THE EXPEDITED PROCEDURES AND COSTS

IN ARBITRATION

1. In a recently published article in 'Resolver' published on behalf of the Charted Institute of Arbitrators (CIArb) Professor George A Berman wrote and I quote :-

"*If you think your stance on arbitration is set in stone, think again."*

1. For a long time arbitration institutions have been struggling with how to make arbitration more user friendly. Two aspects which turn out to be the biggest villains are time and costs. Thus began the effort to resolve these two major hurdles, which were to cap the growing frustration amongst the business community.
2. This lead to streamlining of the lengthy procedures involved in setting up the tribunals and to expedite their working. Expedited dispute resolution procedures are not a recent development brief procedures were known between the 12th and 16th Centuries also.1
3. In the 2013 International Arbitration Survey by PricewaterhouseCoopers (PwC) and Queens Mary University, the financial services industry ranked Court litigation as preferred mechanism to resolve their disputes. The survey cited speed and cost as the significant concerns shaping the opinion of their industry. Thus a working group was setup to devise an expedited procedure, for this industry in particular.
4. Parties who wish to resolve their disputes swiftly and effectively without incurring huge costs greatly benefit from streamlined arbitration with reduced scales of arbitration fee. Under the ICC rules the award must also be made within six months from date of the case management conference, with extension granted only in limited and justified circumstances. The world's leading arbitral institution, International Chamber of Commerce (ICC) introduced expedited procedures w.e.f. 1st March, 2017. The advent of expedited procedures capable of changing the culture of Arbitration in the sense that it will encourage more and more parties to use Arbitration.
5. Today "Emergency Arbitration" have become common feature of the main arbitration institutions2..Now parties can obtain interim relief from an emergency arbitrator who has been appointed on expedited basis. Even Ex-parte hearings and under some rules an Emergency Arbitrator can be appointed before the Notice of Arbitration is issued.
6. After constitution of Arbitral Tribunal, expedition can be achieved by adoption of "Fast Track" procedures/simplified procedures. Amongst the simplified procedures Swiss Rules have served as a very good example, following steps taken by Swiss rules will indicate the expeditious procedure under which any matter can be handled :

* *a sole arbitrator is appointed, unless the arbitration agreement otherwise provides and parties are unable to agree to the appointment of the Sole Arbitrator;*
* *a written pleadings are limited to a statement of case, a defence, and (if applicable) a counterclaim and reply;*
* *unless the parties agree to a documents - only arbitration, a single hearing is held for the examination of witnesses and experts, and for oral argument; and*
* *the award is made within six months of the date of the transmittal of the file to the arbitral tribunal, which states the arbitrator's reasons in summary form (or does not give reasons at all if the parties so agree).*

1. To establish how fast ends can be achieved the famous example is that of F1 Motor Racing Case3. Let me give you the details to highlight the super fast speed with which the expeditious process resulted in delivery of its award. The first Grand Prix of the season was traditionally held in Melbourne (at the relevant time) in the month of March. Therefore the cars participating in the race have to reach Melbourne by mid February. In mid 1990 a dispute regarding one team arose with Federation de L'automobile (FIA), with its headquarters in Paris. A team wanted to paint its own different Cigarette brands of a tobacco company on the cars participating in its team. The team was sponsored by that tobacco company. This was objected to by the FIA, according to them this was a team event and all cars from the same team must have similar livery. The agreement between FIA and the participating team had an ICC arbitration clause. Both FIA and the team agreed to invoke Fast Track arbitration in hope that they could obtain a decision by the end of January so that cars could be painted and shipped to Melbourne by end of February. F1 team filed request for arbitration between 25th December and 31st December. A three member Tribunal was appointed on the New Years day. Draft terms of reference were circulated on the same day which were signed by the Parties in two days. Memorandum with documents were exchanged within few days thereafter, along with Witness Statements. Disputed documents request was resolved promptly by Arbitrators. A eight hour witness hearing took place on last Saturday of January. The arbitral tribunal deliberated on Sunday and sent its award by fax to ICC for scrutiny at lunch time the same day. Next day (Monday), award was approved at an emergency session of ICC Court the same afternoon. Parties were notified overnight by fax and courier. Thus the parties received reasoned award on the last day of January. One month from the day the Tribunal was appointed for dispute resolution, the award was final and the cars were painted and shipped to Melbourne in good time for the race of the season.
2. SUMMARY DETERMINATION

Alternative to Fast Track is early or summary determination. One or more claim or defences can be determined upon an application by a Party, it can also be initiated on the directive of the Tribunal, where it reaches a conclusion that Claim or Defence has no prospect of success. However this was uncommon except in ICSID Rules 41(5). Prior to 2016 none of the major institutional rules expressly dealt with arbitral tribunals power to adopt procedures for the summary disposal.

