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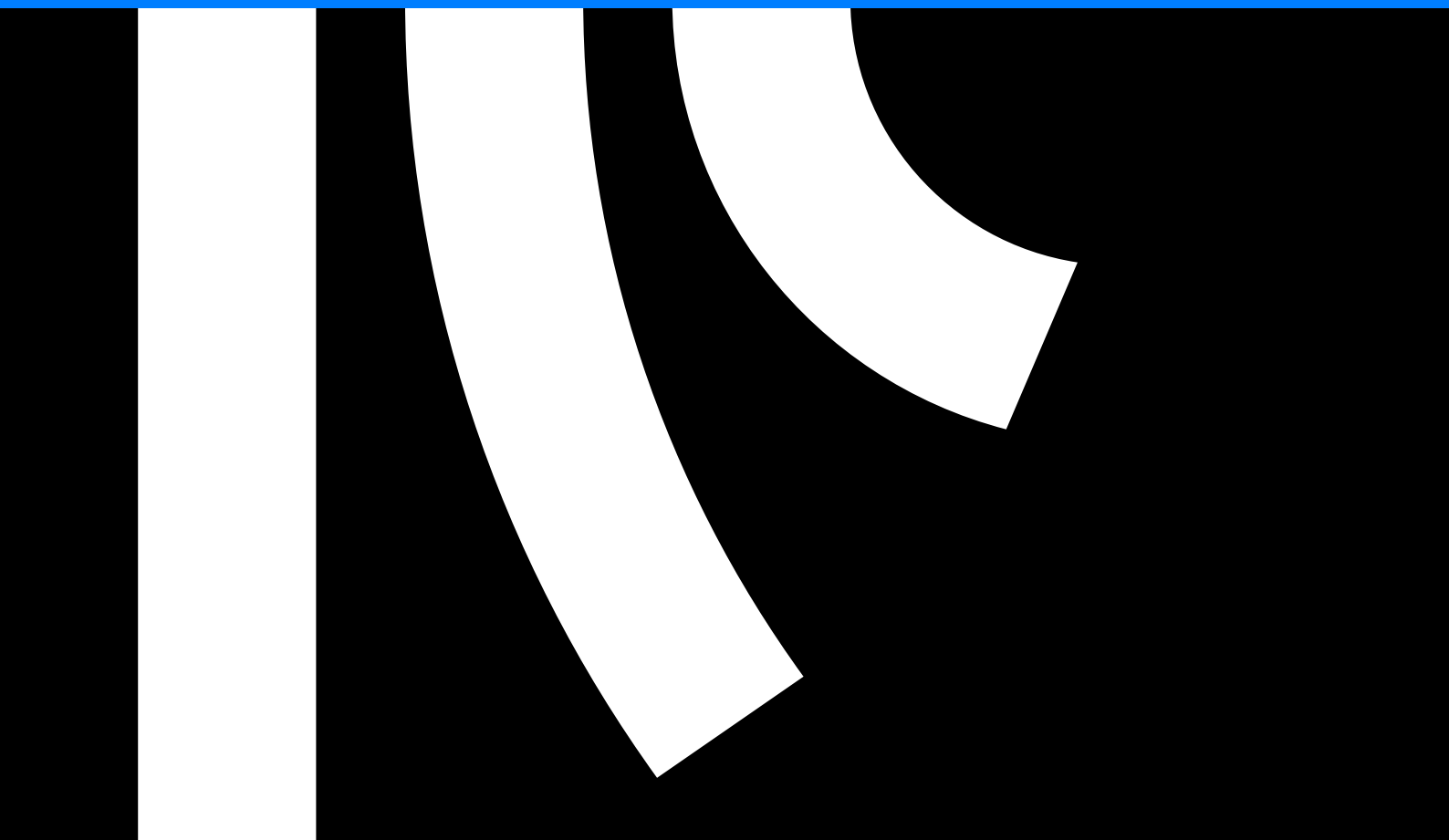
Toolkit

Toolkit for Arbitrators in Expedited Procedures



ICC Toolkit for Arbitrators in Expedited Procedures

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Contents

1. Introduction

1. The ICC Toolkit for Arbitrators in Expedited Procedures (the "Toolkit") supplements the Report Expedited Procedure Provisions: Eight Years On ("EPP Report") and provides guidance to arbitrators involved in expedited procedures. This toolkit was issued by the ICC Commission on Arbitration and ADR and its Working Group (on "Expedited Procedure Provisions and Update of Commission Reports".

2. The aim of the Toolkit is to enable arbitral tribunals constituted under the Expedited Procedure Provisions ("EPP tribunals") to meet tight deadlines and assist such tribunals in successfully navigating proceedings under the EPP. Following this introduction, which includes references to other useful ICC Reports (**Section 1**); this Toolkit provides an overview of what EPP tribunals can expect from a typical expedited procedure (**Section 2**); and guidance for arbitrators on each key stage of an expedited procedure, including a series of short "checklists" (**Section 3**).

3. Each section of the Toolkit is designed to be independently actionable, and may involve some repetition to allow guidance to be easily accessible without the need of reviewing the entire Toolkit.

4. Some elements of this Toolkit are equally informative to arbitrators dealing with regular proceedings under the ICC Arbitration Rules (the "ICC Rules") and are included to ensure that the Toolkit will be in itself sufficient to less experienced arbitrators who may be confronted with limited time to take certain procedural steps.

5. The Toolkit follows the chronology of a typical expedited procedure. It should be read in conjunction with the EPP Report, some sections of which may be of particular interest to arbitrators acting in expedited procedures:

    - Opt-out, opt-in and conversion (Section 4.1.1);
    - Dilatory tactics (Section 4.1.4);
    - New claims (Section 4.3.2);
    - Case management conference (Section 4.3.3);
    - Procedural measures (Section 4.3.4);
    - Hearings (Section 4.3.5);
    - List of issues (Section 4.3.6);
    - Awards (Section 4.4);
    - Costs and fees (Section 4.5);
    - Interim measures (Section 4.6).

6. **Other ICC Reports and Notes.** The following sections of the reports published by the ICC Commission on Arbitration and ADR and the ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules ("ICC Note to Parties and Arbitral Tribunal") may also be of interest to arbitrators acting in expedited procedures, in particular:

   (i) The Report on Techniques for Controlling Time and Costs in Arbitration is generally intended to provide guidance to counsel and arbitrators on how to reduce time and costs through case management tools, some sections can be of interest to arbitrators. Of particular interests in view of expedited procedures may be:

   - Case management conferences (paras. 25–33);
   - Cut-off date for evidence (para. 73);
   - Costs (para. 82);
   - Deliberation and awards (paras. 83-84).

