CHAPTER 10

Submitting New Evidence after the Cut-Off Date: When Are Exceptional Circumstances Present?

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§10.01 INTRODUCTION

Evidence plays a key role in any arbitration; no party will succeed without it. As both parties develop their case, it is common for further evidence to be submitted along the way as the proceedings move forward. However, in order to maintain procedural efficacy, parties should not be allowed to hinder the proceedings by submitting new evidence or facts at an inconveniently late stage when they could and should have submitted it before.

That is why it is common in arbitration to agree on a *cut-off date.* A *cut-off date* is generally defined as a date after which the parties cannot present new facts, arguments or evidence,[1] as the case may be.[2] Its main purpose is to prevent a party from producing such new evidence or facts at a late stage in the proceedings, in a worst-case scenario at the hearing, which could derail the proceedings and harm the other party.[3]

1. Mika Hemmo, *Prosessitoimia rajoittavat määräajat ja niiden poikkeukset välimiesmenettelyssä*, p. 39 (2022), available at https://www.edilex.fi/artikkelit/27108.pdf.
2. In the following article, we will mostly focus on and refer only to 'evidence' when discussing what a party wishes to submit after the passing of the cut-off date. However, it is equally possible that a party may wish to submit new facts, allegations, grounds, or claims (as the case may be), and a cut-off date may well take these into account; but this is not the main focus of this article.
3. This type of conduct is also problematic in terms of parties' equal treatment, as the other party might not have sufficient possibility to be able to comment on such new evidence (and/or produce rebuttal evidence) unless the arbitral tribunal grants the responding party an extension of time, potentially causing even more procedural delays. Such reasoning by a sole arbitrator

In the past, a cut-off date was often recommended to be used in pending cases only where it was already evident that a party was constantly amending its claims or the grounds thereof, or where a party kept producing new evidence, leading to complicated and delayed proceedings. Nowadays, the cut-off date is normally agreed upon soon after the arbitrator has received the case file, for example, at the case management conference. This provision is typically inserted into the procedural timetable even when there is no reason to suspect that one party will keep bringing up new claims, grounds, or evidence throughout the process. However, agreeing on a cut-off date at the outset will likely increase the chances of mutual adherence to the procedural timetable.[4]

Nevertheless, sometimes, even the most diligent parties may face a situation where they have an unexpected need to submit new evidence or rely on new facts after the cut-off date. If the other party objects, it must be determined by the arbitral tribunal whether new facts and/or new evidence is nevertheless permitted. Sometimes, arbitration rules (or the procedural orders, timetables or terms of reference where the cut-off date is agreed upon) state that new evidence is not permitted after the cut-off date unless the arbitral tribunal in *exceptional circumstances* decides otherwise.

But when are the circumstances exceptional?

In this chapter, we aim to address this question. In doing so, we will first conduct a brief overview of certain arbitration rules and practices related to cut-off date provisions. Thereafter, we will discuss some situations in which the circumstances could be found to be exceptional. We present our findings at the end of the chapter.

§10.02 CUT-OFF DATES IN ARBITRATION RULES

Despite the fact that cut-off dates are widely recognised and encouraged to be used, not many of the major arbitration rules contain an explicit article concerning cut-off dates.[5] Instead, the rules merely tend to grant the tribunal the authority to conduct the proceedings in an efficient manner, from which the use of the necessary tools, such as cut-off dates, will follow.[6] Often, the authority to impose cut-off dates will flow from

regarding, e.g., parties equal treatment is found in case law, *see, e.g.*, *Supplier (Xanadu) v. Reseller (Utopia)*, (SCC Case No. 2018/127), Final Award, 14 November 2019, in Stephan W. Schill (ed.), ICCA Yearbook Commercial Arbitration 2020 – Volume XLV, para. 185 (2020), as available at Kluwer Law International.

