

New Rules, Breakthroughs and Trends in China's Foreign-related Arbitration

-- From the Perspective of CMAC Arbitration Rules (2021)

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Abstract

China is accelerating its pace in arbitration reform and opening up. With increasingly abundant arbitration practices, revision to the Arbitration Law has been put on the agenda. China Maritime Arbitration Commission (CMAC), on the basis of summing up its own practical experience and absorbing international advanced arbitration concepts, issued Arbitration Rules 2021, achieving many breakthroughs. Arbitration Rules 2021 for the first time make systematic provisions on the combination of electronic technology and arbitration and on the rules of evidence, distinguish the roles of case manager and tribunal secretary, clarify the nature of consultation and advice as issued by the Advisory Council and its relationship with the arbitral tribunal, provide for the publishing of arbitral awards, the conflict of interest caused by the change in representatives and the service on the Captain of the concerned vessel, and introduce the limitation of liability clause. In addition, Arbitration Rules 2021, on the basis of respecting party autonomy to the greatest extent, give the arbitral tribunal more autonomy, strengthen its duty of prudent judgment, and promote the transition of institutional arbitration to "moderate management". Arbitration Rules 2021 will further help Chinese companies to "go global" under the Belt and Road Initiative.

Keywords

Foreign-related Arbitration; Arbitration Reform; China Maritime Arbitration Commission Arbitration Rules (2021); Breakthroughs in Arbitration Rules; Autonomy of the Arbitral Tribunal.

1. Introduction

In recent years, the accelerated evolution of international trade and investment pattern and the rapid development of international commercial arbitration have brought fierce competition. China at the international level has become a two-way power for introduction of foreign investment and investment in foreign countries. The Belt and Road Initiative is making steady progress. Major international arbitration institutions have been revising their rules and optimizing their practices. They value the huge market potential in Asia, especially China. Arbitration competition has intensified. The COVID-19 epidemic has had a profound impact on international trade and investment and even international arbitration. Technology is increasingly widely used in conventional arbitral proceedings. With respect to the domestic level in China, the General Office of the CPC Central Committee and the General Office of the State Council issued Opinions on Improving the Arbitration System to Strengthen the Credibility of Arbitration (hereinafter referred to as the "Opinions") in December 2018. The Opinions provide a top-level design for China's arbitration system and chart the course for the arbitration development in China. With the acceleration of domestic arbitration reform and

opening up and the increasingly abundant arbitration practices, revision to the Arbitration Law has been put on the agenda. Its draft revision has been open to the public for comments. [1]

In order to meet the development needs of Foreign-related business, keep up with the development pace of international maritime and commercial arbitration, and promote the specialization, modernization and internationalization of arbitration, China Maritime Arbitration Commission (hereinafter referred to as "CMAC") [2] established in January 1959, revised Arbitration Rules 2020 after absorbing advanced arbitration concepts and summing up its own practical experience. China Maritime Arbitration Commission Arbitration Rules (2021) (hereinafter referred to as "Arbitration Rules 2021") came into force on 1 October, 2021. In response to the changes of the times, Arbitration Rules 2021 achieve many breakthroughs, fully reflect party autonomy, enhance transparency of the arbitral proceedings, highlight the advantages of the arbitration system and effectively improve the credibility of arbitration.

2. Breakthroughs of CMAC Arbitration Rules (2021)

2.1. Basic Concepts and Value Orientation of Arbitration Rules 2021

The basic concepts and value orientation of Arbitration Rules 2021 cover five aspects. First, to further respect party autonomy. Respect for party autonomy is the basic principle and the soul of international commercial arbitration. However, party autonomy cannot violate the mandatory provisions of the law of the seat of arbitration. Second, to effectively improve transparency of arbitration, highlight advantages of China's institutional arbitration, and realize the organic combination of institutional management and independent award of arbitral tribunal. Third, to give the arbitral tribunal more flexible authority and strengthen its responsibility, so as to promote the transition of institutional arbitration from "excessive management" to "moderate management". Fourth, to respond to the changes of the times in a timely manner, and systematically provide for the combination and innovation of electronic technology and arbitration to meet the practical needs. Fifth, to learn from the international advanced experience, adopt the "expedited procedure" and further integrate the arbitration fees with international standards while highlighting the characteristic maritime arbitration system.

