Amendment To ICC International Arbitration Rules Adding Expedited Procedures

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For decades the Rules of Arbitration of the International Chamber of Commerce (the "Rules") have been used by companies as a means for resolving disputes – particularly in international transactions. On November 4, 2016 the ICC announced an amendment to these Rules in order to incorporate a procedure for resolving cases on an expedited basis (the "Expedited Procedure Rules"). This amendment is of interest to any entity that uses the Rules as a means for resolving its disputes.

The Expedited Procedure Rules will come into effect on March 1, 2017.

When will the Expedited Procedure Rules apply?

The Expedited Procedure Rules are aimed at cases with a relatively (in terms of ICC cases) low value. They will apply in cases where the value in dispute does not exceed US$ 2 million or where the parties have agreed that they should apply.

The Expedited Procedure Rules will also apply only to contracts that are made after they come into force i.e. after March 1, 2017.

The application of the Expedited Procedure Rules is not automatic. The normal procedure when starting an arbitration is that a claimant will file a Request for Arbitration and then the respondent will file an Answer. After the filing of these two documents, the Court of Arbitration (an independent arbitration body of the ICC) will decide whether the Expedited Procedure Rules should apply to that case or not.

Interestingly, the Rules have not been amended to provide for the parties to give their input into this decision through the Request and the Answer, but prudent parties and counsel should nevertheless include their comments in these documents.

The reason for the "non-automatic" application of the Expedited Procedure Rules is because there are some cases that might fit the requirements but that might nevertheless not be suitable for an application of those rules. For example, some disputes might have a relatively low monetary amount in dispute, but might seek other non-monetary relief (e.g. enforcement of intellectual property rights) that is significant to one of the parties.

The Expedited Procedure Rules are "opt out" rather than "opt in" so they have the potential to apply to all contracts (that choose ICC arbitration) that are made on or after March 1, 2017, even if the parties do not mention the Expedited Procedure Rules. However, parties can agree to “opt out” once a dispute has arisen but before the case is put into the Expedited Procedure track. It is unclear whether parties can “opt out” of the Expedited Procedure Rules after the ICC Court has determined that the Expedited Procedure Rules will apply and the Tribunal has been constituted.

What do the new Expedited Procedure Rules do?

Key features of the Expedited Procedure Rules are:

- There shall be a sole arbitrator, except in exceptional circumstances.
- There shall be no "Terms of Reference". The Terms of Reference are a signature feature of ICC Arbitrations, but they would not apply in Expedited cases.
- No new claims (without permission) after constitution of the tribunal. Normally, new claims can be brought without permission until the signing of the Terms of Reference.
- The default procedure is that the arbitration shall be based on documents only, with no hearing. However, the tribunal may (after consulting the parties) decide to hold a hearing.
- The tribunal has the discretion to structure a procedure so as to resolve the case quickly. The Expedited Procedure Rules specifically mention that parties might not be permitted to request production of documents from the other side, that such requests might be severely limited or that there may be limits on the scope and breadth of written submissions.
- The final award must be rendered within six months from the date of the constitution of the tribunal. This may be extended by the Court in exceptional circumstances, but the clear message from the ICC is that awards should be rendered within six months in almost all cases. The time limit for "normal" cases is six months from the conclusion of the Terms of Reference, but in practice this is extended almost as a matter of course.
- The reasons for the award may be stated in short form.
- The fee schedule for the tribunal is lower than for a non-expedited case.

These features are aimed at reducing the time and cost of ICC arbitration.

What do these new rules mean for my company?

As indicated above, these rules will only apply to contracts made on or after March 1, 2017, so they will not affect any existing contracts.

If you like the idea of an Expedited Procedure for cases where the value in dispute is below US$ 2 million (and you choose ICC arbitration for dispute resolution) you can use the existing model ICC arbitration clause.

However, these rules may not be appropriate for every company or every contract. For some companies, a 1.9 MUSD case might be a "bet-the-company" type case – a case that could make the difference between the company surviving or disappearing. There may be other reasons that a company might not want its disputes referred to arbitration through the Expedited Procedure Rules.

In these cases, it will be important to modify the applicable arbitration agreement. If the parties want to opt out, language like the following could be used: "The Expedited Procedure Rules shall not apply." However, as with the drafting of any arbitration agreement, advice of experienced counsel should be sought to ensure that your company's rights are properly protected.

Reduced time, reduced cost – that sounds pretty good! Should we "opt in" and use Expedited Procedure for all disputes?

As mentioned above, advice should be sought before deciding whether to opt in or exclude the Expedited Procedure Rules.

The Expedited Procedure Rules are intended to give swift results in cases that are – as far as the ICC is concerned – relatively low in value. Many of the procedural rights and safeguards that are taken for granted in a "standard" ICC arbitration are likely to be dispensed with, e.g.: the possibility of three arbitrators (with each party choosing one); Terms of Reference; production of documents; a full evidentiary hearing; cross-examination of witnesses; and a fully reasoned award.

These "shortcuts" might be acceptable to large companies that are dealing with relatively small disputes. The savings in time and cost, coupled with a relatively quick determination of the dispute might outweigh the reduction of some of the procedural steps that come with a full ICC arbitration procedure.

However, the short time frame and reduced procedural steps could make it logistically difficult if not impossible for one party (or both parties) fully to present their case(s). It is easy to imagine two parties being attracted to the idea of reduced time and costs promised by adoption of the Expedited Procedure Rules, only to find that a particular dispute is worth US$ 300 million and is very complex. However, if the parties have already agreed to use them, the ICC Court may feel compelled to hold the parties to their bargain. Once a dispute has arisen, it is usually much more difficult for parties to agree to any modifications to the arbitration agreement set out in their contract.

Accordingly, the safer route may be to avoid opting in to the Expedited Procedure Rules in the arbitration agreement, particularly for large contracts, given that the rules already apply to cases below US$ 2 million, and the parties can opt in by agreement in appropriate circumstances if they so choose.

For further information, please contact one of the authors listed below.

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