Expedited arbitration, autonomy and due process

Alexander Uff

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Expedited arbitration gained currency as part of the arbitration community's response to the growth of time and cost of arbitral proceedings. Such provisions encourage arbitral tribunals and arbitral institutions to adopt procedures which alter the balance between time and cost, on the one hand, and some of the hallmarks of arbitration as a consent-based dispute resolution process, including party autonomy and due process, on the other.

Provisions for expedited arbitration apply in appropriate cases that are identified either by the amount in dispute, party agreement or, in some cases, sufficient urgency. Different arbitration rules apply different "gateway" provisions for expedited arbitration:

» Under Article 30 of the ICC Rules, the Expedited Procedure Provisions apply automatically where the amount in dispute is below a financial threshold (currently US$ 3 million), subject to the ICC Court's determination, or otherwise where the parties agree to an expedited procedure.

» Article 5 of the SIAC Rules likewise applies a financial threshold (S$ 6 million), and also includes cases of exceptional urgency. Unlike the ICC Rules, a party must request the arbitration to be expedited and the decision to apply expedited provisions is taken by the President of SIAC.

» By contrast, the Stockholm Chamber of Commerce (SCC) provides a freestanding set of Rules for Expedited Arbitration, to which the parties must expressly agree. The SCC advises a model arbitration clause by which the parties empower the SCC to decide whether to apply the Expedited Arbitration Rules or standard arbitration rules.

» Like the SCC, the recently published UNCITRAL Expedited Arbitration Rules will apply only by express agreement of the parties (Article 1).

These "gateway" provisions are important in relation to party autonomy. Expedited arbitration procedures frequently provide for the appointment of a sole arbitrator, including overriding contrary provisions of the parties' arbitration agreement. Proceeding this way requires caution as arbitral awards may be set aside, or enforcement refused, where the composition of the arbitral tribunal "was not in accordance with the agreement of the parties" (UNCITRLAL Model Law (2006), Article 34(2)(a)(iv) and Article V(1)(d) of the New York Convention). The question will therefore be what constitutes the "agreement of the parties" for this purpose. As the SCC and UNCITRAL expedited rules apply by express agreement of the parties, it may not be difficult to find the requisite party agreement. The argument may be less straightforward where the application of expedited rules does not require specific party agreement, but flows from a term of the arbitration rules the parties have selected, as is the case with the ICC or SIAC Rules. A set aside application on this basis was rejected by the Singapore High Court in ***AQZ v ARA*** [2015] SGHC 49, however a court in Shanghai refused to enforce another award in an expedited SIAC arbitration under Article V(1)(d) of the New York Convention for this reason (***Noble Resources International Pte Ltd v Shanghai Good Credit International Trade Co, Ltd*** [2016] Shanghai No.1 Intermediate People's Court (Hu 01 Xie Wai Ren No. 1)). The 2016 SIAC Rules, Article 5.3, now includes language intended to bolster party consent to this mechanism. For similar reasons of consent, the ICC Rules specify that they "shall take precedence over any contrary terms of the arbitration agreement" (Article 30.1) and provide that an expedited procedure is inapplicable to arbitration agreements concluded before the ICC expedited procedure came into force – i.e., to which the parties could not be considered to have consented.

Expedited arbitration procedures normally provide a non-exhaustive menu of procedural matters which the arbitral tribunal has the discretion to adopt to ensure the expeditious determination of the parties' dispute. These include curtailing time periods, limiting the number and length and scope of written submissions, similarly limiting the evidence of fact and expert witnesses, and dispensing with or limiting document production requests.

These case management powers are not unique to expedited arbitration. This is reflected in the approach adopted in the 2020 update to the LCIA Rules of Arbitration, which retains the provision for expedited formation of an arbitral tribunal

(Article 9A) but, like previous iterations of the LCIA Rules, does not provide a gateway (whether financial or otherwise) for the application of expedited procedures, but reiterates the arbitral tribunal's "discretion" in all cases to "make any procedural order it considers appropriate with regard to the fair, efficient and expeditious conduct of the arbitration" (Article 14.5). Article 14.6 includes a non-exhaustive list of procedural directions "with a view to expediting the procedure".

The purpose of mentioning specific procedural measures that an arbitral tribunal has discretion to adopt is therefore not a modification of an arbitral tribunal's procedural powers, but serves principally to shape the debate between the parties and the tribunal on procedural matters and, possibly, stiffen the arbitrator's resolve to act assertively on procedural matters at an early stage to promote efficiency. It is difficult successfully to challenge arbitrators' case management decisions. In ***China Machine New Energy Corp. v Jaguar Energy***, the Singapore Court of Appeal rejected an application to set aside an award based inter alia on a tribunal's case management of an arbitration under an agreement that provided for an expedited schedule, noting that this would be a context-specific enquiry and the tribunal's decisions should be afforded a margin of deference (***China Machine New Energy Corp v Jaguar Energy Guatemala LLC*** [2020] SGCA 12; see also ***ASM Shipping Ltd of India v TTMI Ltd of England*** [2005] EWHC 2238 (Comm) at 38, asking whether a procedural decision was "so far removed from what could reasonably be expected of the arbitral process that it must be rectified".

