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BCDR-AAA 2017 ARBITRATION RULES, PART I

Rules

Expedited Procedure

Mark W. Friedman*

Article 6: Expedited procedure

6.1 This Article shall apply, to the exclusion of any conflicting Article of the Rules:

(a) if the parties have not agreed in writing otherwise, and provided that the claim and any counterclaim in the arbitration are quantified monetary claims and the total amount in dispute does not exceed USD 1 million; or

(b) if the parties have agreed in writing that this Article shall apply irrespective of the value of any claim or counterclaim.

6.2 The Claimant shall submit a Request conforming to the provisions of Article 2, save that, in place of the statements prescribed by Articles 2.2(d) and 2.2(e), the Request shall include the Claimant's Statement of Claim, setting out in detail the remedies sought and the amount of any monetary claim, together with the factual and legal basis for its entitlement to such remedies, and accompanied by all documents essential to the claim.

6.3 The Request may, but need not, be submitted to the Chamber using the Chamber's online filing form located at www.bcdr-aaa.org

6.4 If the Respondent is not advancing a counterclaim the value of which will increase the total amount in dispute to a sum greater than USD 1 million, the Respondent shall submit a Response conforming to the provisions of Article 4, save that, in place of the confirmation or denial prescribed by Article 4.2(b) and the statement prescribed by Article 4.2(c), the Response shall include the Respondent's Statement of Defense and its Counterclaim (if any), accompanied by all documents essential to its defense and counterclaim.

6.5 The Response may, but need not, be submitted to the Chamber using the Chamber's online filing form located at www.bcdr-aaa.org

6.6 If the Respondent is advancing a counterclaim the value of which will increase the total amount in dispute to a sum greater than USD 1 million, and the parties have not agreed in writing that this Article shall apply irrespective of the value of any claim or counterclaim, Article 6.4 and Articles 6.7 to 6.13 shall not apply to the arbitration and the Respondent shall file its Response pursuant to the provisions of Article 4.

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Friedman, Mark W., 'Expedited Procedure'. *BCDR International Arbitration Review* 4, no. 2 (2017): 261–282.

6.7 If, after filing the initial claim and counterclaim, a party amends its claim or counterclaim so that the total amount in dispute exceeds USD 1 million, the case will continue to be administered pursuant to this Article, unless the parties agree otherwise, or the Chamber or the arbitral tribunal determines otherwise.

6.8 Notwithstanding any other agreement to the contrary, the arbitral tribunal shall comprise a sole arbitrator.

6.9 Unless the parties have jointly nominated an arbitrator in writing, the Chamber shall, as soon as practicable after receipt of the Response, appoint an arbitrator of its choosing.

6.10 The appointment of the arbitral tribunal shall be promptly confirmed by the Chamber to the parties in a written notice of appointment.

6.11 The arbitral tribunal shall conduct the arbitration as it considers suitable to the nature and circumstances of the case and to the expedited nature of the procedure, including determining whether any further written submissions should be made by the parties, and if so, according to what timetable, and whether the arbitration should be conducted on the papers only, without an oral hearing.

6.12 Unless otherwise agreed by the parties or determined by the Chamber, the arbitral tribunal shall issue the final award no later than 30 days after the date of the close of proceedings.

6.13 Each of the 30-day deadlines prescribed by Article 37 for the interpretation or correction of an award shall be abridged to 15 days in respect of any award issued under this expedited procedure.

1 INTRODUCTION

One of international arbitration's most appealing features to contracting parties is its relatively low cost and great efficiency compared to litigation in national courts. Or at least it used to be. As arbitration costs have risen and become more public, and as national courts have adopted more pragmatic and streamlined procedures and actively competed for market share of commercial disputes, arbitration's efficiency advantage has diminished – or least seems to have done so in the minds of the business community.

This troubling dynamic has many causes, and the arbitration community has proposed various solutions. Among those solutions are new institutional rules offering expedited arbitration procedures to pare back the dispute process to its essentials and thereby accelerate dispute resolution, especially for relatively low-value claims. The Bahrain Chamber for Dispute Resolution ('BCDR-AAA') has recently joined this club by reason of Article 6 of its revised arbitration rules (the '2017 BCDR Rules').[1]

This article will describe the need that prompts expedited rules and other efficiency measures; analyze the BCDR's approach to expedited arbitration and how it compares to what other institutions offer; and finally provide some

[1] Rules of Arbitration of the Bahrain Chamber for Dispute Resolution, effective 1 October 2017, available online at http://www.bcdr-aaa.org/2017-arbitration-rules/.

observations regarding how expedited procedures fit within the international arbitration firmament and what else might be required to preserve or restore arbitration's efficiency advantage.

2 THE NEED FOR SPEED

In considering whether arbitration is genuinely efficient, especially for relatively low-value disputes, an example might be instructive. A number of years ago, two shareholders in Company X commenced an International Chamber of Commerce ('ICC') arbitration against the company for breaching a clause in a share purchase agreement by which they could compel Company X to terminate an investment treaty arbitration Company X had brought against the Government of 'Xanadu'.[2] The shareholders sought an order that Company X either withdraw its investment arbitration request or repay the sum the claimants had paid for their right to terminate the investment arbitration, which they said was EUR 5,912,503, plus moral damages in the amount of EUR 50,000.[3] Company X counterclaimed for a portion of the costs it had expended in the investment arbitration.[4]

A three-member tribunal was appointed.[5] After arbitration proceedings that lasted more than two years, and some additional process that further prolonged the case,[6] the tribunal finally rendered its award: both claims and the counterclaim were to be dismissed, with each side bearing one-half of the costs and its own share of fees.[7] The tribunal essentially held that Company X had breached the contract, but that the shareholders had not adequately proven their damages.

