

THE CHALLENGES  
AND THE FUTURE  
OF COMMERCIAL  
AND INVESTMENT  
ARBITRATION

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# THE CHALLENGES AND THE FUTURE OF COMMERCIAL AND INVESTMENT ARBITRATION

Liber amicorum  
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# FAST TRACK PROCEEDINGS, EXPEDITED PROCEDURE AND EMERGENCY ARBITRATOR – PROS AND CONS

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## 1. INTRODUCTION

Twenty or more years ago, some of the specific advantages of international arbitration were cost-effectiveness on the one hand and speed on the other. Generally, arbitration was believed to be a quick and cost-efficient dispute resolution mechanism. If we look at typical international arbitration cases nowadays, this is unfortunately no longer the case. Therefore, it should come as no surprise that a new ‘trend’ – or even a need – for faster proceedings has emerged. Five or six years ago, fast track arbitration was often modelled on a case-by-case basis alongside institutional rules that already existed. In their recent change of rules, many arbitral institutions introduced specific new rules for such phenomena. Some of them, like the Vienna Rules, are applicable on an ‘opt-in’ basis, whereas others (like the Swiss Rules 2012) apply in general if the value in dispute does not exceed a certain sum, for example one million Swiss Francs.<sup>1</sup>

## 2. FAST TRACK PROCEEDINGS IN GENERAL

Even though fast track arbitration may appear in *ad hoc* arbitration as well as in institutionally administered cases, the increase in the number of arbitral institutions creating specific rules clearly demonstrates that there is a ‘need for speed’ in arbitral proceedings after all.

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<sup>1</sup> Article 42 Swiss Rules 2012.

Generally speaking, fast track arbitration is not a specific kind of arbitration, but rather incorporates various factors that ensure a speedy procedure,<sup>2</sup> such as strict time limits, the limitation of procedural steps, the use of modern means of communication and, sometimes, it also entails a shortened version of the award without full reasoning.<sup>3</sup>

But, there is no light without shadow: there are also some fundamental requirements that fast track arbitration has to meet in order to make a 'fast track award' enforceable under the New York Convention. First, any fast track arbitration proceedings must ensure that, despite the desired speed, each party must be fully able to present the case,<sup>4</sup> and thus be ensured the right to be heard.

Secondly, any award to be rendered in fast track proceedings must comply with public policy.<sup>5</sup> In this respect, it was found to be contrary to public order if the parties had no opportunity whatsoever to comment on a certain piece of evidence, e.g. an expert report during the arbitration proceedings.<sup>6</sup> On the other hand, the good news is that even the absence of full reasoning for an award is usually, at least from a European perspective, not considered a sufficient reason to refuse recognition and enforcement. In this respect, however, it must be borne in mind that the case may be seen differently if the law of the state in which enforcement is sought explicitly sets up the requirement of a reasoned award.<sup>7</sup>

Thirdly, where the arbitral tribunal lacks competence, this can be seen as another reason for non-enforcement.<sup>8</sup> This may be the case if the parties stipulate that the arbitral award must, because of the fast track nature of the proceedings, be rendered within a certain time frame, e.g. six months, but the arbitral tribunal only renders the award after twelve months. If the agreement of the parties on fast track arbitration within such a strict time limit is to be understood in a way that the arbitral tribunal loses its competency afterwards, there is a risk that an arbitral award rendered in fast track proceedings after the state of 'time-out' has indeed

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<sup>2</sup> See E. Gaillard, J. Savage (eds.), *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, Kluwer Law International 1999, p. 680.

<sup>3</sup> See e.g. J. Fry, S. Greenberg, F. Mazza, *The Secretariat's Guide to ICC Arbitration*, Paris: ICC Publication No. 729 E, 2012, 3-1510.

<sup>4</sup> See Article V, Section 1b, New York Convention.

<sup>5</sup> See Article V, Section 2b, New York Convention.

<sup>6</sup> See e.g. J. Fry, S. Greenberg, F. Mazza, *The Secretariat's Guide...*, 3-1511.

