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***In Pursuit Of Efficiency: An Analysis  
of the Expedited Procedure under the  
ICC Rules 2021***



## Abstract

Arbitration, historically celebrated for its efficiency and swiftness compared to litigation, has recently faced criticisms for becoming a cumbersome and costly process. To counteract this perception, many prominent arbitral institutions, including the International Chamber of Commerce (the “ICC”), have introduced expedited procedures aimed at fast-tracking the arbitral process. This article examines the key provisions of expedited procedure within the ICC's 2021 Arbitration Rules, the rationale behind its adoption by the ICC and the unintended consequences of its adoption. By reviewing recent expedited procedure-related decisions from diverse jurisdictions, the article accentuates the delicate balance that must be struck between expediency and upholding due process. Ultimately, the article contends that while expedited arbitration procedures play a pivotal role in international commercial disputes, they must not infringe upon parties' agreement. Hence, it advocates for a nuanced approach in tailoring expedited procedures to distinct dispute profiles, particularly those characterized by complexity and voluminous evidence.

**Keywords:** Arbitration, Arbitration Agreement, Expedited Procedure, ICC, Due Process

## Introduction

In both the 2015<sup>1</sup> and 2018<sup>2</sup> international Arbitration Surveys (the “Surveys”) conducted by the School of International Arbitration at Queen Mary, University of London's (“QMUL”) in partnership with White & Case, “lack of speed” was repeatedly listed by the respondents in the top four worst characteristics of international arbitration. The Surveys also revealed the desire on the part of arbitration users for institutions to be more transparent about the length of proceedings, leading to several major institutions publishing information on time and costs.<sup>3</sup> In order to address the dissatisfaction users attributed to the increased timing and rising costs of arbitration proceedings, arbitral institutions introduced expedited procedure rules.<sup>4</sup>

Basically, an expedited procedure in arbitration is one which imposes stringent deadlines within which the arbitral tribunal must conduct hearings and dispose of the matter.<sup>5</sup> For example, under the ICC's 2021 Arbitration Rules, the arbitrator (or arbitral tribunal) must render its award within six months of the case management conference.<sup>6</sup> In this case, the procedural timetable would need to be tailored to fit the specified time-limit, ultimately saving time spent by parties before the tribunals and saving costs that would otherwise have been incurred over a longer time period.

### 1. Key Features of the Expedited Procedure under the Rules

The ICC first launched its expedited procedure provisions (“EPPs”) in March 2017. In 2021, it introduced an expanded iteration of the EPPs with the launch of the ICC's Rules 2021 to take effect from January 1, 2021.

Generally, an ICC expedited arbitration will be conducted according to the ICC Rules except to the extent that they are expressly modified by *Article 30* and *Appendix VI of the Rules* (together referred as “ICC Expedited Provisions”). More so, while the ICC Expedited Provisions are the ‘primary’ provisions, the ICC's

<sup>1</sup> Queen Mary University of London, 2015 International Arbitration Survey: *Improvements and Innovations in International Arbitration*, School International Arbitration <http://www.arbitration.qmul.ac.uk/research/2015/>

<sup>2</sup> Queen Mary University of London & White & Case, *International Arbitration Survey: The Evolution of International arbitration* 5 (2018) 2 <http://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2018-19.pdf>

<sup>3</sup> For example, ICC's report on decisions on costs in international arbitration (accessed at <https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/decisions-on-costs-in-international-arbitration-icc-arbitration-and-adr-commission-report/>), LCIA's data on average costs and duration of its proceedings (accessed at <https://www.lcia.org/News/lcia-releases-costs-and-duration-data.aspx>), SIAC's study on Costs and Duration (accessed at [https://siac.org.sg/wp-content/uploads/2023/04/SIAC-Releases-Costs-and-Duration-Study\\_10-Oct-2016.pdf](https://siac.org.sg/wp-content/uploads/2023/04/SIAC-Releases-Costs-and-Duration-Study_10-Oct-2016.pdf))

<sup>4</sup> Practical Law Arbitration, *Expedited Procedures in International Arbitration* [https://uk.practicallaw.thomsonreuters.com/w-010-4433?comp=pluk&transitionType=Default&contextData=\(sc.Default\)&firstPage=true&OWSessionId=ea2fc68660204282ba0b46544e5190d1&skipAnonymous=true](https://uk.practicallaw.thomsonreuters.com/w-010-4433?comp=pluk&transitionType=Default&contextData=(sc.Default)&firstPage=true&OWSessionId=ea2fc68660204282ba0b46544e5190d1&skipAnonymous=true)

<sup>5</sup> Ashurst International Arbitration Group, *Expedited Procedure in International Arbitration* (April 2014) <https://www.ashurst.com/-/media/ashurst/documents/news-and-insights/legal-updates/2014/apr/expedited-procedure-in-international-arbitration-april-2014.pdf>

<sup>6</sup> Article 3(5), Appendix VI

“Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC” (the “**ICC Note 2021**”)<sup>7</sup> provides further guidance on expedited procedures.

