A View from Inside the Institution

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The views expressed in this article are those of the author only and should not be thought to reflect those of the ICC International Court of Arbitration or its Secretariat. Nothing in this article binds the ICC Court or its Secretariat.

On 1 March 2017, the newly revised ICC Rules of Arbitration entered into force. Their principal innovation is the provision of an expedited procedure for lower-value cases. In this article, the Deputy Secretary General of the ICC Court, who has been closely involved in establishing and implementing the expedited procedure, describes in detail how they will be put into practice by the ICC Court and its Secretariat and discusses the issues they are likely to raise in relation to such matters as the determination of the amount in dispute and the constitution of the arbitral tribunal, how such issues will be addressed, and the interplay between the new Expedited Procedure Provisions and existing provisions in the Rules. The 2017 revision also introduced some more limited, but nonetheless important, changes reflecting policy and practice developments designed to enhance efficiency and transparency. These changes are also covered in this article.

Introduction

Four years after completing a complete overhaul of the ICC Rules of Arbitration (‘ICC Rules’), the International Court of Arbitration of the International Chamber of Commerce (‘ICC Court’) decided a new revision was needed, this time more limited in scope. This latest revision of the ICC Rules was conducted by the ICC Court, laid before the ICC Commission of Arbitration and ADR (‘ICC Commission’) and approved by the ICC Executive Board in 2016. The amendments resulting from that revision entered into force on 1 March 2017.

This new revision is the latest phase in a strategy of enhancing the efficiency and transparency of ICC arbitration which the ICC Court has been pursuing over the past 18 months. As part of this strategy, the ICC Court has developed and published a series of policies aimed at achieving greater efficiency in the rendering of awards, and increasing transparency in relation to ICC Court decision making, the arbitral tribunals sitting in ICC arbitrations, arbitrator conflicts of interest, and the ICC practices relating to costs.1

The revision consisted of, on the one hand, isolated amendments resulting from developing practices and policies and, on the other hand, the introduction of an expedited procedure for claims of lesser value.

These changes are supplemented by a new version of the Note to Parties and Arbitral Tribunals on the Conduct of Arbitration under the ICC Rules of Arbitration (the ‘Note’), issued on 1 March 2017. The Note provides users with important information relating to the application of the ICC Rules by the ICC Court.2 The implementation of the revised and new provisions will be further supported by practices that the ICC Court and its Secretariat (‘Secretariat’) will establish to that end.

The article describes both aspects of the 2017 revision and provides insight into how they have been implemented and are likely to be applied by the ICC Court and the Secretariat.

Amendments resulting from practice and policy

The 2012 revision of the ICC Rules had been implemented and applied very successfully.3 Consequently, another full overhaul of the ICC Rules
was unlikely to occur within the next few years. However, the ICC Court believed that a revision of certain isolated issues was appropriate at this stage, to reflect policy and practice changes that had occurred over the past four years.

A Article 11(4): Communication of reasons

The most significant of these amendments is the removal of the prohibition on communicating reasons for the Court’s decisions relating to the constitution of the arbitral tribunal.

Increased public scrutiny of arbitration has resulted in a demand for greater transparency in all aspects of arbitration proceedings, whether commercial or investor-state. This led the ICC Court to modify its policy and allow the communication of the reasons for certain of its decisions if all of the parties in a given case so request. The policy change started in 2012, following a recommendation by the ICC Commission on Arbitration and ADR for the reasons behind decisions on challenges against arbitrators in investment treaty cases to be communicated when all parties so requested. A more comprehensive policy change was established in 2015, extending to all decisions on challenges and the replacement of arbitrators, prima facie jurisdictional assessments and decisions on the consolidation of one or more arbitrations. Decisions on the confirmation of arbitrators and costs (fixing or readjusting advances on costs, and fixing costs) are not covered by this policy.

This amendment to the ICC Rules has not proved difficult to implement, as the ICC Court has already communicated reasons for five decisions on challenges. However, it can be expected that the number of requests for the communication of reasons for decisions will rise, especially as an agreement of all the parties is no longer required.

In practice, decisions made by the ICC Court at a plenary session, which normally include those on challenges and replacements of arbitrators, are reached after consideration of a report prepared by a member of the ICC Court, who issues a recommendation. The floor is then opened for debate and the Court members try to reach a consensus on the outcome. If a request has been made for the communication of the reasons, Court members are required to reach a consensus not only on the outcome but also on the reasons. A letter recording such consensus is then drafted by a three-member committee of the Court, which includes the reporter and the president of the session. Such letters are usually two to three pages long and they are usually communicated to the parties within two or three days of the Court’s decision.

A similar procedure is expected to be put in place for decisions made by the ICC Court at a committee session. They normally include prima facie jurisdictional assessments and decisions on the consolidation of one or more arbitrations. To date, the ICC Court has not received any requests to communicate reasons for any of these decisions. However, this is likely to change in view of the reform.

B Article 23: Time limit for Terms of Reference

Of the isolated amendments reflecting changes in practice and policy, the second most significant was the reduction of the time limit set in Article 23 of the Rules for establishing the Terms of Reference, which has dropped from two months to just one month. This amendment is part of a wider effort to cut down the time needed for the initial phases of the arbitration.

The ICC Court expects that the reduction of this time limit will encourage arbitrators to be as diligent as is necessary and possible, and to prepare the Terms of Reference as soon as they receive the file. In other words, the ultimate aim of this revision is to discourage unnecessary delays in the preparation and establishment of the Terms of Reference.

The ICC Court is well aware that parties may request or simply agree to a longer deadline, or that the circumstances of a particular case may require a longer deadline. In such cases, the ICC Court will extend the deadline as permitted by Article 23(2) of the Rules. However, extensions that are attributable to an unjustified lack of diligence on the part of the arbitral tribunal may be taken into consideration by the ICC Court when fixing the arbitrators’ fees.

