FAST TRACK ARBITRATION - The SCC Experience

I. Introduction: The need for expedited arbitration procedures

Issues of speed and cost-efficiency go to the heart of the arbitration procedure, and is often advocated as the core reasons as to why arbitration so clearly surpasses litigation as a suitable choice of dispute resolution for the business community. However, despite its recognition and clear advantages there are also critical voices. According to some critics, arbitration has to an increasing extent failed to deliver exactly that which it so boldly claims to be an expert in: speed and cost-efficiency. And when the arbitration experience for some has turned into an expensive and time-consuming ordeal, business has started to re-evaluate its practice to opt for arbitration as a dispute resolution mechanism. This, of course, is unfortunate as the alternative, a court proceeding, in general does not answer to the needs of business either. So what then are the options?

One of the reasons behind the notion of arbitration as expensive and time-consuming might be that disputes are tending to become more and more complex. An increasing number of commercial disputes involve multiple parties of several nationalities, complex legal issues and considerable amounts in dispute. Furthermore, dilatory tactics and methods for trying to obstruct the arbitration procedure are also more frequent, aggravating the efficiency of arbitration. As a result, many procedural rules and national legislations on arbitration have been adapted to suite this side of the reality of commercial arbitration, i.e. the complex, large disputes.

However, as we all know, far from all disputes correspond to this picture of a commercial dispute. On the contrary, a majority of business disputes are comparatively small and not so complicated as to require the same procedural costume as large, multi-national disputes. So if the trade-mark of arbitration is flexibility and party-autonomy, should we then not recognize that disputes arising from the sale of, for example, one single machine should be decided according to procedural rules which differ from those applied when we are dealing with a dispute regarding a, let's say, complex joint-venture? Indeed we should.

Thus, to meet the needs for the settlement of smaller disputes, alternative, and simplified, arbitration procedures should be made available. The solution has been presented by the providers of dispute resolution services in the form of fast track arbitration, also referred to as expedited arbitration procedures.

II. Institutional Rules for Expedited Arbitrations

A number of arbitration institutions have adopted rules for expedited arbitrations, among which are found the most well known international arbitration institutions, inter alia:

- World Intellectual Property Organisation (WIPO)
- American Arbitration Association (AAA)
- Arbitration Institute of the Stockholm Chamber of Commerce (SCC)
- Geneva Chamber of Commerce and Industry (CCIG)
- China International Economic Arbitration Commission (CIETAC)
- Japan Commercial Arbitration Association (JCAA)
- London Maritime Arbitrator’s Association (LMAA)
Applicability

The application of the rules for expedited arbitration is based on different methods. The AAA, JCAA and CIETAC rules provide for an automatic application if the amount in dispute does not exceed a certain threshold. As a contrast, the WIPO, SCC, CCIG and LMAA rules state that the parties have to make an explicit agreement that the rules should apply.

Where the automatic application is used, it is assumed that when the parties have agreed on the arbitration rules of the specific arbitration institution, they have also consented to the application of the rules for expedited arbitrations of such institutions, if the amount in dispute does not exceed a certain figure. The parties are of course free to exclude the application of the rules for expedited arbitrations in their arbitration agreement.

Where an explicit agreement is required for the application of the expedited rules, the requirements of such agreement do not differ from those of an agreement to arbitrate in general. Thus, ideally the agreement is clear as to the intent of the parties to have their dispute decided according to a defined set of expedited arbitration rules, preferably by using the model clause associated with the rules.

The method of using a pre-decided monetary threshold for determining applicable rules to an arbitral proceeding, a proceeding that may differ considerably from a full-fledged arbitration, gives rise to a number of questions. For example, a dispute concerning a small monetary claim need not always be suitable for expedited arbitration. Minor claims may very well involve difficult issues of facts and law. Where a complicated dispute is forced into a procedural costume that does not fit, unnecessary time and effort might be spent on procedural issues in the course of the proceedings. The parties may even stand the risk of not having their case heard in such an extensive manner as they might have required, had the dispute been decided under a different set of rules. One might consider if not the mere fact that the rules for a certain procedure was applied automatically, without an explicit consent from both parties, may in the end influence a court when deciding on the validity of the arbitral award resulting from such procedure, should it be taken that far.