#### **a) Application of the ICC Expedited Procedure**

The ICC Expedited Provisions apply automatically to all arbitrations referred to arbitration further to the ICC Rules (i) with claims below US\$3 million, where the arbitration agreement was concluded **on or after 1 January 2021**, or (ii) with claims below US\$2 million for arbitration agreements concluded before **1 January 2021**, but **on or after 1 March 2017**.<sup>8</sup> On the other hand, parties may expressly agree to the application of the expedited procedure to their proceedings where the amount in dispute exceeds these amounts or even where the arbitration agreement was concluded before 1 March 2017.<sup>9</sup>

A distinctive feature of the ICC Expedited Provisions is that, where they are applicable, they take precedence over any contrary terms of the underlying arbitration agreement.<sup>10</sup> However, parties may opt out of these provisions, or the ICC International Court of Arbitration (the “**Court**”) may determine that the EPPs are inappropriate in the circumstances of the case.<sup>11</sup>

Furthermore, after consultation with the arbitrator and the parties, the Court may either of its own motion or at the request of a party, decide that the EPPs no longer apply.<sup>12</sup> Where it is at the request (or objection) of a party, the matter will be decided by the Court after giving an opportunity to the other party to state their positions.<sup>13</sup>

#### **b) Factors Considered in Determination of Amount in Dispute for the purpose of the Application of the EPPs**

To ascertain whether the EPPs will apply, the amount in dispute shall include all quantified claims, counterclaims, crossclaims and claims pursuant to Articles 7 (joinder of additional parties) and Article 8 (Claims between multiple parties). Claims relating to interest and costs will not be considered.<sup>14</sup> The ICC Secretariat will also consider the quantifications or estimates submitted by the parties.<sup>15</sup>

However, any decision made by the ICC Secretariat or by the Court as to the amount in dispute for purposes of deciding whether the EPPs will apply does not bind the arbitral tribunal when deciding the substance of the dispute.<sup>16</sup> Also, in making decisions as to costs pursuant to Section 38(5) of the ICC Rules, the arbitral tribunal may take into account whether a party has artificially inflated its claims, in order to prevent the application of the EPP.<sup>17</sup>

#### **c) Constitution of the Tribunal under the ICC Expedited Provisions**

The appointment of a sole arbitrator is among the issues that are within the realm of debate under the ICC Expedited procedures.<sup>18</sup> Under the ICC Expedited Provisions, a sole arbitrator may be appointed by the Court notwithstanding any contrary provision of the arbitration agreement.<sup>19</sup> Hence, the parties’ will

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<sup>7</sup> <https://iccwbo.org/wp-content/uploads/sites/3/2020/12/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration-english-2021.pdf>

<sup>8</sup> Article 30 (2) (a) of the ICC Rules and Article 1 (2) of Appendix VI. Emphasis ours.

<sup>9</sup> Article 30 (2)(b) of the ICC Rules

<sup>10</sup> Article 30 (1) of the ICC Rules. This could potentially lead to cases where the arbitration agreement and the Provisions come into conflict.

<sup>11</sup> Article 30(3) of the ICC Rules

<sup>12</sup> Article 1(4), Appendix VI

<sup>13</sup> ICC Note 2021. Para 135

<sup>14</sup> ICC Note 2021. Para 131

<sup>15</sup> ICC Note 2021. Para 133; It is worthy to note that the EPP does not apply in cases involving declaratory or non-monetary claims the value of which cannot be estimated. (ICC Note 2021. Para 134). However, an exception may arise if these non-monetary claims merely support the monetary claim or do not substantially contribute to the dispute’s complexity.