4. On a related note, the provision regarding a cut-off date was explicitly introduced into the Arbitration Rules of the Finland Chamber of Commerce in 2013 to support swift and cost-efficient dispute resolution. Regarding the aim of introducing the cut-off provision and the intention for its usage, please *see* Mika Savola, *Guide to the Finnish Arbitration Rules*, pp. 297-298 (2015).
5. Mika Hemmo, *Prosessitoimia rajoittavat määräajat ja niiden poikkeukset välimiesmenettelyssä*, p. 41 (2022), available at https://www.edilex.fi/artikkelit/27108.pdf. Despite the fact that not all arbitration rules include an explicit provision on the use of a cut-off date, its use is widely accepted. *See*, *e.g.*, ICC Commission on Arbitration and ADR, *ICC Commission Report: Controlling Time and Costs in Arbitration*, para. 73 on p. 14 (2018) and Gustav Flecke-Giammarco et al., (eds), *The DIS Arbitration Rules: An Article-by-Article Commentary*, p. 432 (2020).
6. The Supreme Court of Finland has also confirmed that cut off-dates may be used in arbitration, as long as the provision is clear and has been accepted by the parties. *See* Finnish Supreme Court case KKO 2018:48, para. 17.

clauses in arbitration rules, which state that submissions shall be made and evidence shall be provided within the time limits set by the arbitral tribunal. The same also arguably follows from the application of the IBA Rules on the Taking of Evidence, where such rules apply.[7]

By way of example, the rules of the Danish Institute of Arbitration (DIA) state that documents or other evidence must be submitted in accordance with the set time limits and that failure to comply with this may cause the arbitral tribunal to reject admission unless the arbitral tribunal considers the failure justified, or if 'special circumstances' exist.[8]

One set of rules which specifically mentions a cut-off date is the Arbitration Rules of the Finland Chamber of Commerce (the 'FAI Rules') which has had a provision concerning the cut-off date since 2013. At the outset, the provision was part of an article concerning the taking of evidence more generally. However, as part of the rule amendments in 2020, the cut-off provision was separated into its own article, while the wording remained the same. It reads as follows:

> The arbitral tribunal may, after consulting with the parties, set a cut-off date prior to the commencement of any hearing referred to in Article 36 and order that after the cut-off date, the parties will not be allowed to present any new claims, arguments or documentary evidence on the merits of the dispute, or to invoke any new witnesses not previously nominated, unless the arbitral tribunal in *exceptional circumstances* decides otherwise.[9] (emphasis added)
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> An explicit provision mentioning a cut-off date is also included in the Prague Rules.[10] Article 3.3. states that 'the arbitral tribunal shall consider imposing a cut-off date for submission of evidence and not accepting any new evidence after that date, save for under *exceptional circumstances*' (emphasis added).[11]

Despite the fact that explicit cut-off articles are not present in all arbitration rules, cut-off dates are widely agreed upon in procedural orders, timetables and/or terms of

7. *See IBA Rules on the Taking of Evidence in International Arbitration,* Art. 3.1 on p. 10 and Art. 4.1 on p. 13 (2020). Arbitration rules also tend to include clauses on closing of the proceedings, which effectively lead to the same outcome as a cut-off date, however, at a later stage in the proceedings. For example, *see ICC Rules of Arbitration* (2021), Art. 27: '(…) After the proceedings are closed, no further submission or argument may be made, or evidence produced, with respect to the matters to be decided in the award, unless requested or authorized by the arbitral tribunal.'
8. The Rules of Arbitration of the Danish Institute of Arbitration (2021), Art. 34: 'The parties shall produce documents or other evidence in support of their claims and give the other party or parties and the Arbitral Tribunal notice of the witness(es) and expert(s) that the party wishes to give testimony, in accordance with the time limits set by the DIA or the Arbitral Tribunal. Failure to comply with a time limit may cause the Arbitral Tribunal to reject admission of the corresponding evidence, unless the Arbitral Tribunal considers the failure justified or if special circumstances exist.'
9. The Arbitration Rules of the Finland Chamber of Commerce (2020), Art. 35.
10. It shall be noted that the Prague Rules have been developed to provide guidance for arbitral tribunals and parties on how to increase efficiency in arbitral proceedings by encouraging more active case management by the arbitral tribunals. Nevertheless, the Prague Rules are not intended to replace the rules of arbitration institutes, but rather to be used to supplement the procedure. Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules) (2018), p. 3.
11. Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules) (2018), Art. 3.3.

reference. Especially in cases where the rules do not provide any specific guidance on how to potentially word the cut-off date provision, it is of essence to carefully consider and specify the scope of the cut-off date ultimately agreed upon with the parties. For example, in the FAI Rules, the scope is extensive, covering 'new claims, arguments or documentary evidence on the merits of the dispute, or to invoke any new witnesses not previously nominated'. In comparison, the Prague Rules and DIA Rules only refer to 'evidence'.[12] As such, the tribunal should be mindful of the wording of both the underlying rules, if any, as well as its own chosen expressions when drafting a cut-off provision.