C Article 6(3): Parties that may raise jurisdictional pleas

The wording of Article 6(3) was slightly modified to clarify that jurisdictional pleas may be raised by any party, even if a claim has not been made against it. This is particularly relevant when a respondent party has requested the joinder of an additional party without making claims against the claimant party, and the claimant party wishes to raise a jurisdictional plea related to such additional party. This modification merely reflects what has been the practice under Article 6(3) since the entry into force of the 2012 ICC Rules.

D Article 13(4): State entities

The wording of Article 13(4)(a) has been modified in order to clarify that the Court may directly appoint an arbitrator when one or more parties are states or
may be considered to be a state entity. The previous language suggested that the Court could make direct appointments only when the party in question itself claimed to be a state entity. The new language, which confirms the practice of the ICC Court, makes it clear that a direct appointment can be made when the party in question may be considered — by any party, the Court or on the basis of information available in the file — to be a state entity.

E Article 36(2): Time limit for an application to correct and interpret an award

Finally, a minor discrepancy in the wording of what is now Article 36(2) between the English and French versions of the ICC Rules has been corrected. It is now clear in both languages that any application for the correction or interpretation of an award must be made to the Secretariat within 30 days of the receipt of the award by such party. The previous language in the French version of the ICC Rules referred to notification — as opposed to receipt — of the award, which led to ambiguity in practice.

Expedited Procedure Provisions

The idea of specific rules for the conduct of arbitrations relating to low-value claims was considered by the ICC Court and the ICC Commission back in 2002. At the time, they were considered unnecessary, as such cases were limited in number, in contrast to other institutions.4 The ICC Commission on Arbitration and ADR decided instead to publish the Guidelines for Arbitrating Small Claims.5 Some of the principles included in these Guidelines are also found in the ICC Commission’s report Techniques for Controlling Time and Costs in Arbitration,6 and in Appendix IV of the ICC Rules introduced in the 2012 revision.

Circumstances have changed over the years. Arbitrations relating to claims below US$ 2 million represent around 33% of the ICC Court’s caseload. Hence, there was clear interest in ICC administering lower-value cases. There is also a demand from users for institutions to adapt their rules to allow such cases to be conducted in the most cost-efficient manner.

According to the 2015 International Arbitration Survey, Improvements and Innovations in International Arbitration (the ‘Survey’),7 92% of respondents favoured the introduction of this type of procedure. Moreover, 33% of respondents were in favour of making the procedure mandatory. At the same time, it is worth noting that an overwhelming 68% of respondents also identified the ICC Court as their preferred arbitration institution and referred to the high quality of administration as the most important criterion they consider when deciding which arbitration institution to choose.

So, when deciding to introduce Expedited Procedure Provisions into the ICC Rules, the ICC Court needed to develop a cost-efficient mechanism for settling low-value claims, while maintaining the kind of administration that users expect in arbitrations conducted under the ICC Rules. The drafting process was undertaken with this objective in mind. The choices that have been made in pursuit of this objective are explained in the following sections.

A General principles and structure

The Expedited Procedure Provisions comprise the new Article 30 of the ICC Rules entitled ‘Expedited Procedure’8 and the new Appendix VI entitled ‘Expedited Procedure Rules’. Together they are referred to as the ‘Expedited Procedure Provisions’. This is the same approach as was taken for the Emergency Arbitrator Provisions introduced in the 2012 revision. Article 30 defines the scope of application of the Expedited Procedure Provisions and Appendix VI the procedure that arbitrations subject to these Provisions will follow.

At this stage it is important to highlight two general principles characterising the Expedited Procedure Provisions.

First, Article 30 states that, by agreeing to the ICC Rules, the parties agree that the Expedited Procedure Provisions shall prevail over any contrary term in the arbitration agreement. This essentially means that parties are, in principle, unable to depart from the essential features of the Expedited Procedure Provisions by including contradictory terms in their arbitration agreements. The manner in which the ICC Court is likely to enforce this general provision will be explained below.

Second, Appendix VI establishes the principle that in all matters concerning the expedited procedure not expressly provided for in that Appendix, the ICC Court and the arbitral tribunal shall act in the spirit of the ICC Rules and that Appendix. This provision gives the ICC Court and arbitral tribunals some flexibility when applying the ICC Rules and the Expedited Procedure Provisions to a specific case. Instances of potential application of this general provision are described below.
B  Scope of application of the Expedited Procedure Provisions

The application of the Expedited Procedure Provisions depends on four factors: (1) the date of the arbitration agreement, (2) the amount in dispute, (3) the possibility for the parties to opt out of or opt into the Provisions and (4) safeguards for not applying the Provisions.

To the extent relevant, parties are encouraged to address the applicability or potential applicability of the Expedited Procedure Provisions as early as possible in the proceedings. The Secretariat will nevertheless invite the parties to provide comments in that respect whenever necessary.

1  Date of arbitration agreement

The Expedited Procedure Provisions apply only to arbitrations arising out of arbitration agreements concluded after the date on which the Expedited Procedure Provisions entered into force (i.e. 1 March 2017). This solution is comparable to that adopted for the Emergency Arbitrator Provisions.9

Article 6(1) of the ICC Rules establishes that by agreeing to submit to arbitration under the ICC Rules, parties shall be deemed to have submitted to the ICC Rules in effect on the date of commencement of the arbitration. As such, when parties agree to refer future disputes to ICC arbitration, they accept the applicability of future amendments to the ICC Rules to their dispute, even if unknown at the time of the arbitration agreement.

The introduction of entirely new Expedited Procedure Provisions is, however, a very substantial modification to the ICC Rules, just as the introduction of the Emergency Arbitration Provisions was.10 Hence, the ICC Court considered that users should be allowed to learn about these modifications before deciding whether to refer their disputes to ICC arbitration or whether to opt out of the application of the Expedited Procedure Provisions.

2  Amount in dispute

i. The monetary ceiling

According to Article 30(2)(a) of the ICC Rules and Article 1(2) of Appendix VI, the Expedited Procedure Provisions shall apply only if the amount in dispute does not exceed US$ 2 million.

