EXPERT VIEW: FAST TRACK ARBITRATION

NEED FOR SPEED

CDR editorial board member **Jakob Ragnwaldh** of **Mannheimer Swartling** examines provisions for fast track arbitration, and argues that many traditional arbitrations are suitable for this time and cost-saving approach

Many tools exist in arbitration to ensure a quick and cost efficient procedure. Arbitration rules are also regularly updated to meet the need for a time and cost efficient procedure. The latest addition is the new ICC Rules, which contain an appendix outlining examples on efficient case management. Other rules, such as the LCIA Rules, contain provisions for expedited commencement of arbitration (but once the tribunal is in place, the normal rules apply).

As an alternative to traditional arbitration, some arbitral institutions have adopted specific sets of rules for fast track arbitration, primarily intended for use in less complex cases. In Sweden, the Rules for Expedited Arbitration of the Arbitration Institute of the Stockholm Chamber of Commerce (the SCC) have gained increased popularity and are now frequently used in domestic Swedish arbitrations. In addition to the SCC Rules for Expedited Arbitration, examples of fast track rules are in the CPR Global Rules for Accelerated Commercial Arbitration and, to a certain extent, in the Swiss Rules.

Typical features of fast track arbitration

Fast track arbitration is an arbitration conducted based on a predetermined set of rules devised in various ways to make the procedure more efficient and streamlined than an arbitration under regular arbitration rules. Clearly not all cases are suitable for a fast track procedure. In fact, most are not suitable for a fast track procedure. Yet again, there are quite a few cases conducted under regular arbitration rules that no doubt could be conducted as fast track arbitrations, and as a result save time and costs for the parties. Compared to regular arbitration rules, fast track arbitration rules generally involve certain limitations on the scope of the procedure. Some of those main features are:

- *One arbitrator*
- *Limited number of submissions*
- *Limited time for filing each submission*
- *Limited scope of the submissions*
- *An express possibility not to have a hearing*
- *An express possibility for the arbitrator not to provide reasons in the award*
- *Short time limit for the arbitrator to issue the award*

For various reasons it may not be possible in a given case to strictly abide by all requirements and time limits in the rules, but, all in all, fast track arbitration works quite well.

The statistics of the SCC provide some insight into how fast track arbitration works in practice. The numbers are encouraging. In 2005, the SCC had 22 fast track cases. In 2011, that figure had increased to 61, which was about the same number as in 2010. Although the

increase needs to be viewed in light of a large overall increase in the case load at the SCC (which during this period increased by 100%), the number of fast track arbitrations increased by more than 270%.

In 2005, only four fast track arbitrations were international cases. In 2010 and 2011, respectively, 15 international fast track arbitrations were registered at the SCC. For the international fast track cases, the average amount in dispute in 2008 was EUR 525,000. In 2010, the average amount in dispute had increased to EUR 838,000.

Under the SCC Rules for expedited arbitration, the time limit for rendering an award is three months from the time the case is referred to the arbitrator. However, upon a request from the sole arbitrator, the Board of the SCC can extend the time limit, and often does so. The average time for an SCC fast track arbitration is therefore somewhat longer than three months, but still is impressively short – in 2011, the average time for an international fast track arbitration was 5.2 months from the filing of the request for arbitration until the rendering of the award. In 2005, the average time for an international fast track case was approximately seven months from commencement to conclusion. The decrease in time, from seven months in 2005 to 5.2 months in 2011, corresponds well with the overall trend at the SCC in the last five years with a swifter resolution of the cases generally.

The type of contracts most commonly referred to SCC fast track arbitrations are service agreements, supply agreements and shareholders agreements. In most cases, a hearing is held and reasons are provided in the award.

