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RECEIPT OF ELECTRONIC COMMUNICATIONS IN THE PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION

The article is dedicated to the study of legal and soft law approaches, and case law on the issue of what and by which means constitutes proper notice of a party via electronic communications, i.e. receipt of such, in the practice of international commercial arbitration. The relevance of the chosen issue directly stems from the widespread use of electronic means of communication and information exchange in the arbitration dispute resolution system, and the importance of proper notification of the parties about the fact and progress of the arbitration process as a key procedural requirement for the recognition and enforcement of arbitral awards. The stated goals were achieved by the author through the use of methods of analysis and synthesis, formal logic methodology, methods of legal hermeneutics and comparative law. The author substantiates that, although 1985 UNCITRAL Model Law on International Commercial Arbitration and other international legal sources are more concerned with broadening the interpretation of the "written" form of the arbitration agreement by including to its scope numerous electronic means, the same approach can and should be applied to any "written communication" between the parties and arbitral tribunal. Thus, the main requirements here are such characteristics of an information (data) transmission via electronic communication for the purposes of arbitration proceedings as the possibility of repeated reading, identification and authentication of the sender/receiver and the fact of delivery or attempt of it. These requirements through the facts of their compliance or breach directly influence the outcome of the issue of proper notice and receipt of electronic communication by the parties. It is also formulated that the official character of an e-mail address of the party is determined: 1) directly by the party in the contract, request for arbitration, statement of claim, registration documents, etc.; 2) indirectly by the party by designating an e-mail address in its official documents or website as a mean of communication "which the addressee holds out to the world"; 3) by the arbitral tribunal or administrative body of an arbitration institution if there is a sufficient legal connection between such e-mail address and the party, e.g., it was used by the latter in previous communications concerning the contract and/or arbitration proceedings.

Keywords: electronic communications, arbitral tribunal, e-document, international commercial arbitration, e-mail.

Introduction. Substantially affected by the COVID-19 pandemic, international commercial arbitration as a whole and its separate means and mechanisms now comprise a somewhat new method of dispute resolution. This shows not only in technical terms, requiring electronic data exchange on practically all stages of arbitration proceedings from signing of an electronic arbitration agreement[1] to enforcing an electronic arbitration award[2], but also in essence, changing our approaches to document production and disclosure, authentication of a party or its representative(s), conduct of virtual hearings etc. Altogether it raises new issues regarding the role of international commercial arbitration in a globalized international commerce and trade, including their electronic manifestations.

[1] Piers, M., Aschauer, C. (2018). *Arbitration in the Digital Age. The Brave New World of Arbitration*. Cambridge University Press, 151-181.
[2] Amro, I. (2019). *Online Arbitration in Theory and in Practice: A Comparative Study of Cross-Border Commercial Transactions in Common Law and Civil Law Countries*. Cambridge Scholars Publishing, 113-117.

While there is a visible trend of adjustment to the modern realities of electronic exchange of arbitration practice as a whole and gradual adaptation of arbitration rules of leading institutions in particular, some problems remain unsolved and require a rigid scientific analysis. One of the latter are the peculiarities of e-document and any electronic communications transmission in international commercial arbitration, namely specifics of delivery of electronic documents from the arbitral tribunal to the parties.

Urgency of this topic can be additionally illustrated by referring to the recent 2022 ICC Arbitration and ADR Commission Report on Leveraging Technology for Fair, Effective and Efficient International Arbitration Proceedings, which establishes, that "documents that may be exchanged electronically include: (a) correspondence (between counsel, among the tribunal and the counsel or the parties, among tribunal members, and with the arbitral institution); (b) pleadings; (c) exhibits and other documents disclosed; (d) hearing briefs, witness statements, and other written submissions; and (e) orders, awards, and other decisions"[1] – basically all and every type of information shared during arbitration proceedings.

Although the key principles and rules regarding delivery of traditional paper documents in arbitration proceedings also generally apply to electronic ones, some specifics do exist, affecting communication between the arbitrator and the parties. Considering the significance of the proper notice of a party of the arbitration proceedings under the Article V(1)(b) of the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (further on – New York Convention)[2], the fact of the absence of which is the ground for the refusal of recognition and enforcement of the arbitral award, the raised problem is of great importance.

Thus, the **purpose** of the article is to study legal and soft law approaches, as well as case law on the issue of what and by which means constitutes a proper notice of a party via the electronic communications in practice of international commercial arbitration.

Methods. In the process of working on the article, were primarily used the methods of analysis and synthesis in combination with the formal logic methodology. Methods of legal hermeneutics and comparative law were also utilized.

Results and discussion. Dr. Ihab Amro in his book on online arbitration through the lens of a comparative study of cross-border commercial transactions in common law and civil law countries rightfully states that "how informational practices that were initially developed in a physical environment can be translated into a digital environment is both challenging and important."[3] This notion corresponds to the fact that almost all foundational conventional and model law on international commercial arbitration was prepared with little to no mentions of alternative to paper forms of communications, demanding further filling of the gaps with the help of amendments, adoption of advisory and additional acts, as well as through judicial and arbitration case law.

