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"Last orders!" – But What About the Cut-Off-Date?

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I. From British Tradition to International Arbitration

"Last Orders!" is a long-standing and much-loved tradition in British pubs. The call for last orders is usually announced loudly by the bartender, sometimes even with a bell. This ritual does not only mark the final chance to buy a drink before closing time, but also carries a unique mix of practicality, courtesy and pub culture charm.

In international arbitration, things are less romantic. Still, there is something similar, namely the last chance to enter documents into the proceedings before the oral hearing takes place: the so called "cut-off-date". While each and every arbitrator has of course heard of the cut-off-date, a closer look reveals that the actual possibilities a cut-off-date offers after the regular submissions have been made are highly unclear. In fact, it is astonishing that while there is ample doctrine on the question whether, in exceptional cases, single documents may even be submitted after the cut-off-date has passed, the significance of the cut-off-date as such remains open. In particular, the question whether the cut-off-date is in fact a last hidden chance to file yet another submission not foreseen in the procedural timetable remains unanswered.

Does the cut-off-date therefore, just like the call for "last orders", offer yet another possibility to file an additional full submission accompanied by documents, or is it only a last resort to submit evidence that had not been available for use before or introduce new facts that could not have been pleaded in prior submissions? Funnily enough, this question remains totally unanswered in the arbitration literature.

II. Sense and Limits of Cut-Off-Dates

Procedural efficiency and fairness are of the utmost importance in ensuring the timely and equitable resolution of arbitral disputes. In connection therewith, the so called "cut-off-date" plays a significant role. A cut-off-date, which is always timed before the hearing takes place, is designed to prevent ambushes on and unfair surprises for witnesses.

Cut-off-dates are therefore one of the procedural tools used to regulate the submission and exchange of evidence in arbitral proceedings. A cut-off-date marks a point in time after which new documentary and other evidence will not be admitted or only admitted subject to more stringent thresholds. Such a date is usually incorporated into procedural orders (POs) and procedural timetables. The primary purpose of including a cut-off-date is to prevent parties from submitting new evidence or facts at a late stage, thereby safeguarding both sides from unexpected developments and surprises during the hearing.

Despite the widespread use of cut-off-date clauses by tribunals around the world, their interpretation and application can differ significantly. These disparities often stem from contrasting understandings of the term itself or ambiguous definitions of the clause's scope. This gives rise to several key questions: What constitutes a cut-off-date in the first place? This is of particular importance if the cut-off-date is an additional date in the procedural timetable after the last round of submissions. How should a cut-off-date clause be construed when the applicable arbitration rules offer no explicit guidance? To what extent may parties continue to make submissions or introduce new evidence before, on and after the cut-off-date, and are they permitted to introduce new arguments beyond that point? Moreover, can a party submit a full additional brief by the cut-off-date to address arguments previously raised by the opposing side, particularly when the procedural timetable does not expressly provide for such filings? Such an opportunity would, in its effect, then result in an unequal number of submissions on the side of claimants and respondents. Finally, what procedural or substantive consequences arise when a submission falls outside the prescribed scope or procedural timeline? Can it simply be dismissed by the tribunal?

These are the issues considered in this contribution. The authors further show best practices for arbitrators, emphasizing the importance of carefully and clearly drafting the cut-off-date clauses and other provisions of the respective PO to prevent misunderstandings and potential conflicts.

III. What Does a Cut-Off-Date Actually Cut-Off?

A. Definition and General Concept of a Cut-Off-Date

In the context of any arbitration, the role of evidence is of paramount importance. No party can succeed without the presentation of credible and persuasive evidence to substantiate its claims or defences. This, however, does not imply that all the evidence is presented directly at the outset; rather, it is common for further evidence to be submitted as both parties develop their respective cases and the proceedings progress. Quite often, the point in time at

which evidence is presented is of particular strategic importance and counsel might even withhold specific documents until the very last moment.

