

Fast-Track Arbitration - Should it be Encouraged in International Commercial Disputes?

Av. Fatih SERBEST

BA, LL.M., PhD Candidate
Advocate, Arbitration Counsel

I. Introduction

Knowledge of history makes one very cautious about proclaiming a revolution in international commercial dispute resolution. The difficulty and the efficiency (both in time and money) of resolving international commercial disputes have been persistent and universal.¹ Numerous new ideas have been suggested, and yet no effective solution has been found.² However, with the impact made internationally by fast-track arbitration over the last two decades, it is greatly tempting to think that something in

¹ Queen Mary, U.O.L.S.O.I.A. & PricewaterhouseCoopers, P., 2006, *International arbitration: corporate attitudes and practices 2006*, PricewaterhouseCoopers, [London]., at 2 ("Expense and the length of time to resolve disputes are the two most commonly cited disadvantages of international arbitration"), 6, 7, 19, 20; PricewaterhouseCoopers, P. & School of International Arbitration (Queen Mary, U.O.L., 2008, *International arbitration: corporate attitudes and practices 2008*, PricewaterhouseCoopers, [New York, NY], at 2 ("the length of time and the costs of International Arbitration are seen as the disadvantages"); Friedland, P. & Ottolenghi, M., 2008, COMMENTS ON THE 2008 SURVEY ON INTERNATIONAL ARBITRATION: CORPORATE ATTITUDES AND PRACTICES ON RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS, *The American review of international arbitration* /, 19(3), pp. 447; Queen Mary, U.O.L.S.O.I.A. & White&Case LLP, 2010 International Arbitration Survey: Choices in International Arbitration [London]., at 3 (Disclosure of documents, written submissions, constitution of the tribunal and hearings are the main stages of the arbitral process that contribute to delay.) 32,33; General Counsel's Forum, 21(1-4) AM. REV. INT'L ARB. 321, 326 (2010) (Mark E. Lowes, KBR, Inc.: "And in general in[sic] takes me three times as long and costs about twice as much to go through an arbitration than it does a trial."); David, D., 2008, Towards a New Paradigm in International Arbitration: The Town Elder Model Revisited, *Arbitration international*, 24(3), 375, at pp. 376-77 (2008)

² Davison, M. & Nowak, L. 2009, *International Arbitration: How Can it Deliver on its Promise?*, in *Arbitration Volume 75 No:2*, pp. 163-8 ("[T]here are no, and never will be any, "permanent" solutions to "problems" in international commercial arbitrations...One of these is how to make arbitration proceedings more efficient, especially in terms of time and cost.")

the nature of a revolution might be taking place. Without a doubt, something quite significant is happening.³

This paper seeks to highlight both the evolutionary and the revolutionary aspects of fast-track arbitration in the Asia-Pacific Region. To that end, the first thing to do is to trace the history which has led to the use of fast-track arbitration in resolving international commercial disputes. The second is to outline the fast-track arbitration process so that it might be compared to the more traditional dispute resolution methods of ordinary arbitration process, so that the strengths and weaknesses of fast-track arbitration may be discerned. Finally, this paper will consider why, given the many benefits of ordinary arbitral proceedings and potential pitfalls of fast-track procedures, many arbitral institutions are offering automatic application of fast-track arbitration.

II. The Historical Development of Fast-Track Arbitration in the Asia-Pacific Region

In the resolution of international commercial disputes everyone agrees that courts simply aren't an option because parties cannot take a judgement from one national court to foreign one and expects to have it easily enforced, whereas an international arbitration award is immediately recognized as an enforceable binding decision⁴. So international arbitration has become more or less a monopoly in the resolution of international commercial disputes.⁵

Most will be familiar with the way that international commercial arbitration developed as a reaction to the excessive cost and delay associated with litigation. The principal reasons for the increase in popularity were the globalization of trade in the 20th century and the fact that arbitral awards could be easily and efficiently enforced under the NYC.⁶ Being in essence a

³ Rovine, 1995, *Fast-track arbitration - an ICC breakthrough*, *Arbitration*, 61(4), pp. 286-8 See ICC Cases 7385 and 7402 in ICCA, *Yearbook Commercial Arbitration* Vol. XVIII, pp. 68-79, 1993; B. Davis, *Laying Down A Gauntlet: The 36-Hour Chairman*, *Festschrift for Professor Hans Smit*, *American Review of International Arbitration*, Vols. 1-4, 1992

⁴ In 1958 the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter "the NYC") was adopted. The NYC provides for international recognition and enforcement of arbitration agreements and awards by national courts. Since it was adopted, the NYC has been the cornerstone of international commercial arbitration and has represented a quantum leap forward for international arbitration.

⁵ Paulsson, 2008, *International Arbitration is not Arbitration*, *Stockholm International Arbitration Review*, 2008(2), pp. 1-20 at.p.2 ("[I]n the transnational environment, international arbitration is the only game. It is a de facto monopoly.")

⁶ Greenwood, *The rise, fall and rise of international arbitration: a view from 2030*, *Arbitration*, 77(4), pp. 435-41 at 436 citing from J.G. Wetter, "The Present Status of the

private enterprise counterpart to the court system, the NYC was initially met with suspicion by the courts, which refused to enforce arbitration agreements, viewing them as ousters of the court's jurisdiction and as such void for public policy reasons.⁷ However, this suspicion dissipated, and national arbitration laws were introduced governing and supporting arbitration.⁸ International and regional arbitration organizations have also flourished that resulted in institutional arbitration culture both domestically and internationally for the resolution commercial disputes. In this way arbitration became an established method of dispute resolution, which is truly supported by arbitration laws, international conventions and arbitration institutions.⁹

However, initially this establishment came an increasing tendency to mimic court procedure, so that international commercial arbitration ceased to be perceived as a cheaper, more efficient alternative to litigation. Whilst accepting the significant position of international commercial arbitration, it soon fell behind the pace of the fast-moving world of international commerce in at least two respects: speed and cost-efficiency.¹⁰

In reaction to this, arbitration rules and national laws were gone through many revisions to provide efficient arbitration process. Foremost, the UNCITRAL Model Law revised in 2006.¹¹ This is followed by the revi-

International Court of Arbitration of the ICC: An Appraisal" (1990) 1 Am. Rev. Int'l Arb. 91 at 93. ("[The NYC is] single most important pillar on which the edifice of international arbitration rests".)

⁷ Despite its present significance, the New York Convention initially attracted relatively few signatories or ratifications. Only 26 of the 45 countries participating in the Conference signed the Convention prior to its entry into force on June 7, 1959. Many of nations, including Turkey and many Far Eastern countries, did not accede to the Convention until many years later. Australia (1975), Bangladesh (1992), China(1987), Hong Kong (1987), Malaysia (1986), Singapore (1986), Turkey(1992)

⁸ In addition to ratifying the New York Convention, China and Turkey enacted legislations supportive of the arbitral process during the last decade. See 1995 Arbitration Law of The People's Republic of China.; 2001 Turkish International Arbitration Code; See infra note 11 (UNCITRAL Model Law on Arbitration is accepted by 66 countries throughout the world and many other countries (where they have not adopted it outright) have based their arbitration law upon it.)

⁹ Howard M. Holtzmann, *Balancing the Need for Certainty and Flexibility in International Arbitration Procedures, International Arbitration in the 21st Century: Towards "Judicialization" and Uniformity?* (Richard B. Lillich & Charles N. Brower eds., 1993) at 7 Conference, L.C.I.A.C., Hunter, M., Marriott, A.L., Veeder, V.V. & London, C.C.O.I., 1995, *The internationalisation of international arbitration: the LCIA Centenary Conference*, Graham & Trotman/Nijhoff, London.

¹⁰ Supra Note 2, Davison at p.163

¹¹ Status 1985 - UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006. Retrieved February 21, 2012, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html

sion of UNCITRAL Arbitration Rules.¹² Furthermore, very widespread adoption of Revised Model Law has been adapted in Austria, Hong Kong, Singapore, Malaysia and Korea. These developments are very significant legislative efforts by these jurisdictions to harmonize with international norms and practices.

