

# Kluwer Arbitration Blog

## Overriding an Explicit Agreement on the Number of Arbitrators – One Step Too Far under the New ICC Expedited Procedure Rules?

Fabian Bonke (Hogan Lovells) · Monday, May 22nd, 2017

Expedited arbitration procedure, which allows procedural streamlining of arbitration proceedings, became widely accepted by arbitration institutions. The ICC followed this global trend by incorporating Expedited Procedure Rules into the ICC Rules which came into force on 1 March 2017 (see [here](#)).

The incorporation of expedited procedures is a response to the need to control the costs and length of arbitration proceedings, which have become a growing concern for arbitral institutions. In regards to the application of the Expedited Procedure Rules, the ICC opted for an automatic application of these rules to disputes with amounts not exceeding USD 2 Mio (Art. 30 (2) (a) ICC Rules in conjunction with Article 1 (2) Appendix VI). With this solution, the ICC Rules joined other institutional rules providing for the application of expedited procedure contingent on financial thresholds, such as the SIAC Rules, with the threshold of S\$ 6,000,000 (Rule 5.1 lit. a) or the HKIAC Rules, with the threshold of HKD 25.000.000 (Art. 41.1 lit. a.).

Whether the new Expedited Procedure Rules will foster parties' choice of the ICC Rules will depend on how successful these rules will be in streamlining arbitral proceedings. There are features which might obstruct such success – one being the power of the ICC Court to appoint a sole arbitrator when the Expedited Procedure Rules are applied. The issue lies in the fact that such an appointment in every case overrides parties' agreement to the contrary.

The idea behind this concept is comprehensible: a proceeding involving a sole arbitrator is cheaper and may lead to the results much faster. It is, therefore, not surprising that institutional rules give preference to a sole arbitrator in expedited proceedings (e.g., Art. 41.2 HKIAC Rules).

Still, institutional rules vary as to how this preference is realized, especially regarding how this solution is to be reconciled with a conflicting arbitration agreement. Some arbitration rules give preference to an arbitration agreement providing for more than one arbitrator (e.g., the DIS Rules in Art. 3.1 DIS-Supplementary Rules for Expedited Proceedings 08 (SREP)). Other rules, such as, for example, the HKIAC Rules (Article 41.2(b)), empower an arbitral institution to invite the parties to agree on a sole arbitrator. In those cases, when the parties fail to agree to reduce the number of arbitrators, the parties' agreement prevails over these institutional rules. Whereas the abovementioned rules preserve party autonomy, so far, only the SIAC Rules have allowed the arbitral institution to override the agreed number of arbitrators:

“[...] the case shall be referred to a sole arbitrator, unless the President determines otherwise;[...]”. (Rule 5.2 lit. (b))

Now, the new ICC Expedited Procedure Rules adopted a similar rule to the SIAC’s solution:

“The Court may, notwithstanding any contrary provision of the arbitration agreement, appoint a sole arbitrator.” (Article 2 of the Appendix VI)

This post examines the reasoning behind this Rule, and it outlines the consequences of the enforceability of an arbitral award rendered in the expedited proceedings.

### **Convincing Reasoning: Implied Consent?**

The rationale behind the rule on institutional power to nominate a sole arbitrator by overriding an agreement to the contrary is based on the theory of implied consent: by agreeing on the application of institutional rules, the parties accepted all rules therein, including this particular rule which empowers the institution as well. The new ICC Rules emphasise:

“By agreeing to arbitration under the Rules, the parties agree that this Article 30 and the Expedited Procedure Rules set forth in Appendix VI [...] shall take precedence over any contrary terms of the arbitration agreement.” (Art. 30 (1))

This corresponds to the reasoning of the Singapore High Court in [AQZ v. ARA](#), which held that overriding the parties’ agreement to arbitrate before three arbitrators was consistent with party autonomy given that the parties had previously agreed on the SIAC Rules.

### **Is There Misinterpretation of the Parties’ Intention?**

When assessing the power of the institution to nominate a sole arbitrator overriding a contrary agreement, one has to consider that the reconciliation of the parties’ agreement on the number of arbitrators and the institutional rules is a question of interpretation of the arbitration agreement<sup>1)</sup>. The interpretation of an arbitration agreement is a matter of national law. The applicable national law, thus, determines whether an institution is entitled to override parties’ agreement as foreseen by the ICC Expedited Procedure Rules.