Nevertheless, it is necessary for the tribunal to ensure that neither party obstructs the proceedings by introducing new facts or evidence at an inconveniently late stage in the arbitration. This is particularly relevant in instances where the parties had ample opportunities to submit their respective evidence beforehand and were even obliged to do so by the concluding number of full submissions foreseen in the procedural timetable. Conversely, these actions may compromise the procedural efficiency of the arbitration. In order to circumvent such issues, and given that tribunals are generally expected to manage proceedings efficiently, they have a range of tools and procedures at their disposal. One such instrument is the implementation of a cut-off-date.[1])

First and foremost, a cut-off-date does of course not by itself constitute permission to file yet another submission. Rather, it is the date after which the introduction of new evidence into the proceedings will only be permitted under exceptional circumstances.

Thus, a cut-off-date does not stipulate that new substantive submissions and legal arguments may be filed at will until its expiry. The distinction is that, before the cut-off-date, a party may request leave of the arbitral tribunal to submit additional evidence without needing to demonstrate the existence of exceptional circumstances. Exceptional circumstances may, for instance, arise where the party concerned had no prior opportunity to present the relevant evidence earlier in the proceedings. By contrast, following the cut-off-date, the arbitral tribunal may insist on a higher standard and a party will be required, when seeking leave to submit new evidence, to also demonstrate that there are exceptional circumstances to permit its admission at such a late date. In other words: It is crystal clear that after the cut-off-date, only "fresh" evidence that was not accessible earlier or did not even exist before can be entered into the proceedings. But does this automatically mean that, until the cut-off-date, any evidence, as old as it may be, can still be successfully introduced?

In order to understand the purpose and function of the cut-off date, it is important to first look at the principal manner in which the submission of evidence and pleading in an arbitration is regulated; the procedural timetable (interpreted in accordance with the rules of procedure). The procedural timetable sets out the number of submissions the parties are to file, the date those submissions are due and (often) what those submissions should include.[2])

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[1]) Lasse Lehtonen, Laura Parkkisenniemi, *Chapter 10: Submitting New Evidence after the Cut-Off Date: When Are Exceptional Circumstances Present?*, in Schöldström/Danielsson, Stockholm Arbitration Yearbook 2023, 161.

[2]) Kristoffer Löf, Aron Skogman, *et al.*, Chapter 9: *The Proceedings, in Magnusson/Ragnwaldh, et al., International Arbitration in Sweden: A Practitioner's Guide* (2nd ed. 2021), 243 [107]; Dorda/Sessler/Pfisterer, *C. Abschließende (post-hearing) Schriftsätze,* in Torggler/Schäfer/Wong/Mohs/Wed, Schiedsgerichtsbarkeit (3rd ed. 2024), 488 [1229 *et seq.*].

Any element not encompassed within the procedural timetable is, *per se*, not a solicited submission – as it has not been agreed between the parties and received approval from the arbitral tribunal in advance. The same principle applies to evidence and witness or expert statements. It is standard practice for the parties to include all supporting evidence and accompanying documentation that substantiate their claims and present their case within their respective written submissions that are explicitly and finally listed in the procedural timetable.[3])

Nevertheless, certain documents or pieces of evidence may only become relevant at a later stage or may not be available for submission earlier. In such cases, a party wishing to submit such new evidence outside the defined procedural timetable must request leave of the arbitral tribunal to submit such evidence *before* entering that evidence into the procedure.[4]) It is by requesting prior leave that the arbitral tribunal is put in a position to fulfil its role of ensuring the efficiency of the procedure and protect the parties' due process rights. Importantly, the tribunal will need to weigh the potential relevance of the evidence for which leave is sought against potential delays it may cause in the procedure and the opposing party's right to respond or comment on the newly submitted evidence. The cut-off-date is a regulatory measure that is intended to support arbitral tribunals in making this assessment.

As will be discussed in more detail below, the cut-off date is a date agreed between the parties and the tribunal as the latest date after which it may be assumed that a party being asked to respond to new evidence will suffer a higher degree of prejudice in having to do so. This hurdle must be understood in the context of the procedural timetable and the planning and scheduling the parties have undertaken to ensure they are properly positioned to present their respective cases. The admission of new evidence after the cut-off-date will generally (depending on the nature and breadth of evidence submitted) have some effect on the parties' preparation of their cases and may also necessitate a postponement of the already agreed hearing dates – a consequence most tribunals greatly prefer to avoid.