As previously indicated, the core objective of the expedited procedure is to provide a more cost-efficient resolution to disputes of relatively low value. Therefore, establishing a monetary ceiling for the application of the Expedited Procedure Rules is essential. Different institutions have made different choices in this regard.11 Their choices are normally based on the typical characteristics of the cases they administer and the expectations of their regular users. It is important to note, though, that most other arbitration institutions have a domestic or regional focus, while the ICC Court is perhaps the only institution that administers cases in over 90 cities involving parties from over 130 jurisdictions worldwide.

When the idea of introducing expedited rules for ‘small claims’ was first discussed within the ICC Commission in 2002, there was no consensus on the definition of ‘small claims’. The amounts defining what constitutes a ‘small claim’ ranged from US$ 5 000 to US$ 5 million.12

Based on its experience and taking into account the average complexity of these types of arbitrations, the ICC Court determined that a US$ 2 million ceiling was appropriate. In any event, the ICC Court included in the Expedited Procedure Provisions the necessary safeguards to allow cases of greater complexity to be conducted according to the ordinary procedure, as described below.

ii. Determination of the amount in dispute

Under the ICC Rules, parties are required to specify the amounts of any quantified claims and, to the extent possible, estimate the monetary value of any other claims.13 If they fail to do so when filing their claims, they will be reminded of this requirement by the Secretariat. If relevant, the Secretariat will also invite them to comment on the applicability of the Expedited Procedure Provisions in relation to the quantification of their claims.

A party that is not in a position to quantify its claims may nevertheless indicate that its claims do not exceed US$ 2 million and request the application of the Expedited Procedure Provisions.

The Secretariat will determine the amount in dispute by adding the value or estimates of all claims that may be filed in the arbitration, be they principal claims (Article 4), counterclaims (Article 5), claims against an additional party (Article 7) or claims between multiple parties (Article 8). Interest and cost claims are excluded from the determination of the amount in dispute.

Claims will normally be taken into account by the Secretariat at their face value. However, the Secretariat may be required to decide whether to take into account a particular claim for the purpose of determining the amount in dispute. For instance, in certain situations the filing of counterclaims may not increase of the amount in dispute. This is most likely to be the case.
if the counterclaims are essentially the flip side of the principal claims and no additional work is required by the arbitral tribunal to decide on them.

If the parties are unable to quantify their claims in full or in part, and fail to indicate whether or not they may US$ 2 million, the Expedited Procedure Provisions will normally not apply.

If a party objects to the determination of the amount in dispute and, as a consequence, to the application of the Expedited Procedure Provisions, the Secretariat will submit the matter to the Court.

Finally, if a party claims that the application of the Expedited Procedure Provisions was triggered or prevented by another party’s incorrect representation of the quantification of its claims, such allegation will be transmitted to the arbitral tribunal. As set forth in Article 38(5) of the ICC Rules, when making decisions on costs the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner. The arbitral tribunal may question whether a party has prevented the application of the Expedited Procedure Provisions by inflating its claims.

If, during the course of the proceedings, the amount in dispute increases and exceeds US$ 2 million, the Expedited Procedure Provisions will not automatically cease to apply, especially if none of the parties so requests. As explained in section 4 (ii) below, the ICC Court can decide on such a measure under Article 1(4) of Appendix VI.

3 Possibility of opting out of or opting into the Expedited Procedure Provisions

As indicated above, parties can opt out of the Expedited Procedure Provisions in the same way as they can opt out of the Emergency Arbitrator Provisions. The ICC Rules recommends standard opt-out clauses for this purpose.14 The parties can decide opt out when concluding their contract or upon commencement of the arbitration. For example, a claimant party, in its Request for Arbitration, may propose to opt out of the Expedited Procedure Provisions if the dispute would otherwise meet the conditions for their application. A respondent party may do the same in the Answer to the Request for Arbitration or in any earlier communication. In such cases, the Secretariat will invite the other party or parties to comment on such proposal in writing.

Conversely, the parties may agree to opt into the Expedited Procedure Provisions if the date of the arbitration agreement and amount in dispute would otherwise exclude their application. In this respect, the parties may agree to opt into the Provisions on a partial or total basis. Recommended standard clauses are provided in the ICC Rules for both scenarios. A partial opt-in is when the parties agree on the application of the Expedited Procedure Rules for disputes up to a determined amount, which may be lower or higher than US$ 2 million. A total opt-in is when the parties agree that the Expedited Procedure Provisions apply to their disputes regardless of the amount in dispute. Parties may also agree to opt into the Expedited Provisions upon commencement of the arbitration. Given that the Expedited Procedure Provisions are not applied retrospectively to arbitration agreements concluded before 1 March 2017, it is expected that the first arbitrations under the Expedited Procedure Provisions will be based on an opt-in agreement.

4 Safeguards against applying the Expedited Procedure Provisions

i. The ICC Court’s decision not to apply the provisions

Article 30(3)(c) includes an initial safeguard allowing the ICC Court not to apply the Expedited Procedure Provisions when, despite the conditions of the date of the arbitration agreement and the amount in dispute being met, the ICC Court determines that it is inappropriate to apply the provisions in the circumstances.

This safeguard may be triggered by the ICC Court upon request by a party before the constitution of the arbitral tribunal or on its own motion. In both cases, the ICC Court will invite the parties to comment in writing before taking a decision.

A situation where this safeguard could be triggered at the request of a party is a case of exceptional complexity or politically sensitive. For instance, a party to an arbitration arising out of an investment treaty might argue that the stakes involved in such a dispute would make the application of the Expedited Procedure Provisions inappropriate. The ICC Court will assess every situation on a case-by-case basis and it will be for the party objecting to the application of the Expedited Procedure Provisions to properly justify its objection.

A situation where this safeguard may be triggered by the Court on its own motion is when it is faced with an arbitration agreement in which the parties have agreed to opt into the Expedited Procedure Provisions while intending to depart substantially from the procedure established therein. The problem that may arise with such arbitration agreements is that arbitrators may be required to perform the same amount of work as in an
ordinary arbitration while being remunerated on the basis of an expedited procedure. One of the essential features of the Expedited Procedure Provisions is that the fees of the arbitrators will be calculated on the basis of reduced scales, as will be described below. The decision by the Court not to apply the Expedited Procedure Provisions in these cases would be consistent with the general principle described above that the Expedited Procedure Provisions shall prevail over any contrary terms in the arbitration agreement.

ii. Suspension at any time during the arbitral proceedings

Article 1(4) of Appendix VI includes a second safeguard allowing the ICC Court to decide, at any time during the arbitral proceedings, that the Expedited Procedure Provisions no longer apply. The ICC Court can take this decision on its own motion or at the request of a party, and only after consulting the parties and the arbitral tribunal.

