Fast Track Arbitration: Just fast or something different?

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I. Introduction

A. "What's it all about?"

Everybody talks about fast track arbitration, but is there a clear definition? First, it is important to stress that fast track arbitration is not a distinct system of arbitration,[1]) but rather a general characterization for an accelerated arbitral procedure. Arbitral proceedings with very stringent deadlines are generally referred to as fast track arbitration.[2])

Fast track arbitration may appear in ad hoc arbitration as well as in institutional arbitration. Several important international arbitration institutions offer specific rules for fast track arbitration. Among these institutions are the American Arbitration Association, the Arbitration Institute of the Stockholm Chamber of Commerce, and, most recently, the German Institute of Arbitration e.V. (DIS).[3]) The increase in number of arbitral institutions creating such special rules for expedited proceedings demonstrates the "need for speed" in arbitral proceedings.[4]) However, fast track arbitration may also take place under the rules of institutions which lack specific regulations for expedited procedures, or have only rudimentary provisions in this regard. The most well-known fast track arbitration cases to date were conducted under the rules published by the International Chamber of Commerce ("ICC"). Although Article 32 of the ICC Rules generally provides for expedited procedures by granting the parties the opportunity to shorten various

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[1]) Alan Redfern & Martin Hunter, Law and Practice of International Commercial Arbitration 6–43 (2004).

[2]) *See* Fouchard, Gaillard, Goldman on International Commercial Arbitration 680 (Gaillard & Savage eds., 1999).

[3]) Klaus P. Berger, *Die ergänzenden Regeln für beschleunigte Verfahren der Deutschen Institution für Schiedsgerichtsbarkeit,* 6 SchiedsVZ 105 (2008).

[4]) For more institutions that have adopted specific rules, *see* Rudolf Fiebinger & Christian Gregorich, *Arbitration on Acid, in* Austrian Arbitration Yearbook 2008 237 (Klausegger, Klein, Kremslehner, Petsche, Pitkowitz, Power, Welser & Zeiler eds., 2008).

time limits set out in these rules, the ICC Rules do not contain further detailed regulations in this regard.[5]) Furthermore, parties may move themselves onto a "fast track" by specifying particular time limits for each phase of an ad-hoc proceeding, or by specifying a deadline for any award, either in the arbitration clause or in a later agreement. In this article, we highlight the advantages, disadvantages, and potential risks of fast track arbitration, and examine the relationship between fast track arbitration and the general principles of arbitration.

B. Disadvantages of "Ordinary" Arbitral Proceedings

Twenty years ago, the conventional wisdom among practitioners was that choosing arbitration – rather than court proceedings – was the best way to ensure avoidance of unnecessary delay. Things, however, have changed.[6]) Nowadays, parties tend to submit extensive files and voluminous attachments to the arbitrators far in excess of the amount of material they would produce in state court. Because arbitrators, unlike state judges, have a reputation to lose, and because compensation schemes for arbitrators tend to foster a more thorough approach, arbitral tribunals are nowadays often expected to review lengthy submissions and countless binders of attachments, despite the fact that, in most circumstances, the case could have been presented in a shorter and more precise manner without sacrificing quality. Perhaps the parties, having chosen the arbitrators and thereby given them a "reason to exist", feel less reluctant to confront them with extensive case materials. Another explanation may be that arbitrators have greater expertise regarding the disputed topic, so parties dare to submit much more detailed information than they would before an ordinary court. Furthermore, parties may make repeated requests for time extensions in a strategic effort to delay the proceedings, and may produce additional information that is nothing more than a "smoke bomb" and is unnecessary for a decision of the case. Therefore, there is a general need to speed the arbitration process.

C. Elements of Fast Track Arbitration

Fast track arbitration is not a distinct kind of arbitration. Instead, it incorporates various forms of expedited procedures, and is not comprised of a fixed set of elements. However, there is a set of procedural possibilities which – in different combinations – form recognized elements of fast track arbitrations.

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[5]) The advantages of such an approach are set out by Fiebinger & Gregorich, *supra* note 4, at 240.

[6]) Irene Welser & Susanne Wurzer, *Formality in International Commercial Arbitration – For Better or for Worse?, in* Austrian Arbitration Yearbook *2008 248 (Klausegger, Klein, Kremslehner, Petsche, Pitkowitz, Power, Welser & Zeiler eds., 2008).*

The key element in a fast track arbitration is *strict time limits.* Such time limits apply to the parties as well as to the arbitrators. The parties are regularly constrained by relatively short time limits for the nomination of their respective arbitrator, as well as for their submissions and preparation for the oral hearing. Meanwhile, the most important restriction for the arbitrator is a time limit for the issuance of the award. Such restrictions on the arbitrator are problematic as they may lead to a situation in which the losing party may contest the issuance of an award after the time limit has elapsed. We will address this question later on, however it should be mentioned that – in order for the parties to avoid unnecessary risk of a possible challenge to the award – it would be best for them to clarify this issue in advance.

Another important element in a fast track arbitration is the *limitation of procedural steps.* For this reason, most specific regulations on expedited proceedings contain restrictions on the number of written submissions as well as limitations regarding the hearing. As the drafting of the award itself may take some time in ordinary arbitral proceedings, most rules for expedited arbitrations also provide for expedited arbitral awards. For example, Section 7 of the German Institution of Arbitration's Complementary Rules for Expedited Proceedings provides that the Arbitral Tribunal may abstain from stating the facts of the case in the arbitral award.[7]) Meanwhile, under Article 35 of the Arbitration Institute of the Stockholm Chamber of Commerce's Rules for Expedited Arbitrations, there is no obligation to include reasons for the award, unless expressly requested by one of the parties.[8]) On the other hand, such "shortened" versions of the award bear the risk that the award may be subject to rescission more easily.

Furthermore, a fast track arbitration is not possible without modern *means of communication.*[9]) Communication in the form of email, fax, telephone and video conferences, and any other appropriate means of avoiding unnecessary formality, is a key factor in the considerably shortened duration of the fast track arbitration proceedings.

