

Proti prúdu: Má ešte ad hoc arbitráž miesto vo svete dominovanom arbitrážnymi inštitúciami?

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Čo je arbitráž ad-hoc?

International arbitration can be either “institutional” or “*ad hoc*.” There are vitally important differences between these two alternatives. Institutional arbitrations are conducted pursuant to institutional arbitration rules, almost always overseen by an administrative authority with responsibility for various aspects relating to constituting the arbitral tribunal, fixing the arbitrators’ compensation and similar matters. (1406) In contrast, *ad hoc* arbitrations are conducted without the benefit of an appointing and administrative authority or (generally) preexisting arbitration rules, subject only to the parties’ arbitration agreement and applicable national arbitration legislation.

[3] Relative Advantages and Disadvantages of Institutional and Ad Hoc Arbitration

Both institutional and *ad hoc* arbitration have strengths. Institutional arbitration is conducted according to a standing set of procedural rules and supervised, to a greater or lesser extent, by a professional staff. (1419) This reduces the risks of procedural breakdowns, particularly at the beginning of the arbitral process, and of technical defects in the arbitration proceedings and arbitral award. The institution’s involvement can be particularly valuable on issues relating to the appointment of arbitrators, the resolution of challenges to arbitrators, the selection of an arbitral seat, the consolidation of related arbitrations and fixing the arbitrators’ fees, where professional, specialized staff provide better service than *ad hoc* decisions by national courts that have little, if any, experience or institutional resources for such matters. (1420)

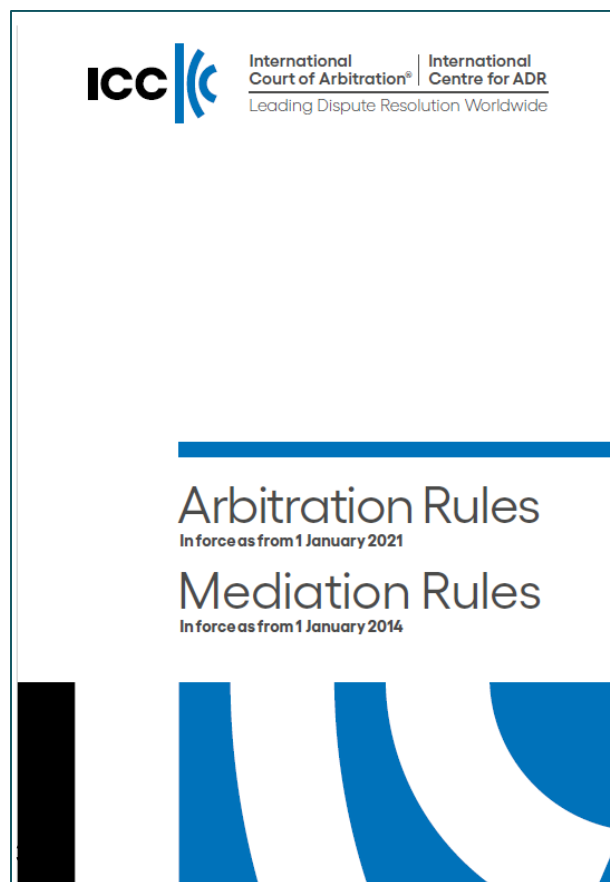
Equally important, many institutional rules contain provisions that make the arbitral process more reliable and expeditious. This includes provisions in institutional rules concerning competence-competence, separability, provisional measures, consolidation and joinder, disclosure, arbitrator impartiality, corrections and challenges to awards, replacement of arbitrators and truncated tribunals, costs and the like. (1421) Less directly, an arbitral institution lends its standing to any award that is rendered, which may enhance the likelihood of voluntary compliance and judicial enforcement. (1422)

On the other hand, *ad hoc* arbitration is sometimes said to be more flexible, less expensive (since it avoids sometimes substantial institutional fees) and more confidential than institutional arbitration; (1423) despite this, the provisions of institutional rules sometimes make institutional arbitrations more flexible (by minimizing the involvement of national courts), more confidential (by including express confidentiality obligations) and less expensive (by providing institutional oversight of arbitrator fees). Although there is room for debate, most international practitioners fairly decisively prefer the more structured, predictable character of institutional arbitration, and the benefits of institutional rules and appointment mechanisms, at least in the absence of unusual circumstances arguing for an *ad hoc* approach. (1424)