Any change in the applicable procedural rules after the constitution of the arbitral tribunal would necessarily entail some degree of disruption. Therefore, this measure is likely to be applied by the ICC Court in exceptional situations when there has been a change of circumstances that render the application of the Expedited Procedure Provisions inappropriate or unfeasible.

A situation in which the ICC Court may be called upon to apply this safeguard is when the arbitral tribunal decides, pursuant to Article 3(2) of Appendix VI, that it is appropriate or necessary in the circumstances to authorise new claims. The inclusion of new claims at such a stage may add a substantially higher level of complexity to the case. This safeguard might also come into play when certain decisions are made by the parties after the arbitral tribunal has been constituted. Examples are when the parties agree to join additional parties, thereby substantially increasing the complexity of the case, or agree to certain procedural measures, such as a complex and lengthy document production phase, or bifurcation of the proceedings.

On the other hand, an increase in the amount in dispute may alone not trigger the need to apply this safeguard. It is likely that the ICC Court would require evidence of an increase in complexity making the application of the Expedited Procedure Rules impracticable.

Sections G, H and I below consider the impact that the ICC Court’s decision to apply this safeguard may have on the constitution of the arbitral tribunal, the proceedings in general and costs.

C Timing of application of the Expedited Procedure Provisions

The Expedited Procedure Provisions will apply as of the moment when the Secretariat informs the parties that they are applicable. Article 1(3) of Appendix VI indicates that this may happen upon receipt of the Answer to the Request for Arbitration, upon the expiry of the time limit to file the Answer, or at any ‘relevant time thereafter’.

When a Request for Joiner or Article 8 claims have been filed with the Answer to the Request for Arbitration, the Secretariat will inform the parties of the application of the Expedited Procedure Provisions only upon receipt of the Answer to those claims or upon expiry of the relevant time limits. When unquantified or partially quantified counterclaims are filed with the Answer to the Request, the Secretariat may inform the parties whether the Expedited Procedure Provisions apply after inviting the responding party to quantify or provide an estimate of the monetary value of its unquantified claims.

As indicated above, when a party objects to the application of the Expedited Procedure Provisions, despite the conditions relating to the date of the arbitration agreement and amount in dispute being met, the matter will be submitted to the ICC Court for a decision. In such cases, the Secretariat will inform the parties as to whether the Expedited Procedure Provisions apply once the ICC Court has taken a decision on the question.

If any party fails to submit an Answer or raises pleas concerning the existence, validity or scope of the arbitration agreement, and the Secretary General refers the matter to the ICC Court for a prima facie assessment under Article 6(4), any determination regarding the application of the Expedited Procedure Provisions is likely to be made only after the ICC Court’s decision pursuant to Article 6(4). According to Article 6(4), the ICC Court may decide that the arbitration proceeds only with respect to some of the parties or only with respect to some of the claims. The exclusion of a party or a claim may have an impact on the amount in dispute and, therefore, on the application of the Expedited Procedure Provisions.

D Request for Arbitration, Answer to the Request and counterclaims, Request for Joiner and Article 8 claims

The Expedited Procedure Provisions have caused no changes in Articles 4, 5, 7 and 8 of the ICC Rules. In principle, there are no new or special requirements established for the filing of a Request for Arbitration,
counterclaims, a Request for Joinder or Article 8 claims in cases where the claims are quantified or estimated at US$ 2 million or below.

However, parties filing claims that do not exceed US$ 2 million may nevertheless wish to consider the following when filing their claims:

- As indicated above, parties are always required to quantify or provide an estimate of the monetary value of their claims.
- To the extent relevant, parties filing claims should comment on the applicability of the Expedited Procedure Provisions in the document filed.
- To the extent relevant, when submitting an Answer, parties should comment on the applicability of the Expedited Procedure Provisions as early as possible in the proceedings and no later than in the document containing the answer to such claims.
- As indicated in Articles 4(3) and 5(5), parties should always consider submitting any documents or information with their claims or answers that they consider appropriate or that may contribute to the efficient resolution of the dispute. This is particularly relevant in arbitrations where the Expedited Procedure Provisions apply or are likely to apply, as the arbitral tribunal may decide to limit document production and written submissions.
- When deciding whether to file claims, parties should bear in mind that, under the Expedited Procedure Provisions, they cannot make new claims after the constitution of the arbitral tribunal unless the arbitral tribunal authorises them to do so.

E Multiple arbitration agreements

According to Article 9 of the Rules, parties may make claims arising out of or in connection with more than one contract, subject to any jurisdictional pleas that may be heard and, if necessary, a prima facie jurisdictional decision by the ICC court pursuant to Article 6(4).

Where claims raised pursuant to Article 9 are made under more than one arbitration agreement and a party has raised pleas as to the existence, scope or validity of any of the arbitration agreements, or as to whether all of the claims may be heard in a single arbitration, the Secretary General may refer the matter to the ICC Court for a prima facie jurisdictional decision. In such cases, the ICC Court will decide whether the arbitration shall proceed as to those claims with respect to which the ICC Court is prima facie satisfied that the arbitration agreements in question may be compatible, and (b) that all parties to the arbitration may have agreed that those claims can be determined in a single arbitration.

