ALERT MEMORANDUM

Important Issues for Potential Users of ICC Arbitration: The New ICC Rules

March 2, 2017

The International Chamber of Commerce ("**ICC**") recently revised its Rules of Arbitration ("**ICC Rules**") in several important respects. The new rules ("**Revised ICC Rules**") are effective March 1, 2017, and supersede the existing ICC Rules, which have been in effect since January 1, 2012 ("**2012 ICC Rules**").

The changes include the deletion of a provision under the 2012 ICC Rules that prevented the ICC's International Court of Arbitration ("**ICC Court**") from disclosing the reasons for its decisions on the appointment, confirmation, challenge and replacement of arbitrators. Under the Revised ICC Rules, the ICC Court will be permitted to disclose, without the advance consent of all parties, its reasons for such decisions as well as its decisions on *prima facie* jurisdictional matters and consolidations.[1] These steps toward increased "transparency and accountability," in the words of ICC Court President Alexis Mourre, will surely be embraced by ICC users.[2]

The Revised ICC Rules also adopt important changes designed to promote greater efficiency. For example, the time limit for establishment of the Terms of Reference, the document intended to define the framework of the arbitration, has been reduced from two months to 30 days.

Perhaps the most important of these changes is the adoption of a new form of expedited procedure for arbitrations with USD 2 million or less in dispute ("**Expedited Procedure Rules**").

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors:

NEW YORK

Jeffrey A. Rosenthal
+1 212 225 2086
jrosenthal@cgsh.com

Ari D. MacKinnon
+1 212 225 2243
amackinnon@cgsh.com

One Liberty Plaza
New York, New York 10006
T: +1 212 225 2000
F: +1 212 225 3999

FRANKFURT

Prof. Dr. Richard Kreindler
+49 69 97103 160
rkreindler@cgsh.com

Main Tower, Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
T: +49 69 97103 0
F: +49 69 97103 199

PARIS

Jean-Yves Garaud
+33 1 40 74 68 76
jgaraud@cgsh.com

Aren Goldsmith
+33 1 40 74 68 51
agoldsmith@cgsh.com

12, rue de Tilsitt
75008 Paris, France
T: +33 1 40 74 68 00
F: +33 1 40 74 68 88

1 Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, March 1, 2017 ("**March 2017 ICC Practice Note**"), paras. 11-13.

2 ICC Court amends its Rules to enhance transparency and efficiency (2017), https://iccwbo.org/media-wall/news-speeches/icc-court-amends-its-rules-to-enhance-transparency-and-efficiency/.

Qualifying disputes will now be subject to the Expedited Procedure Rules unless the parties have agreed to "opt out" of their application. This memorandum discusses the key features of the new Expedited Procedure Rules. While the new expedited procedure offers an efficient and lower-cost[3] solution for many smaller-scale disputes, awards rendered in arbitrations conducted under the new procedure may have carry-over effects in the context of larger legal relationships. Going forward, it will be important for contracting parties to consider these potential effects when drafting agreements to arbitrate under the Revised ICC Rules.

I. Key Features of the Expedited Procedure Rules

A. Scope of Application

Unless the parties have agreed to "opt out" of their application,[4] the Expedited Procedure Rules will be applied to all ICC arbitrations initiated pursuant to an agreement to arbitrate under the ICC Rules concluded on or after March 1, 2017, in which the amount in dispute is USD 2 million or less.[5] Where applicable, the Expedited Procedure Rules "shall take precedence over any contrary terms of the arbitration agreement."[6]

Parties may also expressly "opt in" to the Expedited Procedure Rules, including for arbitrations where the amount in dispute is greater than USD 2 million.[7] The otherwise applicable provisions of the Revised ICC Rules, as well as the parties' own election to "opt in," can, however, be overridden by the ICC Court, which may, on its own motion or on the request of a party, conclude that it would be inappropriate to apply the Expedited Procedure Rules. The ICC Court's power extends to arbitrations that are subject to the Expedited Procedural Rules either because the amount in dispute is USD 2 million or less, or because the parties have "opted in" to their application.[8] The ICC Court may exercise this power at any time during an arbitration. This could result in an arbitration commenced under the Expedited Procedure Rules instead being conducted under the standard ICC Rules.[9]

