

Ниже представлены результаты исследования, проведенного в 2018 г. под эгидой Арбитражной ассоциации (РАА) в рамках разработки Пражских правил.

Published below are the results of the research conducted in 2018 under the auspices of the Arbitration Association (RAA) during drafting the Prague Rules.

Results of the Survey on Inquisitorial Practice of the Taking of Evidence in Arbitration

<https://doi.org/10.32875/icar.2018.1.108>

Introduction

The legal systems of the majority of countries in the world are based either on a continental or common system. The terms “inquisitorial” and “adversarial” are conventionally used to define the main principles in the proceedings. One of the main differences between the two systems is the role of the judge in the trial process. In particular, in the classic inquisitorial model, the judge is actively involved in the investigation of the facts and applicable legal provisions. In the classic adversarial process, the duty of the judge rests with providing the parties with equal and reasonable opportunity to present their cases, while the duty to provide the court with evidence and applicable rules of law is left to the parties.

Generally, arbitration laws give the parties a right to agree on the procedure for conducting arbitration and the taking of evidence. In the event the parties fail to do so (which is often the case), the tribunal has a broad discretion in determining the rules of procedure.

The study of 14 sets of rules (institutional rules of leading Western, Central, and Eastern European arbitration institutions) proves that rules usually avoid providing instructions to arbitrators on conducting the arbitration process, leaving this decision to the tribunals.

Which model the tribunal chooses depends on the particular circumstances of the case, the legal background of the arbitrators and the parties.

With the aim to provide the parties and the arbitrators with broader choices of the applicable procedural rules, a working group was established for summarizing the procedural rules based primarily on the inquisitorial model, where the duty of the judge is to play a more active role in finding the facts and the law.

As a result of the survey of respondents from 30 countries, the most common features of the inquisitorial proceedings are summarized, which were then used as a basis for drafting the Inquisitorial Rules on the Taking of Evidence (the “Prague Rules”).

By adopting a more inquisitorial approach, the new rules will help to reduce time and costs of arbitrations and make the process more efficient.

*Coordinators of the Working Group
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THE STUDY

1. Case Management Conference

In this section, the Respondents were asked about the conduct of the Case Management Conference (the “CMC”) in their relevant jurisdiction.

As follows from the answers, there is no common approach among the Respondents. Most of the time the CMC takes place after an exchange of first written submissions.

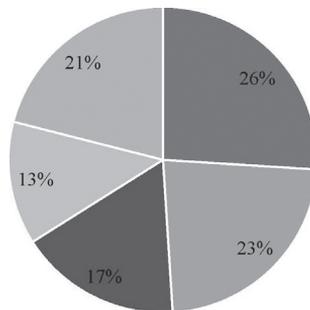
26% of the Respondents admitted that the CMC is conducted almost every time. While 23% of the Respondents noted that it is conducted only in large transnational disputes.

13% of the Respondents answered that the CMC is conducted in any large dispute, 21% of the Respondents provided other answers, while 17% admitted that the CMC is never conducted in their jurisdiction.

Based on the provided comments, the conduct of the CMC depends on the chosen procedural rules. For example, under the influence of the ICC Rules of Arbitration the conduct of the CMC is becoming more popular in France. When neither local arbitration rules nor procedural tradition of local state courts prescribes the conduct of the CMC, it is never used or used only in large transnational disputes.

There is also a certain tendency to include provisions stipulating the conduct of the CMC in arbitration rules of arbitral institutions during their revision, even when the CMC was not widely used before.

Chart 1. The Use of the CMC



26% – Almost everytime

23% – In large cross-border disputes

17% – Never

13% – For any large disputes

21% – Other

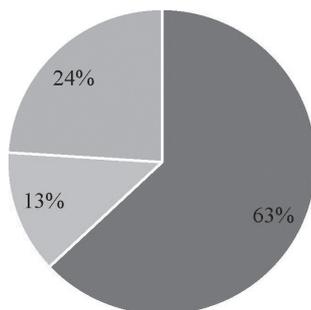
The majority of the Respondents mentioned that the CMC is held primarily with the purpose to establish and agree on the procedure for the conduct of arbitration, including negotiation of the procedural timetable (63% of the Respondents).

