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Austrian Yearbook on International Arbitration 2022

C.H.BECK

Stämpfli Verlag

MANZ

Too Late for This Arbitration? – Introducing New Claims in Pending Proceedings

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I. Introduction

With the continued emphasis that has been placed by users and institutions alike on the time and cost effectiveness of its procedures, parties, in particular respondents, are often placed under considerable time pressure to prepare their answers to arbitrations that have been initiated. Most arbitral rules impose strict time limits on the period within which a respondent is expected to provide their answer to a request for arbitration (often within 30 days, although extensions may be available). These limits, in particular in complex cases or disputes that span years rather than months, may represent a considerable challenge for parties and in particular counsel when putting together all the information and deciding whether there exist grounds for the filing of a counterclaim. Consequently, many respondents may need to introduce their (counter-) claims at a later stage of the proceedings.

Naturally, respondents are best served by raising their claims at the time of their first submission, even if such inclusion is merely cursory and underdeveloped, but in practice, a party may not possess of sufficient information at the time of the introduction of the case by the claimant (in particular where considerable time has passed since the occurrence of the event in dispute and the initiation of the arbitral proceedings). The question then arises: How and when should parties introduce their claims following the submission of their first written submission? Further: Is this still permissible in the ongoing proceedings?

The question of whether it is permissible to enter a new claim in ongoing proceedings and the rules for its admission by the arbitral tribunal is of particular importance when the time-bar is near and claims are soon to become prescribed. For instance, parties in such cases may want to take extra measures to ensure their legal rights are protected. Parties may try to simultaneously enter a new claim (or raise a counterclaim) in one proceeding whilst also initiating new proceedings in parallel in order to guarantee the claim is entered before prescription results. In such cases, the opposing party could raise the *lis pendens* defense. This leads to a precarious situation where the *lis pendens* argument can be affirmed by the second arbitral tribunal before the decision on the permissibility of the entry of the new claim is taken in

the first arbitration. If the first arbitral tribunal subsequently does not permit the new claim, it may be too late to start a third proceeding. It will then be a matter of the applicable rules and law to decide whether there is a possibility to 're-open' the second arbitral proceedings, an issue that bears additional insecurity. Therefore, the problem is not theoretical, but a highly pertinent one.

The authors have set out to explore a number of institutional/arbitration rules and the stipulations they have set out for the manner in which parties are expected (and required) to file their claims. In the course of this assessment, particular attention will be paid to the question as to how the VIAC Rules of Arbitration and Mediation 2021 ("**Vienna Rules**") and the ICC Arbitration Rules 2021 ("**ICC Rules**") deal with the entry of claims and specifically the definition and significance of the term "new claim" for such arbitrations. Lastly, the authors will draw a number of conclusions from this assessment and provide some practical guidance to practitioners for future arbitrations.

II. Selected Arbitration Rules and the Entry of New Claims

The arbitration rules of the VIAC, LCIA, SCC, UNCITRAL and ICC prescribe procedures that are similar in effect. In the following, an overview of the general approaches adopted by arbitral institutions/rules is provided in order not only to identify their similarities, but also particular differences that should be borne in mind.

A. The 2020 LCIA Arbitration Rules

Turning first to the 2020 LCIA Arbitration Rules, which entered into force on October 1, 2020 (the "**LCIA Rules**"). It provides, as most arbitral rules do, that claims and counterclaims should, principally, be included in the request for arbitration for claimants[1]) and the response for respondents.[2]) While claimants naturally have an advantage in preparing their request for arbitration as they are the party to institute the proceedings and will therefore generally only be pressured in the timing of that introduction by economic concerns or the statute of limitation, respondents are provided with a deadline of 28 days for their response.[3]) It is therefore not unusual for these initial submissions to

[1]) 2020 LCIA Rules, Article 1.1(iii).

[2]) 2020 LCIA Rules, Article 2.1(iii).

[3]) 2020 LCIA Rules, Article 2.1; although this period may be reduced or extended at the discretion of the LCIA Court.

be prepared in summary form,[4]) both so as not to reveal too much of one's case strategy at such an early stage of the proceedings, as well as because cases are usually not sufficiently advanced at this stage to provide a comprehensive statement either in favor or in response of any given claim.

Newly introduced with its 2020 iteration are Articles 1.5 and 2.5 (applicable to the request for arbitration and the response respectively), which state that "[a]*t any time* [...] *prior to the appointment of the Arbitral Tribunal the LCIA Court may allow a* [party] *to supplement, modify or amend*" their first submission (entered under Articles 1 and 2 of the LCIA Rules). This affords some leeway to the parties, although such scope is technically limited to the correction of "*any error in computation, any clerical or typographical error, any ambiguity or any mistake of a similar nature*". The language used in this article is relatively broad, however, as the definition of "*any ambiguity or any mistake of a similar nature*" does not necessary preclude a substantive alteration to the nature of a claim. The article neither expressly allows nor disallows a party to amend the substance or nature of its claims.[5]) It remains to be seen how narrowly or broadly the LCIA Court decides to interpret these articles before their effectiveness can be ascertained

In addition to their interpretation, these articles also do not confer a specific right on the parties to make such modifications or amendments, rather it remains within the purview of the LCIA Court to consent to such alterations. The LCIA Rules do not, therefore, provide parties with any general entitlement to introduce new claims after the filing of their first submission.