B. Noteworthy Features

ICC Court's Power to Appoint a Sole Arbitrator

The most noteworthy and remarkable feature of the new Expedited Procedure Rules is a provision that empowers the ICC Court to appoint a sole arbitrator to preside in any proceeding pursuant to the Expedited Procedure Rules, irrespective of the parties' agreement to appoint more than one arbitrator.[10] While it is not expressly stipulated in the Revised ICC Rules, a sole arbitrator will normally be appointed in proceedings under the Expedited Procedure Rules.[11]

---

3 The arbitrators' fees under the Expedited Procedure Rules will be 20% less than under the standard ICC Rules. *See* March 2017 ICC Practice Note, para. 71.

4 Art. 30(3)(b) Revised ICC Rules expressly recognizes the right of the parties to "opt out" of the Expedited Procedure Rules. Such an "opt out" should be stipulated in express terms. *See* March 2017 ICC Practice Note, para. 60(c).

5 Art. 30(2)(a) and (3)(b) Revised ICC Rules. The amount in dispute includes all quantified claims, counterclaims, cross-claims and claims pursuant to Arts. 7-8 Revised ICC Rules, which relate to the joinder of additional parties and claims between multiple parties. *See* March 2017 ICC Practice Note, paras. 63-70. For non-monetary claims, the quantifications or estimates submitted by the parties of the value of such claims will be considered. *Id*. The Expedited Procedure Rules will not usually be applied where the value of declaratory or non-monetary claims cannot be estimated. *Id*.

6 Art. 30(1) Revised ICC Rules.

7 Art. 30(2)(b) Revised ICC Rules.

8 Art. 30(3)(c) Revised ICC Rules.

9 App. VI, Art. 1(4) Revised ICC Rules.

10 App. VI, Art. 2(1) Revised ICC Rules.

11 March 2017 ICC Practice Note, para. 77.

The ICC's Expedited Procedure Rules are not alone in providing for a sole-arbitrator override. A similar position has been taken, for example, by the Singapore International Arbitration Centre ("**SIAC**").[12] Other leading institutions, such as the Swiss Chambers' Arbitration Institution ("**Swiss Chambers**"),[13] the German Institution of Arbitration ("**DIS**"),[14] the Hong Kong International Arbitration Centre ("**HKIAC**"),[15] and the Arbitration Institute of the Stockholm Chamber of Commerce ("**SCC**"),[16] have also sought to encourage parties (i) to agree to a sole arbitrator for expedited procedures (though without reserving the power to appoint a sole arbitrator where the parties' contractual agreement provides otherwise), or (ii) to condition appointment of a sole arbitrator on the parties' express consent to the application of the relevant expedited procedure rules.

As explained below, parties often understandably attach great importance to their ability to select and nominate one member of the arbitral tribunal. Thus, this new power of the ICC Court to appoint a sole arbitrator, even where the parties' agreement provides otherwise, may warrant, in appropriate cases, the inclusion in the agreement to arbitrate of language expressly "opting out" of the application of the Expedited Procedure Rules.

Streamlined Procedures

In keeping with the ICC's goal of providing an efficient and lower-cost mechanism for resolving smaller-value commercial disputes, the Expedited Procedure Rules implement changes to the procedures normally applied in arbitration under the ICC Rules.