<sup>16</sup> ICC Note 2021. Para 137

<sup>17</sup> ICC Note 2021. Para 138

<sup>18</sup> Dr. H. Ercüment Erdem, *Current Issues in Expedited Procedures in Arbitration*. <https://www.erdem-erdem.av.tr/en/insights/current-issues-in-expedited-procedures-in-arbitration>

<sup>19</sup> Article 2(1) of Appendix VI

may be superseded by this provision, and the parties may be faced with an arbitration proceeding conducted by a sole arbitrator, even where their agreement provided for more than one arbitrator.<sup>20</sup>

The ICC Note 2021 has further justified this by stating that *“by submitting to arbitration under the Rules, the parties agree that any reference made to three arbitrators in their arbitration agreement is subject to the Court’s discretion to appoint a sole arbitrator, if the expedited procedure provisions apply”*.<sup>21</sup>

Evidently, the appointment of a sole arbitrator could be problematic considering the importance of parties’ consent in international arbitrations. However, it would seem that the ICC seeks to cushion the effect of this provision by providing that the Court *“may nevertheless appoint three arbitrators if appropriate in the circumstances. In all cases, the Court will invite the parties to comment in writing before taking any decision and shall make every effort to ensure that the award is enforceable at law.”*<sup>22</sup>

#### **d) Proceedings under the ICC Expedited Provisions**

Once the arbitral tribunal is constituted, the parties are prohibited from raising new claims unless granted authorization by the tribunal. In such instances, the arbitral tribunal shall consider factors such as the nature of the new claims, the current stage of the arbitration, the cost implications (if any) and any other relevant circumstances.<sup>23</sup>

The case management conference must take place within 15 days of the tribunal receiving the file, although this time may be extended when necessary.<sup>24</sup> There will be no Terms of Reference and the tribunal has a broad discretion to adopt appropriate procedural measures, such as restricting production of documents and evidence, after consultation with the parties.<sup>25</sup> The tribunal may also, after consultation with the parties, decide the case on a document-only basis, without any hearing or examination of witness.<sup>26</sup>

#### **e) Award under the ICC Expedited Provisions**

Awards must be rendered within six months of the case management conference, with extensions granted pursuant to article 31 (2) of the ICC Rules.<sup>27</sup> Further, the ICC Note 2021 clarify that the award under the expedited procedure shall contain the arbitrator’s reasoning.<sup>28</sup> Some sections of the award, whether factual or procedural, may be limited to what the arbitrators consider to be necessary for the understanding of the award, but the award cannot be deprived of a reasoning.

## **2. Unintended Consequences: The Downsides of Expedited Procedure under the ICC Rules**

Notwithstanding that the ICC expedited procedure offer many advantages to parties seeking speedy resolution of their disputes, there are potential risks associated with arbitrations conducted under these procedures.<sup>29</sup>

### **a) The Risk of Overriding Party Autonomy:**

The fundamental principle of party autonomy, that is, the parties’ consent to have a dispute settled by way of arbitration, is one of the major advantages of arbitration.<sup>30</sup> Yet, according to Article 30 (1) of the ICC Rules, where the ICC Expedited Provisions apply, they override any contrary terms contained in the parties’ agreement. Additionally, the Court may, notwithstanding any contrary provision of the arbitration

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<sup>20</sup> Ibid (n18)

<sup>21</sup> ICC Note 2021. Para 144

<sup>22</sup> ICC Note 2021. Para 146

<sup>23</sup> Article 3(2) of Appendix VI

<sup>24</sup> Article 3(3) of Appendix VI

<sup>25</sup> Article 3(4) of Appendix VI

<sup>26</sup> Article 3(5) of Appendix VI

<sup>27</sup> Article 4(1) of Appendix VI

<sup>28</sup> ICC Note 2021. Para 151

<sup>29</sup> Ibid (n4)

<sup>30</sup> Ibid

agreement, appoint a sole arbitrator (Article 2(1), Appendix VI). It is arguable that parties' consents have been infringed upon, as they have been stripped off of their clearly expressed rights to have their case heard by a three-member arbitral tribunal, among other things.<sup>31</sup> Thus, the concern is that the ICC's priority for efficiency and transparency deprives the parties of a right to which they explicitly agreed. This poses a great problem when placed side by side with Article V(1)(d) New York Convention, which provides as a ground for refusing enforcement of an award the fact that the composition of the arbitral tribunal was "not in accordance with the agreement of the parties."