For example, New York Convention in Article II(2) just mentions that the term "agreement in writing" (relating to the arbitration agreement) shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams[4]. Somewhat similar, although expanded, approach is enshrined in Article I(2)(a) of the 1961 European Convention on International Commercial Arbitration (further on – European Convention), where it is stated, that "the term "arbitration agreement" shall mean either an arbitral clause in a contract or an arbitration agreement being signed by the parties, *or contained in an exchange of letters, telegrams, or in a communication by teleprinter* and, in relations between States whose laws do not require that

[1] ICC Commission on Arbitration and ADR (2022). *ICC Arbitration and ADR Commission Report on Leveraging Technology for Fair, Effective and Efficient International Arbitration Proceedings* 2022. <https://iccwbo.org/content/uploads/sites/3/2022/02/icc-arbitration-and-adr-commission-report-on-leveraging-technology-for-fair-effective-and-efficient-international-arbitration-proceedings.pdf> (2022, July, 12).

[2] United Nations Conference on International Commercial Arbitration (1958). *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* 1958 art. V. <https://www.newyorkconvention.org/11165/web/files/original/1/5/15432.pdf> (2022, July, 12).

[3] Amro, I. (2019). *Online Arbitration in Theory and in Practice: A Comparative Study of Cross-Border Commercial Transactions in Common Law and Civil Law Countries*. Cambridge Scholars Publishing, XIII.

[4] United Nations Conference on International Commercial Arbitration (1958). *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, art. V. <https://www.newyorkconvention.org/11165/web/files/original/1/5/15432.pdf> (2022, July, 12).

an arbitration agreement be made in writing, any arbitration agreement concluded in the form authorized by these laws"[1] (emphasis added).

The 1985 UNCITRAL Model Law on International Commercial Arbitration (with amendments as adopted in 2006) (further on – UNCITRAL Model Law)[2] now goes significantly further in its treatment of electronic communications. Although the UNCITRAL Model Law does not specify what constitutes the "written communications", stating only that "any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter *or any other means which provides a record of the attempt to deliver it*" (emphasis added) in Article 3(1)(a), adding that "the communication is deemed to have been received on the day it is so delivered" in Article 3(1)(b). Wording used in the selected fragment implies expansive interpretation of a mean of communication, noting that the only requirement for it is providing a record of the delivery attempt.

Moreover, subsequent provisions of the UNCITRAL Model Law and the Explanatory Note to it contains positions that allow to clarify the understanding of the used term of "written communications", though not directly. Article 7(4) of the first provides several important definitions in this aspect: "*the requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference*; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy" (emphasis added)[3].

The Explanatory Note by the UNCITRAL secretariat on the UNCITRAL Model Law[4] clarifies the need of improvement of Article 7 and overall understanding of the form of arbitration agreement by referring to the adoption of the wording inspired from the 1996 UNCITRAL Model Law on Electronic Commerce[5] and the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts (further on – the Electronic Communications Convention)[6]. It is worth pointing out that the Article 20(1) of the latter Convention specifically designates its application to the New York Convention, while stating that the provisions of the Electronic Communications Convention "apply to the use of electronic communications in connection with the formation or performance of a contract to which any of the following international conventions, to which a Contracting State to this Convention is or may become a Contracting State". In this regard, Article 10(2) of the Electronic Communications Convention (or, as it is often referred to "e-CC") states, that "the time of receipt of an electronic communication is the time *when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee*. The time of receipt of an electronic communication at another electronic address of the addressee is the time when it becomes capable of being retrieved by the addressee at that address and *the addressee becomes aware that the electronic communication has been sent to that address*. An electronic communication is presumed to be capable of being retrieved by the addressee *when it reaches the addressee's electronic address*." (emphasis added)[7]. This provision confidently establishes

[1] United Nations Organization (1961). *European Convention on International Commercial Arbitration* 1961 art. I. <https://treaties.un.org/doc/Treaties/1964/01/19640107%2002-01%20AM/Ch_XXII_02p.pdf> (2022, July, 12).
[2] United Nations Commission on International Trade Law (2006). *UNCITRAL Model Law on International Commercial Arbitration* 1985 (with amendments). <https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> (2022, July, 12).
[3] Ibid.
[4] United Nations Commission on International Trade Law (2007). *Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Use of Electronic Communications in International Contracts* <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/06-57452_ebook.pdf> (2022, July, 12).
[5] United Nations Commission on International Trade Law (1998). *UNCITRAL Model Law on Electronic Commerce* 1996 (with additional article 5 bis). <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-04970_ebook.pdf> (2022, July, 12).
[6] United Nations Commission on International Trade Law (2005). *United Nations Convention on the Use of Electronic Communications in International Contracts* <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/06-57452_ebook.pdf> (2022, July, 12).
[7] Ibid.

the principle of interconnection between the time, when an e-mail is capable of being retrieved by the addressee and the time when it reaches its electronic address, relieving the parties of the trouble of determining the time of receipt[1].