After the ICC Rules were revised in 2012, the ICC Court had occasion to examine, in the context of Article 6(4), the compatibility of arbitration agreements that were subject to different versions of the ICC Rules. The ICC Court consistently decided that those arbitration agreements were not compatible and, thus, claims made under such arbitration agreements could not be decided in a single arbitration. It is therefore likely that the ICC Court could follow a similar approach by considering that an arbitration agreement subject to any version of the rules in force before 1 March 2017 is incompatible with an arbitration agreement subject to the rules in force as from 1 March 2017. Furthermore, it is important to remember here that the condition triggering the applicability of the Expedited Procedure Provisions, absent an express opt-in, is a contract dated after the date of entry into force of the Expedited Procedure Provisions, i.e. 1 March 2017. Therefore, an arbitration agreement concluded after 1 March 2017 — to which the Expedited Procedure Provisions may apply — may be considered as incompatible with an arbitration agreement concluded before 1 March 2017, irrespective of which version of the ICC Rules is applicable.

F Consolidation of arbitrations

According to Article 10 of the ICC Rules, the Court may, at the request of a party, consolidate two or more pending arbitrations into a single arbitration (1) if all parties to the arbitration have so agreed, (2) if all of the claims are made under the same arbitration agreement, and (3) in the case of claims made under more than one arbitration agreement, if the arbitrations are between the same parties, the disputes arise in connection with the same legal relationship, and the ICC Court finds the arbitration agreements to be compatible.

Article 10 further provides that, in all cases, the ICC Court may take into account any circumstances it considers to be relevant, including whether one or more arbitrators have been confirmed or appointed in the different arbitrations and, if so, whether they are the same or different persons.

The question may arise as to whether the ICC Court would decide to consolidate more than one arbitration, in the absence of an agreement of the parties, when (1) one arbitration is being conducted under the Expedited Procedure Provisions and the other is not, (2) when all of them are being conducted under the Expedited Procedure Rules, or (3) when one arbitration...
is being conducted under the Expedited Procedure Provisions and the other is being conducted on the basis of an arbitration agreement that refers to a version of the ICC Rules predating 1 March 2017 or was concluded before 1 March 2017.

In the first two cases, regard will be had to the fact that consolidation may cause the amount in dispute to exceed US$ 2 million. While an increase in the amount in dispute to over US$ 2 million would not automatically result in the Court deciding under Article 1(4) of Appendix VI that the Expedited Procedure Provisions no longer apply, it is a factor that may prompt the Court to consider taking such action. In the third case, as explained above, the ICC Court is likely to consider the arbitration agreements to be incompatible and therefore to decide not to consolidate the arbitrations.

As already indicated, Article 10 will allow the ICC Court to take into account any circumstances it considers to be relevant. The issue likely to be considered most relevant is whether, on balance, consolidation is more cost-efficient even if that means not applying the Expedited Procedure Provisions to some of the claims. While there may be a general perception that consolidation is always more cost-efficient, these decisions will always have to be taken on a case-by-case basis.

Finally, to put question into perspective, it may be noted that in 2015 the ICC Court received only 17 consolidation requests involving 42 cases. Three of these decisions involved amounts in dispute below US$ 2 million. It is therefore unlikely that the question will arise much in practice.

G Arbitral tribunal

1 Constitution of the arbitral tribunal

The ICC Rules create a presumption in favour of the submission of disputes to sole arbitrators. Specifically, Article 12(2) provides that where the parties have not agreed upon the number of arbitrators, the ICC Court shall appoint a sole arbitrator, except in cases where it considers that a three-member arbitral tribunal is warranted.

In applying this presumption to cases where the parties had failed to agree on the number of arbitrators, the ICC Court’s longstanding practice has been normally to appoint a sole arbitrator where the amount in dispute is less than US$ 5 million and a three-member arbitral tribunal in arbitrations where the claims exceed US$ 30 million. The number of arbitrators in disputes falling inbetween is generally decided on a case-by-case basis.

According to recent ICC Court statistics, cases in which the amount in dispute is less than US$ 2 million are overwhelmingly submitted to a sole arbitrator (80% of cases in 2014, 81% of cases in 2015, 75% of cases in 2016). In the vast majority of cases the choice of a sole arbitrator is made by the parties themselves.

The Expedited Procedure Provisions accord with the ICC Rules’ strong presumption in favour of a sole arbitrator, the ICC Court’s practice in applying such presumption, and what would appear to be the preference of users.

In this respect, the Expedited Procedure Provisions include an important difference. According to Article 2 of Appendix VI, the Court may appoint a sole arbitrator notwithstanding any reference in the arbitration agreement to more than one arbitrator. This provision is linked to the general principle set forth in Article 30(1) that, by agreeing to the ICC Rules, the parties agree that the Expedited Procedure Provisions prevail over any contrary terms in their arbitration agreement.

Hence, the parties agree that any reference to three arbitrators in their arbitration agreement is subject to the Court’s discretion to appoint a sole arbitrator if the Expedited Procedure Provisions apply to any dispute arising under that agreement. If the Expedited Procedure Provisions do not apply, the matter will clearly be submitted to three arbitrators where so indicated in the parties’ arbitration agreement.

The rule expressed in Article 2 of Appendix VI is similar to Rules 5.2 and 5.3 of the SIAC Arbitration Rules and has been tested by Singapore courts. Under the SIAC Arbitration Rules, cases submitted to the expedited procedure are referred to a sole arbitrator, even in cases where the arbitration agreement contains contrary terms, unless the President of the SIAC Court of Arbitration determines otherwise. In the matter AQZ v ARA, an award rendered by a sole arbitrator appointed pursuant to this rule, and despite a reference to three arbitrators in the arbitration agreement, was upheld by the Singapore High Court,19 which determined that the SIAC Arbitration Rules had been ‘incorporated into the Parties’ contract and therefore [...] the rules together with the rest of the contract must be interpreted purposively’. The High Court also found that a ‘commercially sensible approach to interpreting the parties’ arbitration agreement would be to recognize that the SIAC President does have the discretion to appoint a sole arbitrator’ in such a case.

The ICC Court is therefore likely to appoint a sole arbitrator as a matter of general practice under the Expedited Procedure Provisions. That said, the ICC Court will normally appoint three arbitrators if, after
commencing the arbitration and being advised by the Secretariat of the potential application of the Expedited Procedure Provisions, notably its consequences in relation to the constitution of the arbitral tribunal, the parties agree or confirm their agreement to three arbitrators. The ICC Court may also appoint three arbitrators if the clause is silent or refers to three arbitrators and the ICC Court considers that it is appropriate to have a three-member panel in the circumstances.