Apart from empowering the use of a single arbitrator, the most important procedural change is the adoption of a new provision that would permit arbitral tribunals applying the Expedited Procedure Rules to decide the parties' dispute on a documents-only basis, even where one or both of the parties have requested a hearing.[17] Thus, even if a party wishes to call its own witnesses, or to examine any witnesses of the opposing party, the arbitral tribunal may decide not to have *any* witnesses heard, and to issue its decision solely on the basis of the documents, without holding a hearing. This represents a significant departure from the default position under the standard ICC

12 Art. 5(2)(b) SIAC Rules (2016) (providing for referral to a sole arbitrator unless the President determines otherwise). SIAC's expedited procedures apply where the dispute does not involve more than S$6,000,000, where the parties so agree or in cases of exceptional urgency. However, under Art. 5.2 SIAC Rules, at least one party must apply for the application of the expedited procedure and thereby manifest its consent thereto. This feature distinguishes the SIAC approach from the ICC's new approach under the Expedited Procedure Rules.

13 Art. 42(2)(b) of the Swiss Rules (2012) provides that expedited procedures will be referred to a sole arbitrator, "unless the arbitration agreement provides for more than one arbitrator." The expedited rules apply where the amount in dispute is not greater than CHF 1 million or where the parties have so agreed.

14 Art. 3.1 of the DIS Supplementary Rules for Expedited Proceedings (2008) provides that "the dispute shall be decided by a sole arbitrator, unless the parties have agreed prior to the filing of the statement of claim that the dispute shall be decided by three arbitrators." These rules apply where the parties have agreed to them either in the agreement to arbitrate or before filing of the statement of claim.

15 Art. 41.2(a) HKIAC Rules (2013) provides that the HKIAC "shall invite the parties to agree to refer the case to a sole arbitrator." These rules apply where the amount in dispute does not exceed HKD 25 million, the parties so agree, or in cases of exceptional urgency.

16 Art. 17 SCC Rules for Expedited Arbitration (2017) provides for appointment of a sole arbitrator. However, these expedited rules apply only where the parties have expressly consented to their application.

17 App. VI, Art. 3(5) Revised ICC Rules.

Rules, which recognize the right of any party to require the holding of a hearing.[18]

Additional measures designed to enhance efficiency for smaller disputes include:

- The express recognition of the right of the arbitral tribunal, after consulting the parties, to decide not to permit document production or to limit the number, length and scope of written submissions and written witness evidence;[19]
- Elimination of the requirement that the arbitral tribunal establish Terms of Reference for expedited proceedings;[20]
- A requirement that the arbitral tribunal render its award within six months from the date of the case management conference, which must take place within 15 days of the date on which the file is transmitted to the arbitral tribunal (subject, in both cases, to extension);[21] and
- Prohibition of new claims after the arbitral tribunal has been constituted without the arbitral tribunal's authorization.[22]

Unlike other expedited rule regimes, the ICC's Expedited Procedure Rules do not authorize the issuance of unreasoned awards.[23] Indeed, awards issued pursuant to the Expedited Procedure Rules will remain subject to "scrutiny" by the ICC Court, just like other ICC awards.[24] This is a valuable hallmark of ICC arbitration, designed to enhance the quality and enforceability of ICC awards, once issued.

It is also worth noting that the ICC is not alone in authorizing arbitral tribunals to dispense with the need to hold a hearing, even where the parties have jointly or separately requested one.[25]

18 Art. 25(6) Revised ICC Rules. The right to secure a hearing does not mean that the party will have the right to require that all of its witnesses be heard. By operation of Art. 25(3) of the Revised ICC Rules, the arbitral tribunal will retain discretion in deciding what witnesses will be heard, if any, at any hearing. However, the exercise of this discretion is subject to requirements of due process and equal treatment of the parties. In certain jurisdictions, the arbitral tribunal may be required to hold a hearing upon the request of a party. *See* 1047(1) sent. 2 German ZPO.

19 App. VI, Art. 3(4) Revised ICC Rules.

20 App. VI, Art. 3(1) Revised ICC Rules.

21 App. VI, Art. 4(1) and 3(3) Revised ICC Rules. Extensions of the six-month deadline for the arbitral tribunal to render its final award will be granted only in "limited and justified circumstances." March 2017 ICC Practice Note, para. 90.

