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The ICC Expedited Procedure Rules – Strengthening the Court's Powers

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Over the past few decades, responding to the need to control the growing costs and time of arbitration proceedings, the International Court of Arbitration of the International Chamber of Commerce ("ICC Court") has continuously sought to achieve greater efficiency of the ICC arbitration proceedings (examples of such efforts can be found on the links available here, here, and here). On 4 November 2016, in its most recent step of "*further increasing the efficiency and transparency of ICC arbitrations*," the ICC Court announced amendments to the ICC Rules of Arbitration ("ICC Rules"). These amendments, coming into force as of 1 March 2017, introduce – among others – the rules on expedited procedure ("Expedited Procedure Rules"). On that day the ICC Court will join other leading international arbitral institutions that have introduced similar expedited rules (to name but a few: ICDR, SIAC, HKIAC, SCC, ACICA, DIS, Swiss Rules).

The ICC Court has long been active in exploring practical ways to reduce time and costs of international commercial arbitrations, especially with regard to small claims. Already in 2001, the ICC Court formed a Task Force (comprised of nearly 60 representatives from different countries), which produced the ICC Court's Guidelines for Arbitrating Small Claims under the ICC Rules of Arbitration, published in March 2003. The Guidelines are not binding but are often used in practice. Moreover, an accelerated arbitral procedure is not entirely unknown to the users of the ICC Rules, since the parties can always – at least theoretically – use the procedure in an expedited way for mutually agreed fast-track arbitrations. For example, Article 38 (ex Article 32) of the ICC Rules expressly encourages the parties to shorten various time limits under the Rules and accordingly expedite the procedure. However, this requires willingness and close cooperation of all parties, either at the time they agree on arbitration or after the dispute has arisen. Alas, at the former stage the parties are unlikely to know the complexity of their future disputes and at the latter, they are usually unwilling to cooperate, even if such cooperation could save time and costs.

The newly introduced Expedited Procedure Rules aim at addressing this efficiency problem. As stated by the ICC Court President Mr. Alexis Mourre, their introduction "is an entirely new offer" because the rules will apply automatically to all disputes where the amount in dispute does not exceed USD 2 million (Article 30(2)(a)) ("Small Claims"). At the same time, the Expedited Procedure Rules may apply to other cases, provided the parties agree to their application (Article 30(2)(b)).

This post focuses on a single provision of the Expedited Procedure Rules, which the authors find particularly noteworthy. It addresses Article 2(1) of the Expedited Procedure Rules, which

provides that "*[t]he Court may,* ***notwithstanding any contrary provision of the arbitration agreement****, appoint a sole arbitrator.*" (emphasis added) This provision clearly limits party autonomy and, thus, poses a question whether the ICC Court is being given too much power. Do the Expedited Procedure Rules quash one of the basic principles of international arbitration?

These questions can be approached from two perspectives:

> • On the one hand, arbitration as a whole is a creature of consent and, thus, the parties' freedom to design the proceedings as they deem appropriate should not be limited. The decision of the parties as to the number of arbitrators is of crucial importance, especially in light of the known "truth" that arbitration is only as good as arbitrators.
> • On the other hand, by submitting their dispute to the ICC Rules, the parties have already (impliedly) consented to the ICC Court's powers, reflecting their awareness of the mechanisms applied in the Rules and their reliance on the Court's experience and wisdom in applying them.

To start with, a brief look at other expedited arbitration rules shows unanimity among the key arbitral institutions that a sole arbitrator is the most efficient solution for expedited arbitration proceedings. This is not surprising as the sole arbitrator can reach a decision quicker than a panel of three arbitrators and his or her fees and expenses will also be lower that a three-arbitrators' tribunal. However, the institutional rules vary greatly as to how this overarching consent is balanced with party autonomy in cases when the arbitral agreement foresees an arbitral tribunal comprised of more than one arbitrator:

First, in the Commercial Arbitration Rules of the Japan Commercial Arbitration Association ("JCAA Rules") party autonomy trumps the advantages of using expedited rules to 'small claims'. Although the JCAA expedited procedures apply automatically to disputes worth below ¥20 million (Rule 79.1), they become unavailable if the parties agreed on more than one arbitrator (Rule 75.2(2)).

Second, the Arbitration Rules of the Hong Kong International Arbitration Centre ("HKIAC Rules," Article 41.2(b)) and the Swiss Rules on International Arbitration ("Swiss Rules," Article 42.2(c)) advocate the use of persuasion. They mandate the respective institutions to invite the parties to modify their agreement on three arbitrators and refer their case to a sole arbitrator. If the parties do not change their mind, the dispute is resolved by three arbitrators under the expedited rules.

Third, the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") provide that "*the case shall be referred to a sole arbitrator, unless the President determines otherwise*" (Rule 5.2). The SIAC Rules therefore automatically override the party agreement on more than one arbitrator and give the President the power to decide otherwise.

Conversely to the SIAC Rules, the ICC Expedited Procedure Rules introduce a 'manual switch' to the sole arbitrator, to be operated by the ICC Court. Unlike the JCAA or SIAC Rules, the ICC Rules do not mandate a sole arbitrator for expedited proceedings but give the ICC Court discretion to "*appoint a sole arbitrator*" – "*notwithstanding any contrary provision of the arbitration agreement.*" We already know that this 'sole arbitrator switch' will be frequently used because in its recent press release the ICC Court said that it "*will normally appoint a sole arbitrator*." The

ICC Court will therefore likely play a more active role than the SIAC President in the expedited proceedings.

