Is Good, Fast, and Cheap Arbitration a Dream?

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The business community's original idea of arbitration was to solve commercial disputes smoother and faster than the conventional courts could. Back in those days, arbitration was, by definition, fast.

However, this perception has changed. In the 2015 International Arbitration Survey, cost and lack of speed were considered as the worst characteristics of international arbitration.

As a reaction to this growing appetite to run proceedings in a more efficient manner, arbitration institutions came up with specific rules intending to shorten arbitral proceedings and therefore lower costs. The challenge here was to create rules reaching the sweet spot of factors which seem hard do combine: fast track arbitration proceedings had to be fast, cheap and good quality all at the same time.

But doesn't a high-quality proceeding simply have its costs and time? And can a fast and cheap proceeding still be considered good quality?

As usual, the answer is not straightforward. Before giving answers to these questions, to follow are some of the general characteristics of fast track arbitration and the particularities of fast track mechanisms under the ICC, the SCC, the SIAC and the ISTAC arbitration rules.

I The Scope of Application: Automatic or Elective?

The scope of application of the fast tract arbitration rules provided by different institutions can be classified into two major groups: automatic and elective.

A very well-known example of automatic application is the ICC's Expedited Procedure. Accordingly, the expedited procedure will apply automatically if the amount in dispute does not exceed $2 million, and if the arbitration clause was concluded after 1 March 2017.

This automatic application can be deactivated in two scenarios: One, when the parties have agreed on not applying the Expedited Procedure Provisions, so called 'opt-out'. Second, when the Court decides that according to the concrete circumstances, an expedited procedure is not appropriate. This could be, for example, when the dispute appears to be too complex to be resolved under the fast track framework.

Additionally, parties are also free to agree on applying the Expedited Procedure Provisions even if the amount of dispute is higher than $2 million and the arbitration agreement is concluded before 1 March 2017, so called 'opt-in'.

The ISTAC fast track arbitration rules are very similar to the ICC's and also adopt the automatic application mechanism: unless the parties agreed otherwise, the dispute is automatically arbitrated under the fast track rules when the amount in dispute is less than $79,713. Equal to the ICC, the parties are free to opt-in and opt-out and the ISTAC may decide not to apply the fast track rules when the facts and circumstances of the case suggest doing so.

Other institutions like SIAC and SCC opted for an elective application for fast track arbitration.

In the SIAC arbitration, a party may apply for an expedited arbitral proceeding if one of the three criteria is met: (1) the amount in dispute does not exceed $5.6 million, (2) the parties have agreed to apply the expedited procedure and (3) there is a case of exceptional urgency. After the application for fast track arbitration, the SIAC determines whether the dispute is suitable for fast-track arbitration by taking into consideration the views of the parties and the circumstances of the case.

On the other hand, in the SCC, fast track arbitration only applies if both parties consent to its application, regardless of the value of the dispute or any other circumstance.

II. In what sense do fast track rules generally differ from "ordinary" arbitration rules?

1 Dispute generally resolved by a sole arbitrator

Generally, fast track rules provide or aim for the dispute to be decided by a sole arbitrator as opposed to three arbitrators. The goal is to speed up the proceeding and lower cost at the same time. The constitution of a tribunal may take months, and the chance of a successful challenge of the arbitrators is multiplied by three. Plus, it takes time for three professionals with busy schedules to coordinate.

Therefore, a high majority of fast track arbitration rules have authority to appoint a sole arbitrator notwithstanding any contrary provision in the parties' arbitration agreement. However, certain institutions such as the ICC and the SIAC leave themselves room to refer the dispute to the three-member tribunal under some exceptional circumstances. The ISTAC, however, pays further attention to parties' respective agreements and only has the case decided by a sole arbitrator in absence of a contrary agreement by the parties.

2 Limited Submissions and Possibility to Skip the Hearing

Fast track rules usually contain provisions which allow the tribunal to limit the extent (number, length and scope) of submissions and the extent or kind of evidence.

In international arbitral proceedings, it is not uncommon for parties to exchange several rounds of submissions without the tribunal pointing out those topics which are crucial to the decision. This leads the parties to submit extensive and repetitive submissions. Therefore, restrictions are accepted for the sake of speed and cost.

As an example of many others, under the ICC Rules there is no 'Terms of Reference' and the arbitrator may not allow the requests for document production, whereas under the SCC Rules a hearing will only be hold if requested by a party and considered necessary by the arbitrator.

At this point, it is crucial to remark the importance of ensuring equality between the parties and compliance with due process. Particularly, the problem arises when the claimant has ample time to prepare its case in depth before initiating the arbitration, but the respondent is unable to do so due to stringent time limits. Therefore, sometimes it would be wise to remember the saying 'Speeding kills'.

