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New Claims and Amended Claims in International Arbitration – Finding Landmarks in Navigating the Tribunal's Discretion

During arbitral proceedings, a party may try to introduce new claims or to amend its original claims. The applicable arbitration law and the institutional rules chosen by the parties, if any, may not necessarily give a clear answer to the admissibility of such new or amended claims, other than to afford the tribunal large discretion in its decision. This article gives a short overview of the provisions in arbitration laws and institutional rules governing the issue, and then presents a framework of factors to be considered by the tribunal in making its decision.

Während des Schiedsverfahrens kann eine Partei versuchen, ihre Klage zu ändern oder mit neuen Rechtsbegehren zu ergänzen. Das anwendbare Schiedsverfahrensrecht und, falls vorhanden, die von den Parteien gewählte Schiedsordnung geben in der Regel keine eindeutige Antwort auf die Zulässigkeit solcher neuer oder geänderter Rechtsbegehren und räumen dem Schiedsgericht einen großen Ermessensspielraum bei seiner Entscheidung ein. Dieser Artikel gibt einen kurzen Überblick über die Bestimmungen in verschiedenen Gesetzen zur Schiedsgerichtsbarkeit und Schiedsgerichtsordnungen, die solche neue oder geänderte Rechtsbegehren regeln, und stellt dann einen Rahmen verschiedener Aspekte vor, die das Schiedsgericht bei seiner Entscheidung zu berücksichtigen hat.

I. Introduction

Arbitral tribunals endeavor to ensure the fair conduct of the proceedings. One issue that they may face in this context is deciding whether to allow parties to amend their claims and/or to submit new claims during the arbitration proceedings. Although they may have legitimate reasons for filing new or amended claims, some parties may attempt to use such instrument to delay arbitration proceedings and/or obtain other undue advantages. The question thus arises as to the requirements under which a party should be allowed to submit new claims or to amend already submitted claims during ongoing proceedings.

The present article discusses said question and suggests some answers. As a first step, this article explores the definition of an "amendment of claims" and of "new claims" and seeks to differentiate these from other concepts. The article then gives an overview of the requirements for the amendment of claims and the submission of new ones from a comparative perspective and under selected *leges arbitrae* and institutional

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rules. This analysis reveals that the arbitral tribunal usually has large discretion in making its decision on the admissibility of new or amended claims. In order to bring some structure in this regard, the article proposes a framework of factors which an arbitral tribunal may wish to consider when deciding whether to admit or reject new or amended claims.

II. Definitions and Distinction from Other Concepts

Although some national arbitration laws and institutional rules contain specific provisions regarding the requirements for the amendment of a claim or the submission of a new one, they usually do not define what it means for a claim to be "amended" or when a claim must be considered "new". As will be seen in the following, it is important to define and distinguish the filing of amended and new claims from other types of actions, such as the submission of new facts, the filing of new evidence or the withdrawal of claims. Given that there is no universally accepted definition of the concepts involved, the comments below reflect the authors' understanding of the matter.

The identity of a dispute may be pinpointed by the combination of the prayers for relief and the underlying cause of action.[1] Prayers for relief can be defined as the precise indication of the requests the party intends the judgment to rule upon.[2] In contrast, the cause of action is "*the claim's factual basis, i. e. the whole complex of facts and circumstances from which the claim emanates*".[3] As a result, an *amended claim* will refer either to a change in a party's prayers for relief or to a change in the underlying cause of action.[4]

A change in the wording of the prayers for relief without changing their meaning or purpose will not in itself be an amendment of the claim.[5] For a claim to be considered amended, the change in the prayers for relief must relate to a quantitative or qualitative increase to the prayers,[6] rather than a restriction thereof, which may be considered a withdrawal of the claim. Such withdrawal of claims will usually have *res iudicata* effects,[7] unless the opposing party agrees to a withdrawal without prejudice.[8]

A change in the cause of action is where the facts of the case have fundamentally changed.[9] In such a case, a party may amend its claim by changing the prayers for relief based on new facts that change the underlying cause of action. For example, it may increase its damages claim by submitting new facts that show the loss incurred was even larger than it initially assumed.[10] This has to be distinguished from the situation in which a party simply submits new facts or evidence to support its original claims, which does not constitute an amendment of the former claim.[11]

It must also be noted that, where the principle of *iura novit curia* applies, a party may be allowed to make new legal arguments in support of its claim or to change the legal qualification of its claim (such as basing the same claim in contractual law instead of tort law) even where it may not submit new claims (such as where the tribunal has set a deadline for new claims to be submitted, and this deadline has already expired).[12]

In contrast to the above, a claim is "new" where it is independent of the previous claims.[13]

As will be shown below, some national arbitration laws and many institutional rules provide specific guidelines for submitting new or amended claims or counterclaims. The applicable rules may not differentiate between new or amended claims, and scholars commenting on such rules may have a different understanding of new or amended claims than outlined above.

III. New and Amended Claims under National Arbitration Laws

According to most national arbitration laws, new or amended claims will generally be considered admissible during the proceedings, although the arbitral tribunal is granted considerable discretion in its decision on admissibility.

