DECEMBER 2016

COMMENTARY

The New ICC Expedited Procedure Rules: A New Experiment

On December 8, 2016, in Paris, the ICC Court of International Arbitration, the world's leading international arbitration body, presented important amendments to the ICC Rules of Arbitration ("ICC Rules"). These amendments are intended both to improve the transparency and efficiency of ICC arbitral proceedings, and to expedite such proceedings where the amount in dispute does not exceed US$2 million by adopting fast-track rules for "small"[1] claims.

An Automatic Expedited Procedure Adapted to "Small" Claims

ICC statistics show that one-third (32 percent) of the 801 new cases filed in 2015 with the ICC Court of Arbitration involved claims with an amount in dispute below US$2 million. For the last 10 years, between 39.6 percent (2006) and 32 percent (2015) of the ICC's new cases involved amounts in dispute below the US$2 million threshold. In other words, an annual average of 250 of the ICC's new cases concern "small" claims.

Percentage-wise, the last decade has seen a small decline in the number of such cases, due to various reasons. One is the often-heard view that parties choose ICC arbitration for complex and high-stake transactions, in anticipation of the fact that often, disputes resulting from such transactions will be similarly complex and high-stake. Another reason is users' frustration with the often excessive length and cost of ICC arbitration. Indeed, where the amount in dispute is relatively low, the costs needed to pursue an ICC arbitration discourage parties not only from initiating an ICC arbitration but also from providing for ICC arbitration in their contract in the first place. It must be noted, however, that the ICC administrative costs as such represent only between 2 percent and 3 percent of the overall arbitration costs.

The ICC has now adapted its Rules in order for these "small" claims cases to be administered and decided in a more cost-efficient manner and shorter time period by adopting, for the first time, a set of expedited procedural rules for disputes worth US$2 million

1 Of course, for the party pursuing a claim under US$2 million, it is always a question of perspective as to whether or not its claim is a "small" claim. A low amount in dispute also is not necessarily an indicator of the factual and/or legal complexity of the dispute. However, from a cost–benefit standpoint, the lower the amount in dispute, the more it raises the question of whether it is worth arbitrating. With the ICC having issued its New Mediation Rules in January 2014, parties may wish to give more thought to the mediation option, in particular where the amount at stake does not exceed the US$2 million threshold.

or less. In the world of international arbitration, however, the change announced by the ICC is not novel. In fact, it rather follows the initiatives taken by other arbitral institutions such as the Stockholm Chamber of Commerce, the Singapore International Arbitration Centre, the Hong Kong International Arbitration Centre, and, more recently, the International Centre for Dispute Resolution.

Under the revised ICC Rules, all ICC arbitrations with an amount in dispute of US$2 million or less will automatically be governed by the Expedited Procedure Rules now contained in the new Article 30 of the ICC Rules (Expedited Procedure) and the new Appendix VI ("EPR"). In brief, the EPR will result in the following changes:

- A sole arbitrator will be appointed within a time limit set by the ICC Secretariat, even if the arbitration agreement provides for a three-member tribunal.
- No Terms of Reference (one of the traditional hallmarks of ICC arbitration) need to be established.
- Once the sole arbitrator has been appointed, the parties may no longer introduce new claims unless expressly authorized.
- The Case Management Conference must be held no later than 15 days after the sole arbitrator has received the file from the ICC.
- The parties' written submissions will be limited unless otherwise allowed by the sole arbitrator in consultation with the parties.
- No requests for document production will be allowed unless otherwise decided by the sole arbitrator in consultation with the parties.
- The dispute may be decided on the basis of documents only, with no hearing and no witness examination, subject to the sole arbitrator's decision to the contrary after consultation with the parties.
- The final award must be rendered within six months of the date of the Case Management Conference, unless this deadline is extended by the ICC Court.
- The fees of the sole arbitrator are based on a reduced scale fixed in Appendix III, i.e., are 20 percent lower than the regular amount.

Thus, while the principles of the EPR are clear, in practice, many exceptions to them are allowed, based in particular on the parties' agreement or the sole arbitrator's decision.

An Expedited Procedure that Can Be Used and Adapted for Larger Claims

The ICC Rules also provide for the possibility that the EPR may be employed on an opt-in basis for arbitrations exceeding the US$2 million threshold amount if the parties so expressly agree. This opt-in possibility is probably one of the most challenging and innovative provisions, as it allows parties to agree to adopt the EPR regardless of the amount in dispute. As confirmed during the unveiling of the new ICC Rules, parties will also be entitled to agree in advance to have three arbitrators (instead of a sole arbitrator) under the EPR. However, the ICC Court also retains discretion (under Article 30.3(c)) to decide that the EPR are inadequate on a case-by-case basis upon the request of a party before the constitution of the arbitral tribunal or upon its own motion.

Given the time needed to draft and scrutinize the draft award, the EPR will leave approximately four-and-a-half to five months to conduct the proceedings from the time of the first Case Management Conference until the proceedings are closed. This effectively means that there will be no bifurcation of proceedings and limited exchanges of submissions. Document disclosure and hearings, if any, will need to be conducted in a short period of time.

It remains to be seen how ICC arbitration with a dual track system using a single set of Rules will fare, as it can result in quite a few complications, both at the inception of the arbitration and also during its conduct, and possibly even at the enforcement stage in certain jurisdictions.

Coming into Force of the EPR and Outlook

The current version of the ICC Rules has been in force since January 2012, following a major overhaul. The major reform embodied in that revision was primarily based on the need to improve the efficiency and speed of ICC arbitration. At the

time, the ICC was reluctant to adopt a parallel expedited procedure; however, the persistence of the continued need for speed, especially with ongoing pressure from the users of ICC arbitration and from competing arbitration institutions, has led the ICC to take this major new step.

The revised ICC Rules will come into force on March 1, 2017. The EPR will not apply to arbitration agreements concluded before March 1, 2017, however. For arbitration agreements concluded after this date, the EPR will automatically apply, unless the parties explicitly exclude them in their arbitration agreement, i.e., choose to opt out.

Particular attention will have to be given to the drafting of ICC arbitration clauses in commercial agreements concluded after March 1, 2017. It will be essential to carefully consider whether or not to expressly opt out of the EPR and/or of the rules on the emergency arbitrator, a feature introduced for the first time in the 2012 Rules.

Time will tell whether this new experiment will result in the desired result. In practice, the EPR impose strict discipline on all actors: the parties and their counsel, the arbitrators, and the ICC Court itself. There can, however, be no doubt that the overall duration of ICC arbitration conducted under the EPR will be significantly reduced, and for that reason alone, the ICC's new experiment is laudable.

Lawyer Contacts

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