2.2. New Breakthroughs in Arbitration Rules 2021

The total number of the clauses in Arbitration Rules 2021 is increased from 81 to 86. Arbitration Rules 2021 achieve a series of new breakthroughs at the domestic level and create several firsts. To sum up, these new breakthroughs mainly cover the following eight aspects:

2.2.1. Systematically Providing for the Combination and Innovation of Electronic Technology and Arbitration for the First Time

The COVID-19 epidemic has brought profound impact to international arbitration. and information technology (such as audio-video hearing and audio-video testimony) has been widely used in conventional arbitration. In response to the changes of the times, Arbitration Rules 2021 systematically provide for the combination and innovation of electronic technology and arbitration for the first time, Article 8, Article 39, Article 81 and Article 39 of which clearly provide for electronic service[3], audio-video hearing[4], electronic signature[5], cyber security [6] and privacy and data security [6]. It is worth noting that Arbitration Rules 2021 highlight the importance of cyber security and privacy and data protection for the first time, providing that the arbitral tribunal may decide to have discussions with the parties over cyber security, privacy and data protection as necessary and make necessary procedural arrangements to provide the arbitral proceedings with proper safeguard for security, compliance and such like.

2.2.2. Systematically Providing for the Rules of Evidence for the First Time

Cross-examination on witnesses (witnesses of facts and experts) in international commercial arbitration is not only one of the most important parts in arbitration hearing, but also the key factor to win an arbitration. However, China's Arbitration Law and its judicial interpretation are not systematic in the rules of evidence, and emphasize written evidence over oral evidence, which leads to insufficient attention paid by China's arbitral tribunals to the testifying of witnesses of facts and experts, the examination of evidence and the examination of witness. Arbitration Rules 2021, for the first time, comprehensively provide for the rules of evidence, including witness of facts and expert's opinions [7], inspector's report and appraiser's report [8], examination of evidence [9] and examination of witness [10], which fill the gaps in the Arbitration Law and judicial interpretation, and should be able to help the arbitral tribunal to correctly find out the facts of the case, protect the legitimate rights and interests of the parties, and promote the smooth running of the arbitral proceedings.

2.2.3. Distinguishing the Roles of Case Manager and Tribunal Secretary for the First Time

The institution of case manager is one of the most important revisions of CMAC to Arbitration Rules 2020. There are two roles in international arbitral proceedings: case manager and tribunal secretary. The case manager is a staff member of the arbitration institution who handles cases in accordance with the arbitration rules such as the Arbitration Rules of the International Chamber of Commerce and generally cannot serve as tribunal secretary. Although the arbitral tribunal may engage a staff member from the arbitration institution as the arbitration secretary according to the Guidelines on the Use of a Secretary to the Arbitral Tribunal (2014) issued by Hong Kong International Arbitration Center (HKIAC)[11], the staff member cannot act as the case manager in the same case once appointed as the tribunal secretary. However, arbitration rules of Chinese mainland, for example, Article 13.4 of the Arbitration Rules of China International Economic and Trade Arbitration Commission (2015)[12], provide that the case manager may concurrently serve as tribunal secretary and provide professional services to the arbitral tribunal.

Article 40 of Arbitration Rules 2021[13] distinguishes the case manager from the tribunal secretary for the first time, and further clarifies the scope of responsibilities between the arbitration institution and the arbitral tribunal to prevent conflicts of interest, which could be able to help further realize the organic combination of the institution management and the independent award by the arbitral tribunal and improve the transparency of arbitration. According to Article 40, the case manager provides management services for arbitration cases on behalf of the arbitration institution, and the tribunal secretary provides secretarial assistance to the arbitral tribunal. The arbitral tribunal may appoint a secretary. A staff member of the arbitration institution may serve as the tribunal secretary, but may not serve as case manager in the same arbitration case. The duties of the tribunal secretary shall be determined by the arbitral tribunal. The tribunal secretary shall not participate in the making of any decision on the arbitration or the drafting of the substantial portion of the arbitral award.

