. It must, however, be stated from our own experience both as arbitrators and as parties' counsel, that this aspect needs a differentiating view. We have sometimes come across claimants who, at first and as a general approach, express their definite wish to speed up the proceedings as much as possible, even outside of "fast track" arbitration procedures. However, we have seen cases where these same claimants (or their counsel) then complain bitterly if, by chance, the time limits they have to meet fall in the holiday period and ask for extensions, often without bringing any additional arguments other than that the specific counsel in charge of the case – despite being partner of a large law firm of more than one hundred lawyers – will be on holiday in the week when the time limit ends. Requests for time extensions, in such cases, can hardly be regarded as justified and open the argument to the other side that the arbitral tribunal does not treat the parties fairly and equally, because this results in time limits of differing lengths for the claimant and the defendant.

On the other hand, we have also observed the insistence of arbitrators on rigorous formal requirements and application of time limits with excessive strictness. Such insistence is definitely contrary to the spirit of arbitration if it is against the will of both parties.[6]) Although, in this case, formalities (the keeping of time frames as a goal in itself) does not decelerate but accelerate the arbitral proceedings, it nevertheless will not meet the parties' expectations of arbitration as being an informal and party friendly process.

A very similar kind of formality is the insistence on maintaining previously agreed or ordered time limits or even cut-off dates (i.e. dates after which no further new facts and/or evidence may be presented) without duly considering the reasons put forward by the parties in their subsequent request to change these dates. Such a request may, after all, greatly facilitate the proceedings if new facts or new arguments need to be introduced that shed a different light on the case, or if an extension is necessary to re-focus the arguments and dispense with some legal grounds which have, in the course of the proceedings, been identified as less promising. A respective wish may also be caused by a change of counsel. In such cases, the arbitral tribunal should, after all, take into account that the new counsel has to familiarize itself with the facts of the case and that it may be of great advantage to the proceedings if the legal questions are refocused critically. A request for extension of time limits should, of course, not lead to unnecessary delay, but on

[6]) *M. Pryles,* "Limits to party autonomy in arbitral procedure", 24 Journal of International Arbitration, 327.

the other hand, the arbitral tribunal should also take a look at the course and duration of the proceedings so far. We have seen cases where such requests for the extension of time limits were dismissed because of arguments about the speed of the proceedings which have not, however, taken into account that the proceedings have, by this stage, already taken several years during which none or only one hearing had taken place. Lack of flexibility regarding this point clearly shakes the parties' confidence in arbitration because they get the impression that the arbitral tribunal has not taken into consideration changes in circumstances between the setting of the schedule and the time of the application of the party, or has merely stuck to the procedural schedule originally set as it is more convenient.

So-called skeleton submissions or post-hearing-briefs are another issue. Both of them are highly effective, giving the arbitral tribunal a wrap-up of the factual and legal questions of the case, and, in the post-hearing brief, summing up the final pleadings of the respective party, also taking into account the outcome of the evidence taking. On the other hand, they may turn out to be a burdensome cost-factor in smaller arbitrations, and they may invite parties to introduce new arguments long after a possible cut-off-date has expired. The worst effect is that an arbitral tribunal could be inclined to forget about all former submissions and briefs, especially if they are extensive, and rely solely on the contents of these final submissions. It should therefore be clearly evaluated and discussed beforehand, between the arbitral tribunal and parties' counsel, whether they are actually helpful, or whether they only serve as an additional formality that increases costs and leads to a loss of time.

This leads us to the question of *the taking of evidence.* This variant includes possible burdensome forms of presentation of evidence, for example *"common bundles".* Common bundles, for those who have not already encountered them in arbitral practice, are a compilation of all evidence presented so far by the parties in the proceedings contained in a common submission by claimant and defendant, which in most cases is set out chronologically. This requires copying a multitude of documents that have already been submitted, sometimes many folders, and raises the question of what the prior submission of exactly the same documents was for. Such additional submission must usually be made with the close cooperation of both parties and their counsel, sometimes even in a joint submission, of course in several copies for the arbitration panel and all participants. In order to facilitate the handling of these compilations, parties are sometimes asked to produce them in unusual formats (e.g. double sided print on small A5 sheets, stapled or spiralized and paginated). Although such compilations might be comfortable for arbitrators[7]) and convenient during the hearings (a few small booklets may substitute numerous voluminous binders, unless the stipulated print size is so small that they are actually illegible), they are not necessary for the efficient con-

[7]) *A. van den Berg,* "Organizing an International Arbitration: Practice Pointers" in *Newmann, Hill (eds.)* "The Leading Arbitrators' Guide to International Arbitration" (2004) 175.

duct of a hearing and their fabrication can lead to additional costs for the parties. These efforts and costs are increased even more if additional demands are made, such as for supplements to the bundles during the oral hearing or by asking the parties to bring binding machines with them at a time when the parties and their representatives generally have more pressing issues than rearranging copies of documents.

