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DUE PROCESS AND EFFICIENCY IN ARBITRATION: A TWISTED TALE?

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"In international arbitration due process always trumps efficiency."

- Yves Derains[1]

ABSTRACT:

The rise in popularity to choose arbitration as a dispute resolution method has a few drawbacks. The proceedings are slow, depending on the complexity of the case, and may also be costly, although it is still typically faster and less expensive than litigation in the courts. The 2015 international arbitration survey of Queen Mary and White & Case recorded the *"arbitration stakeholders on past and potential improvements in international arbitration"*[2] and one of the findings and concerns was due process and efficiency paranoia.

Moreover, the survey also discovered the lack of efficiency in terms of arbitrators' insights, effective sanctions and non-speedy arbitral proceedings to be the main concerns. Recently, the UNCITRAL Working group II[3] submitted the draft provisions along with some key discussions if expedited arbitration is a solution to efficiency and due process. The essay will focus on the efficiency of expedited arbitration, and if the discretion exercised by the arbitral tribunal ensures due process.

Keywords - international commercial arbitration, due process, efficiency, expedited arbitration

INTRODUCTION:

The worrying concern of due process paranoia is the lack of efficient arbitral proceedings. Most often to compensate for the load of efficiency, due process is scarified. The ideal advantage of

[1]Yves Derains, former secretary general of ICC court, https://lrus.wolterskluwer.com/about-us/experts/yves-derains/ (last visited: 14/02/2020).

[2]Queen Mary University of London and White & Case LLP, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, Executive Summary, www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2015_0.pdf (last visited: 14/02/2020).

[3]71st Session, 3-7th February 2020, New York

arbitration is the flexibility vested with both the parties and the arbitral tribunal. The arbitral tribunal has the discretion to decide upon all matters entrusted by the parties.

However, the arbitrators by the virtue of the arbitral rules or governing law may call upon any dilatory acts of a party in order to ensure due process in the arbitral proceedings.[4] The intrusion of the domestic courts to decide upon matters of the due process further complicates the efficiency of arbitration proceedings.

The efficient and effective ways to resolve complications of due process and efficiency in arbitration proceedings is to resort to expedited arbitration. There are various questions concerned with the rationale behind the expedited proceedings and if it is a solution to resolve conflicts between due process and efficiency in arbitration. The paper will thus focus to answer a few coherent questions regarding the necessity, discretion and importance of expedited proceedings in arbitration.

ARE EXPEDITED ARBITRATION RULES NECESSARY IN THE CONTEXT OF INTERNATIONAL ARBITRATION?

The success of international commercial arbitration is witnessing a surge of complex intertwined arbitration matters in leading institutes, which proportionally causes delays in proceedings and an increase in cost. The solution to this was adopted by 59 arbitral institutions.[5] The aim of expedited arbitration proceedings is to condense the process of arbitration by limited written submissions, no specific oral hearings, document only pleadings and deliver the award in a shorter time-frame[6]than non-expedited arbitration proceedings. Hence, expedited arbitration rules are necessary for international arbitration as they fasten the arbitral procedure which lowers cost increases efficiency in proceedings.

[4]Polkinghorne, M. and Gill, B.A., 2017. Due process paranoia: need we be cruel to be kind. Journal of International Arbitration, 34(6), pp.935-945.
[5]Refer table of expedited arbitration provisions by International Council for commercial arbitration, Annex, pg. 6 https://uncitral.un.org/sites/uncitral.un.org/files/mediadocuments/uncitral/en/overview_of_selected_expedited_arbitration_provisions.pdf (last visited, 14/02/2020).
[6]Eg: German Institute of Arbitrators (DIS), Art 1 ER: “The final award shall be made at the latest six months after conclusion of the case management conference held pursuant

DO ARBITRAL TRIBUNALS HAVE THE DISCRETION OF ADDRESSING THE EFFICIENCY OF THE PROCEEDINGS UNDER THE ORDINARY FRAMEWORK?

Arbitral efficiency is of two categories:

a) regulatory means of promoting explicit default efficiency,[7] thus, the arbitral tribunal promotes default efficiency by setting a higher threshold for establishing a three-member tribunal. Further, The ICC rules *inter alia*, introduced Article 22(1) under which the arbitral tribunal 'make effort to conduct the arbitration in an expeditious and cost-effective manner.' Additionally, Appendix IV of the ICC Rules lists different techniques for the tribunal to use to control the time and cost of the arbitration.

b) Authorisation for the tribunal's discretion regarding the conduct of the proceedings. For instance, the LCIA Rules do not contain expedited procedures. However, Article 9A[8] allows the tribunal to adopt procedures that are suitable in order to avoid delay and provide fair, efficient and expeditious resolution of disputes. [9]

Furthermore, the English High Court in the case of *Travis Coal Restructured Holdings LLC v. Essar Global Fund Ltd.*[10] upheld that the discretion of the parties to opt ICC rules will be considered in entirety and will also infer their consent towards expedited proceedings. Therefore, an arbitral tribunal does have the discretion to address efficiency under their framework when it explicitly or impliedly provides for it.

IS DUE PROCESS ENSURED IN THE EXPEDITED PROCEEDINGS?

Expedited arbitration rules ensure due process but are exposed to certain risks. Specifically, the arbitrators have to be diligent and cautious in their case management decisions. They have to

[7]Art. 12 of the ICC Rules: where the parties have not agreed upon the number of arbitrators, the Court shall appoint a sole arbitrator; Art. 5.8 of the LCIA Rules, 2014: a sole arbitrator shall be appointed unless the parties have agreed in writing otherwise; Art 12 of SCC Rules, 2010: where the parties have not agreed on the number of arbitrators, the arbitral tribunal shall consist of three arbitrators.

