

The ICC Expedited Procedure Provisions four years after their entry into force – a success story



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During the first four years after their entry into force on 1 March 2017, the number of ICC cases conducted under the ICC Expedited Procedure Provisions (“EPP”) has steadily increased and reached an impressive level of 261 cases to date. Due to the recent increase of the maximum amount in dispute from USD 2 million to USD 3 million, until which a case shall be automatically submitted to these Rules, it is likely that these figures will further increase in the future. The present newsletter shall depict the salient features of these Rules by the prism of a recent experience as sole arbitrator under the Rules.

Prior to giving a feedback on how the EPP work out in practice, the statistics over the last four years shall be set out and analysed.

(i) Statistical overview:

Between 1 March 2017, the date of entry into force of the EPP, and 31 December 2020, the Rules applied to all cases filed on the basis of arbitration agreements in contracts entered into on or after 1 March 2017 and where the total amount in dispute did not exceed USD 2 million (Article 30(2) of the ICC Rules of Arbitration).

- Unless the parties have decided to opt out of the Rules or the Court has decided that it would be inappropriate to apply the Rules to a specific case, pursuant to Article 30(3) b and c of the ICC Arbitration Rules.

For all arbitration agreements in contracts entered into on or after 1 January 2021, the threshold of USD 2 million has been augmented to USD 3 million since.

However, the EPP are also available for cases where contracts precede their entry into force or exceed the above monetary threshold, provided that the parties expressly opt in.

As an indicator of the suitability and success of the EPP, the number of opt-in requests has increased considerably over the years.

Thus, in 2017, 46 requests were filed, out of which 12 were agreed to by the adverse party and resulted in being administered under the EPP. In 2018, the number of opt-in requests more than doubled to 96 requests, out of which 22 were agreed to by the adverse party. In 2019, the number of agreed cases remained stable with 21 cases, whereas the number of opt-in requests (50) corresponded more or less to the level of 2017.

As of 2019, an additional category of cases must be added to the number of new cases so far exclusively obtained through the parties' opt-in requests. These are the cases in which the EPP apply by direct operation by virtue of the automatic opt-in mechanism. Thus, 65 new cases have to be added in 2019, in which the arbitration agreement has been entered into after 1 March 2017.

In 2020, the number of cases in which the arbitration agreement was entered into after 1 March 2017 has increased considerably from 65 to 113 new cases. The number of opt-in requests also increased considerably from 50 to 149, out of which 28 were agreed by the other party.

To date, 261 cases have been or are being conducted under the EPP. The reasons for this success cannot be explained alone by the more or less automatic application of the EPP in many instances. Rather, the content of the EPP also responds to the parties' needs and expectations in terms of efficiency and costs, with two thirds of the 115 final awards rendered under the EPP delivered on or around the six-month time limit.

• I.e. arbitration agreements entered into prior to 1 March 2017 and cases with an amount in dispute in excess of EUR 2 million or, since 1 January 2021, EUR 3 million.

• All figures were taken from the official ICC statistics published yearly in the ICC Bulletin.

• In most cases, delay was due to justified circumstances and in the eight cases in which delay could not be sufficiently justified, the delay resulted in a fee reduction for the arbitral tribunal. This time period must be compared to the average duration of roughly 2 years for ICC Arbitrations conducted under the "normal" ICC Arbitration Rules.

There is little doubt that this will enhance the number of opt-in requests by parties also in the future.

(ii) Feedback on a recent practical experience under the Rules:

In a recent case conducted under the EPP, the proceedings could be effectively streamlined and it was possible to prepare a draft final award in less than 5 months' time after receipt of the file by the sole arbitrator. Furthermore, the final award could be approved and notified to the parties within the six months' time period foreseen for that purpose. In addition, the constitution of the arbitral tribunal took less than a month, the parties having agreed on the person of the sole arbitrator. Altogether, the entire proceedings therefore lasted not longer than 7 months' time.

The particularity in that case was that the preparation of the Case Management Conference in writing proved to be very efficient, so that both parties agreed that the holding of a Case Management Conference was no longer necessary. Thus, the procedural aspects and, in particular, the procedural timetable could be agreed with the parties in writing within a very short time period. By contrast, both parties subsequently benefited from the possibility of having two rounds of written submissions, including expert statements.

It was also agreed that no hearing had to be held and that the case could be decided solely on the basis of the documents submitted by the parties. Both parties having a civil law background, it was also agreed that no document production should take place.

It must be clear that in order to meet the six months' deadline, one can hardly conduct the arbitration admitting all the typical ingredients of a "normal" arbitration under the ICC Arbitration Rules, i.e. witnesses, experts, an evidentiary hearing, document production and two or three rounds of submissions. At least some procedural concessions must therefore necessarily be made from each party. Therefore the role of the arbitral tribunal as a moderator promoting adequate procedural downsizing is key in this context.

• Should there be a trend of the parties to submit cases with higher amounts in dispute as compared to the current maximum amount of EUR 3 million to the EPP, the ICC may wish to take that into account when deciding on a potential increase of the current maximum amount in future.

• Obviously, this way to proceed is only possible in situations, in which both parties prove to be fully committed to the idea of having the arbitration conducted as efficiently as possible. In the mentioned case, the strong encouragement of the parties under the EPP to act efficiently showed its effect.

• However, a page limitation was agreed.

• Art. 3 EPP (Appendix VI of the ICC Arbitration Rules)

• While Art. 3 EPP encourages procedural downsizing, it is, at least in theory, possible to run the EPP proceedings almost like a "normal" arbitration.