Many *leges arbitrae* contain specific rules governing new or amended claims in arbitration. For example, § 1046(2) of the German Civil Procedure Code and Art. 23(2) of the UNCITRAL Model Law provide that either party may amend or supplement its claim or defense during the arbitral proceedings, unless the parties have agreed otherwise, except where the arbitral tribunal finds it inappropriate to allow such amendment having regard to the delay in making it without sufficient justification. This is also understood to encompass making new claims.[14]

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1) *Berger/Kellerhals*, International and Domestic Arbitration in Switzerland, 4th ed. 2021, 440, who also name the statement of defense and counterclaim as defining the subject-matter of the dispute.

2) See *Perret*, Les conclusions et les chefs de la demande dans l'arbitrage international, ASA Bull. 1/1996, 7.

3) *Berger/Pfisterer*, Article 20, Amendments to the Claim or Defence, in Zuberbühler/Müller/Habegger (eds), Swiss Rules of International Arbitration, Commentary, 2nd ed. 2013, 228.

4) *Berger/Kellerhals*, International and Domestic Arbitration in Switzerland, 4th ed. 2021, 440.

5) *Berger/Pfisterer* in Zuberbühler/Müller/Habegger (eds), Swiss Rules of International Arbitration, Commentary, 2nd ed. 2013, 227.

6) For a different opinion in relation to new and amended claims in ICC arbitrations, see *Verbist/Schäfer/Imhoos*, ICC Arbitration in Practice, 2nd ed. 2016, 133, who consider that "*a mere increase in the amount of a claim based on facts that have already been presented in time*" do not relate to the "*question […] as to whether the parties may add to their claims or bring new claims after the Terms of Reference have been signed*".

7) See *Berger/Pfisterer* in Zuberbühler/Müller/Habegger (eds), Swiss Rules of International Arbitration, Commentary, 2nd ed. 2013, 227. National arbitration laws and institutional rules may govern the consequences of withdrawal specifically, see for example § 1056(2)(1)(b) German Civil Procedure Code.

8) For a detailed analysis of the topic, see *Haller/Keilmann*, In Claimant's Hands? Admissibility and Consequences of a Withdrawal of Claim in International Arbitration, J. Int'l Arb. 6/2018, 649 *et seqq*.

9) *Berger/Kellerhals*, International and Domestic Arbitration in Switzerland, 4th ed. 2021, 441 *et seqq*.

10) *Berger/Kellerhals*, International and Domestic Arbitration in Switzerland, 4th ed. 2021, 442.

11) See *Craig et al.*, Craig, Park and Paulsson on International Chamber of Commerce Arbitration, 4th ed. 2017, 279. See also *Perret* ASA Bull. 1/1996, 10.

12) See *Schneider/Scherer*, Art. 182 IPRG, in Grolimund/Loacker/Schnyder (eds), Basler Kommentar Internationales Privatrecht, 4th ed. 2020, 2057; *Schlosser*, Das Recht der internationalen privaten Schiedsgerichtsbarkeit, 2nd ed. 1989, 500.

13) *Berger/Pfisterer* in Zuberbühler/Müller/Habegger (eds), Swiss Rules of International Arbitration, Commentary, 2nd ed. 2013, 228-229.

14) *Sachs/Lörcher*, Part II: Commentary on the German Arbitration Law (10 Book of the German Code of Civil Procedure), Chapter V: Conduct of the Arbitral Proceeding, § 1046 – Statements of Claim and Defence, in Nacimiento/Kröll/Böckstiegel (eds), Arbitration in Germany: The Model Law in Practice, 2nd ed. 2015, 274 with further indications.

A similar provision can be found in Sec. 23(2) of the Swedish Arbitration Act (SAA), which (perhaps redundantly) also specifies that new claims must fall within the scope of the arbitration agreement. Comparable discretion is also given to the arbitral tribunal according to English arbitration law: Sec. 34(1) and 34(2)(c) of the English Arbitration Act (EAA) provide that it is for the tribunal to decide all procedural and evidential matters, including whether statements of claim and defense may be amended, subject to the right of the parties to agree on any matter.

However, not all arbitration laws contain explicit references to new or amended claims. For instance, in Switzerland, Chapter 12 of the Swiss Private International Law Act (PILA) does not contain such provision. The admissibility of new or amended claims must thus be considered in light of the general right of the parties to agree on the arbitral procedure (whether directly or by reference to arbitration rules), and, in the absence of such agreement, the right of the arbitral tribunal to determine the procedure (Art. 182(1) and (2) PILA).[15] Regardless of the chosen procedure, the arbitral tribunal must respect the parties' right to be heard and the right to equal treatment (Art. 182(3) PILA).

IV. New and Amended Claims in Institutional Rules and *ad hoc* Arbitrations

Where the applicable *lex arbitri* does not provide for specific instructions regarding the admission of new or amended claims, or where the provisions therein are not mandatory or not complete enough, the applicable arbitration rules, if any, may provide further guidance.