While the disclosed part of the award does not describe the precise costs the parties collectively spent on this arbitration, the ICC's cost calculator[8] indicates that a dispute of this size[9] brought before three arbitrators in 2017 would cost both parties a total of USD 349,065, including USD 298,233 in arbitrators' fees and

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2 A fictitious name used to anonymize the award. *See Shareholder (Xanadu) and Shareholder (Xanadu) v. Court-Appointed Insolvency Administrator for Company X, in liquidation (Germany)*, ICC Case No. 15885, Final Award (2011), XLII Y.B. Comm. Arb. 34 (2017).

3 *Ibid*. at 36.

4 *Ibid*.

5 *Ibid*.

6 The award as published omits exact dates, but confirms that the parties were invited by the tribunal to prepare an agreed list of issues under dispute exactly two years after arbitration was commenced. *See ibid*. at 36, 57 ('On 15 October of Year X+2, Claimants filed a request for ICC arbitration . . . The Parties were invited by the Tribunal on 7 October of Year X+4 to prepare an Agreed List of Issues' [where 'X' is the year of the share sale agreement]). The award was issued in 2011, but there is no indication of how long the overall arbitration took.

7 *Ibid*. at 80.

8 *See* https://iccwbo.org/dispute-resolution-services/arbitration/costs-and-payments/cost-calculator/.

9 To calculate the amount in dispute for the purposes of this exercise, we have summed the claimants' primary EUR 5,912,503 claim and EUR 50,000 moral damages claim for a total of EUR 5,962,503 in dispute, or USD 7,326,997.79 based on current exchange rates.

USD 50,832 in administrative expenses[10] – or USD 174,532.50 for each side. To that the parties would of course have to add fees and expenses of counsel, any expert or witness costs, and perhaps other costs as well, which could easily have exceeded USD 1.5 million per side.[11] In other words, in pursuit of a dispute that was worth only about USD 7.5 million, the parties could easily have spent over USD 3.5 million – about 45% of the claim value – and over two years, only to end up with an outcome that was likely unsatisfactory to everyone. So much for efficiency!

Of course, all arbitration – like litigation – is undertaken at a risk. But the point worth stressing here is that because of the low value of the dispute (at just over USD 7 million), the parties may have taken an *inordinate* amount of risk in proportion to their anticipated reward. Perhaps they did not need a three-member tribunal, or for the proceedings to take over two years; both factors likely served to drive up costs and concomitant frustration.

Ultimately, a saga such as this is not altogether uncommon in international arbitration. Whereas arbitration was traditionally extolled for its speed and low cost, its users are becoming increasingly agitated at what they perceive to be a steady decline in both virtues. In 2006, the School of International Arbitration at Queen Mary University of London ('QMUL') and PriceWaterhouseCoopers surveyed 143 corporate counsel on international arbitration and found that the '[e]xpense and the length of time to resolve disputes are the two most commonly cited disadvantages of international arbitration'.[12] In 2010, a subsequent QMUL survey (this time with White & Case) found that while most interviewees would find it appropriate for an award to be delivered three to six months after the close of hearings, it is more common for awards to be rendered more than twelve months after the close of hearings, with some 'horror stories' of awards not being rendered for up to three years.[13]

By 2015, the top four complaints of arbitration users were all related to cost and efficiency.[14] Cost was 'by far the most complained of characteristic', followed

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10 *See ibid*.

11 Calculations using a figure for amount in dispute of USD 7,326,997.79 (*see supra* note 9 for conversion), number of arbitrators of three, ordinary ICC procedure, and average complexity of dispute. *See* International Arbitration Attorney Network, *Full ICC Arbitration Cost Calculator*, https://www.international-arbitration-attorney.com/icc-arbitration-cost-calculator.

12 Queen Mary University of London School of International Arbitration and PriceWaterhouseCoopers, *International Arbitration: Corporate Attitudes and Practices 2006* at 2 (2006); *see also ibid*. at 6–7.

13 Queen Mary University of London School of International Arbitration and White & Case, *2010 International Arbitration Survey: Choices in International Arbitration* at 32 (2010).

14 Queen Mary University of London School of International Arbitration and White & Case, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* at 7 (2015).

by: the lack of effective sanctions during the arbitral process, 'thought to fail to incentivise efficiency by counsel'; lack of insight into arbitrators' efficiency; and lack of speed.[15] 'Greater efficiency' was also ranked the second most important factor for assessing the improvement of arbitral institutions, in between 'reputation and recognition' and 'high level of administration' (ranked first and third, respectively).[16] When surveyed about areas where arbitration counsel can do better, respondents overwhelmingly endorsed efficiency-related measures, such as: 'work with opposing counsel to narrow issues' (endorsed by 66% of respondents); 'work with opposing counsel to limit document production' (62%); '[e]ncourage settlement' (60%); 'not overlawyer[]' (57%); '[m]ake better use of technology to save time and costs' (46%); '[s]eek more streamlined procedures (37%); and seek '[m]ore efficient use of resources' (33%).[17]

The survey results are in: arbitration users are demanding greater efficiency at all stages of the arbitration and from all of its participants – arbitral institutions, arbitrators, parties, and counsel alike.

There are of course many potential ways of addressing this demand, and considering the full range of them is well beyond the scope of this article. However, some of them are neatly encapsulated in my own firm's Efficiency Protocol, which we launched in 2010 and updated this year. The Protocol reflects our commitment to explore ways to promote efficiency in every case,[18] and to seek procedures proportionate to the case's value and complexity,[19] by identifying twenty-five specific efficiency-enhancing procedures related to each stage of the arbitration, including tribunal formation, procedure, evidence, hearing, and settlement.[20] Of particular relevance to the BCDR's fast-track procedure analyzed in this article, the Protocol contemplates appointing a sole arbitrator for smaller disputes;[21] a fast-track schedule with fixed deadlines;[22] electronic, paperless arbitrations;[23] and alternative briefing formats (such as detailed outlines) to focus the issues for the tribunal's consideration.[24]

Some of these procedures are already hallmarks of institutions that must necessarily resolve cases expeditiously. For example:

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15 *Ibid*.
16 *Ibid*. at 20.
17 *Ibid*. at 30 (note: respondents were able to select multiple answers).
18 Debevoise & Plimpton LLP, *Debevoise Efficiency Protocol* (2018), https://www.debevoise.com/~/media/files/insights/publications/2018/01/debevoise_efficiency_protocol_2018.pdf.
19 *Ibid*. ¶ 6.
20 *Ibid*.
21 *Ibid*. ¶ 3.
22 *Ibid*. ¶ 9.
23 *Ibid*. ¶ 13.
24 *Ibid*. ¶ 22.