Articles 1.5 and 2.5 are limited temporally to the period until the arbitral tribunal has been appointed, thereafter, the LCIA Rules empower the tribunal to decide on the matter of the supplementation, modification or amendment of any claim or counterclaim.[6]) This power is expressly contained in the detailed description of an LCIA tribunal's 'additional powers' under Article 22 of the LCIA Rules. By specifically permitting the supplementation and modification of a party's claim, the LCIA Rules acknowledge the potential that a party may, subject to the arbitral tribunal's consent, introduce new claims into the proceeding also after the arbitral tribunal has been constituted.[7]) Of course, such new claims must always remain within the bounds of the applicable arbitration agreement pursuant to which the arbitral tribunal has been appointed.

The assessment an arbitral tribunal is expected to perform when considering to permit or refuse the supplementation or modification of a party's

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[4]) L. Richman, *Chapter 5: Request for Arbitration, in* ARBITRATING UNDER THE 2020 LCIA RULES: A USER'S GUIDE Chapter 5, para. 23 (M. Scherer, L. Richman et al., 2021).

[5]) *Idem* at Chapter 5, para. 43.

[6]) 2020 LCIA Rules, Article 22.1.

[7]) L. Richman, *supra* note 4, Chapter 17, para. 25.

claim is not made clear on the fact of Article 22. When taken as a whole, however, the LCIA Rules provide in Article 14.1. the general duties of the arbitral tribunal to act fairly and impartially as between all parties[8]) as well as to adopt procedures *"suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties' dispute."*[9]) When read in light of Article 14, it is clear that the additional powers afforded to arbitral tribunals under Article 22 are guided by similar considerations as are found in other arbitral rules, including in particular questions of timeliness and cost-efficiency. Consequently, parties should be cognizant of the fact that despite the broad and near unlimited wording contained in Article 22, real limits exist on a party's ability to introduce new claims after the constitution of the arbitral tribunal. The circumstances of the introduction of such claims will be scrutinized by the arbitral tribunal, and where the supplementation or modification is likely to prejudice the other party or cause undue delay, such a change can be disallowed.

Therefore, the LCIA Rules unequivocally provide parties with the possibility of amending their claims and introducing new claims at a later stage. At all points after the filing of each party's first submission, however, that possibility is made subject to the approval of either the LCIA Court or the appointed arbitral tribunal.

B. The 2013 UNCITRAL Arbitration Rules

The amended UNCITRAL Arbitration Rules as adopted in 2013 ("**UNCITRAL Rules**"), having served as a foundation for many institutional arbitration rules, are very similar to the provisions of the SCC Rules previously discussed. Of note is the fact that these rules have, of course, broader application by virtue of their being used principally for ad hoc arbitration and require no specific agreement on any arbitral institution.

The UNCITRAL Rules also envisage the parties should ideally identify their claims with their initial submissions, for claimant the notice of arbitration and for respondent the response thereto.[10]) Thereafter, the UNCITRAL Rules provide that the amendment or supplementation of a claim or counterclaim may occur unless the arbitral tribunal considers it inappropriate having regard specifically to any consequent delay in the proceedings, prejudice suffered by the other party or any other circumstance. Additionally, such new claim must also expressly be within the jurisdiction of the arbitral tribunal.[11])

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[8]) 2020 LCIA Rules, Article 14.1(i).

[9]) 2020 LCIA Rules, Article 14.1(ii).

[10]) 2013 UNCITRAL Rules, Articles 3(3)(e)-(f) and 4(2)(e) respectively.

[11]) 2013 UNCITRAL Rules, Article 22(1).

The choice of wording, in the UNCITRAL Rules, whereby a party is, in principle, entitled to amend its claim and that such an amendment can only be refused by the arbitral tribunal for being inappropriate[12]) as distinct from needing the express permission of the arbitral tribunal prior to the amendment being validly made, was a deliberate one.[13]) This is an important decision, in particular in situations where parties are introducing their new claims shortly before the expiry of the statute of limitations for that claim. Were the admission of the claim contingent on its acceptance of the claim by the arbitral tribunal, it could jeopardize the timely filing of the claim should such acceptance only be forthcoming after the expiry of the limitation period.

The general duties imposed on the arbitral tribunal to contextualize the determination of whether an amendment or supplementation is inappropriate are expressed in Article 17. This article requires the arbitral tribunal to have specific regard to the equality between the parties, the need to afford the parties a reasonable opportunity to present their cases as well as to avoid unnecessary delay or expense.

When making the assessment as to whether a claim is inappropriate, the drafting history of Article 22 reveals that such amendments of claims should not be unduly restricted by arbitral tribunals.[14]) That being the case, the power was included in the UNCITRAL Rules in part to ensure arbitral tribunals and arbitral proceedings could not be unduly obstructed by a party seeking to frequently change their positions or by making frivolous or vexatious amendments to their case.[15])

Gary Born has cleverly and pragmatically stated that *"arbitral tribunals* [here in the context of their application of Article 22 of the UNCITRAL rules] *are generally highly reluctant to refuse to permit parties to amend existing claims or defenses, as distinguished from a claimant introducing an entirely new claim or counter-claim."*[16]) This tendency is a logical conclusion derived from the fact that an amendment of existing claims (*i.e.* not an entirely new claim) is less likely to have a considerable detrimental impact on the arbitral proceedings with the parties perhaps needing only to make minor changes to their positions, if they need to do so at all. Conversely, the introduction of an entirely new claim virtually guarantees the parties will be required to assume new legal

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[12]) Alternatively, it could also fall outside of the jurisdiction of the arbitral tribunal.

[13]) J. Paulsson & G. Petrochilos, UNCITRAL Arbitration 182, Article 22, para. 12 (2018).

[14]) D. Caron & L. Caplan, The UNCITRAL Arbitration Rules: A Commentary 468-69 (2nd ed. 2013); *see* also G. Born, International Commercial Arbitration 2427 (3rd ed. 2021).