   (ii) The Report on Construction Industry Arbitrations is primarily intended for arbitrators and may also be of interest to arbitrators acting in expedited procedures related to construction:

   - Case management conference and procedural timetable (Section 8);
   - Timetable, practicability of steps and hearing date (Section 9);
   - Splitting a case (Section 15).

   (iii) The ICC Note to Parties and Arbitral Tribunals addresses the issue of efficiency and expedited procedures in the following sections:

   - Expeditious and efficient conduct of the arbitration (Section VII.B);
   - Expedited procedure provisions (Section VIII);
   - Efficiency in the submission of draft awards to the ICC International Court of Arbitration ("ICC Court") (Section IX).

2. What to expect as an arbitrator in EPP cases?

7. In expedited procedures, arbitrators should give particular importance to the following items:

   - Due process considerations;
   - Establish control and authority at the outset of the proceedings;
   - Adopt a proactive case management approach (Section 2.1);
   - Be alert and timely informed of particular provisions of applicable law that need to be considered (Section 2.2);
   - Be alert to inexperienced/non-advised parties (Section 2.3); and
   - Cultural considerations and other expectations (Section 2.4).

8. Due process is a perspective that arises in many contexts in respect of EPP and, indeed, all arbitral proceedings. Its content is informed, notably, by applicable law, of which the EPP tribunal should take due note (see Section 2.2 below). It is particularly important for EPP tribunals to be alert to due process concerns when conducting the expedited procedure, given that these are proceedings on the merits that take place on a very tight time scale – leaving limited room for error and remedial action.

2.1 Proactive case management by the EPP tribunal

9. Arbitral proceedings under EPP generally lead to a final award, similar to other arbitrations on the merits, but are conducted within a tighter timeline. The fact that these proceedings may concern lower amounts in dispute does not mean that the procedure is "simplified" with regard to potential procedural complications, on the contrary. In order to meet the timelines set by the EPP and the parties' expectations for a more-streamlined arbitration, the EPP tribunal is expected to proactively manage the proceedings, being mindful of the need to consult with the parties and, if necessary, with the Secretariat of the ICC Court.

10. **Articles 3(4) and 3(5) of Appendix IV** of the ICC Rules provides an EPP tribunal with broad discretion, subject to consultation with the parties:

> "The arbitral tribunal shall have discretion to adopt such procedural measures as it considers appropriate. In particular, the arbitral tribunal may, after consultation with the parties, decide not to allow requests for document production or to limit the number, length and scope of written submissions and written witness evidence (both fact witnesses and experts).
>
> The arbitral tribunal may, after consulting the parties, decide the dispute solely on the basis of the documents submitted by the parties, with no hearing and no examination of witnesses or experts."[1]

11. This broad grant of discretion empowers an EPP tribunal to control the proceedings, including by playing an active role in determining the procedure and ensuring the parties' compliance to it.

12. The behaviour and role of an EPP tribunal in controlling the procedure can and *should* be different than that of an arbitral tribunal in a non-expedited arbitration. EPP tribunals should be proactive, suggest procedural options for the parties to consider, strictly enforce time limits, respond firmly to dilatory tactics, and intervene promptly in the event of procedural disputes.

13. This said, EPP tribunals will always need to balance the expedited nature of the arbitration with the parties' reasonable opportunities to present their cases. Indeed, as any arbitral tribunal acting under the auspices of the ICC Rules, EPP tribunals are required under **Article 22(4)** of the ICC Rules to "act fairly and impartially and ensure that each party has a reasonable opportunity to present its case".

2.2 Alertness to (mandatory) applicable laws

14. Arbitral tribunals should consider all potentially relevant laws, including the law governing the arbitration and any other mandatory provisions, from the beginning of the process. This approach is advisable as the EPP timeline and the differing levels of parties' experience may require arbitral tribunals to address these issues promptly.

15. This Toolkit is limited to raising awareness and cannot be prescriptive, if only because contents of mandatory laws vary. It is also pertinent for arbitral tribunals to consider the matters of law and culture they may have to look into, or raise with the parties on their own motion.

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1 Art. 22(2), ICC Rules also provides: "In order to ensure effective case management, after consulting the parties, the arbitral tribunal shall adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties. Such measures may include one or more of the case management techniques described in Appendix IV".

16. In general, it is wise for the EPP tribunal to invite the parties to express views on matters that may need to be applied or raised *ex officio*. If the EPP tribunal raises such issues on its own motion, it should in any event exercise caution, and consider putting its (preliminary) views to the parties for comments, in order to prevent "surprising" the parties or due process issues.

17. The following matters may be considered:[2]

    (i) Service of the originating document and other documents in the arbitration: Whether the request for arbitration and other documents must be physically delivered by post, courier or hand or may be emailed or uploaded to an agreed online file/other.

    (ii) Representation: Whether a party must be represented by a lawyer; and whether a foreign lawyer or a non-lawyer representative is permitted to make submissions on the law of the seat of the arbitration.

    (iii) Determination of the arbitral tribunal's jurisdiction – Whether the arbitral tribunal has the power to determine its own jurisdiction.

    (iv) Consumer protection provisions with respect to the validity of arbitration agreements.

    (v) Applicable rules regarding potential insolvency of parties, and their impact on the arbitration (e.g. a mandatory stay).

    (vi) Mandatory provisions regarding the organisation and conduct of hearings (see Section 3).

    (vii) The scope permitted to arbitral tribunals to raise settlement as an option.[3]

    (viii) The scope permitted to arbitral tribunals to express views on particular issues in dispute and/or the outcome of the proceedings prior to the issuance of an order or award.

    (ix) Limitations to exclusion of evidence.

    (x) Whether interest on principal amounts/costs/expenses may or must be ordered, and whether any formal requirements apply in this regard.

    (xi) Mandatory provisions governing costs awards (such as reasonableness).

    (xii) Mandatory requirements for disclosure of third-party funding or of lawyers' conditional fee and contingency fee agreements.

    (xiii) Required content of awards, including procedural history; findings as to every issue raised by parties; detailed reasons as to every issue raised by parties; execution of the award by the arbitrator in the seat of the arbitration; and whether the award must be in the language of the seat of the arbitration.

    (xiv) Whether an apostille of award must be executed on the date of the award and whether the award must be signed at a particular location.

    (xv) Limitations to correction and interpretation of awards.

    (xvi) Potential limitations to revert on reasoning and decisions taken, in orders and/or awards, earlier in the arbitration process.