- The Court of Arbitration for Sport ('CAS') provides for an expedited decision on Olympic-related disputes within a matter of hours.[25] Immediately upon an application for arbitration, the President of an ad hoc Division of the CAS appoints a three-member Panel from a special list of arbitrators and may, in his discretion, appoint a sole arbitrator instead.[26] The parties are summoned to a hearing 'on very short notice immediately upon receipt of the application' and must introduce all evidence at the hearing, as well as produce any witnesses, 'who shall be heard immediately'.[27] The Panel may in its discretion omit a hearing and render an immediate award.[28] In any event, the Panel is required to give a written decision with brief reasons within twenty-four hours of the lodging of the application, unless exceptional circumstances exist.[29] In limited circumstances, the Panel may choose to refer the dispute to the full CAS instead of rendering an immediate decision.[30] Set-aside applications must be made within thirty days.[31]
- The World Intellectual Property Organization's Expedited Arbitration Rules[32] provide a fast-track settlement mechanism for domain name disputes.[33] The claimant must submit its Statement of Claim along with its Request for Arbitration, and the respondent must return its Answer to the Request and Statement of Defense within twenty days.[34] The parties are to jointly nominate a sole arbitrator,[35] who 'shall ensure that the arbitral procedure takes place with due expedition',[36] provided that each party is afforded a fair opportunity to present its case.[37] A preliminary conference is held within fifteen days after the tribunal is constituted;[38] a hearing, if any, is held within thirty days after the claimant receives the respondent's Answer to the Request and Statement of Defense,[39] and may not exceed

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25 Court of Arbitration for Sport, Arbitration Rules applicable to the CAS ad hoc division for the Olympic Games, 14 October 2003, http://www.tas-cas.org/en/arbitration/ad-hoc-division.html.
26 *Ibid*., art. 11.
27 *Ibid*., art. 15(c).
28 *Ibid*.
29 *Ibid*., arts. 18, 19.
30 *Ibid*., art. 20.
31 *Ibid*., art. 21.
32 World Intellectual Property Organization, WIPO Expedited Arbitration Rules, 1 June 2014, http://www.wipo.int/amc/en/arbitration/expedited-rules/.
33 *Ibid*., art. 2.
34 *Ibid*., arts. 10–12.
35 *Ibid*., art. 14.
36 *Ibid*., art. 31(c).
37 *Ibid*., art. 31(b).
38 *Ibid*., art. 34.
39 *Ibid*., art. 49(b).

three days.[40] The final award must be rendered within three months after the delivery of the Statement of Defense or the establishment of the tribunal, whichever occurs later.[41]

– The Fédération Internationale de l'Automobile ('FIA'), governing body of the Formula One motor-sport series, has established a dispute resolution system to resolve disputes about the team for which a driver will compete.[42] This system of ad hoc arbitration establishes a 'Contract Recognition Board' ('CRB') composed of three arbitrators and three alternates of different nationalities, appointed by the President of the ICC and sitting in Geneva, Switzerland.[43] When a dispute arises, the CRB convenes a tripartite meeting with the driver and the 'old' and 'new' teams within three working days after it becomes aware of apparently conflicting contracts.[44] The CRB accepts witnesses and evidence at this meeting and issues a written decision within three days, stating which contract is the prevailing contract.[45]

In contrast to these long-standing expedited procedures in the worlds of sports and intellectual property, rules for expedited commercial arbitration are relatively new. In March 2017, the ICC introduced its Expedited Procedure Provisions, joining, among others, the Stockholm Chamber of Commerce ('SCC'), International Centre for Dispute Resolution ('ICDR'), London Court of International Arbitration ('LCIA'), Singapore International Arbitration Centre ('SIAC'), and the Hong Kong International Arbitration Centre ('HKIAC') – all of which have successfully adopted mechanisms for expedited arbitration.[46] These expedited procedures aim to reduce the duration and cost of arbitral proceedings, while preserving arbitration's main purpose: the fair and efficient resolution of commercial disputes.[47] In October 2017, BCDR-AAA joined this group with Article 6 of its revised Rules of Arbitration, to which I now turn.

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40 *Ibid*.
41 *Ibid*., art. 58(a).
42 Gabrielle Kaufmann-Kohler and Henry Peter, *Formula 1 Racing and Arbitration: The FIA Tailor-Made System for Fast Track Dispute Resolution*, 17(2) Arb. Int'l 173, p. 174 (2001), doi.org/10.1023/A:1011250312120.
43 *Ibid*.
44 *Ibid*. at 176.
45 *Ibid*. at 176–77.
46 *See* Thomas Snider, *Accelerating the Pace of International Arbitration: A Comparative Look at the ICC's New Expedited Procedure Provisions*, *Lexology* (28 April 2017), https://www.lexology.com/library/detail.aspx?g=2ce7fcd1-1dbd-4065-a6c4-5a9b54f7a092.
47 *See ibid*.