Additionally Article 10(3) of the Electronic Communications Convention establishes, that "an electronic communication is deemed to be dispatched at the place where the originator has its place of business and is deemed to be received at the place where the addressee has its place of business, as determined in accordance with article 6" and an Article 10(4) of this Conventions regards that "paragraph 2 of this article applies notwithstanding that the place where the information system supporting an electronic address is located may be different from the place where the electronic communication is deemed to be received under paragraph 3 of this article"[2].

Based on these provisions and the e-commerce practice, Bantekas I. rightfully supposes, that in the context of electronic notices, there are not always available mechanisms by which to show receipt, unless the addressee expressly declares as such, but "practice, therefore, *suggests that electronic service is deemed effected upon successful delivery, without* ***any subsequent proof of receipt*** *by the intended addressee*. This is based on the rationale that modern technology is able to provide confirmation of delivery" (emphasis added). Therefore, the author states, that it is assumed, in those cases where the parties have agreed to electronic forms of written communication, that upon successful delivery the responsibility of the sender has been discharged and that the recipient is able to access the notice"[3].

Para. 57 of the Explanatory Note by the UNCITRAL secretariat on the Electronic Communications Convention cements this proposition by declaring, that "in the context of the Convention, the word "contract" should be understood broadly so as to cover any form of legally binding agreement between two parties that is not explicitly or implicitly excluded from the Convention, whether or not the word "contract" is used by the law or the parties to refer to the agreement in question. Thus, the Convention applies to arbitration agreements in electronic form, even though the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) and most domestic laws do not use the word "contract" to refer to them"[4]. This clearly indicates the formation of a systematic interpretation and application of the provisions of the New York Convention regarding the form of the arbitration agreement, allowing and even encouraging the possibility of concluding it in the latest electronic formats.

Furthermore, the Explanatory Note by the UNCITRAL secretariat on the UNCITRAL Model Law mentions the 2006 UNCITRAL Recommendation regarding the interpretation of Article II, paragraph 2, and Article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958[5], which "was drafted in recognition of the widening use of electronic commerce and enactments of domestic legislation as well as case law, which are more favourable than the New York Convention in respect of the form requirement governing arbitration agreements, arbitration proceedings, and the enforcement of arbitral awards", encouraging States both to apply Article II(2) of the New York Convention "recognizing that the circumstances described therein are not exhaustive" and to adopt the revised Article 7 of the UNCITRAL Model Law[6], meaning the enhanced understanding of the form requirements to the arbitration agreement.

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[1] Prokić, D. (2016). The Adoption of the United Nations Convention on the Use of Electronic Communications in International Contracts in Serbia – A Way to Facilitate Cross-Border Trade. *Annals FLB – Belgrade Law Review, 3*, 278.

[2] United Nations Commission on International Trade Law (2005).*United Nations Convention on the Use of Electronic Communications in International Contracts* <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/06-57452_ebook.pdf> (2022, July, 12).

[3] Bantekas, I; Ortolani, P.; Ali, S.; Gomez, A. M.; Polkinghorne, M. (2020). *UNCITRAL Model Law on International Commercial Arbitration. A Commentary.* Cambridge University Press, 68-69.

[4] United Nations Commission on International Trade Law (2007). *Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Use of Electronic Communications in International Contracts* <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/06-57452_ebook.pdf> (2022, July, 12).

[5] United Nations Commission on International Trade Law (2006). *Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958* <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/a2e.pdf> (2022, July, 12).

[6] United Nations Commission on International Trade Law (2006). *Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006.* <https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> (2022, July, 12).

Such understanding of the New York Convention requirements on "written" form of arbitration agreement, with additional references to said UNCITRAL Recommendation is evident in case law as well: High Court of Justice of Catalonia (Civil and Criminal Chamber, 1st Section) in its decision on 15 March 2012 reviewed the issue for the opposition to enforcement which was the alleged absence of a written agreement to submit to arbitration. On this point, the Court held that the allegation was inconsistent with the e-mails exchanged by the parties and recalled the settled case law of Spain in accordance with which it favoured a non-formalist approach, that is to say, it was understood that the requirement for a written document in the 1958 New York Convention was merely for the purpose of there being a record of the existence of an agreement. The Court also referred to the e-mail correspondence between the parties, and in particular to those e-mails in which the parties referred to already agreed conditions in previous commercial relations, modifying, adding or removing some of them, but not clause 61, which contained the arbitration agreement to submit to arbitration in London (London Maritime Arbitrators Association) and English law[1].