2.2.4. Clarifying the Nature of Consultation and Advice of the Advisory Council and its Relationship with the Arbitral Tribunal for the First Time

Point 6 of the Opinions provides for the improvement of the internal supervision system of arbitration commissions, which requires, on the basis of respecting the independent awards by the arbitral tribunal and arbitrators, the strengthening of administration and supervision of the arbitral proceedings by arbitration commissions and establishment of the scrutiny of arbitral awards by arbitration commissions and the consultation for significant and complex arbitration cases. However, Arbitration Rules 2020 did not provide for the consultation. It is easy to be questioned because of the problem of black-box operation. Transparency has a great influence

on the credibility of China's arbitration institutions. To this end, Arbitration Rules 2021 incorporate the system of Advisory Council, and for the first time clarify the nature of consultation and advice of the Advisory Council and its relationship with the arbitral tribunal in Article 61[14], which is open and transparent. According to Article 61, significant and complex procedural and substantive matters in an arbitration case may be submitted to the Advisory Council for consultation and advice. The consultation and advice of the Advisory Council are for the reference of the arbitral tribunal which has the discretion to decide whether or not to accept such consultation and advice.

The explicit provisions of Arbitration Rules 2021 on the relationship between the consultation and advice of the Advisory Council and the arbitral tribunal are of great significance, conducive to giving full play to the advantages of China's institutional arbitration. They also complement the system of scrutiny of draft award [15] to jointly improve the quality and efficiency of arbitration and effectively enhance the competitiveness and credibility of China's institutional arbitration.

2.2.5. Making Provisions on the Publishing of Arbitral Awards for the First Time

For the first time, Arbitration Rules 2021 provide that, with the consent of the parties concerned, the arbitration institution may publish the award after deleting private and confidential information and accept social supervision. According to Article 58.10 of Arbitration Rules 2021[16], the Arbitration Court of CMAC may, with the consent of all the parties, publish the award after deleting the names of the parties and any other identifiable details, thus further improving the transparency of arbitration.

2.2.6. Making Provisions on the Conflict of Interest Due to the Change in a Party's Representative for the First Time

For the first time, Arbitration Rules 2021 make it clear that the arbitral tribunal may take necessary measures to avoid the conflict of interest due to the change in a party's representative and ensure the fairness of the procedure. According to Article 22.2 of Arbitration Rules 2021[17], each party shall promptly notify the Arbitration Court of any change in its representative. The arbitral tribunal may, after consulting with the parties, take necessary measures to avoid conflict of interest due to the change in a party's representative, including excluding a newly authorized representative of a party from participating in the arbitral proceedings in whole or in part.

2.2.7. Making Provisions on Service on the Captain of the Concerned Vessel for the First Time

For the first time, Arbitration Rules 2021 clearly define service on the Captain of the concerned vessel as one of the modes of service of arbitration documents,[18] which further enriches the means of service of arbitration documents and meets the special needs of maritime arbitration practice.

2.2.8. Introducing the Limitation of Liability Clause for the First Time

For the first time, Arbitration Rules 2021, taking the "law of the seat of arbitration" as the benchmark and precondition, explicitly introduce the limitation of liability clause, properly handle the relationship between the Rules and the legal provisions of the seat of arbitration, making the Rules of practical significance and operability. Article 84 of Arbitration Rules 2021[19] refers to the provisions of ICDR and American Arbitration Association and the advanced practices of arbitration rules of international arbitration institutions such as ICC, providing that "Unless otherwise provided by the law of the seat of arbitration, CMAC and its employees, arbitrators, tribunal secretaries and experts appointed by the arbitral tribunal shall not be liable to any party for any act in connection with the arbitration." This provision enables

arbitration institutions and arbitrators to participate in arbitral proceedings without any scruple.

In addition, Arbitration Rules 2021 are further in line with international standards in terms of “expedited procedure” and arbitration fees. With respect to the design of arbitral proceedings, Arbitration Rules 2021 adopt the expression of “expedited procedure”, and change “summary procedure” to “expedited procedure”, which not only conforms to the international common practice, but also reflects its characteristics of high efficiency, convenience and economy. At the same time, Arbitration Rules 2021 raise the maximum amount in dispute applicable to expedited procedure from RMB2 million to RMB5 million, further saving arbitration resources and improving efficiency. With respect to arbitration fees, Arbitration Rules 2021 make it clear that the parties can choose a charging method that separates the administration fees from the arbitrators’ remuneration, so as to be further in line with international standards, better meet the needs of the parties and stimulate the vitality of arbitration.