Although this is a relatively harmless example of a formality in arbitral proceedings, the insistence of arbitrators on such tools may alienate parties, who are not familiar with these additional efforts and costs from court proceedings, where judges have to content themselves with one set of evidence. The same considerations apply when arbitrators insist on the most advanced forms of court reporting (allowing them to follow the protocol on a screen during the hearing instead of other forms of verbatim reports) in ordinary arbitration. Parties can easily get the impression that the arbitrator is aloof and puts his interests before those of the parties.

Another topic is that of the preparation of *written witness statements.* Principally a very good idea, it may turn out to be the contrary if only the written statements of the witnesses that also attend the oral hearing are accepted, or if submitting written witness statements means that oral questioning during the arbitral proceedings is limited to cross-examination. Furthermore, the point of written witness statements is undermined if they are followed by (compulsory) supplementary statements or witness statements "in reply", thereby complicating rather than facilitating the proceedings.

Witness questioning according to *chess-clock-principle* is a further example of how the right to be treated fairly and equally conflicts with the right to be heard. Such formalities, no doubt, help the proceedings to stay time-efficient and "lean", on the other hand they may infringe the parties' possibility to fully present their case and should therefore be openly and critically discussed between the arbitral tribunal and the parties before they are simply adopted.

Expert witnesses have become more and more important in complex arbitration cases. We have seen proceedings where – albeit both parties submitted extensive expert opinions beforehand – the arbitral tribunal was reluctant to appoint a court expert even though, in the course of the proceedings, it became crystal clear that the various expert questions would be decisive. In such cases, it may not be helpful to organize "expert conferencing", whereby one expert tries to convince the other that his expert opinion is wrong.

The least invasive problem is undue emphasis of the arbitrators (be it the sole arbitrator, the arbitral tribunal or the chairman of the arbitral tribunal) on *organizational aspects* or exhaustive correspondence regarding the organization of the hearing including the determination of the accommodation of the arbitrators. The decision on the place of the hearing may sometimes lead to excessive costs, e.g. if the venue is a five star hotel and the hearing is scheduled for several weeks. Of course, this is not a formality as such, but it may still be annoying if the reservation of the place for the hearing, in effect, becomes decisive over substantive issues

such as a possible adjournment of the proceedings or if witnesses or experts can not be heard because the reservation of the hotel does not leave enough time for this.

All these examples of formalities just described have in common, that the arbitrators may sometimes prioritize the conduct of the proceedings according to their own agenda over the interests of the parties, in some cases even over the express mutual interests of both parties. Further, they also have in common that the arbitrators' decision may actually hinder the parties in presenting their case properly.

Tendencies toward formality in international commercial arbitration have been recognized and have raised concerns by practitioners as well as in legal writing. On a more general level, it has been said that international arbitration rules and practice are becoming too rigidly formal and logistic, with the result that the proceedings are too protracted and too expensive.[8]) The former Secretary of the UNCITRAL, Dr. Gerold Herrmann, a well known name in international arbitration, once called such rigid arbitral proceedings *"potato arbitration"* and complained of its *"formalistic niceties, amounting to litigation outside the courts but without some of their potentially supporting and disciplining powers"*.[9])

Formality is, therefore, one of the facets which may lead to unwanted rigid arbitral proceedings which endanger the reputation of arbitration as an attractive form of dispute resolution.

III. Boundaries for Formality in Arbitration

A. Party Autonomy

Theoretically, one way to prevent arbitrators from being too formalistic in arbitral proceedings would be an agreement of the parties in which they prevent or remove unwanted procedural orders. Although, at first glance, this seems to be an obvious solution, it will very often not work.

First, an agreement of the parties might not be an effective boundary for practical reasons, as parties might not wish or be able to cooperate "against" the arbitral tribunal or the arbitrator even if it is in their common interest. Moreover, in some cases formalities may only violate the interests and rights of one party and therefore the other party has simply no interest in preventing such formalities.