Thus, it is obvious that UNCITRAL Model Law is far more spacious on the issue of interpretation of "written" form of arbitration agreement, than defining what constitutes a "written communication" between the parties and arbitral tribunal. Nevertheless, following the letter and spirit of the specified provisions of not only UNCITRAL Model Law, but mentioned Electronic Communications Convention etc., in relationship with the theses and goals formulated in the Explanatory Note to the UNCITRAL Model Law, it could be confidently argued, that "any other means which provides a record of the attempt to deliver it" encompasses electronic communication "if the information contained therein is accessible so as to be useable for subsequent reference". In other words, we believe that the same broad understanding of the modern form of arbitration agreement can and should be expanded on any electronic communication therefore in arbitration proceedings.

These requirements are interconnected and can be distilled into such characteristics of an information (data) transmission via the electronic communication for the purposes of arbitration proceedings as possibility of repeated reading, identification and authentication of the sender/receiver and the fact of delivery or attempt of it. Also, introducing general concept of "data message" UNCITRAL Model Law expands the list of "traditional" (*i.e.* referred in the New York Convention and European Convention) methods of communication between the parties and the arbitral tribunal from telegram, telex and telecopy to any information, generated, sent, received or stored by electronic, magnetic, optical or similar means, listing, alongside with mentioned above, electronic data interchange (EDI) and electronic mail, which are widespread and even predominant nowadays.

The defined requirements are fundamental for the outcome of the issue of proper notice and receipt of electronic communication by the parties, because they represent what a "proper notice" is itself as a concept with direct practical implications. Their compliance meets the New York Convention and other legal acts principles of due process, and their breach is a ground for refusal of recognition and enforcement of arbitral award.

Naturally that the "first place" for one to be looking for the implementation of said principles are UNCITRAL Arbitration Rules (now in the version adopted in 2021)[2]. Article 2(1) of the latter states that "a notice, including a notification, communication or proposal, may be transmitted by any means of communication that provides or allows for a record of its transmission", while Article 2(2) clarifies, that "if an address has been designated by a party specifically for this purpose or authorized by the arbitral tribunal, any notice shall be delivered to that party at that address, and if so delivered shall be deemed to have been received. *Delivery by electronic means such as facsimile or e-mail may only be made to an address so designated or authorized*." (emphasis added).

Article 2(3) of the UNCITRAL Arbitration Rules formulates basic principles, according to which in the absence of such designation or authorization, a notice is: (a) received if it is physically delivered to the addressee; or (b) deemed to have been received if it is delivered at the place of business, habitual residence or mailing address of the addressee. Furthermore, "a notice shall be deemed to have been

[1] High Court of Justice of Catalonia (2012). *Decision in case 1418* <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V14/069/84/PDF/V1406984.pdf?OpenElement> (2022, July, 12).

[2] United Nations Commission on International Trade Law (2021). *UNCITRAL Arbitration Rules* 1976 (with article 1, paragraph 4, as adopted in 2013 and article 1, paragraph 5, as adopted in 2021). <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/21-07996_expedited-arbitration-e-ebook.pdf> (2022, July, 12).

received on the day it is delivered in accordance with paragraphs 2, 3 or 4, or attempted to be delivered in accordance with paragraph 4. *A notice transmitted by electronic means is deemed to have been received on the day it is sent, except that a notice of arbitration so transmitted is only deemed to have been received on the day when it reaches the addressee's electronic address*" (emphasis added) (Article 2(5) of the UNCITRAL Arbitration Rules.

Thus, above formulated requirements appear to be effectively stipulated in UNCITRAL Arbitration Rules: possibility of repeated reading (a notice may be transmitted by any means of communication *that provides or allows for a record of its transmission*), identification and authentication of the sender/receiver (delivery by electronic means such as facsimile or e-mail *may only be made to an address so designated or authorized*) and the fact of delivery or attempt of it (aforementioned record of the transmission plus the fact of reaching the addressee's electronic address in case of notice of arbitration).

Discussed changes to the UNCITRAL Model Law, the fact that this institution takes into account relatively recent international regulatory developments (namely, 1996 UNCITRAL Model Law on Electronic Commerce and the Electronic Communications Convention) and offers a new, expanding interpretation of established prescriptions of international arbitration conventions, indicates the development and implementation of a new approach to understanding the essence and significance of electronic communications in international commercial arbitration. One of the prime examples is the latest version of UNCITRAL Arbitration Rules, as illustrated above.

However, the key to a complete understanding of law enforcement approaches in the analysed area and the current role of the mechanisms of electronic communications in the arbitration process, lies at the level of regulations and reports of arbitration institutions and decisions of arbitral tribunals, relevant case law. It is their study that will allow us to closely investigate the problematic of receipt of electronic communications and to monitor the practical implementation of the specified requirements to electronic data transmissions in arbitration. Equally important on practice are the "smaller" questions on what constitutes an "official" e-mail address of the party, how the receipt of an e-mail by the latter can be proven, which indicators show that the party can be viewed as the one, properly noticed etc. It will be further shown that there are no universal approaches, but quite a few guidelines of different of varying degrees of legal power, which can and should be addressed.