Many institutional rules contain an explicit provision according to which new or amended claims are admissible, with the exception of where the tribunal considers new or amended claims to be inappropriate, having regard to the delay in making it or prejudice to other parties or any other circumstances.[16]

Uniquely, the ICC Rules turn this around and in substance provide that new claims which fall outside the limits of the terms of reference are inadmissible after the terms of reference have been signed, unless the tribunal admits them.[17] It is generally accepted that the parties may freely file new claims until that moment, without needing to request leave from the ICC Court and/or the arbitral tribunal,[18] except where ordered otherwise by the arbitral tribunal.[19]

Other arbitration rules (such as the DIS Rules) do not contain any provision specifically linked to new claims or to the amendment of claims. In principle, thus, a party may attempt to raise a new claim at any stage of the proceedings.[20]

In *ad hoc* arbitrations, where no such specific rules are set out, it is commonly accepted that tribunals should be liberal in accepting amendments to claims and new claims, with the same limitations that typically apply under institutional rules (such as taking into consideration the delay in the proceedings or prejudice to the parties).[21] Some commentators advise that arbitrators should ideally explicitly indicate the moment from which new or amended claims can no longer be admitted.[22]

V. Relevant Considerations in Determining Whether to Allow New or Amended Claims

As seen above, in particular where there is no specific agreement of the parties in this respect, the arbitral tribunal has considerable discretion in deciding on the admissibility of new and amended claims. Yet, one may wonder what exactly constitutes the circumstances that may be taken into account in this regard. In the authors' opinion, the following categories may be distinguished when answering the question.

1. Applicable standard

a) Specific agreement of the parties

As masters of the proceedings, the parties may at any time agree to allow amended or new claims.[23] Said agreement may hypothetically form part of the arbitration agreement (although such detailed information is unlikely to figure in a dispute resolution clause at the time of its conception), of the terms of references or may stem from any other agreement between the parties.

Such party agreement would in principle be binding upon the arbitral tribunal pursuant to the cornerstone principle of party autonomy in international arbitration. However, it must be noted that even if parties are free to declare whether new or amended claims are admissible, the consent of the arbitral tribunal may be required insofar as the *receptum arbitri* is affected and where, for example, the fees must be adjusted.[24]

b) Applicable arbitration law and applicable arbitration rules

As seen above, certain arbitration laws and many arbitration rules provide guidance on the possibility of admitting new or amended claims, as well as to the requirements that must be met in this regard. Where such provisions and rules exist, the arbitral tribunal must take them into account.

15) *Berger/Kellerhals*, International and Domestic Arbitration in Switzerland, 4th ed. 2021, 439.

16) Art. 22 UNCITRAL Rules 2013; Art. 30 SCC Rules 2017; Art. 22 Swiss Rules 2021. Similarly, Art. 22.1 LCIA Rules 2020 provides that the arbitral tribunal shall have the power, upon the application of any party or upon its own initiative, to allow a party to supplement, modify or amend any claim, defense, counterclaim, cross-claim, defense to counterclaim, defense to cross-claim and reply.

17) Art. 23(4) ICC Rules 2021. Interestingly, earlier versions of the ICC Rules included a provision (former Art. 16), which provided that new claims were prohibited if one of the parties disagreed with their inclusion or in the presence of a non-participating party. In this regard, see *Derains*, Amendments to the claims and new claims: where to draw the line?, in Bond *et al.* (eds), Arbitral Procedure at the Dawn of the New Millennium, Reports of the International Colloquium of CEPANI, 15.10. 2004, 2005, 67.

18) *Verbist/Schäfer/Imhoos*, ICC Arbitration in Practice, 2nd ed. 2016, 37.

19) *Fry/Greenberg/Mazza*, The Secretariat's Guide to ICC Arbitration, 2012, 256.

20) See for counterclaims *Elsing*, Part III: Commentary on the Arbitration Rules of the German Institution of Arbitration (DIS Rules), Section 10 – Counterclaim, in Nacimiento/Kröll/Böckstiegel (eds), Arbitration in Germany: The Model Law in Practice, 2nd ed. 2015, 621.

21) Proposal for Switzerland by *Berger/Kellerhals*, International and Domestic Arbitration in Switzerland, 4th ed. 2021, 440.

22) Criticized by *Poudret/Besson*, Comparative Law of International Arbitration, 2nd ed. 2007, 495 for inciting parties to wait until the last minute to file new claims.

23) *Berger/Kellerhals*, International and Domestic Arbitration in Switzerland, 4th ed. 2021, 439 and 442; *Verbist/Schäfer/Imhoos*, ICC Arbitration in Practice, 2nd ed. 2016, 133.

24) *Schneider/Scherer* in Grolimund/Loacker/Schnyder (eds), Basler Kommentar Internationales Privatrecht, 4th ed. 2020, 2058.

2. Merits of the application

a) Connection with existing claims

One aspect that may guide the arbitral tribunal in deciding whether to admit a new or amended claim is the link between said claim and the former one.