This particular issue was considered by the Shanghai No.1 Intermediate Court in *Noble Resources International Pte Ltd v Shanghai Good Credit International Trade Co, Ltd* [2016] Shanghai No.1 Intermediate People's Court (Hu 01 Xie Wai Ren No. 1). In that case, the Agreement/Contract between the parties contained a clause providing for arbitration under the Singapore International Arbitration Centre (SIAC) Rules then in force and with a three-member tribunal in Singapore. The seller commenced SIAC arbitration against the buyer and applied for the expedited procedure under the SIAC Rules 2013. The buyer opposed the application of the expedited procedure and insisted that three arbitrators be appointed pursuant to the arbitration agreement. In the absence of party agreement, the Vice Chairman of SIAC appointed a sole arbitrator for the expedited procedure. The buyer refused to participate in the arbitration and an award was rendered in favour of the seller.

The seller sought to enforce the award before the Shanghai Court and the buyer, in resisting the enforcement, raised the argument that SIAC's appointment of a sole arbitrator was contrary to the parties' agreement for a three-member tribunal. The Shanghai Court upheld the buyer's argument and found that the expedited procedure under the SIAC Rules 2013 did not exclude other means of composing a tribunal, nor empower the Chairman of SIAC to compel parties to accept a sole arbitrator despite their agreement to a three-member tribunal. Despite the fact that the arbitration agreement explicitly provided for a three-member tribunal and the buyer had expressly objected, SIAC appointed the sole arbitrator and went ahead with the expedited procedure.

The Shanghai Court held that the appointment of the sole arbitrator violated the parties' arbitration agreement. The court refused to enforce the award under Article V(1)(d) of the New York Convention. In support of its decision, the Shanghai Court emphasized that party autonomy is the foundation of arbitration proceedings.<sup>32</sup>

Conversely, in *AQZ v ARA* [2015] SGHC 49, the Singapore High Court upheld a SIAC award under Expedited Procedure. This was an application to set aside an arbitral award. A similar argument was raised by the applicant, in that the arbitration should not have been conducted before a sole arbitrator (appointed, in this case, under the expedited procedure in the SIAC Rules 2010), since the parties had expressly agreed to arbitration before three arbitrators.

The Singapore High Court rejected this argument and upheld SIAC's appointment of a sole arbitrator. The court adopted a "commercially sensible" construction of the arbitration agreement and decided that, by adopting the SIAC Rules 2010 into their contract, the parties had recognized the SIAC President's power and discretion to appoint a sole arbitrator where the expedited procedure applied. The Shanghai Court, supported by the PRC Supreme People's Court (SPC), clearly took a different view from the Singapore High Court.

From the Singapore Court's decision, one could argue that by agreeing to the application of the ICC Rules in the arbitration agreement, the parties implicitly consented to the application of the provisions, which

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<sup>31</sup> Matilde Flores (Curtis Mallet-Prevost Colt & Mosle LLP), *Expedited Procedure under the 2017 ICC Rules: Does the ICC's Priority for Efficiency and Cost Effectiveness Come at the Expense of the Parties' Rights?* <https://arbitrationblog.kluwerarbitration.com/2019/01/13/expedited-procedure-under-the-2017-icc-rules-does-the-iccs-priority-for-efficiency-and-cost-effectiveness-come-at-the-expense-of-the-parties-rights/>

<sup>32</sup> The Shanghai Court's decision was vetted by the PRC Supreme People's Court (SPC), by virtue of the "reporting system" (under which lower courts must report any decision to refuse enforcement of a foreign arbitral award to the SPC for scrutiny).

in turn provide for the possibility to appoint a sole arbitrator.<sup>33</sup> This is the position of the ICC as seen in paragraph 144 of the ICC Note 2021. Nonetheless, in this regard, the interactions between such implicit consent and an explicit contrary consent in the arbitration agreement awaits final clarification.

Furthermore, while it could also be argued that the ICC Rules expressly allow parties to opt-out of these provisions on expedited procedures, parties may not be well informed on the option to opt-out. Parties may not be aware that by providing for the applicability of the ICC Rules in the arbitration agreement, their dispute could be automatically heard under the expedited procedure. It is therefore recommended that these particular provisions are contained in separate standalone expedited rules and parties must agree to their application in their arbitration agreement or subsequently.<sup>34</sup> Alternatively, the ICC Expedited Provisions could be amended and qualified to provide for an opt-in system requiring the parties to specifically refer to the application of the expedited procedure in their proceedings.<sup>35</sup>