First, it should be noted, that different arbitration rules treat issues of receipt of written, including electronic, communications with different levels of details. For instance, Article 3(2) of the 2021 ICC Arbitration Rules[1] states that "all notifications or communications from the Secretariat and the arbitral tribunal shall be made to the last address of the party or its representative for whom the same are intended, as notified either by the party in question or by any other party. Such notification or communication may be made by delivery against receipt, registered post, courier, *email, or any other means of telecommunication that provides a record of the sending thereof*" (emphasis added). In addition, Article 23(1)(b) of ICC Arbitration Rules adds, that arbitral tribunal shall draw up, on the basis of documents or in the presence of the parties and in the light of their most recent submissions, a document defining its Terms of Reference, which shall include, *inter alia,* the addresses to which notifications and communications arising in the course of the arbitration may be made (e-mails, obviously, included in its scope).

Thus, in ICC Arbitration Rules are presented all three requirements, although in "compressed" form. We can also reasonably conclude, that the "official" e-mail addresses of the parties, receival of all communications on which will be deemed sufficient in the light of New York Convention, are those designated by the arbitral tribunal in the Terms of Reference, and based on parties' submissions.

2017 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) are sparser on the issue of receipt confirmation of electronic notifications and communications. Article 5(2-3) contains simple general provisions on a matter of notices: "any notice or other communication shall be delivered by courier or registered mail, e-mail or any other means that records the sending of the communication; "a notice or communication sent in accordance with paragraph (2) shall be deemed to have been received by the addressee on the date it would normally have been received given the means of communication used"[2]. This certainly does not contain answers to our questions.

[1] International Chamber of Commerce (2021). *ICC Arbitration Rules* 2021
<https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/> (2022, July, 12).
[2] Stockholm Chamber of Commerce (2017). *SCC Arbitration Rules*.
<https://sccinstitute.com/media/1407444/arbitrationrules_eng_2020.pdf> (2022, July, 12).

On the other hand, 2020 London Court of International Arbitration (LCIA) Arbitration Rules are far more elaborate and specific on that matter. Besides the statement of a requirement that "any written communication in relation to the arbitration shall be delivered by email or any other electronic means of communication *that provides a record of its transmission*" (emphasis added) in Article 4.2, Article 4.3 of this Rules stipulates, that "delivery by email or other electronic means of communication *shall be as agreed or designated by a party*[1] for the purpose of receiving any communication in regard to the Arbitration Agreement. *Any written communication (including the Request and Response) delivered to such party by that electronic means shall be treated as having been received by such party*. In the absence of such agreement or designation or order by the Arbitral Tribunal, if delivery by electronic means has been regularly used in the parties' previous dealings, any written communication (including the Request and Response) may be delivered to a party by that electronic means and shall be treated as having been received by such party, subject to the LCIA Court or the Arbitral Tribunal being informed of any reason why the communication will not actually be received by such party including electronic delivery failure notification. Notwithstanding the above, the LCIA Court or the Arbitral Tribunal may direct that any written communication be delivered to a party at any address and by any means it considers appropriate"[2] (emphasis added).

It follows, that LCIA Arbitration Rules establishes several logical "links" in determining the "official" e-mail of the party and the fact of its receipt of communications: e-mail is considered to be delivered if it was send to the address, agreed or designated by the party itself → in the absence of such agreement or designation the rule of "latest used electronic address" is used, unless stated otherwise by the party.

Such connections are worked out in detail in the 2018 Hong Kong International Arbitration Centre (HKIAC) Administered Arbitration Rules. Article 3.1 of the latter stipulates that "any written communication pursuant to these Rules shall be deemed to be received by a party, arbitrator, emergency arbitrator or HKIAC if: (a) communicated to the address, facsimile number *and/or email address communicated by the addressee or its representative in the arbitration*; or (b) in the absence of (a), communicated to the address, facsimile number and/or *email address specified in any applicable agreement between the parties*; or (c) in the absence of (a) and (b), communicated to any address, facsimile number and/or *email address which the addressee holds out to the world at the time of such communication*; or (d) in the absence of (a), (b) and (c), communicated to *any last known* address, facsimile number and/or *email address of the addressee*; or (e) uploaded to any secured online repository that the parties have agreed to use (emphasis added). Article 3.2 of the HKIAC Arbitration Rules adds, that "if, after reasonable efforts, communication cannot be effected in accordance with Article 3.1, a written communication is deemed to have been received if it is sent to the addressee's last-known address, facsimile number and/or *email address by means that provides a record of attempted communication*" (emphasis added)[3].

