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# Newsletter

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## INTERNATIONAL ARBITRATION

### The 2017 ICC Rules of Arbitration

The International Chamber of Commerce ("ICC") has revised its arbitration rules to further promote the efficiency and transparency of ICC arbitrations. The revised rules will enter into force on 1 March 2017. The most prominent feature of the amended rules are the new provisions regarding expedited proceedings.

#### 1 BACKGROUND AND MAIN PURPOSE OF THE REVISION

On 4 November 2016, the ICC announced a revision of its current arbitration rules (the "**2012 ICC Rules**"), one of the most commonly used sets of arbitration rules in international commercial contracts around the globe with more than 950 new cases filed in 2016. The revised arbitration rules (the "**Revised ICC Rules**") will enter into force on **1 March 2017** and will – as a rule – automatically apply to arbitration proceedings that commence after that date, irrespective of the date of the arbitration agreement or when the contract containing the arbitration clause in question was concluded. In addition, the parties may agree that the revised rules apply to arbitration proceedings commenced before 1 March 2017.

While the Revised ICC Rules do not bring a fundamental change to the concept of ICC arbitration, they do contain

several important amendments, the most prominent being the introduction of an **expedited arbitration procedure** (the "**Expedited Procedure**") for "smaller" claims. Further modifications include:

- > The reduction of the time limit for issuing the Terms of Reference;
- > Amendments to the Rules allowing for reasoned decisions by the ICC International Court of Arbitration (the "**ICC Court**"); and
- > Changes to the scale of administrative fees to be paid to the ICC, including to reflect the new expedited proceedings.

The main purpose of the revision is to further increase the efficiency and transparency of ICC arbitration.

Several bodies at the ICC were involved in the revision process. The ICC Court and the Governing Body for Dispute Resolution Services proposed the amendments in May 2016, which were approved by the ICC Commission on Arbitration and ADR on 17 September 2016 and finally approved by the ICC Executive Board on 20 October 2016.

"Purpose of the revision is to further increase the efficiency and transparency of ICC arbitrations."

## 2 THE EXPEDITED PROCEDURE

The most salient feature of the Revised ICC Rules is the introduction of expedited procedure provisions, which are set out in Article 30 and Appendix VI (the "**Expedited Procedure Rules**"; together with Article 30 of the Revised ICC Rules the "**Expedited Procedure Provisions**").

In an ICC press release, the President of the ICC Court commented that the Expedited Procedure "is an entirely new offer to our users. Disputes will now be resolved on a very **expeditious and cost-effective** manner, providing an effective answer to the legitimate concerns of the business community as to time and costs."

By introducing an Expedited Procedure, the ICC has followed a number of other leading institutions that have all introduced expedited procedures in the more recent past, including the International Centre for Dispute Resolution (2014) of the American Arbitration Association, the Hong Kong International Arbitration Centre (2008), the Singapore International Arbitration Centre (2010), the Stockholm Chamber of Commerce (2010), and the Swiss Chambers' Arbitration Institution (2004).

### 2.1 SCOPE OF APPLICATION

Pursuant to Article 30(2)(a) of the Revised ICC Rules and Article 1(2) of Appendix VI, the Expedited Procedure Rules **automatically** apply to disputes that have an amount in dispute **below USD 2 million**. The amount in dispute is the aggregate value of all claims (including counterclaims and potentially set-offs). It contains quantified monetary claims (generally excluding costs and interests) and the estimated monetary value of unquantified claims. The ICC Secretariat will inform the parties that the Expedited Procedure Provisions apply after receipt of the Answer to the Request for Arbitration, the expiry of the time limit for the Answer, or any time thereafter (Article 1(3) of Appendix VI).

If the amount in dispute is higher than the threshold of USD 2 million, the parties may nevertheless agree on the application of the Expedited Procedure Rules. Article 30(2)(b) of the Revised ICC Rules expressly contains such an opt-in option.

