

ICC INTRODUCES FAST-TRACK ARBITRATION PROCEDURE AND BOLSTERS TRANSPARENCY

The latest Rules of Arbitration of the International Chamber of Commerce (**ICC**) entered into force on 1 March 2017 (the **2017 Rules**). New provisions are aimed at reducing the cost and increasing the transparency of ICC arbitration. The most significant development is the introduction of bespoke rules for expedited arbitration. These apply automatically to disputes of amounts less than USD 2 million arising out of agreements after 1 March, unless the parties opt out by agreement.

USER CALLS FOR MORE EFFICIENCY

International arbitration remains a popular choice for dispute resolution, mostly due to the increased enforceability of awards and the procedural flexibility that is afforded to parties. However, surveys indicate that users would welcome the introduction of measures to make the arbitral process cheaper and quicker.¹

In response, arbitral institutions increasingly offer arbitral rules tailored for swift arbitration. The Singapore International Arbitration Centre (**SIAC**), the Stockholm Chamber of Commerce (**SCC**), the Hong Kong International Arbitration Centre (**HKIAC**), the International Centre for Dispute Resolution (**ICDR**), and the German Institution of Arbitration (**DIS**) all offer expedited procedures which differ in scope. For example, most of the procedures only apply to disputes below a specific threshold; roughly USD 4 million for the SIAC, USD 3 million for the HKIAC, but only USD 250,000 for the ICDR. By contrast, the SCC and the DIS's expedited procedure have no qualifying monetary threshold. That said, all these procedures have features to ensure that the arbitration proceeds quickly. These include limiting the length of the parties' submissions, presuming that no oral hearing will take place, and ensuring that the award is rendered swiftly.

THE ICC'S EXPEDITED PROCEDURE

The ICC's expedited procedure is set out at Article 30 and Appendix VI of the 2017 Rules (the **Expedited Procedure**). A revised ICC Note to Parties and Arbitrators (the **Guidance**) has been recently published alongside the 2017 Rules which provides further explanation of the new procedure.

Overview of the new expedited procedure

From 1 March 2017, parties providing for ICC arbitration in their agreements should:

- be aware that where the Expedited Procedure applies:
 - the ICC Court is likely to appoint a sole arbitrator – regardless of provisions in the arbitration agreement that state otherwise;
 - the award will usually be rendered within 6 months from the CMC; and
 - sufficient internal resources will need be allocated to the arbitration.
- consider whether disputes under the agreement are likely to be above or below the USD 2 million threshold; and
- assess whether they wish to opt in or out of the ICC Expedited Procedure and draft accordingly.

¹ Queen Mary University of London et al, '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration', p.24.

The Expedited Procedure modifies those features of the normal ICC arbitration process that can be time consuming or which are best suited to more complex and/or higher value claims. For example:

- **Lower fees:** Fees are calculated by reference to the scale of fees set out in Appendix III of the 2017 Rules, which are 20% lower than the usual fees.
- **A sole arbitrator:** The arbitrator may be nominated by the parties within a time limit fixed by the Secretariat, failing which the ICC Court may appoint a sole arbitrator as soon as possible (regardless of what the arbitration agreement provides).
- **Early case management:** The first procedural hearing (the **CMC**) must take place 15 days from the date that the tribunal receives the file (unless extended by the ICC Court).
- **No new claims:** Once the tribunal has been constituted, no new claims can be submitted (unless expressly authorised).
- **No terms of reference:** Where disputes are procedurally and legally complex, the terms of reference are a useful way of setting out the arbitration's parameters. This can be time consuming and is unnecessary in any dispute suitable for expedited resolution.
- **Tribunal-led procedure focused on time-saving:** After discussion with the parties, the tribunal may order time and cost saving measures, for example, short submissions, no document production, and limited witness evidence.
- **No hearing:** After discussion with the parties, the tribunal may decide to conduct the arbitration on a documents-only basis, without a hearing.
- **Early award:** The award must be made within 6 months of the CMC, unless the ICC Court orders otherwise. The Guidance suggests that compliance with the 6-month time limit is of the essence. The time limit will be strictly applied and any extensions should be limited and reasoned.

SCOPE AND APPLICATION

The parties automatically agree to the application of the Expedited Procedure if they adopt the 2017 Rules. It applies to all ICC arbitrations where the amounts in dispute do not exceed USD 2 million (including all claims, counterclaims, and cross-claims between the parties, but not interest or costs) unless:

- a) the arbitration agreement was concluded before 1 March 2017;
- b) the parties have agreed that the Expedited Procedure does not apply; or
- c) the ICC Court determines (either by its own volition or following a party's application before the tribunal has been formed) that it is inappropriate for the Expedited Procedure to apply. The ICC Court may do this at any point in the proceedings but only after consultation with the parties.

TO OPT IN OR OUT?

Parties can either opt in (for amounts in dispute above USD 2 million) or opt out (where amounts in dispute are lower).

When choosing whether to opt in or out of the Expedited Procedure, the parties should consider important factors on a case-by-case basis, such as:

- the complexity of the disputes that have arisen or which are likely to arise;

- the importance of an oral hearing;
- the need for a timely award in the proceedings;
- the availability of internal staff and external counsel to deal with the expedited process; and
- the importance of having a three-person tribunal.

