

The New 2017 ICC Rules of Arbitration

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The International Court of Arbitration (the “ICC Court”) of the International Chamber of Commerce (the “ICC”), the world’s leading international arbitral institution, has made important changes to the ICC Arbitration Rules that came into force in 2012 (the “2012 Rules”) to make ICC arbitration proceedings more efficient, cost-effective, and transparent.

The ICC announced its revision of the 2012 Rules on 4 November 2016, and the revised rules (the “Revised Rules”) entered into force on 1 March 2017. The Revised Rules will apply to arbitrations commenced after 1 March 2017, regardless of the date of the parties’ arbitration agreement.

The most important change in the Revised Rules is the introduction of fast-track rules for “small claims” not exceeding US\$2 million, the Expedited Procedure Rules (the “Expedited Rules”). The Expedited Rules will apply only to arbitration proceedings based on arbitration agreements made after 1 March 2017.¹

In addition, the ICC has issued a new guidance note, the Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, which is dated 1 March 2017 (the “Note”). The Note provides detailed guidance on the Revised Rules, including the Expedited Rules.

I. The Expedited Rules

The Expedited Rules are set out in Article 30 and Appendix VI of the Revised Rules. Certain other provisions of the Revised Rules that apply to standard arbitration proceedings also apply to the expedited proceedings.

A. Scope of Application

The Expedited Rules apply automatically to all arbitration proceedings where (1) the amount in dispute does not exceed US\$2 million, (2) the arbitration agreement was entered into after 1 March 2017, and (3) the parties have not opted out in their arbitration agreement. The US\$2 million threshold is the aggregate value of all quantified claims, excluding costs and interest. The Note clarifies that the parties must also, to the extent possible, provide an estimate of the value of any non-monetary claims. The parties are free to opt out of the Expedited Rules, but they must expressly do so in their arbitration agreement. The parties are likewise free to opt in to the Expedited Rules in their arbitration agreement,

¹ Although parties are allowed to opt in, discussed in Section 1.A herein.

even if the amount in dispute exceeds US\$2 million or their arbitration agreement was entered into prior to 1 March 2017. The ICC Court may determine the appropriateness of the application of the Expedited Rules to a particular proceeding at any time, either upon a party's request or on its own motion.

B. Main Features

The Expedited Rules provide a framework in which to conduct an arbitration proceeding in approximately six and a half months, from the time the case file is submitted to the arbitral tribunal to the rendering of the final award. This is significantly faster than a standard arbitration proceeding, which can often take one to two years, depending on the complexity of the case.

- **Sole Arbitrator.** The arbitral tribunal will consist of a sole arbitrator instead of a panel of three arbitrators, as is normally used in standard arbitration proceedings.
- **No Terms of Reference.**
- **Time Limit for New Claims.** No party can make new claims after the arbitral tribunal has been constituted, without authorization by the tribunal.
- **Advance on Costs.** The Secretary-General may request the claimant to pay an advance on costs up until the case management conference.
- **Case Management Conference.** A case management conference is required, just like in standard arbitration proceedings, but a 15-day time limit is imposed, which runs from the date on which the arbitral tribunal receives the case file.
- **Procedural Measures.** The arbitral tribunal has considerable discretion to adopt procedural measures it considers appropriate and can decide:
 - Not to allow document production;
 - To limit the number, length, and scope of written submissions and written witness evidence (both fact witnesses and experts);
 - To decide the dispute solely on the basis of the documents submitted by the parties (i.e. no hearing and no examination of fact witnesses or experts); and
 - To hold a “distance hearing” (by videoconference, telephone, or similar means of communication) instead of an in-person hearing.
- **Time Limit for Rendering the Award.** The arbitral tribunal must render its final award six months from the date of the case management conference.
- **Reduced Arbitrator's Fees.** The arbitrator's fee range is reduced by 20% compared to standard proceedings.

C. Potential Problems with the Expedited Rules

A fundamental principle of international arbitration is party consent. The ICC has now provided rules that may, in certain circumstances, conflict with what a party consented to in its arbitration agreement. The automatic application of the Expedited Rules to certain proceedings could be considered as non-consensual revisions to an arbitration agreement. The Revised Rules address this potential conflict and provide that the parties' agreement to arbitration under the Revised Rules “takes precedence over any contrary terms of the arbitration agreement.” If a party objects to the automatic application of the Expedited Rules to its proceeding, it can request that the ICC Court determine their appropriateness. If the proceeding continues under the Expedited Rules and the objecting party is dissatisfied with the award, it could initiate set-aside proceedings and/or try to oppose the recognition and enforcement of the award on the grounds of inoperative clause or due process violation.

II. Other New Provisions of the Revised Rules

The time limit for the arbitral tribunal to establish the Terms of Reference has been reduced from two months to thirty days from the date on which it receives the case file from the ICC.

The ICC Court can now disclose, without having to obtain the consent of all parties, the reasons for its procedural decisions, including decisions on (i) the appointment, confirmation, challenge, or replacement of an arbitrator, (ii) prima facie jurisdictional decisions, and (iii) consolidations. This brings the ICC into line with other arbitral institutions who give reasoned decisions on certain issues.

The ICC's administrative expenses have increased. The increase is effective as of 1 January 2017 for all standard arbitrations commenced on or after such date and 1 March 2017 for all expedited proceedings. Although the Revised Rules set out separate Scales of Administrative Expenses and Arbitrator's Fees for standard proceedings and expedited proceedings, the administrative expenses are the same for both types of proceedings. It is only the Arbitrator's Fees which are different, and are 20% less for expedited proceedings compared to standard proceedings.

III. New Features in the Note

The ICC has introduced new provisions concerning the conduct of all participants in the arbitration and encourages parties and tribunals to draw inspiration from, and possibly adopt, the IBA Guidelines on Party Representation in International Arbitration.

An arbitrator or prospective arbitrator is prohibited from engaging in ex parte communications with a party or party representative concerning the arbitration, except in certain limited circumstances.

The ICC has introduced financial rewards and monetary penalties for arbitral tribunals and the ICC Court for their efficiency (or lack thereof) in rendering awards in both standard and expedited proceedings. Arbitrator's fees can be increased for efficient conduct of the proceeding, and arbitrator's fees and the ICC Court's administrative expenses can be reduced in case of delay in rendering the award.

IV. Going Forward

The Revised Rules, including the Expedited Rules, will likely be appreciated by the international business and legal communities for their efforts to increase the efficiency and transparency of ICC arbitrations. Now, as a practical matter, businesses and their counsel should be careful when selecting ICC arbitration as their dispute resolution procedure in contracts. They need to make sure they pick the right framework for potential disputes that could arise from their contract – either the standard or expedited proceedings – and that their arbitration agreement clearly indicates their choice. As always, using the ICC model arbitration clauses in the Revised Rules is a good idea. If the Expedited Rules would automatically apply but the parties don't want them to, they should include the ICC's model opt out language in their arbitration agreement. On the other hand, if the Expedited Rules would not normally apply to their proceeding but the parties want to opt in, they should also make that clear in their arbitration agreement.

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