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DUE PROCESS AS MINIMAL PROCEDURAL SAFEGUARD IN INTERNATIONAL COMMERCIAL ARBITRATION

Abstract

This paper examines the application of *due process* in international commercial arbitration as a mandatory procedural safeguard. It argues that these minimal procedural requirements are mandatory and cannot be derogated with the parties' agreement or with the arbitrators' unilateral decision. Failing to conduct the arbitration procedure according to these minimal procedural requirements could lead to annulment of the arbitration award or for refusal of the request for recognition or enforcement of such award. This paper provides comparative overview of the current legislation on international and national level by examining the application of *due process* in the light of the most significant cases.

Key words: *Due process, Arbitration procedure, International Commercial Arbitration, Mandatory rules*.

I. INTRODUCTION

"As a matter of perception and reality, to retain its legitimacy, the arbitral system must provide *due process* as well as a fair and efficient method of dispute resolution."[1] The basic principle of the International Commercial Arbitration is party autonomy which allows parties to design the arbitration proceedings in a manner that it's most suitable for them. If the parties are silent or failed to reach an agreement, arbitrators will be authorized to adopt such procedures and conduct arbitration in a way that they consider appropriate.

However, the wide freedom that parties and arbitrators have is not unlimited. Hence, "the parties' freedom to agree upon the arbitral procedures, and the tribunal's discretion to adopt such procedure (absent contrary agreement), are subject to the mandatory requirements of applicable national law"[2] Therefore, today almost all countries impose mandatory procedural requirements that are obligatory for all arbitration proceedings. One of these mandatory provisions that limit the effectiveness of the party's choice and the arbitrator's discretion is the procedural *due process* principle. This principle "requires all legal proceedings to be fair and that every party involved is given notice of the proceedings, are treated equally, and are given an opportunity to be heard and to deal with the case of its

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[1] Carolyn B. Lamm, *Fundamental Rules of Procedure: Whose Due Process is it?*, Proskauer Lecture on International Arbitration, New York, 2014 (available at: http://www.arbitration-icca.org/media/3/14246917853210/lamm_fundamental_rules_of_procedure_whose_due_process_is_it.pdf, accessed on 20.03.2017).

[2] Gary B. Born, *International Arbitration: Law and Practice*, Wolters Kluwer Law & Business, Alphen Aan Den Rijn 2012, p. 152.

opponent."[3] According to this principle, these minimal procedural requirements are mandatory and cannot be derogated with the parties' agreement or with arbitrators' unilateral decision.

The problem arises when the parties agree to procedural rules whose implementation could lead to violation of the procedural *due process*. Also, additional problem is the possibility of incorrect interpretation and implementation of *due process* by the arbitrators. Therefore, failing to respect the procedural *due process* may lead to annulment of the arbitration award or refusal of the request for recognition or enforcement of such award.

II. PROCEDURAL FREEDOM

"One of the hallmarks of arbitration is the parties' power to shape the arbitration proceedings."[4] "The ability to choose arbitration, and how the arbitration will be conducted, provides parties with the opportunity to construct a mutually beneficial arrangement to which both parties will voluntarily agree."[5] In this manner, parties are free to prepare their own procedural rules or refer to arbitration rules.

This principle was guaranteed by the Geneva Protocol of 1923, according to which "the arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place."[6] In the same direction, the New York Convention of 1958 also "gives effect to the central role of the parties' autonomy to fashion the arbitral procedure, and provides for non-recognition of awards following proceedings that did not follow the parties' agreed procedures."[7] Moreover, one of the basis of the New York Convention for refusal of the request for recognition and enforcement of the foreign arbitral awards is in case if "the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place."[8]

This principle is also regulated by the national arbitration laws and arbitration rules. Accordingly, the UNCITRAL Model Law regulates that "the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings."[9] Nowadays, almost all modern national arbitration laws[10] and all arbitration rules[11] contain similar

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[3] Fabricio Fortese and Lotta Hemmi, *Procedural Fairness and Efficiency in International Arbitration*, Groningen Journal of International Law, vol 3(1): International Arbitration and Procedure, Groningen 2015, p. 110.

[4] Fortese, Hemmi, op. cit., p. 113.

[5] Elizabeth Shackelford, *Party Autonomy and Regional Harmonization of Rules in International Commercial Arbitration*, University of Pittsburgh Law Review 67, no. 4, Pittsburgh 2006, p. 901.

[6] Protocol on Arbitration Clauses, Geneva 1923, Article 2.

[7] Born, op. cit., 148.

[8] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York 1958, Article V(1)(d).

[9] UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006), Article 19(1).

[10] French Code of Civil Procedure (CCP), Article 1509 paragraph 1; English Arbitration Act, Section 4; The Tenth Book of the Code of Civil Procedure (ZPO) - German Arbitration Act, Section 1042(3); Federal Statute of Private International Law (Switzerland) - Chapter 12: International Arbitration, Article 182(1); Law on Arbitration (Slovenia), Article 23(1); Law on Arbitration (Croatia), Article 18(1); Law on International Commercial Arbitration of the Republic of Macedonia, Article 19 paragraph 1.