2 Although these matters arise in any arbitration, they are particularly useful to flag in this Toolkit as many EPP tribunals may have to grapple with these matters for the first time and do so in an expedited fashion.

3 On the role of the arbitral tribunal in facilitating settlement, see the ICC Report on Facilitating Settlement in International Arbitration (2023).

2.3 Alertness to inexperienced/non-advised parties

18. As most expedited procedures involve disputes of relatively low value, parties are not always represented by counsel, and even when they are, counsel are not necessarily experienced in expedited procedures or international arbitration. If the EPP tribunal perceives any misunderstandings or misconceptions, it may find it appropriate to take time to clarify the procedural particularities of EPP to ensure that the parties:

    - Fully understand the process;
    - Are aware that the EPP tribunal will be alert to due process concerns and may act thereon; and
    - Are consulted or provide informed consent to procedural arrangements that may be made from time to time.

19. Such clarification may also entail more elaborate language in the EPP tribunal's procedural orders to clarify, in particular, how requests and submissions are to be made. The case management conference ("CMC") may be a good opportunity to address such issues, and may indeed, itself, warrant explanation to the parties in terms of purpose and structure (see Section 3(2) below).

2.4 Cultural expectations and other considerations

20. The arbitral tribunal may clarify any cultural misunderstanding that could arise from each side's familiarity with their own legal system, language barriers, and lesser experience with cross-border disputes. While the Toolkit will not attempt to present a comprehensive list, such issues frequently arise with respect to procedural matters pertaining to:

    - Professional privilege;
    - Expectations regarding inquisitorial or adversarial approaches by arbitral tribunals;
    - The balance between written and oral aspects of arbitral proceedings;
    - Potential settlement – and the role (to be) taken by arbitral tribunals in this regard;[4]
    - The structure and purpose of written and oral pleadings; and
    - Expectations regarding the taking of evidence and timing thereof, including perspectives on document production, the use of witness evidence, and the timing of submissions on evidence.

21. Separately, and not so much of a procedural nature, the arbitral tribunal should consider implications of religious and cultural requirements[5] as well as matters pertaining to potential disabilities of persons involved in the arbitral proceedings. On the latter, reference may be made to the ICC Guide for Disability Inclusion in International Arbitration and ADR.

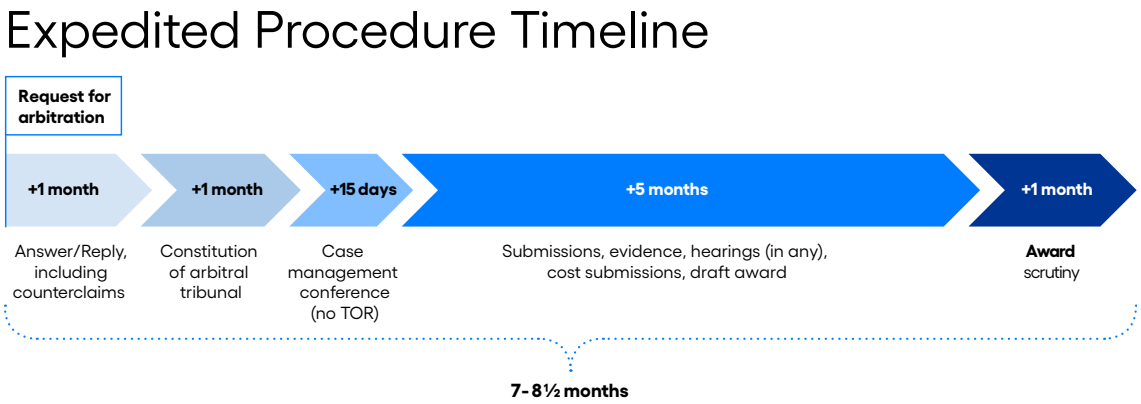
4 On the role of the arbitral tribunal in facilitating settlement, see the ICC Report on Facilitating Settlement in International Arbitration (2023).

5 On the general influence of cultural factors on the approach taken to forming and maintaining long-term, successful business relationship, see e.g. the six-part research report on "The Truth about Cross-Cultural B2B Relationships" by ICC, Jus Connect, and McCann Truth Central (2024-2025). See also K. Gajaseni, Acta Non Verba: Justice and Cultural Sensibility in Global Dispute Resolution, *ICC Dispute Resolution Bulletin* 2025-1.

3. Guidance to arbitrators for the successful conduct of an expedited procedure

22. This section of the Toolkit is designed to offer practical guidance for EPP tribunals and is organised according to the typical sequence of an expedited procedure.

23. The timeline below is indicative and may, of course, be altered – in particular as a consequence of party agreement. In addition, particular time limits may be shortened in practice. For example, the latter applies to the time that needs to be allocated for scrutiny. In urgent cases, the EPP tribunal may consult the Secretariat of the ICC Court on a possible acceleration of the scrutiny process.



3.1 First letter to the parties

24. The EPP tribunal's first letter to the parties at the first stage of the procedure and is as such connected to the CMC (item (ii) below) that the EPP tribunal must hold no later than 15 days from the date on which it receives the case file from the Secretariat of the ICC Court. The case management conference ("CMC") concerns, notably, the obligation to establish a procedural timetable that is typically contained in a first procedural order (item (iii) below).

25. On timing, the first correspondence from the EPP tribunal to the parties is critical to organise the proceedings and establish that the EPP tribunal is in control of the procedure. Given that the CMC takes place within 15 days of the transmission of the case file to the arbitral tribunal, this first correspondence should ideally be sent to the parties within 24 hours of the arbitral tribunal receiving the case file.

26. On content, arbitrators may consider including the following in their first correspondence to the parties:

    (i) **Summon the parties to the CMC**, to be held no later than 15 days after the date on which the file was transmitted to the EPP tribunal. This implies setting the deadline for holding the CMC, proposing several dates and inviting the parties to provide their availabilities. The EPP tribunal may also invite the parties to consider practical aspects of the organisation of the CMC, such as whether it should be held by videoconference, its anticipated duration and provide a list of attendees.

    (ii) **Set a proposed agenda for the CMC** that includes some of the aspects listed in (iii) to (vi) below, and invite any comments prior to the CMC.