13% of the Respondents indicated that the CMC is sometimes used to determine the issues to be decided by the tribunal. The rest of the Respondents provided other answers.

In relation to a time point when the CMC is conducted, the majority of the Respondents (73%) specified that it takes place after the parties have exchanged their first submissions (eg, request for arbitration and answer).

Sometimes the CMC is held before hearings on the merits of the case (16%), with the purpose, for example, to discuss a potential amicable settlement.

Chart 2. Purposes of the CMC

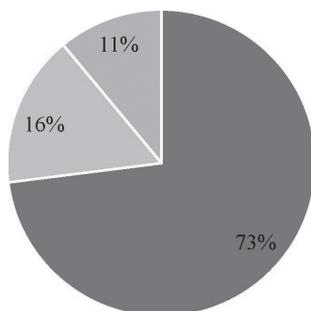


63% – Coordination of the procedural schedule

13% – Determination of disputable issues

24% – Other

Chart 3. The stage for the CMC



73% – After exchange of original documents

16% – Before hearing on merits

11% – Other

2. Arbitral Tribunal's Duty to Establish Facts and Applicable Law

In this part of the Questionnaire the Respondents were asked about powers that the tribunal has to establish facts of the case and content of applicable law.

The majority of the Respondents noted that the tribunal has no obligation to establish facts of the dispute, but has the right to play an active role in establishing the facts.

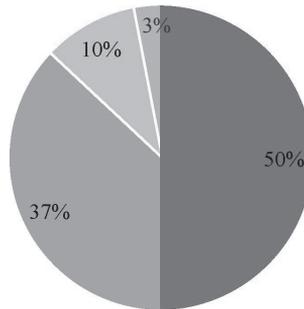
With respect to applicable law, a strong majority of the Respondents admitted that the tribunal either has an obligation or the right to play an active role in establishing the content of applicable law.

The majority of the Respondents noted that the tribunal has no obligation to establish facts of the dispute.

50% of the Respondents pointed out that the tribunal only has a right to play an active role in fact finding. 37% of the Respondents answered that it is parties' obligation to establish facts.

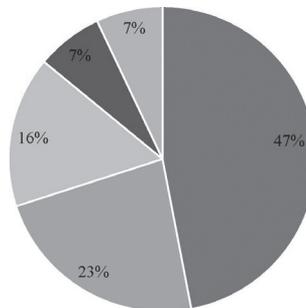
That said, many Respondents mentioned that in fact the tribunal often plays an active role in the process with the purpose of fact finding.

Chart 4. Tribunal's obligation to establish facts



- 50% – Tribunal's right
- 37% – Parties' obligation
- 10% – Provided in arbitration rules
- 3% – Provided by law

Chart 5. Tribunal's obligation to establish the content of applicable law



- 47% – Lex arbitri metter
- 23% – Tribunal's right
- 16% – If in applicable rules
- 7% – Parties establish applicable law
- 7% – Other

With respect to the establishment of applicable law content, in total, 70% of the Respondents pointed out that the tribunal either has an obligation or a right to play an active role in the establishment of applicable law content.

16% of the Respondents noted that such obligation may be provided by relevant arbitration rules.

Only 7% mentioned that this is the parties' obligation, and the remaining 7% of the Respondents provided other comments.

On the question of whether arbitrators guide the parties on their respective burdens of proof, 33% of the Respondents replied no. A few Respondents noted that the tribunal may comment on this issue, but only upon the request of the parties.

3. Document Production

The absolute majority of the Respondents (93%) confirmed that the party can request the production of documents from the opposing party.

