

The new ICC Arbitration Rules: improving the efficiency of arbitrating low to medium value disputes

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In recent years, leading arbitral institutions have been developing innovative ways to promote efficiency and reduce costs in arbitration proceedings, especially in relation to lower value claims. The new version of the ICC Arbitration Rules ("**ICC Rules**") which entered into force on 1 March 2017 provides such innovations, which are discussed below.

Expedited Procedure for Disputes in the Amount of USD 2 million or less

The most important change in the new ICC Rules 2017 is the introduction of the Expedited Procedure provisions. These Rules will automatically apply to ICC arbitrations with a dispute value of up to USD 2 million, unless excluded by the arbitration agreement, provided that the arbitration agreement was concluded after 1 March 2017. Conversely, parties seeking a simplified procedural framework for cases worth over USD 2 million can opt-in and use the Expedited Procedure Rules, although the procedure may not be suitable for complex cases involving jurisdictional disputes, arbitrator challenges or extensive factual and expert evidence. In 2015, approximately one third of the 801 cases filed with the ICC were of a value equal to or less than USD 2 million, so there is a clear commercial need for such cost-effective, expedited arbitration procedures.¹

The key features of the ICC Expedited Procedure Rules are:

- The ICC Court may determine whether it is inappropriate in the circumstances to apply the Expedited Procedure Rules;²
- The ICC Court may appoint a sole arbitrator, even where the arbitration agreement provides for a three-member tribunal;³

¹ ICC Dispute Resolution Bulletin 2016 No. 1, '2015 ICC Dispute Resolution Statistics': a table of the amounts in dispute in USD of all cases filed with the ICC in 2015 provides the percentage of cases within each value bracket, the sum total of all cases with an amount in dispute of equal to or less than USD 2 million is 32 percent.

² ICC Rules, Art. 30(3)(c).

³ *Ibid*, Appendix VI, Art. 2(1).

- Terms of reference, a traditional feature of ICC proceedings, are not required;⁴
- After the constitution of the arbitral tribunal, the parties require the tribunal's express permission to make new claims;⁵
- The tribunal must convene the case management conference no later than 15 days after receiving the files;⁶
- The tribunal may refuse or limit document production, the number and length of submissions, witness statements and expert reports;⁷
- The tribunal may decide to convene hearings by video or teleconference or alternatively decide the dispute on documents only, without an oral hearing;⁸
- The tribunal must render its final award within 6 months of the case management conference,⁹ unless this deadline is extended by the ICC Court;¹⁰
- The arbitrators' fee range is reduced by 20% for the Expedited Procedure, albeit still calculated relative to the amounts in dispute.¹¹

Incentives for early awards and reduced arbitrator fees for late awards

In further attempts to promote efficiency, in its *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration*, dated 1 March 2017, the ICC has incentivised arbitrators to render awards in the times specified by the Rules,¹² giving the ICC Court the power to increase the arbitrators' fees when the tribunal has conducted the

⁴ *Ibid*, Appendix VI, Art. 3(1).

⁵ *Ibid*, Appendix VI, Art. 3(2).

⁶ *Ibid*, Appendix VI Art. 3(3).

⁷ *Ibid*, Appendix VI, Art. 3(4).

⁸ *Ibid*, Appendix VI, Art. 3(5).

⁹ *Ibid*, Appendix VI, Art. 4(1); ICC Rules, Art. 31(2) provides that the Court may also extend the deadline for the case management conference.

¹⁰ *Ibid*, Appendix VI, Art. 4(1); ICC Rules Art. 31(2).

¹¹ ICC Rules, Appendix III, p. 58, 61; *ICC Rules*, Appendix VI, Art. 4(2); *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration*, dated 1 March 2017, para. 71.

¹² ICC Rules, Art. 31(1).

expedited arbitration expeditiously.¹³ At the same time the ICC has taken a strict approach to late awards in Expedited Procedure arbitrations, with the tribunal being expected to submit its draft award within five months from the case management conference,¹⁴ and any extensions to the deadline for the final award being granted only in "limited and justified circumstances",¹⁵ and with the time limit being "of the essence".¹⁶ To that end, the ICC Court may reduce the fees of arbitrators who submit their draft awards late, by 5% to 10% for draft awards up to 7 months late, by 10% to 20% for draft awards up to 10 months late, and by 20% or more for draft awards more than 10 months late.¹⁷ These discounts give the Expedited Procedure provisions "teeth" from the arbitrator's perspective.