Where the amendment of the claim is a change in the prayers for relief but based on the same facts and circumstances (same cause of action) as the original claim, the tribunal should generally allow such amendment without further ado.[25] This may be the case where a party increases the damages it seeks based on the same facts.[26]

Where a change in the prayers for relief is prompted by new facts submitted during the arbitration (for instance where the requested object no longer exists, prompting a change in the prayers to a request for damages), this type of amendment should also generally be allowed by the tribunal. This serves to present the most complete set of facts and prayers possible at the point in time the tribunal decides on the claims.[27]

If the suggested claim stems from matters unrelated to the initial request for arbitration, its admissibility must be questioned. For instance, if the initial claims pertain to a contract for the international sales of goods, but the suggested claim is connected to another contract between the same parties, the tribunal may be more inclined to reject it. The fact that the suggested claim stems from the same contract should, in contrast, be an incentive to admit it.[28]

A tribunal will be less inclined to admit entirely new claims which are independent and separate from the original claim, encompass a new complex of facts and may require the additional taking of evidence and exchange of submissions.[29]

b) Good faith v. bad faith in submitting new or amended claims

It is important to note that a party's motivation for submitting new or amended claims may be legitimate. For example, new information may have come to light and/or new facts which arose during the proceedings may give rise to a change in the prayers for relief.[30] This could for instance be the case where a party files a claim for the transfer of goods and it transpires during the arbitration that the goods have since been destroyed, giving rise to a damages claim.[31]

Conversely, a party may be acting in bad faith. It may choose to file new or amended claims during the proceedings as a dilatory tactic to delay the arbitration.[32] If the tribunal were to accept such new or amended claims, it may necessitate a new round of taking of evidence, or perhaps the repetition of an oral hearing or the involvement of other means in order to grant all parties the right to be heard. However, a party's bad faith and dilatory tactics should not hinder the general efficiency of arbitral proceedings. This is particularly relevant where the applicable arbitration rules contain a good faith provision.[33]

Further, while national arbitration laws and institutional rules afford the tribunal discretion to admit new or amended claims, they usually do not require the submitting party to show sufficient cause for not submitting them at an earlier point in time.[34] Whether a party can show sufficient cause may, however, be an element the arbitral tribunal may wish to take into account when determining whether to admit the new or amended claims. In this regard, a distinction can be made between cases where a party failed to advance such claims previously in a grossly negligent manner[35] and scenarios where a party was prevented from asserting new or amended claims for reasons not attributable to it (in particular if the other party was the cause of the impediment).[36]

c) Prima facie assessment of the merits of the claims?

The tribunal should not proceed to assess the *prima facie* merits of the claim when considering the admissibility question.[37] Where the suggested new or amended claim is blatantly frivolous and/or is obviously introduced only as a dilatory tactic, the tribunal may, however, reject them on the basis that the applying party's interest in filing the new or amended claims is not worthy of protection.

3. Jurisdictional issues

a) Scope of the arbitration agreement

Even where the tribunal has discretion in determining whether to admit amended or new claims, it may only do so where said claims are within the ambit of the arbitration agreement.[38] However, a party may, explicitly or implicitly by failing to raise objections, agree to the arbitral tribunal's jurisdiction over the new or amended claims, as determined by the applicable law.[39]

b) Scope of the receptum arbitri

It is generally considered, most commonly in civil law jurisdictions, that, at the onset of the arbitration, the

25) *Berger/Kellerhals*, International and Domestic Arbitration in Switzerland, 4th ed. 2021, 441. See also *Schwartz/Derains*, Guide to the ICC Rules of Arbitration, 2nd ed. 2005, 269.

26) *Craig et al.*, Craig, Park and Paulsson on International Chamber of Commerce Arbitration, 4th ed. 2017, 279.

27) See also *Berger/Pfisterer* in Zuberbühler/Müller/Habegger (eds), Swiss Rules of International Arbitration, Commentary, 2nd ed. 2013, 228.

28) *Verbist/Schäfer/Imhoos*, ICC Arbitration in Practice, 2nd ed. 2016, 134.

29) See also *Berger/Kellerhals*, International and Domestic Arbitration in Switzerland, 4th ed. 2021, 442-423.

30) *Verbist/Schäfer/Imhoos*, ICC Arbitration in Practice, 2nd ed. 2016, 134.

31) See *Berger/Pfisterer* in Zuberbühler/Müller/Habegger (eds), Swiss Rules of International Arbitration, Commentary, 2nd ed. 2013, 228.

32) See *Verbist/Schäfer/Imhoos*, ICC Arbitration in Practice, 2nd ed. 2016, 134; *Berger/Pfisterer* in Zuberbühler/Müller/Habegger (eds), Swiss Rules of International Arbitration, Commentary, 2nd ed. 2013, 229.

33) See, e.g. Art. 16(1) Swiss Rules 2021 and/or Art. 14(2) LCIA Rules 2020.

34) See *Berger/Pfisterer* in Zuberbühler/Müller/Habegger (eds), Swiss Rules of International Arbitration, Commentary, 2nd ed. 2013, 229.

35) See *Sachs/Lörcher* in Nacimiento/Kröll/Böckstiegel (eds), Arbitration in Germany: The Model Law in Practice, 2nd ed. 2015, 275.