[11] UNCITRAL Arbitration Rules 1976 (as revised in 2010 and with new article 1, paragraph 4, as adopted in 2013), Article 1(1); The Rules of the ICC International Court of Arbitration (ICC Rules) (adopted in 2012 and revised in 2017), Article 19; The London Court of International Arbitration (LCIA) Arbitration rules (2014), Article 14.2; The German Institution of Arbitration (DIS) Arbitration Rules (1998); Section 24.1, The

provisions that guarantee parties' procedural autonomy. According to this legal framework it is clear that the parties are entitled to choose the rules of procedure that are more suitable for their case. Consequently, according to *Park*:

> *"Parties may choose arbitration rules (e.g. the ICC or LCIA Rules), a set of procedural rules without reference to a national legal system (e.g. the IBA Rules of Evidence or the UNCITRAL Notes for Organizing Arbitral Proceedings) or may choose a national law (e.g. the Swiss Private International Law Act or the English Arbitration Act)."*[12]

Nonetheless, in the situation when the parties fail to agree upon the rules of procedure, all modern arbitration laws and rules empower arbitrators to conduct the arbitration in a manner that they consider it appropriate. Hence, the UNCITRAL Model Law states that "failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate."[13] Following this, "the power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence."[14] Almost all modern national arbitral laws[15] and arbitration rules[16] contain similar provisions that grant wide power to arbitrators.

Therefore, the conclusion is that the parties and the arbitrators (when parties failed to reach an agreement) have wide autonomy and discretion to design the arbitration procedure that they consider it most appropriate. In that manner, there are only limited basis to exclude the effectiveness of the parties' choice, or limitation to the arbitrators' discretion to conduct the arbitration in a way that they consider it appropriate.

III. PROCEDURAL *DUE PROCESS*

Due process principle has different meanings. First of all it appeared in the criminal procedures where this principle guaranteed the basic rights of the defendant in order to secure that he has "fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."[17] Lately, this principle was imposed as minimal procedural safeguard for the civil procedures too. Therefore, nowadays usually „*due process* is seen as a set of criteria that protect a private person in relation to the State and authorities."[18]

However, even if the *due process* principal is related for court procedures, this principle is also mandatory for the arbitral proceedings besides the fact that arbitration is a

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Arbitration Institute of the Stockholm Chamber of Commerce (SCC) Arbitration rules (2017), Article 23(1); The Permanent court of Arbitration of the Economic Chamber of Macedonia Rules (2011), Article 19.

[12] Park W. William, *The Procedural Soft Law of International Arbitration: Non-Governmental Instruments in Pervasive Problems in International Arbitration*, Kluwer Law International, Alphen Aan Den Rijn 2006; in Loukas Mistelis, *Reality Test: Current State of Affairs in Theory and Practice Relating to "Lex Arbitri,* The American Review of International Arbitration, vol. 17, no. 2, 2006, p. 166.

[13] UNCITRAL Model Law, Article 19(2).

[14] Ibid.

[15] French Code of Civil Procedure (CCP), Article 1509 paragraph 1; English Arbitration Act, Section 33 paragraphs (a) and (b); German Arbitration Act, Section 1042(4); Federal Statute of Private International Law (Switzerland), Article 182(2); Law on Arbitration (Slovenia), Article 23(2); Law on Arbitration (Croatia), Article 18(2); Law on International Commercial Arbitration of the Republic of Macedonia, Article 19 paragraph 2.

[16] UNCITRAL Arbitration Rules, Article 17(1); ICC Arbitration Rules (2012/2017), Article 19; LCIA Arbitration rules (2014), Article 14.4(ii);DIS Arbitration Rules (1998), Section 24.1; 24.1, SCC Arbitration rules (2017), Article 23(1); The Permanent court of Arbitration of the Economic Chamber of Macedonia Rules (2011), Article 41(1).

[17] The Convention for the Protection of Human Rights and Fundamental Freedoms, Rome 1950, Article 6(1).

[18] Matti S. Kurkela and Santtu Turunen, *Due Process in International Commercial Arbitration (Second Ed.)*, Oxford University Press 2010, p. 1.

private mechanism for dispute settlement. The main reason for imposing these procedural requirements is the fact that one of the fundamental civil rights is the right for access to justice and fair trial. Following this, it is undisputable that "states indirectly delegate jurisdictional powers to arbitral tribunals through the recognition of the parties' agreement."[19] Moreover, the „fundamental principle of arbitration is that the arbitral award (the decision of the tribunal) is a final and binding determination of the parties' rights and obligations"[20] and the "awards are widely enforceable, including internationally."[21] Having in mind this, "comes a type of trade-off in the form of standards of quality applicable to arbitration."[22] "This is mainly because by opting for arbitration, parties to a dispute waive their constitutional rights to have their dispute heard by a national court."[23]

Nowadays all countries imposes minimal procedural requirements that are mandatory for the arbitration proceedings in order are ensure that they are fair, just and impartial. For that purpose:

