

Revised ICC Arbitration Rules and Note Take Effect

March 31, 2017

The International Chamber of Commerce (ICC) has revised its arbitration rules and issued a new [Note to Parties and Arbitral Tribunals on the Conduct of Arbitration](#). The [2017 ICC Rules](#) and Note entered into force on March 1, 2017, and represent a continuation of the ICC's recent efforts to increase transparency, reduce delays and lower costs in arbitral proceedings.

Rather than attempt a complete overhaul of the rules – which last underwent significant revision in 2012 – the ICC has focused its efforts on further enhancing efficiency and transparency. Chief among the revisions is the introduction of new Expedited Procedure Rules, applicable to cases where the amount in dispute is less than US\$2 million. Other modifications include a shortened time limit for establishing Terms of Reference, enhanced transparency through the ICC Court's communication of reasoned decisions, and changes to the ICC's fee scale, including for expedited proceedings.

The revised rules apply to all ICC arbitrations commenced on or after March 1, 2017, irrespective of the date of the conclusion of the arbitration agreement. The new Expedited Procedure Rules, however, will only apply to arbitrations commenced pursuant to arbitration agreements *concluded* after March 1, 2017, unless the parties expressly opt in to the new procedure.

New Expedited Procedure Rules

The most significant change to the 2017 ICC Rules is the creation of an expedited procedure for lower-value disputes, and a corresponding set of rules designed to streamline the procedural steps for such cases and lead to faster awards (new Article 30 and Appendix VI).

In adopting an expedited procedure, the ICC Court follows in the footsteps of other arbitral institutions which have offered such procedures for a number of years, including the Swiss Chambers' Arbitration Institution (2004), the Hong Kong International Arbitration Centre (2008), the Stockholm Chamber of Commerce (2010), the Singapore International Arbitration Centre (2010) and the AAA's International Centre for Dispute Resolution (2014).

The new Expedited Procedure Rules will apply to all cases with an amount in dispute of up to US\$2 million commenced on or after March 1, 2017, with three exceptions: (i) where the arbitration agreement in question was concluded before March 1, 2017; (ii) where the parties have expressly opted out of the expedited procedure; and/or (iii) where the ICC Court, at the request of a party before the constitution of the tribunal or on its own motion, determines that the expedited procedure is not appropriate in the

circumstances.

Parties to arbitrations with higher amounts in dispute may also agree to expressly opt in to the Expedited Procedure Rules and may use the ICC's suggested language for inclusion in the arbitration clause to this end.

The Expedited Procedure Rules are intended to further the twin goals of efficiency and cost savings, and include the following features:

- **Arbitrator appointments:** The expedited procedure provides that cases will normally be heard by a sole arbitrator, even where the underlying arbitration agreement provides for a three-member panel (Appendix VI, Article 2(1)). This represents a significant departure from the traditional default position in ICC arbitration where the parties' agreement on the number of arbitrators has prevailed over the rules. Notwithstanding the new default position in favor of a sole arbitrator for expedited proceedings, the ICC Court may nevertheless appoint three arbitrators if appropriate in the circumstances. It remains to be seen, however, how often and under what circumstances the ICC Court will appoint a sole arbitrator in cases where one or more parties insist upon a three-member panel. The parties may jointly nominate the sole arbitrator within a time limit fixed by the ICC Secretariat, failing which the sole arbitrator will be appointed by the ICC Court within as short a time as possible (Appendix VI, Article 2(2)).
- **No Terms of Reference:** The Terms of Reference procedure has been one of the hallmarks of ICC arbitration, a useful device that allows the tribunal to establish a structure and organization for the arbitration at an early stage, forces the parties to define their dispute and helps to delimit the scope of the tribunal's mandate. Despite these advantages, the ICC has shown that it is serious about streamlining the procedure in expedited cases by eliminating this procedural step for cases administered under the Expedited Procedure Rules (Appendix VI, Article 3(1)).
- **Shorter time limits for new claims:** In expedited proceedings, parties may not make any new claims after the arbitral tribunal has been constituted, unless authorized to do so by the arbitral tribunal (Appendix VI, Article 3(2)). Parties are thus expected to assert all claims at an earlier stage than in ordinary proceedings, where new claims may be raised up until the Terms of Reference are signed or approved by the ICC Court (and subsequently only if authorized by the arbitral tribunal) (Article 23(4)).
- **Accelerated timing for case management conference:** The expedited procedure provides that a case management conference pursuant to Article 24 of the ICC Rules must be convened no later than 15 days from the date the file was transmitted to the arbitral tribunal, although the ICC Court may extend the time limit pursuant to a reasoned request by the tribunal (Appendix VI, Article 3(3)). This contrasts with the ordinary ICC procedure, which provides no fixed deadlines for holding case management conferences.
- **Arbitrator's discretion to limit submissions and evidence:** The Expedited Procedure Rules confer considerable discretion on the sole arbitrator to adopt such procedural measures as considered appropriate (Appendix VI, Article 3(4)). This discretion includes, for example, the power, after consultation with the parties, to disallow requests for document production, or to limit the number, length and scope of written submissions and written witness evidence from both fact witnesses and experts. Optional hearing: Similarly, the sole arbitrator has the discretion, after

consulting the parties, to decide the dispute solely based on the documents submitted by the parties, without a hearing and without examination of witnesses or experts (Appendix VI, Article 3(5)). When a witness hearing is considered appropriate, it may be conducted by videoconference, telephone or similar means of communication.