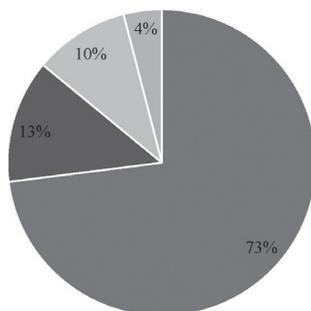
The request should relate to specific documents, which are possible to identify.

In most cases the Respondents indicated that usually the tribunal also has the power to order production of documents; however, it is rarely used. Two most popular objections to the request for document production are the absence of documents from the possession of the requested party and professional or other secrecy.

On the question of whether the tribunal can request the production of documents on its own initiative, only 10% of the Respondents answered that the tribunal not only has a right to order document production, but also usually does so in relation to the documents it believes to be relevant and material to the outcome of the case.

The vast majority of the Respondents, namely 73%, noted that the tribunal rarely uses this right. While 13% of the Respondents mentioned that the tribunal cannot request the production of documents on its own initiative.

Chart 6. Tribunal's power to order documents production



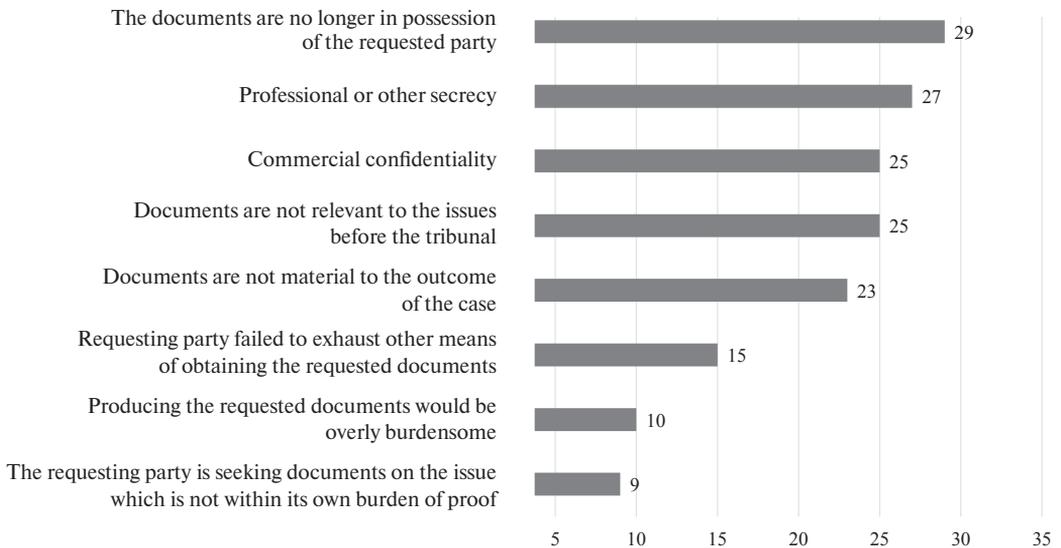
73% – Rarely used

13% – Cannot request on its own motion

10% – Usually requests

4% – Other

**What are the grounds for objections to request document production?
(Multiple options were possible)**

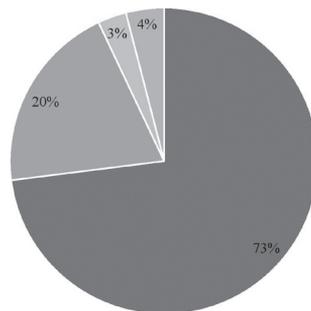


On the question of how narrow the documents should be determined in the request, the majority of the Respondents (73%) noted that the request should be for a specific document and should provide sufficient details to allow identification of such a document.

In some jurisdictions (20% of the Respondents) it is admissible to request a narrow and specific category of documents.

3% of the Respondents noted that the request should be for a specific document, identifying the document by reference to the author and the addressee, date, reference number and other unique characteristics. And the remaining 3% of the Respondents provided another answer.