> *„countries tend to provide assurance that will not produce legal effect on their territory an arbitral award that is adopted in a way that is contrary to their understanding of the fairness of the procedure and the equality of parties in it."*[24]

This view is confirmed by the German Supreme Court conclusion, according to which the request for recognition of the foreign arbitration award could be refused, if the award:

> *"departure from the fundamental principles of German procedural law to such extent, that under German law the decision cannot be seen as derived from normal, and from the perspective of the principle of the constitutional state, correct procedure."*[25]

Therefore, it's crucial for the arbitral tribunal to respect the minimal procedural standards in order arbitration proceedings to end with arbitral award which will be legally enforceable. Hence, "regardless of the procedure and the law chosen, it is undisputed that the arbitration tribunal shall guarantee a number of principles that constitute the procedural "*magna carta of arbitration,*""[26] which involves "*due process* and fair hearings; and independence and impartiality of arbitrators."[27] Following this, the conclusion is that this *due process* guarantees "can be considered aspects of such elements as procedural fairness, opportunity to be heard, and equal treatment as well as access to justice."[28] This "core guarantees of procedural *due process* comprise the arbitrator's duty to treat the parties equally, fairly and impartially, and to ensure that each party has an opportunity to present its case and deal with that of its opponent."[29]

> *"The principle that both sides must be heard on all issues affecting their legal position is one of the most basic concepts of fairness in adversarial proceedings. It is expressed in the Latin maxim of audiatur et altera pars. It is reflected throughout the ICSID Arbitration Rules..."*[30]

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[19] Fortese, Hemmi, op. cit., p. 112.
[20] Kurkela, Turunen, op. cit., p. 1.
[21] Ibid.
[22] Ibid.
[23] Fortese, Hemmi, op. cit., p. 112.
[24] Toni Deskoski, *International Arbitration Law* (*Меѓународно арбитражно право)*, Skopje 2016, p. 355.
[25] Decision of the German Supreme Court (Bundesgerichtshof) of October 18, 1967, 48 BGHZ, 331, Matthias J. Terlau, p. 7, in Deskoski, op. cit., p. 353.
[26] Julian D. M. Lew, Loukas A. Mistelis, and Stefan Kröll, *Comparative International Commercial Arbitration*, Kluwer Law International, The Hague 2003, p. 95.
[27] Ibid.
[28] Kurkela, Turunen, op. cit., p. 2.
[29] Fortese, Hemmi, op. cit. p. 112.
[30] Christoph Schreuer et al., *The ICSID Convention: A Commentary*, 2nd ed. Cambridge University Press 2009, p. 987.

Concerning this, it is undisputable that the parties' and arbitrators' procedural freedom regarding the regulation and conduction of the arbitration proceedings is not unlimited. This is because "in the modern legal systems is insisting on the existence of a certain minimum of procedural justice (fairness) in conducting the arbitration procedure without exception, as indeed is required from the court proceedings."[31]

III.1. Legal Framework

Since it has significant meaning for the arbitration, the *due process* principle is regulated on international and national level. Today we have wide consensus regarding the question related to protection of the minimal procedural guarantees and the consequences of their violation.

> *„This principle is acknowledged in the New York Convention and other international arbitration conventions; it is guaranteed by the arbitration statutes in virtually all jurisdictions; it is contained in and facilitated by the rules of most arbitral institutions; and it is of fundamental practical importance."*[32]

Anyway, the promotion and unification of the *due process* principle is a result of its international regulation. Hence, the first significant regulation of the *due process* was made by the Geneva Convention of 1927 according to which the recognition and enforcement of the award shall be refused if "the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case…"[33] Nevertheless, even the fact that the focus of this provision was on the question of proper notice, "it was generally interpreted as covering all cases involving a serious violation of *due process*."[34]

Significant effort into unification and promotion of *due process* standard was made by the New York Convention of 1958. Consequently, according to Article V(1)(b) of the Convention, the recognition and enforcement of the award may be refused if:

> "(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case."[35]

Furthermore, the Convention provides that the "recognition and enforcement of the award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that "(b) the recognition or enforcement of the award would be contrary to the public policy of that country."[36] This means that "article V(2)(b) is also potentially applicable in cases of serious procedural unfairness, permitting non-recognition of awards for violation of local public policy, including procedural public policies."[37]

This principle is also acknowledged by the national arbitration laws. Significant role for its unification has the UNCITRAL Model Law which directly requires that "the parties shall be treated with equality and each party shall be given a full opportunity of presenting his