In any event, the Secretariat will invite the parties to comment on this issue when notifying the Request for Arbitration. The ICC Court will carefully take into consideration the positions of the parties and any rules of law that may be applicable. In accordance with Article 42, the ICC Court is unlikely to appoint a sole arbitrator if it is determines that by doing so the enforceability of the award may be put at risk.

2 Reconstitution of the arbitral tribunal

As indicated in section B 4 (i) above, the ICC Court may, at any moment in the proceedings, decide that the Expedited Procedure Provisions shall no longer apply. According to 1(4) of Appendix VI, the arbitral tribunal will remain in place unless the ICC Court considers that it is appropriate to replace and/or reconstitute the arbitral tribunal.

It is likely that, if such a situation arises, the Secretariat will request the parties to comment on the possibility of reconstituting the tribunal when inviting them to comment on the possibility of suspending the application of the Expedited Procedure Provisions.

Article 1(4) of Appendix VI establishes a presumption that the original arbitral tribunal will remain in place. In exceptional cases, the ICC Court may take one of the following approaches instead:

> Replace the sole arbitrator with another sole arbitrator. The ICC Court may take this approach if (1) the characteristics of the arbitration have changed significantly, (2) the sole arbitrator originally appointed does not have the experience or expertise required to conduct the arbitration, and (3) the ICC Court determines that, despite the change in circumstances, the arbitration does not warrant the appointment of three arbitrators.

> Replace the sole arbitrator with a three-member arbitral tribunal. The ICC Court may take this approach if (1) the ICC Court determines that there is change of circumstances of such a nature as to warrant the appointment of three arbitrators, or (2) the arbitration agreement refers to three arbitrators, the ICC Court appointed a sole arbitrator pursuant to the Expedited Procedure Rules, and one or more parties request the appointment of three arbitrators. It should be noted that Article 1(4) of Appendix VI gives full discretion to the ICC Court to follow the solution it deems appropriate in this situation. However, in taking this decision, the ICC Court may give weight to the number of arbitrators set forth in the arbitration agreement.

> Replace the sole arbitrator with a three-member arbitral tribunal, appointing the original sole arbitrator as president of the reconstituted arbitral tribunal. The ICC Court may favour this approach in order to take advantage of the original sole arbitrator’s knowledge of the case, provided the original sole arbitrator is able, willing and available to continue conducting the arbitration as the president of the arbitral tribunal.

> Replace the sole arbitrator with an entirely new three-member arbitral tribunal. The ICC Court may take this approach as a last resort, normally if the circumstances of the arbitration have changed so greatly that a three-member arbitral tribunal is warranted and the original sole arbitrator is not suitable, willing or available to sit as president of the reconstituted arbitral tribunal.

3 Duties, obligations, and appointment mechanism

Arbitrators appointed under the Expedited Procedure Provisions are subject to the same duties and obligations as any other arbitrator, in particular those of independence, impartiality and availability. However, special emphasis will be given to availability in light of the strict deadlines and overall objective of the Expedited Procedure Provisions. Furthermore, in order to comply with these time limits, arbitrators appointed under the Expedited Procedure Provisions are allowed a greater degree of discretion when adopting the procedural measures that are necessary to conduct the arbitration in an expeditious and cost-effective manner.

Accordingly, prospective arbitrators that are being considered for appointment under the Expedited Procedure Provisions will be requested to complete a form of acceptance, availability, independence and impartiality that highlights the characteristics and needs of the Expedited Procedure Provisions.

The mechanism for the appointment of arbitrators under the Expedited Procedure Provisions is the same as in the standard procedure. Except as provided in Article 2(1) of Appendix VI, Articles 12 and 13 of the ICC Rules apply. However, Article 2(2) of Appendix VI
requires that when the ICC Court is to appoint the sole arbitrator or, any other arbitrator for that matter, it shall do so ‘within as short a time as possible’.

This requirement will be emphasised by the ICC Court in communications to ICC National Committees invited to propose an arbitrator for a particular case pursuant to Article 13(3). The ICC Court may also take fallback measures to ensure a prompt solution if a given ICC National Committee does not comply with the time limits fixed by the ICC Court for making the proposal. ICC National Committees will also be requested to inform prospective arbitrators of the nature of the case and the availability required under the Expedited Procedure Provisions.

H | Proceedings before the arbitral tribunal

1 | General features

The main purpose of the Expedited Procedure Provisions is to create a simplified procedure for lower-value cases. The premise on which the Expedited Procedure Provisions are based is that expressed in Appendix IV, which was added to the ICC Rules in 2012 and which states that: ‘In cases of low complexity and low value, it is particularly important to ensure that time and costs are proportionate to what is at stake in the dispute’.

Against this backdrop, the Expedited Procedure Provisions have addressed three key areas: (i) procedural steps, (ii) time limits, and (iii) case management.

i. Procedural steps

In order to simplify the procedure, the Expedited Procedure Provisions have dispensed with the need to establish Terms of Reference. Article 3(1) of Appendix VI states that Article 23 (relating to Terms of Reference) shall not apply to arbitrations under the Expedited Procedure Provisions. This is because arbitrations valued at less than US$ 2 million normally involve limited issues and claims, making Terms of Reference less necessary for the organisation of the procedure.

The arbitral tribunal is therefore required to convene the case management conference directly. Of course, during the case management conference the arbitral tribunal is free to address any question relating to claims or issues in dispute or to the mission of the arbitral tribunal that would otherwise be addressed in the Terms of Reference.

The hearing is another crucial stage in the arbitration procedure. The presumption under the ICC Rules, and almost any other set of arbitration rules for that matter, is that a hearing will take place. Article 25(6) provides that the arbitral tribunal may decide the case solely on documents, unless any of the parties requests a hearing. Therefore, a hearing will take place whenever at least one party requests it. The Expedited Procedural Provisions reversed this presumption in Article 3(5) of Appendix VI, which allows the arbitral tribunal to decline to hold a hearing at all if it considers this to be appropriate. The Expedited Procedure Provisions also simplify formalities by expressly allowing any hearing that might take place to be conducted by way of videoconference or similar means of communication.