2.3. Arbitration Rules 2021 Granting the Arbitral Tribunal More Autonomy

Arbitration Rules 2021 respect party autonomy to the greatest extent in the tribunal constitution procedure, and fully guarantee the rights of the parties to agree on the constitution and number of arbitrators and choose arbitrators outside CMAC’s Panel of Arbitrators [20]. At the same time, in order to fully guarantee the quality of arbitration and prevent the parties from abusing their rights, Arbitration Rules 2021 have made significant changes in the procedure of constituting the arbitral tribunal, giving the arbitral tribunal more autonomy, strengthening its duty of prudent judgment and promoting the transition of institutional arbitration to “moderate management”.

First, Arbitration Rules 2021 make systematic and optimized provisions on the constitution of the arbitral tribunal and the withdrawal and replacement of the arbitrator. Article 30.1 of Arbitration Rules 2021[21] provides that the Presiding Arbitrator and Sole Arbitrator shall be nominated or appointed from CMAC’s Panel of Arbitrators. Where the parties fail to jointly appoint the Presiding Arbitrator, the two arbitrators who have been nominated by the parties shall jointly nominate the Presiding Arbitrator; where the two nominated arbitrators fail to jointly nominate the Presiding Arbitrator within the prescribed time limit, the Chairman of CMAC shall appoint the Presiding Arbitrator.[22] The arbitration institution must provide the reasons when making the decision on whether the arbitrator should be replaced or whether the arbitrator should withdraw.

Second, Arbitration Rules 2021 strengthen the duties, powers and responsibilities of the arbitral tribunal. The arbitral tribunal is the center of hearing and judgment. It shall actively exercise its functions after its constitution. However, in practice, the arbitral tribunal in China often does not actively exercise its functions after its constitution, but is driven by the arbitration institution. Therefore, it is urgent to strengthen the arbitral tribunal’s role in hearing. To this end, Arbitration Rules 2021 provide that the arbitral tribunal shall promptly hold a case management conference after its constitution[23] to decide on the possible procedural measures, the route diagram and timetable for hearing and award, make it clear that the arbitral tribunal has the right to require the parties to disclose whether any non-party has undertaken to fund the arbitral proceedings or has an economic interest in the outcome of the arbitration,[24] require that the arbitral tribunal, before fixing the date of an oral hearing, shall take into account whether documents have been exchanged before the hearing and whether requirements for oral hearing have been satisfied,[25] and clearly provide that the production and exchange of evidence shall be finalized before the arbitral tribunal holds a hearing to examine the substantive disputes,[26] so as to effectively improve the quality and efficiency of arbitration decisions.

3. Conclusion

The revision to CMAC Arbitration Rules is a typical case in accelerating the pace of China's arbitration reform and opening up, leading the new direction and trend of China's Foreign-related arbitration. Arbitration Rules 2021 will further enrich China's arbitration practices and help amend the Arbitration Law, and will also effectively enhance the competitiveness and credibility of China's institutional arbitration.

Arbitration Rules 2021 are a set of arbitration rules that further respect party autonomy, bring convenience to the parties, improve transparency of the procedure, guarantee independent award and conform to international standards. It can be predicted that the implementation of Arbitration Rules 2021 will help CMAC solve the disputes between Chinese companies in "going global" and foreign companies in "coming to China" in a more professional, efficient and economical way, and effectively protect the legitimate rights and interests of Chinese and foreign companies.

