



Association Suisse de l'Arbitrage  
Schweiz. Vereinigung für Schiedsgerichtsbarkeit  
Associazione Svizzera per l'Arbitrato  
Swiss Arbitration Association

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The UNCITRAL Notes on Organizing Arbitral Proceedings and  
the ASA Arbitration Toolbox

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## Introduction

Over the past 20-25 years: trends towards “harmonization” of arbitral proceedings

“Harmonization”: a euphemism for “standardization”?

“Best practices” have become “best practice” → the plural has become the singular

Not necessarily a bad thing, if similar situations in similar cases with parties from similar backgrounds, having similar minimum expectations...



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## Introduction (cont'd)

But...

The idea of a single “best practice” has always been debatable (flexibility, cultural sensitivity = key to arbitration)

Over the (same) past 20-25 years: expansion of arbitration to new horizons, with their own cultural and legal traditions

Similar situations? Similar cases? Similar Parties with similar backgrounds? Similar minimum expectations? → clearly no

No choice: The plural must prevail → “best practice” must be “best practices”



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## Introduction (cont'd)

UNCITRAL Notes on Organizing Arbitral Proceedings = chief tool for safeguarding flexibility and cultural sensitivity in arbitration

Revision of the Notes has not changed this

Parallel process within Swiss Arbitration Association → resulted in “ASA Arbitration Toolbox”



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## Introduction (cont'd)

# Outline

1. What has not changed with the 2016 UNCITRAL Notes on Organizing Arbitral Proceedings?
2. What has changed with the 2016 UNCITRAL Notes on Organizing Arbitral Proceedings?
3. The ASA Arbitration Toolbox



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## 1. What has not changed with the 2016 UNCITRAL Notes on Organizing Arbitral Proceedings? (cont'd)

Most importantly:

- Descriptive (non-prescriptive) nature of the Notes
- Non-binding nature of the Notes
- Adaptability of the Notes to institutional arbitration



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## 1. What has not changed with the 2016 UNCITRAL Notes on Organizing Arbitral Proceedings? (cont'd)

Descriptive (non-prescriptive) nature of the Notes: see Introduction, paras. 1 and 2 of 2016 version:

### ***Purpose of the Notes***

*1. The purpose of the Notes is to list and briefly describe matters relevant to the organization of arbitral proceedings. [...]*

*2. Given that procedural styles and practices in arbitration do vary and that each of them has its own merit, the Notes do not seek to promote any practice as best practice.*



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## 1. What has not changed with the 2016 UNCITRAL Notes on Organizing Arbitral Proceedings? (cont'd)

Example of the descriptive nature of the Notes (compare with Articles 3.2 – 3.8 of the IBA Rules on the Taking of Evidence in International Arbitration...):

### ***Requests to disclose documents***

*76. Approaches of arbitration laws and practices vary on whether a party may request the other party or parties to disclose specified documents and to what extent the arbitral tribunal should order such disclosure (for possible submission as evidence), when the requested party refuses to disclose voluntarily. Therefore, it may be useful for the arbitral tribunal to clarify with the parties at an early stage of the proceedings whether a party may request the other party to disclose documents and, if so, to indicate the scope of such disclosure, and to set out the relevant time limits, the form of disclosure requests and the procedures for contesting requests, if relevant.*





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## 1. What has not changed with the 2016 UNCITRAL Notes on Organizing Arbitral Proceedings? (cont'd)

Non-binding nature of the Notes: see Introduction, para. 3 of 2016 version:

### ***Non-binding character of the Notes***

*3. The Notes do not impose any legal requirement binding on the parties or the arbitral tribunal. The parties and the arbitral tribunal may use or refer to the Notes at their discretion and to the extent they see fit and need not adopt or provide reasons for not adopting any particular element of the Notes.*



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## 1. What has not changed with the 2016 UNCITRAL Notes on Organizing Arbitral Proceedings? (cont'd)

Adaptability of the Notes to institutional arbitration: see Introduction, para. 4 of 2016 version:

*4. The Notes are not suitable to be used as arbitration rules, since they do not oblige the parties or the arbitral tribunal to act in any particular manner. Various matters discussed in the Notes may be covered by applicable arbitration rules. The use of the Notes does not imply any modification of such arbitration rules.*