Finally, the Expedited Procedure Provisions tackle an aspect of procedure that has become commonplace in arbitration proceedings, often without justification: document production. Article 3(4) of Appendix VI expressly provides that the arbitral tribunal may decide not to allow requests for document production. While this measure is also possible under the standard ICC procedure because the ICC Rules do not create an obligation to allow document production requests, arbitral tribunals often feel compelled to allow such requests. Therefore, Article 3(4) serves as an encouragement for arbitral tribunals to deny such requests when they consider them inappropriate or unnecessary in resolving the dispute.

ii. Time limits

The simplification of the procedure will in itself reduce the amount of time required to conduct the arbitration. However, in order to further reduce time, the Expedited Procedure Provisions reduce certain time limits as follows:

> Case management conference. According to Article 3(3) of Appendix VI, the case management conference convened pursuant to Article 24 must take place within 15 days following the date on which the file is transferred to the arbitral tribunal. It is worth recalling that, according to Article 24(3) of the ICC Rules, arbitral tribunals are encouraged to convene any additional case management conferences as may be appropriate to ensure continued effective case management.

> Final Award. According to Article 4 of Appendix VI, the award must be rendered within six months from the date of the case management conference. While extensions are allowed pursuant to Article 31(2) of the ICC Rules, the Note indicates that arbitral tribunals are expected to conduct the case in a manner in which no extensions will be necessary. The Note also points out that any applications for an extension of time should be reasoned.
Submission of the draft award for scrutiny. The six-month time limit for rendering the final award includes the time needed for the ICC Court to perform scrutiny and approve the final award, and for the final award to be notified to the parties. Therefore, the Note indicates that the draft final award for scrutiny must be submitted to the ICC Court within five months from the date of the case management conference.

iii. Case management

Effective case management was one of the core objectives of the 2012 revision of the ICC Rules. Building on these revisions, the measures described above allow arbitral tribunals to be even more proactive in terms of case management for cases under the Expedited Procedure Provisions.

Proactive case management has its limits, however, and they should be respected. Article 22 establishes that in all cases — and this would certainly include cases under the Expedited Procedure Provisions — the arbitral tribunal must act fairly and impartially and ensure that each party has a ‘reasonable’ — as opposed to ‘every’ — opportunity to present its case. In deciding what is reasonable, arbitral tribunals should be mindful of potential rules of law that may be applicable to the award and, thus, make every effort to ensure that the award is enforceable. It is important to consider how any state courts that may be called upon to examine the validity of the award will regard certain procedural decisions taken by the arbitrator, such as deciding not to hold a hearing at all.

2 Procedure following suspension of the application of the Expedited Procedure Provisions

It should be said, to begin with, that situations in which the ICC Court may be called upon to suspend the application of the Expedited Procedure Provisions and replace or reconstitute the arbitral tribunal are likely to be rare.

The Expedited Procedure Provisions do not expressly indicate how the proceedings should be conducted after the Expedited Procedure Provisions cease to apply. Given that these situations are likely to be exceptional and that they are likely to involve singular fact patterns, it would be difficult and, perhaps, unnecessary to attempt to regulate how to reorganise the proceedings. This is precisely one of the areas where the arbitral tribunal and the ICC Court will need to act in the spirit of the Rules and the Expedited Procedure Provisions.

There are three questions that may arise in such situations: (1) Is there a need for Terms of Reference? (2) How will the remainder of the proceedings be organised? (3) Is there a need to repeat certain steps?

The last two questions are uncontroversial. To the extent that the arbitral tribunal is replaced or reconstituted, fully or partly, the provisions related to replacement of arbitrators, namely Article 15, shall apply. According to Article 15(4), once reconstituted, and after having invited the parties to comment, the arbitral tribunal shall determine if and to what extent prior proceedings shall be repeated. At the very least, a case management conference is likely to occur in order to reorganise the proceedings.

The need to establish Terms of Reference may depend on the circumstances of the case, in particular (1) whether one or more parties request Terms of Reference or whether, on the contrary, none of the parties do so; (2) whether the arbitral tribunal has been replaced or reconstituted, in which case Terms of Reference may assist the new arbitral tribunal in introducing itself to the parties and familiarising itself with the case; or (3) whether the circumstances of the case have changed substantially, in which case Terms of Reference may assist the arbitral tribunal and the parties in better defining the tribunal’s mission. In cases where Terms of Reference are to be established, the ICC Court is likely to fix a time limit of one month from the date on which the Expedited Procedure Provisions ceased to apply and/or the arbitral tribunal was reconstituted.

I Costs

The natural consequence of a shorter and simplified procedure is that it should be less costly. Given that the highest costs in arbitration proceedings are those related to the parties’ representation, it is expected that the simplified nature of the expedited procedure will reduce such costs.

Furthermore, arbitrations under the Expedited Procedure Provisions are submitted to a new set of scales, which is found in Appendix III. The arbitrator’s fees in these scales are 20% lower than in ordinary proceedings in view of the simplified nature of the procedure. These scales may therefore not be suitable if the parties intend to depart substantially from the procedure established in the Expedited Procedure Provisions.

According to Article 37(1), a provisional advance may be fixed by the Secretary General after receipt of the Request for Arbitration. Under the Expedited Procedure Provisions, such provisional advance
on costs is intended to cover the costs until the case management conference. If in the Request for Arbitration the claimant quantifies or estimates its claims as amounting to less than US$ 2 million, the Secretary General will fix a provisional advance on costs based on the scales for the expedited procedure. The provisional advance on costs may be readjusted at a later stage on the basis of the standard scales if the Expedited Procedure Provisions are ultimately not applied.

The advance on costs will be fixed on the basis of the scales for the expedited procedure once the Secretariat or, as the case may be, the Court has determined that the Expedited Procedure Provisions are applicable. If the ICC Court later decides that the Expedited Procedure Provisions no longer apply, it will readjust the advance on costs on the basis of the standard scales.