Challenges and opportunities

Users should be aware that fast track arbitration involves both challenges and opportunities. A party needs to be aware what it is signing up to when opting for fast track arbitration. Not surprisingly, fast track rules favour expeditious resolution of disputes. Inevitably, certain compromises need to be made when it comes to the scope and time for the various stages of the proceedings. Time limits for submitting briefs will in most instances be much shorter than in a regular arbitration. The number of briefs and their size will also have to be limited. As far as evidence is concerned, there will no doubt be less room for elaborate expert reports and witness statements.

Another area which has to be limited in scope is document production. Although that may not always be a bad thing, it is something that parties need to bear in mind. Some say that another challenge may be to find an arbitrator who can commit to conducting the case within the time needed. However, the statistics at the SCC and our experience of fast track arbitration clearly suggest that finding an arbitrator who can stick to a fast timetable is not difficult.

Some cases are not suitable for fast track arbitration. For example, complex, technical cases, which often require detailed technical evidence should not be conducted under fast track rules. Nor are most multiparty cases suitable for fast track arbitration.

Fast track arbitration has many advantages, time and cost being of course the two best examples. For smaller claims, the difference in costs between a fast track and a regular arbitration may be decisive in terms of whether or not the claim is worth pursuing at all. In such situations, the availability of fast track arbitration may, in fact, be a matter of access to justice. In other situations, for example if a dispute arises within a long-term co-operation or in an ongoing project, a swift resolution of the dispute – in a final and binding award – may be particularly important.

A positive side effect of the high pace of fast track proceedings is the need for the parties to focus on what is really important, which may not always be the case in a regular arbitration today. In a sense, fast track arbitration takes arbitration back to its roots, with short, focused briefs and limited document production.

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limitations that follow with respect to the time afforded to parties to present their cases, and although arbitrators in some instances have strictly applied the time limits in the rules, there has been no successful challenge of a fast track award in Sweden (nor has to our knowledge any fast track award been set aside in Switzerland under the Swiss rules). We are aware of a Swedish case where the three-month time limit for rendering the award was kept, although the case involved three submissions and one expert report for each side, three procedural hearings over the phone, limited document production and a two day hearing with four witnesses giving testimony. In order for such an arbitration to work properly under a fast track regime, the parties and their counsel need to be cooperative. In addition, the arbitrator needs to take a firm stance on the time limits imposed by the rules and at all times work towards the three-month time limit for rendering the award.

Opting for flexibility

For a party considering fast track arbitration as an option, it is recommended to agree this in the arbitration agreement. Once a dispute has arisen, it is usually difficult for the parties to agree on the procedural rules for the arbitration. Furthermore it is advisable to provide for flexibility in terms of the application of the rules so that, once a dispute arises, the arbitration rules best suited for the case will be applied.

In the Swiss rules, there is an inherent flexibility in the sense that the fast track rules apply by default if the amount in dispute does not exceed one million Swiss francs. Unlike the Swiss rules, the application of the SCC fast track rules is not dependent on the amount in dispute. Instead, the rules apply by operation of the parties' agreement to conduct their arbitration under the fast track rules, which are stand alone rules. Parties opting for the SCC's expedited rules often use a combination clause, which either provides that the rules for expedited arbitrations shall apply unless the board of the SCC in its discretion determines that the arbitration rules shall apply, or that the fast track rules apply if the case involves an amount in dispute under a certain agreed threshold, e.g.: "The Rules for Expedited Arbitrations shall apply where the amount in dispute does not exceed EUR [*x*]. Where the amount in dispute exceeds EUR [*y*] the Arbitration Rules shall apply." If the former model is used, the SCC Board will determine, based on the request for arbitration and the answer to the request for arbitration, which set of rules to apply, taking into account the perceived complexity of the case, the amount in dispute and other factors.

At the end of the day, the successful conduct of any arbitration depends on the parties, their counsel and the tribunal. That is true irrespective of the rules applicable to the case. For the right case, and with parties willing to work towards a swift resolution of their dispute, fast track arbitration is clearly an interesting option which ought to be kept in mind whenever an arbitration clause is to be negotiated and drafted. ■