(iii) **Procedural timetable and time-limit to render award.** During the CMC, the EPP tribunal and the parties will discuss the procedural timetable (see Art. 24(2), ICC Rules). In preparation for the CMC, the EPP tribunal may invite the parties to liaise and try to agree on a procedural timetable. They should provide their jointly agreed procedural timetable or their respective procedural timetable proposals in advance of the CMC, keeping in mind that the time limit to render the award is six months from the date of the CMC (Art. 4(1), Appendix VI of the ICC Rules). The EPP tribunal may emphasise that – to meet this deadline – the last written submission or hearing (if applicable) must be completed within a specific timeframe, which allows sufficient time for drafting the award, scrutiny by the ICC Court and notification to the parties.

(iv) **Case management techniques.** The EPP tribunal may suggest the use of case management techniques to control time and cost (described in Arts. 3(4) and 3(5) of Appendix VI, and Appendix IV of the ICC Rules) and invite the parties to propose any further case management techniques that they consider appropriate.

(v) **Rules of procedure.** If relevant, the EPP tribunal may inform the parties that it will issue a draft Procedural Order No. 1 (or "PO 1") setting out the rules of procedure for the arbitration, which the parties will be invited to review and comment on. It is generally good practice to circulate a draft PO 1 in advance of the CMC as a proxy to an agenda on the part of the CMC dedicated to the applicable rules of law and procedure.

(vi) **Case specific matters.** Every arbitration is different and may call for different approaches. For this reason and due to time constraints that apply *a fortiori* to expedited procedures, arbitrators acting under EPP are encouraged to carefully review the case file and address – in their first correspondence to the parties – any procedural issues critical to the case, such as the language of the arbitration, the applicable law, requests for interim measures, clarification of the reliefs requested, or bifurcation of the proceedings, among other matters. As such, an EPP tribunal should ensure that it has sufficient information about the nature of the dispute before fixing the procedure. To this end, an EPP tribunal may wish to ask the parties for additional information at the outset of the expedited procedure. The additional information requested could include, for example, lists of the issues to be determined, lists of the areas of agreement or disagreement, matters pertaining to applicable mandatory law or an indication of the number of witnesses or experts, if any.

3.2 Organisation of a case management conference ("CMC")

27. As noted, before the CMC, it is good practice to send the parties a draft agenda setting out the issues to be addressed. The CMC agenda may include the procedural timetable, the PO 1, and any other issues identified by the EPP tribunal and/or the parties that could appropriately be addressed or discussed at this stage (see Section 3.1 above).

28. During the CMC, the EPP tribunal should address the items listed on the agenda.[6] As the first – and potentially only – opportunity for the tribunal and parties to discuss and design the overall expedited procedure framework, the EPP tribunal should be prepared invite the parties to share their views on the substantive and procedural rules that will govern the arbitration. Such issues are generally addressed in PO 1, and it is considered good practice to circulate a draft PO 1 in

6 Whether to go through each item on the agenda or make a general inquiry to the parties as to whether they have any comments on the draft agenda is a judgement call. EPP tribunals dealing with less sophisticated or more reticent parties may opt to go through each items individually to ensure the parties "speak up".

advance of the CMC. Key issues will likely include whether (i) to provide for document production; (ii) to limit the number, length and scope of written submissions and written witness evidence; and/or (iii) to hold a hearing (Arts. 3(4) and 3(5) of Appendix VI of the ICC Rules).

29. The CMC is also the best time to discuss and try to agree on any case management techniques that may be appropriate for the case. In particular, the tribunal and the parties may wish to discuss:

- A joint list of issues for determination; a joint list of agreed facts; an agreed chronology; a joint statement of undisputed facts; a joint list of agreed legal principles. The arbitral tribunal should consider whether asking the parties to agree on anything will be more burdensome than efficient. If so, the arbitral tribunal may defer this process until more is known about the case and the contentious issues.
- Any further case management techniques that the parties may suggest and that the tribunal may find relevant.

30. Experience shows that the CMC also provides an opportunity to identify and address any (known or potential) concerns and misunderstanding regarding the conduct of the proceedings, including issues arising from the inexperience of the parties or counsel (see Section 2.3 above) and cultural differences (see Section 2.4). The EPP tribunal may therefore hold more than one virtual CMC during the proceedings if this is considered to be more efficient than exchanging several rounds of communications with the parties. This would also allow the EPP tribunal to discuss with the parties and address procedural issues from the outset of the procedure.

31. Finally, experience shows that the CMC provide an opportunity for arbitrators to "showcase" their authority, to the extent needed or appropriate. Arbitrators should therefore convey their expectations and views (even if they are strong) to the parties during the CMC, to ensure that the expedited procedure moves forward accordingly.

3.3 Procedural Order No. 1 ("PO 1") and timetable

32. As the ICC Rules are silent on the specific procedure of any arbitration, arbitral tribunals generally set out the specific rules applicable to the arbitration in PO 1, after consultation with the parties (see Section 3.1 above).

33. There are no set rules regarding the contents of PO 1. When preparing it, EPP tribunals may consider the following items:

(i) **Notifications and communications.** Set out the rules applicable to the correspondence between the EPP tribunal and the parties, including (i) the addresses to which notifications and communications must be sent, (ii) the requirement that all correspondence to the EPP tribunal must be copied to the Secretariat of the ICC Court and all parties, and (iii) the prohibition of any *ex parte* communications between one party and the EPP tribunal.

(ii) **Written submissions.** Specify the format and contents of written submissions (including witness statements and expert reports) and the page limit agreed by the parties or imposed by the arbitral tribunal (Art. 3 of Appendix VI of the ICC Rules). In doing so, the EPP tribunal should take into account the expectations and wishes of the parties (see Section 2.4).

(iii) **Incorporation of procedural timetable and compliance with time limits.** Explain that submissions shall be filed in compliance with the time limits set out in the procedural timetable, and with the rules applicable to extensions of time for the filing of written submissions. To minimise the risk of procedural disputes and the possible timetable disruptions, EPP tribunals may wish to:

- Inform the parties that deadlines will be strictly enforced; or
- Establish narrow circumstances in which deadlines can be extended (i.e. with the leave of the EPP tribunal and only if a subsequent deadline is moved forward simultaneously, while preserving the hearing date, if any, or the date of the last submission).

(iv) **Documentary evidence.** Address how exhibits will be presented, including their translations, and whether authentication is necessary.

(v) **Production of documents.** Determine whether disclosure requests will be allowed and to what extent. If permitted, PO 1 should govern the exchange of the disclosure requests between the parties and their submission to the EPP tribunal in case the parties are unable to resolve the disputed requests. It should also cover how documents will be produced. The EPP tribunal may consider incorporating the IBA Rules on the Taking of Evidence as rules or guidelines.