Pravidlá arbitráže ICC od roku 1975 výrazne narástli

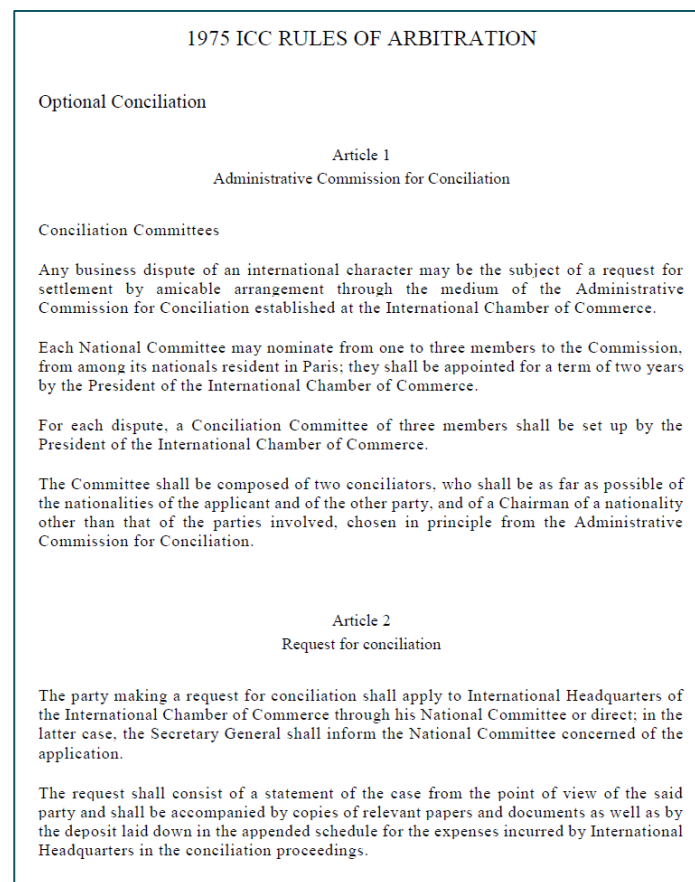
Súčasná verzia z roku 2021:

46 článkov, 6 príloh



Verzia z roku 1975:

21 článkov o arbitráži



Pravidlá ICC sú (prevažne?) kogentné

ARTICLE 19

Rules Governing the Proceedings

The proceedings before the arbitral tribunal shall be governed by the Rules and, where the Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration.

Article 11

Rules governing the proceedings

The rules governing the proceedings before the arbitrator shall be those resulting from these Rules and, where these Rules are silent, any rules which the parties (or, failing them, the arbitrator) may settle, and whether or not reference is thereby made to a municipal procedural law to be applied to the arbitration.

There is, lastly, an issue that arises from time to time in ICC arbitration practice that should be mentioned: that is, whether and, if so, to what extent, the parties may derogate from the Rules or whether they are otherwise **mandatory**. Certain provisions expressly contemplate the Rules' possible alteration by the parties. However, the Rules do not, for the most part, provide for this. **Insofar as the ICC, by issuing its Rules, can be said to make an offer to the public to administer arbitrations in**

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accordance therewith, the ICC can reasonably also take the position that it is not obligated to accept to administer cases where the parties have made alterations of the Rules that the Rules do not contemplate. (11) Of course, the ICC is not necessarily precluded from accepting such cases either. It, thus, enjoys the discretion to determine what its policy ought to be in this respect. This is a matter as to which different institutions have taken different positions. Thus, for example, the AAA International Arbitration Rules provide (Article 1.1) that those rules shall apply "subject to whatever modifications the parties may adopt in writing". However, no such general provision has ever been included in the ICC Rules, and the ICC has, from time to time, refused to administer arbitrations where the parties have agreed to alterations of its Rules that the Rules do not themselves contemplate.

In the silence of the ICC Rules on this subject, the related issues of policy are, thus, left to the ICC Court to resolve on a case-by-case basis. Although this may leave parties with a degree of uncertainty, the most prudent course for them, in the circumstances, would be to adopt the Rules without alteration unless they are otherwise able to obtain the ICC's assurance that a specific change will not raise a problem. In this regard, the Court's Secretariat has been willing to provide advice and assistance to parties concerning the compatibility of proposed arbitration clauses with the Rules and the Court's practices.