D. Some Exemplary Cases

Before we go into further detail, a brief overview of some fast track arbitration cases might help to illustrate the characteristics of fast track arbitration. Perhaps the best known and most discussed fast track arbitration case is the Panhandle case, decided under the ICC Rules, in which an award was made within two-and-a-half months from the request for arbitration, and, even more remarkably,

[7]) *See* Annex to the DIS Arbitration Rules, *available at* http://www.dis-arb.de/scho/2008_SREP.html (last visited 11 November 2008).

[8]) *See* Arbitration Institute of the Stockholm Chamber of Commerce, Rules for Expedited Arbitrations, *available at* http://www.sccinstitute.com/_upload/shared_files/regler/2007_expedited_rules_eng.pdf (last visited 11 November 2008).

[9]) Fiebinger & Gregorich, *supra* note 4, at 250.

within two-and-a-half weeks of the arbitral tribunal's formation. In Panhandle, the parties had stipulated that, in the event of a dispute, certain issues concerning the determination of the price in a long-term gas supply contract were to be resolved by arbitrators within two months from the request for arbitration. The parties later agreed to an extension of this time limit by one week. The Secretariat of the ICC International Court of Arbitration's counsel in charge of the case later highlighted the fact that at no time during the arbitration did a party seek an extension of time to make its submissions. All parties respected all deadlines assiduously.[10])

While the Panhandle case shows that arbitration may achieve fast results that state court proceedings cannot offer, it also shows that the cooperation of the parties is definite requirement in achieving this goal. As Hans Smit, the chairman in the arbitration, noted, "*special fast-track rules are needed to render fast-track treatment possible when the tribunal has to deal with less operative litigants or is a less harmonious body*".[11])

Another famous fast track case was handled under the ICC Rules as well. Its name, Formula One Racing, perhaps made it pre-destined for fast track arbitration. In this case, the arbitral tribunal had to decide an issue regarding the paint of Formula One racing cars within a time frame of approximately one month. As in the Panhandle case, both parties were interested in a prompt decision and therefore were cooperative.[12]) In this arbitration, the parties exchanged submissions within 7-day intervals and the arbitral tribunal finalized its draft award within 48 hours of the hearing.

These two cases show that it is also possible to conduct fast track arbitration efficiently without detailed rules for expedited procedures. However, in both cases, all participants and both parties were very cooperative and interested in the fast settlement of the case. It remains dubious whether the aim of fast track arbitration – to accelerate the proceedings – would also have been reached if one of the parties had decided not to cooperate but rather to delay the proceedings.

The feasibility of fast track ad hoc arbitration is illustrated in the following Austrian example. The case, concerning claims based on a delay in construction work, involved both complex facts and substantive issues, and is discussed in further detail by Fiebinger and Gregorich.[13]) The arbitration agreement provided that the decision of the arbitral tribunal must be made within three months of an appointment of a chairman. Because of its strict management of the proceedings, the arbitral tribunal was able to make its decision within this rigid time frame. However, the proceedings did take longer than three months because the process of selecting the tribunal took almost a year. As this case shows, ad hoc agreements

[10]) Benjamin Davis, *The Case Viewed by a Council at the ICC Court's Secretariat,* Fast-Track-Arbitration: Different perspectives, 3 ICC Bulletin 8 (1992).

[11]) Hans Smit, *A Chairman's Perspective,* Fast-Track-Arbitration: Different Perspectives, 3 ICC Bulletin 17 (1992).

[12]) ICC case No.10211/AER *in* Redfern & Hunter, *supra* note 1, at 6–44.

[13]) Fiebinger & Gregorich, *supra* note 4, at 246.

on expedited proceedings should also include provisions regarding the election of the arbitral tribunal, and choosing a sole arbitrator instead of an arbitral panel might be preferable.

II. Fast Track Arbitration and the Fundamental Principles of Arbitration

As mentioned above, two important features of arbitration as a dispute settlement procedure are speed and cost-efficiency. However, while time and money may be the driving forces behind the choice of arbitration as a means of dispute resolution, there are a number of characteristics fundamental to arbitration which make it a viable alternative to state jurisdiction. They include, *inter alia:*

- *Party autonomy* (choice of arbitration as a dispute settlement procedure; determination of applicable law; setting of rules for the arbitration);
- *Equal treatment* (due process; fairness of proceedings);
- *Arbitrators' neutrality* (impartiality; independence); and
- *Enforceability of arbitral awards.*

These characteristics – also referred to as the fundamental principles of arbitration – apply to fast track arbitration as well. However, certain features inherent to fast track arbitration may push the limits of these principles.

A. Party Autonomy

The attraction of arbitration as a dispute settlement procedure lies in the flexibility it offers to the parties in determining the framework for the resolution of their dispute in accordance with the specifics of the case.

1. Choice of Arbitration

Based on the principle of party autonomy, the parties are free to choose arbitration as a dispute settlement procedure and to establish the related rules – from the place of the arbitration and the applicable (substantive and procedural) law, to the number of arbitrators and the details of the proceedings. The parties' creativity is limited only by the mandatory rule of equal treatment of the parties, in particular with regard to their right to receive a full opportunity to be heard.[14])

The decision to commit to fast track arbitration is also a matter of party autonomy. While the parties are free to establish certain procedural limitations in order to reflect their interest in a speedy process, there is a certain risk to the balance between the parties' interest in the fast resolution of their dispute and the general fairness of the proceedings.

[14]) Johannes Trappe, *The Arbitration Proceedings: Fundamental Principles and Rights of the Parties,* 15 Journal of International Arbitration 98 (1998); *see also* Section 594 (2) Austrian Code of Civil Procedure and Article 18 UNCITRAL Model Law.