Understood in this context as an agreement between all the stakeholders involved in the arbitration, it is clear that the arbitral tribunal may consider this kind of prejudice, and the parties' agreement on its existence after the cut-off-date, in deciding whether the unsolicited submission of new evidence or pleading is permissible.

In practice, parties often submit their new evidence concurrently with making their request for leave to have the evidence admitted to the record of

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[3]) Löf and Skogman, *supra* note 2, at 243 *et seq.*; Dorda/Sessler/Pfisterer, *supra* note 2, at 488.

[4]) Hahnkamper, *IX. Praxistipps für Schiedsrichter*, in Nueber, Handbuch Schiedsgerichtsbarkeit und ADR (1st ed. 2020), 980 [50].

the arbitration.[5]) This practice is to be discouraged and arbitral tribunals may wish to factor the breach of procedure in their assessment whether to grant leave to admit the evidence to the procedure or not. Ultimately, the circumstances of the case will be the determinative factor in whether any given request should be granted.

B. The Time of Fixing a Cut-Off-Date

As previously established, the cut-off-date is generally defined as the "final" opportunity – or in other words: "last order" – for the parties to add new evidence or arguments to the file.

Historically, cut-off-dates were commonly used after the procedural timetable had already been fixed in arbitrations that were already pending and where it was evident that a party was regularly amending its claims or the grounds thereof. Furthermore, tribunals used cut-off-dates in instances where a party has persistently presented further evidence, resulting in complex and time-consuming proceedings or even the postponement of fixed hearing dates.[6])

The dynamic has clearly shifted: Nowadays, parties and tribunals typically agree on cut-off-dates when fixing the procedural timetable, thus shortly after the arbitrators receive the file, in most instances during or after the case management conference. Tribunals therefore frequently incorporate cut-off-dates into POs or procedural timetables, even when there is no apparent indication to anticipate that a party will submit additional claims, evidence or arguments.[7])

Regardless of the temporal context, it is imperative that arbitrators notify the respective parties prior to setting a cut-off-date. The purpose of this procedure is to ensure that there are no surprise decisions and that the parties are aware of the timeframe in which they are on the safe side to submit evidence. Consequently, they are able to arrange the presentation of their case in advance, which has a positive effect on both the efficiency and duration of the respective arbitral proceeding.[8])

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[5]) *Id.*, at 980 [50].

[6]) Lehtonen and Parkkisenniemi, *supra* note 1, at 162.

[7]) Lehtonen and Parkkisenniemi, *supra* note 1, at 162.

[8]) Franz T. Schwarz, Christian W. Konrad, *Article 20: The Conduct of the Proceedings*, in Schwarz/Konrad, The Vienna Rules: A Commentary on International Arbitration in Austria (2009), 444 [20-072].

C. The Scope of the Cut-Off-Date

Despite the fact that cut-off-dates are widely recognised and used, not many arbitration rules contain an explicit provision concerning the exact meaning thereof. Most of the rules tend to merely grant the tribunal the authority to conduct the proceedings in an efficient manner. This authority will include the implementation of cut-off-dates. In addition, the imposition of cut-off-dates is often the consequence of the applicable rules, stipulating that submissions shall be made and evidence shall be provided "within the time limits set by the tribunal".[9])

For instance, the Rules of Arbitration of the Danish Institute of Arbitration 2021 (DIA Rules) provide in Article 34 that all documents or other evidence must be submitted in accordance with the set time limits. A failure to comply with the set limits may cause the rejection of the respective submission unless the tribunal considers the failure justified, or if *special circumstances* exist.

Any preclusion of evidence or of any submission is, however, limited by the parties' right to be heard and their right to fair and equal treatment.[10])

Furthermore, the authority to implement cut-off-dates can also be inferred from the application of the IBA Rules on the Taking of Evidence as tribunals – or more specifically – the decisions of tribunals with respect to the taking of evidence are often guided or inspired by these rules.[11])

Article 3 of the IBA Rules on the Taking of Evidence provides: "*Within the time ordered by the Arbitral Tribunal, each Party shall submit to the Arbitral Tribunal and to the other Parties all Documents available to it on which it relies [...]*". Moreover, Article 9 establishes, that the Tribunal shall "*determine the admissibility, relevance, materiality and weight of evidence*".