Second, there are also legal restrictions which prevent or restrict the feasibility of this solution: Even if the parties cooperate, the limits to party autonomy

[8]) *A. Marriott,* "Pros and Cons of More Detailed Arbitration Laws and Rules" in *A. van den Berg* (ed.) Planning Efficient Arbitration Proceedings (1996) 71.

[9]) *G. Herrmann,* "Power of Arbitrators to Determine Procedures under the UNCITRAL Model Law", in *A. van den Berg* (ed.) "Planning Efficient Arbitration Proceedings" (1996) 40.

might render their agreement ineffective, as the arbitrator is not bound by the parties' agreement and may overrule it. Although party autonomy is generally recognized to be a guiding principle in international commercial arbitration[10]), its extent is disputed.

The principle of party autonomy is basically expressed in Article 19 UNCITRAL Model Law which states "*Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in the conduct of the proceedings*" and which was incorporated into most national laws (e.g. section 594 ACCP).

The full freedom of the parties to determine the conduct of the proceedings *before* the commencement of arbitration is generally recognized. At this stage, party autonomy is only restricted by the mandatory provisions of the applicable lex arbitri (which normally imposes few limitations on the conduct of the proceedings) and the requirements for a valid arbitration agreement. Parties therefore, theoretically, are free to agree beforehand, for example in the arbitration clause, on certain principles of the conduct of the arbitration which restrict arbitrators' possibilities in resorting to formality. However, as formality has many facets, it will often not be possible to exclude it entirely in advance. Furthermore, parties often prefer very short arbitration clauses[11]), which are derived from the standard clauses of arbitral institutions and do not include regulations on the conduct of the proceedings. For these reasons a prevention of formality beforehand is generally not feasible.

It would thus be more important for parties to be able to react to formalities when they occur and to prevent them by agreement on differing conduct at this point in time. As party autonomy after the establishment of the arbitral tribunal is disputed[12]) and as the ability of parties to enforce their agreement at this stage is generally not recognized, the freedom of parties to determine the arbitral procedure during the arbitral proceedings therefore might be circumscribed.

The freedom of parties of a concrete arbitration to influence the conduct of the proceedings after the constitution of the arbitral tribunal depends on the applicable lex arbitri and the institutional rules chosen by the parties:

Regarding the UNCITRAL Model Law, it is said that Article 19 provides for a continuing freedom of the parties to agree on the procedure, even after the tribunal has entered into contact with the parties.[13]) The Austrian regulation regarding

[10]) *Redfern/Hunter,* Law and practice of international commercial arbitration (2004) 6-01.

[11]) The arbitration clause is often referred to as a "midnight clause" because it is the last clause in a contract, which parties agree on after exhausting discussions very late in the day, and to which they do not pay specific attention, let alone include details of a possible future arbitration procedure.

[12]) *M. Pryles,* "Limits to party autonomy in arbitral procedure", 24 Journal of International Arbitration, 331.

[13]) *Von Saucken,* Die Reform des österreichischen Schiedsverfahrensrechts auf der Basis des UNCITRAL-Model Gesetzes über die internationale Handelsschiedsgerichtsbarkeit (2004) 104.

the conduct of the proceedings, section 594 ACCP, is based on the Model Law and provides for far reaching party autonomy. German law recognizes the ability of the parties to determine the conduct of the proceedings and even acknowledges party agreements which are contrary to procedural orders of the arbitrator. Parties' agreements therefore prevail and the arbitrator, in the case he does not want to follow these, only has the possibility of terminating his contract.[14])

Even in these cases, where the parties' autonomy generally persists after the arbitrator has been appointed, this autonomy may, however, have been abrogated by the parties by granting the arbitrator the authority to prescribe the procedural rules that will be observed. As Article 19 of the UNCITRAL Model Law is not a mandatory provision, parties are free to waive it and to derogate their autonomy. Such waiver is normally given by way of agreement to *"Procedural Order No. 1"* which contains such authorization and fixes detailed rules of procedure. Once this order has been adopted, the parties cannot change it without consent of the arbitrators[15]) and the arbitrators are – within the scope of this order – free to determine the conduct of the proceedings according to their discretionary authority.

As a consequence, also in Model Law countries like Austria, in most arbitrations, parties' autonomy and their ability to influence the conduct of the proceedings will be derogated with their consent.