3 ARTICLE 6: BCDR-AAA'S EXPEDITED PROCEDURE

In partnership with the American Arbitration Association ('AAA'), the Bahrain Chamber for Dispute Resolution provides independent dispute settlement of commercial and government disputes. The BCDR-AAA arbitration rules were first adopted in 2010 and were closely modeled on the then-existing rules of the ICDR.[48] In early 2016, the BCDR-AAA Board of Trustees (the 'Board') tasked Nassib G. Ziadé, Adrian Winstanley, and Antonio R. Parra with reviewing and drafting revised arbitration rules for the Board's consideration.[49] BCDR-AAA representatives publicized the draft revised rules at the International Bar Association Annual Conference and invited comments from arbitration stakeholders.[50] The Board adopted the revised rules, including a new fee schedule and a model arbitration clause, effective as of 1 October 2017.[51]

The 2017 BCDR Rules contain a variety of amendments to address explicitly perennial issues arising in international arbitration. For example, they expressly permit ex parte discussions between a party and the arbitrator the party has appointed on the suitability of presiding arbitrator candidates,[52] and they require a party to pay an emergency arbitrator fee at the time it applies for emergency measures.[53] A new Article 13 addresses the appointment of a secretary to assist the arbitrators with research, which now requires party approval and maintenance of the secretary's impartiality and independence, as well as specifying that the secretary refrain from exercising the decision-making powers of the tribunal.[54]

Many of the amendments, however, reflect a heightened institutional sensitivity to efficiency. The words 'efficiency', 'speed', 'timely', or 'fast' do not appear in the 2010 BCDR Rules. The 2010 rules only brushed on the topic in Article 16, titled 'Conduct of the Arbitration',[55] in which Article 16(2) stated: 'The tribunal, exercising its discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute. It may conduct a preparatory conference with the parties for the purpose of organizing, scheduling and agreeing to procedures to expedite the subsequent proceedings.' Article 16(3) followed: 'The tribunal may in its discretion direct the order of proof, bifurcate proceedings,

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48 *See* Press Release, BCDR-AAA, *New Draft Arbitration Rules for the BCDR-AAA* (31 October 2016), http://www.bcdr-aaa.org/new-draft-arbitration-rules-for-the-bcdr-aaa/.

49 *See* Press Release, BCDR-AAA, *BCDR-AAA Launches New Arbitration Rules* (5 October 2017), http://www.bcdr-aaa.org/bcdr-aaa-launches-new-arbitration-rules/.

50 *Ibid*.

51 *Ibid*.; 2017 BCDR Rules.

52 2017 BCDR Rules, art. 10.2; Press Release, *supra* note 49.

53 2017 BCDR Rules, art. 14; Press Release, *supra* note 49.

54 2017 BCDR Rules, art. 13; Press Release, *supra* note 49.

55 BCDR-AAA's 2010 arbitration rules, art. 16, http://www.bcdr-aaa.org/2010-arbitration-rules/ (hereinafter '2010 BCDR Rules').

exclude cumulative or irrelevant testimony or other evidence and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.'

By contrast, the 2017 version of Article 16 contains meatier provisions on efficiency, including exhortations that the tribunal, as well as the parties, 'avoid[] unnecessary delay and expense';[56] 'consider how technology, including electronic communications, might be used to increase the efficiency and economy of the proceedings';[57] and conduct a preliminary conference 'promptly' after the tribunal is appointed.[58] Elsewhere, joinder and consolidation provisions also newly make reference to the need to consider efficiency.[59] Article 6 goes even further by setting out a fast-track procedure for low-value claims or for claims of any value if the parties opt into it.

Article 6.1 sets out the expedited procedure's scope, providing that it will apply automatically to all cases with quantifiable monetary claims where the sum of the claim and any counterclaim do not exceed USD 1 million.[60] This means that cases seeking non-quantifiable – i.e., declaratory or injunctive – relief would not automatically trigger the application of Article 6.[61] Notwithstanding the value of the claim or counterclaim, parties may agree in writing to opt into the expedited procedure.[62] Under BCDR-AAA's 'ordinary', non-expedited procedure, it is possible for the claimant to submit only a short summary of its claim and the relief requested with its Request for Arbitration ('RfA'), with a detailed Statement of Claim and accompanying evidence due after the tribunal is constituted.[63] Likewise, the respondent's Answer to the RfA need not include detailed factual and legal support until such time as the tribunal determines appropriate.[64] By contrast, the expedited procedure requires the parties to submit their entire case (i.e., detailed Statements of Claim and Defense – along with all 'essential' documents) simultaneously with the RfA and the Answer, respectively.[65] The expedited procedure permits paperless, online submission of the RfA, Answer, and Statements of Claim and Defense, at the option of the parties.[66]

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56 2017 BCDR Rules, arts. 16.2, 16.4.
57 *Ibid*., art. 16.3.
58 *Ibid*.
59 *See ibid*., arts. 28.4(b), 29.3 (tribunal to consider 'the interests of justice and efficiency' when evaluating applications for joinder and consolidation, respectively).
60 Unless the parties have agreed otherwise, *see ibid*., art. 6.1(a).
61 It is unclear under the plain text of the 2017 BCDR Rules how so-called 'mixed' arbitration – with claims for both quantifiable and non-quantifiable – relief would be treated.
62 2017 BCDR Rules, art. 6.1(b).
63 *See generally ibid*., arts. 2, 17.
64 *See generally ibid*., arts. 4, 17.
65 *Ibid*., arts. 6.2, 6.4.
66 *Ibid*., arts. 6.3, 6.5.

Article 6.6 stipulates that if the Answer and Statement of Defense (due thirty days after commencement of the arbitration under both the ordinary and expedited procedures[67]) advances a counterclaim which increases the total amount in dispute to above USD 1 million, the parties automatically revert to the ordinary procedure, unless they agree in writing to continue with the expedited procedure.[68] However, reversion to the ordinary procedure may occur only at the time of the Answer; if subsequent amendments or additions to the claim by either party increase the amount in dispute to over USD 1 million, the expedited procedure will nevertheless continue to apply, 'unless the parties agree otherwise, or the Chamber or the arbitral tribunal determines otherwise'.[69] These articles strike a procedural balance between the need to limit the scope of the expedited procedure provision to a jurisdictional amount, on the one hand, and the need to limit uncertainty or gamesmanship, on the other.

