

# Accelerating the Pace of International Arbitration: A Comparative Look at the ICC's New Expedited Procedure Provisions

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International arbitration has become the preferred means of resolving cross-border commercial disputes in the modern business world. However, increasing demand for arbitration has resulted in complaints about delay and the costs of arbitral proceedings, which, in turn, is driving demand for change aimed at improving the efficiency and cost-effectiveness of arbitration.

Expedited arbitration is a relatively new process in international arbitration that is often used for disputes of limited value. It aims to shorten the duration of arbitral proceedings and reduce the cost of arbitration while preserving its main principles and purposes. The International Chamber of Commerce (ICC) is the latest institution to have introduced expedited arbitration procedures. It joins several other arbitral institutions, including the Stockholm Chamber of Commerce (SCC), International Centre for Dispute Resolution (ICDR), Singapore International Arbitration Centre (SIAC), Swiss Chambers' Arbitration Institution, and Hong Kong International Arbitration Centre (HKIAC), that have successfully adopted mechanisms for expedited arbitration. All of these mechanisms serve the same purpose – effective, time- and cost-efficient arbitration.

## Main Features of the ICC's Expedited Procedure Provisions

The ICC recently introduced its Expedited Procedure Provisions, which offer an option to conduct arbitration on an expedited or “fast-track” basis for disputes with a limited amount at stake. The Expedited Procedure Provisions came into effect on 1 March 2017 and are set out at Article 30 and Appendix VI of the ICC Rules. The Expedited Procedure Provisions apply to arbitrations in which (1) the arbitration agreement was concluded after 1 March 2017, (2) the amount in dispute is not more than USD 2 million, and (3) the parties have not opted out of the Expedited Procedure Provisions.

The main features of the Expedited Procedure Provisions that distinguish them from the general arbitration procedures set out in the ICC Rules are summarised in the table below:

	<b>General Arbitration Procedures under ICC Rules</b>	<b>Expedited Arbitration Provisions under the ICC Rules</b>
<b>Maximum Amount in Dispute (USD)</b>	Not limited	USD 2 million (or more if agreed by parties) (Article 30(2) and Article 1(2) of Appendix VI of the ICC Rules)
<b>Terms of Reference</b>	Required (Article 23 of the ICC Rules)	Not required
<b>Case Management Conference</b>	To be held “as soon as possible” after drawing up the Terms of Reference (Article 24 of the ICC Rules)	Timing is limited to no later than 15 days after the date on which the file is transmitted to the arbitral tribunal (Article 3(3) of Appendix VI of the ICC Rules)
<b>Number of Arbitrators</b>	One or three, as provided in the arbitration agreement (with a default of one if not specified) (Article 12 of the ICC Rules)	One, irrespective of the arbitration agreement (Article 2 of Appendix VI of the ICC Rules)

<b>Expedited Appointment of Arbitrators</b>	No time-limit requirements	Appointment to be made “within as short a time as possible” (Article 2(2) of Appendix VI of the ICC Rules)
<b>No Oral Hearings/Documents Only</b>	Possible, but only if neither party requests otherwise (Article 25(6) of the ICC Rules)	Possible, but for the tribunal to decide (Article 3(4) of Appendix VI of the ICC Rules)
<b>Submission of New Claims after Constitution of Tribunal</b>	Possible	Not allowed (Article 3(2) of Appendix VI of the ICC Rules)
<b>Deadline for a Final Award</b>	Six months from the date of the last signature by the arbitral tribunal or by the parties of the Terms of Reference (Article 31 of the ICC Rules)	Six months from the date of the case management conference (Article 4(1) of Appendix VI of the ICC Rules)
<b>Arbitrator Fees</b>	Fee scale with a minimum amount of USD 3,000 (Appendix III, Scale B, for general arbitration)	Fee scale with a minimum amount of USD 2,400 (Appendix III, Scale B, for the Expedited Procedure)

### Comparison with Other Institutional Rules

As noted above, the ICC is not alone in offering a mechanism for expediting arbitral proceedings – several other arbitral institutions, including the SCC, ICDR, SIAC, and HKIAC have incorporated such features into their rules as well. This section highlights some of the important similarities and differences in these expedited features among the various sets of rules.

#### *Amount in dispute*

Under the ICC’s rules, the expedited procedures will apply automatically if the amount in dispute is less than USD 2 million, although parties can “opt-out” if they agree that the Expedited Procedure Provisions will not apply. Conversely, parties may also agree to apply the Expedited Procedure Provisions to cases with an amount in dispute of more than USD 2 million if they “opt in” to the Expedited Procedure Provisions for such disputes via the arbitration agreement.

By way of comparison, under the SIAC Rules, expedited procedures can be applied to disputes with an amount in dispute up to the equivalent of USD 4,280,000 (Rule 5.1(a) of Schedule 1 of the SIAC Rules). The recently revised SCC Rules for Expedited Arbitration go even further: they are silent on the amount in dispute in terms of applying the expedited procedures. This approach provides the parties with greater latitude in using the procedures, including in high-value disputes. However, both SIAC and the SCC apply their expedited procedures only in disputes where the parties “opted in” by specifically choosing the expedited procedures in their arbitration agreement.

Some institutional rules provide that their expedited rules can apply in cases of “exceptional urgency” (e.g., Rule 5(1)(c) of the SIAC Rules and Article 41.1(c) of the HKIAC Rules), even where the amount in dispute is higher than the amount in dispute stipulated for expedited procedures for non-urgent cases. However, most institutions with expedited procedures, and the ICC in particular, do not require a pre-condition of “urgency” or “emergency” for their expedited procedures to be applied.