2. Determination of Applicable Law/Setting of Rules for the Arbitration

Like the decision to submit a matter to arbitration, the choice of the law (substantive and procedural) applicable to the arbitration also falls within the ambit of the principle of party autonomy. Arbitrators may disregard the parties' choice only in certain limited and highly exceptional situations.[15]) As of yet, no common principles have been developed with regard to the question of whether or not the choice of fast track arbitration *per se* may justify the arbitrator's disregard of the parties' choice of law. As a matter of fact, a number of national conflict of law rules provide for the application of national law if the law otherwise applicable cannot be determined.[16])

International arbitration practice recognizes several methods for designating the applicable rules of law.[17]) Oftentimes, the arbitrator's choice is guided by the application of transnational principles of private international law, and there is an increasing trend towards the direct application of substantive principles of transnational law to the merits of a case.[18]) The arbitrator's freedom to choose the applicable law is limited virtually only by the principles of international public policy. Ultimately, the difficulties related to the application, or abandonment, of conflict of law rules may be overcome by the identification of the presumed intention of the parties and the application of the contract terms themselves.[19]) It is quite clear that the arbitrator's application of these general principles will require less research than the application of (foreign) law, which the arbitrator may not necessarily be familiar with.

When it comes to the designation of the relevant rules of law, the particular legal traditions of the acting arbitrators do play a significant role. In most civil law jurisdictions, a judge or arbitrator is expected to actively research the applicable (foreign) law under the *jura novit curia* rule. However, in many other – mostly common law – jurisdictions, foreign law is treated as a question of fact. Instead of the active involvement of the judge or arbitrator, the party making a claim under a specific law bears the burden of proof regarding its applicability.[20])

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[15]) Emmanuel Gaillard, *The Role of the Arbitrator in Determining the Applicable Law,* The Leading Arbitrator's Guide to International Arbitration 205 (Newman & Hill eds., 2004).

[16]) *See, e.g.,* Section 4, para 2 of the Austrian Code on the Conflicts of Law, which states that Austrian law is to be applied if the relevant foreign law cannot be determined within reasonable time.

[17]) Mauro Rubino-Sammartano, International Arbitration Law and Practice 433 *et seq.* (2nd ed. 2001).

[18]) Gaillard, *supra* note 15, at 205 *et seq.*

[19]) Julian D. M. Lew, Loukas A. Mistelis & Stefan A. Kröll, Comparative International Commercial Arbitration 469 (2003).

[20]) Rubino-Sammartano, *supra* note 16, at 455; Lew, Mistelis & Kröll, *supra* note 18, at 442.

Arbitrators may have little or no connection with, or access to, the applicable national law. Therefore, particularly in arbitral proceedings in which the parties would expect the arbitrator to actively research the law, the parties or the appointing body may be well advised to choose an arbitrator who has a good knowledge of the applicable national law.

As there is usually not a lot of time available, the choice of fast track arbitration may affect the approach chosen by the arbitrator when it comes to identifying the applicable law. Therefore, in fast track arbitration, the relevant contents of the applicable law are more likely to be determined on the basis of the submissions of the parties pleading a claim under a specific national law. Likewise, there may be a greater tendency to apply alternative rules such as *lex mercatoria,* common substantive principles of law, or the substantive law at the place of arbitration.[21])

3. The Finding of Facts/Admissibility of Evidence

Just as in regular arbitration proceedings, the parties to fast track arbitrations may establish the rules governing the proceedings in an arbitration agreement or arbitration clause, or consent to a certain set of institutional rules at any time prior to the commencement of the arbitration. With respect to the finding of facts, however, the arbitrator plays a crucial role in determining the course of the proceedings once they have commenced. In the absence of binding guidelines from the parties or applicable institutional rules, the arbitrator has the right – and the obligation – to decide upon the arbitration rules as he or she deems fit. In this respect, international arbitration institutions have offered a valuable source of guidance for arbitrators when admitting evidence.[22])

While international arbitral tribunals are generally free to admit evidence at their own discretion, they are certainly required to observe standards of fairness so as to not jeopardize the enforceability of the ensuing award. Thus, the arbitrator's decision on the admissibility of evidence should be guided by the individual requirements of the case, the nature of the parties involved, and the important question of whether the evidence would be appropriate under the circumstances of the case.[23])

The choice of fast track arbitration will not necessarily remain without consequences as far as the rules governing the proceedings are concerned, and therefore may have a substantial impact on the fact-finding process.

One likely consequence concerns the requirement of oral hearings, which may constitute a source of delay in arbitration proceedings. Arbitrators in fast

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[21]) Gaillard, *supra* note 15, at 216.

[22]) *See* ICC Rules of Arbitration, Article 20; UNCITRAL Model Law on International Commercial Arbitration, Article 19; IBA Rules on the Taking of Evidence in International Commercial Arbitration, Articles 8 and 9.

[23]) Charles N. Browner & Jeremy K. Sharpe, *Determining the Extent of Discovery and Dealing with Requests for Discovery: Perspectives from the Common Law, in* The Leading Arbitrator's Guide to International Arbitration 316 *et seqq.* (Newman & Hill eds., 2004).

track arbitrations should therefore pay particular attention to the following questions when planning evidentiary hearings:

- Do the particularities of the case require oral evidentiary hearings at all?
- To what extent can the time available for each party to put forward their arguments and to question witnesses reasonably be limited?
- Would a detailed hearing schedule help structure the process and balance the time available for each party to present their case?
- What should the order be in which the parties present their arguments and evidence?

Limitations may, however, not only apply to hearings, but to the particular types of proof admitted in fast track arbitrations as well.[24])

The parties' *submissions* may be limited in number and length. The arbitral tribunal may focus the parties on the key issues by providing counsel with a list of particular questions for the parties to address.

In order to help avoid repetition and to encourage concise arguments, *documentary evidence* may be restricted as well. In particular, the parties to a fast track arbitration may be faced with a cut-off date which will usually be set in advance of any evidentiary hearing and after which no new documentary evidence will be admitted, unless there are compelling reasons to do so.

Considerations of time management in fast track arbitrations may also influence the *examination of witnesses.* As in regular arbitration proceedings, where the entire process of taking evidence should be shortened by a precise determination of those uncontroversial facts which will not need to be addressed by evidence at all, the strict time limits of fast track arbitrations will also regularly force the arbitrator to impose restrictions as to evidence concerning the disputed facts. Such limitations often concern the number of witnesses to be heard, the possibility of (cross) examining the witnesses, and, if applicable, the time available for witness examination, therefore impacting the parties' opportunity to present their case.

The same generally applies to *expert evidence.* Such limitations tend to restrict the time available for hearing and questioning experts in oral proceedings.