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References

- [1] Ministry of Justice: Notice of the Ministry of Justice on Publicly Soliciting Opinions for the Arbitration Law of the People's Republic of China (Revised) (Draft for Comment), http://www.moj.gov.cn/pub/sfbgw/lfyjzj/lfyjzj/202107/t20210730_432967.html.
- [2] China Maritime Arbitration Commission is affiliated to the China Council for the Promotion of International Trade. It is the only national-level permanent Foreign-related arbitration institution in China, mainly dealing with disputes related to admiralty, maritime, transportation and logistics. The number of admiralty and maritime arbitrations it accepts ranks among the top in the world. Its fairness in making awards has been unanimously affirmed by the international community. It represents the international image of China's maritime arbitration. CMAC has been continuously improving its internationalization in arbitration in recent years. It is committed to formulating bona fide, friendly, fair, efficient, professional and international arbitration rules.
- [3] Article 8.2 Unless otherwise agreed by the parties, all documents, notices and materials in relation to the arbitration may be served in person, by registered post, express mail service, fax, e-mail, such instant telecommunication as recordable by data system, or sent to the Captain of the concerned vessel, or by any other means considered as proper by the Arbitration Court or the arbitral tribunal.
- [4] Article 39.4 Unless otherwise agreed by the parties, the arbitral tribunal may, after consulting with the parties, decide to hold hearings by virtual audio-video conferences or other communication means which it deems appropriate.
- [5] Article 81 Electronic Signature Unless otherwise provided by the law of the seat of arbitration or agreed by the parties, or decided by the Arbitration Court or the arbitral tribunal, arbitrators may use electronic signatures on the arbitral awards, conciliation statements and decisions on dismissal, etc.
- [6] Article 39.6 Unless otherwise agreed by the parties, the arbitral tribunal may, after consulting with the parties, adopt appropriate procedural measures, including but not limited to setting out terms of reference, issuing procedural orders, sending lists of questions, holding pre-hearing meetings, and having discussions with the parties over cyber security, privacy and data protection, in order to provide the arbitral proceedings with proper safeguard for security, compliance and such like. With the authorization of the other members of the arbitral tribunal, the Presiding Arbitrator may solely decide on procedural arrangements for the arbitral proceedings.

- [7] Article 47 Witness of Facts and Expert's Opinions Where a party wishes to call a witness, it shall inform the arbitral tribunal of the identity of the witness and what matters the witness testifies to. The witness shall submit a written testimony before the hearing. A party may submit an expert's opinions on specific issues to support its claims or defenses.
- [8] Article 49 Inspector's Report and Appraiser's Report The arbitral tribunal may, at the request of a party or at the tribunal's own initiative, appoint inspector(s) to inspect the scene, goods, documents or other relevant evidence, or appoint appraiser(s) for clarification of specific professional or technical issues. The parties shall be notified in advance and have the right to be present at the inspection or appraisal. The arbitral tribunal has the power to request the parties, and the parties are also obliged, to deliver to or supply the inspector or appraiser any relevant materials, documents, property, or physical objects for inspection or appraisal by the inspector or appraiser. Copies of the inspector's or appraiser's report shall be forwarded to the parties who shall have an opportunity to comment thereon.
- [9] Article 50 Examination of Evidence The arbitral tribunal shall ensure any party an opportunity to make comments on all the evidence produced by other parties. Examination of evidence may be conducted orally or in writing. Where a case is examined by way of an oral hearing, the evidence shall be produced at the oral hearing and may be examined by the parties. Where a case is to be decided on the basis of documents only, or where evidence is submitted after the hearing and both parties have agreed to written examination, the parties may examine the evidence in writing. In such circumstances, the parties shall submit their views in writing on the evidence within the time period specified by the arbitral tribunal. Any evidence confirmed or undisputed by all the parties shall be deemed as having been examined.
- [10] Article 51 Examination of Witness. In principle, a witness shall attend a hearing in person or by virtual audio-video conferences, and take the examinations raised by the engaging party and cross-examinations by the other parties. Inspectors or appraisers appointed by the arbitral tribunal shall attend hearings in person or by virtual audio-video conferences. The arbitral tribunal shall ensure that all the parties have opportunities to raise questions to the inspector or appraiser.
- [11] See Article 2.5 of the Guidelines on the Use of a Secretary to the Arbitral Tribunal issued by Hong Kong International Arbitration Center: [//www.hkiac.org/sites/default/files/ck_filebrowser/PDF/arbitration/tribunal-secretaries/Guidelines for the Use of the Secretary of the Arbitral Tribunal of the Hong Kong International Arbitration Centre %20-%202021 renew.pdf](https://www.hkiac.org/sites/default/files/ck_filebrowser/PDF/arbitration/tribunal-secretaries/Guidelines%20for%20the%20Use%20of%20the%20Secretary%20of%20the%20Arbitral%20Tribunal%20of%20the%20Hong%20Kong%20International%20Arbitration%20Centre%20-%202021%20renew.pdf).
- [12] Article 13.4 After CIETAC accepts a case, the Arbitration Court shall designate a case manager to assist with the procedural administration of the case.
- [13] Article 40 Tribunal Secretary. The arbitral tribunal may, after consulting with the Arbitration Court, appoint a tribunal secretary to assist. The arbitral tribunal may appoint a staff member from the Arbitration Court as tribunal secretary, save that he/she is not the case manager in the same arbitration. The arbitral tribunal shall determine the tasks of the tribunal secretary. The tribunal secretary shall not participate in the making of any decision on the arbitration or the drafting of the substantive portion of the arbitral award.
- [14] Article 61 Advisory Council. The arbitral tribunal or CMAC may submit any significant or complex procedural and substantive matters in an arbitration to the Advisory Council for consultation and advice. The arbitral tribunal has the discretion to decide on whether or not to follow the consultation and advice as issued by the Advisory Council.
- [15] Article 60 Scrutiny of Draft Award. The arbitral tribunal shall submit the draft award to CMAC for scrutiny before signing the award. CMAC may bring to the attention of the arbitral tribunal issues addressed in the award on the condition that the arbitral tribunal's independence in rendering the award is not affected.
- [16] Article 58.10 The Arbitration Court may, with the consent of all the parties, publish the award which has been encrypted to disguise the names of the parties and any other identifying details.
- [17] Article 22.2 Each party shall promptly notify the Arbitration Court of any change in its representative. The arbitral tribunal may, after consulting with the parties, take necessary measures to avoid conflict of interest due to the change in a party's representative, including