36) *Herzberg*, Artikel 23: Schiedsauftrag, in Nedden/Herzberg (eds), ICC-SchO/DIS-SchO, Praxiskommentar zu den Schiedsgerichtsordnungen, 2014, 333. See also *Sachs/Lörcher* in Nacimiento/Kröll/Böckstiegel (eds), Arbitration in Germany: The Model Law in Practice, 2nd ed. 2015, 275.

37) See also *Fry/Greenberg/Mazza*, The Secretariat's Guide to ICC Arbitration, 2012, 259.

38) See, e.g. Art. 22 UNCITRAL Rules 2013; *Rüede/Hadenfeldt*, Schweizerisches Schiedsgerichtsrecht nach Konkordat und IPRG, 1999, 217; *Born*, International Commercial Arbitration, 3rd ed. 2021, 2427.

39) *Schlosser*, Das Recht der internationalen privaten Schiedsgerichtsbarkeit, 2nd ed. 1989, 498.

arbitrator enters into an arbitrator contract, or *receptum arbitri*, with the parties.[40]

As a result, the arbitrators faced with the question of admitting a new or amended claim shall bear in mind that they have been entrusted with a specific (contractual) mission. The question then arises as to whether, by refusing to rule on a new and amended claim, a contractual breach of the *receptum arbitri* would occur. This would, e. g., be the case if the suggested claim has legitimate grounds to be admitted (in particular if the parties agreed as to its admission) but the arbitrators refuse to render a decision on the matter. If such contractual violation occurs, liability issues could hypothetically arise, as discussed further below.[41]

c) Composition of the arbitral tribunal

Hypothetically, it is possible that the new claims or amendments to the claims may exceed the scope and the qualifications of the arbitrators with respect to the original claims and as envisaged when the tribunal was constituted.[42] However, this is a weak argument in practice. It is common in arbitration to allow new and amended claims, although the new and amended claims must fall within the tribunal's jurisdiction. The parties equally expect that the arbitrators will not only deal with the original claim but also with any new and amended claim arising during the proceedings.[43] It is hard to think of legitimate grounds for why the parties consider a new composition of the tribunal necessary to account for new developments in the proceedings.

4. Procedural issues

a) Timing of the request and delay in the proceedings

Where the new or amended claim is based on facts different than the ones originally relied on, the new allegations may require a fresh round of submissions and evidence addressing those new facts. The tribunal must consider whether the potential delay in the arbitration is justified. It will need to take into account not only the stage of the current arbitration proceedings, but also the delay in having to review the claims in a second arbitration proceeding. The tribunal will wish to consider why the claims were submitted at this late stage, and whether such reason was beyond the control of the submitting party.[44] On the whole, it may be more efficient and cost less to deal with all the claims in the first arbitration, rather than having to commence a second one.[45] Permitting new or amended claims adds to the flexibility and informality of arbitration, one of its key selling features compared to state court litigation.[46]

If the applicable arbitration rules (e. g. in ICC arbitrations) contain a cut-off moment to file new claims, those filed before said moment should be admissible without further ado.[47] The admissibility of new or amended claims may also depend on whether and to what extent the principle that all relevant issues should – where possible – be raised at the beginning of the proceedings applies.[48] This is a question that can be agreed upon between the parties or determined by the tribunal at the outset of the proceedings,[49] such as by a procedural order.

The further the stage of the proceedings, the more conservative a tribunal will be in admitting new or amended claims. A tribunal will already want to exercise caution in admitting new claims after the written rounds of submissions, even where the hearing has not yet taken place.[50]

Where the party submits the new or amended claim at a very late stage of the proceedings, such as during the oral hearing or the post-hearing brief, the tribunal will be inclined not to admit the new claims or amendments.[51] An exception may be made where not admitting the claims would amount to a denial of justice.[52]

In order to balance the interests of the parties, it is advisable for the arbitral tribunal to set a deadline after which no new claims may be admitted.[53] This is a solution proposed by some authors to counteract the unpredictability of allowing the parties to amend claims and counterclaims throughout the proceedings.[54] An arbitral tribunal will be conservative in disallowing new claims to prevent any reproach as to violations of the right to be heard, making it all too easy for parties to take advantage of this by submitting new claims even where the delay is caused by poor organization or tactics. Setting such a deadline may thus instill some discipline into the proceedings.

b) Right to be heard, equal treatment and prejudice to the other party

Arbitration laws and institutional rules commonly contain provisions according to which the parties' right to be heard and right to equal treatment must be observed at all times.[55] Accordingly, an arbitral tribunal faced with a new or amended claim shall consider its admission based on the applying party's right to be heard.[56] This consideration shall be analyzed in view of the applicable *lex arbitri* and arbitration rules (if any), and

40) See *Smahi*, The Arbitrator's Liability and Immunity Under Swiss Law – Part I, ASA Bull. 4/2016, 883-884 and quoted references.

41) See below at V.5.c).

42) *Schneider/Scherer* in Grolimund/Loacker/Schnyder (eds), Basler Kommentar Internationales Privatrecht, 4th ed. 2020, 2057; *Schlosser*, Das Recht der internationalen privaten Schiedsgerichtsbarkeit, 2nd ed. 1989, 498-499.