Like the ICC’s Expedited Procedure Provisions, the ICDR’s expedited procedures automatically apply to certain low-value disputes, but the cap is set much lower at USD 250,000 as compared to the ICC’s threshold of USD 2 million. Similarly, the cap under the Swiss Rules is set at the equivalent of USD 993,000. The ICC’s calibration of the USD 2 million-threshold may have been driven by the fact that both the number and value of disputes submitted for arbitration under the ICC Rules is growing. According to the ICC Statistical Report for 2015, the average value of the disputes referred to the ICC rose to USD 84 million, which is 25% higher than in 2014, when it was USD 63 million.

### *Size and role of an arbitral tribunal*

Under the ICC's Expedited Procedure Provisions, the dispute is to be resolved by a sole arbitrator nominated by the parties. If the parties cannot agree, the ICC's International Court of Arbitration (ICC Court) will appoint an arbitrator. The requirement of a sole arbitrator in the Expedited Procedure Provisions (regardless of the number stipulated by the parties in their arbitration agreement) will foster efficiency in the arbitration process and help reduce the cost of the arbitration. The appointment of arbitrators can be a time-consuming exercise and parties may misuse it as a delaying tactic. Additionally, an arbitration conducted by a sole arbitrator will typically be far cheaper than one in which three members of a tribunal take part.

The provision for a sole arbitrator is also provided for in the SCC and the ICDR Rules, even when the parties have agreed otherwise. In contrast, the ICDR, SIAC, Swiss, and HKIAC Rules allow a multiple-member tribunal to be appointed by agreement between the parties or by the decision of the arbitration institution.

With respect to the powers of the tribunal, the ICC's Expedited Procedure Provisions follow the practise of most other institutions (including the ICDR, SIAC, and HKIAC) by giving the tribunal the full discretion to conduct an arbitration (e.g., to dispense with an oral hearing and to decide a case on the basis of documents only).

### *Time limits and procedural matters*

One of the main purposes of the Expedited Procedure Provisions is to shorten the duration of the arbitration process, which in some complex matters can take years. One of the provisions geared towards keeping the arbitral process brief is the prohibition on parties introducing new claims once the sole arbitrator has been appointed, unless expressly authorized by the arbitrator. Moreover, the Expedited Procedure Provisions provide that the case management conference must be held no later than 15 days after the sole arbitrator has received the file from the ICC. The requirement of a case management conference for expedited arbitrations in most of the institutional rules is consistent with the approach in mainstream arbitration under those institutional rules. A number of institutions, including the ICC, SCC, ICDR, and SIAC, require a case management conference to be held for expedited arbitration.

Most institutional rules are silent as to whether the application of expedited procedures may be objected to or discontinued after they have been applied. Following the practice of the ICDR Rules and the SIAC Rules, the ICC's Expedited Procedure Provisions reserve for the ICC Court a right to discontinue the application of the expedited procedure at any stage of the proceedings, either on its own motion or upon the request of a party after consultation with the tribunal and the parties.

### *Timing and content of an arbitration award*

Award timing differs under the expedited rules of the various institutions. Under the ICC's Expedited Procedure Provisions, the time limit within which the arbitral tribunal must render its final award is six months from the date of the case management conference.

In comparison, under most other expedited rules, even those providing a case management conference for their expedited arbitrations (e.g., ICDR, SIAC, and SCC Rules), the time limit for rendering an award is calculated from the date of the constitution of the tribunal (e.g., Rule 5(2)(d) of the SIAC Rules) or from the transmittal of the file to the tribunal (e.g., Article 41(2)(f) of the HKIAC Rules; Article 42(1)(d) of the Swiss Rules).

The ICC's six-month time limit for rendering an award follows the practice of most arbitral institutions. However, some institutions provide for a three-month time limit (e.g., Article 43 of the SCC Rules for Expedited Arbitrations). The ICDR Rules establish the shortest deadline for

rendering an arbitral award in expedited arbitration, providing that an award must be rendered within 30 days of the closing hearing or of final written submissions.

There is a tension between, on the one hand, the need to finalise the arbitration within the strict time-limit imposed by the rules, and, on the other, the tribunal's duty to allow the parties a full opportunity to present their cases. A failure to comply with that duty may make the award unenforceable under Article V(1)(b) of the New York Convention. To avoid this outcome, the ICC's Expedited Procedure Provisions reserve the right for the ICC Court to extend the time limit for issuing a final award. Hopefully, this provision will apply only in very limited exceptional circumstances.

The ICC's Expedited Procedure Provisions require that an award must be reasoned. In contrast, most other expedited rules allow for an award to be in summary form unless the parties have specifically agreed otherwise (e.g., Rule 5.2(e) of the SIAC Rules, Article 41.2(g) of the HKIAC Rules, and Article 42.1(e) of the Swiss Rules).

## **Conclusion**

Mr. Alexis Mourre, the President of the ICC Court, has stated that the ICC's Expedited Procedure Provisions are "an entirely new offer to the business community and an effective answer to the legitimate concerns of the business community as to the time and costs of arbitration". Such procedures are indeed a key development in terms of maintaining the attractiveness and utility of international arbitration and have been taken up with enthusiasm. While parties should understand that the Expedited Procedure Provisions are not suitable for all kinds of disputes, parties should seriously consider using these newly established procedure where:

- the dispute is low-value and/or has little impact on the ongoing business of the parties;
- the case is straightforward and can be dealt with on a documents-only basis;
- situations where the time and cost of arbitration are material issues; and/or
- both parties agree to apply the expedited procedure.

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