3 Time Frame for the Award, Reasoning, Public Policy

Maybe the most attractive thing in fast track arbitrations is the existence of a short time limit for rendering the final award. According to most of the fast track arbitration rules, final awards must be given within six months. However, the starting date for the calculation of this time varies depending on (i) the date of the case management conference (the ICC), (ii) the date when the arbitrator received the file or (iii) the date when the tribunal is formed (the SIAC).

Although the SCC stipulates the award will be rendered within three months after the arbitrator received the case file, in practice, the SCC often extends this time limit when the sole arbitrator requests it. And yet, 55% of awards rendered under the SCC's expedited arbitration rules were rendered within three to six months after the registration of the case.

Just like the SCC, the ISTAC also sets a shorter time limit for rendering the final award. Accordingly, the arbitrator is expected to render a decision within three months after the arbitrator received the file or one month after the last statement or the last hearing, whichever occurs later.

In any case, all the rules for expedited procedures provide for the possibility of extending this time limit in 'exceptional circumstances' (the SIAC) or 'upon a reasoned request from the arbitrator; or, otherwise

deemed necessary' (the SCC, the ICC and the ISTAC).

Additionally, an interesting point is whether the award will state reasons on with it is based. In fact, some institutions do not require the arbitrator to reason the award or allow reasoning in a summary form. For example, the SCC rules only require the award to contain reasoning if a party explicitly requests it. The SIAC rules require the arbitrator to state reasons at least in summary form, unless the parties have agreed that no reasons are to be given. The ICC and the ISTAC rules on the other hand do not contain any specific rules with regards to the reasoning of the award. Therefore, the general rule applies and the award must contain reasoning.

It is important to note the court precedents vary from country to country as to whether national authorities may refuse the recognition and enforcement of the award if the award lacks reasons. Therefore, if the seat of arbitration or possible enforcement place has the possibility of setting aside the award due to lack of reasoning, parties should pay significant attention to this risk and ask for a reasoned award in due time.

III Fast Track Arbitration-good, fast, and cheap?

The fast track arbitration rules introduced here are designed to make the arbitral process faster and cheaper. However, use of expedited procedures may have some serious consequences including the risk of setting aside the award.

Despite their importance, arbitration clauses are often a 'midnight clause': introduced at a time when all other points are agreed between the parties and no one wants to spend time on the detailed provisions for possible disputes. Therefore, it is not rare arbitration clauses do not take into account the specifics of the case.

Accordingly, bearing in mind the automatic application of fast track arbitration under some institutions, parties may suddenly find themselves in fast track arbitration, which might not perfectly be suitable for their case.

In this respect, careful attention must be given to the most important points that businesses should consider before opting for a fast track mechanism.

1 Not all cases are suitable for a fast track procedure:

Although the fast track arbitration rules may seem as a perfect tool when parties are seeking a speedy solution for their outstanding problem, they might not be appropriate in every arbitration case.

Most of the introduced rules in some way assume a dispute to be suitable for fast track arbitration when the amount in dispute is rather small. However, a dispute concerning a small amount does not necessarily mean that the case is easy to solve. Factually and/or legally complex cases are not suitable for fast track procedure.

Fast track arbitrations usually operate without any expert witness. This leads to a potential problem if the arbitrators do not have an expertise on the subject matter of the dispute. Therefore, if the dispute involves complex technical questions which may require the involvement of experts, it might not be prudent to go for fast track arbitration.

Likewise, under fast track arbitrations, arbitrators usually do not allow for extensive evidentiary proceedings. Arbitrators even have the authority to skip the hearings. Therefore, if the case is heavily relied on the witness statements rather than documentary evidence, the risk of no or limited hearing must always be bear in mind.

2 It matters who the arbitrator is.

A leading principle in international arbitration is that the arbitration is no better than the arbitrator. Therefore, the key factor in a high-quality award in fast track proceedings is choosing an arbitrator who has an

expertise on the subject matter of the dispute, and is available at the given time.

This may seem not a minor issue at the beginning but might have significant importance since the experienced arbitrator's schedules are generally so full they might not promise you to fulfill all the requirements of the fast track rules.

3 Short time limits require availability of resources and counsel

Equally important to the availability of the arbitrator is the availability of the counsel. The counsel needs to have the capacity to act swiftly within the required time limits and still make the best case. This also means the counsel needs to be able to access relevant documents, resources and evidence quickly and without unnecessary constraint.

The fast track arbitration must be distilled and focused even before the arbitration starts. In this respect, it is advisable to involve the counsel in the preparation of the evidence to ensure they are familiar with the facts, the law and the case strategy.

All in all, fast track arbitration certainly is an option businesses should keep in mind. This is especially relevant for countries like Turkey where national courts tend to be slow. However, for a fast track arbitration to be successful and satisfying, businesses should always assess the specifics of the case and whether these are in line with the specifics of fast track procedure.

Written by Pelin Baysal and Bilge Kagan Cevik of Turkish law firm, **Gun + Partners.**

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