[8]Art. 9.1 of LCIA Rules: In the case of exceptional urgency, any party may apply to the LCIA Court for the expedited formation of the Arbitral Tribunal under Article 5.

[9] Art. 14.4 of the London Court of International Arbitration(LCIA) Rules.

[10](2014) EWHC 2510.

ensure if they have not granted repeated extensions of time, accepted multiple amendments to submission, or reschedule oral hearings impartially. The UNCITRAL Working Group II in their sixty-ninth session[11] considered if case management conference should be an essential tool to conduct expediated arbitration.

The main debate on this front was, whether case management would help in streamlining the procedure and provide certainty to the parties or if the conference might not be appropriate for disputes decided in the short period. The commission concluded that the word "may" in the draft provision 3(1) reflects the view that the arbitral tribunal should be given flexibility and discretion in organizing a case management conference.

However, under some institutional rules,[12] case management is a mandatory procedure during expediated arbitration. The ICC rules on expedited arbitration suggest for case management conference to be convened within 15 days of the tribunal's receipt of the arbitration file.[13] It is essential that parties and the tribunal have case management conference and resolve discrepancies in proceedings which may affect the due process.

Another vital concern is the appointment of arbitrators. Under the ICC arbitration rules,[14] it imposes the power to the court to decide the contrary if it deems fit notwithstanding the agreement of the parties. The UNCITRAL Working group II also suggests that the parties shall jointly agree on a sole arbitrator.[15] The lay-stone principle of party autonomy is taken away by imposing these strong guidelines on the parties.

In cases such as *Siddhi Real Estate Developers v. Metro Cash & Caeey India Pvt. Ltd*.[16] held that sanctity of the party autonomy should be preserved whilst deferring the procedure for appointment of arbitrators and the courts should retain the power to appoint arbitrators. Similarly, in *AQZ v. ARA*[17] the Singapore High Court ruled that by opting for SIAC Rules, the parties had recognised the SIAC president's power and discretion to appoint a sole arbitrator where the expedited procedure applied. This case was overruled in *Nobles Resources Pvt Ltd.*

[11] 71st session, Working Group II: Arbitration and Conciliation/ Dispute Settlement, A/CN.9/969, para. 58
[12] German Arbitration Institute Rules (DIS), Art. 27.4; The Permanent Arbitration Court of the Hungarian Chamber of Commerce and Industry, Art. 36; Asian International Arbitration Centre (AIAC), Rule 21(1)(b); Art.29, Expedited Rules of Stockholm Chamber of Commerce(SCC).
[13] Art. 3(3) Appendix VI, ICC rules.
[14] Art. 2(1) Appendix VI, ICC rules: "the court may, notwithstanding any contrary provisions of the arbitration agreement, appoint a sole arbitrator."
[15] Draft provision 2, UNCITRAL Rules on Expedited arbitration.
[16] (2014) Bom 623.
[17] (2015) SGHC 49.

v. Good Credit International Trade Co. Ltd[18], where the court refused to enforce a SIAC award passed under the expedited procedure.

Subsequently, The SIAC Rules 2016 (6th Ed.) amended that rule 5.2[19] will apply even when the arbitration agreement contains contrary terms. This constant dilemma of implicit consent in expedited arbitration has also resulted in amendments in Swiss rules[20] and HIKAC rules[21] to ensure due process and party autonomy.

CONCLUDING REMARKS:

Firstly, expedited arbitration through efficient has inbuilt complexities. Some of the concerns being what is the right monetary limit to impose expedited proceedings (e.g.: ICC has a limit of US 2,000,000[22]); if the parties consent prevails in the selection of arbitrators; is document-only hearing efficient; should there be limitations in counter or additional claims, etc.

Secondly, there are enforcement concerns in an expedited procedure, this ideally is the case when the parties consent to three arbitrators but a sole arbitrator is appointed.[23] Furthermore, certain institutions such as ICC allow the tribunal to dismiss a case preliminary when it lacks merit, this will be a potential ground to challenge the award. [24]

Finally, flexibility and consent are key factors in the arbitration to achieve viable results and thus, the arbitral institutions through their rules should not impose any obligation on parties which violates the principle of party autonomy. While there is tension between efficiency and

[18](2018) 1 CMCLR 18.

[19]Rule 5: 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:
(b) the case shall be referred to a sole arbitrator, unless the President determines otherwise.

[20]Art 42(2)(b) of Swiss Rules of International Arbitration: The case shall be referred to a sole arbitrator, unless the arbitration agreement provides for more than one arbitrator

[21]Art 41.2 of Hong Kong International Arbitration Centre (HKIAC) Rules: if the arbitration agreement provides for three arbitrators, HKIAC shall invite the parties to agree to refer the case to a sole arbitrator. If the parties do not agree, the case shall be referred to three arbitrators.

[22]Art. 30(2); Art. 1(2) Appendix VI)

[23]Article V(1)(d) New York Convention, which provides as a ground for refusing enforcement of an award the fact that the composition of the arbitral tribunal was "*not in accordance with the agreement of the parties*."

[24]Article V(1)(b) New York Convention, a party may argue that it was "*unable to present his case*."

due process, it is the task of the arbitrator to ensure compliance with due process. Therefore, efficiency and due process are intertwined and will not operate in isolation.