Importantly, and perhaps most controversially, Article 6.8 provides for a sole arbitrator to decide the expedited dispute '[n]otwithstanding any other agreement to the contrary'.[70] The sole arbitrator is to be nominated by BCDR-AAA, failing a joint nomination by the parties.[71] The sole arbitrator provision thus explicitly overrides any agreement between the parties – either in the underlying contract or in a subsequent agreement to arbitrate – for the dispute to be settled by three arbitrators, two of whom are usually to be appointed by the parties. A single arbitrator is often a more efficient decision maker than three-member panels for all of the obvious reasons: streamlined procedural decision making, the need to accommodate fewer disparate schedules, reduction of deliberation time, and reduction of award-rendering time in light of the elimination of effort to forge a consensus out of concurring or dissenting opinions. The trade-off, of course, is decreased party autonomy and the deprivation of the party's expectation – right or wrong – that at least one of the decision makers would likely have some degree of understanding of, or even sympathy for, its perspective. In a world where autonomy and party choice are touted nearly as much and as often as efficiency as a virtue of arbitration, Article 6.8's mandate for a single arbitrator is a serious consideration that has not gone without previous challenge (as will be discussed *infra*).

The 2017 BCDR Rules further require the tribunal (consisting of a sole arbitrator) to conduct the arbitration as it sees fit in light of the nature and circumstances of the case, bearing in mind the expedited nature of the

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67 *Ibid.*, arts. 4.1, 6.4.
68 *Ibid.*, art. 6.6.
69 *Ibid.*, art. 6.7.
70 *Ibid.*, art. 6.8.
71 *Ibid.*, art. 6.9.

procedure.[72] The Rules explicitly permit the tribunal to curtail or deny further written submissions and to decline to conduct an oral hearing.[73] All of these considerations will inevitably require a trade-off between efficiency and thoroughness.

Under the expedited procedure, the tribunal must issue an award no later than thirty days after the close of proceedings,[74] defined as the date the tribunal declares that the proceedings have closed when it is satisfied that the record is complete, or upon receiving negative replies from the parties with regards to whether each may wish to pursue further written or oral submissions.[75] The parties or BCDR-AAA can extend the thirty-day deadline if the case requires.[76] Additionally, the deadline for any applications to interpret or correct the award under Article 37 is abridged from thirty to fifteen days from the date the award is issued.[77]

4 OTHER INSTITUTIONAL MODELS

As noted, the institutional rules of the ICC, SCC, ICDR, LCIA, SIAC, and HKIAC, among others, also now provide expedited procedures. In this section, each institution's expedited procedure will be compared at a high level to BCDR-AAA's expedited procedure, with attention being drawn to any noteworthy differences. A summary chart is also provided to allow for a quick comparison of the various institutional rules. As can be seen, each institution's rules offer their own distinct advantages and disadvantages, which must be considered by parties drafting arbitration clauses that stipulate that arbitrations shall be administered according to any of these institutional rules.

– The ICC Expedited Procedure Provisions, in force as of 1 March 2017, apply to disputes not exceeding USD 2 million, but allow the parties to opt out.[78] They apply only to arbitration agreements concluded after 1 March 2017, or whenever the parties so agree.[79] Like the 2017 BCDR Rules, the ICC Expedited Procedure Rules mandate the appointment of a sole

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72 *Ibid.*, art. 6.11.
73 *Ibid.*
74 *Ibid.*, art. 6.12.
75 *Ibid.*, art. 33.1.
76 *Ibid.*, art. 6.12.
77 *Ibid.*, art. 6.13.
78 *See generally* International Chamber of Commerce, Arbitration Rules, 1 March 2017, art. 30, Appendix VI, available at https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/ (hereinafter, the 'ICC Arbitration Rules').
79 ICC Arbitration Rules, art. 30(2); International Chamber of Commerce, *Expedited Procedure Provisions*, https://iccwbo.org/dispute-resolution-services/arbitration/expedited-procedure-provisions/ (hereinafter 'ICC Expedited Procedure').

arbitrator notwithstanding any contrary provision.[80] However, the ICC Court may appoint three arbitrators in appropriate circumstances, taking notice of any party's written comments.[81] The procedure is simplified, allowing the tribunal to waive an oral hearing and to limit the number, length, and scope of written submissions and witness evidence.[82] A case management conference is held within fifteen days of the transmittal of the file to the tribunal,[83] and the award must be rendered six months thereafter.[84]

- Unlike the BCDR and ICC expedited procedure rules, which apply whenever a dispute submitted under either institution's auspices lies below a certain ceiling, the SCC's expedited arbitration procedure must be specifically invoked by the parties in their arbitration agreement.[85] The SCC's Expedited Procedure Rules (2007, revised 2010, 2017) thus constitute a separate set of rules entirely. The dispute is decided by a sole arbitrator, who is jointly appointed by the parties or, failing that, by the SCC Board of Directors.[86] The case management conference is held promptly after case referral, and a procedural timetable released no later than seven days thereafter.[87] Only one supplementary written submission is permitted as of right and a deadline of fifteen working days is allotted for each submission.[88] Hearings are held only upon party request for 'compelling' reasons.[89] A final written award with reasons must be made no later than three months after the case was referred to the arbitrator.[90]
- The ICDR International Dispute Resolution Procedures, as amended and effective 1 June 2014, incorporate expedited procedures at appended Articles E-1 to E-10.[91] They apply whenever no individual claim or counterclaim exceeds USD 250,000, exclusive of interest and costs, or whenever the parties opt in for a dispute of any size.[92] Like BCDR-AAA, the ICDR requires detailed statements of claim and defense to be filed

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80 ICC Arbitration Rules, app.VI, art. 2; ICC Expedited Procedure.
81 ICC Expedited Procedure.
82 ICC Arbitration Rules, app.VI, arts. 3(4)–3(5).
83 *Ibid.*, app.VI, art. 3(3).
84 *Ibid.*, app.VI, art. 4(1).
85 Arbitration Institute of the Stockholm Chamber of Commerce, *Expedited Arbitration*, http://www.sccinstitute.com/dispute-resolution/expedited-arbitration/.
86 Arbitration Institute of the Stockholm Chamber of Commerce, 2017 Rules for Expedited Arbitration, arts. 17–18, http://www.sccinstitute.com/dispute-resolution/rules/.
87 *Ibid.*, art. 29.
88 *Ibid.*, art. 30.
89 *Ibid.*, art. 33(1).
90 *Ibid.*, art. 43.
91 International Centre for Dispute Resolution, International Dispute Resolution Procedures (Including Mediation and Arbitration Rules), 1 June 2014, https://www.icdr.org/rules_forms_fees.
92 *Ibid.* at 7.