Fast-track arbitrations was one of those revisions, which started with the implementation of expedited procedures under CITEAC Rules in 1994 and followed by other Asia-pacific arbitration centers.¹³ It is commonly known as fast-track procedure, expedited arbitration, lean management or accelerated proceedings. In China, this kind of proceedings called Summary Procedures under CIETAC Arbitration Rules.¹⁴

a. Fast-track Procedures and the quest for efficient dispute resolution process

Fast-track Arbitration is a method of binding dispute resolution distinct from litigation and mediation and a sub-system of ordinary arbitration. The process is accelerated with the swift establishment of the sole arbitral tribunal, shorter time limits and procedural limitations to ensure speed and cost-efficiency in resolving international commercial disputes.¹⁵ However, it is capable of producing a quick, inexpensive determination of a disputed matter, its practicability and enforcement is fraught with some difficulty, especially when participants are not cooperative.¹⁶ Fast-track procedures are relatively recent developments in the ongoing quest by commercial parties for faster, cheaper and more efficient dispute resolution process. This is because resolving disputes using ordinary arbitration procedures have not proven to be efficient as parties expects.¹⁷

¹² Moss, G.C., 2010, *Revision of the UNCITRAL Arbitration Rules: Further Steps*, Int. A.L.R., 13(3).

¹³ In particular, in 2008 the Hong Kong International Arbitration Centre ("HKIAC") was adopted expedited procedures when the claimed amount in dispute does not exceed USD250,000 and in 2010 the Singapore International Arbitration Centre ("SIAC") made expedited procedures available when the amount in dispute does not exceed S\$5million; or when the parties agree; or in cases of exceptional urgency.

¹⁴ 2012 CITEAC Rules articles 54-62 Chapter IV Summary Procedures

¹⁵ *Techniques for Controlling Time and Costs in Arbitration*, 2007, Report from the ICC Commission on Arbitration, ICC Publication 843 .

¹⁶ Pyles, M., 2007, *Limits to Party Autonomy in Arbitral Procedure*, J. Int'l Arb., 24(3), p. 327

¹⁷ Redfern A., *Stemming the Tide of Judicialization in International Arbitration* World Arbitration & Mediation Review 2008 Volume 2 Issue 5, pp.21-38

b. History repeated itself

The courts were initially reluctant to enforce fast-track arbitration agreements, and the spectra of the argument that such clauses may be void as ousters of the court's jurisdiction was again raised.¹⁸ However, judicial suspicion has again given way to a warm welcome, as the courts have placed increasing importance on giving effect to the parties' agreed method of fast-track dispute resolution. An increasing body of national laws makes it clear that fast-track arbitration agreements are enforceable and that many national courts will generally give effect to the fast-track arbitral awards.¹⁹

However, in a further instance of history repeating itself, fast-track arbitration in many instances are growing to be more and more like ordinary arbitration proceedings without getting much the benefits of speed and economy. Thus, fast-track arbitrations arise out of dissatisfaction with the slow and cumbersome options of ordinary arbitration proceedings, but in different ways. The following sections will outline the legal principles governing fast-track arbitration.

III. The Scope of Application for Fast-Track Arbitration Rules

There are two different approaches for the applicability of fast-track procedures: 1) Opt –out and 2) Opt – in. This division is a direct result of the arbitration centers' effort to develop and incorporate fast-track procedures in the arbitration clause. Arbitral institutions have devoted significant pre-contract planning and established dispute-filtering methods tailored to address disputes by type and size.

a. Opt-out Approach

Opt-out approach is a product of Swiss Chambers Arbitration institutions who has first introduced the automatic application of fast-track arbitration below certain monetary threshold. The CIETAC incorporated and modified these rules in 1994.²⁰ Initially the monetary threshold was law but

¹⁸ Davis, Lagace & Volkovitsch, 1993, *When Doctrines Meet - Fast -Track Arbitration and the ICC Experience*, J. Int'l Arb., 10(4), pp. 69 – 96 at p.73 (discussing fast-track arbitration clauses and pathology)

¹⁹ Scherer, C. & Baizeau, D. 2009, *Swiss Rules Of International Arbitration Awards Before The Swiss Federal Supreme Court*, in Füg (ed), *The Swiss Rules of International Arbitration - Five Years of Experience*, Swiss Chambers' Court of Arbitration and Mediation, Basel

²⁰ 1994 CIETAC Rules Articles 64-74 Chapter III Summary Procedures Art 64 states "this Summary Procedure shall apply to any case in dispute where the amount of the claim totals not more than RMB. 500,000.00 yuan"

the 2012 CIETAC Rules has increased it from RMB500,000 (Approx. USD 80,000) to RMB2,000,000 (Approx. USD 320,000).²¹ This entailed submitting higher amount disputes to summary procedures for determination outside the auspices of regular arbitration proceedings. However, the CIETAC has authority to determine the applicability of summary procedures if the claimed amount is not specified in the request of arbitration. Once arbitration begins with summary procedures it will not be affected by the later changes in the monetary threshold. (i.e. if the claimed amounts exceed the monetary threshold with counterclaims or with the later increases on the claimed amount.)²²

The situation is slightly different in other regional institutions. For instance, under the SIAC this threshold is much higher S\$5million but for it to apply a party shall request fast-track procedures before the establishment of an arbitral tribunal. This means it is not entirely an automatic application because the tribunal requires obtaining parties opinion on fast-track procedures prior to proceed with it.²³ Under the HKIAC this monetary threshold is US 250,000 but it is not applicable if the claimed amount exceed the threshold with counterclaims or in other ways during the dispute resolution process.²⁴ Similarly, under the Japan Commercial Arbitration Association (“JCAA”) Rules expedited procedures automatically applies in any case where the amount and economic value of the claimant’s claim are not more than ¥20,000,000 (Approximately USD 250,000).²⁵ Under the Korean Chamber of Arbitration Board (“KCAB”) Rules fast-track procedures are not applicable if the claimed amount exceeds the monetary threshold of US 180,000 during the dispute resolution process.²⁶

b. Opt-in Approach

Opt-in approach to fast-track procedures necessitates explicit agreement to fast-track arbitration either in their arbitration clause when signing

²¹ 2012 CIETAC Rules Articles 54-62 Chapter IV Summary Procedures Art 54 states that “Unless otherwise agreed by the parties, Summary Procedure shall apply to any case where the amount in dispute does not exceed RMB 2,000,000 yuan”

²² Compare with 2011 KCAB Rules and the 2012 SCIA Rules where later changes effect the applicability of fast-track procedures.

²³ 2010 SIAC Rules Article 5

²⁴ 2008 HKIAC Rules Article 38

²⁵ 2006 JCAA Rules Articles 59-67 Chapter V Expedited Procedures but there is no expedited procedures under the 2009 JCAA International Arbitration Rules.

²⁶ 2011 KCAB Rules Articles 38-44 Chapter 6 Expedited Procedures applies 1. where the claim amount does not exceed 200,000,000 Korean won; or 2. where the parties agree to be subject to the expedited Procedures. See also

the substantial contract or in the submission agreement when initiating fast-track arbitration. There is no monetary threshold in respect of the sum in dispute for an automatic application of such rules. Almost all arbitration rules accept parties' agreement when they opt for fast-track procedures.