[15]) Report of 8th Session, 1-17 April 1975, UN Doc A/10017, VI UNCITRAL, Ybk 9, 37, para. 126; see also J. Paulsson & G. Petrochilos, *supra* note 13, at 178, Article 2, para. 2.

[16]) G. Born, *supra* note 14, at 2428.

and perhaps factual positions on the matter, which necessitates the exchange of pleadings. As a result, an efficiency-minded arbitral tribunal will of course weigh the introduction of an amendment of an existing claim differently from the entry of a new claim. On the other hand, it should not force the parties into another, new proceeding that will double the effort and costs unless the new claim has been brought in in the attempt to "torpedo" the ongoing proceedings and open up the evidence-taking procedure at a very late stage.

C. The 2017 SCC Arbitration Rules

Following on from the UNCITRAL, the rules of the Stockholm Chamber of Commerce, which entered into force on January 1, 2017 ("**SCC Rules**"), provide a similar set of rules concerning the amendment of a party's claims and the associated powers of arbitral tribunals. As is common, the parties are expected to provide their initial statements as to their claims or counterclaims in their first written submission. The SCC Rules expressly acknowledge that this statement needs merely be "*preliminary*".[17])

Concerning the ability to subsequently add or amend claims, the guidance offered to arbitral tribunals is clearly expressed in a single, dedicated article under the SCC Rules, mirroring the UNCITRAL Rules. Article 30 concerns amendments and it provides:

> "*At any time prior to the close of proceedings pursuant to Article 40, a party may amend or supplement its claim, counterclaim, defence or set-off provided its case, as amended or supplemented, is still comprised by the arbitration agreement, unless the Arbitral Tribunal considers it inappropriate to allow such amendment or supplement having regard to the delay in making it, the prejudice to the other party or any other relevant circumstances.*"

This detailed provision is, therefore, much more "open" than the LCIA Rules, carving out the possibility to amend a claim (including the introduction of a new claim by virtue of the ability to "*supplement*" it) as long as such amendment remains within the applicable arbitration agreement (which should be clear anyway) and the arbitral tribunal does not consider such amendment inappropriate. Instead of having to be admitted, it is sufficient that the tribunal does not explicitly disallow it.

It is worth noting that according to the Swedish *lex arbitri*, it is even possible for the Parties to enter into a valid arbitration agreement orally or by conduct and that this enables a party to enter a claim into ongoing proceedings, which, if the opposing party fails to object, can become part of the arbitral

[17]) 2017 SCC Rules, Articles 6(iii) and 9(1)(iii) for a claimant and respondent respectively.

tribunal's jurisdiction even in the strict absence of a strict underlying arbitration agreement.[18]) The original arbitration agreement is then considered to have been extended by the assent of the opposing party to cover the new claim. Whether this would be valid in other jurisdictions is subject to question and should be carefully considered in view of the enforceability of the award abroad.

Generally, arbitral tribunals under the SCC Rules are expected to be generous when permitting parties to enter new claims[19]) and therefore should not be too eager to dismiss claims for their being inappropriate. However, the existence of undue delay or prejudice on the part of the opposing party remain considerations that entitle the arbitral tribunal to disallow the amendment of a party's claim.

The meaning of "*other relevant circumstances*" should also be read in light of Articles 2 and 23 of the SCC Rules, which add general duties on the arbitral tribunal to conduct the arbitration in an "*efficient and expeditious manner*" and to maintain the equality as between the parties. Therefore, even if a party has not delayed "in making" the amendment or supplementation of its claim (such as by reason of the claim having only arisen in the course of the proceedings), the arbitral tribunal may nonetheless rely on the lack of timeliness of the claim to refuse such amendment where it would operate to unduly interfere with the efficiency of the proceeding. On the other hand, the tribunal will leave to bear in mind the consequences: It is really sensible to start altogether "new" proceedings for this additional claim? Or will the parties actually be better off if the new claim is taken care of in the proceedings that are already on their way? Therefore, a very, very late introduction of new claims should only be guarded against if it is used as a strategic tool to obstruct the arbitral proceedings.[20])

D. The 2021 VIAC Rules of Arbitration and Mediation 2021

Unlike the three foregoing examples, the Vienna Rules do not strictly follow the same model to prescribe the procedure by which a claim can be amended, or a new claim can be entered into the proceedings.

As usual, the Vienna Rules also require claimants to enter their claims at the outset of the arbitration.[21]) In terms of the entry of counterclaims, however,

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[18]) K. Löf, A Skogman et al., *Chapter 9: The Proceedings*, *in* International Arbitration in Sweden: A Practitioner's Guide 256, para. 157 (A. Magnusson, J. Ragnwaldh et al. eds., 2nd ed. 2021).

[19]) *Idem* at 255, para. 153.

[20]) *Idem* at 255, para. 154; *see* also R. Oldenstam, K. Löf et al., Mannheimer Swartling's Concise Guide to Arbitration in Sweden 52 (2014).

[21]) 2021 Vienna Rules, Article 7(2.3).

the Vienna Rules do not specifically demand that they are to be entered with respondent's first submission. Rather, the procedure for the entry of a counterclaim is governed by its own dedicated article (Article 9) and, in principle, allows a respondent to enter its counterclaim at any time in the course of the proceedings.[22]) The opportunity to so enter a counterclaim is limited, however, in that an arbitral tribunal is entitled to "*return the counterclaim to the Secretariat*" should (i) the parties involved in the claim not be identical or (ii) where the counterclaim is submitted after the answer to the claimant's statement of claim (claimant's first submission), if such entry would result in a substantial delay in the main proceedings. In practice, as the advance on costs for the counterclaim is calculated separately,[23]) which includes the arbitrators' fees, the entry of counterclaims often results in the "doubling" of the arbitrators' fees. This does not apply for increases to the value of existing claims. As such, arbitral tribunals rarely deny counterclaims (if they can avoid it) in favor of returning it to the Secretariat.