Regarding arbitration under the ICC rules, parties' autonomy is safeguarded under Article 15 which gives precedence to agreements of the parties as to procedure over the arbitrators' decisions.[16])

Despite this explicit priority of party autonomy also in arbitral proceedings under the ICC Rules, the parties' ability to impose on the arbitrators further procedural requirements or to amend existing procedural regulations generally has to be regarded as restricted after the signature of the Terms of Reference: It is said, that the Terms of Reference in certain aspects have to be treated as a contract between the parties and the arbitrators and thus they can only be amended with the consent of all parties of this contract, which also means that the consent of the arbitrator is required to change the Terms of Reference.[17]) This is of specific importance as sometimes the Terms of Reference contain regulations which authorize the chairman or the sole arbitrator to determine the conduct of the proceedings.

A further argument for the prevalence of arbitrators' powers over party autonomy in ICC arbitration is Article 18 para 4 ICC rules, which authorizes the ar-

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[14]) *Stein/Jonas/Schlosser,* ZPO[22] section 1042 item 3.

[15]) *H. Smit,* "Roles of the Arbitral Tribunals in Civil and Common Law Systems with Respect to Presentation of Evidence" in *A. van den Berg* (ed.) "Planning Efficient Arbitration Proceedings" (1996) 71.

[16]) *Craig/Park/Paulsson,* International Chamber of Commerce Arbitration, 2nd edition (1990) 295.

[17]) *Derains/Schwarz,* A Guide to the ICC rules of arbitration[2] (2005) 225.

bitrators to issue the procedural timetable. As the procedural timetable commonly specifies the dates for the pleadings and memorandums to be delivered and does not need to be agreed to by the parties, the parties' influence on the dates or their subsequent change is very limited.[18]) Any subsequent modifications of the provisional timetable shall, according to Article 18 para 4 last sentence of the ICC Rules (only) be "communicated" to the parties and the ICC court, thus making it clear that such changes fully fall under the discretion of the arbitrator or arbitral tribunal.

As the parties' freedom to determine the conduct of the proceedings after the constitution of the arbitral tribunal is therefore likely to be restricted or even abolished under most applicable regulations, parties may not overcome formalities imposed by an arbitrator, even if they agree on a different procedure. This result can be illustrated in cases in which the parties have agreed upon certain deadlines but the arbitrators simply do not want to follow this agreement.

Despite these restrictions to party autonomy, an agreement between the parties to overcome formalities of the arbitrators should not be disregarded by the arbitrators without serious grounds, since – after all – it is the parties' arbitration.

B. The Right to Be Heard and to Be Treated Fairly

The arbitrators have to treat the parties fairly and have to give each party the opportunity to present its case. The principles of fair treatment and the *right to be heard* are generally recognized in most leges arbitri, in Austria in section 594 ACCP. Furthermore, it is a reason for setting aside the award according to section 611 ACCP *"if a party was unable to present its case"* or *"if the arbitration proceedings were conducted in a way so as to violate Austrian public policy"*. These principles may act as boundaries to arbitrators' formalities if the formalities hinder a party from fully presenting its case or if they unfairly put one of the parties at a disadvantage. These principles do, therefore, not restrict arbitrators from all types of formality described above but only protect parties in "the worst cases".

A violation of the requirement to act fairly could be given in case of an overly strict application of existing formal regulations regarding one party while being lenient towards the other party. However, as such conduct is not really a question of formality but of the partiality of arbitrators, the right to be heard is more suitable for offering protection from the problems of formalities. Again, the extent of the protection offered by the principle of fair treatment and the right to be heard depends on the scope and extent of these principles in the applicable lex arbitri.

[18]) *M. Pryles,* "Limits to party autonomy in arbitral procedure", 24 Journal of International Arbitration, 327.

Under Austrian law, before the reform of the regulations on arbitration, the case law on the extent of the right to be heard was restrictive. Pursuant to this case law, only a complete denial of the right to be heard was regarded as a relevant violation of the right to be heard, but not ignoring submissions of the parties or incomplete identification of the facts of the case by the arbitral tribunal.[19]) Because of this limited scope of the right to be heard under the old Austrian regulations on arbitration, it offered no effective protection to parties against formalistic arbitrators. Under the case law it was possible for arbitrators to insist on deadlines and to ignore later submissions or to reject motions to hear evidence for purely formalistic reasons as long as such insistence did not amount to a complete denial of the possibility of presenting the case.