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## 1. What has not changed with the 2016 UNCITRAL Notes on Organizing Arbitral Proceedings? (cont'd)

Example of the adaptability of the Notes to institutional arbitration:

### **3. Place of arbitration**

#### **(a) Determination of the place of arbitration**

*27. The parties may agree on the place (or “seat”) of arbitration. If the place of arbitration has not been agreed by the parties, typically the arbitral tribunal or the arbitral institution administering the arbitration will have to determine the place of arbitration at the outset of the arbitral proceedings. Arbitration rules of some institutions contain a default place of arbitration, applicable where the parties have not chosen one.*



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## 2. What has changed with the 2016 UNCITRAL Notes on Organizing Arbitral Proceedings?

Mainly:

- Greater level of detail for issues already covered
- Inclusion of some entirely new issues



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## 2. What has changed with the 2016 UNCITRAL Notes on Organizing Arbitral Proceedings? (cont'd)

Greater level of detail for issues already covered... selected examples:

- Overall remark: 1996 Notes = 90 paras. / 2016 Notes = 146 paras. → not due only to inclusion of entirely new issues
- Examples of issues covered in greater detail:
  - Language issues [1996: paras. 17-20 / 2016: paras. 20-26]
  - Issues relating to the place of arbitration [1996: paras. 21-23 / 2016: paras. 27-31]
  - Means of communication [1996: paras.35-37 / 2016: paras. 56-59]
  - Hearings [1996: paras. 74-85 / 2016: paras. 114-136; see especially paras. 121-133]



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## 2. What has changed with the 2016 UNCITRAL Notes on Organizing Arbitral Proceedings? (cont'd)

Inclusion of entirely new issues... the main ones being:

- Detailed section of organizing procedural meetings [2016: paras. 9-19]
- Administrative secretary [2016: paras. 35-38]
- Items of costs / fixing and allocating costs [2016: paras. 39 and 47-49]
- Transparency in treaty-based investor-State arbitration [2016: para. 55]
- Interim measures [2016: paras. 60-64]
- New (more prudent) language on arbitral tribunal providing guidance on relief sought [compare 2016, para. 71, to 1996, para. 46]



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## 2. What has changed with the 2016 UNCITRAL Notes on Organizing Arbitral Proceedings? (cont'd)

Inclusion of entirely new issues... the main ones (cont'd):

- Specific and detailed section on witnesses of fact [2016: paras. 86-90]
- Comprehensive section on party-appointed experts and expert witnesses [2016: paras. 94-100... compare to 1996, para. 73]
- Joinder and consolidation of arbitral proceedings [2016: paras. 139-143]



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## 2. What has changed with the 2016 UNCITRAL Notes on Organizing Arbitral Proceedings? (cont'd)

Closing remarks on what has changed:

- Modernization in terms of issues addressed = welcome feature
- “Modernization” in terms of greater level of detail = inevitable feature (?) but is it a welcome one?
- In any case, no revolutionary changes





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### 3. The ASA Arbitration Toolbox

A few words about the Swiss Arbitration Association (ASA):

- A non-profit association devoted to the study and promotion of arbitration in Switzerland and worldwide
- About 1,200 members of which 1/3 outside of Switzerland
- A thought-center, a thought-leader
  - ASA Conferences
  - ASA publications: ASA Bulletin, ASA Special Series
  - ASA initiatives
- Not an arbitral institution!



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### 3. The ASA Arbitration Toolbox

#### 3. The ASA Arbitration Toolbox (cont'd)

The philosophy: same as UNCITRAL Notes: no single “best practice” → need to preserve the plural “best practices”

The concept: create an electronic tool giving parties and arbitrators an overview of multiple ways of addressing procedural issues



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### 3. The ASA Arbitration Toolbox