This is possible for instance by choosing stand alone fast-track procedures of the 2011 ACICA Expedited Rules or the 2012 KLRCA Fast track Rules, or by imposing time limits under ICC Arbitration²⁷, or by agreeing to proceed fast-track procedures with tailor made proceedings under ordinary arbitration. As long as, parties specifically agrees fast-track arbitration arbitrators, arbitration providers are bound to respect their autonomy within the limits of procedural fairness and mandatory laws.²⁸

IV. Fast-Track Arbitration Rules

Following is a list of fast-track arbitration rules that have been adopted by arbitration institutions. One interesting feature of these rules is that the degree of independence over ordinary arbitration rules divides them into three different types. Therefore, in addition to opt-in and opt-out approaches, fast-track arbitration rules broadly fall into the following categories: 1) Stand Alone Fast Track Arbitration Rules (Separate) 2) Semi Separate Fast Track Arbitration Rules (Quasi-Separate) 3) Implicit Fast Track Arbitration Rules (Non-Separate)

a. Stand Alone Fast Track Arbitration Rules (Separate Rules-Opt-in Approach)

There are nine stand-alone fast-track arbitration rules available in resolving international commercial disputes.²⁹ Three of these are offered in the Asia-pacific arbitration centers: **(1)** the Expedited Rules of Arbitration (2010) of the Australian Centre for International Commercial Arbitration

²⁷ 2012 ICC Arbitration Rules Article 38

²⁸ Japaridze, N., 2008, *Fair Enough? Reconciling the Pursuit of Fairness and Justice with Preserving the Nature of International Commercial Arbitration* (2008), Hofstra Law Review, 36, pp. 1415-45 at 1430

²⁹ (1) The Expedited Arbitration Rules (1994) of the World Intellectual Property Organization ("WIPO") was the first separate fast-track arbitration rules (2) Rules for Expedited Arbitrations (1995) of the Stockholm Chamber of Commerce ("SCC") (3) The Fast and Low Cost Arbitration Rules (1996) of the London Maritime Arbitration Association ("FALCA") (4) the Rules for Expedited Arbitration (2004) of the Arbitration Institute of the Finland Chamber of Commerce ("FCC"), (5) 100-Day Arbitration Procedure (2004) of the United Kingdom's Society of Construction Arbitrators (6) International Institute for Conflict Prevention & Resolution, Global Rules for Accelerated Commercial Arbitration (2009) ("CPR Expedited Rules")

(“ACICA”)³⁰ (2) the Fast Track Rules (2010) of the Kuala Lumpur Regional Centre for Arbitration (“KLRCA”)³¹ (3) Fast Track Arbitration Rules of the (2007) the Institute of Arbitrators and Mediators Australia (“IAMA”)³²

What differentiate stand-alone fast-track arbitration rules is that they are completely separate and distinct from ordinary arbitration procedures. These are the most comprehensive of the fast-track procedures, creating a stand-alone set of detailed rules governing an expedited arbitration from initiation of the claim through appointment of arbitrator, production of evidence, hearings, and the award.

b. Semi-Separate Fast Track Arbitration Rules (Opt out)

There are twelve semi-separate or supplementary fast-track arbitration rules expressly insert a chapter, or rules for fast track procedures within the conventional institutional arbitration rules.³³ These are not separate because ordinary arbitration rules remain applicable to proceedings conducted under these kinds of fast-track procedures. Also it is always possible to shift from fast-track procedures to ordinary arbitral procedures when particularities of current disputes make it necessary.³⁴

Almost all of the semi-separate fast-track arbitration rules offer “opt out” approach to fast-track arbitration. Fast-track procedures apply by default, and then only to claims under a dollar-value threshold. These groups

³⁰ The first edition of the Rules has revised in 2011. The second edition is enacted to take in force from 01 August 2011. See Art. 1 of the ACICA Expedited Arbitration Rules.

³¹ KLRCA has revised its Fast Track Rules in 2012 in line with the 2011 amendments to the 2005 Arbitration Act and 2012 Construction Industry Payment and Adjudication Act. (Revised KLRCA Fast Track Rules (2nd Edition) accommodate maritime matters and admiralty disputes and benefit many different industries, domestic and international) . See KLRCA Newsletter Jan-Mar 2012. http://klrca.org.my/userfiles/File/KLRCA_Newsletter_JanMar2012.pdf

³² http://www.iama.org.au/pdf/IAMAAR_FastTrack07.pdf See also 2007, *Fast Track Arbitration Rules*, in BDPS Regional News pp.11-18 (IAMA sees the model applying not only to construction disputes, but also to disputes arising in all industry sectors whether domestic or international)

³³ (1) Article 31 of the Arbitration Rules of the Geneva Chamber of Commerce and Industry (1992) was the first institutional enactment of this kind. (2) Article 41 of the Rules of Arbitration of the Basel Chamber of Commerce (1995), (3) Article 48 of the Arbitration Rules of the Chamber of Commerce of Ticino (1997) (4) Article 37 of the Arbitration Rules (1998) of the Netherlands Arbitration Institute (“NAI”), (5) Expedited Procedures (1999) of American Arbitration Association (“AAA”), (6) Expedited Procedures of the Swiss International Arbitration Rules (2004) of the Swiss Chambers’ Arbitration Institution (“SCAI”) (7) Supplementary Rules of Expedited Arbitration Rules of the German Institution of Arbitration (2008)

³⁴ Conference, S.V.F.S. et al, 2004, *The Swiss rules of international arbitration*. [Bezug]: ASA Secretariat, attn. R. Füg, Basel (Aeschenvorstadt 67),

of Rules have taken significant steps towards addressing concerns voiced by the international business community about cost and delays in arbitration process because they provide an automatic application for fast-track procedures. In addition to an automatic application of fast-track procedures parties are permitted to make a specific fast-track arbitration agreement for a dispute where claimed amount is higher than the monetary threshold.

In the Asia-pacific region, five arbitration organizations offer semi-separate fast-track rules: **(1)** The Summary Procedures (1994) of the Arbitration Rules of the China International Economic and Trade Arbitration Commission ("CIETAC")³⁵ was the first arbitration organization that offered fast-track arbitration in the region. **(2)** This is followed with the Expedited Procedures of the Commercial Arbitration Rules (1997) of The Japan Commercial Arbitration Association ("JCAA")³⁶, **(3)** Article 38 of Administered Arbitration Rules (2008) of the Council of the Hong Kong International Arbitration Centre ("HKIAC") **(4)** Article 5 of the International Arbitration Rules (2010) of the Singapore International Arbitration Centre ("SIAC") and **(5)** Articles 38-44 of the Rules (2011) of International Arbitration of the Korean Commercial Arbitration Board ("KCAB")

c. Implicit Fast Track Arbitration Rules

Some arbitration institutions imply the possibility fast track arbitration procedures in the realm of their ordinary arbitration rules but they don't expressly offer fast-track arbitration procedures. Article 38 of the 2012 Arbitration Rules of the International Chambers of Commerce ("ICC") is the prominent example of this kind. It only provides a mechanism for parties in regular arbitration to opt for shorter time limits. In a similar vein, Article 9 of the London Court of International Arbitration ("LCIA") Rules provides for an "Expedited Formation" of the Arbitral Tribunal. This grants the LCIA Court the authority to abridge or curtail only the time limits for the formation of the arbitral tribunal but not - at least not expressly -for an expedited

³⁵ Articles 64-74 of the 1994 CIETAC Rules. The CIETAC Arbitration Rules revised in 2012. See Articles 54-62 of the 2012 CIETAC Rules in which the RAM 500,000 Yuan threshold for automatic application of fast-track procedures increased to RAM 2,000,000 Yuan (approximately USD 320,000 equivalent). Considering the CIETAC dealt with 560 international arbitration cases in 2009, 418 in 2010 and 470 in 2011, and majority of disputes are below USD 500,000 threshold. Fast Track Arbitrations are expected to boost in the next years.

³⁶ Art. 52-61 of the JCAA. This rules are last revised in 2008 in which the application of expedited procedures remained the same. See the 2008 JCAA Art.59-67 (It is necessary to note that such expedited procedures are not added into the 2009 JCAA International Arbitration and Mediation Rules.

procedure once the Arbitral Tribunal has been constituted. Depending on the circumstances, an Arbitral Tribunal constituted under the "Expedited Formation" procedure could conduct accelerated proceedings in light of Article 14.1(ii) of the LCIA Rules.³⁷

Since fast-track arbitration under the LCIA and ICC require an agreement in writing by the parties, the result would be similar to the adoption by the parties of expedited procedure rules once the dispute has arisen. However, the same could be said of any fast-track procedure agreed by the parties and the Arbitral Tribunal under stand-alone and semi-separate institutional fast-track rules, so that implicit fast-track rules are not the same as that in which the applicable rules contain a specific provision on fast-track procedures.