(vi) **Hearing.** Determine whether to hold a hearing, and, if so, whether it will be remote, in-person or hybrid. Provide an overview of how the hearing (if any) will be organized, including how fact witnesses and expert witnesses (if any will be questioned at the hearing). The EPP tribunal and the parties may decide to defer the decision on whether to hold a hearing, instead leaving a placeholder and blocking time on the timetable and their calendars, without prejudice to a later decision on holding a hearing.

(vii) **Costs.** Provide guidance on potential page limitation. Indicate the principles of cost-allocation, and whether an affidavit by counsel is sufficient or if further documentation is required to substantiate the costs.

(viii) **Resolving procedural disputes.** In the event of a procedural dispute, the EPP tribunal should act promptly and not hesitate to direct the parties as to the procedure for resolving the dispute. To avoid inefficiencies, the EPP tribunal may instruct the parties that, other than disclosure requests or extensions of deadlines, no party shall file any application without first submitting a short message to the EPP tribunal. This message should outline the nature and features of the application and explain why it may succeed, providing the other party with a few days to respond. The EPP tribunal will set a time limit for the other party to respond and issue directions on any additional submissions to the application, which will be decided (i) on the documents, or (ii) at the EPP tribunal's discretion, during a conference call to be scheduled.

34. In addition, as the expedited procedure does not require the establishment of terms of reference, it is good practice to record certain key aspects of the arbitration, to which parties have agreed, such as:

(i) **The identity of parties.** Names in full, description, address and other contact details of each party as well as of any person(s) representing a party in the arbitration;

(ii) **Confirmation of the tribunal's jurisdiction,** including a reference to the arbitration agreement or dispute resolution clause; and

(iii) **Reference to the applicable law(s)**, when agreed upon or undisputed.

3.4 Establishing the facts of the case

3.4.1 Written submissions

35. The written phase of an expedited procedure must take into account the six-month timeframe for concluding an expedited procedure. When setting the procedural calendar, an EPP tribunal may take into account the following questions:

- Should an agreement be reached at the outset on the issues to be addressed?
- Should there be single or multiple rounds of submissions?
- Should submissions be exchanged sequentially or simultaneously?
- Should written submissions be accompanied by witness statements and expert reports?
- Should there be page limits?
- Should the parties be required to set out their positive cases in full in the first written submission?
- Should the parties be prohibited from raising new arguments or evidence after a certain point in time?
- Should the parties be instructed that there is no need for repeat arguments in subsequent submissions?

36. In addition, EPP tribunals will need to consider and consult on whether the parties should make further submissions after any hearing, i.e. submit post-hearing briefs.[7] If a hearing takes place, an EPP tribunal may wish to consider – instead of post-hearing briefs – oral closing statements or a question-and-answer session following the conclusion of the parties' oral arguments.

3.4.2 Document production

37. Document production is infrequently used in expedited procedures.[8] Notwithstanding this practice, document production may be essential to the resolution of a given dispute – especially where there is an information imbalance such that the evidence that one party requires to establish its case is in the possession of the other party.

38. An EPP tribunal must tailor any document production phase to fit the expedited nature of the procedure. Factors that an EPP tribunal may wish to consider include:

- Adopting guidelines, such as the IBA Rules on the Taking of Evidence, and insisting on their strict application;
- Providing guidance on the EPP tribunal's approach to document production in PO 1;
- Limiting the number of requests that each party may make;
- Run the document production phase in parallel with the written submissions;
- Limiting the number of exchanges concerning document requests; and
- Encouraging the parties to meet and confer to resolve any dispute.

7 Between 2017 and 2024, post-hearing briefs were filed in only a minority of the EPP cases (139), while 70% of the EPP cases (322) had no post-hearing briefs.

8 See 4.3.4(i) of the Report Expedited Procedure Provisions – Eight Years On.

3.4.3 Witness statements and expert reports

39. Witness or expert evidence may be required for the parties to an expedited procedure to have a reasonable opportunity to present their case. That said, it appears from available statistics that expert reports have rarely been used to date in expedited procedures.[9]

40. Where there is a need for witness or expert testimony, an EPP tribunal may wish to:

- Limit the number of witnesses or experts;
- Limit the number of statements or reports submitted by each witness or expert;
- Require the parties to agree on the number of experts and/or their disciplines at the outset as this will allow respondent parties an early opportunity to engage experts;
- Require prior agreement on the issues to be addressed in each witness statement and expert report;
- Require joint expert reports, in lieu of separate reports from each party's expert(s);
- Use tribunal-appointed experts, in lieu of party-appointed experts; and
- Provide for witness or expert conferencing.

3.5 Techniques for controlling time and costs in arbitration

41. In addition to this Toolkit, EPP tribunals may find the ICC Report on Techniques for Controlling Time and Costs in Arbitration a helpful source of guidance.

3.6 Allowing new claims

42. **Article 3(2) of Appendix VI** of the ICC Rules addresses the introduction of new claims, which are precluded after the constitution of the arbitral tribunal absent leave from the arbitral tribunal. Article 3(2) reads as follows:

> "After the arbitral tribunal has been constituted, no party shall make new claims, unless it has been authorized to do so by the arbitral tribunal, which shall consider the nature of such new claims, the stage of the arbitration, any cost implications and any other relevant circumstances."

43. If a party has introduced or requests to introduce a new claim after the constitution of the arbitral tribunal, the arbitral tribunal should seek the parties' comments and apply Article 3(2) to decide whether the new claim should be admitted. This also applies to counterclaims raised at a late stage of the proceedings.[10]

9 Between 2017 and 2024, expert reports were submitted in only 26 (5,2%) of the 461 EPP cases that reached a final award. See the EPP Factsheet and paras. 32, 122 of the EPP Report.

10 See e.g. the Secretariat's Guide to ICC Arbitration (ICC, 2012); E. Schwartz, New Claims' in ICC Arbitration : Navigating Article 19 of the ICC Rules, *ICC International Court of Arbitration Bulletin*, Vol. 17-2, 2006.

44. Given that the time limit to render the award is six months from the CMC, the test for admitting new claims in expedited procedures may be stricter than in regular arbitration proceedings. This much depends on the specific circumstances applicable to the case. Circumstances that the arbitral tribunal may consider include:

    (i) The nature of the new claim and whether it is sufficiently connected to the existing claims.

    (ii) The stage of the expedited procedure and whether any disruption to the existing timetable is appropriate, considering the potential inefficiency if the new claim must be brought in separate proceedings.

    (iii) Whether the timing and substance of the new claim are prejudicial to the other side's ability to present its case and respond to the new claim.