It could be argued that a tribunal must have jurisdiction to draft a cut-off provision which is narrower in scope than what the rules envisage (e.g., the FAI Rules state that the arbitral tribunal 'may' set a cut-off date concerning the issues mentioned in Article 35, not that it 'must' or 'shall' set such a date). However, it is a bit more unclear whether a tribunal has jurisdiction to set a cut-off date which is more far-reaching than what the rules envisage. In practice, this is unlikely to be a recurring problem, as institutional rules rarely contain restrictive wording to this effect, to the extent that they contain any such wording at all. In any event, party agreement and involvement are the keys to any successfully worded cut-off date.

Often, arbitrators tend to interpret cut-off provisions strictly based on their wording. By way of example, when a dispute concerning the scope of the cut-off arose in SCC case 2018/127, the arbitrator concluded that the cut-off date provision in the case at hand referred only to the submissions of additional documentary evidence and legal texts, and as such did not refer to oral witness testimonies. Thus, new oral testimony was admissible even after the cut-off date, as the provision was clear in its meaning and could not be interpreted against its plain wording to encompass oral testimony of fact witnesses.[13]

12. The DIA rules also mention 'documents', which arguably would fall under the category of 'evidence'. The ICC commission report also envisions a similar scope: 'In advance of any evidentiary hearing, consider setting a cut-off date after which no new documentary evidence will be admitted unless a compelling reason is shown.' ICC Commission on Arbitration and ADR, *ICC Commission Report: Controlling Time and Costs in Arbitration*, para. 73 (2018).
13. In the case at hand, Procedural order No. 1 included the following provision on cut-off date: 'After the cut-off date mentioned in Section (1) of the Procedural Timetable, the parties are not permitted to submit any additional documentary evidence or legal texts. The Arbitral Tribunal will not accept any late submission unless the Arbitral Tribunal in exceptional circumstances decides otherwise upon a party's reasoned request showing sufficient cause for the delay.' *Supplier (Xanadu) v. Reseller (Utopia)*, (SCC Case No. 2018/127), Final Award, 14 November 2019, paras 38, 161-170, in ICCA Yearbook Commercial Arbitration 2020 – Volume XLV (2020), as available at Kluwer Law International. Similarly, in SCC case 2018/a, the arbitrator found that a party had the right to claim interest also after the cut-off date: 'According to Article 30 of the SCC Rules, a party may amend or supplement its case prior to the close of the proceedings, pursuant to Article 40. The proceedings were not closed on [date X], and the claim for interest is comprised by the arbitration agreement. In the opinion of the arbitrator, the general cut-off date does not exclude the application of Article 30 in the SCC Rules', *Company (Xanadu) v. Company (Sweden)*, (SCC Case No. 2018/a), Final Award, 30 January 2020, para. 562, in ICCA Yearbook Commercial Arbitration 2021 – Volume XLVI (2021), as available at Kluwer Law International.

As demonstrated by the examples above, quite often, cut-off date provisions either state that new evidence may only be submitted after the cut-off date in *exceptional circumstances* or use similar wording to the same effect. Such wording allows for multiple arguments, but the use of the word 'exceptional' in and of itself suggests that such circumstances should not materialise often.[14] Therefore, it is worthwhile to consider what might constitute such exceptional circumstances. In the following, we will delve into the main topic of this article and discuss in what instances evidence may be submitted even after the relevant cut-off date has passed; i.e., when might the 'exceptional circumstances' threshold be met?

§10.03 WHAT MIGHT CONSTITUTE 'EXCEPTIONAL CIRCUMSTANCES'?