The Expedited Procedure Rules do not apply to arbitration agreements that have been concluded before 1 March 2017 (Article 30(3)(a) of the Revised ICC Rules). Again, however, the parties may agree to opt in to the Expedited Procedure even if the arbitration agreement was concluded before 1 March 2017 (Article 30(3)(b) of the Revised ICC Rules). Furthermore, the Parties are free to agree to entirely **opt out** of the application of the Expedited Procedure Rules, even for arbitration agreements concluded after

1 March 2017. In this respect, the ICC provides a model arbitration clause including the following language: "The Expedited Procedure Provisions shall not apply."

In addition, the ICC Court may determine, upon its own motion or upon the request of a party, that the Expedited Procedure is inappropriate in the circumstances from the outset (Article 30(3)(c) of the Revised ICC Rules).

### 2.2 THE APPOINTMENT OF A SOLE ARBITRATOR

Pursuant to Article 2(1) of Appendix VI, the ICC Court may **appoint a sole arbitrator** even if the arbitration agreement provides for three (or more) arbitrators. The ICC has confirmed that the ICC Court will normally do so if the Expedited Procedure applies. This is a novelty to ICC arbitration. Thus far, the parties' agreement prevailed over the ICC Rules when determining the number of arbitrators and the appointment procedure. The new rule also goes beyond what other institutions provide; the Court of the Swiss Chambers' Arbitration Institution, e.g., will only suggest that the Parties agree on a sole arbitrator.

It remains to be seen how the ICC Court will handle situations in which both parties **insist** on the constitution of a three-member tribunal notwithstanding the application of the Expedited Procedure. In the meantime, parties concluding ICC arbitration agreements should be aware that their agreement to have their dispute heard by a three member tribunal may not be honored in all circumstances.

Pursuant to Article 2(2) of Appendix VI, the parties may appoint the sole arbitrator within the time limit set by the ICC Secretariat. If the parties fail to agree, the ICC Court itself will appoint a sole arbitrator.

Finally, where the ICC Court decides during the course of the proceedings that the Expedited Procedure shall no longer apply, the sole arbitrator shall, as a rule, remain in place, unless the ICC Court decides that it is appropriate to replace the tribunal (Article 1(4) of Appendix VI). In other words, even where the arbitration agreement provided for three arbitrators and a sole arbitrator was appointed by the ICC Court given the initial automatic application of the Expedited Procedure, there is a risk that the case will continue with a sole arbitrator even if the proceedings are later continued as "regular" arbitration proceedings outside the scope of the Expedited Procedure.

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### 2.3 NO TERMS OF REFERENCE

Unlike in regular ICC proceedings, in expedited proceedings there is no need for the arbitral tribunal to issue **Terms of Reference**, which have always been a distinct feature of ICC arbitration. Article 3 of Appendix VI explicitly provides that "Article 23 of the Rules shall not apply".

### 2.4 NEW CLAIMS

While in regular ICC proceedings **new claims shall not be made after the Terms of Reference** have been signed or

approved by the ICC Court (Article 23(4) of the Revised ICC Rules) unless authorized to do so by the arbitral tribunal, in expedited proceedings new claims shall not be made after the arbitral tribunal has been constituted (Article 3(2) of Appendix VI). This difference can be explained by the fact that Terms of Reference are not issued in expedited proceedings. Like in regular ICC arbitration proceedings, however, the arbitral tribunal may authorize a party to bring new claims after the cut-off date.

## 2.5 CASE MANAGEMENT CONFERENCE

The requirement to conduct a **case management conference** under Article 24 of the ICC Rules also applies under the Expedited Procedure Rules. The Expedited Procedure Rules provide a specific time limit within which the case management conference shall take place, namely 15 days after the case file has been transmitted to the arbitral tribunal (Article 3(3) of Appendix VI). The ICC Court can extend this time limit either upon a reasoned request from the tribunal or upon its own motion.

## 2.6 CONDUCT OF THE PROCEEDINGS

Like in regular ICC proceedings, the arbitral tribunal has broad discretion regarding the conduct of the proceedings. The Expedited Procedure Rules explicitly mention **several measures** the arbitral tribunal may adopt **to increase the efficiency** of the proceedings (Article 3(4) and (5) of Appendix VI): The arbitral tribunal may decide to **limit** the number, length, and scope of **submissions**, and the length of written witness evidence, including **fact witness statements** as well as **expert reports**. It may further **exclude the production of documents**. Additionally, the arbitral tribunal may **decide** the dispute **solely on the basis of documents**. It is thus within the discretion of the tribunal whether to conduct a hearing, and the Expedited Procedure Rules give the tribunal the power to refrain from doing so in expedited proceedings even if one party wishes to hold a hearing. Should a hearing take place, the Expedited Procedure Rules specify that the arbitral tribunal may conduct the hearing by videoconference, telephone, or similar means of communication instead of in person.