The authority to set cut-off-dates is also derived from major arbitration frameworks: For example, the Vienna Rules 2021 stipulate in Article 28 (2) the following: "*Upon prior notice, the arbitral tribunal may inter alia consider pleadings, the submission of evidence, and requests for the taking of evidence to be admissible only up to a certain point in time of the proceedings.*"

Moreover, Article 22 (2) of the International Dispute Resolution Procedures (including Mediation and Arbitration Rules) 2021 (ICDR Rules) reads as follows "*The tribunal shall conduct the proceedings with a view to expediting the resolution of the dispute. The tribunal may, promptly after being constituted, conduct a procedural hearing with the parties for the purpose of organizing, scheduling, and agreeing to procedures, including the setting of deadlines for any submissions by the parties.* [...]"

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[9]) Lehtonen and Parkkisenniemi, *supra* note 1, at 162.

[10]) Schwarz and Konrad, *supra* note 8, at 486 [20–183].

[11]) Lehtonen and Parkkisenniemi, *supra* note 1, at 163; Löf and Skogman, *supra* note 2, at 244 [109].

Furthermore, the International Chamber of Commerce (ICC) has published a Commission Report in 2021. These reports are developed by expert commissions with the aim of improving the efficiency, fairness and predictability of international commercial practices through commentary, practical tools and best practices. The ICC established the following as a *best practice* for arbitrators: "*In advance of any evidentiary hearing, consider setting a cut-off date after which no new documentary evidence will be admitted unless a compelling reason is shown.*"[12])

On the other hand, there are some arbitration rules that explicitly refer to a cut-off-date: For instance, the Arbitration Rules of the Finland Chamber of Commerce 2020 (FAI Rules) contain an explicit "cut-off-date" provision in Article 35. This Article stipulates that after the agreed upon date, no party will be allowed to present any new claims, arguments or documentary evidence on the merits of the dispute, nor invoke any new witnesses not previously nominated, unless the tribunal in "*exceptional circumstances decides otherwise*".

Furthermore, the Rules on the Efficient Conduct of Proceedings in International Arbitration ("Prague Rules") also contain an explicit provision in Article 3.3: "*The arbitral tribunal shall consider imposing a cut-off date for submission of evidence and not accepting any new evidence after that date, save for under exceptional circumstances.*"[13])

It is evident that, even in instances where explicit cut-off-date provisions are included in the rules, their scope may vary. For instance, the FAI Rules stipulate a rather extensive scope of application: The cut-off-date restriction covers new claims, arguments or documentary evidence on the merits of the dispute. In addition, it limits the introduction of new witnesses not previously nominated. On the other hand, the Prague Rules only refer to the submission of evidence. *Consequently, when drafting a cut-off-date clause, the Tribunal should be mindful of the wording of both the underlying rules, if any, and its own chosen terminologies.*[14])

This raises the question of how to proceed when the applicable rules do not contain any provisions regarding a cut-off-date clause. *The answer is straightforward*: It falls to the respective tribunal to establish the specific terms of such clauses, as it holds both the authority and the duty to determine the procedural framework governing the conduct and organization of the proceedings. In such instances, the tribunal is at liberty to decide whether and how to stipulate a cut-off-date provision and the other provisions of the PO to establish what may and may not be submitted. *In order to preserve the parties'*

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[12]) The International Chamber of Commerce (ICC), *Controlling Time and Costs in Arbitration* 2021, 14 [73].

[13]) These rules were first introduced and developed by a Working Group of nearly 30 representatives of civil law countries in 2018. These rules are not mandatory but serve as a non-binding, soft-law supplement that parties and arbitral tribunals can agree to apply in international arbitration proceedings.