When considering whether to admit new evidence or facts after the cut-off date, the FAI Rules and the Prague Rules both refer to *exceptional circumstances*.[15] The DIA Rules similarly refer to a 'justified' failure to submit evidence or to the existence of 'special circumstances', while the ICC commission has used the wording 'compelling reason'.[16] Similar wording has also been used in many procedural orders and timetables, as well as terms of reference drafted by arbitral tribunals worldwide. Therefore, we will discuss what type of standard is required. In other words, when could such exceptional circumstances be present, which would allow new evidence to be submitted after the cut-off date?

In conducting this evaluation, it must first be established what the content and scope of the agreed cut-off date is. Ultimately, this comes down to the wording of the clause itself. Have the parties intentionally agreed on either a high or a low threshold for when new evidence can be submitted? Could it be argued that a 'justified reason' constitutes a lower threshold for the submission of evidence than a 'compelling reason' or an 'exceptional circumstance'? In this article, our focus is on 'exceptional circumstances' as mentioned in the FAI Rules, but in a real-life scenario, the use of different – and perhaps less strict – wording in the actual cut-off date provision could be of significant importance when determining whether new evidence can be submitted.

At the outset, it should be noted that the arbitral tribunal will not need to rule on what might constitute exceptional circumstances should all of the parties agree that the new evidence in question may be submitted despite the passing of the cut-off date. However, when the other party objects, the arbitral tribunal must decide whether to declare the evidence admissible. In taking such a decision, the arbitral tribunal has

14. A similar interpretation has been presented by Finnish professor Mika Hemmo. Mika Hemmo, *Prosessitoimia rajoittavat määräajat ja niiden poikkeukset välimiesmenettelyssä*, footnote 16 (2022), available at https://www.edilex.fi/artikkelit/27108.pdf.
15. The Arbitration Rules of the Finland Chamber of Commerce (2020), Art. 35. Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules) (2018), Art. 3.3.
16. The Rules of Arbitration of the Danish Institute of Arbitration (2021), Art. 34. ICC Commission on Arbitration and ADR, *ICC Commission Report: Controlling Time and Costs in Arbitration*, para. 73 on p. 14 (2018).

wide discretionary powers unless the parties have agreed otherwise or more specifically agreed on what should be regarded as 'exceptional circumstances'.[17]

Moving to the question at hand, we will address different aspects considered by tribunals as potential 'exceptional circumstances' in the evaluation of the admissibility of a certain piece of evidence after the cut-off date.

First, tribunals would typically consider whether the party has had an opportunity to submit it before the cut-off date. If such evidence has not been reasonably available earlier, it has been considered not to be fair to preclude its submission.[18] Such situations could arise with regard to, e.g., financial statements or judgments that have been issued after the cut-off date.[19] As such, the availability or materialisation of certain evidence only after the cut-off date has passed could be seen to constitute exceptional circumstances which may lead to the evidence being admissible.

Second, it might sometimes happen that, at the outset of a dispute, a party considers a certain piece of documentary evidence to be redundant. At this stage, it may appear to only be relevant for a point which is wholly undisputed by the opposing party. However, if the opposing party later turns out to dispute such a point, either in written submissions or even as late as at the hearing, it might then be justified to request that the tribunal allow the submission of such evidence, even if the cut-off date has passed. These circumstances could arguably be seen as 'compelling' or 'justified', but it might be somewhat more unclear whether they would rise to the level of being 'exceptional', considering that the party will have had said evidence in its possession throughout the duration of the dispute. The question then becomes whether a party should pre-emptively submit any and all loosely related documentary evidence to the tribunal at its earliest convenience in order to not take the risk of having to argue in favour of its right to submit such evidence at a later stage, after the passing of the cut-off date. However, submitting excessive documentary evidence to the tribunal will hinder procedural efficiency and render the case overly burdensome, which is why a certain degree of restraint should be exercised in this respect.[20] In deciding how to