43) *Schlosser*, Das Recht der internationalen privaten Schiedsgerichtsbarkeit, 2nd ed. 1989, 499.

44) *Caron/Caplan*, The UNCITRAL Arbitration Rules, A Commentary, 2nd ed. 2013, 471.

45) In the same sense, see *Derains* in Bond *et al.* (eds), Arbitral Procedure at the Dawn of the New Millennium, Reports of the International Colloquium of CEPANI, 15.10.2004, 2005, 69-70.

46) *Born*, International Commercial Arbitration, 3rd ed. 2021, 2427.

47) *Verbist/Schäfer/Imhoos*, ICC Arbitration in Practice, 2nd ed. 2016, 37.

48) In Swiss court litigations, this principle is called the *Eventualmaxime*; see *Berger/Kellerhals*, International and Domestic Arbitration in Switzerland, 4th ed. 2021, 439.

49) See *Berger/Kellerhals*, International and Domestic Arbitration in Switzerland, 4th ed. 2021, 439-440.

50) See *Caron/Caplan*, The UNCITRAL Arbitration Rules, A Commentary, 2nd ed. 2013, 473.

51) *Berger/Pfisterer* in Zuberbühler/Müller/Habegger (eds), Swiss Rules of International Arbitration, Commentary, 2nd ed. 2013, 229.

52) *Berger/Kellerhals*, International and Domestic Arbitration in Switzerland, 4th ed. 2021, 443.

53) See *Gaillard/Savage*, Fouchard Gaillard Goldman on International Commercial Arbitration, 1999, 659; *Poudret/Besson*, Comparative Law of International Arbitration, 2nd ed. 2007, 495.

54) *Rüede/Hadenfeldt*, Schweizerisches Schiedsgerichtsrecht nach Konkordat und IPRG, 1999, 217-218; *Schneider/Scherer* in Grolimund/Loacker/Schnyder (eds), Basler Kommentar Internationales Privatrecht, 4th ed. 2020, 2058.

55) See, e.g. Art. 19(1) Swiss Rules 2021/Art. 15(1) Swiss Rules 2012; Art. 21(1) DIS Rules 2018; Art. 182(3) PILA; § 1042(1) German Code of Civil Procedure; Sec. 33(1) EAA.

56) *Poudret/Besson*, Comparative Law of International Arbitration, 2nd ed. 2007, 495.

in light of the other considerations at hand (such as the standard applicable at the place of enforcement). Refusing to rule on a new or amended claim could violate the applying party's right to be heard if the suggested claim has legitimate grounds to be admitted and the tribunal did not previously outline a deadline for new or amended claims.[57]

Admitting new or amended claims requires the tribunal to afford the other parties an opportunity to be heard on these new claims. This may include allowing a party to file new evidence.[58] A party will be prejudiced if a tribunal admits new claims or amendments to the opposing party's claims and if it does not receive adequate opportunity to defend itself because the new claims or amendments were submitted too late in the proceedings.[59] This may be the case if the new or amended claims are filed after the oral hearing or after the second round of submissions.

As a practical illustration, in an ICC arbitration referred to by *Webster/Bühler*, in advance of the evidentiary hearing, the claimants attempted to file a new claim in tort following information learnt in the respondent's rejoinder. The respondent objected, claiming that it would not have enough time to prepare its defense to the claim before the hearing. The arbitral tribunal ruled that the new claim was admissible, but also decided to bifurcate the proceedings in relation to the new tort claim to allow the respondent to properly take a position on the matter.[60]

On the other hand, a party's right to be heard is not violated if a tribunal decides to reopen proceedings at a late stage to allow a new claim, provided that the opposing party has the opportunity to respond to the claim in the proceedings.[61]

c) New parties and new claims (joinder and consolidation)

Where the suggested claim is brought forward against a new party that is not yet part of the proceedings, the applicable rules on joinder will determine whether this is admissible.[62] If they are met and joinder effectively takes place, and provided that the new claim falls within the jurisdiction of the arbitral tribunal, admitting such claim should be possible.[63]

Where the tribunal refuses to admit new claims or the amendment of existing ones, the disappointed party may wish to consider initiating a new arbitration and request the consolidation of both proceedings.[64]

d) Advance on costs and costs in general

In appropriate circumstances, arbitral tribunals may request an increase in the advance on costs. This is usually justified where the new or amended claim increases the complexity and effort involved in resolving the case, and/or the amount in dispute.[65] According to one commentator, the arbitrators could even order the party introducing the new claim to bear the associated costs.[66] Upon failure to make payment of such advance, the tribunal could then refrain from dealing with the new or amended claims.

Since costs generally rise on a diminishing scale in relation to the amount in disputes, the cost of filing a claim in new proceedings is usually higher than filing a new or amended claim in the same proceedings. However, where a party submitting new or amended claims is doing so in bad faith, such as where it waited until very late in the proceedings to do so, this may cause additional costs and tear at the efficiency of the arbitration process.[67] In this case, it may be justified for a tribunal to refrain from hearing these claims in the same proceedings.