    (iv) The EPP tribunal's commitment to conduct expeditious and cost-effective proceedings (**Art. 22(1)**, ICC Rules).

    (v) How prejudicial it may be for each side to allow/deny a new claim, taking into account considerations relating to *res judicata* and issue preclusion.

3.7 Non-participating parties

45. In expedited procedures, as in regular arbitral proceedings, parties may not participate. Such non-participation can occur for various reasons or purposes and in many different circumstances, sometimes only for part of the arbitration.

46. Arbitral tribunals dealing with non-participating parties must consider the principle of international arbitration that, unlike a national court, an arbitral tribunal has no authority to issue a so-called "default award". Instead, an arbitral tribunal is required to review the evidence presented to it, ensure that the case has been proven, and provide reasons for its decision in the final award. Of course, this is subject to applicable law.

47. The arbitral tribunal may consider the following factors when determining how to address matters involving non-participating parties:

    (i) **Service of process.** Although service of process rules often do not formally apply to the arbitration (this should be verified by the arbitral tribunal), an EPP tribunal should consider whether the non-participating party has been sufficiently notified of the expedited proceedure, whether this can be documented and whether, under the (potentially) applicable laws, it is for the arbitral tribunal to take steps in relation to service of process.

    (ii) ***Ex officio* obligations.** Whether, under the (potentially) applicable laws, it is for the arbitral tribunal to *ex officio* address arguments put forward by the participating parties and/or to assess the basis of its jurisdiction.

    (iii) **Records.** Provide records of the CMC, procedural conferences, the hearing and/or other interactions between the participating parties and the arbitral tribunal.

    (iv) **Temporary non-participation.** If a party's status changes from non-participant to a participating party during the proceedings (or *vice versa*), the arbitral tribunal may consider:

    - Organising another CMC upon the change of event;
    - Determining the impact on the procedural timetable and liaising with the parties and Secretariat of the ICC Court; and
    - Addressing the cost implications of this change.

(v) **Hearings.** The arbitral tribunal should comply with **Article 26(2)** of the ICC Rules, whereby "[i]f any of the parties, although duly summoned, fails to appear without valid excuse, the arbitral tribunal shall have the power to proceed with the hearing".

(vi) **Applicable law.** Generally, the arbitral tribunal should establish the requirements set by the applicable law on the conduct of proceedings where parties decline to participate.

3.8 Interim measures

48. Interim measures are available in expedited proceedings, as with regular arbitration proceedings, and governed by **Article 28** of the ICC Rules, which allows the arbitral tribunal to order any interim measure it deems appropriate at the request of a party, with any provision for security that it deems appropriate. This may be done in the form of an order or an award, with reasons.

3.8.1 Balancing factors

49. As discussed in Report Expedited Procedure Provisions Eight Years On,[11] interim measures in expedited procedures are generally subject to the same standards as any application for interim relief in regular arbitrations. That said, given the potential tension raised by the need to accommodate an application for an interim measure in the context of an expedited procedure, the EPP tribunal may issue procedural guidance in anticipation of an application for interim relief, including:

- Page limits on applications and responses;
- A default procedure for hearing applications for interim relief on the papers (i.e. without a hearing, which is not required *per se*) unless the it decides otherwise; and
- A statement to the effect that it may order compensation for costs for unmeritorious applications.

50. EPP tribunals may also wish to take steps to discourage parties from making frivolous applications, while also aiming to minimise the risk of award challenges, by stating at the outset which elements will be considered when determining application for interim measures. Such elements may include:

- The urgency of the measure;
- The degree of prejudice that the applicant will suffer if the measure is dismissed;
- The relevance and need for the measure, while considering the time and cost implications for the other party;
- Perspectives on offering security and/or undertakings regarding potential damage that may arise from the issuance of the measure;
- The time when the applicant knew or ought to have known its need for the measure;
- The likely impact on the procedural timetable and award deadline;
- The inadequacy of damages as an alternative means of achieving the stated objectives of the issuance of the measure;
- The balance of convenience; and
- The potential for irreparable harm.

Whether or not these and/or other elements should be weighed, and how, may depend on the applicable law and the parties' expectations.

11 See para. 24 and Section 4.6 of the EPP Report.

3.8.2 Considerations when holding a hearing on interim measures

51. When an EPP tribunal orders a hearing on interim measures, notably with a view to ensuring the right to be heard, it should only consider hearing the issues that need to be heard, taking into account the nature of the disputed issues and whether a hearing is in fact needed for each one.

3.8.3 The form of the decision ordering the interim measure

52. EPP tribunals may wish to consider the following:

    (i) An interim measure in the form of an order may be more expeditious but less enforceable.

    (ii) An interim measure in the form of an award must be reasoned and scrutinised by the ICC Court, and may encounter enforcement challenges based on, for example, an alleged lack of finality.

    (iii) A compromise method may be to combine both approaches and grant the measure in a provisional order, which would be confirmed in a subsequent award.

53. The EPP tribunal should consider discussing item (i) and/or (iii) with the parties and/or the Secretariat of the ICC Court.

3.9 Procedural incidents and dilatory tactics

54. Applications that may cause delay and procedural incidents (i.e. requests that may give rise to time extensions and delays that may impact the procedural calendar, etc.) are inevitable in expedited procedures, as they are in any arbitration. Given that the issuance date of the award should be treated as if set in stone in expedited procedures, EPP tribunals have a particularly difficult balancing act between ensuring efficiency without rigidity and protecting each party's ability to present their case without causing undue prejudice to the other.

55. When considering applications or requests that will delay the arbitration, EPP tribunals should consider:

    (i) To what extent does the application arise from facts unknown to the applicant before the start of the arbitration or the finalisation of the timetable.

    (ii) How the application, including the opponent's opportunity to present their views, can be accommodated within the existing timetable or with limited adjustments.

    (iii) Whether and how prejudicial the application is to the other side and how to minimise the prejudice.

    (iv) Whether the application is prompted by issues that may require reconsidering the application of EPP to the case.

56. EPP tribunals should have an open conversation with the parties when such issues arise, rather than dealing with the issues raised by the incident on their own. This will often serve to deflect tension, prompting the parties to act reasonably before the EPP tribunal and enabling room for compromise. If a party acts unreasonably, the EPP tribunal will have a better sense of the equities and the extent to which the request addresses genuine concerns.

3.10 Hearings

3.10.1 Whether or not to conduct a hearing

57. **Article 3(5) of Appendix VI** of the ICC Rules provides that:

> "The arbitral tribunal may, after consulting the parties, decide the dispute solely on the basis of the documents submitted by the parties, with no hearing and no examination of witnesses or experts."