These stand-alone, semi-separate and implicit rules recognize the crucial role of arbitral institutions to assist parties in the effective and efficient case management. These rules help parties to focus on speed and cost-efficiency right from the stage of drafting an arbitration clause to the administration of fast-track arbitration process and to the issuance of fast-track arbitral award.

After a dispute, parties often unable to settle a fast-track dispute resolution process, so that efficient institutional supervision makes the difference both in the swift establishment of an arbitral tribunal and in the administration of expedited procedural rules.³⁸

By contrast, there are no administrative body in ad hoc arbitrations where arbitrators observe procedural conduct of arbitration.³⁹ Therefore, it is virtually impossible to engage in a fast-track ad hoc proceeding absent the consent of both parties. This is because the cooperation of each is needed to constitute the tribunal and get the arbitration underway.⁴⁰

The following sections analyze the characteristics of fast-track procedures. Particularly makes comparisons between fast-track procedures and

³⁷ LCIA art 14.1(ii) imposes arbitrators' a duty to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay or expense, so as to provide a fair and efficient means for the final resolution of the parties' dispute.

³⁸ C. Imhoos, *The 1992 Geneva Chamber of Commerce and Industry Arbitration Rules under Scrutiny*, 9 J. Int. Arb. 4, December 1992 at footnote 113 p. 135; special sections of the *American Review of International Arbitration* Vol. 2, No. 2, 1991, and *ICC International Court of Arbitration Bulletin*, Vol. 3, No. 2, November 1992;

³⁹ See *UNCITRAL Rules*; China do not accept non-institutional arbitration as all arbitrations have to be institutional.

⁴⁰ McIlwrath & Savage, J., 2010, *International Arbitration and Mediation- A Practical Guide*, Kluwer Law International, at p.279 (

ordinary arbitral procedures to identify how fast-track arbitration intend to achieve greater speed and cost-efficiency in the resolution of international commercial disputes.

V. Characteristics of Fast-track Procedures

Fast-track arbitration rules differ from ordinary arbitration rules in five main respects; (1) Swift Appointment of a Sole arbitral Tribunal (2) Time Limits and Overall Time Frame (3) Limitations on type of Procedures (4) Submission of evidence, witness testimony and discovery; and (5) Fees and Costs

a. Swift Appointment of a Sole Arbitrator as a Default Rule

There is much to be said for the number of arbitrators and the length of the periods of time for their appointment. It often takes four months or more to form a three-person tribunal in a substantial case.⁴¹ Indeed, it is not easy to vet arbitrator candidates, particularly in an international commercial case, but it is a procedure that can be expedited. Swift appointment process and a selection of a sole arbitral tribunal may save time compare to normal routine of appointment process and selecting three members tribunal.

In addition, it is increasingly common to challenge the appointed arbitrators, which may inevitably delay the overall arbitration process. Thus can be also be expedited and better regulated to reduce the obstructive effects of challenges.

i. Sole Arbitrator

Unless the parties agree otherwise, the default position under all fast-track rules is that a sole arbitrator will decide the arbitration.⁴² This differs significantly from the conventional number of three arbitrators normally appointed under the CIETAC Arbitration Rules⁴³, KLRCA Arbitration Rules and the UNCITRAL Arbitration Rules.

⁴¹ Böhning-Uhle, C., Kirchhoff, L. & Scherer, G., 2006, *Arbitration and Mediation in International Business*, Kluwer Law International, p.108

⁴² KLRCA art.4 SCC art. 1 and WIPO art. 14 respectively.

⁴³ CIETAC Article 23 1. The arbitral tribunal shall be composed of one or three arbitrators. 2. Unless otherwise agreed by the parties or provided by these Rules, *the arbitral tribunal shall be composed of three arbitrators*. By contrast, under CIETAC Article 56 Unless otherwise agreed by the parties, *a sole-arbitrator tribunal shall be formed* in accordance with Article 26 of these Rules to hear a case under Summary Procedure. See ACICA Art. 8 There shall be one arbitrator. KLRCA Art 4. Unless the parties have agreed otherwise, any arbitration conducted under these Rules *shall be conducted by a sole arbitrator*

Arbitral proceedings involving the selection of sole arbitral tribunal will obviously entail less cost and time compared to arbitration before a tribunal comprising a larger number of arbitrators. The costs of the tribunal are likely to be reduced by 50 per cent compared to a panel of three arbitrators⁴⁴ as no voting process on a decision by the arbitral tribunal, including the issuance of the award, is required.

The role of a sole arbitrator is certainly more demanding than that of a co-arbitrator, as it involves more responsibility. However, provided that the sole arbitrator is carefully chosen and suitably qualified, the absence of the co-arbitrators should not represent any threat to the interest of either party and one arbitrator can ensure a speedier resolution of the dispute.⁴⁵

ii. Expedited Formation of Arbitral Tribunal

Fast-track procedures set out a mechanism for expedited formation of the arbitral tribunal. The KLRCA Fast-track Rules stipulate 7 days time limit from the commencement of the arbitration for parties to appointment of a sole arbitrator.⁴⁶ Thereafter with the notice of either party the director appoints the sole arbitrator within 14 days. Under the ACICA Fast-track Rules time limit for the institutional appointment is 14 days from the commencement of the arbitration. Also arbitral institutions are empowered “*alone*” to appoint the arbitrator within stipulated time limit.⁴⁷

Under CIETAC rules, there is no separate arbitrator appointment mechanism for summary procedures. This is because the general provisions of CIETAC provide swift mechanism regarding the appointment of arbitrators. It requires parties within fifteen (15) days from the date of the Respondent’s receipt of the Notice of Arbitration, to jointly nominate the sole arbitrator, or entrust the Chairman of CIETAC to make an appointment from the list of arbitrators.⁴⁸ Under these rules there is no time limit for the Chairman of CIETAC to appoint the sole arbitrator. It is presumed that the chairman will act expeditiously once parties fail to appoint their arbitrators.

The HKIAC also refers to the general provisions for the formation of arbitral tribunal but their rules are not as expeditious as the CIETAC Rules.

⁴⁴ Expedited Arbitration Rules: Stockholm and WIPO, *Arbitration International*, (Kluwer Law International 1997 Volume 13 Issue 2) pp. 193 – 198 at p. 193

⁴⁵ Mauro Rubino-Sammartano, *Arbitration Is Useful Only if It Is Better than Court Proceedings* in M. Á. Fernández-Ballesteros and David Arias (eds), *Liber Amicorum Bernardo Cremades*, (La Ley 2010) pp. 1047 - 1050

⁴⁶ 2012 KLRCA Fast-track Rules Article 4

⁴⁷ 2011 ACICA Expedited Rules Article 8

⁴⁸ 2012 CIETAC Rules Article 25

Under HKIAC parties are given 30 days to jointly appoint the sole arbitrator.⁴⁹ To rectify this Article 38(2)(1) empowers the Secretariat to shorten all time limits in Rules in expedited procedures. Similarly, the SIAC Expedited Rules in Article 5 empowers the Register to shorten any time limits under its rules. Normally, the Chairman shall appoint a sole arbitrator as soon as practicable if the parties have not reached an agreement on the nomination within 21 days after the receipt of the Notice of Arbitration.⁵⁰

iii. Shorter Time Limits for the Challenge of the Arbitrator's Position

Parties in fast-track arbitrations are generally limited in the time to object to a proposed arbitrator. For instance, parties have seven days (as opposed to the usual 15) to object to an arbitrator's appointment under the KLRCA and ACICA fast-track rules, 10 days under the CIETAC Arbitration Rules.⁵¹ Under the HKIAC and the SIAC rules, the parties' time to object to an appointment will be limited by the undefined shortened time periods that are determined by the parties or the arbitral organization. These Rules state that a challenge to the appointment of an arbitrator must be made immediately after the alleged disqualifying circumstances have become known to the party, and in any event no later than 14 days under the SIAC and 15 days under the HKIAC.⁵² What is significant in terms of efficiency is that the expedited procedures empower these institutions to shorten any time limits in their rules.

b. Time Limits and Overall Time of Arbitration

Fast-track procedures offer some form of shortened time periods in order to decrease the total time of arbitration. The approach taken varies from detailed limits on almost every stage of the arbitration, to a single overall time limit, to mere discretionary shortening of the various time limits of the arbitration or for the creation of the arbitral tribunal.

i. Written Statements and Exchange of Submissions

Contrary to Standard Rules, which give the tribunal wide discretion to set down the procedural rules, Expedited Rules impose an express shorter time limits for the exchange of submissions and written statements.