#### 3. The ASA Arbitration Toolbox (cont'd)

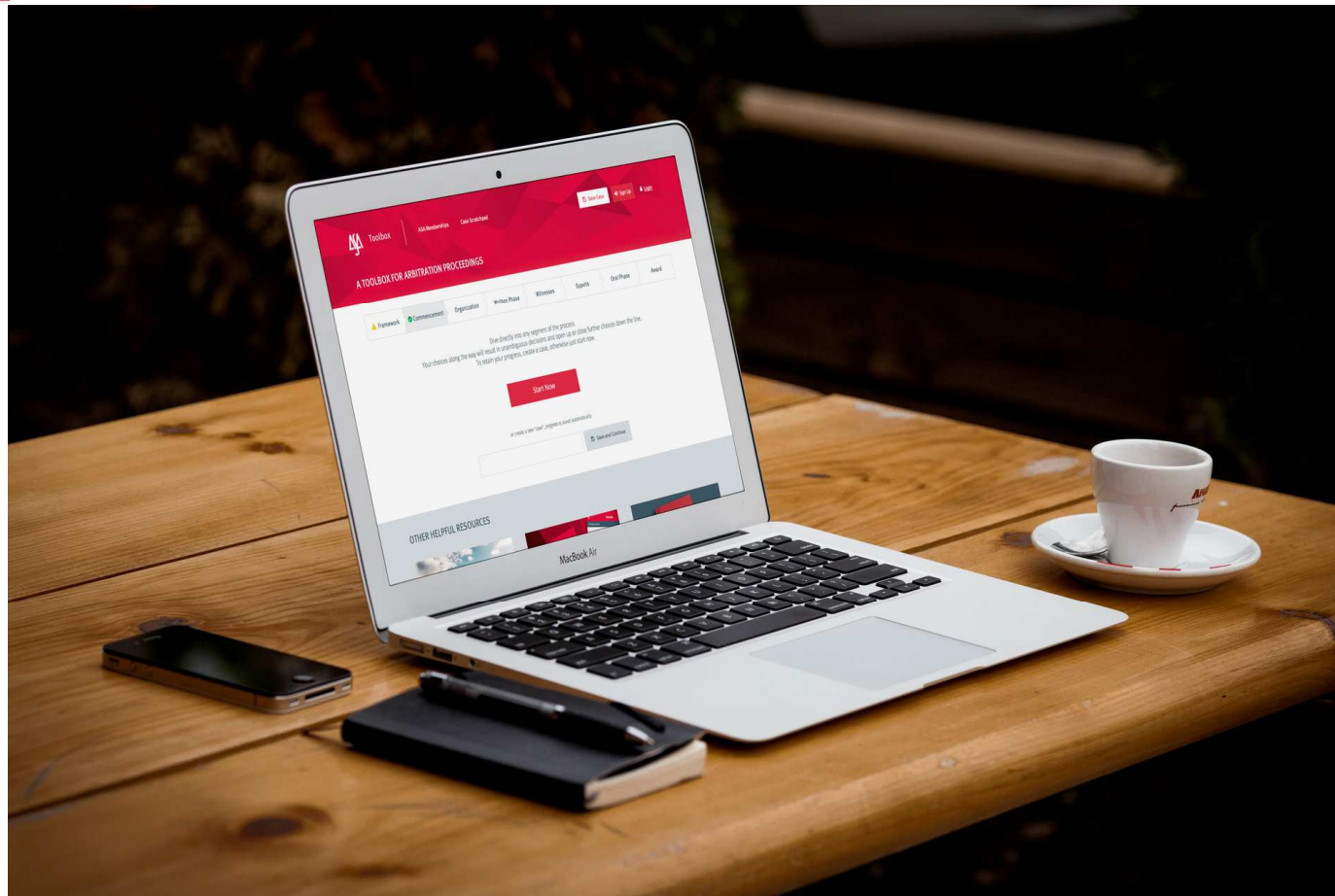
The result: downloadable, free-of-charge online tool that:

- Describes the choices available at the main phases of arbitral proceedings
- Describes the pros and cons of each choice
- Provides drafting suggestions for each choice
- Raises “red flags” in case of incompatible choices

So, what does it look like?



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### **3. The ASA Arbitration Toolbox (cont'd)**

This is work in progress

Hoped-for launch date: H1 2018

Use not only for arbitration proceedings, but also for educational purposes (in particular in collaboration with UNCITRAL)



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**Thank you...**

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