Similar provisions are embodied in Article 11(5)(1) of Rules of the International Commercial Arbitration Court (ICAC) at the Ukrainian Chamber of Commerce and Industry, which directly defines, that any written notification shall be deemed to have been received if it is, *inter alia*, "sent to the party to its *e-mail address specified by it or indicated in the contract, on the official website or in official documents, or confirmed, in particular, by registration documents, or used by the party during the conclusion and/or execution of the contract"*[4] (emphasis added). This provision, alongside with few others, constitute recent changes to the ICAC Rules, aimed mainly at thorough introduction of e-communications and video-

[1] Article 1.1(i) and Article 2.1(i) of 2020 LCIA Arbitration Rules require from the Claimant and the Respondent to accompany the written request for arbitration and the response to it respectively, with an information on all contact details, including email addresses of the parties themselves, their authorised representatives (if any) and of all other parties to the arbitration.

[2] London Court of International Arbitration (2020). *LCIA Arbitration Rules* <https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx> (2022, July, 12).

[3] Hong Kong International Arbitration Centre (2018). *HKIAC Administered Arbitration Rules* 2018. <https://www.hkiac.org/sites/default/files/ck_filebrowser/PDF/arbitration/2018%20Rules%20book/2018%20AA%20Rules_English.pdf> (2022, July, 12).

[4] Presidium of the Chamber of Commerce and Industry of Ukraine (2022). *Rules of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry* <https://icac.org.ua/wp-content/uploads/Reglament_ICAC_ENG_2022.pdf> (2022, July, 12).

conferencing into the arbitration process[1]. Additionally the Article 11(5) of the new ICAC Rules stipulates that "If the commercial place of business, habitual residence or mailing address can not be found after making a reasonable inquiry, a written notification is deemed to have been received by the party if it is sent to the addressee's last-known commercial place of business, habitual residence or mailing address by registered letter *or any other means which provide a record of the attempt to deliver this notification*. A written notification is also deemed to have been received if the person did not appear for receiving the notification or refused to receive it. A written notification shall be deemed to have been received on the day it is so delivered or the recording of a delivery attempt." (emphasis added). Article 11(6) of the 2022 ICAC Rules further establishes that "a written notification sent to a party by electronic means of communication *shall be deemed to have been received on the day it is so sent* (the time is determined by reference to the recipient's time zone)" (emphasis added).

Although, contextually from the meaning of Article 11(5)(1) it is deemed that a written notification covers an e-mail, the latter cited provisions of Article 11(5) and Article 11(6), by exemption of emphasized general phrasing ("any other means which provide a record of the attempt to deliver this notification") does not seem to consider specifics of an e-mail notification, just the "traditionally" written one, concerning the fact of necessity for "providing *a record of the attempt to deliver notification*" via e-mail. On this note, it is advisable to expand the Article 11(6) of the 2022 ICAC Rules to be published in the following version, taking into account all the determined above requirements to the e-communications in international commercial arbitration and approaches taken in other arbitration rules of leading arbitration institutions:

"a written notification sent to a party by electronic means of communication specified in this Article (Part 5) shall be deemed to have been received on the day it is so sent (the time is determined by reference to the recipient's time zone) *by means that provides a record of attempted communication, regardless of the fact of opening or reading of such notification by the party it is send to*".

These lists, presented in the LCIA Arbitration Rules, the HKIAC Arbitration Rules and the ICAC Rules, include all the main ways of confirming the existence of a legal relationship between a party and its e-mail address, either by the direct designation of such connection by the party itself or through sufficiently reliable means. Therefore, we can rightfully assume, that the official character of an e-mail address of the party is determined: 1) directly by the party in the contract, request for arbitration, statement of claim, registration documents etc.; 2) indirectly by the party by designating an e-mail address in its official documents or website as a mean of communication "which the addressee holds out to the world"; 3) by the arbitral tribunal or administrative body of an arbitration institution if there is a sufficient legal connection between such e-mail address and the party, *e.g.*, it was used by the latter in previous communications concerning the contract and/or arbitration proceedings.

Apparently, these conclusions should rather serve as a principles of authentication of e-mail addresses of the parties and, though that, affect the acknowledgment of a receipt of notifications and communications send by the administrative body or arbitral tribunal, than an absolute indicator, regardless the circumstances of a specific case. Moreover, on practice several additional problems and issues may arise.