[14]) Lehtonen and Parkkisenniemi, *supra* note 1, at 164.

right to a fair hearing, the tribunal should clearly define and stipulate this from the outset of the proceedings.[15])

Established doctrine also reveals differing interpretations of the scope of a cut-off-date clause. Some authorities confine its application to the introduction of newly produced evidence; some extend it to the submission of previously undisclosed documents. Other interpretations adopt a broader view, extending the clause's scope to encompass the introduction of new factual as well as legal pleadings.[16]) In the majority of cases, however, the cut-off-date is set for the submission of "new" evidence, without further explaining whether the evidence existed before or not.[17])

In the absence of explicit provisions in the applicable arbitration rules, the determination of this matter rests within the discretion of the arbitral tribunal. As a result, the scope and effect of such clauses are defined by the arbitrators on a case-by-case basis. *Ultimately, the precise wording of the clause remains of paramount importance.*

IV. A Cut-Off-Date After the Last Round of Submissions Does Not Constitute a Right to "a Very Last Submission"

All the above considerations show that it is, of course, best for the tribunal to *explicitly regulate* that the cut-off-date only serves for submitting documents that either did not exist when the last submission was due or could, despite reasonable efforts, not have been obtained or presented in this submission. If the procedural timetable fixes an equal number of submissions for both parties, "this is it". Setting an additional cut-off-date can therefore not be used – or abused – by either party to file yet another substantive submission including evidence that had been available well before that date.

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[15]) *Id.*, at 164; A. Horvath, Meisinger, *Beweisverfahren*, in Czernich/Deixler-Hübner/Schauer, Handbuch Schiedsrecht (2018), 468 [13.43].

[16]) Dorda/Sessler/Pfisterer, *supra* note 2, at 488 [1230]; Gary Born, *Chapter 15: Procedures in International Arbitration (Updated March 2024)*, in Born, International Commercial Arbitration (3rd ed. 2024), [Y]; Eliane Fischer and Courtney Furner, *Chapter 48: Early Case Documents*, in Lotfi/Zielińska-Eisen, *et al.*, International Arbitration in Practice, 549.

[17]) Andrea Meier, Nadja Kull, *Chapter 17, Part II: Commentary on the ICC Rules, Appendix IV [Case management techniques]*, in Arroyo, Arbitration in Switzerland: The Practitioner's Guide (2nd ed. 2018), 2346 [11]; Irene Welser, Christian Klausegger, *Fast Track Arbitration: Just fast or something different?*, in Klausegger/Klein/Kremslehner/Petsche/Pitkowitz/Power/Welser/Zeiler, Austrian Arbitration Yearbook 2009, 266.

Such an understanding can also implicitly derive from a procedural timetable with a strictly specified number of rounds of written submissions.[18]) In the event that such a strict timetable with an exhaustive number of submissions (*e.g.*, Full Statement of Claim, Full Statement of Defence, Rejoinder, Rebutter, Re-Rejoinder and Re-Rebutter) exists, it is clear that no further submissions are allowed, even if an (additional) cut-off-date is fixed out of precaution. Such additional cut-off-date merely allows a party to draw conclusions from facts that did *not yet exist* when its last submission was due or to submit documents *that could not be filed before*. Adopting a good faith approach, this may include documents that already existed, but were not accessible to such party. By contrast, newly drafted written witness statements just to "rebut" the opponent's last submission to not fall under this exception.

When the tribunal, in cooperation with the parties, establishes the procedural timetable, it is perfectly clear that it will be one party – usually the respondent – to have the "last word". The stipulation of a cut-off-date is not an excuse to circumvent this rule and to file an extra "unsolicited" submission. Therefore, if the parties expressly agreed on a procedural calendar with a specified number of submissions, no additional submission may be filed by the cut-off-date.

Quite frequently, PO1 will contain wording more or less similar to the following:

> "*The number and sequence of pleadings was determined by the parties in the procedural calendar. However, the arbitral tribunal may at any time request the parties to submit further pleadings on specific issues which it considers essential for its decision.*".

Already such a provision makes it clear that, without substantive and unforeseen reasons, no party may "save" its final arguments or additional evidence that had been available before until the cut-off-date.

The cut-off-date is therefore not at all comparable with a call for "last orders" in a British Pub.

If the arbitral tribunal does not request the parties to submit any further pleadings after the last submission has been filed, no additional submissions are permissible as per the cut-off-date unless new facts arise or new documents become available.