along with the Notice of Arbitration and the Answer;[93] it also maintains the expedited procedure even if claims or counterclaims are subsequently amended to exceed the ceiling.[94] An arbitrator is appointed from an experienced pool of arbitrators ready to serve on an expedited basis, with each party permitted to strike any two names from the institution's proposed list of five arbitrators.[95] Within fourteen days from appointment, the arbitrator shall issue a procedural order, and written submissions are due sixty days thereafter.[96] Cases less than USD 100,000 in value (exclusive of interest, fees, and costs) are presumed to be on the papers only, omitting any oral hearings.[97] An award must be issued within thirty calendar days from the close of the hearings or, where there is no hearing, submission of the parties' final statements.[98]

– The LCIA Arbitration Rules (1 October 2014) do not provide for separate expedited procedures for claims under certain jurisdictional amounts, but do provide measures for the expedited appointment of (1) the tribunal proper under Article 9A; and (2) an emergency arbitrator to decide exigent measures under Article 9B.[99] At any time, either party may apply to the LCIA Court for the immediate appointment of a temporary sole arbitrator to conduct emergency proceedings, and the application must be decided 'as soon as possible in the circumstances'.[100] Once the application is granted, the emergency arbitrator is appointed by the Court within three days and may conduct emergency proceedings as he or she deems fit, without any requirement to hold a hearing with the parties.[101] A decision in the form of an award or order, with reasons, must be made within fourteen days following the emergency arbitrator's appointment.[102] The emergency award can be revised or revoked by the permanent tribunal upon party application or its own initiative.[103] The emergency arbitrator rules apply only to arbitration agreements concluded after the effective date of the rules (1 October 2014); parties may agree to opt in or opt out as they see fit.[104]

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93 *Ibid.*, art. E-2.
94 *Ibid.*, art. E-5.
95 *Ibid.* at 7, art. E-6.
96 *Ibid.*, arts. E-7, E-8.
97 *Ibid.* at 7, art. 1(4).
98 *Ibid.* at 7, art. E-10.
99 London Court of International Arbitration, LCIA Arbitration Rules, 1 October 2014, http://www.lcia.org/dispute_resolution_services/lcia-arbitration-rules-2014.aspx#Article 9.
100 *Ibid.*, art. 9.6.
101 *Ibid.*, art. 9.7.
102 *Ibid.*, arts. 9.8, 9.9.
103 *Ibid.*, art. 9.11.
104 *Ibid.*, art. 9.14.

- Article 5 of the SIAC Arbitration Rules (6th edition, 1 August 2016) governs its expedited procedure.[105] Unlike the BCDR, ICC, and ICDR expedited procedures (which automatically apply to certain disputes), the SIAC expedited procedure applies only upon application by one of the parties, provided one of the following conditions are met: (1) the total amount in dispute does not exceed USD 6 million; (2) both parties agree to the expedited procedure; or (3) there is a matter of exceptional urgency.[106] Once the request for expediting is approved by the President of the SIAC Court of Arbitration, the Registrar of the Court may abbreviate any previously established time limits under the rules, the case is referred to a sole arbitrator unless the President determines otherwise, and the tribunal may decide the dispute solely on the documents.[107] The award must be issued six months after the tribunal is constituted, unless the Registrar grants an extension under exceptional circumstances; the tribunal may state its reasons in summary form.[108]
- Article 41 of the HKIAC Administered Arbitration Rules (2008, revised 2013) sets out the institution's expedited procedure.[109] It uses the same one-party application procedure as SIAC (i.e., requiring one of three 'triggering' conditions of aggregate amount, party agreement, or exceptional urgency), here with the aggregate amount in dispute set at HKD 25 million (approximately USD 3,187,250.00 based on current exchange rates).[110] The dispute is referred to a sole arbitrator; however, when the arbitration agreement provides for three arbitrators, the parties must specifically consent to a sole arbitrator.[111] HKIAC is entitled to shorten the time limits provided for in the rules or thereafter established by the tribunal.[112] There is no hearing as of right unless the tribunal decides otherwise, and the award must be made in summary form six months after the file is transmitted to the arbitral tribunal.[113]

Below, we tabulate the key differences between the above institutional rules for expedited arbitral procedure.

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105 Singapore International Arbitration Centre, SIAC Arbitration Rules, 1 August 2016, http://www.siac.org.sg/our-rules/rules/siac-rules-2016.
106 *Ibid.*, r. 5.1.
107 *Ibid.*, r. 5.2(a)–(c).
108 *Ibid.*, r. 5.2(d)–(e).
109 Hong Kong International Arbitration Centre, Administered Arbitration Rules, 1 November 2013, http://hkiac.org/arbitration/rules-practice-notes/administered-arbitration-rules.
110 *Ibid.*, art. 41.1.
111 *Ibid.*, art. 41.2(a)–(b).
112 *Ibid.*, art. 41.2(c).
113 *Ibid.*, art. 41.2(e)–(g).