- **Deadline for award:** The time limit within which the arbitral tribunal must render its final award is six months from the date of the case management conference, although the ICC Court may extend this time limit (Appendix VI, Article 4(1)). While this appears only marginally faster than the deadline for arbitrations under the ordinary procedure set out in Article 31 (six months from the signing of the Terms of Reference), statistics show that in practice ICC final awards are rarely issued within this six-month period. The various new features of the expedited procedure have the potential to facilitate the tribunal's task and thus make the six-month deadline more realistic and attainable.
- **Costs:** The fees of the arbitral tribunal will be fixed according to a new scale in expedited proceedings, which is set out in Appendix III (Appendix VI, Article 4(2)). While the ICC's administrative expenses are the same for both ordinary and expedited proceedings, arbitrators' fees are reduced by 20 percent. Expedited proceedings are thus expected to be significantly more cost effective, while nevertheless maintaining quality control of awards through continued scrutiny by the ICC Court and Secretariat.

Other Notable Changes

Streamlining the Initial Procedural Phase of ICC Arbitrations

The 2017 ICC Rules demonstrate that the ICC is not only concerned with increasing efficiency for lower-value disputes, but also with streamlining ordinary proceedings by reducing the time limit for establishing Terms of Reference. The previous 2012 ICC Rules provided that the signed Terms of Reference were to be transmitted by the arbitral tribunal to the ICC Court within two months from the date of the tribunal's receipt of the file. This deadline is now shortened to only 30 days (Article 23(2)). This modification should encourage tribunals to act promptly to launch arbitral proceedings and to avoid undue delay at the front end of cases.

Enhanced Transparency: ICC Court to Communicate Reasoned Decisions

Also of note is the ICC's decision to embrace greater transparency with respect to decisions made by the ICC Court concerning the appointment, confirmation, challenge and replacement of arbitrators. Previously, in accordance with Article 11(4) of the 2012 ICC Rules, the ICC Court did not communicate the reasons for its decisions concerning arbitrators to the parties. Consistent with the ICC's policies in favor of greater transparency, this language has been deleted from Article 11(4), and the ICC Court may now communicate the reasons for its decisions on such matters to the parties.

Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration

In addition to the revised rules, the ICC also released the latest version of its *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration*, in force as of March 1, 2017. This revised Note builds on and incorporates previous topic-specific notes such that users now have a single, comprehensive and practical reference guide to ICC arbitration.

The Note includes detailed guidance on the application of the new Expedited Procedure Rules. Of particular interest is the ICC's decision to extend the financial carrots and sticks used to encourage arbitrators to issue awards promptly in expedited procedure cases. As with ordinary cases, the Court has discretion to increase or decrease the arbitrators' fees to reward the expeditious issue of final awards or penalize undue delay, so as to incentivize tribunals to resolve disputes promptly. Similar financial consequences are applied to the Court's administrative expenses, which may be reduced by up to 20 percent where there is unjustifiable delay in the process of scrutinizing awards.

The Note also introduces new provisions concerning the ethical conduct of participants in ICC arbitrations. Tribunals, parties and representatives are expected *"to abide by the highest standards of integrity and honesty, and to conduct themselves with honour, courtesy and professionalism."* The Note also encourages parties and tribunals to draw inspiration from – and in appropriate cases, adopt – the IBA Guidelines on Party Representation in International Arbitration.

Finally, the Note introduces a range of administrative services available to parties, including the identification of administrative secretaries, organization of hearings, deposit of funds and assistance with sealed offers.

Conclusion

Taken as a whole, the 2017 revisions to the ICC Rules represent an impressive effort by one of the world's leading arbitral institutions to further promote efficiency, cost savings and transparency in international arbitration. These changes build on other recent reforms by the ICC, including the introduction of penalties for arbitrators who submit awards to the ICC Court with undue delay, and the publication of names of arbitrators sitting in ICC arbitrations. How future users of the 2017 ICC Rules will react to these new rules and their expedited procedure remains to be seen, but the ICC should be applauded for its efforts to lead the way in establishing best practices and responding to the evolving needs of international business.

If you have any questions regarding this Sidley Update, please contact the Sidley lawyer with whom you usually work, or

Tanya Landon

Partner

+41 22 308 00 60

tlandon@sidley.com

Marc Palay

Partner

+41 22 308 00 15

mpalay@sidley.com

David Roney

Partner

+41 22 308 00 44

droney@sidley.com

[International Arbitration Practice](#)

To receive Sidley Updates, please subscribe at www.sidley.com/subscribe.

Sidley Austin provides this information as a service to clients and other friends for educational purposes only. It should not be construed or relied on as legal advice or to create a lawyer-client relationship.

Attorney Advertising - For purposes of compliance with New York State Bar rules, our headquarters are Sidley Austin LLP, 787 Seventh Avenue, New York, NY 10019, 212.839.5300; One South Dearborn, Chicago, IL 60603, 312.853.7000; and 1501 K Street, N.W., Washington, D.C. 20005, 202.736.8000.

Sidley Austin LLP provides this information as a service to clients and other friends for educational purposes only. It should not be construed or relied on as legal advice or to create a lawyer-client relationship. Readers should not act upon this information without seeking advice from professional advisers. In addition, this information was not intended or written to be used, and cannot be used, by any person for the purpose of avoiding any U.S. federal, state or local tax penalties that may be imposed on such person.

Attorney Advertising —Sidley Austin LLP, One South Dearborn, Chicago, IL 60603. +1 312 853 7000. Sidley and Sidley Austin refer to Sidley Austin LLP and affiliated partnerships as explained at www.sidley.com/disclaimer.

© Sidley Austin LLP