17. The FAI Rules do not provide guidance on what could be regarded as exceptional circumstances, and therefore, it likely falls on the tribunal to determine this. *See* Mika Savola: *Guide to the Finnish Arbitration Rules*, p. 298 (2015).
18. Nikolas Pitkowitz, *Chapter II: The Arbitrator and the Arbitration Procedure, The Vienna Predictability Propositions: Paving the Road to Predictability in International Arbitration* in Christian Klausegger et al. (eds), Austrian Yearbook on International Arbitration 2017, p. 137 (2017), as available at Kluwer Law International. Generally, the evaluation has centered upon whether the party is able to provide sufficient reasons for why the evidence has not been submitted earlier, *see*, *e.g.*, Jakob Ragnwaldh, Fredrik Andersson, Celeste E. Salinas Quero, *Chapter 5: The Proceedings Before the Arbitral Tribunal*, in *A Guide to the SCC Arbitration Rules*, p. 103 (2019), as available at Kluwer Law International: 'The Arbitral Tribunal's determination as to whether to admit the new evidence will, in general, turn on factors such as whether the party in question can convincingly explain why the evidence has not been able to be submitted before and the weight and materiality of the evidence.'
19. Mika Hemmo, *Prosessitoimia rajoittavat määräajat ja niiden poikkeukset välimiesmenettelyssä*, p. 51 (2022), available at https://www.edilex.fi/artikkelit/27108.pdf.
20. *See*, *e.g.*, Mika Hemmo, *Prosessitoimia rajoittavat määräajat ja niiden poikkeukset välimiesmenettelyssä*, pp. 49–50 (2022), available at https://www.edilex.fi/artikkelit/27108.pdf.

proceed, it is necessary to carry out a careful balancing act of the various interests that are affected.

By way of example, in ICC case No. 18671, the claimant's new evidence was admissible despite the cut-off date having already passed, as the respondent had presented vague and contradicting arguments in the proceedings. The sole arbitrator stated, e.g., that 'the Sole Arbitrator has the power to admit documentary evidence after the cut-off date in exceptional circumstances, if appropriate in view of all relevant circumstances. When assessing all relevant circumstances of the case, the Sole Arbitrator particularly focuses on (i) the relevance of the evidence submitted and (ii) the reasons why it was not submitted within the ordinary exchange of briefs as per Timetable.'[21]

The sole arbitrator found that the submitted evidence could be relevant, as it related to a substantive issue of the case, i.e., which version of the contract was the correct one. Pursuant to the arbitrator's decision, exceptional circumstances were present as the respondent had submitted two directly contradictory explanations with respect to the relevant contract versions and had additionally raised a counterclaim based on a contractual relationship – even though it had also disputed the existence of such a contractual relationship. Additionally, the need for the submitted evidence appeared only after the respondent had pleaded inconsistent factual arguments. As such, the sole arbitrator considered that exceptional circumstances were present, allowing the submission of new evidence past the cut-off date.[22]

Third, a similar situation might also arise regarding witness evidence, and the same points could be argued with respect to a sudden need to supplement the witness list with additional witnesses. However, witness evidence also presents some further challenges as compared to the submission of documentary evidence: in addition to the late recognition of a need to call a certain witness to testify, issues might arise with respect to witness availability and/or the witness's willingness to cooperate.

For example, one could envisage a situation where a witness who has previously been uncooperative suddenly decides to engage in the proceedings. At the outset, no witness statement might have been submitted on the witness's behalf, but the possibility to do so might later present itself after the relevant cut-off date has passed. In such a situation, it might be somewhat more difficult to argue that this would constitute '*exceptional*' circumstances, assuming that the relevance of the witness' statements was known to the parties already well before the passing of the cut-off date. Additionally, and depending on the judicial system, a party to an arbitration might also be able to enlist the help of the national courts in compelling a reluctant witness to give evidence.[23] Although parties are understandably reluctant to go to such lengths, in situations where this option exists, a party could arguably have availed itself of such an

21. *Buyer (Taiwan) v. Seller (Germany), Final Award, ICC Case No. 18671*, in Albert Jan van den Berg (ed.), *ICCA Yearbook Commercial Arbitration 2017* – Volume XLII, para. 23 (2017), as available at Kluwer Law International.
22. *Buyer (Taiwan) v. Seller (Germany), Final Award, ICC Case No. 18671*, in Albert Jan van den Berg (ed.), *ICCA Yearbook Commercial Arbitration 2017* – Volume XLII, paras 15-33 (2017), as available at Kluwer Law International.
23. *See, e.g.*, the Finnish Arbitration Act (23.10.1992/967), section 29.

option sooner, in case it was aware of the reluctance of a certain witness to testify coupled with the relevance of the testimony already before the passing of the cut-off date.