Even if, for formal reasons or for reasons of delay, the arbitral tribunal does not accept the new claim, it never rejects a counterclaim on its substance. The arbitral tribunal thereby also does not determine any matter of jurisdiction if it returns counterclaim to the VIAC Secretariat on the basis of Article 9.[24]) The consequence of the refusal to accept a counterclaim under the Vienna Rules is to return it to the Secretariat so as to permit the matter to be subject to the jurisdiction of a separate arbitral tribunal. Therefore, under the Vienna Rules, there is a "safe harbour" that the prescription trap lined out above will never apply.

Still, in theory, a tribunal could actually, also under the Vienna Rules, return the counterclaim to the Secretariat because of delay. There is, therefore, also in the Vienna Rules, a certain incentive for respondents to submit their claims with their (and not *after*) 'answer' as the language of Article 9(3)(ii) explicitly prevents a counterclaim from being returned to the VIAC Secretariat merely because it would substantially delay the proceedings.[25])

According to the Vienna Rules, counterclaims should not be submitted by a respondent to the arbitral tribunal in an ongoing arbitration. Article 9(2) provides that articles 7, 10 and 11 of the Vienna Rules shall also apply to counterclaims and Articles 7(1) and 11 require counterclaims to first be addressed to the VIAC Secretariat, which in turn, subject to the prerequisite requirements, shall forward the counterclaim on to an arbitral tribunal. As such, VIAC ensures all arbitral matters to be conducted under its auspices are

[22]) N. Pitkowitz & K. Dobosz, Handbook Vienna Rules Article 9, para. 1 (2019).

[23]) 2021 Vienna Rules, Article 44(5).

[24]) N. Pitkowitz & K. Dobosz, *supra* note 22, at Article 9, para. 10.

[25]) *Idem* at Article 9, para. 11.

always addressed directly to its secretariat, which, in turn, makes the first (preliminary) assessment as to the VIAC's jurisdiction.[26])

At a later point in time, the unfortunate decision of whether a *"substantial delay"* is expected will be the measure by which an arbitral tribunal is entitled to return a counterclaim to the Secretariat. It is not difficult to contemplate cases where the entry of a counterclaim, which directly arises out of the factual relationship between the parties that forms the basis for the claim, would still give rise to a 'substantial delay' in the proceedings on the claim. The phrase 'substantial delay' does not connote any impropriety or tardiness, it is an exclusive reference to the scope of the counterclaim and the time investiture required to assess it. Naturally, it is both time- and cost-efficient to combine these cases, but the strict wording of the Vienna Rules would permit an arbitral tribunal to refuse to admit such a counterclaim nonetheless.

In practice, however, arbitrators – even irrespective of the above-mentioned remuneration issues – tend to be guided by the generally recognized principles acknowledged to be intrinsic to the procedural conduct of arbitral proceedings. The need to ensure the proceedings are conducted in a time and cost-effective manner as well as safeguards concerning fairness and equality between the parties (including the need to avoid undue prejudice of any one party). These too are recognized by the Vienna Rules in Article 28 and despite the absence of any direct link between Article 9 and 28, the latter imposes general duties and powers on the arbitral tribunal, which will also need to guide its decision under Article 9. As such, the phrase "substantial delay" can be interpreted in light of these concepts. While the concepts frame the assessment to be made by the arbitral tribunal, they do not specifically limit the ability for Article 9 to be applied more broadly than similar provisions for the refusal of counterclaims under other procedural rules. Parties should be aware of this particular facet of VIAC arbitration when engaging in arbitral proceedings pursuant to its rules.

An interesting characteristic of the Article 9 regime for the entry of counterclaims is that such counterclaims are not required to arise out of the same arbitration agreement for it to be validly entered.[27]) Such claims must still be subject to an arbitration agreement under the auspices of the VIAC, but the only positive requirement for a counterclaim to be entered in an ongoing VIAC arbitration is that the parties be identical.[28]) The Vienna Rules are predicated

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[26]) The VIAC Secretariat does no more than conduct this preliminary *prima facie* assessment, its forwarding on of a claim to an arbitral tribunal does not preclude the ability to raise jurisdictional objections in the course of the subsequent arbitral procedure. *See* F. Schwarz & C. Konrad, The Vienna Rules – A Commentary on International Arbitration in Austria para. 11-013 (2005).

[27]) *Idem* at para. 11-006.

[28]) Joinder and consolidation being governed separately in Articles 14 and 15 of the Vienna Rules.

in the idea that VIAC arbitration should offer parties the opportunity to fully and finally settle all of the disputes that exist between the parties to any given arbitration.[29]) It is for this reason that the emphasis is placed not on the arbitration agreement, rather on the parties involved. This also serves to limit the extent to which Article 9 is used in practice to refuse duly and reasonably entered counterclaims which nonetheless give rise to substantial delays in the procedure. VIAC tribunals will generally be inclined to favor conducting procedures in a conclusive matter to settle the entirety of the dispute and should therefore be hesitant to refuse counterclaims where these are part of the greater dispute from which the original claim arises. Luckily, this is – as far as the authors are aware of – also the practical approach of most arbitral tribunals under the Vienna Rules.