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[31] Deskoski, op. cit., p. 350.
[32] Born, op. cit., p. 148.
[33] Convention on the Execution of Foreign Arbitral Awards, Geneva 1927, Article 2(1)(b).
[34] See H.W. Greminger, *Die Genfer Abkommen von 1923 und 1927 uber die international private Schiedsgerichtsbarkeit* (Winterthur 1957) p. 69, in A. J. Van Den. Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Deventer: Kluwer Law and Taxation, 1981), p. 297.
[35] New York Convention (1958), Article V(1)(d).
[36] Ibid, Article V(2)(d).
[37] Mantilla-Serrano, *Towards a Transnational Procedural Public Policy*, Arb. Int'l 333 (2014); Schwarz & Ortner, *Procedural Ordre Public and the Internationalization of Public Policy in Arbitration*, in C. Klausgger et al. (eds.), *Austrian Arbitration Yearbook* 133 (2008), in Born, op. cit., p. 152.

case."[38] Most of the countries which have adopted this Model Law have the same or similar provision in its national arbitration laws.[39] Apart from the Model law countries,[40] other countries also regulates this principle. For example, the French Code of Civil Procedure provides that "irrespective of the procedure adopted, the arbitral tribunal shall ensure that the parties are treated equally and shall uphold the principle of *due process*."[41] Similarly, the Swiss Federal Statute of Private International Law requires that "whatever procedure is chosen, the arbitral tribunal shall ensure equal treatment of the parties and their right to be heard in an adversary procedure."[42] The English Arbitration Act also provides that one of the general duties of the tribunal is to "(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent."[43]

Beside national laws, this principle is also regulated by most of the arbitration rules. Hence, the UNCITRAL Arbitration Rules regulates that one of the duties of the arbitration tribunal is to ensure that "…the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case."[44] Similarly, the ICC Arbitration Rules requires that "in all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case."[45] Following the English Arbitration Act principles, the LCIA Arbitration Rules also regulates that one of the general duties of the Arbitral Tribunal is: "(i) a duty to act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent(s)."[46] Other arbitration rules contain more or less similar provisions.[47]

The importance of this principle can be also analyzed through the consequences of its violation. Namely, every country provide guarantee that violation of the *due process* may lead to annulment of the arbitral award or for refusing of its recognition and enforcement. Therefore, the UNCITRAL Model Law provides that an arbitral award may be set aside if:

> "(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case."[48]

Most of the countries national arbitration laws contain more or less similar rule according to which violation of the *due process* may lead to annulment of the arbitral award.[49] Moreover, violation of this principle present justified reason for refusing the

[38] UNCITRAL Model Law, Article 18.

[39] German Arbitration Act, Section 1042(1); Law on Arbitration (Slovenia), Article 21; Law on Arbitration (Croatia), Article 17(1) and (2); Law on International Commercial Arbitration of the Republic of Macedonia, Article 18.

[40] The countries that developed its own national arbitration legislation based on the text of the UNCITRAL Model Law on International Commercial Arbitration.

[41] French Code of Civil Procedure (CCP), Article 1510.

[42] Federal Statute of Private International Law (Switzerland), Article 182(3).

[43] English Arbitration Act, Section 33(1)(a).

[44] UNCITRAL Arbitration Rules, Article 17(1).

[45] ICC Arbitration Rules (2012/2017), Article 22(4).

[46] LCIA Arbitration rules (2014), Article 14.4(i).

[47] DIS Arbitration Rules (1998), Article 26.1.; SCC Arbitration rules (2017), Article 23(2); Swiss Rules (2012), Article 15(1); The Permanent court of Arbitration of the Economic Chamber of Macedonia Rules (2011), Article 41(1).

[48] UNCITRAL Model Law, Article 34(2)(a)(ii).

[49] Following laws contain identical provision: German Arbitration Act, Section 1059(2)(1)(b); Law on Arbitration (Slovenia), Article 40(2)(1)(2); Law on Arbitration (Croatia), Article 36(2)(c); Law on International Commercial Arbitration of the Republic of Macedonia, Article 35(2)(1)(3). Similar provision, but with the same function, contain following laws: French Code of Civil Procedure (CCP), Article 1520(4); English Arbitration Act, Section 68(2)(a); Federal Statute of Private International Law (Switzerland), Article 190(a)(d).

recognition and enforcement of the foreign arbitral award. Namely, the UNCITRAL Model Law regulates that one of the basis for this refusing is if:

> "(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case."[50]

Similar provision contain some of the national arbitration laws,[51] while the other laws simply contain norm that refer to the New York Convention of 1958 regarding the recognition and enforcement of the foreign arbitral awards.[52]

III.2. FUNDAMENTALS OF *DUE PROCESS*

From the above analyzed legal framework we can distinguish the basic elements of the *due process*. Namely, it is clear that the wide interpretation of this principle requires arbitral procedures to be fair, just and each party to have equal opportunity to present his case, including the independence and impartiality of arbitrators. However, it is also unquestionable that the evaluation of the violation of the *due process* will be made by the national court in front of which the question will be raised. Hereafter, the most acceptable approach for determination of the violation of the *due process*, as well as the determination of the *due process* components, is the one defined in the Article V(1)(b) from the New York Convention of 1958. According to this article, the recognition and enforcement of the award may be refused if "the party against whom the award is invoked was not given **proper notice** of the appointment of the arbitrator or of the arbitration proceedings or was otherwise **unable to present his case**."[53]

Therefore, the assumption is that „the primary elements of *due process* are **notice of the proceedings** and the **opportunity to be heard**."[54] The first element includes tribunals' duty to properly notify parties for each procedural phase, including appointment of the arbitrators. The second element imposes the rule of equality of the parties and the right of each party to present his case. Additionally, according to wide interpretation, the principle of **independence and impartiality of arbitrators** is also part of *due process*, but it falls only under the Article V(2)(b) of the New York Convention as violation of public policy.