The restrictions in fast track arbitrations discussed above may also affect the way arbitrators approach *burden of proof issues.* If, for reasons inherent to fast track arbitration, the parties are unable to provide proof of certain facts, the arbitrator may be inclined to apply rules which provide for a shift in the burden of proof. Also, there may be instances in fast track proceedings where time is so limited that the arbitrator either expressly or implicitly (by taking into consideration the limitations described above) lowers the level of proof required, or may otherwise lessen the plaintiff's burden of proof.

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[24]) *See* Techniques for Controlling Time and Costs in Arbitration, Report from the ICC Commission on Arbitration, *available at* http://www.iccwbo.org/uploadedFiles/TimeCost_E.pdf (last visited 11 November 2008).

The procedural limitations described above affect the overall fact-finding process and the parties' ability to present their cases. Neither fast track rules of arbitral institutions nor regular arbitration agreements providing for fast track arbitration offer specific guidance to arbitrators regarding to the question of how these limitations should factor in the decision-making process. Most national laws and arbitration rules give the arbitrator full discretion in weighing the evidence.[25]) Thus, it is generally within the responsibility of the arbitrator to appreciate the limitations imposed on the parties in these accelerated proceedings when considering the facts of the case.

B. Equal Treatment

While procedural limitations are characteristic of fast track arbitration, these limitations must not undermine the equal treatment of the parties. In particular, expediting the arbitral proceedings must not deprive either the parties of their right to present the case or the arbitral tribunal of the time and means to consider the case properly.[26]) It would be incorrect to assume that the parties who agreed to fast track arbitration also agreed to a limitation of their procedural rights. The principle of giving each party a sufficient opportunity to present its case is both fundamental and mandatory. That the two parties agreed on the expedited conduct of the arbitration proceedings does not alter this fact.[27])

1. Due Process

Whether due process rights are sufficiently respected in a fast track arbitration depends predominantly on the particularities of the case. While there are a number of issues that a reasonable arbitrator must pay particular attention to in any type of proceeding, these issues may be especially crucial in fast track proceedings. Such issues generally concern the transparency of the process and the interaction between the tribunal and the parties. For example: the parties' pleadings should be made available to their opponents early enough so as to give them the opportunity to respond; orders of the arbitrator regarding future procedures or the extension of deadlines in favor of one party should also be communicated without delay; and the parties should have an equal opportunity to comment on proffered evidence.[28]) Furthermore, where applicable, sufficient time should be

[25]) *See* German Code of Civil Procedure, Section 287; Dutch Code of Civil Procedure, Section 1039.5; Swedish Code of Civil Procedure, Section 35.5; Austrian Code of Civil Procedure, Section 273.

[26]) Eva Müller, *Fast Track Arbitration: Meeting the Demands of the Next Millennium,* 15 Journal of International Arbitration 6 (1998).

[27]) Annette Magnusson, *Fast Track Arbitration – The SCC Experience, available at* http://www.sccinstitute.se/_upload/shared_files/artikelarkiv/fast_track_arbitration.pdf (last visited 11 November 2008).

[28]) Johannes Trappe, *The Arbitration Proceedings: Fundamental Principles and Rights of the Parties,* 15 Journal of International Arbitration 99 (1998).

allowed to prepare the translation of a document produced in a foreign language. Of course, the determination of what constitutes "sufficient time" in a fast track arbitration must reflect the parties' choice of an accelerated dispute resolution mechanism. Thus, the time frame granted in fast track arbitration may be considerably shorter than in regular arbitration. Finally, it should be highlighted that it likely would be considered a violation of the parties' due process rights if the time restriction forced the arbitrator to apply procedural limitations not previously agreed to by the parties.[29])

The time restrictions imposed in accelerated proceedings also reduce the time available to the arbitrator to render an award. Of course, "quality must not be sacrificed to speed".[30]) However, given the particularities of accelerated proceedings, it is not an uncommon practice to dispense with the requirement of a reasoned award in the interest of saving even more time. Regardless of such choice to pursue a fast track arbitration, however, the parties should never be taken by surprise when learning of the arbitrator's decision. For example, if the arbitrator has expressed a certain opinion, he is obliged to inform the parties if he subsequently changes his mind.[31]) Therefore, the arbitral tribunal should ask the parties to address, in writing, the legal or factual issues which the tribunal itself considers to be decisive in its ultimate decision.

2. Fairness of Proceedings

Fairness is often defined in subjective terms and reflects a party's position in a particular case. Therefore, taking into account the issues discussed under section II.A. in this article, the arbitrator in fast track proceedings must also grant each party a reasonable amount of time to put forward its arguments and to respond to the other party's case. However, in most fast track proceedings, it will not be unreasonable to refuse multiple days of hearings, numerous witnesses, or lengthy arguments in the interest of saving time and resources. Nevertheless, it remains important to ensure that each party receives sufficient time to fully respond to the evidentiary submissions of its opponent. While it has become standard in international arbitration that the arbitrators establish a schedule determining the timeframe of the proceedings as well as the nature and number of the parties' submissions[32]) at an early stage in the proceedings (*e.g.,* in Procedural Order No. 1), such structured approach should be considered a must in fast track arbitration.

Again depending on the peculiarities of the case, there may be a number of complex and genuine issues of fact and/or law making it absurd or even counterproductive to provide for fast track arbitration. If, under such circumstances the parties nevertheless choose expedited proceedings, then the arbitration clause

[29]) Eva Müller, *supra* note 26, at 7.
[30]) Rubino-Sammartano, *supra* note 16, at 548.
[31]) Johannes Trappe, *supra* note 28, at 99.
[32]) Lew, Mistelis & Kröll, *supra* note 18, at 282.

may be considered defective, perhaps triggering the risk that the award will be successfully challenged later for lack of due process. Even in cases where fast track arbitration provides a viable method of dispute resolution, respect for a minimum standard of due process is indispensible if a state court is to lend its support to the enforcement of such an award.[33])

C. Arbitrator's Neutrality

It is undisputed that impartiality and independence are indispensable elements of both regular and fast track arbitrations. In fast track proceedings, experience has shown that the parties should make sure that the independence of the individual arbitrators cannot be called into question, even in the earliest stages of the arbitral tribunal's formation. A party should be prepared to propose an alternative candidate if the appointment of the first arbitrator of choice is challenged by the other party.[34])

As a consequence of the restrictions resulting from the limited time available, arbitrators in fast track proceedings face a more difficult task than in regular arbitrations. The success of accelerated arbitration proceedings will, amongst other things, depend first and foremost on the arbitrator's ability to navigate the parties through a usually very strict procedural program without creating the impression that the constraints placed on the parties and their counsel are in any way a result of a lack of neutrality on his or her part.