Chart 7. The scope of request for documents production



- 73% – Identifiable documents
- 20% – Specific and certain category
- 3% – Only if indicate details
- 4% – Other

4. Witnesses of Facts

Despite the common opinion that witnesses of facts are rarely used in commercial disputes in the continental legal tradition, only 3% of the Respondents indicated that witnesses are never used.

In addition to that, 17% of the Respondents noted that witnesses are used in arbitration proceedings, but this happens only in exceptional cases.

At the same time, the parties are free to call the witnesses of their choice (57% of the Respondents).

In the vast majority of jurisdictions (93% of Respondents), there are no restrictions as to who can act as a witness.

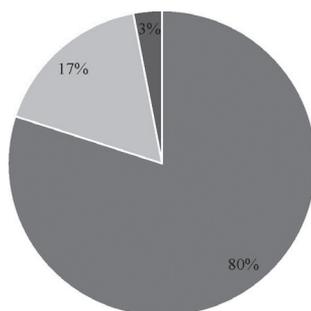
It is difficult to single out the prevailing practice of presenting testimony. 30% of the Respondents noted that witnesses usually present written witness statements.

It is also common that witnesses are examined either orally at a hearing (20% of Respondents) or the party is expected to explain which topics will be addressed by the witness (20% Respondents).

As follows from Chart 8, the majority of the Respondents (80%) noted that witnesses of facts are used in arbitration proceedings in their jurisdictions.

17% of the Respondents noted that witnesses of facts are used only in exceptional cases and only 3% of the Respondents answered that witnesses of facts are never used.

Chart 8. The use of facts witnesses



80% – Yes

17% – In exceptional cases

3% – Never

57% of the Respondents noted that the parties in their jurisdictions are free to call the witnesses of their choice.

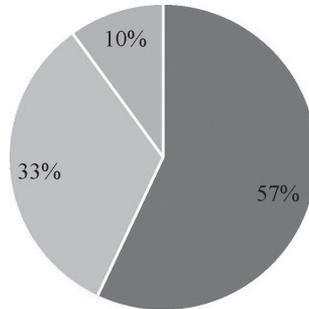
Nevertheless, it is also good practice when the party identifies the witness and the issues he or she would be able to cover, and the tribunal will determine (at its discretion) whether to call this witness (33% of the Respondents).

The majority of the Respondents (53%) noted that the examination of witnesses is conducted primarily by the parties, but the tribunal may interfere at any point.

33% of the Respondents answered that examination is primarily conducted by the tribunal, followed by questions of parties' counsels.

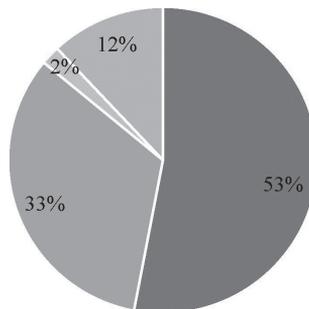
Only 2% of the Respondents noted that the examination of witnesses is conducted exclusively by the tribunal.

Chart 9. The scope of parties' freedom to identify the witnesses they will be summoning



- 57% – Parties independently invite witnesses
- 33% – Witnesses interview on approved issues
- 10% – Other

Chart 10. The conduct of witnesses examination

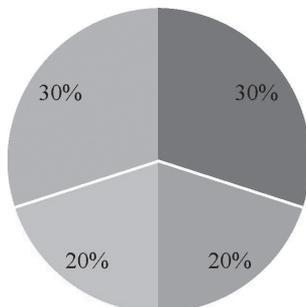


- 53% – Parties examine
- 33% – Primarily tribunal's examination
- 2% – Only tribunal examine
- 12% – Other

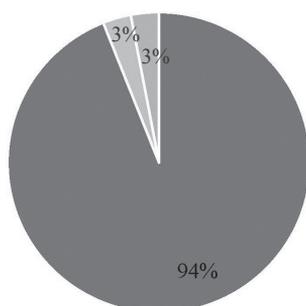
30% of the Respondents noted that detailed written witness statements would usually be used in lieu of examination in chief.