However, as the reform of the Austrian regulations on arbitration (which entered into force on 1 July 2006) amended the right to be heard with the right to fair treatment, it has been said in legal writing that the restrictive case law is no longer applicable and that the right to be heard has a wider scope.[20]) Based on this broader understanding of the right to be heard, it can be argued that Austrian law now also offers some protection against decisions of arbitrators which are too formalistic regarding the admissibility of the presentation of arguments and evidence. In this regard, section 597 ACCP also has to be taken into account, which expressly entitles the arbitrators to reject late submissions. From our point of view, this provision can only be understood as encompassing "correct" decisions of the arbitrators and decisions which are not too formalistic where the reasons of the parties for the late submission are not taken into account properly.

In summary, the principles of fair trial and of the right to be heard may only offer protection against arbitral formality in the case of unjustified impediments to the parties in properly presenting their case. Regarding other forms of formality, these principles do not offer any protection.

C. Further Boundaries in Regulations?

Generally speaking, most arbitral rules and national leges arbitri (at least those which are modeled on the UNCITRAL Model Law) only contain few further restrictions on arbitrators' powers to determine the conduct of the arbitral proceedings, apart from insuring that an award is enforceable and to safeguard party's autonomy and procedural fairness.

a) Arbitral Rules

The ICC rules, for example, only provide for the corner pillars of the proceedings in a mandatory way: Such regulations concern the formulation of the

[19]) *Rechberger/Melis* in *Rechberger,* ZPO[3] (2006) § 611 Rz 5.
[20]) *Zeiler,* Schiedsverfahren (2006) § 594 Rz 21.

Terms of Reference after receipt of the file, the admissibility of new claims, the obligation to conduct an oral hearing if applied for by one of the parties and the obligation to summon the parties to such hearing and to close the proceedings before the award (Articles 18 to 22 of the ICC Rules). As mentioned before, Article 15 para 2 of the ICC Rules, similarly to what is laid down in section 594 ACCP, provides that arbitrators shall act fairly and impartially and shall ensure that each party has a *reasonable opportunity* to present its case.

It should, furthermore, not be forgotten, that the ICC Rules tend to ensure a speedy procedure, as in Article 20 it is laid down that "the arbitral tribunal shall proceed within as short a time as possible", and, according to Article 24, "the time limit within which the arbitral tribunal must render its final award is six months". However, as this time limit may be extended, this is neither an excuse nor a justification for formalities of one or the other kind. From a practical view, it must be said that we have – except for cases where specific "fast track" proceedings have been required by the parties – hardly ever seen an ICC arbitration that was really closed by award within six months.

Also, the UNCITRAL Arbitration Rules leave wide discretion to the arbitrators in determining the conduct of the proceedings. Article 15 of the UNCITRAL Arbitration Rules, in its wording, even goes beyond the provision of section 594 ACCP, when it provides that *"subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting its case"*. The regulations restricting the arbitrators as to the conduct of the proceedings primarily concern the requirement to hold a hearing if requested by either party and the communication of the statement of claim and the statement of defense. Moreover, Article 22 of the UNCITRAL Arbitration Rules restricts the arbitrators' freedom to determine time limits, as it provides that the periods of time fixed for written submissions should not exceed 45 days. However, this restriction still grants a considerable scope of discretion to the arbitrators and furthermore is not mandatory.

Article 14 of the Rules of Arbitration and Conciliation of the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna (Vienna Rules) concern the conduct of the proceedings. Article 14 para 1 of the Vienna Rules states that *"in the context of the Vienna Rules and the agreements between the parties, the sole arbitrator (arbitral tribunal) may conduct the arbitration proceedings at his (its) absolute discretion […]"*, but on the other hand, the principle of equal treatment shall apply, the right to be heard being ensured *"at every stage of the proceedings"*. There are only a few restrictions to the arbitrators' discretion (besides the right to be heard and to be treated fairly) which again mainly concern the necessity of a hearing. Furthermore, Article 14 of the Vienna Rules obliges the arbitrator to give the parties the opportunity to take note of, and comment on, the motions and pleadings of the other parties and the result of the evidentiary proceedings (para 3) and to ask the parties whether they have any further proof to offer, witnesses to be heard or submissions to make (para 8).

All in all, arbitration rules generally allow the arbitrators a great deal of discretion and only regulate a very basic and rough outline of the course of the proceedings. Generally, unwanted formalities are not prevented by these Rules.

b) Austrian Law

Austrian law only contains some rudimentary regulation concerning the conduct of the proceedings, which moreover – apart from the arbitrator's obligation to conduct an oral hearing upon application of the parties (section 598 ACCP), the duty of notification of hearings and submissions to the other party, as well as of evidence (section 599 ACCP), the regulations regarding the default of a party (section 600 ACCP), and the requirement of the presence of an expert if required by any party (section 601 ACCP) – are not mandatory for arbitrators.

