Kluwer Arbitration Blog

Award under expedited arbitration rules examined by the Swiss Supreme Court

Domitille Baizeau · Monday, April 6th, 2009

In Switzerland, the Federal Supreme Court has recently, and for the first time, had the opportunity to hear and reject the challenge of an award rendered pursuant to the Expedited Procedure (Article 42) of the Swiss Rules.

There is nowadays a recurring complaint that arbitration is becoming too long and too expensive a dispute resolution process. We hear it from users (e.g. the recent IDN podcast from Michael Mcilwrath, GE Senior Counsel, "As Long As a Piece of String: Timing in International Arbitration"); we hear it from our litigation colleagues; we talk about it ourselves, in particular in relation to "small claims", although we rarely agree on what a "small claim" might be: below US$100,000? US$1 million? US$5 million? We often hear that one of the answers may be fast track / expedited / accelerated arbitration, i.e. one of two options: a more efficient case management under standard arbitration rules, or the use of specific fast track / expedited / accelerated arbitration rules. The latter at least continues to be met with some scepticism by practitioners.

Rules for expedited arbitration, outside specific industries, are now available through at least six international arbitration institutions, the Arbitration Institute of Stockholm Chamber of Commerce, the Swiss Chambers of Commerce, the AAA, the Arbitration Institute of the Central Chamber of Commerce of Finland, the CIETAC and the Japan Commercial Arbitration Association. And such rules are used in practice; at least the SCC rules (25% of the SCC cases in 2007) and the Swiss rules (24% of the Swiss Chambers' cases in 2008, 32% since the adoption of the rules in 2004), although they are perhaps not used as much as they should or could be.

One of the common criticisms is that expedited arbitration fails to guarantee due process, in particular for respondents, and that awards are therefore more likely to be annulled. In practice, however, at least in Sweden and in Switzerland, this has not been an issue. In Switzerland, the Federal Supreme Court has recently ruled on an application to set aside an award rendered pursuant to the Expedited Procedure (Article 42) of the Swiss Rules (28 October 2008, 4A_294/2008).

The dispute had arisen out of a sales contract for petrochemical products between a Swiss and a Canadian company. The amount at stake was low – below CHF1 million (in this case just below US$500,000) so that the Expedited Procedure applied automatically. The award, rendered within six months by a sole arbitrator, was challenged *inter alia* on the basis of a violation of the Respondent's right to be heard, reflected in the conduct of the proceedings and the lack of "real reasons" in the award. On the facts, the Supreme Court's dismissal of the application hardly came as a surprise. Interestingly, however, the Court saw no need to refer specifically to the parties' agreement to arbitrate under the Swiss Rules, entailing their agreement to an accelerated procedure and to an award stating reasons "in summary form" only. In other words, the Supreme Court applied its standard (and very strict) approach when hearing challenges of arbitral awards, and confirmed that awards rendered pursuant to the

Expedited Procedure are as safe as awards rendered in regular proceedings.

More generally, provisions for expedited arbitration such as those contained in the Swiss Rules seem to provide a good compromise. The default provisions do ensure speed and cost-efficiency, but the rules also make a clear allowance for the parties' right to be heard and for some flexibility. First, they provide for one round of pleadings "*in principle*", which means that further briefs may be submitted in appropriate circumstances (as it indeed occurred in the case referred to above), and there are *no time limits* set in advance by the rules for the submission of briefs. Secondly, a single hearing – for the examination of witnesses *and* for oral argument – shall take place, *unless* both parties agree that the Tribunal should decide on the basis of the documentary evidence alone. Thirdly, the rules apply automatically to all cases where the amount in dispute is below CHF1 million (currently US$880,000). This is higher than under other rules with a similar provision: approximately US$75,000 for the AAA and CIETAC, and US$200,000 for the JCAA. Again however, this is so "*unless the Chambers decide otherwise, taking into account all relevant circumstances*", which circumstances will include the complexity of the case (factual, legal, procedural) and the nature of the relief (e.g. declaratory relief). Fourthly, the case must be heard by a sole arbitrator *unless* the parties initially agreed and continue to insist on a three member tribunal. Finally, the six month time limit to render the award may be extended in exceptional circumstances, a condition agreed among Swiss practitioners to be strictly but not unreasonably applied by the Chambers.

True, such expedited process is not suited to every case, and true it is often difficult to ascertain in advance whether or not it will be suited to disputes that may arise after the contract has been signed. But does it mean that rules for expedited arbitration should continue to be confined to specific industries (sports, intellectual property, commodity pricing, maritime disputes, etc.) or to "very low amounts"? If so, why? Because of the increasing complexity of the business world we live in? Or because practitioners have become accustomed to a very long piece of string? In most cases, even if not in all cases, less time to decide a case does result in lower legal costs, if anything because everyone involved, counsel included, is compelled to focus on the key issues to be determined by the Tribunal, rather than try to overturn every stone.

Judging by the level of complaints from clients, expedited or at least faster arbitration *without* specific rules does not seem to work. It may be time for lawyers to include more systematically in their arbitration clauses, either tailor-made procedural schedules, or a reference to specific rules for expedited arbitration. There must indeed be far more instances where such rules could be adopted, even when "high" amounts are or are likely to be at stake. In the current economic climate, as companies seek to recover undisputed debts, they may even be able to renegotiate their arbitration clauses and – with an idea of what a future dispute may entail – may be considerably better off opting for expedited arbitration rules.

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