<sup>7</sup> I. Welser, C. Klausegger, *Fast Track Arbitration: Just fast or something different?*, in: Klausegger, Klein, Kremsehner, Petsche, Pitkowitz, Power, Welser & Zeiler (eds.), *Austrian Arbitration Yearbook 2009*, p. 272.

<sup>8</sup> See Article V, Section 1c, New York Convention.

been rendered by an incompetent body and may therefore not be enforced under the New York Convention.

Therefore, institutional or tailor-made rules that provide for fast track arbitration must definitely avoid these three pitfalls. Luckily, this message has been well received, and both institutions and arbitral tribunals that have set up fast track arbitration rules have reacted accordingly. This is especially true for the expedited proceedings under the new Vienna Rules, which are particularly familiar to the author.

### 3. THE EXPEDITED PROCEDURE UNDER THE VIENNA RULES 2013

The Vienna Rules explicitly decided against an additional ‘interim’ solution like an emergency arbitrator – which will be dealt with later – but chose to introduce specific provisions for an expedited procedure in its Article 45. The declared aim of these provisions was to provide for a ‘fast track’ framework without any reduction in quality.<sup>9</sup>

Unlike other institutional rules where fast track proceedings go hand in hand with a certain value of the dispute in question,<sup>10</sup> the Vienna Rules explicitly chose to leave it to the parties to agree on the expedited procedure for any dispute, regardless of its value. Therefore, they chose an ‘opt-in solution’. If the parties therefore wish to go for fast track proceedings under the Vienna Rules, in addition to the usual model clause ‘All disputes or claims arising out of or in connection with this contract, including disputes relating to its validity, breach, termination or novelty shall be finally settled under the rules of arbitration of the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna (Vienna Rules) by one or three arbitrators appointed in accordance with the said rules’, they need to add one more sentence: ‘The provisions on expedited proceedings are applicable.’<sup>11</sup>

If the parties have not ‘opted in’ in advance, Article 45 (1) of the Vienna Rules also allows them to agree on expedited proceedings until the answer to the statement of claim is submitted. Of course, it is neither at the discretion of the Secretary General, the Board of the VIAC or the arbitral tribunal itself to ‘force’ the parties into such an expedited procedure.

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<sup>9</sup> Haugeneder, Netal in: *Handbook Vienna Rules*, Vienna: 2014, Art. 45 mn2.

<sup>10</sup> E.g. Swiss Rules.

<sup>11</sup> Haugeneder, Netal in: *Handbook Vienna Rules*, Vienna: 2014, Art. 45 mn3 *et seq.*

If the parties opt into the VIAC expedited procedure, they may be assured that all prerequisites of the New York Convention are met and they do not run the risk that the award rendered in such fast track proceedings will be unenforceable.<sup>12</sup>

Key features of the VIAC expedited procedure are strict time limits, a limitation of procedural steps (namely, no post-hearing briefs) and the use of modern means of communication such as email. Apart from these new facilities, the possibility of an oral hearing, a joinder, a consolidation of proceedings and the submission of expert opinions remain. In addition, the parties may at any time switch to normal proceedings if they see that the case is too complex for a fast track solution.

If we look at the Vienna Rules in more detail, there is a short time limit for payment of the advance on costs of fifteen days, and there are also shorter time limits for the nomination of arbitrators, also of fifteen days. However, as the claimant in fast track proceedings often prepares its statement of claim for a long time, it was a deliberate decision to include in the VIAC Rules a provision that states that the time limit for submitting the answer to the statement of claim remains the 'normal' period of thirty days. On the other hand, within these thirty days, the respondent will also have to decide on counterclaims or set-off, as both of these procedural steps must be brought in together with the answer to the statement of claim.<sup>13</sup>

The time limit for the end of the proceedings may at first glance seem generous as the final award must 'only' be rendered within six months of the transmission of the file. As we all know, 'normal' ICC proceedings should also, as a general rule, be terminated by an award six months after the signing of the terms of reference. On the other hand, it is a fact that ICC proceedings in general take much, much longer. Even in straightforward cases, the deadline is frequently extended by the ICC Court, sometimes even at its own motion. According to the experience of the author, ICC proceedings, despite the six-month time limit, usually take one to two years or even longer.

