

What You Need To Know About the ICC's New Fast Track Arbitration Process

By Rahat Godil and Max Shapiro

The International Chamber of Commerce has streamlined its arbitration process to reduce the length and cost of arbitrations with new amendments to its Rules of Arbitration which came into force on March 1, 2017. Among the most notable changes is a new expedited procedure for resolving disputes in which the amount claimed is less than US\$2-million, which the ICC is implementing in response to cost and efficiency concerns raised by businesses using institutional arbitration to resolve international commercial disputes. This article discusses the major benefits of and practical considerations relating to ICC's new expedited procedure and how it compares to similar processes offered by other international arbitration institutions.

Following the trend towards increased arbitral efficiency, the International Chamber of Commerce (ICC) has recently streamlined its arbitration process to reduce the length and cost of arbitrations with new amendments to its Rules of Arbitration (ICC Rules). The amendments came into force on March 1, 2017 and will be of interest to arbitration practitioners and parties globally who use ICC arbitration or are considering selecting institutional arbitration as the dispute resolution mechanism in their commercial agreements but want a process that provides for improved transparency, efficiency, and lower costs. Among the most notable changes in the new ICC Rules is an expedited procedure for resolution of disputes in which the amount claimed is less than US\$2-million. This article outlines the major benefits of, and practical considerations relating to, this new procedure. It also considers the process to opt out of it and discusses how the ICC expedited process compares to the streamlined processes offered by some of the other leading international arbitral institutions.

BENEFITS AND PRACTICAL CONSIDERATIONS RELATING TO ICC'S NEW FAST TRACK RULES

The new ICC Expedited Procedure Rules (Expedited Rules) automatically apply to all ICC arbitrations in which the underlying arbitration agreement was concluded after March 1, 2017, the amount in dispute is under US\$2-million, and the parties do not expressly opt-out of the Expedited Rules in their arbitration agreement. If the parties agree, they may also opt-in to have disputes that exceed US\$2-million decided by use of the Expedited Rules regardless of the date of the arbitration agreement.

Some of the key benefits offered by the Expedited Rules include the following:

1. The ICC court may now appoint a sole arbitrator to hear the matter, even if the arbitration agreement provides otherwise. This is intended to reduce costs that would normally be incurred through use of a three-member tribunal but is subject to the ICC court's discretion.
2. The parties may nominate the sole arbitrator within a specified time. If they do not, the ICC court will appoint one within as short a time as possible.
3. The arbitral tribunal is not required to determine the terms of reference. This was traditionally a significant feature of ICC arbitrations, and sometimes a time-consuming and costly process.
4. After the arbitral tribunal has been constituted, parties cannot make new claims unless they are first authorized to do so by the tribunal.
5. The arbitral tribunal has the discretion to "adopt such procedural measures as it considers appropriate". It may, after consulting with the parties, decide the case on a documents-only basis, with no oral hearing, no requests to produce documents, and no examination of witnesses or experts. If a hearing is held, it may be held by video or telephone conference. These measures may significantly enhance the efficiency of the arbitration and reduce costs.
6. The arbitral tribunal must provide its final award within six months of the initial case management conference. That conference is to occur no later than 15 days after the date on which the file is sent to the arbitral tribunal.
7. A reduced fee scale will apply for administrative expenses and arbitrator's fees.

Under the Expedited Rules, the ICC court and its secretariat will continue to maintain their existing quality control protocol over awards. Moreover, departures from that protocol are permitted in many cases if the parties' agree or the sole arbitrator decides.

CONSIDERATIONS FOR OPTING OUT

If the Expedited Rules apply to a matter by default given the quantum at issue, the parties may opt-out. Despite the benefits of the Expedited Rules, parties entering into arbitration agreements after March 1, 2017 will need to carefully consider whether to opt-out of the Expedited Rules. This is particularly so if the disputes they might encounter in the future are expected to be complex ones notwithstanding that they are below the US\$2-million threshold. The parties also may not want to risk having changes made to their arbitration agreement that they never consented to because of contradictions or inconsistencies between the parties' agreement and the Expedited Rules. Parties who wish to have a three-member arbitral tribunal will also likely need to opt-out of the Expedited Rules (if they apply) given the likelihood that the ICC court will otherwise appoint a sole arbitrator notwithstanding.

If the parties decide to opt-out, it is crucial that their intent be clearly and expressly set out in the opt-out agreement. Section 7 of the ICC's Note to Parties and Arbitral Tribunals, which is intended to provide guidance on the Expedited Rules, makes it clear that it is not sufficient for the purpose of opting out "that the parties have referred in the arbitration agreement to a three-member arbitral tribunal, or have adopted time limits that depart from those provided by the [Expedited Rules]". Rather, opt-out agreements should "express in specific terms the parties' intention not to subject themselves" to the Expedited Rules.

KEY DIFFERENCES BETWEEN FAST TRACK RULES OFFERED BY THE ICC AND OTHER INSTITUTIONS

While the ICC's initiative to streamline and increase arbitration efficiency is generally consistent with similar fast-track rules now used by other international arbitral institutions, there are some notable differences in the processes that warrant consideration when choosing an arbitral institution. In particular:

1. Expedited rules may not be automatic or mandatory. This is the case with the expedited or summary procedures of the London Court of International Arbitration (LCIA), Stockholm Chamber of Commerce (SCC), and Singapore International Arbitration Centre (SIAC).
2. Monetary thresholds may be different. For instance, the expedited rules of the International Centre for Dispute Resolution apply if no party's claims exceeds US\$250,000, while the SIAC expedited procedure may be triggered if the amount in dispute is less than S\$6,000,000. The expedited rules of the LCIA and SCC, however, do not prescribe monetary thresholds.

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