22 App. VI, Art. 3(2) Revised ICC Rules.

23 *See, e.g.*, Art. 41.2(g) HKIAC Rules ("[T]he arbitral tribunal shall state the reasons upon which the award is based in summary form, unless the parties have agreed that no reasons are to be given."); Art. 42(1)(e) Swiss Rules ("The arbitral tribunal shall state the reasons upon which the award is based in summary form, unless the parties have agreed that no reasons are to be given."); Art. 5.2(e.) SIAC Rules ("[T]he Tribunal may state the reasons upon which the final Award is based in summary form, unless the parties have agreed that no reasons are to be given."); Art. 42(1) SCC Rules for Expedited Arbitration (providing that a party must request a reasoned award before the closing statement).

24 At most, arbitral tribunals may limit the factual or procedural sections of the award to what is necessary to understand the award, and state the reasons for the award in a concise fashion. *See* March 2017 ICC Practice Note, para. 83.

25 *See, e.g.*, Art. 41.2(e) HKIAC Rules ("[T]he arbitral tribunal shall decide the dispute on the basis of documentary evidence only, unless it decides that it is appropriate to hold one or more hearings."); Art. 5.2 DIS Supplementary Rules for Expedited Proceedings (providing for one oral hearing "unless the arbitral tribunal determines otherwise"); Art. 5.2(c) SIAC Rules ("[T]he Tribunal may, in consultation with the parties, decide if the dispute is to be decided on the basis of

II. Potential Issues and Solutions

A. Constitution of the Arbitral Tribunal

As noted above, the ICC Court now has the power to decide that a sole arbitrator shall preside over expedited proceedings, even where the parties have previously agreed to a three-member arbitral tribunal.

Where the parties so agree, it is frequently the result of a joint consensus that there is important value in each party having the right to identify and name one arbitrator to the arbitral tribunal. While arbitrators must remain independent and impartial, parties take comfort in their ability to select a party arbitrator who they believe will be sensitive to their concerns and ensure that their positions will be considered. Thus, the new power of the ICC Court is one that parties should consider carefully when drafting arbitration agreements providing for arbitration pursuant to the ICC Rules.

While the Expedited Procedure Rules do not apply to disputes with a substantial monetary value, even "smaller" disputes can have significant ramifications. By way of illustration, an award rendered in an expedited procedure could determine the meaning of an important contractual provision, and that determination could, subject to applicable law, have binding effect between the parties as to the meaning of the provision in future disputes of far greater value. In the context of long-term supply, licensing or concession agreements, for instance, the potential ramifications of such a decision could be significant. Similar issues may arise where parties have entered into multiple related contracts in carrying out complex corporate transactions, such as merger and acquisition or carve-out and divestiture transactions.

Accordingly, where larger interests may be implicated by a binding adjudication of the parties' positions in relation to a transaction or ongoing legal relationship, contracting parties should consider whether it would be appropriate to entrust even "small-value" disputes to a sole arbitrator, who would be appointed by the ICC Court if the parties are themselves unable to agree on the sole arbitrator when given an opportunity to do so by the ICC Court. Parties should particularly bear in mind that where they are unable to agree on a sole arbitrator under the Expedited Procedure Rules, the ICC Court may appoint competent but less experienced arbitrators to handle small-value disputes, if only because more experienced arbitrators are often "overbooked."

Especially where significant interests may be implicated by an arbitration irrespective of the amount involved, parties should, when drafting arbitration agreements providing for ICC arbitration, give serious consideration to exercising their right to "opt out" of the Expedited Procedure Rules.[26] As noted above, any such "opt out" should be expressed in clear and explicit terms in the agreement to arbitrate.[27] Specific reference to the right to "opt out" pursuant to Article 30(3)(b) of the Revised ICC Rules would be advisable.