5. Post-award considerations

a) Res iudicata issues

Should the arbitral tribunal refuse to admit a new or amended claim, the party that had requested its admission will have to commence new and separate arbitration proceedings. As a result, a wholly or partially new arbitral tribunal will be constituted.

In this context, depending on the closeness of the new arbitration claims with the former arbitration claims, there is a risk that the newly constituted arbitral tribunal will consider that the new arbitration claims cannot be decided upon due to the principle of *res iudicata*. Indeed, pursuant to a generally admitted definition, *res iudicata* exists when a disputed claim is identical to one that has already been the subject of a judgment which has entered into force, i.e. if, in both proceedings, the same parties have submitted the same claim to the judge (or arbitral tribunal) based on the same facts.[68] As a commentator noted, "*[t]he possibility to introduce claims and to amend them also relates to the interest to achieve justice when the claims cannot be brought up in new proceedings due to res judicata*".[69]

In addition, even if the new arbitrators declare the claims admissible, they will decide independently from the former ones. Accordingly, there is a further risk that an entirely different decision is reached on a similar and/or related matter.[70] The ensuing co-existence

57) *Schlosser*, Das Recht der internationalen privaten Schiedsgerichtsbarkeit, 2nd ed. 1989, 498-499.

58) *Born*, International Commercial Arbitration, 3rd ed. 2021, 3857.

59) *Caron/Caplan*, The UNCITRAL Arbitration Rules, A Commentary, 2nd ed. 2013, 472.

60) Unpublished ICC decision referred to in *Webster/Bühler*, Handbook of ICC Arbitration, 4th ed. 2018, 371.

61) *Kröll*, Part II: Commentary on the German Arbitration Law (10 Book of the German Code of Civil Procedure), Chapter VIII: Recognition and Enforcement of Awards, § 1061 – Foreign Awards, in Nacimiento/Kröll/Böckstiegel (eds), Arbitration in Germany: The Model Law in Practice, 2nd ed. 2015, 482, with reference to OLG Dresden of 18.11. 2005 – 11 Sch 13/05, in which a challenge against an award was dismissed. In the proceedings, the claimant had submitted new claims after the oral hearing, whereupon the tribunal reopened the oral hearing on account of the new claims, decided on the first set of claims in a partial award, and decided on the new claims in a final award.

62) See, e. g. Art. 7 ICC Rules 2021; Art. 6(1) and (3) Swiss Rules 2021; Art. 19 DIS Rules 2018; Art. 22.1(x) LCIA Rules 2020; Art. 13 SCC Rules 2017; Art. 17(5) UNCITRAL Rules 2013.

63) *Caron/Caplan*, The UNCITRAL Arbitration Rules, A Commentary, 2nd ed. 2013, 469. In this regard, see also *Verbist/Schäfer/Imhoos*, ICC Arbitration in Practice, 2nd ed. 2016, 134.

64) In this sense, see *Ragnwaldh/Andersson/Salinas Quero*, A Guide to the SCC Arbitration Rules, 2019, 100.

65) *Berger/Pfisterer* in Zuberbühler/Müller/Habegger (eds), Swiss Rules of International Arbitration, Commentary, 2nd ed. 2013, 230-231.

66) *Runesson*, Chapter 3: A Negotiation Perspective on the Agreement to Arbitrate and Its Completion, in Calissendorff/Schöldström (eds), Stockholm Arb. YB 2020, 2020, 37.

67) *Born*, International Commercial Arbitration, 3rd ed. 2021, 2427.

68) As commonly defined by the Swiss Federal Supreme Court, see, e. g. Swiss Federal Supreme Court Decision 140 III 278, consideration 3.3.

69) *Runesson* in Calissendorff/Schöldström (eds), Stockholm Arb. YB 2020, 2020, 33-34.

70) *Verbist/Schäfer/Imhoos*, ICC Arbitration in Practice, 2nd ed. 2016, 134.

of two conflicting awards on the same dispute and between the same parties would be undesirable, if not contrary to public policy in certain countries.[71] This is precisely what the *res iudicata* principle aims at preventing.

b) Potential enforcement and challenge issues

If the arbitral tribunal refuses to hear the suggested claim, the enforcement of the award may, later on, be refused pursuant to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC). For instance, the aggrieved party may try to resist the enforcement by stating that it was unable to present its case (Art. V(1)(b) NYC). In addition, where the tribunal fails to follow the parties' agreement, (or failing such agreement, the law of the country where the arbitration took place), in relation to the admission of new or amended claims, recognition and enforcement of the award could, in theory, be refused on the basis of Art. V(1)(d) NYC. However, the broad discretion granted to the tribunal under arbitration laws and institutional rules, if any are selected by the parties, makes this rather unlikely.

On the other hand, if the arbitral tribunal admits the suggested claim, the objecting party may, in theory, try to resist enforcement pursuant to Art. V(1)(c) NYC, arguing that the award contains decisions on matters not (correctly) submitted to the arbitration.[72]

The above considerations under the New York Convention also apply in relation to refusal of enforcement under Artt. 36(1)(b), 36(1)(c) and 36(1)(d) in jurisdictions that have adopted the UNCITRAL Model Law.

