New ICC Fast Track Arbitration Rules – The faster the better?

The new ICC Rules automatically fast track lower value disputes. But, is putting arbitration on fast track always the best prescription for any dispute? Be aware of this new feature when drafting your ICC arbitration clause!

1. Fast Track Arbitration

Arbitration is usually viewed as cost-effective and as a faster alternative to the courts. While this can be true in most cases, to the dismay of the parties they would found it to be neither. Especially when it comes to solving disputes involving smaller claims, costs and length of the arbitral proceedings might appear disproportionate. For smaller claims, the difference in costs between a fast track and a regular arbitration may even be decisive in terms of whether the claim is worth pursuing at all. In reaction to this, arbitration rules went through many revisions to provide and preserve an efficient arbitration process while fast track arbitration was one of those revisions. Fast track arbitration accelerates the arbitration process with shorter time limits and procedural limitations to ensure speed and cost efficiency. Most of the major institutions have now included an expedited procedure which applies upon agreement to the parties’ disputes.

Such “opt-in approach” to fast track procedures requires explicit agreement to fast-track arbitration either in the arbitration clause when signing the substantial contract or when submitting the dispute to arbitration. Of course, if the parties have a common interest in solving their dispute as fast as possible, finding an agreement on fast track procedure after a dispute has arisen, is not an issue. For example, in a case related to the Formula One Racing the parties agreed on fast track arbitration under the ICC Rules and the arbitral tribunal decided an issue regarding the paint of Formula One racing cars within a timeframe of approximately 40 days. However, in most cases the reality is a different one. Once the parties are in dispute, the likelihood of their agreeing on an expedited procedure is slim.

The Swiss Chambers’ Arbitration Institution («SCAI») addressed that issue already more than ten years ago: Under the assumption that lower value disputes are generally fit for fast track arbitration, the Swiss Rules of International Arbitration 2004 («Swiss Rules») provide for an expedited arbitration procedure, which automatically applies in cases of disputes involving claims of less than
CHF 1 million. The main features of such automatically applicable fast track procedure are as follows: (i) the dispute is, in principle, referred to a sole arbitrator; (ii) the chambers may shorten time limits for the appointment of the arbitral tribunal; (iii) the number of briefs is limited (usually only one full exchange of written submissions); (iv) the dispute is decided after holding only one hearing for the examination of witnesses and experts or, if agreed with the parties, only on the basis of documentary evidence; (v) the award must be made within six months after transmission of the file to the arbitral tribunal; and (vi) the reasons of the award are only stated in summary form (the parties may waive the reasoning of the award entirely).

In the same vein, the International Chamber of Commerce (“ICC”) recently introduced expedited procedure rules (“ICC Expedited Procedure”), submitting disputes below USD 2 million automatically to fast track arbitration if the arbitration clause came into force on or after 1 March 2017 unless the parties have expressly opted out in their arbitration agreement. The ICC Expedited Procedure features typical characteristics of fast track arbitration and does not differ significantly from the expedited procedure under the Swiss Rules.

2. **Key features of the ICC Expedited Procedure**

2.1 **Appointment of a sole arbitrator:** The ICC Expedited Procedure foresees the appointment of a sole arbitrator, even if the arbitration agreement provides for a three-member tribunal. The parties may nominate the sole arbitrator within a specified time frame, however, if the parties cannot agree, the ICC will appoint the arbitrator. The arbitrator fees are reduced in the range of about 20% against the standard arbitrator fees under the ICC regime. However, the appointment of a sole arbitrator is not mandatory. Thus, even where the ICC Expedited Procedure applies the parties may agree on a three-member tribunal. Nonetheless, it is worth noting that since entering into force of the new rules according to the ICC in all cases with expedited proceeding the parties agreed to submit the dispute to a sole arbitrator – either under the original arbitration agreement or subsequently.

2.2 **No Terms of Reference:** While the ICC Expedited Procedure eliminates the requirement for an arbitral tribunal to draw up Terms of Reference, the requirement of an initial case management conference remains in place, such conference to be conducted within 15 days of the date the case file was transmitted to the arbitral tribunal.

2.3 **Limitation of the parties’ submissions:** The ICC Expedited Procedure Rules provide for various optional measures the arbitral tribunal may adopt as it considers appropriate. The arbitral tribunal may limit the number, length and scope of written submissions, of written witness statements and expert reports. Moreover, it may decide not to allow requests for document production.

2.4 **Possibility to decide without an oral hearing:** The arbitral tribunal may also decide the dispute solely on the basis of the documents submitted by the parties with no hearing and no examination of witnesses or experts.
2.5 **Speedy Award:** The arbitral tribunal must render the award within six months from the date of the case management conference (unless extended by the ICC Court based on reasoned requests by the arbitral tribunal). However, awards are still subject to the scrutiny of the ICC Court before publication.