However, despite the broad wording of the Article V(1)(b), "the courts appear to accept a violation of *due process* in very serious cases only, thereby applying the general rule of interpretation of Article V that the grounds for refusal of enforcement are to be construed narrowly."[55] This is a consequence of the high popularity of using this principle by the defendant in order to oppose or delay the recognition or enforcement of the award. Considering this, the application of the two fundamental elements of *due process* (proper notice and right to be heard) will be analyzed below.

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[50] UNCITRAL Model Law, Article 36(1)(a)(ii).
[51] English Arbitration Act, Section 103(2)(c); similar: Law on Arbitration (Croatia), Article 40(1).
[52] German Arbitration Act, Section 1061(1); Federal Statute of Private International Law (Switzerland), Article 194; Law on Arbitration (Slovenia), Article 42(1); and Law on International Commercial Arbitration of the Republic of Macedonia, Article 37(3).
[53] New York Convention (1958), Article V(1)(d).
[54] *Biotronik, ETC. v. Medford Medical Instrument Co*., 415 F. Supp. 133 (D.N.J. 1976), U.S. District Court for the District of New Jersey - 415 F. Supp. 133 (D.N.J. 1976). in Berg (1981), op. cit., p. 307.
[55] Berg (1981), op. cit., p. 297.

III.2.1. Proper Notice

The first *due process* component is the principle of proper notice. One of the basic requirements of *due process* is the requirement each of the parties to be properly notified for the proceedings, including the appointment of the arbitrators. Otherwise, parties may lose their right to participate at proceedings and they will be unable to present their case. However, it opens two additional questions. First question is about the form and the type of the notice submission, while the other is related to timeliness of the notice.

The first question related to the proper notice principle is the definition of the term "**proper**" used in Article V(1)(b) in the New York Convention. Hence, even the fact that the legislative history of the Article V(1)(b) indicate that the term "proper" was imported to serve in the appropriate representation of the parties (as it was regulated in the Geneva Convention of 1927), today its interpretation goes in opposite direction. Consequently, nowadays the term "proper" can "be interpreted in the sense that the notice of the appointment of the arbitrator and the arbitral proceedings must be adequate."[56] Then, the question for the adequacy of the notice is directly related to the form and the method of notice submission. Also, the term ""proper" may refer to the content of the notice."[57]

Nevertheless, beside the recognized importance of this principle as part of *due process*, today's tendency goes in its narrow interpretation by the arbitrators and the courts. Namely, the fact that arbitration is a private mechanism of dispute resolution releases arbitrators from formalities which are mandatory for the court trials. As a result, the conclusion is that "the notice need not be in a specific (official) form as is laid down in certain laws for domestic arbitration or court proceedings."[58] Arbitrators only have to ensure that the parties are duly and properly notified. Moreover, "notification need not be proven by acknowledgment of receipt by the defendant; instead, confirmation of delivery of documents related to the proceedings by courier is sufficient."[59]

This conclusion was confirmed by two decisions of the Mexican courts. Namely, the parties that recourse against the awards refers to the improperness of the notice since according to the Mexican law the first notice of summons should be personally, and not by mail as the arbitral tribunals did. The courts denied this claims explaining that signing the arbitration agreement parties waived their right to require formalities imposed by the national law that are applying at the domestic trials to apply at the arbitral proceedings.[60] Also, the Court of Appeal of Florence refuses the claims of the defendant that he was not properly informed according to the Section 39 of the Arbitration Rules of the American Arbitration Association since from the facts of the case arises the conclusion that the respondent was properly notified, but he explicitly refused to participate at the proceedings. Additionally, the AAA conditioned to inform defendant of the progress of the arbitration.[61]

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[56] Ibid, p. 303.

[57] Jana, Armer and Kranenberg, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, p. 241.

[58] Albert Jan Van Den Berg, *An Overview of the The New York Convention of 1958*, ed. Emmanuel Gaillard, Domenico Di Pietro, and Nanou Leleu-Knobil, Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice, 2008, p. 15, (available at: http://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overvi ew.pdf, accessed on October 06, 2016).

[59] Oleg Y. Alyoshin and Tatyana Slipachuk, *Enforcement of Foreign Arbitral Awards in the Ukraine: To Be or Not to Be*, 22 *Journal of International Arbitration*, 2005, p. 69, in Jana, Armer and Kranenberg, op. cit., p. 242.