One of those issues was dealt with in the judgment of the Supreme Court of New South Wales in case *Bauen Constructions Pty Ltd v. Sky General Services Pty Ltd and Another*, namely the fact that the plaintiff had served an adjudication response to the defendant by email, which, while was received, it was, nonetheless, withheld by the spam filter of the adjudication body. In the presented case Bauen referred to the Section 13A of the 2000 New South Wales Electronic Transactions Act, which contains similar to the Electronic Communications Convention terminology and provision, under which "the time of receipt of the electronic communication is the time when the electronic communication becomes capable of being retrieved by the addressee at an electronic address designated by the addressee"[2]. The Supreme Court of New South Wales, taking into account this norm, held that the email was clearly received, even though it was caught by the spam filter. The Court also noted that the words "capable of being retrieved", required under the applicable law, certainly do not require an email to be opened, or read. The spam filter caught an

[1] International Commercial Arbitration Court at the Ukrainian Chamber of Commerce (2020). *Amendments into the ICAC Rules* <https://icac.org.ua/wp-content/uploads/AMENDMENTS-INTO-THE-ICAC-RULES-2020.pdf> (2022, July, 12).

[2] New South Wales Legislative Assembly (2021). *Electronic Transactions Act* (As at 10 November) <http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/nsw/consol_act/eta2000256/> (2022, July, 12).

email that was archived and accessible via the adjudication body's external IT consultant. Consequently, according to the applicable law, when an email was sent and was capable of being retrieved, but had not been actually opened or read, it could be considered as being received by the addressee, and thus "lodged"[1]. This judgment is certainly should be viewed as a practical implication of a principle of a possibility of an e-mail to retrieved, regardless technical obstacles (here – spam filter) and, therefore, the acknowledgment of it to be received by the other party.

Some expansion in terms of authentication and receipt of electronic communication mechanisms in connection to the provisions of ICC Arbitration Rules can be found in ICC Commission (ICC Arbitration and ADR Commission) reports. 2016 ICC Arbitration Commission Report on Managing E-Document Production, which, apparently, has a different main topic, still contains several important for our research definitions and tools, primarily in Appendix II "A Glossary of Electronic Document Terms". Concerning the issue of proving actual receipt of an email (which "is a means of communicating via computer Networks including the World Wide Web by using POP or SMTP protocols") by an intended recipient, in the event the recipient denies receipt, Report states that it may be difficult for technical reasons. However, "the content of other available information (documents) may indirectly prove receipt. Computer Forensics may also be used to clarify the issue. Issues relating to Authenticity or subsequent alterations of messages (technically easy) may be resolved by comparing copies of emails. Otherwise, Computer Forensics may also be used to clarify the issue"[2].

In the same Appendix II of it, the discussed Report clarifies, that Computer Forensics refers to "a branch of forensics dealing with (i) security threats to computing systems and intrusions, but also (ii) Data Recovery and verification of data integrity, which are relevant to eDisclosure". Computer Forensics is a service provided by experts and comprises inter alia: a) extraction of relevant data from computer systems and Data Carriers; b) recovery of deleted data; c) data analysis for establishing the "history" of data and Authenticity. The latter term is described as "a nontechnical attribute ascribed to it in a communication context, here a dispute. An Electronic Document is considered as being authentic if (i) the author or creator who figures as such in the context of the information displayed in the document or identified by somebody as being the author/creator really is or is determined by the arbitrators to be the "real" author/ creator; (ii) that this author/creator did produce exactly this Electronic Document at the moment ascribed to it by him or a third party; and (iii) that the Electronic Document was not subsequently altered by anybody"[3].

Therefore, it could be argued, that the proposed mechanism of Computer Forensics expertise, alongside with the indirect confirmation of receipt of e-mail, can be used for the purposes of establishing the history of electronic messages sent and received, authentication of those facts and the person of the sender (author/creator). We see such means as of additional nature, when the "official" e-mail address of the party is not presented or confirmed or there are any other difficulties.

Other, "external" to the arbitration procedure, approach to establishing official e-mail address, as illustrated by the Draft Law on amendments to some legislative acts of Ukraine regarding the use of electronic addresses, which proposes introduction of an official e-mail address (legal entities (including state bodies and local self-government bodies) and natural persons – entrepreneurs will be obliged to submit to the state registrar information about their official e-mail address) in the Ukrainian Unified State Register of Legal Entities, Sole Proprietors and Public Associations, which, together with the official e-mail address that will function in the Unified Judicial Information and Telecommunication System, will be used in courts when conducting economic, civil and administrative proceedings to send copies of decisions, rulings, court summonses and other documents to the participants of the court process in electronic form[4]. We believe that such mandatory registration of the legal entity's official e-mail address can have a positive effect on the recognition and enforcement of foreign arbitration awards in Ukraine, eliminating

[1] NSWSC 1123 (2021). *Judgment in the case Bauen Constructions Pty Ltd v Sky General Services Pty Ltd & Anor* <http://www.uncitral.org/docs/clout/AUS/AUS_180912_FT.pdf> (2022, July, 12).

[2] International Chamber of Commerce (2016). *ICC Arbitration Commission Report on Managing E-Document Production* <https://iccwbo.org/publication/icc-arbitration-commission-report-on-managing-e-document-production/> (2022, July, 12).

[3] Ibid.