However, a party might more easily be able to meet a lower threshold for the submission of new witness evidence after the cut-off date, arguing, e.g., that 'justified' circumstances exist for calling a new witness although the cut-off date has passed. Yet again, the wording of the cut-off clause is central in this respect: does it envisage that exceptional circumstances have to be present for new evidence to be submitted, or does it allow for the submission of new evidence on the basis of a lower threshold? Is there even any wording included in the clause which would concern witness evidence and/or the threshold for submission of evidence after the passing of the cut-off date?

Another potential situation could arise where a certain witness has been called to testify and may already have submitted a written witness statement before the cut-off date but is then unable to appear at the hearing despite being called to be examined and/or cross-examined. If a party is unable to compel the witness to arrive, the question becomes whether this could amount to exceptional circumstances which would allow a party to call a new replacement witness after the cut-off date. The argument seems easier to make if the witness is severely ill or has, in fact, died, but in cases where the witness is simply reluctant to cooperate, and the assistance of the courts could be available but the party calling the witness is reluctant to resort to this measure, meeting the threshold of 'exceptional circumstances' might prove to be difficult.[24]

In our experience, some arbitral tribunals have also admitted new written evidence where a party had requested to submit it in order to prove that a witness' oral testimony at the hearing was contradictory and/or that the witness allegedly was lying. For instance, such tribunals have concluded that the threshold of 'exceptional circumstances' had been met, as the relevance of the evidence allegedly only became clear to the party at the hearing when it stated that a witness was giving contradictory testimony, and the new evidence was considered to be of essential relevance to the credibility of such a witness.[25]

Fourth, technical difficulties might also meet the threshold of 'exceptional circumstances', allowing for the late filing of evidence. In a judgment by the Svea Court of Appeal, the court addressed a case in which the arbitral tribunal had deemed a submission admissible after the cut-off date when the party who made the filing had suffered from technical difficulties and the submission was filed 1 hour and 52 minutes late (at 1.52 am), with some appendices being filed around noon on the same day. The parties had scheduled a hearing for roughly two weeks from the filing, and the opposing party objected to the late filing. However, the Svea Court of Appeal did not

24. This situation also raises the related point of whether the written witness statement in and of itself could be considered sufficient evidence without any direct examination or cross-examination of the witness at the hearing, but this is outside the scope of this article and would, in any event, largely depend on the wording of the procedural orders in the case at hand.
25. On this topic, *see, e.g.*, Mika Hemmo, *Prosessitoimia rajoittavat määräajat ja niiden poikkeukset välimiesmenettelyssä*, pp. 55-59 (2022), available at https://www.edilex.fi/artikkelit/27108.pdf.

assess the arbitral tribunal's decision to accept the submission, as it deemed that the opposing party had waived its right to object to the decision by not raising the issue again at a later stage of the arbitration, after a short discussion on the first day of the hearing in which it was left to the said party's discretion to request a measure to mitigate the problem, such as adding more time to the hearing or submitting another submission.[26] Thus, one could argue that technical issues might constitute exceptional circumstances, but only for a very limited period of time after the cut-off date. Proving such technical difficulties may be challenging, but in order to meet the standard of 'exceptional circumstances', some evidence might arguably need to be provided in support of the notion that technical difficulties (such as a network disruption) have actually occurred to an extent which hindered the timely filing of the evidence. It may also be relevant whether the technical difficulties in question were foreseeable and/or within the control of the party making the submission.

In all instances mentioned above, the materiality and the weight of the evidence which a party wishes to submit after the passing of the cut-off date plays a key role. It would arguably not be necessary to file any such evidence which only relates to a minor point – or where the relevance of the evidence is unclear – after the passing of the cut-off date, and finding exceptional circumstances to be at hand in such an instance might prove more difficult.

