

To Make a Long Story Short: Saving Time and Costs in Fast Track ICC Arbitration

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The Arbitration Rules of the International Chamber of Commerce are the latest international arbitration rules to implement the introduction of expedited arbitration procedures. The ICC Arbitration Rules of 2012, as amended in 2017, came into effect on 1 March 2017 (the “ICC Rules”). While the reforms of the ICC Rules in 2012 also addressed arbitration users’ concerns about the time and costs of arbitration, including by proposing case management strategies, these did not include expedited arbitration procedures. Since then the case for fast track arbitration continues to gain traction and a number of other international arbitration rules have introduced mechanisms to further promote efficiency and costs savings for parties through expedited or fast track arbitration where appropriate.¹ The ICC’s expedited arbitration procedure is a welcome development but also raises a number of practical considerations for ICC arbitrations users.

Why and what is expedited arbitration?

The ICC Rules expressly require the arbitral tribunal and the parties to “*make every effort to conduct the arbitration in an expeditious and cost-effective manner*, and at the same time regard must be had to the “*to the complexity and value of the dispute*”² as this will determine in each case what procedures and procedural timetables are appropriate and cost-effective – one size does not fit all in international arbitration proceedings and there are various permutations to be considered in any given case. In complex and high stakes disputes, even where parties avail themselves of the case management procedures available³ and cooperate to ensure expeditious and cost effective dispute resolution, arbitration proceedings may typically last for many months.⁴

For many arbitrations, such as those which concern more straightforward as well as lower value claims, where the imperative to ensure costs of the arbitration are proportionate to the amounts at stake will be more acute, expedited arbitration procedures can offer a more streamlined alternative. This is achieved by reducing certain preliminary procedural steps (such as setting up of the arbitral tribunal) and the evidentiary stages (such as the scope of documentary and witness and expert evidence, and hearings or having documents-only arbitration) thereby allowing the tribunal to render an award within a relatively short time frame. In appropriate cases, these mechanisms or a combination of them can lead to significant cost and time efficiencies benefiting both parties.

The new expedited procedure provisions under the ICC Rules

The expedited procedure is set out under Article 30 of the ICC Rules and the Expedited Procedure Rules which are in Appendix VI to the ICC Rules. The expedited procedure applies to arbitration agreements concluded after 1 March 2017. The expedited procedure is automatically applicable in cases where the amount in dispute does not exceed US\$ 2 million. It will not apply if the parties have decided to opt out of the expedited procedure. The ICC Court may however, upon the request of a party before the constitution of the arbitral tribunal or on its own motion, determine that it is inappropriate in the circumstances to apply the procedure. The parties may also opt,

¹ For instance: The Arbitration Institute of the Stockholm Chamber of Commerce (SCC) Rules for Expedited Arbitrations (2017); Singapore International Arbitration Centre (SIAC) Rules (2016), Rule 5; and the Hong Kong International Arbitration Centre (HKIAC) 2013 Administered Arbitration Rules, Article 41.

² Article 22.1 of the ICC Rules.

³ The ICC Rules, Appendix IV, set out examples of case management techniques. In 2014, the ICC also published a paper on additional techniques entitled “Controlling Time and Costs in Arbitration.”

⁴ For instance, in November 2015, the LCIA published an analysis of the duration of LCIA arbitration proceedings from receipt of the Request for Arbitration to the final award (including stays) reporting an average duration of 20 months, with a median duration of 16 months, with three member tribunals typically taking longer. There are no comparable statistics published by the ICC.

if they agree, to apply this procedure in higher value cases. The guidance to the rules also makes clear that parties can also opt in irrespective of the date of their arbitration agreement and amount in dispute either in their agreement or by a subsequent agreement.⁵ By agreeing to arbitration under the ICC Rules, the expedited procedure takes precedence over any contrary terms of the arbitration agreement.