3. **Is Expedited Arbitration suitable for all disputes?**

The advantages of expedited arbitration either under ICC or Swiss Rules appear to be obvious. Next to shorter and less costly proceedings a positive effect of the limited procedural steps is the concentration of material questions and evidence: It is impossible to devote time to lengthy arguments, to exchange voluminous briefs or to hold (over)long hearings. This normally requires both, the arbitrator(s) and the parties to think straight as well as to keep their arguments lean. Furthermore, the limited procedure forces the parties at the outset of the proceedings to put all cards on the table, thereby showing the other party what the conflict is all about, which may also facilitate an early amicable settlement. In addition, the expedited procedures could be a better choice if the business relationships shall be preserved, not only but in particular if parties seated in Asian countries are involved, which are in general less ardent to confrontational hearings.

However, even though it is assumed under the automatically applicable expedited procedures that lower value disputes are in general suitable for conducting an arbitration in a more time- and cost-efficient manner, this might not always be the case for the particular dispute and subject matter in question. In our experience also smaller disputes are sometimes better submitted to the «regular» arbitration proceedings instead of being squeezed into the fast-track corset, in particular, due to the limited possibilities and time constraints in presenting the facts of the case and legal arguments under the expedited procedure regime. The limitation on the taking of evidence may entail a lower degree of proof, e.g. in construction disputes it might be advisable not to cut down the tools of taking of evidence if technical matters are decisive to resolve the dispute. Furthermore, even though the parties may chose an arbitrator who is familiar with technical matters, this will not make up for the neutral expert who could be involved in a «regular» arbitration. Also, witness hearings might be indispensable if credibility is an issue. Moreover, fast track arbitration is most likely unmanageable in multiparty disputes. Finally, given the limited possibilities to submission of facts and evidence, fast track arbitration is particularly prone to due process concerns. In the event an unhappy party concludes that it did not have adequate opportunity to present its case e.g. due to the limitations on parties’ submissions, the subsequent challenge of the award even if unsuccessful could again prolong the process and add costs.

4. **Consequences for the drafting of Arbitration Agreements**

Parties wishing to make reference to ICC Arbitration in their contract while it is foreseeable that a potential dispute may require extensive clarification of facts or involves complex technical issues, shall consider – even in case of a lower potential value in dispute – to expressly exclude the ICC Expedited Procedure. Furthermore, the ICC Rules allow for a deviating threshold, meaning that the parties may consider to agree on a higher or lower threshold for the automatic application of
the ICC Expedited Procedure in their agreement to arbitrate. On the other hand, the ICC Expedited Procedure is also available for matters with amounts in dispute over USD 2 million upon agreement of the parties. Therefore, if deemed appropriate, the parties may agree to submit any potential dispute to the ICC Expedited Procedure regardless the amount at issue.

Parties intending to have their dispute decided in an expedited procedure or to have the expedited procedure automatically applied only for claims with values in dispute below CHF 1 million should also consider submitting a potential arbitration to the Swiss Rules. The SCAI has not only vast experience in administering arbitrations under the expedited procedures (given that since 2004 approximately 30% of the cases submitted to the Swiss Rules were decided in expedited procedures), on average the expedited procedure under the Swiss Rules might turn out to be faster than the ICC Expedited Procedure: While both rules foresee a six months deadline for rendering the award, in practice, the six-month time limit is one of the most significant challenges in fast track arbitration and it is clear from the outset that such short time period may not always be observed. Under the Swiss Rules there is a respectable proven record that the expedited procedure is on average cost-efficiently resolved within eight months. It remains to be seen whether the ICC Expedited Procedure will not be on average longer, in particular due to the mandatory scrutiny of the draft award by the ICC Court, which may cause delays in rendering the final award.

5. Summary

Come what may, at the end of the day, the successful conduct of any arbitration depends on the parties, their counsel and the arbitral tribunal. Whilst the introduction in the ICC Rules of an automatically applicable expedited procedure, which under the Swiss Rules has proven to be successful for many years now, is a welcome development when drafting their arbitration agreement, parties should carefully consider whether the expedited procedure would be appropriate in their particular circumstances. If they choose to opt-out of these procedures, or to amend the arbitration clause in particular in terms of the threshold for the application of the expedited procedure, such option should be drafted carefully and without ambiguity. On the other hand, under given circumstances and with parties willing to work towards a swift resolution of the case, even in an ad hoc setting, the expedited procedure is clearly an interesting option notwithstanding the value in dispute.