The ICC also provides for incentives and reduced arbitrator fees for early or late awards respectively in non-expedited arbitrations, providing that:

- Sole arbitrators are expected to submit draft awards within two months and three-member arbitral tribunals within three months after the last hearing or submissions;¹⁸ and
- Where the draft award is rendered later than six months (or such other time as fixed by the ICC Court) after the Terms of Reference are fixed, the ICC Court may reduce arbitrator's fees on a sliding scale (relative to how late the draft award is submitted), if it finds that delay is due to the arbitrator. The fees may be reduced by the same percentages as for late awards in expedited arbitrations where awards are submitted 7, 10, or more than 10 months respectively after the last substantive hearing or submissions.

Comparison with other institutional rules

The ICC's introduction of its Expedited Procedure reflects the trend of other leading arbitral institutions in recent years to provide fast-track rules for lower value claims. For example, ACICA, the SCC, the AAA, SIAC and HKIAC all offer expedited procedures. The expedited procedure provisions of the SIAC Rules and the HKIAC Rules are similar to the ICC procedure in that they:

¹³ *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration*, para. 93.

¹⁴ *Ibid*, para. 92.

¹⁵ *Ibid*, para 90.

¹⁶ *Ibid*, para. 91.

¹⁷ *Ibid*, para. 94.

¹⁸ *Ibid*, para. 86.

- Give the institution the power to shorten the time to constitute the tribunal;¹⁹
- Allow tribunals to determine disputes on documentary evidence alone;²⁰ and
- Require the tribunal to render the award within six months.²¹

However, notwithstanding those similarities, the institutions provide differing levels of party autonomy (an underlying principle of arbitration) - particularly where the expedited procedures provide for single arbitrators but the parties' arbitration agreements provide for three arbitrators.

For example, the SIAC Rules provide that cases shall be referred to a sole arbitrator, unless the President of SIAC determines otherwise,²² thereby potentially overriding party autonomy where the arbitration agreement provides for three arbitrators. The ICC rules similarly provide that: "[t]he court may, notwithstanding any contrary provision of the arbitration agreement, appoint a sole arbitrator".²³ By contrast, the HKIAC expedited procedure provides that the case shall be referred to a sole arbitrator, unless the arbitration agreement provides for three arbitrators;²⁴ and the Swiss Chambers of Commerce Association for Arbitration and Mediation provides a similar provision.²⁵ Other institutional rules arguably provide even less room for party autonomy. For example the SCC Rules simply provides that "[t]he [expedited]

¹⁹ ICC Rules, Appendix VI, Art. 2(2); 2013 HKIAC Administered Arbitration Rules ("**HKIAC Rules**"), Art. 41.2(c); 2016 Arbitration Rules of SIAC ("**SIAC Rules**"), Rule 5.2(a).

²⁰ ICC Rules, Appendix VI, Art. 3(5); HKIAC Rules, Art. 41.2(e); SIAC Rules, Rule 5.2(c).

²¹ ICC Rules, Appendix VI, Art. 4(1); Art. 41.2(f) of the HKIAC Rules provides that the award shall be made within six months from the date when HKIAC transmitted the file to the arbitral tribunal. This deadline may be extended in exceptional circumstances. Rule 5.2(d) of the SIAC Rules provides that the final Award shall be made within six months from the date when the Tribunal is constituted unless, in exceptional circumstances, the Registrar extends the time for making such final Award.

²² SIAC Rules, Rule 5.2(b).

²³ ICC Rules, Appendix VI, Art. 2(1). Article 30 of the ICC Rules provides further that: "[b]y agreeing to arbitration under the Rules, the parties agree that this Art. 30 and the Expedited Procedure Rules set forth in Appendix VI (collectively the "Expedited Procedure Provisions") shall take precedence over any contrary terms of the arbitration agreement".

²⁴ HKIAC Rules, Art. 41.2(a); Art. 41.2(b) provides that: "HKIAC shall invite the parties to agree to refer the case to a sole arbitrator. If the parties do not agree, the case shall be referred to three arbitrators".