Contrary to this, the six-month time limit as laid down in Article 45 (8) of the Vienna Rules is to be taken seriously. On the other hand, in order to avoid the aforementioned risk of loss of competency, there is a specific provision which allows the Secretary General to extend the time limit in case of a reasoned request by the arbitral tribunal or on its own, and it is also specifically laid down in the Rules that exceeding the time limit

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<sup>12</sup> The enforceability of arbitral awards is an important topic, also when it comes to fast track arbitration. See e.g. I. Welser, C. Klausegger, *Fast Track Arbitration...*, p. 269.

<sup>13</sup> See Art. 45 para. 4 Vienna Rules.

for the award will not render the arbitration agreement invalid or deprive the arbitral tribunal of its jurisdiction.

Despite the general wording ‘arbitral tribunal’ in the Vienna Rules, expedited proceedings are normally conducted by a sole arbitrator unless the parties agree otherwise. If we look at international arbitration practice, this is a very wise decision as the inability of three arbitrators to find an agreement on possible dates for a hearing as well as the need to circulate drafts of decisions between members of the arbitral tribunal is often a serious cause for delay.<sup>14</sup>

As it should be, the course of the proceedings itself is also much faster if the expedited procedure is chosen. Unless otherwise determined by the arbitral tribunal, there is only one further round of written submissions after the statement of claim and the answer thereto.<sup>15</sup> All factual arguments and written evidence must be attached to the written submissions, including potential written witness statements. On the other hand, there is the possibility of an oral hearing, which should not be deferred, postponed or interrupted, in which all oral evidence will be taken and all legal issues addressed. The fact that there are no written submissions after the oral hearing, thus, no post-hearing briefs are submitted, should also help to cut down on costs. On the other hand, as already outlined above, there is no shortened award, so that parties will neither run the risk of the award being unenforceable, nor will they experience the ‘bitter taste’ of not knowing why the arbitrator decided in their favour or against them.

### 3.1. Expedited proceedings – Pros

So, if we evaluate expedited proceedings as outlined above, what are the main advantages?

First of all, they are fast. In the economic landscape as it is nowadays, justice delayed is often justice denied. The time frame of six months or an even shorter time frame under other institutional provisions ensures that the parties get a quick and enforceable decision.

Additionally, if the case is decided by a sole arbitrator, as is the case with the Vienna Rules, arbitrator’s fees are generally much cheaper than a case decided by three arbitrators. The award that comes out of expedited proceedings is final and binding, unlike the order of an emergency arbitrator. As such an award stays within the Rules, there is no risk that

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<sup>14</sup> Haugeneder, Netal in: *Handbook Vienna Rules*, Vienna: 2014, Art. 45 mn 13 *et seq.*

<sup>15</sup> I. Welser, C. Klausegger, *Fast Track Arbitration...*, p. 261.



the arbitral tribunal will lose its competency even after the time limit for submitting the award has elapsed.

Furthermore, expedited proceedings ensure that the parties concentrate on substantive issues from the very beginning. There is no room for material ‘smoke bombs’ to be thrown, and as strict cut-off-dates apply, the party that seeks to delay the issuance of an award risks that its arguments will not be heard at all at a later stage.<sup>16</sup> This goes hand in hand with the necessity of thorough preparation and concentration on the main issues from the very beginning, consequently meaning it is also necessary for legal counsel to deal with the substantive facts and legal issues at a very early stage, which may even facilitate a quick amicable settlement.

On the other hand, if the final award is really rendered within six months, there is usually neither a need for interim measures nor for an (often cost-intensive) emergency arbitrator. Furthermore, the possibility and necessity to submit all briefs electronically also avoids costly formalism like double-sided A5 format mini-bibles that keep a small army of secretaries occupied over long weekends.