If choosing to opt out, the ICC recommends using the following wording: "*The Expedited Procedure Provisions shall not apply.*"

TERMS OF REFERENCE

Under the 2017 Rules, the time limit for the conclusion of the Terms of Reference has been shortened. They must now be agreed within 30 days from the transmission of the file to the tribunal (rather than 2 months). This amendment is in line with an overall drive to improve the efficiency of proceedings.

REASONS FOR ICC COURT DECISIONS

The other notable amendment is that the ICC Court is now permitted to provide reasons for the appointment, challenge, or replacement of an arbitrator (Article 11(4)). Under the previous rules, the ICC Court was expressly prohibited from giving reasons, and only did so in exceptional circumstances. One of the reasons for this was to preserve the manner in which the ICC Court reaches its decisions, which was more by consensus than reasoned opinions and to avoid decisions being challenged which may slow down the decision-making process.

Under the 2017 Rules, if a party requests it to do so, the ICC Court may provide reasons for its decisions, although the Guidance makes clear that the ICC Court has full discretion to accept or reject the request.

This also applies to the ICC Court's decisions regarding the *prima facie* existence of the arbitration agreement (Article 6) and its decisions regarding the consolidation of arbitrations (Article 10).

CONSIDER NEW MECHANISMS CAREFULLY

The recent updates to the ICC's arbitration rules should be welcomed as they demonstrate the ICC's responsiveness to the needs of its users. However, careful thought should be given in each case whether these mechanisms are appropriate.

Of all the varieties of expedited procedures now available, the ICC's Expedited Procedure is at the 'tougher end', by providing for mandatory expedition unless the parties opt out. In 2015, disputes of or under USD 2 million accounted for 32% of the ICC's caseload; many users of ICC arbitration will be affected.

ISSUES WITH ENFORCEMENT?

In particular, the Expedited Procedure states that the ICC Court "*may, notwithstanding any contrary provision of the arbitration agreement appoint a sole arbitrator*". This empowers the ICC Court to override the parties' express agreement as to the number of arbitrators required to resolve the dispute.

There are some concerns that this provides opportunities for an award rendered under the Expedited Procedure to be challenged at the seat or on enforcement. Such arguments were raised before the Singaporean court in

2015; an award rendered under SIAC's expedited procedure was challenged on the basis that the president of SIAC appointed a sole arbitrator where the parties had expressly specified a tribunal of three – a decision over which SIAC president has complete discretion under the institution's rules.² The judge rejected the challenge and took the view that by agreeing to SIAC arbitration, the parties had also agreed to the application of the terms of its expedited procedure, including the appointment of a sole arbitrator where the expedited procedure applies. Arguably this is the better view and hopefully if a court were asked to consider the ICC's procedure in a similar light, it would come to the same conclusion. However, much will depend on which court is considering the issue.

Parties should be aware of this provision before they enter into ICC arbitration agreements and have regard both to the place of arbitration and the likely place of enforcement. If all parties are aware of this provision, the risk of challenge of the award, either at the seat or on enforcement may be reduced.

TRANSPARENCY AT INCREASED COST?

Similarly, the ability to seek the ICC Court's reasoning for its decisions may promote transparency. The ICC has previously noted the importance of this, particularly in investor-State arbitration. Indeed, this measure sits alongside other measures taken to promote transparency; since 1 January 2016, the ICC publish the names, nationality and appointing party of all arbitrators in newly registered cases (unless parties opt out).

However, it should also be remembered that reasoned decisions will add time and cost to the proceedings. Further, the availability of reasons could provide a premise (whether robust or not) for challenging the ICC Court's decisions before national courts. Thought should be given to these implications before requesting reasons from the ICC Court.

² *AQZ v ARA* (2015) SGHC 49.

CONTACTS



Jason Fry
Partner, Paris

T +33 14405 5303
E jason.fry
@cliffordchance.com



Tim Schreiber
Partner, Munich

T +49 8921632 8710
E tim.schreiber
@cliffordchance.com



Kabir Singh
Partner, Singapore

T +65 6410 2273
E kabir.singh
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street,
London, E14 5JJ

© Clifford Chance 2017

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street,
London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to nomorecontact@cliffordchance.com or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ

Abu Dhabi • Amsterdam • Bangkok • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Dubai • Düsseldorf • Frankfurt • Hong Kong • Istanbul • Jakarta* • London • Luxembourg • Madrid • Milan • Moscow • Munich • New York • Paris • Perth • Prague • Rome • São Paulo • Seoul • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

*Linda Widyati & Partners in association with Clifford Chance.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.



Anna Kirkpatrick
Senior PSL, London

T +44 20 7006 2069
E anna.kirkpatrick
@cliffordchance.com



Shobna Chandran
Senior Associate,
Singapore

T +65 6410 2281
E shobna.chandran
@cliffordchance.com



Cameron Hassall
Partner, Hong Kong

T +852 2825 8902
E cameron.hassall
@cliffordchance.com



Lei Shi
Consultant, Hong Kong

T +852 2826 3547
E lei.shi
@cliffordchance.com



Thomas Walsh
Consultant, Hong Kong

T +852 2825 8052
E thomas.walsh
@cliffordchance.com



Romesh Weeramantry
Foreign Legal
Consultant, Hong Kong

T +852 2825 8938
E romesh.weeramantry
@cliffordchance.com