The key features of the ICC expedited arbitration procedure are as follows:

- 1) The ICC Secretariat will inform the parties if the expedited procedure is to apply to their dispute following receipt of the Answer or on expiry of the time limit for the Answer but may do so later. Parties therefore should make any submission about the application of the expedited procedure in the Request or Answer, or within any other time limit set by the Court. If a party objects to the procedure the Court will decide on the matter after hearing the other party. The ICC Court may also decide at any time, upon request of a party or on its own motion after consulting the tribunal and the parties, that the expedited procedures shall no longer apply.
- 2) In determining whether the expedited procedure applies, the ICC Secretariat will take into account all quantified claims, counterclaims, cross-claims, and claims. This may involve consideration as to whether claims have been exaggerated to avoid the expedited procedures. Expedited arbitration will not apply in principle where there are declaratory or non-monetary claims unless they support a monetary claim or do not add significantly to the dispute.
- 3) Even if the arbitration agreement provides otherwise, the ICC Court may decide to appoint a sole arbitrator if the expedited procedure applies. The parties may nominate the sole arbitrator within the time limit fixed by the ICC Secretariat. The ICC Court will appoint the sole arbitrator within as short a time limit as possible if the parties do not make a nomination.
- 4) New claims may not be made by the parties once the tribunal has been constituted without leave of the tribunal depending on the nature of the new claims, the stage of the arbitration, costs implications, and any other relevant circumstances.
- 5) The tribunal is to convene a case management conference no later than 15 days after the date on which it received the arbitration file.⁶ This time limit may be extended by the ICC Court if it considers it necessary to do so after a reasoned request of the tribunal or on its own initiative.
- 6) The tribunal decides the appropriate procedural measures including, after consultation with the parties, decisions whether to dispense with requests for document production, limit parties' written submissions (in number, length, and scope) as well as written factual and expert evidence, and whether to hear the matter or decide on a documents only basis. The tribunal remains under the duty to act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.
- 7) The final award is to be rendered within six months from the date of the case management conference. Tribunals will need to submit a reasoned application to the ICC Court if an extension is required. An award under the expedited procedure provisions shall be a reasoned award although the tribunal may give concise reasons and may limit the factual and/or procedural sections to what they consider to be necessary to the understanding of the award.

In ICC arbitration, the administrative expenses of the ICC and arbitrator's fees are fixed according to a fee scale based on the value of the claim. A reduced fee scale is effective as of 1 March 2017 and, when parties have agreed to the expedited procedure, the scales for the expedited procedure will apply. The arbitrators' fees pursuant to these scales for the expedited procedure are 20 percent less than under the general scales.

⁵ Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration provides guidance on the conduct of arbitrations under the 2017 ICC Rules and approach of the LCIA Court.

⁶ In order to reduce time spent on preliminary procedural steps, the expedited procedure excludes the requirement under Article 23 the ICC Rules for the tribunal to draw up the document known as the "Terms of Reference".

Conclusions on expedited arbitration in London ICC arbitrations

The ICC expedited arbitration procedures raise some important considerations for parties when drafting ICC arbitration clauses post- 1 March 2017, in particular parties may consider opting out for instance if they do not wish to have disputes referred to a sole arbitrator and where disclosure of documents and attendance of witnesses is likely to be required.

Although the nature and value of disputes may not be immediately obvious to all parties at the time of contracting, it will be relatively clear in certain contracts that disputes will likely come within the ambit of the expedited provisions. For instance, in the shipbuilding context, where certain warranty and repair disputes could be anticipated which would fall within the upper value limit set by the expedited procedures.

Although relatively low value arbitrations may on the face of it lend themselves to simpler and shorter processes such disputes are not always straightforward, and parties may also have other overriding concerns such as establishing precedent rather than speed and cost. Unless they have opted out, parties will therefore need to apply to the ICC Court for a decision in this regard.