In many cases, tribunals have also considered whether the opposing party can and should be afforded an opportunity to rebut the evidence submitted after cut-off. In case a late filing is allowed, tribunals have often attempted to ensure that the other party has such a possibility, whether it be through the opportunity to file rebuttal evidence or simply the right to comment on the substance of the new evidence.[27]

§10.04 CONCLUSION

In light of the above, we conclude that exceptional circumstances may be present in a variety of different situations, such as where a certain piece of evidence did not exist or was not in the possession of a party wanting to submit it prior to the cut-off date, where its relevance was not previously known to the party that now wishes to submit it, or where technical difficulties have prevented the timely submission of evidence.

However, the final answer as to what can constitute exceptional circumstances is not straightforward, as it will always depend on an assessment of the facts of the case at hand taken as a whole. In particular, the wording of the cut-off clause is of central

26. Judgment of the Svea Court of Appeal, 16 December 2015 regarding SCC Case No. V 2012/171, *Doan Technology Pty Ltd. and Mr. Binh Doan v. Uretek Worldwide Oy*, to the extent summarised in English, available at Jus Mundi.
27. Such considerations, which relate to equal treatment of the parties and the parties' right to present their case, have been taken into account in several cases mentioned in this article. *See, e.g.*, Judgment of the Svea Court of Appeal, 16 December 2015 regarding SCC Case No. V 2012/171, *Doan Technology Pty Ltd.* and *Mr. Binh Doan v. Uretek Worldwide* Oy, para. 154, to the extent summarised in English, available at Jus Mundi. *Supplier (Xanadu) v. Reseller (Utopia)*, (SCC Case No. 2018/127), Final Award, 14 November 2019, in Stephan W. Schill (ed.), ICCA Yearbook Commercial Arbitration 2020 – Volume XLV, para. 169 (2020).

importance when assessing what evidence can be submitted after the passing of the cut-off date, as well as the materiality and weight of the proposed new evidence.

Some commentators have argued that arbitrators should adopt a restrained approach when considering whether to allow new evidence to be presented after the cut-off date. As it is not mandatory to impose a cut-off date, in cases where such a date has been inserted into a procedural timetable or a procedural order, the parties have presumably consented to such inclusion. As such, the cut-off date will usually constitute a party agreement. Therefore, it has been argued that subsequent derogation from such agreement at the insistence of only one party should not be permitted lightly.[28] Indeed, depending on the wording of the agreement, this may not even be possible.

Be that as it may, the question of when to accept new evidence after the cut-off date is of essential importance, as it may give grounds for a party to attempt to challenge the subsequent arbitral award. If the tribunal considers that extraordinary circumstances exist and thus allows the submission of new evidence that affects the outcome of the case, the losing party may seek to contest the arbitral award, stating that the tribunal has exceeded its mandate or that a procedural error has occurred when it allowed new evidence after the cut-off date.[29]

However, should the tribunal instead reject the admissibility of the new evidence, the party whose evidence was rejected could try to set aside the award, claiming that the arbitral tribunal did not allow that party a sufficient opportunity to present its case.[30] It follows that the arbitral tribunal must diligently consider the admissibility of the new evidence, taking into consideration such things as the equal treatment of the parties as well as the enforceability of the award.

28. *See, e.g.*, Irene Welser, Samuel Mimnagh, 'Chapter II: The Arbitrator and the Arbitration Procedure, An Arbitrator's Imperative – How to Avoid Disappointing the Parties, Preventing Surprises and Enabling Efficient and Progressive Arbitral Proceedings', in Christian Klausegger et al. (eds), Austrian Yearbook on International Arbitration, Volume 2021, p. 150 (2021), as available at Kluwer Law International.
29. *See, e.g.*, Judgment of the Svea Court of Appeal, 16 December 2015 regarding SCC Case No. V 2012/171, *Doan Technology Pty Ltd. and Mr. Binh Doan v. Uretek Worldwide Oy*, to the extent summarised in English, available at Jus Mundi.
30. *See, e.g.*, Mika Hemmo, *Prosessitoimia rajoittavat määräajat ja niiden poikkeukset välimiesmenettelyssä*, p. 62 (2022).