## b) Due Process considerations

Another area of controversy under the ICC Expedited Provisions relates to the quantification of claims. In order to determine whether the amount in dispute exceeds USD\$3 million, and thus whether the provisions apply, all quantified claims, counterclaims and crossclaims are considered.<sup>36</sup> This, however, imposes the expeditious procedure to all disputes with an amount in dispute which does not exceed US\$3,000,000, without taking into consideration the complexity of the dispute.<sup>37</sup> In effect, this assumes that the value and complexity of a dispute are always directly proportional. While this may be the case in many arbitrations, it will not always be true, and concerns may arise when the complexity of the dispute warrants more scrutiny and a more thorough procedure, despite a low amount in dispute.<sup>38</sup>

Although the ICC Court has pledged to preserve the quality of awards by providing scrutiny at the highest level, there is no guarantee that shorter time limits, no document production, or absence of expert or witness evidence at the hearing will not affect the outcome of the dispute.<sup>39</sup> In fact, the expeditious nature of the proceedings under the provisions, particularly in complex disputes, could even constitute a potential ground to challenge the enforcement of the final award pursuant to Article V(1)(b) New York Convention. A party may argue that it was unable to meet the strict timelines, and hence was “unable to present his case.” The Singapore Court of Appeal in *CBS v CBP* recently found that an arbitral tribunal’s refusal to hold a hearing on the request of a party was a breach of natural justice.<sup>40</sup> The court attached weight to the fact that the applicable arbitration rules required the tribunal to hold a hearing at a party’s request and also emphasized that case management powers did not override rules of natural justice.<sup>41</sup>

No doubt, arbitrators overseeing expedited procedures have the onerous task of complying with the expedited provisions to ensure a quick resolution of the dispute while ensuring that due process principles are upheld to safeguard the award and its enforcement.<sup>42</sup> On the other hand, the ICC Rules provide safeguards to ensure that the parties’ right to adequately present their case is preserved. Apart from providing an option to opt out of the Expedited Procedure Provisions, the ICC Rules state that the arbitral tribunal may decide not to allow requests for document production or to limit the number, length and scope of written submissions and written witness evidence or decide the dispute solely on the basis of the documents submitted by the parties, with no hearing nor examination of witnesses or experts, “after

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<sup>33</sup> Ibid (n31) 2,3

<sup>34</sup> Ibid (n 4)

<sup>35</sup> As an example, the DIS (German Institution of Arbitration) Supplementary Rules for Expedited Proceedings sets forth that the rules shall only be applied if the parties have referred to them in their arbitration agreement, or if they agreed to their application prior to filing a statement of claim. Article 1.1 of the DIS- Supplementary Rules for Expedited Proceedings.

<sup>36</sup> Article 30(2); ICC Note 2021. Para. 131

<sup>37</sup> Ibid (n31) 3

<sup>38</sup> Ibid

<sup>39</sup> Ibid

<sup>40</sup> *CBS v. CBP [2021] SGCA 4, Civil Appeal No. 30 of 2020*, para. 79

<sup>41</sup> Alexander Uff, *Expedited arbitration, autonomy and due process*. Thomson Reuters Practical Law Arbitration Blog. [https://uk.practicallaw.thomsonreuters.com/w-032-5178?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/w-032-5178?transitionType=Default&contextData=(sc.Default))

<sup>42</sup> Ibid (n4)



*(and only after) consulting with the parties”*.<sup>43</sup> Nonetheless, the question remains whether the safeguards are enough to preserve the parties’ right to adequately present their case.

### **3. Conclusion**

Expedited arbitration provisions play a valuable role in resolving international commercial disputes by providing a streamlined procedure for the resolution of such disputes. Moreso, they save time and reduce costs of the arbitral proceeding(s). However, these provisions should not be overreaching and contradict the parties’ agreement, which is the basis of arbitration proceedings as a dispute resolution mechanism.<sup>44</sup> Also, the Court must realize that not all cases are suitable for an expedited process, especially complex matters with voluminous documents and many witnesses. Trying to fit such a case into an expedited process will likely deprive a party of a fair opportunity to present its case, which could lead to an infringement of due process and a denial of justice.

Hence, while expedited arbitration is a valuable tool for efficiently resolving disputes, it is more appropriate for straightforward cases that can be resolved on a document-only basis and for disputes that bear minimal impact on the ongoing business of the parties.<sup>45</sup> Critically, to minimize the risk of any party using dilatory tactics to frustrate the arbitral process, arbitral institutions should ensure that the parties (and not just one of the parties) are agreeable to using the expedited procedure.

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<sup>43</sup> Article 3 (4) (5) of Appendix VI

<sup>44</sup> *Ibid* (n18)

<sup>45</sup> *Ibid* (n5)

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