⁷Chapter 1 An Introduction to the ICC Arbitration Rules', in Eric Schwartz and Yves Derains, Guide to the ICC Rules of Arbitration (Second Edition), (© Kluwer Law International; Kluwer Law International 2005), pp. 1 - 10

1. Náklady ICC arbitráže

Requested estimation

• Amount in dispute	10,000,000
• Number of arbitrators	3
• Year (scale)	2017

Fees per arbitrator

• Min	\$31,334
• Avg	\$90,627
• Max	\$149,920

Advance on costs (without arbitrator expenses)

• Average fees multiplied by number of arbitrators	\$271,881
• Administrative expenses	\$57,515
• Total	\$329,396

2. Článok 6 Pravidiel ICC AKA *prima facie* posúdenie dohody o arbitráži

3 If any party against which a claim has been made does not submit an Answer, or if any party raises one or more pleas concerning the existence, validity or scope of the arbitration agreement or concerning whether all of the claims made in the arbitration may be determined together in a single arbitration, the arbitration shall proceed and any question of jurisdiction or of whether the claims may be determined together in that arbitration shall be decided directly by the arbitral tribunal, unless the Secretary General refers the matter to the Court for its decision pursuant to Article 6(4).

4 In all cases referred to the Court under Article 6(3), the Court shall decide whether and to what extent the arbitration shall proceed. The arbitration shall proceed if and to the extent that the Court is *prima facie* satisfied that an arbitration agreement under the Rules may exist. In particular:

Article 7

Absence of agreement to arbitrate

Where there is no *prima facie* agreement between the parties to arbitrate or where there is an agreement but it does not specify the International Chamber of Commerce, and if the Defendant does not file an Answer within the period of 30 days provided by paragraph 1 of Article 4 or refuses arbitration by the International Chamber of Commerce, the Claimant shall be informed that the arbitration cannot proceed.

Article 8

Effect of the agreement to arbitrate

Where the parties have agreed to submit to arbitration by the International Chamber of Commerce, they shall be deemed thereby to have submitted ipso facto to the present Rules.

If one of the parties refuses or fails to take part in the arbitration, the arbitration shall proceed notwithstanding such refusal or failure.

Should one of the parties raise one or more pleas concerning the existence or validity of the agreement to arbitrate, and should the Court be satisfied of the *prima facie* existence of such an agreement, the Court may, without prejudice to the admissibility or merits of the plea or pleas, decide that the arbitration shall proceed. In such a case any decision as to the arbitrator's jurisdiction shall be taken by the arbitrator himself.

3. Terms of Reference / Zadanie pre rozhodcovský senát

ARTICLE 23

Terms of Reference

1 As soon as it has received the file from the Secretariat, the arbitral tribunal shall draw up, on the basis of documents or in the presence of the parties and in the light of their most recent submissions, a document defining its Terms of Reference. This document shall include the following particulars:

- a) the names in full, description, address and other contact details of each of the parties and of any person(s) representing a party in the arbitration;
- b) the addresses to which notifications and communications arising in the course of the arbitration may be made;
- c) a summary of the parties' respective claims and of the relief sought by each party, together with the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of any other claims;
- d) unless the arbitral tribunal considers it inappropriate, a list of issues to be determined;
- e) the names in full, address and other contact details of each of the arbitrators;
- f) the place of the arbitration; and
- g) particulars of the applicable procedural rules and, if such is the case, reference to the power conferred upon the arbitral tribunal to act as *amiable compositeur* or to decide *ex aequo et bono*.

Article 13

Terms of reference

Before proceeding with the preparation of the case, the arbitrator shall draw up, on the basis of the documents or in the presence of the parties and in the light of their most recent submissions, a document defining his Terms of Reference. This document shall include the following particulars:

- a) the full names and description of the parties,
- b) the addresses of the parties to which notifications or communications arising in the course of the arbitration may validly be made,
- c) a summary of the parties' respective claims,
- d) definition of the issues to be determined,
- e) the arbitrator's full name, description and address,
- f) the place of arbitration,
- g) particulars of the applicable procedural rules and, if such is the case, reference to the power conferred upon the arbitrator to act as *amiable compositeur*,
- h) such other particulars as may be required to make the arbitral award enforceable in law or may be regarded as helpful by the Court of Arbitration or the arbitrator.

4. Scrutiny: Povinná kontrola rozsudku Súdom ICC

ARTICLE 34

Scrutiny of the Award by the Court

Before signing any award, the arbitral tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to points of substance. No award shall be rendered by the arbitral tribunal until it has been approved by the Court as to its form.

Article 21

Scrutiny of award by the Court

Before signing an award, whether partial or definitive, the arbitrator shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the award and, without affecting the arbitrator's liberty of decision, may also draw his attention to points of substance. No award shall be signed until it has been approved by the Court as to its form.

Ďakujem Vám za pozornosť!



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