However, it is also common that witnesses are examined either orally at a hearing (20% of Respondents) or the party is expected to explain which topics will be addressed by the witness (20% Respondents).

However, 30% of the Respondents provided their own answers.

Chart 11. The use of written witness statements

- 30% – Written statements
- 20% – Party describes the content of testimony
- 20% – Only orally
- 30% – Other

Chart 12. Who can act as a witness of fact

- 94% – No restrictions
- 3% – Only independent persons
- 3% – Other

5. Use of Experts Summary

60% of the Respondents noted that it is usual to use party-appointed experts.

According to 33% of the Respondents, if the expert is needed, it would usually be appointed by the tribunal and sometimes (13% of Respondents) the tribunal appoints its own expert in addition to the party-appointed experts.

In 42% of cases the tribunal would usually identify potential candidates and ask for the parties' views on each of them.

39% of the Respondents noted that the tribunal will produce the initial draft of the terms of reference and provide it for the parties' comments.

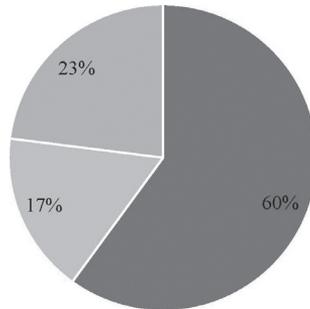
In 56% of cases the examination of an expert is conducted primarily by the parties, but the tribunal may interfere at any point.

In 50% of cases the expert can request relevant information from the parties directly or through the arbitral tribunal.

60% of the Respondents noted that it is common to use party- appointed experts in arbitration and usually each party would appoint its own expert.

17% of the Respondents mentioned that it is not common in their jurisdiction to use party- appointed expert. While 23% of the Respondents provided their own answers.

Chart 13. The use of party-appointed experts



60% – By parties

17% – Not by parties

23% – Other

30% of the Respondents stated that if the expert is needed, he or she would usually be appointed by the tribunal.

The same amount of the Respondents (30%) admitted that the tribunals would usually not appoint their own experts.

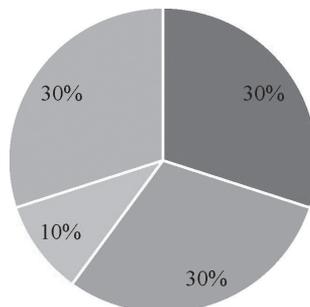
10% of the Respondents noted that the tribunal would usually appoint its own expert in addition to the party-appointed experts.

In 42% of jurisdictions that is usual practice that the tribunal would identify potential candidates and ask for the parties' views on each of them.

However, in 33% of cases the tribunal would usually ask the parties to come up with the list of potential experts.

And only 11% of the Respondents stated that the tribunal would usually determine the relevant expert unilaterally and inform the parties of its choice.

Chart 14. Tribunal-appointed expert



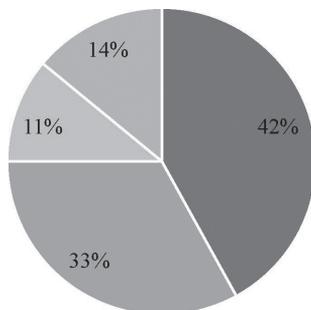
30% – Tribunal's expert participate

30% – Tribunal does not appoint expert

10% – Tribunal appoints additional expert

30% – Other

Chart 15. Determination of expert



42% – Tribunal consults with parties

33% – Tribunal selects from parties' list

11% – Tribunal chooses

14% – Other

In case of tribunal-appointed experts, 39% of the Respondents stated that the tribunal will produce the initial draft of the terms of reference and provide it for the parties' comments.

In 30% of cases the parties are invited to produce an initial draft of the terms of reference.