Even if the parties have explicitly agreed on a set of expedited rules, the situation may still arise that the procedure selected turns out to be inappropriate, once the dispute between the parties bursts out. The parties may have assumed, when negotiating the contract, that the content of their agreement and the issues related to it were such that an expedited arbitration would be suitable. However, once the dispute arises this may no longer be the case, perhaps on account of circumstances arising after the contract was signed. It should also be taken into consideration that most parties do not put very much thought into the decision of the dispute settlement procedure at the time of drafting the contract, and thus may have selected an arbitration procedure without really considering its consequences. Few parties expect the arbitration clause ever to be used in practice.

The risk that a party should be successful in claiming that it was not given sufficient opportunity to present its case due to the procedural limitations in expedited arbitrations, must however be regarded as considerably less in a case where the parties have explicitly agreed to the expedited procedure, compared to cases where the expedited rules were applied automatically.

The most efficient procedure is of course a procedure agreed by the parties after the dispute has arisen. A tailor-made procedure may very well be set up. Frequently, however, parties are not inclined to agree on procedural provisions, if, indeed, on anything, at this point. The arbitration procedure thus must be determined at an earlier stage, before the dispute itself distorts the relationship between the parties.

The Arbitrator

According to most rules for expedited arbitrations, the parties shall jointly appoint an arbitrator. If an arbitrator has not been appointed in due time, the arbitral institution makes the appointment.

A leading principle in international arbitration is that the arbitration is no better than the arbitrator, and consequently, one of the most important functions of any arbitral institution is the appointment of arbitrators. The institution must be very conscious of the trust invested in it by the parties and make every effort to select the most appropriate person in each arbitration. Some arbitral institutions provides a list from which the parties shall select
an arbitrator, while other institutions appoints arbitrators at its own discretion.

In arbitrations under the SCC rules the SCC Institute always appoints the arbitrator, unless the parties have agreed otherwise. The practice of having the arbitral institution appoint the arbitrator may reduce the risk of delay in the proceeding. When selecting arbitrators the arbitral institution will take into consideration, inter alia, the nature of the dispute, the number and nationality of the parties, the substantive law which is applicable to the contract and the language to be used in the proceedings.

One of the arbitrator's tasks is to carefully plan the arbitral proceedings in order to secure the effectiveness of the process. As a general rule, a sole arbitrator therefore needs to possess experience, preferably in the form of having previously served as sole arbitrator or chairman of arbitral tribunals. The importance of being able to smoothly handle and administer hearings, the exchange of written submissions between the parties etc., should not be under-estimated.

Even though no rules for expedited arbitrations provide that arbitrators have to be legal professionals, most arbitrators have such background. However, not only professional qualifications are of importance. A personality which is fit to handle complex situations, sometimes in international contexts, is required, and the arbitrators must be people of integrity.

**Procedural limitations**

Rules for expedited arbitrations typically include several procedural limitations, such as, for example, restriction on written pleadings, limitations regarding the hearing and a reduced time for rendering the award. Limitations as regards the submission of documents may concern both extent and number, and as for the hearings, there are restrictions on the duration of the same. Some rules stipulate, as a prerequisite for an oral hearing, that the arbitrator must deem it appropriate, unless both parties agree on a hearing.³

The time limit for rendering the award may be linked to the various procedural steps, such as, for example, the constitution of the arbitral tribunal, the hearing or the referral of the arbitration to the arbitrator. The time limits vary from 14 days to six months.⁴ Under the SCC rules there is no obligation to include reasons for the award, unless one of the parties so demand in connection with the closing statement.

**Arbitration Costs**

The rules for expedited arbitrations limit the number of arbitrators and the time spent on the case. Thereby the arbitration costs are reduced. However, one of the most important factors that affects the consumption of time and resources is the parties behavior in the proceedings. Parties that cooperate and focus on having a smooth and efficient arbitration procedure can avoid delays and reduce the costs considerably. The problem is that parties have different interests in the dispute and seldom co-operate at this stage. Therefore, instead of focusing on an efficient arbitration procedure some parties concentrate on obstructing the procedure which, of course, leads to unnecessary costs and waste of time.