⁴⁹ 2008 HKIAC Rules Articles 38 for the expedited procedures and Articles 7.1, 7.2 and 8.2 for the formation of arbitral tribunal.

⁵⁰ 2010 SIAC Rules Articles 7.1 and 7.2

⁵¹ 2012 KLRCA Fast-track Rules Article 15; 2011 ACICA Expedited Rules Article 10; 2012 CIETAC Rules Article 30

⁵² 2010 SIAC Rules Articles 11 and 12; 2008 HKIAC Rules Article 11

The CIETAC Rules allow the claimant to file the statement of claim and one supplemental written statement (inclusive of a preliminary statement of evidence). Similarly, the respondent may, in addition to the statement of defense, submit a supplemental written statement. All submissions should be made within 20 days rather than 45 days.⁵³ However, there is no stated sanction in case the submission is not made timely and in practice it is unlikely that the arbitrator would reject it. Moreover, the arbitrator and the secretariat have discretion to allow time extension in special circumstances.

The KLRCA and ACICA Rules stipulate that the statement of claim must accompany the request for arbitration and that the statement of defense must accompany the answer to the request.⁵⁴ Under both rules, the Respondent is required to respond within 28 days of the receipt the notice of arbitration. While further submissions depends on Tribunal's approval under ACICA Rules, KLRCA provides 7 days time limit to the Claimant for a reply to statement of defense and 7 days time limit for the Respondent's Reply. The Respondent may also submit a 'counterclaim' within 7 days to submit a counterclaim defense.⁵⁵

ii. The Fast-Track Award

The CIETAC Summary Procedures stipulate a three-month period for rendering the award. This period commences when the case has been submitted to the arbitrator.⁵⁶ This represents a significant departure from the period of 6 months stated in the Standard CIETAC procedures. If it becomes difficult or perhaps impossible for the arbitrator to comply with this time limit, the Secretary General of CIETAC may, at the request of the arbitrator, extend the period.⁵⁷ The HKIAC and the SIAC Expedited Procedures also provide a time limit for the rendering of an award but their expedited time limit equals the standard procedures of CIETAC, which is six months from the formation of arbitral tribunal.⁵⁸

In the case of stand alone fast-track rules, the KLRCA stipulates 90 days time limit in a documents only arbitration from the commencement of arbitration. With regard to arbitration with a substantive oral hearing, the Arbi-

⁵³ 2012 CIETAC Rules Articles 14 and 57

⁵⁴ 2012 KLRCA Fast-track Rules Article 3(2)(g), 7 and 8; 2011 ACICA Expedited Rules Articles 17 and 18

⁵⁵ Ibid

⁵⁶ 2012 CIETAC Rules Articles 60

⁵⁷ 2012 CIETAC Rules Articles 46

⁵⁸ 2010 SIAC Rules Articles 5(2)(d); 2008 HKIAC Rules Article 38(d)

tral Tribunal shall publish the final award expeditiously and no later than hundred and sixty (160) days.⁵⁹ This means a hearing adds additional 70 days to the arbitral proceedings. By contrast, arbitrations that proceed under the KLRCA standard arbitration rules are estimated to last between one year (365 days) and one year and a half (547 days). Under the ACICA Expedited Rules, the final award should be made within four (4) months of the appointment of the Arbitrator but if there is a counterclaim then it is within 5 months.⁶⁰

c. Limitations on types of Procedures

Although time limits provide goals for expedited arbitration, most expedited procedures also restrict the types of procedures available at arbitration to ensure that these time limits can be met, such as by limiting the number of memorials and cross claims, providing more liberal rules for service of process or limiting the availability of oral hearings.

Most of the fast-track procedures limit the number and type of memorials to be submitted and discourage oral hearings. The KLRCA Rules utilize perhaps the most unorthodox time-saving device by permitting service of notice of the initiation of the arbitration by fax, email or any other means of electronic transmission.⁶¹ Similarly, CIATEC rules empowers the Secretariat use any other means of communication that can provide a record of the attempt at delivery.⁶² Indeed they are not as expedited as the AAA which allows telephoning, so long as it is followed by written notice.⁶³

i. Documents-Only Arbitration

Fast-track procedures allow for the possibility of a documents-only arbitration.⁶⁴ This is a decision made on written submissions and documentary evidence unless the parties request a hearing or the arbitrator deems one necessary.

For instance, under KLRCA Fast-track Rules where the aggregate amount of the claim (and/or counter claim) in dispute in an international arbitration is less than or unlikely to exceed US \$75,000, that arbitration

⁵⁹ 2012 KLRCA Fast-track Rules Articles 12(4) and 12(5)

⁶⁰ 2011 ACICA Expedited Rules 27

⁶¹ 2012 KLRCA Fast-track Rules 2(4)

⁶² 2012 CIETAC Rules 8

⁶³ See the AAA Commercial Arbitration Rules and the AAA Construction Industry Arbitration Rules,

⁶⁴ 2012 KLRCA Fast-track Rules 9

must proceed as a documents-only arbitration unless an oral hearing is deemed necessary by the arbitrator in consultation with the parties.⁶⁵

ii. Single Hearing (if any at all)

Under the CIETAC standard arbitration procedures an oral hearing should normally be held.⁶⁶ Whereas, under the summary procedures the tribunal has great discretion to not hold an oral hearing⁶⁷ The arbitrator can direct that the procedure be conducted in documents only, even if a party requests an oral hearing. If a party in good faith requests an oral hearing it would, however, be difficult for the arbitrator to conclude that an oral hearing is not necessary. A party's application for an oral hearing would generally, by itself, in most cases lead to the inference that such a hearing is necessary, particularly if one party is relying upon written witness statements. Same can be said about the HKIAC expedited procedures and the KCAB expedited rules.

Hearings, if they are to occur, are limited by the ACICA to one day and by KLRCA to six days. Under CIETAC, HKIAC and KCAB arbitral tribunal has discretion to determine the length and procedure of a hearing, if one is to be held. In contrast, expedited arbitration under SIAC requires an hearing unless parties agree otherwise. In this respect, the SIAC Expedited procedures differ from the CIETAC Summary Procedures and other semi-separate rules because the parties are entitled to an oral hearing unless they agree otherwise.⁶⁸

d. Submission of Evidence, Witness Testimony and Discovery

All of the expedited rules provide some form of procedure for exchange of evidence in advance of the hearing, either by rules specific to the expedited arbitration or by reference to the arbitral tribunal's authority under the regular arbitration rules but there is no broader discovery. The detailed procedures provided in the ACICA Expedited Arbitration Rules⁶⁹ and the KLRCA Fast-track Rules, which explicitly grants the arbitrator the authority to order production of relevant, documents or evidence.