## 2.7 TIME LIMIT FOR RENDERING THE AWARD

In the absence of Terms of Reference, the arbitral tribunal must render its final award **within six months** from date of the case management conference (Article 4(1) of Appendix VI). If the need arises, the Court may extend this time limit upon a reasoned request by the arbitral tribunal or upon its own motion.

## 2.8 SCRUTINY OF THE AWARD

One typical feature of ICC arbitration is the **scrutiny** of awards by the ICC Court pursuant to Article 33 of the 2012 ICC Rules (Article 34 of the Revised ICC Rules). This process, which aims to ensure the quality of ICC awards, applies likewise to awards issued in expedited proceedings.

## 2.9 REDUCED TRIBUNAL FEES

Proceedings conducted under the Expedited Procedure Rules are expected to be more cost effective than regular ICC proceedings as **the arbitrators' fee range is reduced by 20 percent**.

By contrast, the administrative fees of the ICC remain the same, irrespective of the type of proceedings.

## 3 TIME LIMIT FOR TERMS OF REFERENCE

Another important modification is **the reduction of the time limit for issuing the Terms of Reference** from previously two months to **30 days** (Article 23(2) of the Revised ICC Rules). This time limit commences upon the transmission of the case file to the arbitral tribunal. The shortening of this time limit aims at expediting the initial stages of ICC arbitrations. During the revision process, the proposal to shorten the time limit for issuing the Terms of Reference was criticized by some. It remains to be seen whether the 30-day time limit will have the intended effect.

The arbitral tribunal continues to be able to request an extension of the time limit if the circumstances so warrant.

## 4 REASONED ICC COURT DECISIONS

The ICC announced already in October 2015 that it would communicate **reasons for decisions** on arbitrator challenges and replacements of arbitrators, *prima facie* decisions on jurisdiction, and consolidation decisions if all the parties in a case agree to this.

The Revised ICC Rules now go a step further. The part of Article 11(4) of the 2012 ICC Rules that provides that the ICC Court shall not communicate to the parties its reasons for decisions on appointment, confirmation, challenge, or replacement of arbitrators has been **deleted**. Under the Revised ICC Rules, nothing prevents the ICC Court from communicating to the parties its reasoning for such and other decisions, and it is no longer necessary for the Court to seek the consent of all parties to do so. The ICC has stated that "[a]ny party will now be in a position to ask the ICC Court to provide reasons for its decisions."

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## 5 ADMINISTRATIVE EXPENSES

Under the Revised ICC Rules, **the scale of administrative expenses** has been modified. For example, in a case with an amount in dispute of up to USD 50,000, the ICC administrative expenses have increased from USD 3,000 to USD 5,000. Another example are the ICC administrative expenses with respect to disputes with an amount in dispute over USD 500 million: they have increased from USD 113,215 to USD 150,000. The new scale of administrative expenses is effective as of 1 January 2017 (Article 4 of Appendix III).

## 6 OUTLOOK

The latest revision of the ICC Rules is in line with recent initiatives by the ICC to further increase the efficiency and transparency of arbitration proceedings conducted under its Rules. In early 2016, the ICC started to **publish the names of arbitrators** with the parties' consent, and decided to **lower arbitrator fees in case of unjustified delays** in submitting awards, as well as its own administrative fees in case of delays in scrutinizing awards. In September 2016, the ICC promulgated its latest version of the "Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration", which includes, *inter alia*, **enhancements regarding the formalities of signing the Terms of Reference and awards**.

## Contacts

The content of this Newsletter does not constitute legal or tax advice and may not be relied upon as such. Should you seek advice with regard to your specific circumstances, please contact your Schellenberg Wittmer liaison or any of the following persons:



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