### 3.2. Expedited procedure – Cons

Of course, where there is light there is shadow. Sometimes ‘speed kills’, and some cases are simply not suited to being resolved in fast track proceedings.<sup>17</sup> This is particularly true if the documentation is complex and not promptly available, if there is a need for expert opinions, if possible witnesses are scattered all over the globe and cannot be expected to provide the necessary evidence or even sign witness statements on time, or if the strict time limits do – practically speaking – not allow for necessary expert opinions.

It is a common observation that, in principle (and as always in arbitration), the behaviour of the parties is the crucial factor which decides whether an expedited procedure is a success or not. However, the expedited procedure has a lot of potential and is often the more attractive alternative to ‘ordinary’ arbitration.

## 4. THE EMERGENCY ARBITRATOR

In clear contradiction to fast track or expedited proceedings, which are, as outlined above, basically ‘full’ arbitration proceedings, the emergency

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<sup>16</sup> Ordinary arbitration proceedings usually do not have such advantages. See, e. g. I. Welser, C. Klausegger, *Fast Track Arbitration...*, p. 260.

<sup>17</sup> *Ibid.*, p. 274.

arbitrator usually only grants interim measures or conservatory relief. One of the best known emergency arbitrator proceedings is the institution introduced by the new ICC Rules in 2011. Unlike the expedited proceedings under the Vienna Rules, which provide for an 'opt-in solution', the ICC emergency arbitrator is always a possible option unless the parties have explicitly opted out of the emergency arbitrator provisions. Therefore, if the parties do not want an emergency arbitrator to potentially grant interim measures, they must include the following sentence in the arbitration clause: 'The Emergency Arbitrator Provisions shall not apply.'

Generally speaking, the emergency arbitrator, who is a sole arbitrator, is to grant interim or conservatory relief only. Thus, instead of asking the arbitral tribunal itself to render a preliminary injunction, or instead of reverting to the national courts to grant such measures, the parties may submit an application for emergency measures to the Secretariat of the ICC Court. Such request may either be submitted together with or after a corresponding request for arbitration has been submitted. It may, however, even be submitted before the request for arbitration, in which case the request must be submitted within ten days of such request being made.<sup>18</sup> There is no possibility for the parties to agree on the person of the emergency arbitrator, but the president of the ICC Court will select a suitable candidate.<sup>19</sup> It is important to note that an emergency arbitrator will never be permitted to sit as a 'regular' arbitrator in the same case, i.e. the related arbitration proceedings, unless all parties agree otherwise.

The task of an emergency arbitrator is a challenging one. He is appointed within two days of the date of notification and must prepare a procedural timetable usually within a further two days. Whereas the emergency arbitrator is, of course, committed to fairness and impartiality and it is his task to ensure due process, there is no need for him to consult with the parties on the conduct of the emergency arbitrator proceedings. This is quite understandable as he is required to render his order within 15 days of the date on which the file was transmitted to him.

It must also be stressed that according to the ICC Rules, an emergency arbitrator may only grant urgent interim or conservatory relief that cannot wait until an arbitral tribunal is constituted. As his decision is made in the form of an order, it is neither subject to scrutiny by the ICC Court nor can it be considered an award that is enforceable according to the New York Convention.<sup>20</sup>

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<sup>18</sup> See Article 29 of the ICC Rules.

<sup>19</sup> See J. Fry, S. Greenberg, F. Mazza, *The Secretariat's Guide...*, 3-1056.

<sup>20</sup> See e.g. B. Steindl, *The 2012 ICC Arbitration Rules – Origin, Development and Practicability*, in: Klausegger, Klein, Kremsehner, Petsche, Pitkowitz, Power, Wel-

Furthermore, as explicitly laid down in Article 29.3 of the ICC Rules, the emergency arbitrator's order is not binding on the arbitral tribunal with respect to any question, issue or dispute determined in the order. The arbitral tribunal may therefore, once constituted, modify, terminate or set aside the emergency arbitrator's order. Thus, such an order is regarded as preliminary in nature.