[60] Tribunal Superior de Justicia, 18th Civil Court of First Instance of Mexico, D.F., February 24, 1977, *Presse Office §.A. v. Centro Editorial Hoy §.A.* (Mexico no. 1); Tribunal Superior de Justicia [Court of Appeals] (5th Chamber) of Mexico, D.F., August 1,1977, *Malden Mills Inc. v. Hilaturas Lourdes §.A.* (Mexico no. 2).

[61] Corte di Appello of Florence, October 8, 1977, *Bobbie Brooks Inc. v. Lanificio Walter Banci S.a.S.* (Italy no. 29), in Berg (1981), op. cit., p. 304.

The second question requires **timely notification** as a precondition for party to participate at the proceedings and guarantees equality of the parties. This question is directly related to short time limits for appointment of arbitrator and for preparation of the defense. Therefore, in order to ensure that parties has enough time to appoint arbitrator and prepare their defense, arbitrators has to ensure that parties are notified in due time and had enough reasonable time to answer.

Nevertheless, there is also restrictive interpretation of this principle by the arbitrators and courts. This is because *due process* principle comes in collision with the requirements for speed and efficiency of the arbitration proceedings. In that context, the intention of the arbitral tribunals is to make balance between the optimal time for parties to make the appointment of arbitrator or to prepare their defense, but in the same time to avoid unexceptional delays of the proceedings.

Hence, regarding the question of the appointment of arbitrators, the Court of Appeal of Basle held that the time limit of seven days, plus seven days extension granted by the Secretariat, could not be considered as a violation of *due process*.[62] Further, the Court of Appeal of Naples decided that the request to appoint arbitrator in 7 days also could not be measured as a violation of *due process*.[63] Moreover, the Italian Supreme Court decided that 12 days for appointment of the arbitrator is reasonable time limit.[64]

Following this narrow approach, the questions regarding the short time limits for defense preparation or short deadlines for answer or refusal of the requests for extension, generally are not considered as violation of *due process*. For example, the Court of Appeal of Naples decides that a time limit of 14 days is enough for the respondent to prepare the defense and to present his evidence.[65] Similarly, the Court of Appeal of Basle decided that cannot be taken as a violation of *due process* principle the fact that the arbitral tribunal denied the respondent request for postponement of the arbitral proceedings. In this case, the Swiss respondent requested the postponement explaining that it was unable to prepare the defense since its director had to leave due to obligatory military service in Switzerland.

> "The Court of Appeal of Basle rejected the assertion as the notice of the arbitration and the setting of time limits by the Secretary had occurred before the entry into military service; the director had, therefore, the possibility to prepare the defense, and, in particular, to the extent that he could act himself, to take appropriate measures."[66]

Contrary, in the ICSID Case *Fraport v. Philippines*, respondent requested 6-months extension of time for filing Rejoinder and corresponding postponement of hearing for extraordinary circumstances, which impeded Respondent's ability to fully present its case. Finally, Tribunal postponed hearing concluding that:

> "In these circumstances, the Tribunal is concerned lest, if the hearing dates are maintained, both Parties may be prevented from fully presenting their case. The Tribunal is also concerned that … there be a serious risk that the evidentiary record will be incomplete and that the efficient conduct of the hearing would thus be impeded."[67]

Additionally, the necessity of balance between *due process* and efficient arbitration is seen in the ICSID Case *BIVAC v. Paraguay*, where the respondent requested postponement of hearing because there were recent significant change of political direction and government and the Counsel has been retained only few days before the hearing on jurisdiction. The ICSID Tribunal rejected this request explaining that:

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[62] Obergreicht of Basle, June 3, 1971 (Switz. No. 3).
[63] Corte di Appello of Naples, February 20, 1975, *Carters (Merchants) Ltd.* ***v.*** *Francesco Ferraro* (Italy no. 21).
[64] Corte di Cassazizone (Sez. 1), January 20, 1977, no. 272, *S.p.A. Nosegno e Morando v. Bohne Friedrich und C0-Import-Export* (Italy no.23).
[65] Corte di Appello of Naples, February 21, 1975, *Cartes (Mercahnts) Ltd. V. Francesco Ferraro* (Italy no. 21).
[66] Obergericht of Basle, June 3, 1971 (Switz. No. 5), in Berg (1981), op. cit., p. 308.
[67] *Fraport v. Philippines*, ICSID Case No. ARB/03/25, Award (Aug 16, 2007), 27-31.

> "The Tribunal explained that the decision was motivated by the need to strike a balance between the constraints of the parties and the obligation to conduct the proceedings in reasonable speed and bring them to an end within an expedient and efficient period of time. The Tribunal reiterated that the requirements of *due process* had been complied with, that both parties had been fully involved in the process, including in the setting of the timetable and agenda for the hearing on jurisdiction. The Tribunal expressed its understanding as to the challenges facing the new government, but nevertheless considered that the interests of the sound administration of justice would justify a continuation of the hearing."[68]

These cases explain the necessity of the fast and efficient dispute resolution which requires parties to be proactive. Therefore, the conclusion is that the principle of proper notice is a significant part of the *due process* and that beside the agreed procedures by the parties, or adopted such procedures by the arbitrators, the later will be obliged to conduct the arbitration proceeding in a way that will ensure that the parties are informed properly and in due time for all procedural phases. Even there is restrictive interpretation of this principle, arbitrators have to be aware that violation of the proper notice principle may endanger and compromise the validity of the arbitral award.