Any party wishing to submit an additional written statement that is not provided for in the procedural calendar must therefore first submit a corresponding application. Written statements or submissions of substantial content that are submitted without prior permission from the arbitral tribunal

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[18]) Dorda/Sessler/Pfisterer, *supra* note 2, at 488 [1229 *et seq.*]; Irene Welser, Susanne Wurzer, *Formality in International Commercial Arbitration – For Better or For Worse?*, in Klausegger/Klein/Kremslehner/Petsche/Pitkowitz/Power/Welser/Zeiler, Austrian Arbitration Yearbook 2008, 222 *et seq.*

are inadmissible, and the mere existence of an additional cut-off-date does not change this situation: they are to be rejected.

This is particularly clear if the PO1 expressly states that the parties must, in their respective filings, submit arguments in support of their positions and offer and include evidence to support them. Regularly, the factual and/or legal evidence, witness statements and/or expert opinions that a party intends to rely on must already be attached to these written submissions.

This automatically prohibits withholding certain documents until the very last minute for strategic reasons, even if a later cut-off-date is also foreseen in the procedural timetable.

Despite such a cut-off-date, it is inherent in any arbitration proceedings that the exchange of written submissions between the parties must come to an end at some point, whereby, for reasons of equal treatment, neither party may submit more written submissions than the other. Allowing one party to file yet another brief not provided for in the procedural timetable would violate the principle of equal treatment. Any other approach would result in an exchange of written submissions between the parties turning into a never-ending "ping-pong game".

Even if the cut-off-date is defined as "a date after which no party is permitted to submit new documents or request other evidence, unless the arbitral tribunal expressly permits this in individual cases", this does not automatically entitle any party to file yet another written submission *up to that date*. Quite to the contrary, if – as usual – the number of submissions is limited by number it follows that a further round of written submissions is not available and that the cut-off-date is intended for exceptional cases, such as those in which a party subsequently finds individual documents that it was previously unable to use.

In the above cut-off-date-definition containing the restriction to "new documents or other evidence", it is particularly clear that the cut-off date is not intended to allow parties to make submissions that they have previously failed to make, to submit documents that have long been known, and, in particular, to refute the arguments of the party that was entitled to submit the last written statement according to the agreed procedural calendar.

All this does not, of course, preclude the possibility that, in individual cases, a procedural order could take a different approach and grant the parties a "final, joint round of written submissions" at the time of the cut-off-date.

To sum up: If a cut-off-date is provided for in the procedural timetable, this is not a permission for another submission, raising arguments that could long have been raised before, rebutting arguments of the opposite party that had, according to the procedural timetable, had the last word or to even submit evidence that could have been submitted before. The cut-off-date merely serves as a possibility to bring latest developments to the tribunal's attention that could not have been addressed before, or to submit documents that were not accessible earlier. Never may a cut-off-date be used to file newly drafted written

witness statements or expert reports serving solely to rebut the opponent's arguments or evidence.

This is further supported by the fact that, under most institutional arbitration rules, all parties to the arbitration proceedings must act in good faith; they shall use all means to ensure that the proceedings are conducted efficiently and avoid unnecessary costs and delays.

The cut-off-date cannot therefore not be interpreted as granting the parties autonomous discretion to submit documents at will or on a continuous basis until the cut-off-date elapses.

V. Submissions Made On and After the Cut-Off Date: Legal and Practical Challenges

With regard to submissions made either before or after the stipulated deadline, two principal issues arise: the scope of application of the clause in question and the extent of the tribunal's discretion in addressing such submissions that fall outside the stipulated scope or are submitted belatedly.

Regarding the first matter, *i.e.,* the scope, the following points are noted: Arbitrators tend to interpret the cut-off-date clauses and thus the respective scope of these clauses strictly based on the wording. For instance, in *SCC case 2018/127,* a dispute arose concerning the scope of the respective cut-off-date clause. The clause in question in the respective PO read as follows:

> *"After the cut-off date mentioned in Section (1) of the Procedural Timetable, the parties are not permitted to submit any additional documentary evidence or legal texts. The Arbitral Tribunal will not accept any late submission unless the Arbitral Tribunal in exceptional circumstances decides otherwise upon a party's reasoned request showing sufficient cause for the delay."*

The arbitrators thus concluded that – seeing that the clause did not contain *oral* witness testimonies – new oral witness testimonies were admissible (even after the cut-off-date elapsed). This decision was justified on the basis that the clause in question was unambiguous and could not be subject to contradictory interpretation.[19]) This case shows how important it is to draft the relevant cut-off-date provision carefully and precisely. Unclear wording of the clause can lead to many conflicts and possible legal consequences, some of which are dealt with in Chapter VI.

