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?

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Article 30 of the 2017 ICC Rules of Arbitration, along with Appendix VI, constitute the Expedited Procedure Provisions ("Provisions"). These new provisions are among the most notable innovations of the 2017 ICC Rules, and are part of the ICC's efforts to increase the efficiency and transparency of arbitrations. However, certain aspects of this Provisions may leave its users questioning whether the ICC has stricken the right balance between time and cost effectiveness on the one hand, and due process and other substantive rights on the other hand.

Scope of the Provisions

Pursuant to the 2017 ICC Rules, the Provisions apply to arbitrations where (i) the amount in dispute does not exceed US$2,000,000 (Article 30(2); Article 1(2) Appendix VI); (ii) the arbitration agreement was concluded after 1 March 2017 (Article 30(3)(a)); and (iii) the parties have not opted out of the Provisions (Article 30(3)(b)). In addition, the Provisions will apply to disputes that do not fall within the above criteria if the parties so agree (Article 30(2)(b)).

The distinct features of the Provisions include the ICC Court's power to appoint a sole arbitrator, notwithstanding any provisions to the contrary in the arbitration agreement (Article 2(1) Appendix VI), and the arbitral tribunal's power to, at its discretion and in consultation with the parties, limit the length and scope of the submissions, including witness and expert evidence, or exclude requests for document production (Article 3(4) Appendix VI). After consulting with the parties, the tribunal can even decide the dispute without a hearing and without examining witnesses and experts (Article 3(5) Appendix VI). Finally, the Provisions fix the time limit for rendering the final award to six months from the case management conference (Article 4(1) Appendix VI).

Particular Features of the Provisions

It should be emphasized that if the parties agree to the 2017 ICC Rules, which is the case for any arbitration agreement concluded from 1 March 2017 designating the ICC Rules, and if the dispute falls within the scope of the Provisions, then the Provisions will take precedence over the arbitration agreement (Article 30(1)). That is, the Provisions will apply automatically and determine how the arbitration is to be conducted despite any contrary specific terms in the arbitration agreement. This could lead to cases where the arbitration agreement and the Provisions come into conflict.

For instance, if an arbitration agreement explicitly provides for a three-member arbitral tribunal, but the Provisions also apply, which favor the appointment of a sole arbitrator, then the latter take precedence. A similar situation can arise if the parties specify time limits in the arbitration agreement that are different to those imposed by the Provisions. Again, the Provisions relating to the time limits of the arbitration will be favored over any contrary terms in the arbitration agreement. This derives from the fact that the ICC Rules specify that an agreement to opt out of the Provisions shall be clearly stated in the arbitration agreement.

Rationale Behind the Provisions

The introduction of an expedited procedure in the 2017 ICC Rules was motivated by the aim to render arbitrations more efficient in terms of time and cost and to enhance transparency. This is in line with additional efforts carried out by the ICC towards these ends, such as the ICC Guide on *Effective Management of Arbitration*, which emphasizes the importance of managing the time and cost of an arbitration in light of the value and complexity of the dispute.

The provisions also follow the trend that has been adopted by other arbitral institutions seeking to develop expedited procedures and resolve disputes in a faster and less expensive manner.

Controversial Aspects of the Provisions

Given the novelty and distinction of the Provisions, their application in practice will likely come with certain controversies or uncertainties for users.

1. Is Consent Overridden by the Provisions?

As stated above, the automatic application of the Provisions to an arbitration that falls within their scope may impose terms on the parties that differ from what they agreed to in the arbitration agreement. This has been criticized mainly in terms of overriding the parties' consent to appoint a three-member arbitral tribunal, since the provisions call for the appointment of a sole arbitrator (Article 2(1) Appendix VI).

According to some critics, the consent on which arbitration is based is infringed if the parties are stripped off their right to have their case heard by a three-member arbitral tribunal if this was clearly and explicitly specified in the arbitration agreement. Thus, the argument is that the ICC's priority for efficiency and transparency deprives the parties from a right to which they explicitly agreed.

Nevertheless, by agreeing to the application of the ICC Rules in the arbitration agreement, the parties implicitly consented to the application of the Provisions, which in turn provide for the possibility to appoint a sole arbitrator. In this regard, the interactions between such implicit consent and an explicit contrary consent in the arbitration agreement pend final clarification.

The text of Article 2(1) Appendix VI states that "*the Court may, notwithstanding any contrary provision of the arbitration agreement, appoint a sole arbitrator*." As such, the provision does not impose a strict obligation on the Court to appoint a sole arbitrator. According to the ICC, "*[t]he 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.*" (ICC *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration*, dated 30 October 2017, p. 13.)

Therefore, the relevant question at issue is whether the safeguard in place, i.e. allowing the Court to appoint a three-member tribunal at its discretion, sufficiently protects the parties' rights and consent. Much of the answer will depend on the practice developed by the ICC Court and by state courts dealing with enforcement and setting aside proceedings. Of particular relevance is the interplay between the Provisions and 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*."

2. Is the Value of a Dispute Indicative of its Complexity?

Another area of uncertainty or controversy under the Provisions relates to the quantification of claims. In order to determine whether the amount in dispute exceeds US$2,000,000, and thus whether the Provisions apply, all quantified claims, counterclaims and cross-claims are considered (Article 30(2); ICC Note to Parties, p. 12). This however, imposes the expeditious procedure to all disputes with an amount in dispute which does not exceed US$2,000,000, without taking into consideration the complexity of the dispute. 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.

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 no expert or witness evidence at the hearing will not affect the outcome of the dispute. In fact, the expeditious nature of the proceedings under the Provisions could even constitute a potential ground to challenge the enforcement of the final award pursuant to Article V(1)(b) New York Convention, since a party may argue that it was "*unable to present his case*." This adds to the uncertainty of how the Provisions will be interpreted and dealt with by state courts in enforcement or setting aside proceedings and by arbitral tribunals.

On the other hand, the ICC Rules provide safeguards to ensure that a complex dispute be decided with sufficient scrutiny, regardless of the amount of the claim. Article 3(b) of the ICC Rules for instance, states that the parties may opt out of the Provisions in the arbitration agreement or thereafter. Similarly, Article 1(4) Appendix VI states that the Court may decide at any time, on its own motion or upon a party's request, that the Provisions shall no longer apply.

Thus once again, the issue is whether the safeguards in place are enough to preserve the parties' right to adequately present their case.

In all likelihood, the Provisions will prove to be adequately equipped to address both of these concerns; none of their features are strictly mandatory and the parties ultimately have the last word in determining how to conduct the arbitration. However, it remains to be seen, with the aid of arbitral awards and judicial interpretation, whether the Provisions will in fact achieve greater efficiency and transparency without jeopardizing the rights of its users.