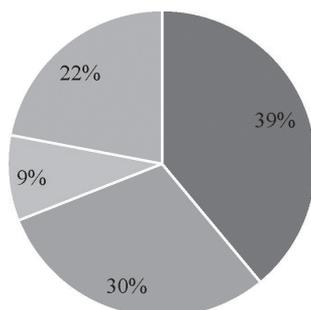
And 9% of the Respondents noted that the tribunal will unilaterally draft the terms of reference for the tribunal-appointed expert.

In 50% of cases the expert can request relevant information from the parties directly or through the arbitral tribunal.

17% of the Respondents noted that the parties will voluntarily grant access to all information needed to the expert.

And 11% of the Respondents admitted that the expert is restricted with information submitted by the parties to the case file.

Chart 16. Drafting terms of reference for tribunal-appointed expert

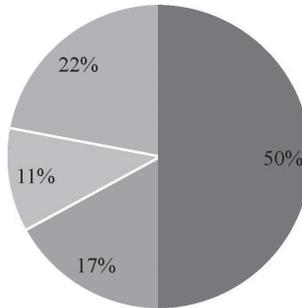


39% – Parties actively participate

30% – Parties prepare first draft

9% – Tribunal without parties

22% – Other

Chart 17. Access of the tribunal-appointed expert to the documents and information

50% – Expert may request

17% – Parties willingly disclose

11% – Expert limited to case file

22 % – Other

6. Hearings

The survey showed that oral hearings are common in arbitration proceedings in countries with a continental legal system.

At the same time, the majority of the Respondents (60%) indicated that hearings are primarily conducted to examine experts and witnesses.

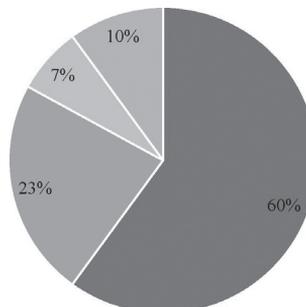
23% of the survey participants noted that the hearings are conducted only in isolated instances.

At the same time, according to the Respondents' comments, in a number of countries hearings are held for the parties to present their case irrespective of whether witnesses or experts are involved (for example: Belarus, Hungary, Georgia, Egypt, Kazakhstan, Lithuania, Russia, Ukraine, Estonia).

The predominant part of the Respondents (60%) admitted that in their jurisdictions evidentiary hearings are usually conducted to examine experts and witnesses.

23% of the respondents stated that the evidentiary hearings are conducted in isolated cases to examine witnesses and experts.

And only 7% of the Respondents expressly stated that hearings in their jurisdictions are only used to allow parties' counsel to address the tribunal on the issues of law.

Chart 18. The conduct of hearings

- 60% – For interrogation of witnesses and experts
- 23% – Only if interrogation is necessary
- 7% – Only parties' representatives
- 10% – Other

7. Settlement Facilitation

Respondents were also asked to answer several questions regarding the assistance of the tribunal in facilitating the settlement of the dispute.

47% of the Respondents answered that the tribunal does not assist the parties in settling the dispute.

When the assistance of the tribunal is common in the relevant jurisdiction, in most cases it is provided to the parties before or during the hearing (23%), less often after the first exchange of procedural documents (13%).

On the question of whether the tribunal can announce its interim opinion on the dispute to the parties to encourage settlement, the majority of the Respondents answered no (50%).

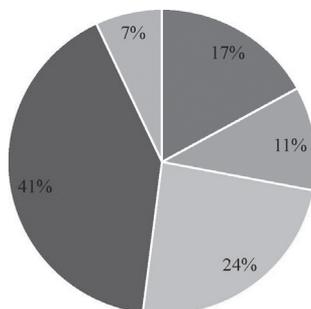
41% of the Respondents answered that the tribunals usually do not attempt to facilitate settlement of the dispute.

24% of the Respondents noted that the tribunal is obligated to do so by *lex arbitri*.

In 17% of cases settlement facilitation of the dispute by the tribunal is usual practice in that jurisdiction.