excluding a newly authorized representative of a party from participating in the arbitral proceedings in whole or in part.

- [18] Article 8.2 Unless otherwise agreed by the parties, all documents, notices and materials in relation to the arbitration may be served in person, by registered post, express mail service, fax, e-mail, such instant telecommunication as recordable by data system, or sent to the Captain of the concerned vessel, or by any other means considered as proper by the Arbitration Court or the arbitral tribunal.
- [19] Article 84 Limitation of Liability. Unless otherwise provided by the law of the seat of arbitration, CMAC and its employees, arbitrators, tribunal secretaries and experts appointed by the arbitral tribunal shall not be liable to any party for any act in connection with the arbitration.
- [20] Article 30.2 Nomination of arbitrators from outside CMAC's Panel of Arbitrators should comply with the law of the seat of arbitration.
- [21] Article 30.1 Nomination or Appointment of Arbitrators. CMAC maintains a Panel of Arbitrators which uniformly applies to CMAC and Shanghai Headquarters/sub-commissions/arbitration centers. Parties may nominate arbitrators from the Panel of Arbitrators provided by CMAC, or from outside CMAC's Panel of Arbitrators. Unless otherwise decided by CMAC, the Sole Arbitrator or Presiding Arbitrator shall be nominated or appointed from CMAC's Panel of Arbitrators.
- [22] Article 31.4 Where the parties have failed to jointly nominate or entrust the Chairman of CMAC to appoint the Presiding Arbitrator, or failed to recommend, or have recommended but there is not one candidate commonly enlisted on the lists, the two arbitrators who have been nominated by the parties or appointed by the Chairman of CMAC shall jointly nominate the Presiding Arbitrator.
- [23] Article 39.1 After the constitution of the arbitral tribunal, the Arbitration Court shall immediately hand over the case to the arbitral tribunal. The arbitral tribunal shall subject to the circumstances of the case promptly hold a case management conference and consult with the parties on procedural measures that may be adopted pursuant to Paragraph 6 of this Article.
- [24] Article 39.7 On the application of a party, or on the arbitral tribunal's initiative after consulting with the parties, the arbitral tribunal may require the parties to disclose whether any non-party (such as a third-party funder or insurer) has undertaken to fund the arbitration proceedings or whether any non-party (such as a third-party funder, insurer, parent company, or ultimate beneficial owner) has an economic interest in the outcome of the arbitration.
- [25] Article 42.4 Before fixing the date of an oral hearing, the arbitral tribunal shall take into account whether documents have been exchanged before the hearing and whether requirements for oral hearing have been satisfied.
- [26] Article 46.5 If a party bearing the burden of proof fails to produce evidence within the specified time period, or if the produced evidence is not sufficient to support its claim or counterclaim, it shall bear the consequences thereof. In general, the production and exchange of evidence shall be finalized before the arbitral tribunal holds a hearing to examine the substantive disputes.