D. Enforceability of Arbitral Awards

While the expeditious treatment of a dispute offers a number of benefits to the parties, it must not be forgotten that any decision arrived at in an accelerated proceeding is only valuable insofar as its enforceability is ensured. Arbitrators in accelerated arbitration proceedings must be aware that observation of the key principles discussed above also serves to ensure that the award rendered can ultimately be enforced. The failure to comply with these principles may cause an arbitral award to be set aside under the applicable national law or may otherwise constitute a ground for the refusal of enforcement.

As the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention 1958) is undoubtedly the most important international treaty in this area, the following analysis of potential stumbling blocks to the enforcement of a fast track arbitral award shall focus on the grounds for re-

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[33]) Pierre Yves Tschanz, *The Chamber of Commerce and Industry of Geneva's Arbitration Rules and their Expedited Procedure,* 10 Journal of International Arbitration 56 (1993).

[34]) *See* the various accounts of the participants in the Panhandle case, 2 American Review of International Arbitration 138–162 (1991).

fusal enumerated in Article V of the New York Convention, in particular Section 1(b), concerning the violation of due process rights, and Section 2(b), concerning public policy issues.[35])

1. Inability to Present the Case

According to Article V, Section 1(b) of the New York Convention, the recognition and enforcement of an arbitral award may be denied at the request of the party against whom it is invoked if "[…] [that party] *was unable to present* [its] *case*".[36])

This provision primarily covers violations of the previously discussed principles of equal treatment of the parties and the right to be heard (due process). As evidenced in international case law, state courts are rather restrictive when it comes to citing violations of due process rights as grounds for refusing to recognize and enforce an award. Generally, the identification of a violation of the parties' procedural rights will not *per se* suffice as a ground for refusal under Article V, Section 1(b) of the New York Convention – it is further required that the identified violation had a direct influence on the outcome of the proceedings.[37])

State courts have qualified the following procedural defects as constituting denials of due process rights: the failure to inform a party of the opposing party's arguments;[38]) the failure to present to one party a substantial document submitted to the arbitrator by the other party, and the subsequent denial of the opportunity to comment thereupon;[39]) and the denial of the opportunity to comment on expert written reports or oral statements.[40]) On the other hand, state courts refused to classify the following as violations of due process rights: the implicit limitation of the deadline for submissions through the arbitrator's announcement that a decision was to be made by a certain date and based on the documents made available up until that date;[41]) and basing an award on certain select

[35]) These provisions correspond with Article 34, Sections 2 (a) (ii) and 2 (h) (ii) of the UNCITRAL Model Law on International Commercial Arbitration concerning the setting aside of an arbitral award, *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (last visited 11 November 2008).

[36]) Article V 1(b), United Nations Conference on International Commercial Arbitration, Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, *available at* http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf (last visited 11 November 2008).

[37]) Barbara Steindl, *Durchsetzung ausländischer Schiedssprüche, in* Praxishandbuch Schiedsgerichtsbarkeit 261 (Hellwig Torggler ed., 2007).

[38]) LG Bremen, Jan 20, 1983, docket no. 12 0 184/1981, *in* XII Yearbook Commercial Arbitration 486 (1987) (Germany).

[39]) OLG Hamburg, Apr 3, 1975, *in* II Yearbook Commercial Arbitration 241 (1977) (Germany).

[40]) Tribunal Fédéral (Bundesgericht), Feb 8, 1978, Chrome Resources S.A. v. Léopold Lazarus Ltd., *in* XI Yearbook Commercial Arbitration 541 (1986) (Switzerland).

[41]) OLG Hamburg, Sept 6, 1984, docket no. 6 U 50/84, *in* 31 RIW 490 *et seq.* (1985) (Germany).

arguments rather than all arguments set forth by a party during the proceedings.[42])

Thus, shortening time limits creates little risk with regard to the enforceability of an arbitral award as long as the utmost care and attention is given to ensuring that all submissions by one party in the proceedings are presented to the other party. Overall, the setting of strict deadlines for responding to submissions appears to be a much safer approach than denying the opportunity to comment at all.

2. Award Contrary to Public Policy

Article V, Section 2(b) of the New York Convention contains a provision for the *ex officio* refusal of the recognition and enforcement of an international arbitral award *"if the competent authority in the country where recognition and enforcement is sought finds that the recognition or enforcement of the award would be contrary to the public policy of that country"*.[43])

The cited provision allows for the refusal of recognition and enforcement of an international arbitral award if the award was rendered in violation of a legal norm which constitutes the foundation of a state's national or economic order *(ordre public)*. It also applies if the arbitral award intolerably contradicts general concepts of justice and equity in the state in which enforcement is sought.

Again, Article V, Section 2(b) of the New York Convention is rarely invoked by state courts as a basis for refusal of enforcement. For example, the Austrian Supreme Court has qualified the reservation clause of Article V, Section 2(b) as an "exceptional rule that must be used sparingly, in order not to disturb the harmony of international decisions unnecessarily".[44]) In particular, for a procedural defect to be considered contrary to public order, it does not suffice that the law or legal relationship itself is at odds with public policy; the enforcement of the award must also be intolerable for the domestic legal system.[45])

Arbitral awards have been considered contrary to public order in the context of Article V, Section 1(b) of the New York Convention mainly for the same reasons invoked by state courts, *e.g.*, where a document was submitted during the proceedings without the knowledge of one of the parties and the arbitrator subsequently did not consider any evidence contradicting said document.[46]) Further-

[42]) OGH, Nov 27, 1991, docket no. 3 Ob 1091/91, *in* 33 ZfRV 309 (1992) (Austria); OLG Köln, Apr 23, 2004, docket no. 9 Sch 01-03, *in* XXX Yearbook Commercial Arbitration 560 (2005) (Germany).