In addition to the specific, rather "broad" system for the entry of counterclaims, that avoids prescription issues even if the claim will in the end not be treated in the proceedings that are already pending, the Vienna Rules are also set apart from their other institutional counterparts by (at least) not expressly providing the parties with a right to amend, modify or supplement their claims and counterclaims. The Vienna Rules are silent on the issue. This, of course, does not preclude the possibility that such amendments or modifications are possible, it simply means that it must be interpreted by necessary implication from the general discretion afforded to the arbitral tribunal in any given case under Article 28 of the Vienna Rules. Article 28 provides an arbitral tribunal with near to absolute discretion in the conduct of the proceedings, limited specifically by the requirement to conduct those proceedings in an efficient and cost-effective manner as well as to afford the parties their right to be heard at every stage of the proceedings. This discretion must therefore necessarily include the arbitral tribunal's power to admit or deny the amendment of any existing claim (in the absence of an express exclusion thereof).

The main difficulty arises out of whether or not a claim raised before an arbitral tribunal is a 'new' claim or merely an amendment of an existing claim and whether the procedure outlined under Article 9 should apply *mutatis mutandis* to any claim that is 'new' rather than merely an amended existing claim. Since Article 9 applies to any counterclaims raised,[30]) it could seem improper for only new counterclaims to be subject to the additional procedural obstacles presented by Article 9, while new claims were admissible by the arbitral tribunal's discretion under Article 28. One might even argue that it

[29]) F. Schwarz & C. Konrad, *supra* note 26, at para. 11-006.

[30]) According to Article 9, all counterclaims are subject to the requirement that they first be submitted to the VIAC Secretariat. Article 9(1) starts by referring to "claims" raised generally by a respondent and terms all claims raised by a respondent as "counterclaims". Article 9(2) then applies to all counterclaims and provides no exclusion for only the first counterclaim raised by a respondent.

would infringe on the procedural safeguard that the parties must be treated equally.

Despite the existence of Article 9 and a specific, more onerous, regime for the entry of new counterclaims under the Vienna Rules, the entry of new claims (by claimants) is, in practice, regularly *not* subject to the filing of that claim with the VIAC Secretariat as opposed to directly to the arbitral tribunal in an ongoing matter. Parties commonly submit their new claims directly to the arbitral tribunal, but the Secretariat is always furnished a copy by virtue of their inclusion in the list of recipients. The arbitral tribunal usually also accepts such claims (unless there are clear contrary reasons for doing so). This willingness to accept an extension of the claims will be motivated by the desire to allow the parties to effectively arbitrate all of their dispute against each other, as well as the added motivation that an increase in the total value of the claims will have on the cost calculation for the arbitration.

The fact that this practice is capable of developing under the Vienna Rules is, of course, due to the Vienna Rules prescribing for situations where the arbitral tribunal will be seized of a claim, but in relation to which claim, the prerequisites set out in Articles 7, 10 and 11 have not been fulfilled (as is required for new [counter]claims by Article 9[2]). Article 42, concerning the payment of the advance on costs, in subsection (11) provides "[i]*n principle, the arbitral tribunal shall only address the claims or counterclaims, for which the advance on costs has been paid in full. If a payment is not made within the deadline set by the Secretary General,* ***the arbitral tribunal may suspend the arbitral proceedings in whole or in part*** [...]". Article 11 establishes the payment in full of the advance on costs as a prerequisite for the transmission of the file to the arbitral tribunal. Consequently, Article 42(11) constitutes recognition in the Vienna Rules for a situation whereby a (new or amended) claim is before the arbitral tribunal (as they can suspend the arbitral proceedings in relation thereto) without having gone through the procedure set out in Article 9.

In theory, if one were to ignore this practice, the extent to which an arbitral tribunal in any given matter might insist on adherence to Article 9 for the entry of new claims or whether it will simply decide to accept the claim under its own discretion afforded by Article 28 greatly depends on the disposition of the arbitral tribunal. In fact, even the distinction between whether a claim is merely an amendment or a true 'new' claim lies within the arbitral tribunal's authority.[31]) In making this decision, an arbitral tribunal can again be guided by considerations such as the existence of jurisdiction on the part of the arbitral tribunal, any 'substantial delay' (as discussed above) and whether or not both

[31]) F. Schwarz & C. Konrad, *supra* note 26, at para. 11-032; note that the applicable law may also influence this determination. The fine line between a new claim and a mere amendment will generally also be within the discretion of the arbitral tribunal pursuant to other institutional rules.

parties will have the opportunity to adequately present their positions on the substance of the claim.

E. The 2021 ICC Arbitration Rules

The ICC Rules are a return, in part, to the standard formula described above for the entry of claims and counterclaims into an arbitral proceeding. Yet, there is an (additional) stumbling block in the form of the "Terms of Reference", at least in theory. Parties are – again – generally expected to file their claims in their first submission, and, again, such filings do not need to be comprehensive in nature.[32]) The ICC Rules do not provide for the opportunity to amend these first submissions in advance of the constitution of the arbitral tribunal and the transmission of the file by the ICC Secretariat. Any such amendment is expected to occur after the arbitral tribunal has been constituted although it is noted that parties are not expressly precluded from writing to the ICC Secretariat to amend their claims between the filing of their claim and the constitution of the arbitral tribunal.

The main departure from the norm concerning the ICC Rules arises by virtue of the unique rules surrounding the use of the 'Terms of Reference'. This document is the instrument by which the parties, together with the arbitral tribunal, define the issues and procedures for the arbitration.[33]) The preparation of the Terms of Reference has even (contrary to what actually occurs in many ICC arbitrations) been described as the "*ultimate moment*" for the formulation of the framework of the arbitration as well as the task assigned to the arbitral tribunal.[34]) Article 23 of the ICC Rules requires that this preparatory work toward the Terms of Reference start "*as soon as*" the arbitral tribunal has received the file from the ICC Secretariat and generally it is expected this be done within 30 days from that date (Article 23[2]), although extensions are available and often requested. This is a point in time when, usually, counterclaims have often not yet been considered, the necessary evidence has not been gathered, and therefore, they are not at all "on the table".