1. After 2017 ICC Rules of Arbitration adopted the summary determination mode where an Arbitration Agreement is signed on or after 1st March 2017 and an overall amount in dispute does not exceed US $ 2 Million. But the parties could elect to opt out of expedited procedure and ICC Court may also do the same if it is found not suitable to a particular case. It is important to note that till now in all the expedited Arbitration proceeding cases parties have agreed to submit to a Sole Arbitrator.
2. It is important to mention here the Judgment of the English High Court in Travis Coal Restructured Holdings LLC vs. Essar Global Fund Ltd. [2014] EWHC 2510 (COMM), [2014] 2 Lloyd's Rep. 494.In this case the Court disagreed with the General proposition that the employment of a summary judgment process by an arbitral tribunal amounts to a denial of due process.
3. The SIAC has also now incorporated the expedited Procedure under Rule 5.1

Rule 5: Expedited Procedure

*5.1 Prior to the constitution of the Tribunal, a party may file an application with the Registrar for the arbitral proceedings to be conducted in accordance with the Expedited Procedure under this Rule, provided that any of the following criteria is satisfied:*

*a. the amount in dispute does not exceed the equivalent amount of S$6,000,000, representing the aggregate of the claim, counterclaim and any defence of set-off;*

*b. the parties so agree; or*

*c. in cases of exceptional urgency.*

*The party applying for the arbitral proceedings to be conducted in accordance with the Expedited Procedure under this Rule 5.1 shall, at the same time as it files an application for the proceedings to be conducted in accordance with the Expedited Procedure with the Registrar, send a copy of the application to the other party and shall notify the Registrar that it has done so, specifying the mode of service employed and the date of service.*

*5.2 Where a party has filed an application with the Registrar under Rule 5.1, and where the President determines, after considering the views of the parties, and having regard to the circumstances of the case, that the arbitral proceedings shall be conducted in accordance with the Expedited Procedure, the following procedure shall apply:*

*a. the Registrar may abbreviate any time limits under these Rules;*

*b. the case shall be referred to a sole arbitrator, unless the President determines otherwise;*

*c. 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;*

*d. the final Award shall be made within six months from the date when the Tribunal is constituted unless, in exceptional circumstances, the Registrar extends the time for making such final Award; and*

*e. the 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.*

*5.3 By agreeing to arbitration under these Rules, the parties agree that, where arbitral proceedings are conducted in accordance with the Expedited Procedure under this Rule 5, the rules and procedures set forth in Rule 5.2 shall apply even in cases where the arbitration agreement contains contrary terms.*

*5.4 Upon application by a party, and after giving the parties the opportunity to be heard, the Tribunal may, having regard to any further information as may subsequently become available, and in consultation with the Registrar, order that the arbitral proceedings shall no longer be conducted in accordance with the Expedited Procedure. Where the Tribunal decides to grant an application under this Rule 5.4, the arbitration shall continue to be conducted by the same Tribunal that was constituted to conduct the arbitration in accordance with the Expedited Procedure.*

1. The World Intellectual Property Organisation (WIPO) has also modified its rules to incorporate expedited arbitration. The main modifications are :

*i) The registration and administration fees are lower than those applicable to an arbitration conducted under the WIPO Arbitration Rules. Fixed arbitrator’s fees apply to disputes of up to US$ 10 million.*

*(ii) The Statement of Claim must accompany (and not be filed later and separately from) the Request for Arbitration. Similarly, the Statement of Defense must accompany the Answer to the Request.*

*(iii) Unless otherwise agreed, there is always a sole arbitrator.*

*(iv) Any hearings before the arbitrator are condensed and may not, save in exceptional circumstances, exceed three days.*

*(v) The time limits applying to the various stages of the arbitral proceedings have been shortened. In particular, the proceedings should, whenever reasonably possible, be declared closed within three months (as opposed to nine months under the WIPO Arbitration Rules) of either the delivery of the Statement of Defense or the establishment of the Tribunal, whichever event occurs later, and the final award should, whenever reasonably possible, be made within one month (as opposed to three months under the WIPO Arbitration Rules) thereafter.*

In the end let me mention that now under the Arbitration and Conciliation Act, 1996 (2015) under Section 29 (B) parties can opt for a Fast Track procedure. The following procedure is prescribed while conducting the arbitration proceedings under sub section (1)(a) to (d), (4) and (5):

*29B. (1) Notwithstanding anything contained in this Act, the parties to an arbitration agreement, may, at any stage either before or at the time of appointment of the arbitral tribunal, agree in writing to have their dispute resolved by fast track procedure specified in sub-section (3).*

*(2) The parties to the arbitration agreement, while agreeing for resolution of dispute by fast track procedure, may agree that the arbitral tribunal shall consist of a sole arbitrator who shall be chosen by the parties.*

*(3) The arbitral tribunal shall follow the following procedure while conducting arbitration proceedings under sub-section (1):*

*(a) The arbitral tribunal shall decide the dispute on the basis of written pleadings, documents and submissions filed by the parties without any oral hearing;*

*(b) The arbitral tribunal shall have power to call for any further information or clarification from the parties in addition to the pleadings and documents filed by them;*

*(c) An oral hearing may be held only, if, all the parties make a request or if the arbitral tribunal considers it necessary to have oral hearing for clarifying certain issues;*

*(d) The arbitral tribunal may dispense with any technical formalities, if an oral hearing is held, and adopt such procedure as deemed appropriate for expeditious disposal of the case.*

*(4) The award under this section shall be made within a period of six months from the date the arbitral tribunal enters upon the reference.*

*(5) If the award is not made within the period specified in sub-section (4), the provisions of sub-sections (3) to (9) of section 29A shall apply to the proceedings. (6) The fees payable to the arbitrator and the manner of payment of the fees shall be such as may be agreed between the arbitrator and the parties.’’.*

BIBLIOGRAPHY

1. *Redfern and Hunter in International Arbitration, Sixth Edition , para 6.26 at page 361*
2. *ICC Rules, Art 29 and Appendix V, LCIA Rules Art 9B (Since 1990), SIAC Rules Schedule 1, etc*
3. *ICC Case No. 10211, ( 2001 )17 Arb Intl 173*