[43]) Article V 1(b), United Nations Conference on International Commercial Arbitration, Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, *available at* http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf (last visited 11 November 2008).

[44]) OGH, Jan 26, 2005, docket no. 3 Ob 221/04b, *in* XXX Yearbook Commercial Arbitration 428 (2005) (Austria).

[45]) *Ibid.*

[46]) OLG Hamburg, April 3, 1975, *in* II Yearbook Commercial Arbitration 241 (1977) (Germany).

more, it was found to be contrary to public order where the parties had no opportunity to comment on an expert report during the arbitration proceedings.[47]) Failure to render a reasoned award, however, did not qualify as sufficient reason to refuse recognition and enforcement of an arbitral award in accordance with Article V, Section 2(b) of the New York Convention where the law of the state in which enforcement was sought did not set out the requirement of a reasoned award[48]). Consequently, the parties should keep in mind that state courts may require a reasoned award as a prerequisite for enforcement when consenting to arbitration rules which do not require the arbitrator to render a reasoned award.

III. Guidelines for Practitioners – The User's Point of View: Pros and Cons

A. Advantages of Fast Track Arbitration

First, as shown above, the main advantage of fast track arbitration is to guarantee the parties a *speedy procedure.* In fact, this originally was one of the key ideas of "normal" arbitration. The greatest advantage of fast track arbitration is that decisions are rendered within weeks or, at the very most, months. It is, therefore, much quicker in relation both to a normal arbitration procedure and traditional court proceedings.

Thus, intense yet short preparation helps both the parties and the arbitrators save time and therefore makes arbitration more efficient. If the parties are ready and willing to devote some time before the proceedings to the arbitration, then the parties can avoid any unnecessary delays during the proceedings.

A positive "side effect" of this feature is the *concentration of material questions and evidence:* In most fast track proceedings it is absolutely impossible to exchange voluminous briefs, to hold lengthy hearings, and to devote time to extensive arguments. This normally leads both the arbitrators and the parties to "think sharp" and to keep their arguments lean. In other words, they have to focus on what is really important – a feature we tend to increasingly forget in arbitration.

In well-mastered fast track arbitration proceedings, there are *few possibilities of delay.* As a rule, there are only one or two rounds of submissions, possibly simultaneous for both parties, including all evidence. Still, according to some rules, time limits may be extended by the institution. Moreover, to ensure a speedy proceeding, the defendant's cooperation is essential.

Surprises during proceedings are usually *rare.* Because of the strict procedures imposed, surprise witnesses cannot be "saved" until the end of the proceed-

[47]) Tribunal Fédéral (Bundesgericht), Feb 8, 1978, Chrome Resources S.A. v. Léopold Lazarus Ltd., *in* XI Yearbook Commercial Arbitration 541 (1986) (Switzerland).

[48]) OLG Schleswig, Mar 30, 2000, docket no. 16 SchH 5/99, *in* 46 RIW 709 (2000) (Germany).

ings, and the same goes for strategic presentation of evidence at a very late stage. Usually, "fast track" forces the parties to submit their position in a straightforward way at the very beginning, thereby showing the other party what the conflict is all about. Sometimes, this also facilitates an early amicable settlement.

If no such settlement during the proceedings can be reached, there usually will be a *quick decision.* In a traditional arbitration, there usually exists a strict schedule for submissions; however, post-hearing-briefs, the deliberation of the arbitral tribunal, and the time for the tribunal to write, approve, and submit an award are very time consuming. Even at this stage, possible suggestions of an overly-formalistic nature may protract the duration and thus, in effect, ruin the best intention of the arbitral tribunal to adhere to a tight time frame when the case began.

If, however, the arbitral tribunal is forced to render the award within three or six months from the beginning of the proceedings, such delays must be avoided. Therefore, a clear time limit for the making of the award by the arbitrators (*e.g.*, three months after the arbitration was referred to the arbitral tribunal (*see* Rules for Expedited Arbitrations of the Arbitration Institute of the Stockholm Chamber of Commerce) is a key feature for the success of fast track arbitration.

Another clear advantage of "fast track", if arranged properly, is a possibly *wider range of party autonomy.* If the parties agree beforehand on what they expect from a future arbitration, they can quite freely determine the conduct and duration of the proceedings. In this respect, however, we may easily conflict with the fact that, quite often, the arbitration clause is added at a time when the parties are far too exhausted or simply unwilling to consider the specific rules or procedures they would like applied in the event of a dispute. In sum, there is more party influence on the course of proceedings if clear rules are agreed upon by the parties. Even the right to be heard or the question of due process may be influenced by what the parties negotiate beforehand.

In "fast track" arbitration, there is usually *no need for interim measures.* Because the arbitration must be quick (as per definition), and interim awards tend to be challenged, the decision for "fast track" arbitration is a decision, in and of itself, against interim measures. In any case, duplicity should be avoided as it may seriously impede the positive effects of "fast track" procedures. Interim awards are likely to propel an attack in court and therefore completely undermine the "fast track" scheme.

Another advantage of "fast track" is the *lower costs* to all parties involved. Fewer submissions, stricter time limits, shorter hearings, more efficiency in the procedure all contribute to the lower costs of "fast track."

However, there are some hidden risks. There is a chance that, in fact, fast track arbitration is not as cost-saving as it appears. One must consider that, in order to keep to short deadlines, lawyers and arbitrators have to be retained nearly full-time. Moreover, managers or appropriately informed representatives have to be assigned to the preparation of the case on nearly the same basis. This may greatly increase arbitration costs. If expert opinions are needed, they, in most

cases, have to be collected beforehand. Although experts are costly, however, this may ultimately reduce costs because after the parties understand any material problems as a result of their expert reports, they may be more inclined to settle.