⁶⁵ 2012 KLRCA Fast-track Rules 9(3)

⁶⁶ 2012 CIETAC Rules Article 33 (2)

⁶⁷ 2012 CIETAC Rules Article 58

⁶⁸ 2010 SIAC Rules Article 5

⁶⁹ 2011 ACICA Expedited Rules 25

e. Fees and Costs

Many fast-track arbitration rules correspond to the Standard Rules as to fees and costs. The fee payable to the arbitrator shall, unless the parties and the arbitrator agree otherwise, be determined within a range set out in a schedule of fees issued by the arbitration centers. Subject to any agreement between the parties, the tribunal shall apportion the cost of the arbitration and the registration and administration fees between the parties in the light of all the circumstances. The tribunal may also, subject to any contrary agreement, order a party to pay the whole or part of reasonable expenses incurred by the other party in presenting its case, including costs for legal representatives and witnesses.

By contrast, under the KLRCA Fast-Track Rules, the costs, which the parties may recover, are capped. In a documents-only arbitration, neither party is entitled to recover more than 30% of the total amount claimed. In arbitration with an oral hearing, no more than 50% of the amount claimed can be recovered in costs⁷⁰ It should be noted that these percentages are maximum figures and a tribunal may, at its discretion, cap costs at a lower percentage.

VI. Comparing Fast-Track Procedures and Ordinary Arbitration Procedures

Fast-track arbitration in its various forms has taken international commercial dispute resolution by storm. The SIAC reported that 8% of all arbitration in 2011 dealt with fast-track procedures.⁷¹ With the recent increases on monetary thresholds for the applicability of fast-track procedures the numbers are expected to continue to rise in the near future. Also the development by institutions of various rules for fast-track procedures is a good indication of its growth and popularity.

This increased use of fast-track arbitration is no doubt due in large part to the fact that international commercial arbitration has become costly, lengthy and cumbersome as a method of international commercial dispute resolution.⁷² This is likely the result of the temptation in international com-

⁷⁰ 2012 KLRCA Fast-track Rules 14(3)

⁷¹ See 2011 SIAC Annual Report at (This process has proved particularly popular and 8% of the SIAC administered cases filed this year were conducted pursuant to the Expedited Procedure, involving parties from 14 countries across Asia, Europe, the Middle East and the USA.) See also Swiss Chambers 2011 Statistics reveals that 33% of the cases was expedited arbitration in 2011.

⁷² Barrington, 2009, *Do we need fast-track arbitration?*, Construction Law Review at 38 See also McIlwrath, 2009, *'As Long as a Piece of String': Timing Expectations in International*

mercial arbitration to mimic traditional court procedure. In many instances the arbitrator's fear of criticism by a court has resulted in arbitration procedures being more cumbersome than the foreshortened procedures available even in the commercial courts. In contrast, fast-track arbitration is seen as a quick and efficient alternative means of getting an answer to a certain type of international commercial disputes.⁷³

This being said, commentators have voiced concern about the lack of research into quantifying the relative effectiveness of fast-track procedures.⁷⁴ Whatever the validity of such concerns, fast track procedures is becoming a core dispute resolution techniques at both domestic and international levels.

The following section will consider some of the differences between fast-track procedures and ordinary arbitration procedures in terms of their effectiveness as a method of resolving international commercial disputes. If fast track procedures could be shown to have distinct benefits over ordinary arbitration procedures then this could go some way towards supporting the encouragement of its use. Accordingly, what follows is a comparison of the two procedures, with the objective of identifying some central procedural differences between fast-track arbitration and ordinary arbitration. This comparison does not deal with all of the post facto criteria relevant to distinguishing between fast-track arbitration and ordinary arbitration, as there is only one type of international commercial arbitration that depends on the enforcement and recognition mechanism of New York Convention. Hence, the author only deals with those which serve to bring to light the procedural differences.

a. Enforcement of Fast-Track Arbitration Agreement

Usually, the fast-track arbitration agreement is contained in an arbitration clause that gives reference to institutional arbitration rules, although

Arbitration (IDN Podcast 66), <http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/475/As-...ming-Expectations-in-International-Arbitration-IDN-Podcast-66.aspx>, Retrieved July 28, 2011

⁷³ Conference, Oetiker, C 2008, ASA Below 40, *Fast Track Arbitration The Rules and Laws Available*, 10 October 2008

⁷⁴ See for instance Paulsson, J. 1994, *Fast-Track Arbitration in Europe (With Special Reference to the WIPO Expedited Arbitration Rules)*, in *Hastings Int'l & Comp. L. Rev*, HeinOnline, p. 713 (Expedited Arbitration, is designed for parties ... who are willing to accept the marginal reduction in legal security for greater speed and lower costs.); Müller, E., 1998, *Fast-Track Arbitration-Meeting the Demands of the Next Millennium*, *J. Int'l Arb.*, 15(3), pp. 5-18. See also Conference, IBA Madrid 2009, *Fast-track arbitration: an idea whose time has come?* Madrid 4-9 October 2009.

fast-track ad hoc arbitration are not uncommon.⁷⁵ Such agreement will refer all or some part of the disputes for final and binding resolution with the use of fast-track procedures from the formation of a sole arbitral tribunal to fast-track arbitral award.

Essentially, the substantive obstacle to enforcement of such an agreement is the courts' unnecessary involvement for not allowing the operation of the fast-track procedures. Although, the courts do have the statutory power to stay its proceedings in favour of arbitration when it comes to shorter time limits and procedural limitations only arbitration friendly seats allows effective conduct of fast-track arbitration.⁷⁶ In the *lex arbitri* where international commercial arbitration is at the development stage the reluctant party may apply the court, as there is always a good ground that fast-track procedures are inoperative or void.⁷⁷

However, the tendency of courts to give weight to the freedom of parties to contract has meant generally that courts have restrained from interfering with fast-track arbitration agreements. Generally speaking, their approach to fast-track agreements has been to interpret the clauses as not ousting the jurisdiction of the courts. To this effect, a court is unlikely to interfere with fast-track arbitration unless the sole arbitrator has acted outside his or her terms of reference as set out in the arbitration agreement.⁷⁸

A further complication involved in fast-track arbitration arises where a fast-track arbitration agreement fails to clearly delineate an arbitrator's jurisdiction and the types of matters which can be submitted to fast-track arbitration. Parties may be forced to abandon fast-track proceedings in order to determine subsidiary questions relating to the tribunal's jurisdiction. This matter is obfuscated by the fact that fast-track arbitration, if not stated oth-

⁷⁵ Non-institutional arbitration is sometimes inaccurately referred to as "ad hoc" arbitration. Non-institutional arbitration takes place independently of an arbitration association like the ICC, AAA or LCIA. Ad hoc arbitration involves the adoption of arbitration at the time of a dispute, rather than in consequence of an arbitration clause in a pre-existing contract. Non-institutional and ad hoc arbitration often coincide in fact. However, they diverge, for example, when the parties submit their ad hoc dispute for resolution in accordance with the rules and procedures of a particular arbitration association.

⁷⁶ Secomb et al 2011, *International arbitration Streamlining, while competition heats up*, PLC Magazine, April 2011 at p.5 (citing that "The 2010 [Choices in International Arbitration] survey suggests that Asia has become a more familiar, trusted and frequently-used region for parties involved in international arbitration proceedings.")

⁷⁷ Guenou et al 1994, *International Fast-Track Commercial Arbitration*, in *The Comparative Law Yearbook of International Business*, Graham & Trotman, pp. 357-455

⁷⁸ Conference, Shunmugam 2010, *Confidence in Arbitration (Is Choosing Arbitration Justifiable?)*, Current Developments, Trends and Opportunities, 29 April 2010, Singapore Shipping Conference.

erwise in the agreement, often does not require the parties to submit particulars of the dispute or formal pleadings, in which event the tribunal is left with daunting jurisdictional and determinative issues.⁷⁹

Related to the issue of an tribunal's jurisdiction is the question of what matters should be referred to fast-track arbitration. The decision in *Walkinshaw v Diniz*⁸⁰ (Stay of Proceedings) suggests that fast-track arbitration might not be appropriate where complex questions of law or the construction of legal documents are involved.⁸¹ Further, the models of fast-track arbitration adopted by some organizations suggest that fast-track procedures might be better suited to disputes that are financially small in size.⁸² There is a perception that complex disputes involving large sums of money require the more formal and extensive dispute resolution procedure of arbitration.⁸³ For this reason it is common to find institutional fast-track rules that provide for fast-track arbitration to be applicable if the claimed amount is less than a certain figure, by contrast parties need to specifically agree fast-track procedures above this figure to invoke fast-track arbitration.