III.2.2. Right to be heard

The equal opportunities and the parties' right to present their case is the second element of the *due process*. It's a complex question that requires arbitration tribunal to treat parties equally, to give equal opportunities (equality of arms), each party's right to a full opportunity to present its case (right to be heard), each party's right to confront the opposing party's witnesses and evidence and each party's right to defend itself. Additionally, verification of the importance of this principle is given by the terminology used in Article V(1)(б) of the New York Convention, according to which it will consider as violation of the *due process* if the party "**was unable to present his case**."[69]

Having in mind this, the first question that has to be answered is the question related to **oral hearings**. Namely, it is a question that is left on parties' autonomy to decide on the type of proceedings. Hence, if they agree, or refer to arbitration rules, that the arbitration proceedings will be conducted by documents exchange only, then non-conducting oral hearings by the arbitration tribunal will not be considered as violation of *due process*. The situation is different if the arbitration tribunal failed to conduct oral hearings even if the agreement or the applicable procedural law requires it. In that case, this failure may be considered as a violation of Article V(1)(d) of the New York Convention.

Beside the importance of the question of **proper notice** that was explained in point III.2.1, next important question is the **right of the party to submit evidences and propose witnesses**. This right is the key element of the *due process* which allows parties to fully present their case. However, this right is not unlimited since the arbitral tribunal has power to determine the admissibility, relevance, materiality and weight of any evidence.[70] In other words, the arbitral tribunal "may refuse to admit evidence which is offered where such

[68] *BIVAC v. Paraguay*, ICSID Case No. ARB/07/9, Decision on Jurisdiction (May 29, 2009), 41-43.
[69] New York Convention (1958), Article V(1)(d).
[70] UNCITRAL Model Law, Article 19(2). Similar: English Arbitration Act, Section 34(2)(f); German Arbitration Act, Section 1042(4); Federal Statute of Private International Law (Switzerland), Article 184(1); Law on Arbitration (Slovenia), Article 23(2); Law on Arbitration (Croatia), Article 18(2); Law on International Commercial Arbitration of the Republic of Macedonia, Article 19(2); UNCITRAL Arbitration Rules, Article 27(4); LCIA Arbitration rules (2014), Article 22.1(vi); SCC Arbitration rules (2017), Article 31(1); Swiss Rules (2012), Article 24(2).

evidence is manifestly irrelevant to the case or where such refusal is justified having regard to the time at which the evidence is offered."[71] This is confirmed by the Court of Appeals in Bizkaia (Spain) decision which held that "…arbitral tribunal are under no obligation to admit all and any evidence offered by the parties … a parties' right to be heard is not breached by a court or Arbitral Tribunal's decision not to admit evidence."[72] Moreover, "the courts are generally averse to the allegation that the arbitrator has refused to postpone the arbitration hearing because a witness of the respondent was unable to appear at a given time or has refused to hear a witness, considering the hearing unnecessary."[73] Therefore, arbitrators' refusal to admit evidence or witnesses will not be automatically considered as a violation of *due process*. It means that they will be evaluated case by case and only serious failures of arbitration tribunal could be considered as violation of *due process*.

Furthermore, very important part of the right ones' to present his case is the **right to confront the opposing party's witnesses and evidence**. Regarding this question, UNICTRAL Model Law provides that:

> "(3) All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties."[74]

Having in mind that more or less all national arbitration laws contain similar provision,[75] "implies that the arbitrator must inform a party of the arguments and evidence of the other party and allow the former to express an opinion thereon."[76] Failing to respect the parties' right to deal with the opponent's arguments and evidences may be considered as a violation of *due process*.

This is confirmed by the District Court The Hague decision in *Rice Trading (Guyana) Ltd. v. Nidera Handelscompagnie BV* case. Hence, the issue arises since it was concluded that five documents that was submitted by *Rice Trading* after the date on which Nidera submitted its statement of claim were not forwarded to *Nidera*. Commenting procedure the court held that:

> "…for us to conclude in the present case that Nidera waived its right, based on the fundamental procedural principle of contradictory proceedings, to comment on these documents either orally or in writing, it would be necessary at least that Nidera explicitly agreed that it would not react, either orally or in writing, on the documents unknown to Nidera."[77]

Having in mind that there were no statement of Nidera concerning waiving its right, the President correctly concluded that the arbitral tribunal violated the fundamental right to contradictory proceedings to Nidera's disadvantage."[78] Similarly, the Swiss Supreme Court has also decided that "an arbitral tribunal violated the parties' right to be heard by hearing

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[71] Swedish Arbitration Act, Section 25 paragraph 2.