58. When forming a view on the matter, the EPP tribunal must consult the parties and consider their agreement (if any) as well as their views and any applicable laws. In addition, the EPP tribunal may consider whether:

- The applicable law requires a physical hearing;[12]
- A hearing would in fact resolve any disputed issues;
- Complex questions of fact or law require an oral explanation from counsel;
- The time and costs implications of a hearing; and
- To reserve its decision on the conduct of a hearing until after the submission of written pleadings.

59. If a hearing is to be held, the EPP tribunal may consider setting out in a procedural order the matters indicated in Sections 3.10.2 and 3.10.3 below.

3.10.2 Hearing organisation and protocol

60. **Article 18(2)** of the ICC Rules states that the arbitral tribunal may, after consulting the parties, conduct hearings and meetings at any location it considers appropriate, unless otherwise agreed by the parties.

61. Where a hearing is held in an expedited procedure, the following may need to be specifically considered:[13]

- Limits on duration and scope;
- Format of the hearing (i.e. physical or virtual) especially ensuring the parties' reasonable opportunity to present their case;
- The use of post-hearing briefs instead of closing arguments (or *vice versa*); and
- The EPP tribunal's ongoing control over the conduct of the hearing.

12 See e.g. The ICCA Reports No. 10: Does a Right to a Physical Hearing Exist in International Arbitration? (2022, International Council for Commercial Arbitration).

13 This is in addition to questions on time allocations between the parties, transcripts, interpretation etc.

3.10.3 Considerations specific to virtual hearings

62. **Article 26** of the ICC Rules allows remote hearings. In this regard, the EPP tribunal may consider the following factors:

- The background of the parties (see Section 2(4) above).
- The relative ease and cost-effectiveness of virtual hearings, taking into account the need to ensure the participation of parties, lawyers, and witnesses (in comparison, physical hearings often require to travel, travel arrangements, visas, and other expenses, etc.).
- Technical considerations, for which many sources can be referenced, such as the ICC Checklist for a Protocol on Virtual Hearings and the ICC Report on Leveraging Technology for Fair, Effective and Efficient International Arbitration Proceedings. As many of these protocols and guidance notes were published during the 2020s pandemic, it is important to be alert to technological developments (both positive and negative) that have emerged since then. This is particularly relevant in relation to data security, privacy concerns; and (AI-generated) transcripts.

3.11 Costs and fees

63. **Articles 4(2) and 5 of Appendix VI** of the ICC Rules, together with **Article 38** of the ICC Rules, establish the general and relevant framework for costs.

64. For expedited procedures, the following specific considerations apply:

(i) **The EPP tribunal may provide early guidance**, possibly at the CMC and/or in PO 1:

- On cost-implications of the parties' conduct during the proceedings given the need to control disruptions and surprises.
- On the timing and expected format of the cost submissions, including potential page limitation, and whether an affidavit by counsel is sufficient or what additional evidence may be required to substantiate costs.

(ii) **Determination of reasonable recoverable costs in the EPP context.** The lower amount in dispute in expedited procedures, coupled with EPP's focus on cost effectiveness, may call for stricter consideration of what qualifies as reasonable recoverable costs under **Article 38** of the ICC Rules.[14]

14 The ICC Report on Decisions on Costs in International Arbitration (2015), at p. 23 "(c) Reasonableness of legal and other costs incurred by the parties". See also e.g. C. Baltag, Recoverability of In-House Counsel Costs before ICC Arbitral Tribunals, *ICC Dispute Resolution Bulletin*, 2023-1.

3.12 Award

65. Given the requirement that the final award under EPP must be issued six months after the CMC,[15] EPP tribunals are required to balance efficiency and conciseness with mandatory requirements when drafting their award. It is essential that tribunals acknowledge that the timeline for issuing awards is a cornerstone of the expedited procedure which should not lightly be departed from.

66. According to the ICC Note to Parties and Arbitral Tribunals (para. 151), the following applies, thus maintaining the favourable perceptions of the quality of awards rendered in an expedited procedure:

> "Any award under the Expedited Procedure Provisions must be reasoned. In such arbitrations it is particularly appropriate to keep the factual and/or procedural sections of the award to what the arbitral tribunal considers necessary for the understanding of the award, and state the reasons of the award in as concise a fashion as possible."

3.12.1 Relevant mandatory requirements[16]

67. Arbitrators must be guided by the mandatory requirements under the applicable laws, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") and the ICC Rules.[17] The New York Convention is a key point of reference regarding enforcement of an award. The law of the seat (and possibly of the place of enforcement) may impose specific requirements on the form and content of an award.

68. The ICC Rules require that, like any award, an award rendered under EPP "shall state the reasons upon which it is based";[18] and must fix and apportion the costs of the arbitration.[19] It is also subject to the ICC Court's mandatory scrutiny. The ICC Rules also require the ICC Court and the arbitral tribunal to "make every effort to make sure that the award is enforceable at law".[20]

15 Art. 4(1), Appendix VI of the ICC Rules.

16 As EPP contemplate that such arbitrations are by default decided by one arbitrator, we do not review the provisions governing the decision-making by multiple-member tribunals.

17 On mandatory rules and requirements, see e.g. *ICC Institute Dossier XIX*, Overriding Mandatory Rules and Compliance in International Arbitration ; the ICC Guide to National Rules of Procedure for Recognition and Enforcement of Foreign Awards under the New York Convention (2019) and for more case law on the implementation of the New York Convention, see https://newyorkconvention1958.org/. See also Ch. Nairac; M. Thadikkara; E. Aleynikova, Public Policy and the Enforceability of Arbitral Awards - To What Extent do Arbitral Tribunals Take into Account Public Policy in the Jurisdictions of Prospective Enforcement of an Award? An Analysis of ICC Awards, *ICC Dispute Resolution Bulletin*, 2016-1.

18 Art. 32(2), ICC Rules.

19 Id. Art. 38(4).

20 Id. Art. 42; see also Ten Tips on How to Make an Arbitration Award Work: Lessons from the ICC Scrutiny Process, *ICC Dispute Resolution Bulletin*, 2022-2.

3.12.2 Drafting considerations

69. When drafting an award, EPP tribunals may consider the following points:

70. **(i) General considerations**. In addition to any requirements imposed by an applicable arbitration law, tribunals must pay particular attention to:

- what constitutes a reasoned award (and what does not); and
- whether features of their arbitration case or procedure require specific additions to the reasoning beyond what is generally expected.