But this approach is by no means uniform. When the case involved complex questions of law, arbitration providers are of the opinion that the fast-track procedure prescribed by the agreement was wholly unsuited to the resolution of the dispute.⁸⁴ Thus, parties cannot confidently predict that their fast-track arbitration agreement will be enforced as arbitral institutions or arbitrators may conduct ordinary arbitration proceedings instead of fast-track procedures.⁸⁵

b. Procedural Assistance

If the fast-track process breaks down because, for example, when parties cannot decide upon the appointment of a sole arbitrator, or if the agreement between the parties is incomplete as to a procedure necessary for the fast-

⁷⁹ Conference, Magnusson, 2001, *Fast Track Arbitration - The Scc Experience*, 13 - 16 June, 2001, in Stockholm Arbitration Days

⁸⁰ [2000] 2 All E.R. (Comm) 237 (QBD (Comm))

⁸¹ Kaufmann-Kohler, G. & Peter, H., 2001, *Formula 1 Racing and Arbitration: The FIA Tailor-made System for Fast-Track Dispute Resolution*, *Arb. Int'l*, 17(2), pp. 173-210.

⁸² Whitley, 2010, *Is There a Better Way to Resolve Smaller Disputes?* Texas Construction Journal

⁸³ Rutherford, 1995, *The need for a new drive: rethinking arbitration as a service to the public - the need to shorten the duration of domestic and international arbitral proceedings*, *Arbitration*, 61(1).at p.9

⁸⁴ Supra Note 16 Pryles at p. 328 ("The parties' freedom to agree on an arbitration regime of their choice and to prescribe the procedure to be followed is subject to few limitations.")

⁸⁵ *Note on Expedited ICC Arbitration Procedure*, ICC International Court of Arbitration Bulletin, 2002, 13(1), p. 29

track procedure to be effective, then the agreement to use fast-track procedure may be claimed to become unenforceable and therefore void. This is a challenge typically brought by a party reluctant to abide by fast-track provisions. Such challenges could be avoided by clearly prescribing fast-track procedures in the dispute resolution clause.⁸⁶ However, it is difficult if not impossible to provide contractual machinery in the arbitration clause for every conceivable procedural difficulty prior to the existence of a real dispute.

In respect of ordinary arbitration, institutional rules if not national laws typically provide for assistance where procedural difficulties arise. This assistance is based on flexibility and adaptability rather than time barred supervision. For example, where the parties cannot agree on the appointment of an arbitrator, or an arbitrator's impartiality is doubted, there are institutional and legislative procedures to help facilitate arbitration and ensure it stays on foot. However, no such procedural assistance applies quickly to fast-track procedures. Both the institutional mechanisms and the courts take time for "filling gaps" in fast-track arbitration agreements, and it is therefore imperative that fast-track arbitration agreements set out a comprehensive procedure and default provisions which apply swiftly when procedural difficulties arise.⁸⁷

c. The Arbitrators' Role

A party choosing fast-track procedures in a big case will often give up something very valuable: the opportunity for a three-person tribunal. While some think three-arbitrator tribunals are more likely to compromise than sole arbitrators, many view a panel of active arbitrators is, in general and all other things being equal, more likely to get it right than a single arbitrator - three minds are better than one.⁸⁸ Given the virtual absence of appeals on the merits, this is an important safeguard.

The expertise of three-members tribunal and sole arbitrator may be contrasted. If the parties fail to specify how the proceedings are to be conducted in the fast-track arbitration, a sole arbitrator is left to his or her own opinions or devices. But, unlike three -members tribunal, sole arbitrator do not have any guidance or assistance in relation to its conduct in making a determina-

⁸⁶ Broichmann, 2008, *Disputes in the Fast Lane: Fast-Track Arbitration in Merger and Acquisition Disputes*, Int. A.L.R.(4), p. 143.

⁸⁷ Phillippe 2002, *Are Specific Fast-Track Arbitration Rules Necessary?* in *Arbitration in Air, Space and Telecommunications Law: Enforcing Regulatory Measures* The PCA/Peace Palace Papers, p. 255.

⁸⁸ Carter, 2011, *Arbitration Under Expedited Discovery Procedures: What Are the Sacrifices?* Global Arbitration Review The Arbitration Review of the Americas 2011 Section 2: Overviews

tion. At any rate neither an arbitrator nor the court can intervene, provided the determination has been made honestly and within power (in the sense of “in accordance with the contract”). If the contract fails to outline the arbitrator’s duties he may still need to comply with an implied duty to act fairly, and will owe a duty of care to the parties to the fast-track arbitration.⁸⁹

It may well be that the only time a lack of procedural assistance would prove a real disadvantage would be in the situation where a recalcitrant party refused to cooperate or an appointed arbitrator failed to resolve a procedural difficulty. The effect, after all, of there being many facilitative legislation for fast-track arbitration is that the procedure unlikely to remains at all times in the hands of the contracting parties.⁹⁰ But the lesson is that if a fast-track arbitration clause is poorly drafted then parties are likely to have difficulty enforcing the dispute resolution mechanism. In an effort to avoid these difficulties, parties usually incorporate into the fast-track arbitration agreement a set of standard rules promulgated by a professional body.

While the process involved in seeking one of these remedies is cumbersome, parties to an arbitration agreement can simply apply to a court to have an arbitrator removed or to have an award set aside where there has been misconduct on the part of the arbitrator.⁹¹ This statutory recourse is desirable because it bolsters the dispute resolution process and enables a matter to be re-submitted to arbitration but it is time consuming and expensive.

d. Enforcing the Outcome

There is no legislative difference upon which the fast-track arbitral award itself may be enforced. Any avenue of enforcement of a fast-track arbitration is therefore dependent on the terms of the contract between the parties

For agreements with an international dimension, particular difficulties arise because of time limits and procedural limitations imposed in the fast-track arbitration process.⁹² Parties to an international fast-track commercial arbitration are faced with having to rely on New York Convention and the national laws governing fast-track arbitration process. In this respect, ordinary procedures would appear to have a distinct advantage over fast-track

⁸⁹ Ibid

⁹⁰ Supra note 16 Pryles at 329

⁹¹ Bleemer, R., 2006, *High-quality results, high-quality processes: Top in-house counsel discuss the continuing challenges in commercial arbitration*, *Alternatives to the High Cost of Litigation*, 24(11), pp. 182-5

⁹² Vasani & Tallent 2006, *Proportional Autonomy: Addressing Delay in International Arbitration through a Deadline for the Rendering of Final Awards*, in *Disp. Resol. J*, pp. 255-75.

procedures because the arbitration community is so accustomed to habits and regular practices.⁹³

However, one would query whether it is necessary to have fast-track arbitration at all when there is a risk that a lack of cooperation between the parties will force disputes to ordinary arbitration. An answer to this might be that the risk of having to resort to ordinary arbitration to enforce a fast-track procedure is outweighed by the benefits to be gained from using fast-track arbitration.

e. Practical Problems

As with ordinary arbitral proceedings, the fast-track proceedings are open to being manipulated or used tactically to create delay. Like any dispute resolution procedure, a recalcitrant party may use fast-track arbitration to disrupt the contractual agreement or to delay dispute resolution process.⁹⁴ However, the arbitrator has powers to combat a party's dilatory tactics. For example, a court can issue a subpoena to force the production of material, or the arbitrator(s) can progress with an ex parte arbitration. The use of such coercive power, and court assistance assist the ordinary arbitration process. A fast-track procedure could be easily derailed if party relations turn sour and co-operation ceases.