	BCDR	ICC	SCC	ICDR	LCIA	SIAC	HKIAC
Are the expedited procedure rules included in the general arbitration rules, or must they be separately and specifically invoked in the arbitration agreement?	Art. 6 of arbitration rules	Art. 30, app. VI of arbitration rules	Separate expedited procedure rules	Arts. E-1 to E-10 of arbitration rules	Art. 9B of arbitration rules	Art. 5 of arbitration rules	Art. 41 of arbitration rules
Does the expedited procedure apply automatically?	Yes, to low-value claims	Yes, to low-value claims arising from arbitration agreements concluded after 1 March 2017	No, they are completely optional with no regard to value of claim	Yes, to low-value claims	No, only upon successful party application showing exceptional urgency and based on agreements concluded after 1 October 2014	No, only upon successful party application showing low value or exceptional urgency	No, only upon successful party application showing low value or exceptional urgency

	BCDR	ICC	SCC	ICDR	LCIA	SIAC	HKIAC
What is the jurisdictional ceiling for amount in dispute?	USD 1 million total	USD 2 million total	N/A	USD 250,000 per claim or counterclaim	N/A	USD 6 million total	HKD 25 million total[114]
Can the parties opt in?	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Can the parties opt out?	No	Yes	Yes	No	Yes	No	No
Number of arbitrators	1	1	1	1	1	1	1
Can a three-member panel be constituted instead?	No	Yes, upon ICC approval after party comment	No	No	No	Yes, upon President's approval	Yes, if arbitration agreement provides for three arbitrators
What is the time limit for issuance of the award?	30 days after close of proceedings	6 months from case management conference	3 months from transmittal of file to tribunal	30 days after close of proceedings	Decision due 14 days following appointment, written award to follow.	6 months after constitution of tribunal	6 months after transmittal of file to tribunal

[114] Roughly USD 3.2 million based on current exchange rates.

5 ONGOING CHALLENGES

Expedited procedure is not without its trade-offs. The benefits of longer proceedings – thoroughness, fairness, and due process – may not be available to the parties to the fullest extent in an expedited case. Discovery and fact finding – often the lengthiest processes in an arbitration – must inevitably be cut down or refused entirely by the tribunal, potentially jeopardizing the *systemic* fairness of arbitration and potentially putting at risk the parties' (or, at the very least, the losing party's) *perception* of fairness.

Expedited procedures therefore require a tribunal – often a sole arbitrator – to make a series of potentially difficult judgment calls, such as whether to hear witness testimony, whether to allow additional fact finding after the period for discovery has passed, or whether to hold an oral rather than an on-the-papers hearing. The tribunal will have to weigh the disputed procedure's value-add against its cost in light of the expedited framework.

Those judgment calls are certainly not without consequence. Losing parties in expedited procedures have invoked (with mixed levels of success) specific expedited procedural mechanisms in their applications for annulment, alleging that the procedures have violated due process. In 2008, for instance, the Swiss Federal Tribunal considered a set-aside application against an arbitration award issued under the expedited procedure of the Geneva Chamber of Commerce and Industry.[115] The respondent alleged that its right to be heard was violated when the parties were allegedly allotted unequal times to be heard and the arbitrator provided insufficient reasoning.[116] The Federal Tribunal rejected the set-aside request, holding that the arbitral tribunal took everything into consideration and is permitted to provide a brief statement of reasons.[117] In 2012, the Svea Court of Appeal rejected a set-aside application relating to an SCC expedited arbitration, finding that the arbitrator's decision not to hold a hearing was made legitimately in light of the expedited rules.[118] When scrutinizing awards, enforcement and annulment courts are thus tasked with the same challenge as the arbitrators themselves: how to strike the proper balance between giving effect to the cost- and time-saving purposes of the expedited procedure, while constantly and scrupulously observing the fundamental tenets of due process and the opportunity to be heard.

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115 *X. v. Y.*, Case No. 4A_294/2008, 28 October 2008, 27 ASA Bull. 144 (2009); 2(2) Swiss Int'l Arb. Rep. 495 (2008).

116 *Ibid*.

117 *Ibid*.

118 Case No. T 6238-10, 24 February 2012, available at https://www.arbitration.sccinstitute.com/Swedish-Arbitration-Portal.

The imposition of a sole arbitrator on expedited claims is a specific compromise for parties to consider in terms of ongoing challenges. Having a single arbitrator rather than a traditional panel of three tends to reduce time and costs, not only in terms of reduced arbitrator's fees, but also – and more importantly – in terms of the far quicker pace of both procedural decision making and the rendering of the substantive award. With a single arbitrator, of course, there is no longer a need to schedule deliberations or to accommodate the added time necessary for arbitrators to issue any concurring or dissenting opinions alongside the award. In light of these benefits, rules making it *optional* for parties to select a single arbitrator for their expedited claims should be uncontroversial.

More controversial, however, are the rules that make a single arbitrator *mandatory*, notwithstanding any other agreement to the contrary – which the 2017 BCDR Rules do at Article 6.8. To the extent that parties select arbitration as their preferred method of dispute resolution because of the ability to choose their own decision makers, this choice would be frustrated by the forced elimination of party-appointed arbitrators, whom parties often perceive to be a potential 'advocate' within the tribunal, a check on the adversary's appointee, and someone who is expected to understand and possibly sympathize with, if not necessarily endorse, the party's position.[119]

The imposition of a sole arbitrator imposes legal, in addition to strategic, complications. Primarily, there is the possibility of a particular vulnerability under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'New York Convention'). Specifically, Article V(1)(d) of the New York Convention permits courts in the jurisdiction of enforcement to refuse enforcement when '[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties'. An application to set aside an award on the basis that the imposition of a sole arbitrator in the context of expedited procedure violated the New York Convention was considered by the Singapore High Court in 2015, but was ultimately rejected.[120] In theory, agreement to adopt the 2017 BCDR Rules is likewise an agreement of the parties and therefore arguably stands on equal footing with an express term in the parties' contract that a tribunal shall be composed of

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[119] *See* Lawrence W. Newman and David Zaslowsky, *The Party-Appointed Arbitrator Dialectic*, 242(20) N.Y.L.J. (29 July 2009); A.A. de Fina, *The Party Appointed Arbitrator in International Arbitrations – Role and Selection*, 15(4) Arb. Int'l 381 (1999).