Last but not least, an order issued by an emergency arbitrator does not come cheap. The fee payable in order for the emergency arbitrator to get active is no less than USD 40,000,<sup>21</sup> consisting of USD 10,000 to cover ICC administrative expenses and USD 30,000 to cover the emergency arbitrator's fees and expenses. Such a fee may even be increased by the president of the ICC, taking into account the complexity of the case and the nature and the amount of work performed by the emergency arbitrator. If the party submitting the application fails to pay the increased costs, the application for the emergency order is considered as having been withdrawn.

#### 4.1. Emergency arbitrator – Pros

If we sum up the aforementioned descriptions, what are the advantages of an emergency arbitrator?

Firstly, both the costs and the time limit for the emergency arbitrator's order are fairly clear from the very beginning. It is also clear that the emergency arbitrator will be much quicker than any arbitral tribunal ordering preliminary injunctions, and most probably also quicker than state courts. Secondly, there is a clear competency of the emergency arbitrator. Unless the parties have explicitly excluded the provisions on the emergency arbitrator, they are applicable and thus set up a clear regime without surprises. Even the mere existence of such an agreement – and, accordingly, the 'threat' that this weapon will be used – may be an incentive for the parties to avoid such a procedure, and to refrain from measures that an emergency arbitrator would otherwise include in his order.

Contrary to arbitral tribunals, which often tend to follow unclear rules as far as preliminary injunctions are concerned, the 'road map' that the emergency arbitrator has to follow is rather clear. Therefore, by agreeing on the ICC Rules, the parties ensure that they have a powerful and effective weapon that can be called upon if the situation warrants its use.

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ser & Zeiler (eds.), *Austrian Yearbook on International Arbitration* 2012, p. 160.

<sup>21</sup> ICC Arbitration Rules Art. 7, Appendix V.

## 4.2. Emergency arbitrator – Cons

But there are also big disadvantages to this procedure. The first one is that – irrespective of the value in question – the emergency arbitrator procedure is very costly. The parties cannot even be sure that the – relatively high – sum of USD 40,000 for a two week procedure is sufficient as it may be increased by the President of the ICC Court.

On the other hand, the emergency arbitrator does not render an award that is enforceable according to the New York Convention. Therefore, the parties, having obtained such a decision, have to go back to their own jurisdiction to find out whether such an ‘order’ is even enforceable in their respective states. This is quite similar to the situation with preliminary injunctions. Therefore, despite the high costs, there is no guarantee that the emergency arbitrator’s decision will actually be put into force. Thus, an application for an interim order before the state courts may often be the more attractive alternative.<sup>22</sup>

Thirdly, the order that the emergency arbitrator makes is, in its best sense, preliminary. The arbitral tribunal, once constituted, may set aside such an order, invalidate or modify it. So, overall, it seems quite a high price to pay for a preliminary solution.

## 5. CONCLUSION

Now, if we compare the emergency arbitrator solution on the one hand with the possibility of expedited or fast track proceedings on the other, it becomes fairly clear that even though the emergency arbitrator procedure may be a sharp and effective weapon, its ‘time out’ is clearly programmed in advance. Apart from the high costs, enforceability is – at best – highly doubtful.

At the same time, ‘normal’ fast track proceedings also aim at a quick solution of the dispute but produce an award that is final, binding and enforceable according to the New York Convention. Therefore, it is quite understandable that the Vienna Rules focused on the expedited procedure and avoided the emergency arbitrator solution.

It must, however, be pointed out that expedited proceedings, if agreed upon in advance, might not be the ideal solution for each and every kind of dispute. There are cases where more time, reflection and evidence gathering is needed. Therefore, despite the convincing argument that the parties usually want their dispute to be solved quickly, it should clearly be

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<sup>22</sup> See e.g. B. Steindl, *The 2012 ICC Arbitration Rules...*, p. 160.

considered in advance whether such a quick solution is really needed and suitable for possible disputes arising out of a complex contract. In this respect, careful consideration should be given to formulating the arbitration agreement. A 'midnight clause' should not merely be tacked on, at the last minute, without giving the subject of and issues surrounding arbitration the due care and attention they deserve.