Most sets of rules do not contain separate stipulations as to the arbitration costs for expedited arbitrations in particular, but refer to regulations for costs in other rules published by the same institution. However, the LMAA and the SCC rules both represent an exception to this principle, as they have adopted separate fee schedules, applicable solely in the expedited procedure.

**III. The SCC Experience**


The rules are primarily recommended for minor disputes and aim at solving disputes in an expeditious and inexpensive manner. The salient features of the rules are the following:
A sole arbitrator determines the dispute (Article 12)
The parties are only allowed to submit three written pleadings (Article 16)
The written pleadings shall be brief and must be submitted within a period of ten days (Article 16)
Hearings shall be held only if a party so requests and if the arbitrator deems it necessary (Article 21)
The award does not have to state reasons unless a party so requests (Article 27)
The award must be rendered within three months (Article 28)
The arbitrator's fee and the fee of the SCC Institute are based on the amount in dispute (Article 34)

The parties and the procedure

In arbitrations administered under the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, a majority of the parties are non-Swedish. Approximately eighty per cent of the SCC case load involves foreign parties. As regards the expedited arbitrations, the scenario is somewhat different. The expedited arbitrations so far involve for the most part Swedish parties, even though a number of cases have included parties from other countries, for example Estonia, Finland, Germany, Norway and Russia.

According to arbitrators and counsel in the expedited arbitrations, the time limit of ten days for the submission of documents (article 16) has been upheld in most of the cases. In some arbitrations the number of submissions has exceeded three in total.

Hearings have been held in most of the cases and some of the hearings have been comparable with hearings in full-fledged arbitral proceedings as regards for example the number of witnesses and the duration of the hearing.

The average time for rendering the award has been 108 days. The average number of days from the date of the request of arbitration until the referral of the case to the arbitrator, which is dependent on the parties paying the advance on cost, has been 86 days.

There are no indications that the parties are of the opinion that they have not been provided a fair opportunity to present their case and to the best of our knowledge none of the awards rendered under the rules for expedited arbitration has been challenged in court.

Some statistics

Since the start in 1995, when the rules first came into force, 72 requests for arbitration under the expedited rules have been filed with the SCC Institute. A total of 32 awards have been rendered and 23 cases have been terminated for other reasons. The remaining cases are pending.

IV. How "fast" can arbitration become?

After this brief introduction of the world of fast track arbitration, I would like to conclude by raising a question for the future;

How "fast" can fast track arbitration become?

As we are travelling down the road of the third millennium with a business community going about its daily affairs in an ever-increasing pace, the need for fast track arbitration can only be expected to continue to grow. As an example, the many initiatives taken, world-wide, in the area of what has come to be referred to as online dispute resolution reflect the expectations of speed and efficiency from business on those providing dispute resolution services, be it arbitrators, mediators or arbitration institutions.

Perhaps then, in this time of ever-increasing speed, it would be wise to remember from time to time the saying "If you travel faster than the speed of light - everything will go black." Hence, faster might not always be better.
A problem associated with an increasing desire for fastness in arbitration can be illustrated by the following:

From time to time it has been suggested (or assumed) by parties involved in an arbitration under the SCC Expedited Rules that the fact that the parties have agreed on expedited arbitration also limits their procedural rights per se. It has happened that a party has argued that the opposing party should be prevented from bringing in new evidence or hear the desired number of witnesses solely on the ground that the arbitration is expedited, and that the proposed measures to be performed by the opposing party thus would jeopardize the expeditious character of the procedure.

This is of course an incorrect assumption. In any arbitration in Sweden, and indeed anywhere in the world, the principle of giving each party a sufficient opportunity to present its case, is fundamental and mandatory. The mere fact that the parties have agreed on expedited arbitration does not alter this fact.