[120] Supreme Court of Singapore, High Court, 13 February 2015, [2015] SGHC 49, Originating Summons No. 530 of 2014 and Summons No. 3168 of 2014. An award rendered under the 2010 SIAC expedited procedure was alleged to have disregarded the parties' explicit agreement to have their dispute decided by three arbitrators. The Singapore High Court held that since the parties had contracted to arbitrate under the SIAC Arbitration Rules, it is a sensible construction to recognize that the President of the SIAC Court had the discretion to appoint a sole arbitrator under the expedited provisions of those very same rules.

three arbitrators. However, it is possible to imagine another national court coming to a different conclusion in the course of set-aside or enforcement proceedings.

There are also potential jurisdictional challenges to consider. Does the failure to render an award within the prescribed time frame rob the tribunal of jurisdiction? Article 6.12 provides something of a safeguard by providing for a thirty-day timeline '[u]nless otherwise agreed by the parties or determined by the Chamber',[121] but room for challenge on this ground may remain.

Investor-state disputes and commercial claims against states or state-owned entities may pose particular challenges if expedited. Counsel for state parties have often contended that the cogs of state machinery tend to run at a slower pace than they must in business. The weeks or months that it usually takes states to obtain the relevant internal clearances, or to answer discovery requests, may imperil the time frame prescribed by the expedited procedure for the entire arbitration. Therefore, it remains to be seen whether expedited procedures will be practicable in cases involving states. To date, there appear to be no publicly-available examples of expedited or 'fast-track' arbitrations involving states or state-owned entities.

One final challenge – or, better put, a systemic limitation – is Article 6's ultimate scope. In general, the average value of disputes submitted to arbitration falls in the range of multi-million dollar claims – far exceeding the jurisdictional ceiling for the BCDR's expedited procedure of merely USD 1 million.[122] For cases subject to the BCDR Rules by party agreement (known as 'Section 2' cases, as opposed to cases that fall within BCDR jurisdiction by law, known as 'Section 1' cases),[123] the average amount in dispute in cases hitherto filed under the 2010 BCDR Rules was USD 22 million, with values per case ranging from USD 100,000 to USD 100 million. This is a fairly standard trend. A 2012 QMUL/White & Case survey of 710 arbitration users concluded that 'fast-track arbitration is still rare' despite increasing publicity, with 54% of survey respondents having no experience of fast-track arbitration in the previous five years and 41% involved in only one to five fast-track arbitrations in that same time.[124] The 2017 BCDR Rules' USD 1 million ceiling may be a prudent choice, in light of the institution's youth, the recency of the Rules and the absence of an opt-out mechanism for low-value claims. Presumably, BCDR-AAA will over time be able

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121 2017 BCDR Rules, art. 6.12.

122 *See e.g.* News, International Chamber of Commerce, *ICC announces 2017 figures confirming global reach and leading position for complex, high-value disputes* (3 July 2018), https://iccwbo.org/media-wall/news-speeches/icc-announces-2017-figures-confirming-global-reach-leading-position-complex-high-value-disputes/ (reporting that the average amount in dispute at the ICC in 2017 was USD 45 million for newly registered cases and over USD 137 million for all pending cases at the end of 2017).

123 *See* Press Release, BCDR-AAA, *New Draft Arbitration Rules for the BCDR-AAA* (31 October 2016), http://www.bcdr-aaa.org/new-draft-arbitration-rules-for-the-bcdr-aaa/.

124 Queen Mary University of London School of International Arbitration and White & Case, *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process* 2, 14 (2012).

to learn from experience, including with the opt-in opportunity, to further discern what types of cases its users consider to be 'expeditable'. The particular USD 1 million ceiling may need to be recalibrated later, but it seems like a rational place at which to start.

6 CONCLUDING OBSERVATIONS

BCDR-AAA's Article 6 expedited procedure is a constructive addition to the BCDR Rules. It provides a framework for more efficient resolution of relatively low-value claims. While reasonable minds could differ about some of the particular lines BCDR-AAA has drawn in crafting those procedures, they are cogent and should be effective for qualifying cases.

Moreover, given the pace at which major institutions have adopted expedited procedures, Article 6 was likely necessary just to keep up and provide a contemporary suite of rules. Unlike just a few years ago, expedited procedures are now the norm – at least for institutional rules primarily geared to governing commercial arbitrations.

However, while expedited procedures like Article 6 and those offered by other institutions are valuable insofar as they go and may help solve *a* problem, they arguably do little to address *the* problem. The central efficiency concern among users or prospective users of international commercial arbitration likely does not arise from the disputes worth USD 1 million or less – the important but small claims of the international arbitration world. Instead, it more likely arises from the costs associated with larger arbitrations. It is having to spend USD 3.5 million and over two years on a case that is worth only USD 7.5 million and that yields no definitive result; or facing discovery burdens that approach those of US or UK court proceedings; or seeing the tribunal fail to seriously grapple with promising and decisive issues that could be resolved at an early stage with a highly efficient and focused procedure; or seeking but getting no tribunal guidance about what issues might be important and hence having little choice but to continue to contest every issue one party or the other has introduced into the case; or having to contain one's rapidly mounting frustration when deliberations drag on for months or years with no sense of the urgency that animates commerce and no discipline by the administering institution.

Constructive and creative solutions exist for these and other inefficiencies. Perhaps expedited procedure rules, and lessons learned from conducting cases under them, can even provide some of these solutions. One could imagine, for example, an intermediate set of presumptive procedures for 'medium'-value cases so that the world is not divided only into cases above and below a single, relatively low ceiling; or a matrix for determining when even cases with greater amounts at

stake might be amenable to resolution by a sole arbitrator; or an agreement that particular issues in a case could be decided by a sole arbitrator while still reserving the ultimate issues for a three-member tribunal; or proceedings in which briefing is completed in, say, half the time it currently takes on average, even if not within the highly abbreviated schedule found in expedited procedures.

Moreover, the rapid and widespread adoption of such rules at least signals institutional understanding that efficiency matters and that the market demands it. The pressing challenge for the international arbitration community is to do even more to respond to that demand and once again demonstrate international commercial arbitration's efficiency advantage.