According to 11% of the Respondents, the tribunal will try to facilitate settlement of the dispute, but only upon specific request by the parties. And 7% of the Respondents provided other answers.

Chart 19. Tribunal's facilitation of settlement



- 17% – Usual practice
- 11% – If parties requested
- 24% – Legal obligation to assist in conciliation
- 41% – No
- 7% – Other

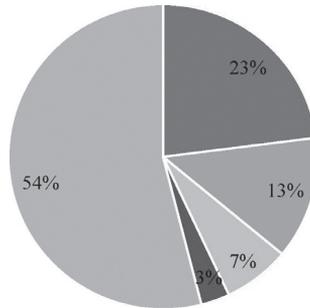
Answering the question of at what stage the tribunals usually seek to facilitate settlement, the majority of the Respondents (54%) preferred to give their own answers in the comments.

However, in those cases where settlement facilitation by the tribunal is relevant, 23% of the Respondents noted that it is conducted prior to the merits hearing, 13% of the Respondents – after the exchange of the statement of claim and statement of defence, 7% of the Respondents – right after the merits hearing, and 3% – after the exchange of the request for arbitration and answer to the request.

50% of the Respondents answered that the tribunal could not share with the parties its initial views on their respective positions to facilitate settlement. 23% of the Respondents admitted that the tribunal may do so, but only when both parties so consented.

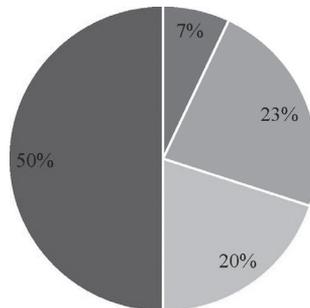
Only 7% of the Respondents responded completely positively to this question.

Chart 20. The stage for settlement negotiation



- 23% – Before hearing
- 13% – After exchange of claim and defence
- 7% – After hearing
- 3% – After exchange of request and response
- 54% – Other

Chart 21. Announcement of tribunal's preliminary opinion to the parties



- 7% – Yes
- 23% – Only with parties' consent
- 20% – Theoretically possible
- 50% – No

Annex 1. The List of Charts

- Chart 1. The use of the CMC
- Chart 2. Purposes of the CMC
- Chart 3. The stage for the CMC
- Chart 4. Tribunal's obligation to establish facts
- Chart 5. Tribunal's obligation to establish the content of applicable law
- Chart 6. Tribunal's power to order document production

- Chart 7. The scope of the request for document production
- Chart 8. The use of facts witnesses
- Chart 9. The scope of the parties' freedom to identify the witnesses they will be summoning
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- Chart 20. The stage for settlement negotiation
- Chart 21. Announcement of tribunal's preliminary opinion to the parties

Annex 2. Respondents to the Questionnaire

- Albania – Lazimi Fatos
- Argentina – Christian Albanesi
- Armenia – Sargis Grigoryan
- Austria – Christoph Liebscher
- Azerbaijan – Gunduz Karimov
- Belarus – Alexandre Khrapoutski
- Brazil – José Emilio Nunes Pinto
- Bulgaria – Assen Alexiev
- Egypt – Mohamed Abdel Wahab
- Estonia – Asko Pohla
- Finland – Leena Kujansuu
- France – Christian Albanesi
- Georgia – Lasha Nodia
- Germany – Klaus Peter Berger
- Kazakhstan – Alexander Korobeinikov
- Kyrgyzstan – Nurbek Sabirov
- Latvia – Ziedonis Udris
- Lithuania – Ramūnas Audzevičius
- Norway – Ola Haugen
- Poland – Beata Gessel
- Portugal – Duarte Henriques
- Russia – Andrey Panov
- Serbia – Vladimir Pavić
- Slovakia – Roman Prekop
- Slovenia – Aleš Galič
- Sweden – Carl Persson
- Switzerland – Philipp Habegger
- Turkey – Ziya Akinci
- Ukraine – Olena Perepelinska
- Hungary – Jozsef Antal