One may then ask oneself - what is the purpose of special rules for fast track arbitration if in reality the "fastness" of the procedure will always be subject to a mandatory principle, which may, in the end, make the procedure not very fast at all.

The answer must be sought in the balance between due process and the parties freedom of contract, a balance considered by arbitration institutions when drafting fast track arbitration rules, by the arbitrator when hearing the case, and ultimately by the public court when charged with the task on deciding on a challenge, or enforcement, of an arbitral award.

Most states which recognise international commercial arbitration have enacted laws whereby the proceedings of a given award must have met minimum standard of due process before the state will lend its support to the enforcement of such award. According to Article 19 of the UNCITRAL Model Law, described as "the heart of modern systems of arbitration"¹¹, the parties are free to agree on the procedure. Still, the parties are also bound by Article 18,¹² which in practice could be regarded as "a limitation"¹³ of Article 19.

Again, the interest of party-autonomy and due process meet, or, potentially, collide.

So how far do we dare stretching the fastness of the procedure before we indeed have a clear collision of interest, i.e. how "fast" can we design fast track arbitration before the scale tips over and in practice renders the design inapplicable? It is perhaps not entirely unlikely that an award could be declared invalid and not enforceable, if the proceedings were clearly violating a mandatory provision of due process, even when the conduct of the proceedings have been agreed by the parties.¹⁴ True, most arbitration rules, and also national arbitration laws, contain provisions stipulating an obligation for a party to object to procedural irregularities, in absence of which that party will be assumed to have waived his right to invoke such irregularity, thus indicating the non-mandatory characteristic of provisions governing the conduct of the proceedings.¹⁵ However, perhaps one could argue that the requirement of due process forms an exception to this rule. The English Arbitration Act (1996), for example, clearly states that the general duty of an arbitral tribunal to give each party a "reasonable opportunity to present his case"¹⁶ is a mandatory provision, and may not be made subject to any agreement between the parties.¹⁷

I’d like to conclude these reflections on how "fast" arbitration can become by pointing out that I have not yet seen any set of procedural rules that in practice forces its parties to actually "travel faster than the speed of light". However, I think we should all be aware of the fact, and perhaps more importantly make fast-paced business aware of the fact, that there is indeed a limit, the definition or exact "location" of which I am looking forward to continue discussing.

On a closing note, let us not forget, that the degree of success of any arbitral procedure, including fast track arbitration, relies to a large extent on the conduct of the parties in the course of the proceedings. National law and procedural rules constitute an important infrastructure for an efficient and judicial procedure, however, at the end of the day, the parties loyalty to the procedure once chosen is essential for fast track arbitration’s possibility to fulfill the task with which it is charged.

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Footnotes

¹: LMAA provides two sets of rules for smaller claims: Fast and Low Costs Arbitration
(FALCA Rules) and Small Claims Procedure (SCP Rules).

2: However, it should be noted that AAA may, at its discretion, determine that the rules for expedited arbitrations shall not apply even though the amount in dispute does not come up to the threshold.

3: Regarding hearings see for example JCAA Rule 58, AAA E-9 and SCC Article 21.

4: See for example JCAA Rule 59, AAA E-10, WIPO Article 63 and SCC Article 27.

5: Also referred to as the SCC Rules or the main rules, as opposed to the SCC Expedited Rules.

6: See Article 11 of the SCC Expedited Rules.

7: All of the statistics here presented are as of 30 April, 2001.

8: It could be noted that a majority of the awards have included reasons (cf. Article 27(2) of the SCC Expedited Rules).

9: Some disputes have been withdrawn on account of settlements and some have been dismissed by the SCC Institute on account of lack of jurisdiction or because the parties did not provide the requested advance on costs.


12: UNCITRAL Model Law Article 18: The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.


14: Cf. ibid.

15: Cf. e.g. Swedish Arbitration Act (SFS 1999:116), Section 34.

16: English Arbitration Act 1996, s.33(1). It should be noted that the English Act uses the prerequisite reasonable opportunity instead of full opportunity used in Article 18 of the Model Law.