J Award

1 Form

With respect to form, the Expedited Procedure Provisions do not establish any special requirement for awards rendered under the Expedited Procedure Provisions. That said, arbitrators are encouraged to limit the section related to procedure and facts to what is strictly necessary to understand the award, and to state the reasons in a concise manner.

2 Scrutiny of awards

One of the ICC Court’s chief hallmarks is the scrutiny of awards. It is a crucial quality control check performed by the ICC Court and the Secretariat. The ICC Court is therefore better placed than perhaps any other institution to administer cases on an expedited basis as users will have the assurance of this important safety net. The tribunal’s reasoning and due process are matters typically addressed during the scrutiny process.

The new Article 4(6) of Appendix II states that, exceptionally and for purposes of the Expedited Procedure Provisions only, a one-person Committee of the ICC Court can be constituted. The ICC Court already meets in a Committee Session twice per week and in a Plenary Session once per month. It also holds special sessions at least once per month to scrutinise awards drafted in the most commonly used languages other than English and French. Therefore, it is unlikely that this provision will be used very often.

It is expected that in the years to come the ICC Court will develop specific practice for the scrutiny of awards under the Expedited Procedure Provisions in order to ensure their highest possible quality, without undermining the efficiency that is the distinctive feature of the Expedited Procedure Provisions.

3 Efficiency in the submission of draft awards for scrutiny

Awards in arbitrations under the Expedited Procedure Provisions must be submitted to scrutiny by the ICC Court within the deadlines that have been described above.

In 2016, the ICC Court announced a new policy aimed at encouraging efficiency and reducing delays in the preparation of awards by arbitrators. To this end, the Court may increase the arbitrators’ fees above the amount that it would otherwise consider fixing if the arbitrators have been particularly efficient. The ICC Court also published a scale of reductions applicable in the event of unjustified delays under the standard procedure.

A new scale of reductions has now been established and published for delays in cases under the Expedited Procedure Provisions. The fees that the Court would otherwise consider fixing are reduced by 5% to 10%, if the draft award is submitted for scrutiny up to seven months after the case management conference; by 10% to 20% if the draft award is submitted for scrutiny up to nine months after the case management conference; and by 20% or more, if the draft award is submitted for scrutiny more than ten months after the case management conference.

Conclusion

The 2017 revision of the ICC Rules, while limited in scope, may nevertheless be considered highly significant for two reasons.

First, past revisions of the ICC Rules have been comprehensive in scope. While revisions of this kind will continue to be necessary, particularly after lengthy periods of time, occasional limited revisions are also useful as they allow arbitration institutions to adapt certain aspects of their procedures to rapidly evolving circumstances and users’ demands. By completing a revision process in a relatively rapid manner to address immediate concerns, the ICC Court has strengthened its standing as a modern, agile and competitive service provider.

Second, the ICC Rules have traditionally followed a ‘one size fits all’ philosophy, which has allowed it to provide the highest standard of quality to all of the cases it administers. The Expedited Procedure Provisions
have changed this philosophy by providing a service adapted to low value claims without compromising quality, for which ICC arbitration is so widely renowned. Achieving this fine balance is perhaps one of the key successes of the 2017 revision.

As with any other revision process, time will tell to what extent this revision and, in particular, the new Expedited Procedure Provisions live up to expectations. However, it is perhaps safe to predict that they have a promising future before them. ICC arbitration owes the continuous success it has enjoyed throughout the years to the unique experience and know-how of the ICC Court and its Secretariat. The ICC Rules have been adapted, swiftly and successfully, to the most unexpected of situations, and now will be no exception. This is perhaps the most significant guarantee users receive when they agree to refer their disputes to ICC arbitration.

Notes
2. The Note and other ICC case management documents can be viewed and downloaded at: https://iccwbo.org/dispute-resolution-services/arbitration/practice-notes-forms-checklists/.
3. While it is difficult to measure the success of the ICC Rules in numeric terms, the all-time record of 966 new arbitrations filed in 2016, and the 50 emergency arbitrator applications that have been filed since 2012 (under arbitration agreements concluded after 1 January 2012), can be taken as very positive indicators of success.
4. Institutions that have included this type of rules include: (i) the Singapore International Arbitration Centre (2010), the American Arbitration Association (2014), the Hong Kong International Arbitration Centre (2013) and the Arbitration Institute of the Stockholm Chamber of Commerce (1999).
5. For more information on the discussions that led to the adoption of these Guidelines, see L. Barrington, ‘ICC’s New Guidelines for Arbitrating “Small” Claims: A view from behind the scenes in a global task force’, Law Asia, May 2003, at 10-11.
7. The Survey was undertaken by the School of International Arbitration, Centre for Commercial Law Studies, Queen Mary University of London, with the support of White & Case.
8. The numbering of the articles of the ICC Rules has changed as a result of the introduction of the new Article 30.
9. Article 29 of the ICC Rules (Emergency Arbitrator) has also been amended by expressly mentioning that the Emergency Arbitrator Provisions shall not apply to arbitrations arising out of arbitration agreements concluded before 1 January 2012. Previously, it referred to ‘the date on which the [ICC] Rules came into force’ without specifying the date.
11. For instance, the amount set by the Singapore International Arbitration Centre is US$ 6 million, by the Hong Kong International Court of Arbitration US$ 5.2 million, by the American Arbitration Association US$ 250,000, while the Stockholm Chamber of Commerce does not specify an amount.
12. See L. Barrington, supra note 5.
13. See Article 4(3)(d), Article 5(5)(b), Articles 7(3) and 7(4), and Articles 8(2) and 8(3).
15. Remuneration of arbitrators under the Expedited Procedure Rules is addressed further below.
16. In 2015, the Secretary General referred only 19 out of 170 jurisdictional pleas to the ICC Court for a decision under Article 6(4). Of these pleas only 10 involved more than one arbitration agreement.
17. As indicated in section B 1 above, Article 6(1) of the Rules provides that by agreeing to the ICC Rules parties are deemed to have submitted ipso facto to the Rules in force on the date of commencement of the arbitration.