



Expedited procedures – but what about quantum?

On 1 March 2017 the International Court of Arbitration of the International Chamber of Commerce (ICC Court) joined other leading international arbitral institutions with the introduction of expedited rules¹ (to name but a few: ICDR, SIAC, HKIAC, SCC, ACICA, Swiss Rules).

This development directly addresses survey evidence that a lack of simplified procedures for arbitration, at least for lower value claims, is regarded by users as a significant weakness² of arbitration. At first glance, this adoption of expedited procedures appears to be an appropriate response.

However, the question is whether these condensed proceedings will provide arbitrators³ with sufficient, robust and accurate information from which they can make appropriate awards. In particular, whether there is sufficient scope within the expedited procedures for expert evidence, especially that focusing on quantum, and how expert evidence can work with expedited procedures.

As ever, each case is different. The amended ICC Court Rules provide that expedited procedures will automatically apply to all arbitrations below US\$2 million (and to cases involving higher amounts on an opt-in basis, equally the parties can opt out)⁴. However, the quantum of a claim does not always correlate with its complexity and that goes for issues of liability as well as quantum and so the impact of expedited procedures needs to be carefully considered prior to their application.

Can quantum evidence fit in with expedited procedures?

Expedited rules provide for an award to be made in a short timeframe, for example:

“The final award shall be made no later than three months from the date the case was referred to the Arbitrator pursuant to Article 23” (SCC, Article 43)

“...the Arbitrator shall make the final award within 4 months of the appointment of the Arbitrator...” (ACICA Expedited Arbitration Rules Article 27)

“The time limit within which the arbitral tribunal must render its final award is six months from the date of the case management conference.” (ICC, Appendix VI, Article 4)

Are those timescales sufficient for quantum experts (acting for both the Claimant and Respondent or the tribunal) to prepare robust and useful expert reports to assist the tribunal? In our experience, the limited timescale has potential to limit the efficacy of the expert's report. It can often take experts more than three months to prepare an expert report from first approach by instructing solicitors to the submission of a final report, never mind supplemental reports, joint reports, oral evidence etc. Any expert engaged under the auspices of expedited procedures would no doubt aim to prepare the best possible report in the time given but the limitations need to be considered. We set out below a few suggestions for getting the most out of your expert in these situations.

¹ <http://www.iccwbo.org/News/Articles/2016/ICC-Court-amends-its-Rules-to-enhance-transparency-and-efficiency>

² The 2015 International Arbitration Survey by the School of International Arbitration at Queen Mary University of London 2 (QMUL Survey) found that one of the worst characteristics of international arbitration is the lack of speed with 92% of respondents favouring the inclusion in institutional rules of simplified procedures for claims under a certain value, 33% as a mandatory feature and 59% as an optional feature.

³ We note that in the majority, if not all, expedited procedures will involve a sole arbitrator.

⁴ In contradiction to other institutes which require the parties to agree to adopt them or satisfy other criteria.

How to incorporate expert evidence into expedited procedures

1 Involve the expert as early as possible

As the majority of quantum experts will tell you, the earlier they become involved in the case the better they can provide an expert view when assessing the critical issues. In terms of quantifying a claim to be put forward under expedited procedures, involving quantum experts is even more critical in terms of fact finding and ensuring any damage analysis or claim quantification is as accurate as possible. In a recent case, when we were appointed at a relatively late stage, our involvement led to a ten percent increase in the claim amount and an amended Statement of Case merely upon our reading of the contract. If we had been instructed earlier this could have been accounted for prior to the filing of any submissions.

Early involvement is all well and good as Claimant, but where does that leave the Respondent in a claim under expedited procedures? Assuming the Respondent is aware that a claim may be forthcoming, early engagement of an expert may be beneficial and reports drafted in anticipation of the claim. To the extent any claim comes out of the blue, getting an expert on board as early as possible will help the Respondent assess the validity of any claim and assist in the preparation of any counter-claims.

2 Restrict the scope

Under Article 3 of the ICC expedited procedures the tribunal has the discretion to (amongst other things) “...limit the number, length and scope of...written witness evidence (both fact witnesses and experts)” and “may, after consulting the parties, decide the dispute solely on the basis of documents submitted by the parties”. This would require the involvement of quantum experts early in the arbitration process with the parties, or arbitrators, providing identical instructions for both parties’ experts, relying on the same disclosed information. This assumes the parties and/or arbitrators have sufficient understanding sensibly to restrict the scope and provide instructions. In theory, this approach should reduce the need for supplemental reports, with the experts providing a short joint report clarifying the areas of difference for the arbitrators. This could also reduce the need for oral evidence from quantum experts. However, if oral evidence is ordered the time required may well be shorter with a restricted instructions, especially if hot tubbing is employed.

⁵ <http://kluwerarbitrationblog.com/2013/08/15/bifurcation-of-proceedings-in-icsid-arbitration-where-do-we-stand/>

3 Bifurcation

Bifurcation of proceedings by splitting the merits into liability and quantum⁵, could probably tie in quite nicely with restriction of the scope. This allows the jurisdictional and/or liability issues to be determined in the original time scale, following which, if required, procedures in relation to quantum could then be pursued. The concern here is lack of consideration of quantum issues at an early stage could lead to key issues not being taken into consideration during the liability proceedings so having an eye on quantum could also be beneficial depending on the case specifics.

Going forward

At the time of writing we were still waiting for the first ICC expedited case, so we will have to see how these issues are covered in practice. Nevertheless, an expert’s report on quantum needs to stand up to detailed scrutiny in an arbitration hearing. It can indeed take several months from an expert’s appointment to the production of a final report due to wrestling with complex and fast changing issues.

However, expedited proceedings are here to stay. More so than ever, our usual recommendations are clear: In order to continue to receive robust and comprehensive reports in shortened timeframes, parties and their lawyers need to involve experts early, give them clear instructions and monitor progress closely on an on-going basis.

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