With regard to the latter issue, specifically the arbitrators' handling of and discretion regarding belated submissions, the following should be noted: As previously stated, the cut-off-date does not constitute an invitation to

[19]) Lehtonen and Parkkisenniemi, *supra* note 1, at 164; SCC Case No. 2018/127, Final Award, 14 November 2019, paras 38, 161–170.

submit. Accordingly, irrespective of the timing – whether occurring before or after the cut-off-date – the submission remains one not previously consented to by the parties or the tribunal and, as such, is subject to the tribunal's prior authorization. The difference is that, after the designated date has passed, the burden of justification increases significantly for the parties, who are required to provide substantial justification for their submission. The tribunal will then have to determine the weight of the submitted materials, and whether this submission bears the risk of delaying the proceedings if accepted or whether it is only presented with the aim of surprising the other party. Furthermore, the Tribunal will have to consider whether there was a relevant reasoning for not making a prior submission.[20]) Ensuring the procedural efficiency is the tribunal's main priority. In order to achieve this, most POs grant the tribunals the authority to reject belated submissions, which do not follow from the agreed timetable or which are not specifically requested beforehand by the tribunals.[21])

It is evident that submissions made either before or after the designated cut-off-date may give rise to procedural disputes, particularly when the scope of the relevant clause lacks sufficient precision. As previously stated, submissions that are not submitted within the specified procedural timetable are generally regarded as unsolicited. In such instances, the tribunal retains the discretion to admit or reject these submissions.

From a legal standpoint, these circumstances test the balance between procedural fairness and the tribunal's duty to ensure efficiency and finality. From a practical perspective, they prompt consideration of how tribunals should address late or additional evidence without undermining the integrity of the arbitral process or causing undue prejudice to either party. The interplay of these factors underscores the necessity of defining clear procedural consequences for breaches of cut-off-dates and maintaining consistent and predictable standards for their enforcement.

VI. Tribunal Discretion and Legal Consequences

As previously established, arbitral tribunals generally enjoy broad discretion in the conduct of arbitral proceedings. This discretion is recognized by many rules and conventions, such as the New York Convention. The tribunal may determine the arbitral procedure, including admissibility and relevance of evidence. This discretion is subject to the principles of fairness, equality and the right to be heard. In principle, the parties have procedural autonomy, meaning they can agree on rules to govern the arbitration, but failing such

[20]) Löf and Skogman, *supra* note 2, at 270 [212].
[21]) *Id.*, at 243 *et seq.*

agreement, the tribunal may conduct the proceedings as it sees appropriate. This is under the rationale of the applicable laws and rules.

POs intend to set specific procedural rules for the parties from the outset of the proceedings. This results in predictability and efficiency of the arbitration. The content of the POs depends on the level of detail both the parties and the tribunal consider necessary. Normally, the parties and the tribunal endeavour to resolve as many procedural matters as possible in the POs. The rationale behind this is to mitigate the risk of unforeseen and timely procedural issues arising.[22])

Disputes regarding the permissibility of certain submissions prior to and after the designated cut-off-date are sometimes used by the parties to invoke a violation of their right to fair treatment or their right to be heard. Arbitral Tribunals, however, should not be too timid *vis-à-vis* such complaints. *No "due process paranoia", please!*

Again, it needs to be stressed that the cut-off-date is the date, where the presentation of both parties is "cut-off", once *they had a reasonable chance to present their case.*[23]) Pleadings cannot go on forever.

Tribunals should therefore not be overly cautious while dealing with procedural decisions such as belated introduction of additional evidence. Only where a party has been totally denied the opportunity to be heard without a reasonable justification, this can be considered to be a ground for annulment of the award. This is, of course, not the case if a predefined cut-off-date is taken into account. In addition, both parties will of course have the right to react to the opposing party's submission during the oral hearing and therefore, the right to be heard is of course ensured.