In this light, it seems questionable whether the implied consent accurately represents the intention of the parties. When the parties refer to arbitration rules which provide for an expedited procedure while expressly agreeing on the number of arbitrators, there is at least some reasonable doubt as to whether the former should prevail.

Namely, by expressly agreeing on the number of arbitrators, the parties demonstrate their intention to deviate from the otherwise applicable institutional rules. The priority clause in the ICC Expedited Procedure Rules is unlikely to rebut this interpretation in favour of the express agreement in all cases. In fact, one could argue that the existence of the contrary agreement indicates the parties’ ignorance vis-à-vis the priority rule. Therefore, courts might conclude that the

parties agreed on a three-arbitrator panel and deviated from the ICC Expedited Procedure Rules.

### **Fortunately: No Dynamic Reference**

The solution provided by the ICC Expedited Procedure Rules seems to be more in line with the parties' intention when compared to the SIAC Rules, as interpreted by the Singapore High Court.

In the aforementioned case of *AQZ v. ARA*, the referenced SIAC Rules did not empower the SIAC President at the time of the conclusion of the arbitration agreement to nominate a sole arbitrator. The Court presumed that references to institutional rules are to be construed as references to those rules that may be applicable at the date of the commencement of the arbitration, as long as those rules contain mainly procedural provisions. This presumption could be displaced by the parties' specific reference to the rules in force at the date of the arbitration agreement. In *AQZ v. ARA*, such a reference, however, was not included in the agreement, and the court, therefore, applied the Rules applicable at the time of the commencement of the proceedings.

The presumptive nature of such a dynamic reference is widely accepted also in other jurisdictions, such as Germany. The German Federal Supreme Court convincingly justified its acceptance of the dynamic reference with the parties' expectation that institutional rules were to be continuously adapted to commercial or legal developments<sup>2)</sup>. A rebuttal of the presumption is accepted if contrary intention by the parties can be identified. It seems, however, that the Singapore High Court should have assumed such a rebuttal in the abovementioned case. According to the arbitration agreement in this case "[...] the dispute shall be finally settled by arbitration [...] in accordance with the rules of conciliation and arbitration of the Singapore International Arbitration Centre (SIAC) by three arbitrators [...]". One could argue that this agreement on the number of arbitrators illustrates the parties' intention to rebut the presumption on dynamic reference, at least in the part relevant for expedited procedure, which was not even provided for at the time of the conclusion of the agreement. Hence, it seems too narrow to assume a rebuttal only if the parties specified a particular version of the SIAC Rules.

Under the new ICC Rules, such a conflict between the parties' intention and the priority rule is fortunately avoided by excluding its applicability to arbitration agreements concluded before the new ICC Rules came into force (Art. 30 (3) (a) ICC-Rules 2017).

### **Conclusion**

When the abovementioned concerns are taken into account, it seems that the recent ICC reform took a step too far when empowering the ICC Court to override a contrary agreement between the parties in expedited proceedings. Disregarding parties' autonomy, which is a well-known and recognized core of arbitration, poses a risk to the enforceability of an award. A losing party might try to set aside or resist enforceability of an award arguing that the composition of the arbitral tribunal was not in accordance with the party agreement (Art. 34 (2) (a) (iv) of the UNCITRAL Model Law; Art. 35 and 36 (1) (a) (iv) UNCITRAL Model Law; Article V 1. (d) NY Convention). In the end, this uncertainty could prolong arbitration proceedings as much as enforcement proceedings, and paradoxically this could deteriorate efficiency, which is exactly a result contrary to the one for which expedited procedures are established for.

As many other issues raised in the practice, this one as well boils down to advising parties to draft carefully: For the parties who aim for fast-track proceedings, it is recommendable to avoid an

agreement on more than one arbitrator (until the legal uncertainty pertaining to this issue is resolved by national courts), whereas the parties with a strong preference for a panel of more than one arbitrator should explicitly opt-out from the application of the ICC Expedited Procedure Rules in their agreement.

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The graphic features a black background with white text and a circular icon. The icon depicts a group of stylized human figures, with one figure in the center being magnified by a magnifying glass. The background is accented with horizontal lines in blue and green.

### References

?1 BGH NJW 1986, 1436 (1437).

?2 BGH NJW-RR 1986, 1059, 1060.

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