This restraint in regulation generally is expedient, as it gives the arbitrators sufficient flexibility to accommodate the proceedings to the needs of the parties and of the respective case. This flexibility, however, also allows the arbitrators the possibility of *"abuse"* by resorting to formalities.

Primarily there is only one regulation which might be used as a constraint, the ability of the parties to replace an arbitrator. Generally it is possible for parties to replace an arbitrator or to request replacement upon common request (e.g. Art 12 ICC Rules, section 590 ACCP). However, because of the costs resulting from such replacement and because of its delaying effect on the conduct of the proceedings, this possibility can only be seen as a last resort and is not generally a solution to be recommended for dealing with the problems of formality.

c) "Soft Rules"

Even though there is no effective restriction on formalities in these *"hard rules"*, there may be restriction in *"soft rules"*, like the UNCITRAL Notes on Organizing Arbitral Proceedings.[21]) These notes have the purpose of assisting arbitration practitioners by proposing solutions for procedural issues.

The notes contain recommendations for the most important procedural questions arising during the course of an arbitral proceeding and are mainly formulated quite liberally. For example, in Item 39 the notes advise the setting of time limits but also suggest that arbitrators reserve *"a degree of discretion and allow late submissions if appropriate under the circumstances"*. However, the notes also contain regulations which do not combat formality but seem to encourage it by proposing the provision of paragraph numbering in written submissions, preparation of a list of issues before the hearing and denying the admission of late evidence. Further, the notes recommend providing a time limit on the adequate amount of time each party will have for oral arguments and questioning of witnesses during the hearing. All these recommendations are of a rather formalistic nature and thus rather support arbitrators who insist on excessive formality.

[21]) http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf.

In order to prevent proceedings from being too protracted and too formal, arbitral institutions have introduced the possibility of a *"fast track arbitration"*, which leads to an accelerated procedure".[22])

Also, the guidelines for small claims in arbitral institutions show a trend towards less formality. These guidelines offer methods to shorten the procedure and minimize the costs. An important example for such guidelines are the Guidelines for Arbitrating Small Claims under the ICC Rules of Arbitration.[23]) On the other hand, these Guidelines can also be used as argument for formality in the form of strict insistence on set time-limits, as one of their aims is to reduce the time and cost of arbitrating smaller claims.

IV. Conclusion: Strategies for Parties and Arbitrators to Avoid Formality

From our perspective, for arbitrators it is most important to be aware of the danger of formalities and of their negative effects on the public image of arbitration and on the inclination of parties to submit future conflicts to arbitration. Even though formal requirements are definitely necessary and expedient for the conduct of efficient proceedings, it is – as always – necessary to find equilibrium. It should be kept in mind that procedure is the servant of arbitration and not its master.[24])

It is therefore advisable for arbitrators to test their procedural orders in advance by using the criterion whether the rules promote rapid and fair resolutions of commercial disputes by also taking into account the costs of the parties. For this reason arbitrators should also refrain from using one set of standard rules for all of "their" arbitrations, but adapt them to the needs of the respective case. Especially regulations which could be regarded as formalistic and lead to additional costs for the parties should be discussed with the parties in advance in order to give them the possibility of airing their concerns.

Even though the parties have only restricted legal possibilities to prevent formalities, they should nevertheless call arbitrators' attention to regulations which they consider to be overly formalistic and detrimental to their interests. Where interests of the parties correspond, they should, in this regard, overcome their disputes and act together and thus try to prevent formality. Even where arbitrators are not legally bound to follow such agreement of the parties, they are well advised to take it into account (if only to avoid replacement or because of their wish to be recommended by the parties and their representatives).

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[22]) See *Fiebinger/Gregorich,* "Arbitration on Acid, Fast Track Arbitration in Austria from a Practical Perspective", below page 237.

[23]) http://www.iccwbo.org/uploadedFiles/Court/Arbitration/arbitration/small_claims.pdf.

[24]) *A. Marriott,* Pros and Cons of More Detailed Arbitration Laws and Rules in *A. van den Berg* (ed.) Planning Efficient Arbitration Proceedings (1996) 71.

Parties should therefore pay close attention to potentially formalistic tendencies in "their" arbitration and should not hesitate to discuss them with the arbitrators. By airing their concerns about possible formality in due time and by voicing their expectations regarding the efficient conduct of the proceedings, parties may succeed in preventing or reducing formalities, which may be the basis for prevailing in the proceedings.