Parties cannot be allowed to submit everything and at every single stage of the arbitration, until they are satisfied with presenting their case. *Therefore*, arbitral tribunals should not fear to formally reject belated submissions and evidence, as the rejection of late filings does not violate due process, if each party has had a reasonable opportunity to present its case before.[24])

Accordingly, the tribunal bears the duty to prevent the process from devolving into an unrestrained or continuous exchange of pleadings and documents.[25])

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[22]) Fischer and Furner, *supra* note 16, at 536 [D].

[23]) Nikolaus Pitkowitz, *Chapter II: The Arbitrator and the Arbitration Procedure, The Vienna Predictability Propositions: Paving the Road to Predictability in International Arbitration*, in Klausegger/Klein, *et al.*, Austrian Yearbook on International Arbitration 2017, 135.

[24]) Rolf Trittmann, Ramona Schardt, *§2.05: The Proceedings Before the Arbitral Tribunal, Article 31: Closing of Proceedings*, in Flecke-Giammarco/Boog, *et al.*, The DIS Arbitration Rules – An Article-by-Article Commentary (2020), 496 [14]; Schwarz and Konrad, *supra* note 8, at 445 *et seq.* [20-075 *et seq.*].

[25]) Trittmann and Schardt, *supra* note 24, at 496 [14]; Schwarz and Konrad, *supra* note 1, at 445.

VII. "Best Practice" for Arbitrators

Tribunals should implement clauses which clearly define the scope of the cut-off-date. It is helpful if transparent guidelines are provided on what can and cannot be submitted.

Therefore, draft with precision today to avoid deliberation regrets tomorrow.

This principle also applies to the other provisions of the respective PO and to the procedural timetable. It is imperative to establish explicit criteria from the outset to determine acceptable submissions and those that are not.

Drafting POs with foresight spares the tribunal from future friction.

In addition, the cut-off-date in question, while making clear that it does not give room to make up for prior omissions, should be set within a reasonable margin to the last submissions of the parties as well as to the hearing. The cut-off-date clause should further, if necessary, allow the tribunal to grant the other party reasonable time to respond. This should happen without the possibility of delaying or jeopardizing the scheduled hearing.[26])

Draft cut-off provisions to give room for response, not room for delay.

While strict timelines are essential for POs, tribunals should retain the authority to permit reasonable accommodations when justified. This ensures that neither party is unfairly disadvantaged due to unforeseen circumstances. Any exception to the cut-off-date should be granted only upon showing substantial cause, and the other party must always be given adequate time to respond to new material.

Therefore, maintain firm timelines, but let flexibility serve fairness, not convenience.

Provisions should be drafted to prevent strategic or negligent behaviour. A party should not be able to use late submissions nor procedural requests as means to delay the proceedings or jeopardize the subsequent scheduled hearing.

Procedural clarity is the best shield against strategic misuse and delay.

The cut-off-date clause should clearly define what happens if a party submits materials after the cut-off-date or submissions, that fall outside of the stipulate scope of this clause. Consequences might include an exclusion of the submission, the denial of consideration or cost implications for the respective

[26]) Martin Agren, Niklas Astenius, *Chapter 3: Time and Cost in Arbitration*, in Magnusson/Ragnwaldh, *et al.*, International Arbitration in Sweden: A Practioner's Guide (2nd ed. 2021), 88 [105].

party. These measures encourage compliance and reinforce procedural discipline. However, flexibility should remain for the tribunal to accept late materials when refusal would compromise the fairness of the proceedings.

Therefore, define consequences clearly – discipline thrives where uncertainty ends.

To conclude: A well-drafted cut-off-date clause contributes significantly to clarity, predictability, and equality between the parties. It helps avoid negative surprises, promotes a timely management of the proceeding and supports the tribunal in conducting efficient and orderly hearings. When both parties understand the boundaries and potential impacts from the outset, the process becomes more transparent and less predisposed to contention.

And, at long last:

Don't let due process paranoia get hold of you!