Interestingly, the question whether an arbitral institution can override the party agreement to have the case decided by three arbitrators has specifically been dealt with in a landmark decision by the Singapore High Court in the AQZ v. ARA case of February 2015. In that case, Mrs. Justice Prakash had to decide on a setting aside of an award rendered by a sole arbitrator (confirmed by the SIAC President) in disregard of the parties' explicit agreement to have their dispute decided by three arbitrators. As explained in a previous post, the party requesting setting aside of the award based its argument on Article 34(2)(a)(iv) of the UNCITRAL Model Law, allowing for setting aside when the composition of the arbitral tribunal and/or the arbitral procedure was not in accordance with the clear agreement of the parties. In her judgment, Justice Prakash rejected the application and held that since the parties had

> "expressly chosen a version of the SIAC Rules that contained the Expedited Procedure provision. Therefore, it was consistent with party autonomy for the Expedited Procedure provision to override their agreement for arbitration before three arbitrators."

This decision can be highly relevant for the interpretation of Article 2(1) of the Expedited Procedure Rules, due to their similarities with the SIAC Rules. Specifically, both the SIAC Rules (Rule 5.3) and the ICC Rules (Article 30(1)) contain provisions stating that, by submitting to the respective rules, the parties agree that these rules take precedence over any contrary terms contained in the arbitration agreement.

Conclusion

It is clear that with the introduction of the Expedited Procedure Rules, the ICC Court powers are further increased. However, examination of other expedited rules does not lead to a conclusion that the Court's new powers are going 'too far'. It is the parties' choice to agree to those powers by incorporating the ICC Rules in their arbitration agreement. The party autonomy is further respected by the fact that the Expedited Procedure Rules will not apply to arbitration agreements concluded before 1 March 2017, i.e. before the new Rules' entry into force (Article 30(3)(a)). Moreover, if the parties wish to have three arbitrators in a tribunal, they can opt out of the Expedited Procedure Rules in their arbitration agreement (Article 30(3)(b)). In this regard, while the increased powers of the ICC Court may seem to be an assault on party autonomy, they are based on a clear and justified assumption that the expedited rules are helping precisely those parties who cannot agree between themselves to expedite the arbitration in circumstances where such mutual consent would have made the proceedings time- and cost-effective, i.e. with regard the Small Claims. These provisions also do not close the door to fast-track arbitrations based on agreements between cooperative parties.

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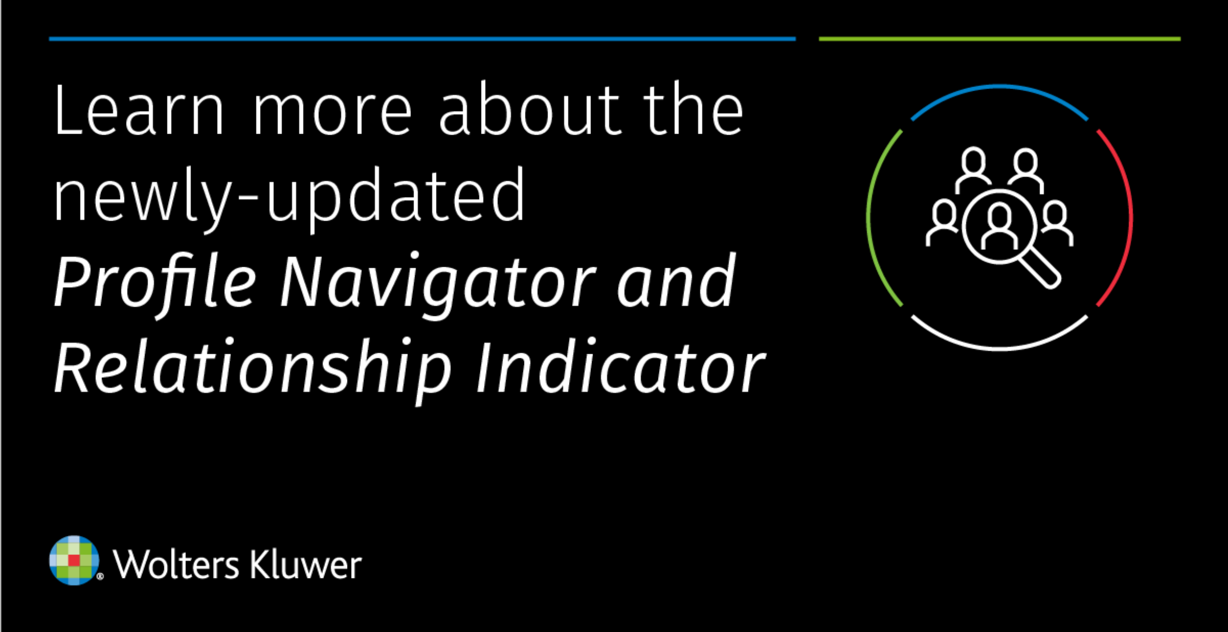

This entry was posted on Tuesday, December 13th, 2016 at 10:44 am and is filed under Arbitration, Arbitration Agreements, Arbitration Institutions and Rules, Arbitrators, Expedited arbitration, ICC Arbitration, ICC Rules, Party autonomy, Procedure
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