[72] Court of Appeals in Bizkaia, Spain in Norplanet v Transporters Bubainos Vizcaya Audencia Provicial de Bizakia, F.s. Mantilla, "Decision of 29 May 2009," A Contribution by the ITA Board of Reporters, in Nathan D. O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide*, Taylor & Francis, 2013, p. 78.

[73] Berg (1981), op. cit., p. 309.

[74] UNCITRAL Model Law, Article 24(3).

[75] German Arbitration Act, Section 1047(3); Law on Arbitration (Slovenia), Article 28(3); Law on Arbitration (Croatia), Article 23(4); Law on International Commercial Arbitration of the Republic of Macedonia, Article 24(3).

[76] Berg (1981), op. cit., p. 307.

[77] *Rice Trading (Guyana) Ltd. v. Nidera Handelscompagnie BV*, Yearbook Commercial Arbitration XXIII (1998), (Netherlands no. 24), pp731-734, in O'Malley, op. cit., 77. See also: Amsterdam Court of Appeal (G.W.L. *Kersten & Co. BV v Societe Commerciale Raoul - Duval et Cie*, decided 1992), YCA XIX (1994), p. 708.

[78] Ibid.

from an expert on technical issues without informing the parties."[79] Even the fact that the arbitral tribunal later informed parties for the consultations and question discussed, the fact that parties were unable to participate at the consultations and were unable to submit questions to the expert was considered as violation of *due process* by the court.[80]

Finally, it is also important to be examined situation when party properly noticed **refuses to participate at the proceedings or remains inactive**. For that purpose, the UNCITRAL Model Law provides that if the respondent fails to communicate his statement of defense in accordance with article 23(1) or any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal shall continue the proceedings and make the award on the evidence before it.[81]

There are a lot of examples where courts refuse the inactive parties allegations that were unable to present their cases. Likewise, in the ICC arbitration seated in Switzerland between *Biotronik, ETC. v. Medford Medical Instrument Co,* even properly noticed, defendant refused to participate at the proceedings claiming that there are still rights and obligations and the agreement hadn't expired. However, the US District Court in New Jersey refused this allegation and stated that defendant misunderstood the *due process* principle. According to the court, as he was properly informed and invited by the arbitral tribunal, he should make that allegation before the tribunal as a part of his right to present his case. The fact that the defendant refused to participate at the proceedings could not be considered as violation of *due process*.[82] Thereon, the conclusion is that *due process* principle in arbitration requires active involvement and participation of the parties.

All of these cases shows the importance of the principle "right to be heard" as a fundamental part of *due process*. Therefore, arbitrators must ensure that all parties are treated equally during the proceedings, and that each of the parties had opportunity to fully present his case and to deal with the opponents' case. On the other hand, parties' must be aware that they have to be proactive during the proceedings and their failure to participate or to act will not be considered as a violation of *due process* principle.

IV.CONCLUSION

The International Commercial Arbitration became most attractive and preferable method for dispute settlement out of the national courts. With the delegation of jurisdiction to arbitral tribunals to produce awards that will be legally recognized and enforceable, all countries impose minimal procedural standards that has to be applied to each arbitral proceedings. According to these minimal procedural safeguards all arbitration proceedings has to be fair, just and impartial with equal treatment of the parties. These procedural *due process* standards are mandatory and cannot be derogated with the parties' agreement or with the arbitrators' unilateral decision.

The fundamentals of *due process* principle according to Article V(1)(b) of the New York Convention (1958) are the proper notice and right to be heard. According to the first

[79] Tribunal Federal (decide Feb. 8, 1978, [1980] SI, 65 (Supreme Court Switzerland), in Jana, Armer and Kranenberg, op. cit., p. 247.
[80] Ibid.
[81] UNCITRAL Model Law, Article 25(2) and (3). Similar: English Arbitration Act, Section 41; German Arbitration Act, Section 1048; Law on Arbitration (Slovenia), Article 29; Law on Arbitration (Croatia), Article 24; Law on International Commercial Arbitration of the Republic of Macedonia, Article 25; UNCITRAL Arbitration Rules, Article 30; ICC Rules of Arbitration (2012/2017), Article 26(2); LCIA Arbitration rules (2014), Article 15.8; SCC Arbitration rules (2017), Article 35; Swiss Rules (2012), Article 28; The Permanent court of Arbitration of the Economic Chamber of Macedonia Rules (2011), Article 47.
[82] U.S. District Court for the District of New Jersey - 415 F. Supp. 133 (D.N.J. 1976).

element, arbitral tribunal must conduct the arbitration proceeding in a way that will ensure that the parties are informed properly and in due time for all procedural phases, including appointment of arbitrators. The second element requires equal treatment of the parties during the procedure and equal opportunity to present their case and to confront the opposing party's witnesses and evidence. Even if there is a narrow interpretation of *due process* by the courts, arbitrators must be aware that violation of the *due process* principle may endanger and compromise the validity of the arbitral award. There is a wide consensus today that violation of these minimal procedural safeguards may lead to annulment of the award or for refusal of its recognition and enforcement. Moreover, the violations of the *due process* could be qualified as a violation of public policy too.

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