If the parties have exercised this right in their agreement to arbitrate, they will remain free to

documentary evidence only."); Art. 33(1) SCC Rules for Expedited Arbitration (providing for a hearing "only at the request of the party" and where the arbitrator finds the reasons for the request "to be compelling"); *but see, e.g.,* Art. 42(c) Swiss Rules ("Unless the parties agree that the dispute shall be decided on the basis of documentary evidence only, the arbitral tribunal shall hold a single hearing for the examination of the witnesses and expert witnesses, as well as for oral argument.").

[26] Art. 30(3)(b) ICC Rules.

[27] *See* March 2017 ICC Practice Note, para. 60(c).

agree later to "opt back in." Once a dispute has crystallized, the parties often will be in a better position to evaluate whether this would be appropriate, and to balance the procedural efficiencies associated with the Expedited Procedure Rules against the considerations outlined above. By expressly "opting in," the parties would also avoid potential legal uncertainties regarding the reach of the ICC Court's new power to appoint a sole arbitrator even where the agreement to arbitrate provides for the appointment of a three-member arbitral tribunal.[28]

B. The New Procedural Regime

For the same reasons that parties may be concerned about losing the right to appoint one member of the arbitral tribunal, parties may also be concerned about having their disputes resolved under an expedited procedure.

Where significant broader interests are at stake, the loss of the right to secure an oral hearing to present and examine witnesses could be a costly one. For example, a party's best means of arguing in favor of its interpretation of a key contractual provision having long-term implications may be through examination of the opposing party's witnesses. Allowing the meaning of that provision instead to be adjudicated without adversarial testing may be inadequate, depending on the circumstances.

The same issue arises from the language of the Expedited Procedure Rules that expressly contemplates the possibility that no document production will be available. On the one hand, arbitral tribunals already enjoy great procedural discretion under the ICC Rules generally, and are not required to authorize document production (absent a contractual stipulation to that effect). On the other hand, the new language could make it more difficult, as a practical matter, for parties to convince arbitral tribunals to authorize document production in proceedings under the Expedited Procedure Rules. In cases involving significant broader interests, the reduced ability to obtain mandatory disclosure through document production requests, or to seek adverse inferences based on the failure of the opposing party to produce documents that it has been ordered to disclose, could be problematic.

The same concerns are implicated by the express recognition in the Expedited Procedure Rules of an arbitral tribunal's power to limit submissions. While not new, this power could embolden arbitral tribunals to provide for more restrictive expedited proceedings, even where a party believes that the important interests at stake warrant more extensive briefing.

In view of the foregoing, prudence dictates that parties concerned as to the potential implications of any award for their future legal relationship should consider, when providing for ICC arbitration in their agreement to arbitrate, whether it is in their interest to expressly "opt out" of the Expedited Procedure Rules. If a smaller dispute arises in which the efficiency and lower cost of this approach appears appropriate, the parties will be free to "opt in," and may well wish to do so. In such cases, the parties may also wish to consider

[28] This issue is one that has not been widely tested in national jurisdictions. A similar mechanism was upheld in Singapore (*AQZ* v *ARA* [2015] SGHC 49, paras. 128 *et seq.*). However, whether other jurisdictions will take the same approach remains to be seen. In many jurisdictions, specific party agreements related to arbitration will be given serious weight. *See, e.g.*, OLG Frankfurt a.M., February 17, 2011, SchiedsVZ 2013, 49 (54 *et seq.*), in which the court annulled an award where the arbitral tribunal, based upon its general procedural discretion under the DIS Rules, declined to give effect to the parties' agreement on a specific matter of arbitral procedure.

including additional appropriate procedural safeguards.

For example, parties wishing to secure the right to an oral hearing and/or document production may wish to provide expressly for them in their submission agreement. Alternatively, the parties could request that the arbitral tribunal take guidance from (or follow) the IBA Rules on the Taking of Evidence in International Arbitration (2010), which already provide for these procedural rights.

By adopting such provisions when submitting an existing dispute to arbitration, the parties would benefit from the efficiencies of the ICC's innovative expedited procedure, while preserving procedural features that the parties consider to be important in the context of their dispute.

…

CLEARY GOTTLIEB