The same concerns apply to potential challenge proceedings against the award at the seat of the arbitration. Indeed, many arbitration laws contain provisions that allow for the setting aside of an arbitral award based on violations to the parties' mandatory procedural rights (such as the right to be heard and the right to equal treatment),[73] as well as on the basis of *ultra petita* (where a tribunal has ruled on more than the claims submitted to it).[74] Further, if the suggested claim has (unduly) been declared inadmissible, a party may think about challenging the award on an *infra petita* basis, i. e. where the arbitral tribunal has not ruled on all issues submitted to it.

c) Possible liability issues

The question of the arbitrator's liability (or immunity, as the case may be) varies depending on the jurisdiction where the arbitration is seated. In general, common law jurisdictions (e. g. the United States and England) tend to have an arbitral immunity regime in place. On the other hand, civil law jurisdictions, which usually consider that a contract (the *receptum arbitri*) exists between the parties and the arbitrator, will generally apply a contractual liability regime to arbitrators.

As a result, arbitrators sitting in civil law jurisdictions (or, in general, in jurisdictions where no arbitral immunity exists) should pay particular attention to their contractual obligations towards the parties. This applies to their obligation to finally settle the dispute between the parties, in accordance with the arbitration agreement and the applicable law, and to personally fulfill their mandate.[75] Accordingly, rejecting a new or amended claim where they are legitimate could be in breach of the arbitrators' contractual obligation to render an award that finally settles the dispute between the parties and could thus give rise to the arbitrators' liability. However, in light of the practical obstacles (quantification of loss incurred by the parties, large discretion of tribunal in the matter, general reluctancy to go after arbitrators personally), judgments to this effect would be rather unlikely in practice.

d) Burden of initiating brand-new arbitration proceedings

In deciding on the admission of a new or amended claim, the arbitral tribunal shall bear in mind that the party whose application is denied will have to initiate new arbitration proceedings from scratch. Provided that a request in this sense is promptly filed and that the relevant requirements are met, efficiency concerns may be mitigated by consolidating the new proceedings with the ongoing one (as discussed above). Where consolidation is out of the question, such as if the final award has already been rendered in the first arbitration, the "unheard" party will have the burden of filing a new request for arbitration, participating in the constitution of a new arbitral tribunal and then going through full-blown arbitration proceedings again. As summed up by a commentator, "*in certain circumstances the admission of a new claim may not only be reasonable and legitimate but preferable to the alternative, i. e. the commencement of a new arbitration*".[76]

VI. Procedure to Follow when Admitting New and Amended Claims

In terms of procedure, the arbitral tribunal could decide on the admissibility of the new or amended claims either in a procedural order at the time of their submission, or in connection with the award on the merits.[77] Where a party files the new or amended claims at an early point in time, the tribunal should tend to decide on their admissibility in a procedural order, to give the parties clarity on the scope of any future submissions and pleadings.[78] Where they are filed late in the proceedings, the tribunal may directly wish to decide on both their admissibility and merits in the award on the merits.

Before deciding on the admissibility of the new or amended claims, the tribunal should hear the opposing party on the question.

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71) See *Schaffstein*, The Doctrine of Res Judicata Before International Commercial Arbitral Tribunals, 2016, 247.

72) On this topic in general, see for instance *Rau*, Chapter 9: Matters Beyond the Scope of the Submission to Arbitration, in Ferrari/Rosenfeld (eds), Autonomous Versus Domestic Concepts under the New York Convention, 61 International Law Library, 2021, 181 *et seqq*.

73) See for example Art. 190(2)(d) PILA; § 1059(2)(1)(b) German Code of Civil Procedure.

74) See for example Art. 190(2)(c) PILA; § 1059(2)(1)(c) German Code of Civil Procedure.

75) See *Smahi* ASA Bull. 4/2016, 885.

76) See *Derains* in Bond *et al.* (eds), Arbitral Procedure at the Dawn of the New Millennium, Reports of the International Colloquium of CEPANI, 15.10.2004, 2005, 69-70.

77) See *Caron/Caplan*, The UNCITRAL Arbitration Rules, A Commentary, 2nd ed. 2013, 474. In ICC arbitrations, commentators consider that the decision on the admission of a new claim shall be made by way of procedural order only (see *Verbist/Schäfer/Imhoos*, ICC Arbitration in Practice, 2nd ed. 2016, 133).

78) See *Fry/Greenberg/Mazza*, The Secretariat's Guide to ICC Arbitration, 2012, 259.

VII. Conclusion

The admission of new or amended claims in arbitration is not a clear-cut issue. The arbitral tribunal's discretion in this regard generally takes the front stage and it has a wide array of criteria at its disposal to assess whether to admit a new or amended claim. Appropriately used, admitting new or amended claims during ongoing proceedings may be a tool for efficiency in international arbitration. Misused, said tool could jeopardize the fairness of the proceedings and even open to the door to post-award issues, including as to the finality of the award.