The content of the Terms of Reference is set out in Article 23(1) of particular note is the fact that the parties are expected to present a summary of their claims, relief sought and any respective quantification as appropriate.[35]) The formulation of the parties' claims under Article 23(1) is a key moment in an

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[32]) 2021 ICC Rules, Articles 4(3)(c)-(d) and 5(5)(a)-(b). Both only require "*descriptions*" of the facts and concerning quantification, they merely require "*to the extent possible, an* ***estimate*** *of the monetary value*".

[33]) G. Born, *supra* note 14, at 198.

[34]) F. Petillion, *The relevance of the Terms of Reference, in* Liber Amicorum CEPANI (1969–2019): 50 Years of Solutions 257–269, 258 (D. De Meulemeester, M. Berlingin et al. eds., 2019).

[35]) 2021 ICC Rules, Article 23(1)(c).

ICC arbitration. The ICC Rules impose no limits on the amendment, modification or supplementation of a party's claims *prior* to the finalization of the Terms of Reference. Once the Terms of Reference have been prepared, signed and approved in accordance with the ICC Rules, however, considerable restrictions are placed on the admission of 'new' claims in an ongoing ICC arbitration.

According to Article 23(4), once the Terms of Reference have been signed, "*no party shall make new claims which fall outside the limits of the Terms of Reference unless it has been authorized to do so by the arbitral tribunal, which shall consider the nature of such new claims, the stage of the arbitration and other relevant circumstances.*" This places significant limits on the freedom enjoyed by parties to formulate and amend their claims before the signing of the Terms of Reference and, in particular, also to bring a (new) counterclaim. It is also a departure from the approach adopted by other institutions, such as the LCIA and SCC rules, where the parties are generally free to alter their claims in a proceeding, subject only to the arbitral tribunal's consent. The absence of such consent or approval can subsequently result in the refusal of the claim (without prejudice).

The purpose of Article 23(4) is to act as a tool for arbitral tribunals in the smooth and efficient management of the arbitral proceedings and prevent undue disruption.[36]) It does not serve to prohibit the introduction of new claims. In fact, arbitral tribunals are expressly provided with the means of admitting such new claims, their admission need merely be "*appropriate*".[37]) The Arbitral Tribunal has broad discretion in authorising the entry of new claims into the proceeding.[38])

Before turning to the question of 'new' claims, it should be noted that (only) a claim that falls within the limits of the Terms of Reference is **automatically admissible**.[39]) It is for the arbitral tribunal to determine the novelty of a claim. Where the claim does not alter or add the range of defenses available to the opposing side, it is to be considered within the limits of the Terms of Reference.[40]) Therefore, mere clarifications as to the amount claimed or changes to the manner in which it is calculated will of course not be sufficient

[36]) J. Fry, S. Greenberg & F. Mazza, The Secretariat's Guide to ICC Arbitration para. 3–890 (2012); T. Webster & M. Bühler, Handbook of ICC Arbitration 391, para. 23–83 (4th ed. 2018).

[37]) J. Fry, S. Greenberg & F. Mazza, *supra* note 36, at para. 3-890.

[38]) T. Webster & M. Bühler, *supra* note 36, at 392, para. 23-86; H. Verbist, E. Schäfer et al., ICC Arbitration in Practice 135 (2nd ed. 2015); N. Kull, *Chapter 17, Part II: Commentary on the ICC Rules, Article 23 [Terms of reference], in* Arbitration in Switzerland: The Practitioner's Guide 2335 (M. Arroyo ed., 2nd ed. 2018).

[39]) H. Verbist, E. Schäfer et al., *supra* note 38, at 133.

[40]) J. Fry, S. Greenberg & F. Mazza, *supra* note 36, at para. 3–901.

to amount to a 'new claim'.[41]) Additionally, practice has also shown that arbitral tribunals tend to find claims to be within the Terms of Reference even where there are deviations as to the legal basis for a claim as long as they remain premised in the same underlying facts.[42]) Where the claim arises out of the same contract and factual basis, there is no prejudice in accepting the new claim (subject only to the time at which it is raised) and it is in fact more cost-effective to have the claim dealt with in the same proceeding as the original claims.[43]) The notion of a 'new' claim therefore generally arises where there is an "*entirely new complex of facts and circumstances*".[44])

1. The Counterclaim Falls within the Terms of Reference

Where a party, for example, already in its answer to the request for arbitration concerning alleged contractual damage claims reserves its right to claim "*full contractual remuneration by counterclaim*", the consequent introduction of such a counterclaim will not arise out of an entirely new complex of fact or circumstance. Instead, it is a logical correlative that arises out of the arbitral tribunal's mandate to determine whether or not the contract gives rise to damage claims and how this influences the other side's remuneration claims. Respective counterclaims may then already fall **within** the Terms of Reference and, if so, are automatically admissible.