²⁵ Art. 42(2)(b) of the 2012 Swiss Rules of International Arbitration provides that: "[t]he case shall be referred to a sole arbitrator, unless the arbitration agreement provides for more than one arbitrator".

arbitration shall be decided by a sole Arbitrator",²⁶ and the ACICA Rules provide that "[t]here shall be one arbitrator".²⁷

The question of whether an arbitral institution can override the parties' arbitration agreement was tested in the Singapore High Court in *AQZ v ARA* where the court held that since the parties had expressly chosen a version of the SIAC rules containing the 'expedited procedure' provision requiring a sole arbitrator, overriding the parties' agreement to use three arbitrators was consistent with party autonomy.²⁸

The benefits of a single arbitrator override

The ICC Expedited Procedure provisions reflect a general trend amongst arbitral institutions towards providing fast track procedures for lower value claims where institutional rules may override the wishes of the parties to appoint three arbitrators and require the parties to have their cases decided by a sole arbitrator. Although this could be viewed as an encroachment on party autonomy, for lower value claims there are obvious potential benefits to cases being heard by a single arbitrator. Some of those benefits may include lower arbitrator costs, avoiding the challenge of identifying three suitable arbitrators who are available at the required times (especially in relation to claims where arbitrators with specific expertise are required), and awards often being issued in a shorter timeframe as only one arbitrator needs to decide the issues in the case. Another potential benefit of a clear provision for single arbitrator override is the disincentive to challenge the effect of the provision in the courts in the light of the *AQZ v ARA* decision and the possibility that a number of arbitration-friendly national courts could potentially take the same view.

Accordingly, parties with a preference for using three arbitrators - and for whom the potential benefits of appointing a single arbitrator are not a priority - should carefully consider which institutional rules they eventually choose in their arbitration agreements, given the significant differences in the rules of leading institutions.

Other efficiency-driven changes to the ICC Rules

²⁶ 2017 SCC Expedited Arbitration Rules, Art. 17.

²⁷ 2016 ACICA Expedited Arbitration Rules, Art. 8.1.

²⁸ In *AQZ v ARA* [2015] SGHC 49 the plaintiff sought to set aside an award rendered by a sole arbitrator under Art. 34(2)(a)(iv) of the UNCITRAL Model Law, which provides for setting aside when the composition of the tribunal or the arbitral procedure is not in accordance with the parties' agreement. The arbitration agreement provided for three arbitrators. The Court rejected the application to set aside stating that since the parties had expressly chosen a version of the SIAC rules that contained the 'expedited procedure' provision (which required a sole arbitrator), it was consistent with party autonomy to override the parties' agreement to use three arbitrators.

Other than the Expedited Procedure rules, the most important developments in the ICC Rules are:

- **Shortened Time Periods** - the time-limit for the agreeing the Terms of Reference and transmitting them to the ICC Court is reduced from 2 months to 30 days in non-Expedited ICC arbitration proceedings.²⁹ The intention is to reduce the time spent and costs incurred in the initial procedural discussions, enabling the tribunal and parties to start working on the substantive issues earlier, although the ICC Court may extend the time-limit as needed in more complex cases.
- **Reasoned Decisions** - the parties may now request reasons for procedural decisions of the ICC Court,³⁰ including decisions concerning the appointment, confirmation, challenge and replacement of arbitrators. This is intended to increase procedural transparency and encourage the parties' acceptance of these decisions.
- **Increased filing fee and updated administrative fee schedule** - a request for arbitration will require a filing fee of USD 5,000 (instead of USD 3,000);³¹ and the schedule of fees for administrative expenses and arbitrator fees has been revised, effective as of 1 January 2017,³² and 1 March 2017 for the Expedited Procedure.³³

Conclusion

The amendments contained in the new ICC Rules are likely to be welcomed by parties wishing to resolve disputes quickly and cheaply. The new Expedited Procedure offers the potential for rapid and streamlined resolution of lower value disputes, and over time parties using expedited processes to resolve lower value disputes may be persuaded to use those expedited processes for certain higher value disputes, resulting in increased arbitral efficiency generally. However, it remains to be seen whether complex cases - such as matters involving jurisdictional disputes, arbitrator challenges and significant factual and/or expert evidence - will be accommodated within this fast-track process.

²⁹ ICC Rules, Art. 23(2).

³⁰ Art. 11(4) has been amended deleting the language that previously prevented the Court from communicating its reasons for certain decisions. The amendment will increase the Court's transparency by disclosing its reasoning to the parties and further confirm its commitment to accountability.

³¹ ICC Rules, Appendix III, Art. 1.

³² *Ibid*, Appendix III, Art. 3(1).

³³ *Ibid*, Appendix III, Art. 3(3).

More broadly, the new ICC Rules are likely to increase the diversity of the arbitrator pool. With new sanctions for failure to meet award delivery deadlines and a structural preference for sole arbitrators in Expedited Procedure arbitrations, the busier and more established arbitrators may well decline appointments under the new rules. This is likely to open up appointments to the new generation of arbitrators, at least in smaller cases.