Hearings add significantly to the duration and cost of an arbitration. Standard international arbitration rules normally entitle any party to request a hearing. The UNCITRAL Rules (2013) are typical in providing that "If at an appropriate stage of the proceedings any party so requests, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses … or for oral argument" (Article 17.3). Article 26.1 of the 2021 ICC Rules similarly requires that "A hearing shall be held if any of the parties so requests …".

Provisions for expedited arbitration modulate the parties' right to a hearing, potentially limiting a prominent aspect of a party's due process right to an opportunity to present its case. Article 5.2(c) of the SIAC Rules, for instance, provides:

> *the Tribunal may, in consultation with the parties, decide if the dispute is to be decided on the basis of documentary evidence only, or if a hearing is required for the examination of any witness and expert witness as well as for any oral argument.*

Article 5 of Appendix VI to the ICC Rules, which applies to expedited cases, takes a similar approach in providing that the tribunal may after consulting the parties "decide the dispute solely on the basis of documents submitted by the parties, with no hearing".

Article 33.1 of the SCC Expedited Rules provides a framework to dispense with a hearing:

> *A hearing shall be held only at the request of a party and if the Arbitrator considers the reasons for the request to be compelling.*

The UNCITRAL Expedited Arbitration Rules take a different approach, providing in Article 11:

> *The arbitral tribunal may, after inviting the parties to express their views and in the absence of a request to hold hearings, decide that hearings shall not be held.*

Article 11 falls to be read in light of the arbitral tribunal's control over the content of the hearing under Article 15(3):

> *The arbitral tribunal may decide which witnesses, including expert witnesses, shall testify to the arbitral tribunal if hearings are held.*

Article 14.6(v) of the LCIA Rules includes a power of the tribunal to "dispens[e] with a hearing, subject always to Article 19". Article 19.1 provides that "Any party has the right to a hearing before the Arbitral Tribunal …". An LCIA arbitral tribunal therefore could only dispense with a hearing if the parties agree, although as with other arbitration rules, a tribunal has the power to refuse or limit the testimony of witnesses (Article 20.4) and thus control the content of the hearing.

Provisions relating to dispensing with a hearing fall to be viewed in light of due process requirements, the breach of which may lead to an award being set aside by the courts of the seat (for example under UNCITRAL Model Law, if a party was "unable to present his case" (Art. 34(2)(a)(ii)), or recognition and enforcement being refused on the same basis by an enforcing court under Article V(1)(b) of the New York Convention.

The Singapore Court of Appeal in ***CBS v CBP*** recently found that an arbitral tribunal's refusal to hold a hearing on the request of a party was a breach of natural justice (***CBS v. CBP*** [2021] SGCA 4, Civil Appeal No. 30 of 2020, para. 79.). The court attached weight to the fact that the applicable arbitration rules required the tribunal to hold a hearing at a party's request and also emphasised that case management powers did not override rules of natural justice (id., 53-57, 61.). While arbitral tribunals have on occasion declined to hear witness evidence in the absence of a party agreement, this situation is likely to be a rarity (for an example see ***Dalmia Dairy Industries Ltd v National Bank of Pakistan*** [1978] 2 Lloyd's Rep 223, involving an ICC arbitration which notably turned exclusively on legal issues). It remains to be seen how arbitrators will approach provisions that give them discretion to dispense with a hearing in expedited proceedings, and also how reviewing and enforcing courts will view them. As a practical matter, arbitrators may be inclined to play safe, and with the recent growth of virtual hearings, there is greater scope to comply with a request for a hearing while maintaining an expedited schedule.

Balancing due process with efficiency has long been enshrined in international arbitration. The English Arbitration Act 1996 incorporates parallel general duties of the arbitral tribunal to "act fairly and impartially as between the parties giving each party a reasonable opportunity of putting his case …" while "avoiding unnecessary delay or expense" (s. 33(1)(a)-(b)). Similarly, Articles 22.1 and 22.4 of the 2021 ICC Rules respectively provide that the arbitral tribunal shall "make every effort to conduct the arbitration in an expeditious and cost-effective manner having regard to the complexity and value of the dispute" and "shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case". As seen, expedited arbitration rules aim to shift how an arbitral tribunal balances those interests to meet the exigencies of economy and/or urgency in particular cases. Allowing similar considerations of efficiency to trump such deep-rooted aspects of arbitration as a party's right to select arbitrators or a right to a hearing is a more marked shift and is likely to attract greater scrutiny.

Alexander Uff

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Alexander provides advice, representation and advocacy to corporations, States and State-owned entities in complex international commercial and investment treaty arbitrations. His work has focused in recent years on disputes in the energy, mining and infrastructure sectors, investment treaty claims and commercial disputes, while his experience covers numerous other industries and subject matters including IP and licensing, M&A, shareholder and joint venture disputes, pharmaceuticals, IP, retail, food industries, aviation and agribusiness, among others.

> view Alexander's full profile

alexander.uff@quadrantchambers.com