It is remarked that, in the event of a looming statute of limitations, it may be advisable for parties to seek formal acknowledgement on the part of the arbitral tribunal of the entry of a claim believed to fall within the limits of the Terms of Reference at an early stage. Since the ICC Rules specifically predicate the entrance of a new claim into ongoing proceedings on the authorisation of the arbitral tribunal and since the arbitral tribunal possesses the discretion to determine if a claim is 'new' or not, obtaining acknowledgement from the arbitral tribunal of the proper entry of the claim can alleviate concerns of the claim subsequently being rejected. It also allows the party to determine whether it is necessary to enter a new claim in a (second) arbitral proceeding. That second procedure can subsequently be consolidated according to Article 10 of the ICC Rules by the ICC court (*i.e.* **not** by the tribunal) if the parties agree to such consolidation, all of the claims are made under the same agreement (which will often be the case for counterclaims) or if (as always in such situations) the arbitrations are between the same parties, the disputes

[41]) J. Paulsson & G. Petrochilos, *supra* note 13, at 180, Article 22, para. 6; stated here specifically in the context of the UNCITRAL Rules, but it is submitted that this statement is of broader application.

[42]) *Idem* at para. 3–902; T. Webster & M. Bühler, *supra* note 36, at 392–393, para. 23–88.

[43]) T. Webster & M. Bühler, *supra* note 36, at 393, para. 23–89.

[44]) N. Kull, *supra* note 38, at 2334.

arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible.

2. Stipulations for Authorization

In deciding whether to authorise the introduction of a new claim, Article 23(4) of the ICC Rules provides that the arbitral tribunal shall consider the nature of the claim, the stage of the arbitration and other relevant circumstances. According to the ICC Secretariat's Guide to ICC Arbitration, a claim will be more acceptable where it is related to the underlying dispute and fits into the proceedings (*e.g.* because it related to similar questions of fact and law).[45])

Furthermore, the purpose of Article 23(4) is to act as a tool for arbitral tribunals in the smooth and efficient management of the arbitral proceedings and prevent undue disruption.[46]) There is no prohibition against the introduction of new claims. In fact, arbitral tribunals are expressly provided with the means of admitting such new claims, their admission need merely be "appropriate".[47]) The arbitral tribunal has broad discretion in authorising the entry of new claims into the proceeding.[48])

Whether or not it is appropriate, in addition to assessing the closeness of the underlying facts between the old and new claims, requires the balancing of the disruption to the proceedings against any inefficiency caused if the claim needed to be brought in separate proceedings[49]) (which would be the only remedy available on the refusal of authorisation). In this regard, the stage of the proceedings at which the new claim is requested to be authorised plays an important role.[50]) Considerations of fairness and good administration should also be considered in determining if the new claim is important to the underlying dispute.[51])

Lastly, regard should be had to the reasons for the delay in bringing the new claim and whether those reasons are sufficient to justify the claim's admission post-signing of the Terms of Reference.[52]) Where new events transpire giving rise to the existence of a new claim (or its arbitrability), it would

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[45]) J. Fry, S. Greenberg & F. Mazza, *supra* note 36, at para. 3–904; *see* also N. Kull, *supra* note 38, at 2335.

[46]) J. Fry, S. Greenberg & F. Mazza, *supra* note 36, at para. 3–890; T. Webster & M. Bühler, *supra* note 36, at 391, para. 23–83.

[47]) J. Fry, S. Greenberg & F. Mazza, *supra* note 36, at para. 3–890.

[48]) T. Webster & M. Bühler, *supra* note 36, at 392, para. 23–86; H. Verbist, E. Schäfer et al., *supra* note 38, at 135; N. Kull, *supra* note 38, at 2335.

[49]) J. Fry, S. Greenberg & F. Mazza, *supra* note 36, at para. 3–905.

[50]) H. Verbist, E. Schäfer et al., *supra* note 38, at 134; N. Kull, *supra* note 38, at 2336.

[51]) J. Fry, S. Greenberg & F. Mazza, *supra* note 36, at para. 3–905.

[52]) *Idem* at para. 3–906.

often be inappropriate not to also deal with such new claims in the same proceedings as the original claims.[53])

If a claim is simply entered in pending proceedings on the belief that it falls within the limits of the Terms of Reference, but the arbitral tribunal subsequently disagrees with that assessment, the absence of authorisation means the claim was never validly entered into the proceedings at all. Thus, a request for acknowledgement of valid entry is therefore advisable. Naturally, such a request opens up the opportunity for the opposing side to contest, but transparency toward the arbitral tribunal as to the impending nature of the limitation period should ensure the arbitrators cooperate towards deciding on the authorisation of the claim within the relevant period.[54]) Where limitations periods are truly imminent, it may be advisable to enter a request for acknowledgement of the claim as 'not new' to the Terms of Reference as well as, in the alternative, authorization under Article 23(4) ICC Rules. This will allow the arbitral tribunal to resolve the entire matter promptly.

If the arbitral tribunal decides the claim is 'new', which must be done by reference to the content of the Terms of Reference in the given case, then it falls to the arbitral tribunal to decide whether it should authorise the claim. As stated above, this assessment is done on the basis of whether it is appropriate in the given case to admit the claim into the proceedings.

Whether or not it is appropriate, in addition to assessing the closeness of the underlying facts between the old and new claims, requires the balancing of the disruption to the proceedings against any inefficiency caused by the claim needing to be brought in separate proceedings[55]) (which would be the only alternative should authorisation be refused). In this regard, the stage of the proceedings at which the new claim is requested to be authorised plays an important role.[56]) Considerations of fairness and good administration should also be considered in determining if the new claim is important to the underlying dispute.[57])

Furthermore, as in the case of other rules, the arbitral tribunal, in making this assessment, should be cognizant of its general powers and duties set out in the ICC Rules. Article 22(1) requires the arbitral tribunal conduct the arbitration in an expeditious and cost-effective manner and clarifies that the meaning of these terms will be affected by the complexity of the case and value in dispute. Further, Article 22(4) requires the arbitral tribunal to act fairly and

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[53]) H. Verbist, E. Schäfer et al., *supra* note 38, at 134.