B. Disadvantages of Fast Track Arbitration

Because of their "speedy" approach, fast track proceedings are *not suitable for every kind of conflict.* Though they may seem the perfect tool if both parties need a quick solution to a pending contractual problem (*e.g.,* price adaptation clauses or a construction site where work is underway), they may not be appropriate if there is a need to call expert witnesses or submit factual questions to tribunal-appointed experts. It is also clear that fast track arbitration is not suitable for complex conflicts or multi-party proceedings

Fast track proceedings frequently operate *without any experts,* a potentially serious disadvantage if the arbitrators lack experience in the parties' business or the factual questions of the case. Of course, parties can compensate by appointing technical experts as arbitrators, but technical experts are usually not trained to deal with legal intricacies, including the application of the tight fast track procedural rules.[49]) Submitting private expert opinions is another possible solution, but the concomitant invocation of counter-expert opinions from the opposing party leads again to a *"non liquet"* situation of proof.

As discussed above, fast track proceedings may entail a *lower degree of proof.* Even if the arbitrators reject this principle, the time limits involved in fast track arbitration often do not allow for extensive evidentiary procedures, such as written witness statements followed by examination and cross-examination, and, as mentioned above, expert opinions.

In some cases, this may mean that there is *no oral hearing at all.* Thus, the principle of immediacy is not guaranteed when opting for fast track proceedings. Unless there is a violation of the right to be heard,[50]) a tribunal might dispense with hearings altogether, as long as there are other means of adducing evidence. In such a case, written witness statements usually must be prepared on short notice, meaning that the witnesses must be available for the parties' counsel whenever needed.

Preparation efforts for parties can therefore be demanding in fast track arbitration. Files and documents have to be assembled and verified rapidly, and lawyers have to be familiar with the case, the law, and the strategic aims of the party from the very beginning. Usually, full-time staff on both sides must be assigned to the case. If managers or board members are important witnesses or hold the key

[49]) We have seen technicians appointed as arbitrators who submitted their procedural orders or even interim and final awards by means of a delivery note.

[50]) This is clearly not the case if the party has been invited to submit a written statement or counter-statement, *see* D.1 in this article.

information, scheduling problems can arise because they usually cannot afford to "back out" of their day-to-day business for days at a time. Parties should therefore bear in mind that when opting for fast track arbitration the actual work will usually have to be started well before the proceedings are initiated.

As a consequence, it is vital for the parties to *find lawyers and arbitrators with enough time.* This may seem a small problem at first, but may become crucial because the best experts usually do not "sit around" without work. On the contrary, the schedules of sought-after attorneys and arbitrators are usually so full that they cannot seriously promise to meet all of the demands that fast track procedures require.[51])

Also, *advances on costs* must usually be paid within a few days. Therefore, the claimant choosing fast track arbitration must therefore be prepared to pay both its own advance on costs and that of the defendant so as to avoid putting the arbitration at risk. This may not always be easy, especially in times of economic difficulties.

Furthermore, the success of fast track proceedings is largely dependent on the parties' will to proceed. If only one party is interested in speed and the other is *reluctant to cooperate,* the overall success of the fast track proceeding will be endangered. Of course, non-compliance with short time limits for submissions will usually be a detriment to the defaulting party and will not itself hinder an award. However, we have often seen the defaulting party try to "kill" the award in rescission proceedings by arguing that the right to be heard has been violated through excessively short deadlines, especially if no specific fast track rules have been agreed upon beforehand. Thus, if one party does not fully cooperate in fast track proceedings there is a higher risk that an award will be set aside.

If the parties are not sure whether to agree on fast track arbitration, they should be realistic. In such proceedings, deadlines as short as one or two working days are possible – will they really be ready to meet them? If not, will the arbitral tribunal or institution be able to extend time limits in order to "save" the arbitration? Or, more generally, what will be the consequence if the arbitration cannot be finished within the agreed time frame? As discussed above, the worst-case scenario may be that after the time limit for the arbitral award lapses, the arbitration is "over" and the matter will continue on to "normal" litigation; alternatively, the parties have to go "back to square one" and a second, "new" arbitral tribunal restarts the arbitration from the beginning. Despite the advantages of fast track arbitration, these "cons" should be borne in mind.

[51]) *See, e.g.,* the Panhandle case, cited above, where only the fact that an arbitration was to be solved within the Christmas holidays allowed the arbitrators to accept their nomination.

IV. What is Necessary to Make Fast Track Proceedings a Success?

Considering the aforementioned pros and cons, how can fast track arbitration overcome these disadvantages?

First of all, the conflict between the need for rapidity ("Justice delayed is justice denied", as Wolfgang Hahnkamper stated in his abstract of the Vienna Arbitration Days 2008) and concerns for due process ("Speed kills") must be avoided. Of course, the ideal scenario involves a clear and comprehensive fast track arbitration agreement, *clearly setting out rules* and precisely defining which steps the tribunal must follow. However, we must remain realistic. We all know that an arbitration clause is often a "midnight clause", introduced at a time when all other points are clear and no one wants to elaborate on the detailed rules for possible disputes. More realistically, especially in transaction contracts, the respective lawyers merely ask their litigation and arbitration colleagues for "a good arbitration clause" at the last minute, with the result that the clause does not take into account the specifics of the case.

On the other hand, it is an old wisdom that neither all possible conflicts arising out of a contract nor all possible formalistic aspects that might impede proceedings can be foreseen. Nor can it be predicted whether a party will be a claimant or defendant. Therefore, it will hardly ever be possible to craft a specially-tailored clause that will, in the end, operate as intended in a specific situation.

On the contrary, we have frequently seen absurd clauses that make fast track proceedings more complicated, or which fail to leave room for "saving" the arbitration in situations where established deadlines cannot – for objective reasons – be met. Instead, it would be ideal if parties could refer to a standard set of fast track rules. The adoption of comprehensive institutional rules would therefore be favorable. If this is not possible, like in the first ICC fast track case back in 1992, the chairman may still act through the powers conferred to him under Article 1.3 of the ICC Rules in order to address urgent matters.

At the very least, what is necessary is a *clear time limit* for the arbitration and the parties' mutual understanding of what will happen if this time limit is not met, because later efforts to reach agreements on these issues may be complicated, if not impossible.