The availability of expedited arbitration under the ICC Rules provides parties with procedures to obtain an award more quickly and in a cost effective manner. It is still early days to know the experiences of expedited arbitration in London ICC arbitrations although undoubtedly the availability of these procedures represents a positive development, particularly in relatively low value arbitrations, in addressing the issues of time and costs of arbitration. In appropriate cases, as noted, these fast-track procedures may apply to higher value disputes if the parties are in agreement, although this may be relatively unusual once a dispute has arisen. It should also follow that, as well as reduced arbitrator fees under the ICC fee scale, a shorter and simpler arbitration will result in lower legal costs. The costs of the ICC to administer expedited arbitration are at the same level as for full arbitrations. The costs of institutional arbitration, such as arbitration under the ICC Rules, will nevertheless remain a consideration for parties when selecting arbitration rules. For instance, for many users of arbitration in the maritime sector, London arbitration conducted on the basis the London Maritime Arbitration Association (LMAA) Terms on an *ad hoc* basis under the English Arbitration Act 1996 is generally preferred not only for lower value and straightforward claims (such as repairs and the like) but also for higher value disputes in the offshore oil and gas industries.⁷

While the expedited procedures under the ICC provide for mandatory simplified procedures for claims under a certain value, with the possibility for parties to opt in to the procedure for higher claims, other international arbitration rules have adopted different approaches with optional procedures for expedited arbitration. The LCIA Rules provide that parties may request expedited formation of the arbitral tribunal in any cases irrespective of value.⁸ The SCC requires the parties to agree that the dispute shall be resolved by arbitration under the SCC Rules for Expedited Arbitration.⁹ If certain criteria are satisfied, parties arbitrating under the SIAC Rules¹⁰ and the HKIAC¹¹ Rules may apply for the proceedings to be conducted in accordance with expedited procedures.

⁷ Statistics published by the LMAA estimated that demand for LMAA arbitration remained high with some 1720 arbitrations commenced in 2016. The LMAA Terms (2017) incorporate "light" revisions to the existing provisions to assist parties in reaching speedier and more economical resolution of disputes and are effective for arbitral proceedings commenced on or after 1 May 2017.

⁸ Article 9A, LCIA Rules. The parties' application needs to set out the specific grounds for exceptional urgency requiring the expedited formation of the arbitral tribunal. If granted, the LCIA Court can abridge any period of time under the arbitration agreement or other agreement of the parties.

⁹ Parties may opt for a combination of expedited arbitration or full scale arbitration in their arbitration agreement depending on the nature and value of the dispute.

The mandatory approach adopted in ICC arbitration for lower value disputes recognizes that the difficulty is not the process itself but that often responsibility for expensive, overly long and cumbersome arbitrations lies with the parties themselves. International arbitration rules already allow parties great procedural flexibility to tailor the process, but achieving expeditious resolution of disputes largely depends on the cooperation and agreement of the parties, and their arbitration counsel, as well as the assistance of robust tribunals. In our experience, practical steps such as identifying preliminary issues, narrowing the issues, limiting document production, better use of technology, and minimizing the length of certain submissions, where appropriate, will be met favourably by London tribunals and can in conjunction with approaches to encourage settlement lead to early resolution of arbitration disputes.

¹⁰ The SIAC Arbitration Rules (2016), Rule 5 provide that a party may file an application with the Registrar for the arbitral proceedings to be conducted in accordance with the Expedited Procedure, provided that any of the following criteria is satisfied: a. the amount in dispute does not exceed the equivalent amount of S\$6,000,000, representing the aggregate of the claim, counterclaim and any defence of set-off; b. the parties so agree; or c. in cases of exceptional urgency.

¹¹ Under the HKIAC Administered Arbitration Rules (2013), Article 41.2 provides that, prior to the constitution of the arbitral tribunal, a party may apply to HKIAC in writing for expedited arbitration to be conducted if: the amount in dispute representing the aggregate of any claim and counterclaim (or any set-off defence) does not exceed HKD 25,000,000 (twenty-five million Hong Kong Dollars); or the parties so agree; or in cases of exceptional urgency.