Some fast-track arbitration agreements have attempted to overcome the difficulty of delay by inserting time restraints in the fast-track arbitration clause. If a party fails to submit documents or attend meetings in accordance with the fast-track arbitration clause they will be liable for cost and delay related expenses.⁹⁵ These contractual provisions may create enough dissuasion to avoid delay altogether, but the question again arises: why choose fast-track arbitration over ordinary arbitration if it is probable that a dispute will ultimately be determined by ordinary arbitration alike procedures?

VII. Given the Difference - Why Should Fast-Track Arbitration be Encouraged?

The above discussion has highlighted that the concept of fast-track arbitration, although a reaction to the cost and delay of arbitration, is in

⁹³ Morton, 2010, *Can a World Exist Where Expedited Arbitration Becomes the Default Procedure*, *Arbitration International*, 26(1), pp. 103-13.

⁹⁴ 2011, Corporate Counsel Institute - Europe (Coping with Heightened Regulations and the Need for Better Dispute Resolution), *Guerilla Tactics in Transnational Dispute Resolution*. Georgetown Law, Paris,.

⁹⁵ Stipanowich 2010, *Protocols for Expeditious, Cost-Effective Commercial Arbitration*, in *College of Commercial Arbitrators*, College of Commercial Arbitrators

theory a poor substitute for ordinary arbitration as a means of resolving disputes in international commercial contracts. Fast-track arbitration suffers a number of drawbacks, significantly in relation to difficulties with enforcement and practical applicability. Regardless of these difficulties, parties are increasingly preferring fast-track arbitration, begging the question: why?

Parties can attempt to overcome the potential drawbacks outlined above either by carefully drafting a fast-track arbitration clause or by introducing institutional fast-track arbitration as the final step in the dispute resolution procedure. The chief practice is to refer disputes to institutional fast-track arbitration rules, that is, instead of non-institutional fast-track ad hoc arbitration. This is achieved through a choosing appropriate arbitral institution. In this way, fast-track procedures act as an alternative process to ordinary arbitral proceedings. With this alternative fast-track system not only the simple and straightforward disputes but also those complicated disputes may be dealt with lesser amount of time and cost. This requires the availability of various fast-track procedures.

The system produces a more efficient dispute resolution process, saving the parties both time and money by addressing more international commercial disputes at a lower level. It also frees up arbitral panels and courts for more complex disputes. Arbitration legislation does not restrict the procedure in this regard. And when it is considered that the court only becomes involved in arbitration at the request of a party (usually when some procedural or legal problem has arisen), the risk of increased costs is not significantly greater than the risk had fast track arbitration been implemented. As a result, fast track arbitration should be encouraged for the important role it plays as a funneling device in contractual freedom with the capacity to streamline international dispute resolution process. Fast-track procedures remind arbitration community to recognize the importance of party autonomy, as it is the parties who design the process and dispense with discovery, determine witnesses, or even decide not to hold a hearing.⁹⁶

The two lines of thought are related. In recent years international arbitration has maintained its reputation for being costly and time consuming.⁹⁷ While some commentators have suggested that this reputation is un-

⁹⁶ Karton, J.D., 2010, *Party autonomy and choice of law: is international arbitration leading the way or marching to the beat of its own drummer?* University of New Brunswick Law Journal.

⁹⁷ McIlwrath, 2010, *Faster, cheaper: global initiatives to promote efficiency in international arbitration*, *Arbitration*, 76(3), pp. 532-7.

founded, it is undoubtedly responsible, at least in part, for the increased use of fast-track arbitration.⁹⁸ Fast-track arbitration on the other hand, has been praised for its speed and cost-effectiveness, two of the most desirable features of any dispute resolution process. Furthermore, the major arbitral institutions have developed accelerated or 'fast track' arbitration procedures, which may, for instance, apply time limits and condense proceedings to a sole arbitrator. Given that accelerated arbitration relies on party cooperation, it would take a rare commercial relationship to ensure the process did not encounter some form of delay.⁹⁹

Another significant feature of fast-track arbitration is its simplicity. Fast-track procedure is an abbreviated, simple form of dispute resolution. Unless otherwise agreed by the parties, there is no need for formal pleadings, discovery or witness statements. There is also no formal hearing, no cross-examination or oral submissions and the sole arbitrator and written submissions is given as much power as stipulated in the fast-track arbitration rules. The fact that fast-track arbitration is a creature of party autonomy it creates a real sense of control by the parties over the dispute resolution process. This, coupled with a general dissatisfaction with the formal procedures of arbitration, is perhaps one reason why parties are adopting fast-track procedures over ordinary arbitration procedures.¹⁰⁰

Also related to the issue of simplicity is a perception that there is an increased opportunity to preserve relationships through fast-track arbitration than with litigation and ordinary arbitration. The perception is that because parties are agreed shorter time limits and procedural shortcuts, the parties are more likely to achieve a commercial rather than a legal settlement. It has been suggested that fast-track arbitration provides parties with a mechanism to avoid or discourage disputes where as ordinary arbitration is perceived to be more like litigation that requires parties to take part in proceedings whatever it costs or it takes.¹⁰¹

⁹⁸ Gaillard, E. 1998, *Fast-track arbitration and beyond: Is there emerging a new need for speed in international commercial arbitration?* in BG Davis (ed), *Improving International Arbitration: The Need for Speed and Trust: Liber Amicorum Michel Gaudet*, International Chamber of Commerce, Pub No:598, at p. 28

⁹⁹ 1999, *Factors to Consider in Choosing an Efficient Arbitrator*, in *Improving the Efficiency of Arbitration and Awards: 40 Years of Application of the New York Convention*, pp. 286 - 313

¹⁰⁰ Davis, B. 1992, *Fast-Track Arbitration and Fast-Tracking your Arbitration*, in *J. Int'l Arb*, WERNER ET ASSOCIES, pp. 43-50

¹⁰¹ Bühring-Uhle, C., Kirchhoff, L. & Scherer, G., 1996, *Arbitration and Mediation in International Business*, Kluwer Law International at p. 156 See similar results in the second survey Bühring-Uhle, C., Kirchhoff, L. & Scherer, G., 2006, *Arbitration and Mediation in International Business*, Kluwer Law International.

VIII. Conclusion

Overall, because there is no real statistical evidence to consider, it could be suggested that some of the perception of fast-track arbitration is the result of literature promoting its use. Without research to quantify fast-track arbitration in terms of its effectiveness, it is difficult to displace these attitudes or assess whether they are justified.

That said, the recent popularity of institutional fast-track arbitration rules indicates a growing concern for efficient dispute resolution. It is possible that fast-track arbitration may play a bigger role in the resolution of future disputes. The ordinary arbitration procedures, on the other hand, certainly have a major role to play in resolving commercial disputes, however in order to remain useful, it must develop. Fast-track procedures are part of these developments as the arbitration users indicate that they are providing sought after benefits where ordinary arbitral procedures is lacking.¹⁰²

Time may emphasize the ability of ordinary arbitration procedures to be streamlined while maintaining its unique flexible and adaptable underpinnings. However, until these improvements are achieved, fast-track arbitration represents the best opportunity to ensure an efficient and simple dispute resolution process. At the very least, the promotion of fast-track arbitration may serve as an incentive to arbitral bodies to improve their procedures so that they more closely reflect the requirements of arbitration users.

It is however suspected that the continued adherence to the fast-track arbitral procedures by arbitral institutions with significant experience is connected with some perceived commercial advantage arising from introducing fast-track arbitral process. Even if it is near impossible to ascertain a practical reason for choosing fast-track procedures over ordinary arbitral procedures, it is clear that fast-track procedures has struck a chord with the increased time and cost efficiency expectations for both arbitration users and arbitration providers, especially in the resolution of international commercial disputes.

¹⁰² American Arbitration Association, the A.A.A., 2003, *Dispute-wise management: improving economic and non-economic outcomes in managing business conflicts*, American Arbitration Association, New York.