



# ARTICLE

## INCREASING THE EFFICIENCY OF ICC ARBITRAL PROCEEDINGS WITH EXPEDITED DETERMINATION OF MANIFESTLY UNMERITORIOUS CLAIMS

| 10/01/18 | Marie Danis



At the end of October 2017, the International Chamber of Commerce ("ICC") made available a new case management tool enabling the parties to seek the immediate dismissal of manifestly unmeritorious claims or defences, or which manifestly fall outside the arbitral tribunal's jurisdiction. It comes in addition to the other case management tools already in effect and which are also aimed at enhancing the efficiency and expeditiousness of arbitration.

The mechanism, which is close to the *motion to dismiss* available in common law jurisdictions, enables parties to request that claims, and defences, be determined on a priority basis pursuant to an expedited schedule. The aim is to ensure that only the relevant claims be reviewed in full by the arbitrators and that the claims manifestly devoid of merits, or the unmeritorious parts of a claim, be subject to expedited determination and dismissed. This is good news for parties!

At the beginning of 2017, the ICC unveiled new Arbitration Rules applicable to disputes arising out of arbitration agreements concluded after 1<sup>st</sup> March 2017. Article 22 provides in particular that "[t]he arbitral tribunal and the parties 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 that "[i]n order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties."

In its new version of 30<sup>th</sup> October 2017, the Note to parties and arbitral tribunals on the conduct of the arbitration under the ICC Rules of Arbitration[1] (the "Note") provides guidance as to the broad scope and wording of Article 22 of the Arbitration Rules by allowing parties to seek early and quick determination of manifestly unreasonable claims.

### Increasing the attractiveness of arbitration

Applications for expedited determination are open both to claims and to defences, that are manifestly devoid of merit or that fall manifestly outside the arbitral tribunal's jurisdiction.

The Note logically requires that any such application for expedited determination be made "*as promptly as possible*" after the filing of the relevant disputed claim. In order to avoid any dilatory behaviour, the arbitral tribunal has full discretion to decide whether or not to allow the application to proceed, considering the stage of the proceedings and the need to ensure time and cost efficiency.

Should the application be allowed to proceed, the tribunal will adopt the procedural measures it considers appropriate, after consulting the parties – and in particular the replying party – who shall be given the opportunity to present their arguments. This requirement, which is expressly laid down by the Note, mirrors the contents of Article 22-4 of the ICC Arbitration Rules, which provides that "[i]n all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case". There is a reason to believe that this rule, the violation of which is a fairly common ground for the annulment of arbitral awards, should also be applied to the applications for the expeditious determination of manifestly unmeritorious claims under the Note.

In order to ensure that such manifestly unmeritorious claims be determined expeditiously – this being key to the attractiveness of this new tool – the Note also specifies that any further presentation of evidence will be allowed only exceptionally and that where a hearing is appropriate, it may be conducted by videoconference or by telephone.

The application for expedited determination must be decided "*as promptly as possible*" and the tribunal's decision may be made in the form of an order or of an award, which would be subject to annulment proceedings. In any case, the decision must state its reasons in a concise manner and may rule on the costs of the application or reserve it until the final award.

In order to allow the arbitration to move on quickly on the other issues while guaranteeing a high quality of the awards, decisions on applications for expeditious determination of manifestly unmeritorious claims are scrutinised by the Court within one week of receipt.

### Increasing the efficiency of the proceedings

Applications for preliminary rulings on manifest lack of jurisdiction of the tribunal were already available to the parties; the originality of the new tool is that such applications are to be determined within a very short timeframe in the course of the arbitration. Parties should however carefully analyse and anticipate the contents of the debates on the "manifest" nature



of the lack of jurisdiction of the arbitrators: while some cases will be relatively cut and dry, others may be more complex. That is the case for example of issues which can be determined differently depending on the applicable law – such as issues of transfer or extension of the arbitration clause.

The real novelty for civil law practitioners is the possibility to apply for early dismissal claims which are manifestly devoid of merit: the new tool can be used to lift long-lasting risks imposed on the opposing party or supporting communications aimed at weakening an opponent. A word of caution however: applying for early dismissal of unmeritorious claims can be a great opportunity to put an end to a case before it begins and thereby to avoid the associated costs – but should it fail, the penalties can be high. A proper assessment of the chances of success of such an application is therefore in order!

#### **A general trend**

The introduction of this tool in ICC arbitration rules and practice reflects a broader trend in arbitral institutions who intensify their efforts to provide innovative mechanisms to meet the need of the parties in terms of efficiency, expeditiousness and reduction of the costs of arbitration:

- This is the case of the Singapore International Arbitration Centre, which provides that the arbitral tribunal may, in its discretion, allow a similar application for early dismissal of claims and defences manifestly without legal merit or manifestly outside the jurisdiction of the tribunal. Any order or award ruling on such application is required to be issued within 60 days of the date of filing of the application;[2]
- The arbitration rules of the Arbitration Institute of the Stockholm Chamber of Commerce also provide for a similar mechanism;[3]
- Similarly, the rules of the International Centre for Settlement of Investment Disputes have provided for an expedited procedure to dispose of unmeritorious claims at the preliminary stage of a proceeding since 2006. Any party raising any such objection to jurisdiction or merits at a preliminary stage must do so within 30 days of the date of the constitution of the tribunal.

These tools further increase the competitiveness of arbitration proceedings compared to law court proceedings.

[1] <https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf>

[2] SIAC 2016 Arbitration Rules, Article 29

[3] SCC 2017 Arbitration Rules, Article 39

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