[54]) Subject to such a period not being too short. An arbitral tribunal will need to balance the interests of the party seeking to enter the claim with the interest of the opposing party and providing them with a right to be heard as arbitrators are ordinarily required to do in relation to 'every stage of the proceedings'.

[55]) J. Fry, S. Greenberg & F. Mazza, *supra* note 36, at para. 3–905.

[56]) H. Verbist, E. Schäfer et al., *supra* note 38, at 134; N. Kull, *supra* note 38, at 2336.

[57]) J. Fry, S. Greenberg & F. Mazza, *supra* note 36, at para. 3–905.

impartially as well as to ensure each party has a reasonable opportunity to present its case. In particular in the context of the entry of new claims, this means that it is important that such entry not be prejudicial to the party responding to the new claim and that such party has ample opportunity to establish and present its defense thereto.

In terms of the timing of the request for authorisation of a new claim, regard should be had to the reasons for the delay in bringing the new claim and whether those reasons are sufficient to justify the claim's admission post-signing of the Terms of Reference.[58]) Where new events transpire giving rise to the existence of a new claim (or its arbitrability), it would often be inappropriate not to also deal with such new claims in the same proceedings as the original claims.[59]) Parties should therefore be sure they support their entry of new claims with arguments that alleviate the arbitral tribunal's concerns in terms of efficiency, both in time and cost, and the prejudicial nature of such a claim's inclusion at the relevant stage of the proceedings. Highlighting the factual connections between the new claim and any existing lends considerable support in this regard.

The ICC Rules prescribe a clear process for parties toward the entry of claims that fall outside the Terms of Reference following that document's signing. The ICC Rules may (theoretically) be unclear on a party's entitlement to change its claims in advance of that time, but since a strict rule is expressly adopted post the completion of the Terms of Reference, it stands to reason that greater liberties are afforded to parties in this respect in advance of that milestone. Parties should be aware of the change brought about by the Terms of Reference to a party's ability to enter new claims. While parties are not precluded from amending or supplementing their claims subsequent to the signing of the Terms of Reference, the arbitral tribunal will scrutinise such changes following the event. This may even give rise to strategic considerations, namely, to delay the agreement on a draft Terms of Reference where a party knows that it will soon enter a counterclaim.

In summation, the ICC Rules' follow a more unique approach as compared to other institutional rules. They require the prior authorisation of any new claim as opposed to allowing it to be submitted, but subsequently rejected by the arbitral tribunal if found to be inappropriate. Parties should therefore be more prepared in advance of the entry of their new claim to defend the validity of its entry. While the main factors considered by an arbitral tribunal in ICC proceedings are similar to those identified by other rules, the principal difference between them is borne out of the order in which the proceedings are conducted and the more extensive power afforded to ICC tribunals to control the confines of their arbitral proceedings.

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[58]) *Idem* at para. 3-906.

[59]) H. Verbist, E. Schäfer et al., *supra* note 38, at 134.

III. Conclusion

Parties, in particular respondents, are often placed in a time-sensitive position concerning the entry of new (counter-)claims in ongoing arbitral proceedings and may only belatedly realize the formal hurdles that need to be overcome. This is particularly the case where the respective claim is threatened by prescription. Therefore, this contribution serves as an 'alert' to draw attention to such situations. It is a question of tardiness versus prudence. It requires a fact-driven as well as a strategic decision as to whether and when to enter a counterclaim or a new claim. The foregoing assessment has detailed the stances adopted by the identified institutional or other arbitration rules concerning the entry of claim and counterclaims into arbitral proceedings both before and after the arbitral tribunal has been constituted. Considerable similarities exist in terms of the timing at which parties are generally expected to first identify their claims as well as the factors considered when it comes to assessing whether a new claim should or should not form part of the procedure after the parties' first submissions.

There exist also meaningful differences between the identified rules in terms of the formal procedure toward the entry of such claims. In particular, the LCIA, UNICTRAL and SCC Rules, which generally adhere to similar procedures, differ greatly from the approach prescribed by the Vienna Rules. The Vienna Rules employ unique procedures on the entry of claims and generally do not put the first assessment thereof in the hands of the relevant arbitral tribunal, rather seek to have all new claims pass by the preliminary scrutiny of the VIAC Secretariat first. In addition, they safeguard the (counter-)claiming party's interest in avoiding prescription, because the counterclaim must be addressed to the VIAC Secretariat, and once it has arrived there, prescription is automatically interrupted, regardless of whether the existing or a new tribunal will be dealing with the case.

In contrast, the ICC Rules do not only differ from the LCIA, UNCITRAL and SCC (as well as the VIAC) standard in terms of their formalities. The difference between the formal entry of a new claim in an ICC arbitration and arbitrations under the other mentioned rules is significant. The ICC Rules establish a very specific formal 'hurdle' for new claims as soon as the Terms of Reference are signed. The fact that ICC Rules, after this point in time, prescribe a requirement of prior authorization by the tribunal considerably restricts the freedom afforded to parties in terms of the entry of their claims. The work of the party entering such a claim is 'frontloaded', with the need to argue why it should be admitted before the claim is even legally entered into the proceedings.

The entry of claims is therefore a matter that must be afforded consideration at the very outset an arbitration. It may not always be possible to identify every claim a party has at that time, but party counsel should be aware of the limits placed on their future supplementation of their claims once the procedure is

starting. Therefore, parties should prioritize exploring all possible avenues as early as possible so as not to face an uphill battle when additional claims are identified after the exchange of subsequent submissions and the procedure will necessarily be delayed (or even the claim itself endangered) because of the necessity of their admission to the arbitration. Therefore, it is better to "look before you leap".