Furthermore, there is a need to *accelerate nomination procedures* for arbitrators. Each party should be ready to nominate its arbitrator within a few days, and challenges should be required within 24 hours or other such limited time frame. This need is highlighted by the practical examples of fast track arbitrations discussed above. It must be conceded that an arbitration clause that urges the arbitral tribunal to issue the award "within three months after appointment of the chairman" or "within six months from the constitution of the arbitral tribunal" certainly does not have its full intended effect if – due to various challenging procedures – the appointment of the chairman or the constitution of the arbitral

tribunal takes one year or more. Therefore, selection of the arbitrators in the "pre-arbitral phase" should be duly considered – and expedited.

In case of institutional arbitration, preliminary contacts with the court or the court's staff are useful to ensure its availability. It does not help if both parties and arbitrators are ready and available, but the institution itself is so overworked that the necessary procedural steps or approvals are not timely.

One of the key factors for success is *the possibility and the will of the arbitrators to devote nearly all of their time to the pending arbitration,* to eventually even "skip" their holidays, cancel all other possible engagements, and to deliver the award very shortly (days or even hours) after the hearing. Therefore, there is a need to find arbitrators who are prepared to do this. The question of whether a sole arbitrator or a tribunal can better serve this purpose cannot generally be answered, because, even though a sole arbitrator can decide all questions by himself, he must be prepared to work on the case "full time" and is not able to divide the workload. In any event, parties will benefit from arbitrators who are truly experts, both with respect to the facts and the law and who therefore are conscientious professionals able to assimilate the key issues and significant information from the filings. Finally, spare candidates should be kept in mind in the case of challenge.

Another crucial element is – assuming that the claimant is interested in a quick decision – a *defendant who cooperates.* Because time-limit extensions likely will frustrate the purpose of the arbitration, the possibility of prior agreement on negative procedural effects or even penalties if one party attempts to impede the proceedings should be explored. This must, of course, be analyzed on a case-by-case basis, and it must always be taken into account that such measures must not result in violations of a party's right to be heard or of fair trial principles in general. However, it should be noted that – as far as Autrian law is concerned – the old wording in Section 587 ACCP that *"each party shall be given full opportunity to present its case"* has been replaced by the *"right to be heard"* according to Section 594 ACCP. This is obviously a clear indication that, unless very basic principles are violated, the defaulting party cannot challenge the award on the sole basis of short time limits.

Thorough preparation and collection of evidence, perhaps involving lawyers, well before the commencement of proceedings is usually necessary. The arbitration issues should be distilled and focused from the very beginning, often even before the arbitration actually begins. If there is no oral hearing, or only a condensed one, this necessitates the preparation of well-honed affidavits and exhibits on short notice. Even though time may be short, submissions must be pointed, and "demonstrate a high level of advocacy and focus". However, this is usually a time-consuming, rather than time-saving, endeavor. As a colleague once put it: "I know I could have made my submission shorter, but I just did not have enough time for that."

Professional and aggressive *management of the proceedings* by the chairman and the arbitral institution is another key to success. Of course, the use of modern communication tools is essential, but even more important is that the chairman

or sole arbitrator simply does not allow any party-imposed delay. This, however, requires an ability to distinguish between a mere attempt to unnecessarily prolong the proceedings and a real need to postpone a deadline so as not to endanger the arbitration and the right to be heard altogether. Thus, both experience and intuition are needed in order to find the right balance between maintaining a tight schedule while at the same time getting a full picture of the case. Thus, the previously established rules must embody a combination of flexibility and structure. For example, discovery and inspection are usually not appropriate. Moreover, there should be clear deadlines for evidence and further arguments that are communicated to the parties from the very beginning and, ideally, are approved of by the parties.

An *oral hearing*, if any, should be *concentrated on the main points* – not unlike a preliminary injunction proceeding. As outlined above, it may help to have written witness statements. However, practice has shown that such written statements, rather than in-person testimony, may perhaps lead to even a more complicated procedure, due to the need for reply statements and cross examination, rather than a simple oral questioning by the arbitral tribunal. Therefore, it is mostly again left to the chairman's experience to decide whether written witness statements will serve to accelerate, rather than burden, the evidence-taking.

The *award* itself should, needless to say, be *clear and precise* in order to minimize the risk of challenge or unenforceability. It should not be replete with pages and pages about the course of the proceedings and a repetition of facts, which have either been laid out in the "terms of reference" or are merely "copied and pasted" from former procedural orders merely for the sake of completeness. In this respect, institutional "control mechanisms" such as secretaries of Courts of Arbitration should not demand compliance with formalities, but rather should try to support the "fast track" nature of the proceedings. From a practical standpoint, a draft award should be prepared before an oral hearing to ensure a prompt resolution. Any required affirmation by institutional arbitration courts should follow quickly. Assertion of authority to address issues that have not been submitted to fast track arbitration should, of course, be avoided.

Ultimately, it is the clear and faultless award that puts fast track proceedings to their real test. A successful challenge of an award, or even an award that for some reason provides a basis for a challenge, seriously calls into question both the need and future success of fast track dispute resolution.

V. Conclusion

Clearly, fast track procedures must be welcomed by both parties as well as the arbitral tribunal, and must be duly supported by the institution which provides the framework for the proceedings, or else they will not be a success.

However, if managed in a professional manner by all participants involved, there is no reason why fast track arbitration should not be regarded as an efficient

and fair dispute settlement procedure, and the traditional objections to such accelerated conduct of arbitration proceedings – from the procedural limitations introduced in the interest of speed to the fact that fast track dispute resolution may not suit every dispute – can be dispelled. Furthermore, the fundamental principles of arbitration apply in an equal, if not in some aspects even a greater, manner to fast track arbitration as to regular arbitration. Provided the arbitrator safeguards these fundamental principles, thereby ensuring that the benefits of accelerated proceedings are not perverted (*e.g.*, by exposing the ensuing award to rescission or non-enforceability on the basis of grave procedural shortcomings), he or she may well disprove those who might be tempted to claim that, with respect to fast track arbitration, "nobody running at full speed has either a head or a heart".[52])

[52]) *See* William Butler Yeats, Estrangement, *in* Autobiographies 495 (London, 1956).