[4] *Проект Закону про внесення змін до деяких законодавчих актів України щодо використання електронних адрес* 2021 (Верховна Рада України). *Офіційний сайт Верховної Ради України* <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=72166> (2022, July, 12).

the possibility of a potential reference by a party to failure to notify it of the start and course of arbitration proceedings.

In this view, considering further improvement of e-communication practices between an arbitral tribunal and the parties, we can turn to the already mentioned 2022 ICC Arbitration and ADR Commission Report on Leveraging Technology for Fair, Effective and Efficient International Arbitration Proceedings. It specifically handles the issue of proof of service, regarding the transmission and receipt of information by e-mail, pointing at its possible controversial outcome. To minimize such effects, the authors of the Report propose several recommendations of managemental and technical nature. One of it is, according to the Report, that directions concerning some or all of the following precautionary measures could be considered: (i) duty to check electronic mailbox or website hosting a document repository at certain intervals (*e.g.* daily); (ii) duty to acknowledge receipt with copy to all, especially the tribunal; and (iii) directions regarding what happens if receipt is not acknowledged within a certain period of time.

Many recommendations in this Report are relying on technical capabilities of e-mail programs and other software, that can: generate acknowledgements of receipt, which are electronically returned to the sender if this functionality is activated; track access to a document; be used as a certified e-mail service, which will confirm the delivery, receipt, content, chain of custody and chronological stamp of e-mails and contents (Certimail, eEvidence, E-Post, eWitness) etc.. Naturally, it is also recommended to consider taking appropriate steps in case management field, quoting: "it would be a simple matter to agree on the requirement that any recipient manually generate and send an electronic acknowledgement of receipt and confirm its successful access to the files" or, from an early stage of the proceedings reaching an agreement between the tribunal and the parties on the use of such tools (certified e-mail services). The Report also proposes a notion that "at least to date, receipt of e-mails and other documents transmitted in the course of the arbitration is normally not an issue", with the possible exception of a non-participating party, but in these instances, considers delivery of hard copies by courier as "the most prudent option to secure proof of service"[1].

We believe that, although main guarantees and principles of e-communication in international commercial arbitration, first and foremost the ones that regulate receipt of such, must be embodied in legal texts and confirmed in consistent case law, it must not preclude the arbitration institutions, arbitral tribunals and/or the parties to develop more detailed set of rules on this aspect or to use special e-mail or tracking services. The latter steps can prove themselves to be quite efficient, simultaneously in the functionally and legally.

Conclusions. Nowadays the widespread use of electronic communications in e-commerce and, therefore, in international commercial arbitration, dealing with the cases, which arise from it, corresponds to the establishment of set of legal principles, defining the requirements to e-communication and its receipt by the parties of the arbitration. In this article we substantiate the thesis, that these requirements are interconnected and can be distilled into such characteristics of an information (data) transmission via the electronic communication for the purposes of arbitration proceedings as possibility of repeated reading, identification and authentication of the sender/receiver and the fact of delivery or attempt of it. These requirements are stipulated in one way or another in international conventions, model laws and arbitration rules of leading arbitration institutions (on examples of ICC, LCIA, SCC, HKIAC and ICAC at the Ukrainian CCI). Their compliance is therefore crucial to the outcome of the issue of proper notice and receipt of electronic communication by the parties, meeting the New York Convention and other legal acts principles of due process, and their breach is a ground for refusal of recognition and enforcement of arbitral award.

Meanwhile, the problematic of receipt of electronic notifications and communications in international commercial arbitration lies in practical and technical issues of what constitutes a factual delivery of an e-mail to the addressee and which e-mail address should be viewed as an "official", meaning there is a legal link between the receival of a message on this address and the person of the party. On the first issue there is, developed on conventional level, principle, according to which the time of receipt of an electronic communication is the time when it becomes capable of being retrieved by the addressee at an electronic

[1] ICC Commission on Arbitration and ADR (2022). *ICC Arbitration and ADR Commission Report on Leveraging Technology for Fair, Effective and Efficient International Arbitration Proceedings* 2022 <https://iccwbo.org/content/uploads/sites/3/2022/02/icc-arbitration-and-adr-commission-report-on-leveraging-technology-for-fair-effective-and-efficient-international-arbitration-proceedings.pdf> (2022, July, 12).

address designated by the addressee. As a case law shows technical obstacles to such reading (*e.g.* spam filters) are not taking into account by the court.

On the latter question, we conclude, that the official character of an e-mail address of the party to the arbitration proceedings is determined: 1) directly by the party in the contract, request for arbitration, statement of claim, registration documents etc.; 2) indirectly by the party by designating an e-mail address in its official documents or website as a mean of communication "which the addressee holds out to the world"; 3) by the arbitral tribunal or administrative body of an arbitration institution if there is a sufficient legal connection between such e-mail address and the party, *e.g.*, it was used by the latter in previous communications concerning the contract and/or arbitration proceedings.

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