71. **(ii) Structure of the award**. Subject to particular domestic requirements, an award typically includes a description of:

- the basis of the arbitral tribunal's jurisdiction;
- relevant procedural history (discussed in (iii) immediately below);
- facts and law relevant to the decision;
- how the arbitral tribunal applied the law to the facts, including the reasons for granting the remedies set out in the dispositive part of the award; and
- the dispositive section, in which the arbitral tribunal clearly sets out the remedies awarded, including interest, costs and expenses (if any), and dismisses any claims or relief not expressly awarded.

72. For each point of contention, it is prudent to first capture the parties' positions, then proceed to analyse these positions, and finally render a decision.

73. **(iii) Reciting procedural steps**. An award, in particular in an expedited procedure, may address only the issues that are determinative to the outcome and does not have to recite every submission, piece of evidence or issue, as long as the reasoning supports the decisions on all claims submitted. As provided in the ICC Note to Parties and Arbitral Tribunals (para. 151, quoted above), the award should contain factual and procedural details sufficient for its understanding. All ICC arbitral tribunals must be careful to have addressed all issues submitted for its consideration.

74. Accordingly, the award under EPP generally does not require a reiteration or exhaustive summary of the procedural history of the arbitration. Instead, the tribunal should focus on describing what was in dispute or could be in dispute under Article V, New York Convention (on the recognition and enforcement of the award) if and when the award creditor seeks to enforce the award.

75. The award should therefore contain a record of the proper conduct of the proceedings (in particular regarding due process standards), if procedural objections were raised, issues were decided upon; or a party did not appear. This should include efforts made, notably concerning the service of process to that party. When applicable, the award should clarify either in the procedural or merits section, that although one party failed to appear, the arbitral tribunal still reviewed the merits of the opposing party's claim rather than issuing a "default" award (see Section 3.7 above). The award should document these matters and how they were resolved as necessary.

76. **(iv) Rationale for reason**. The ICC Rules and international arbitration principles require that the award state the reasons upon which it is based. The explicit requirement is that the reader (such as the enforcement court) must understand the rationale behind the decision of the arbitral tribunal's reasoning. What this implicitly and fundamentally means is that the award must be a self-contained document, providing the reader (e.g. the enforcement court) is presented with the foundation and significance of every decision in the award, without the need to look outside the four corners of the award.

77. In practice, this implies that the EPP tribunal must review its work carefully to ensure that the key aspects of the dispute and how the decision was reached are clear to anyone reading the award for the first time. Reasons are said to serve two primary functions:

- Limit arbitrariness in the decision-making and ensure thoughtful consideration of the facts and issues of the case; and
- Enhance the legitimacy of the arbitration by showing both the winning and losing parties that their positions have been considered, understood and decided upon.

78. Although there is no universal standard of reasoning, the requirement is that the award should enable the reader to understand how the arbitral tribunal reached its decision, for which some context may be required or for which the applicable law may provide further detail or requirements.

79. **(v) Timing**. The EPP tribunal should organise its timetable to ensure there is sufficient time to deliberate, draft and issue a final award within the shorten timeframe of EPP, including the (accelerated) scrutiny of the award by the ICC Court (see para. 23 above). On this, the EPP tribunal may liaise with the Secretariat of the ICC Court (see Section 3 above). While remaining open-minded, the tribunal may consider drafting the award before the hearing and/or the last submission (e.g. drafting a short summary of the proceedings and the undisputed facts known to date).

80. **(vi) Multiple awards**. In principle, EPP tribunals may issue multiple awards. However, since drafting an award and undergoing the scrutiny process takes longer than issuing an order, and issuing an interim award would not extend or reset the six-month time limit to issue a final award, EPP tribunals should determine, as a preliminary matter, whether or not multiple awards are required as a legal or procedural matter. That said, EPP tribunals inclined to issue orders should ensure that the matters addressed should, under the ICC Rules and/or applicable laws, not be dealt with in awards rather than orders.

81. If interim or partial awards are (to be) issued prior to the issuance of the final award, EPP tribunals may consider working on such awards in parallel with the next phase of the expedited procedure (assuming this is possible and appropriate).

82. Useful resources addressing mandatory requirements and drafting considerations include the ICC Award Checklist; The Bare Minimum: Cost-Efficient Awards for Disputes of Small–and Medium–Sized Enterprises;[21] and the IBA Toolkit for Award Drafting.

21 By G. Bermann, A. Jana, A. Rigozzi, M. van Hooijdonk, N. Kamau and S. Menon, published in the *ICC Dispute Resolution Bulletin*, 2024-3.

3.13 Division of tasks between the ICC Court, Secretariat of the ICC Court ("Secretariat"), and arbitral tribunal

83. Although the ICC Rules allocate the tasks and responsibilities between the ICC Court, the Secretariat, and the arbitral tribunal, there is no provision for direct interaction between the arbitral tribunal and the ICC Court or the Secretariat. In practice, however, the arbitral tribunal communicates with the Secretariat, which then invites the ICC Court to complete the tasks sought under its authority. The arbitral tribunal should not seek to communicate directly with the ICC Court.

84. The EPP tribunal may wish to reach out to the Secretariat in the circumstances referred to in Sections 3.13.1 to 3.13.3 below.

3.13.1 For the ICC Court to consider whether EPP should no longer apply to the case

85. Under **Article 1(4) of Appendix VI** of the ICC Rules, the ICC Court is granted the authority, on its own motion or upon the request of a party and after consultation with the EPP tribunal and the parties, to decide that EPP shall no longer apply to the case.

86. While the ICC Rules do not contemplate the circumstances in which an EPP tribunal may request the ICC Court to consider taking such decision, there are situations in which the EPP tribunal would wish to do so. In some cases, EPP tribunals have informally asked the ICC Court, via the Secretariat, to consider such option.

87. This may occur, for example, if the parties have agreed to a timeline that is inconsistent with the time limits prescribed in EPP; or if the handling of the dispute reveals complexities that require several rounds of submissions, expert evidence, document production and an extensive hearing, which would undeniably lengthen the procedure to warrant that it becomes a regular one. In that event, the arbitral tribunal may wish to contact the Secretariat to discuss the reasons why EPP may no longer apply and obtain the view of the Secretariat. Following the discussion with the Secretariat, the EPP tribunal may request that the Secretariat draw the ICC Court's attention to the reasons why it should consider converting the EPP case into a regular procedure.

3.13.2 For extensions of time

88. Under **Article 1(3) of Appendix VI** of the ICC Rules, the CMC shall take place no later than 15 days from the transmission of the file to the EPP tribunal. The ICC Court may extend that time limit on its own initiative or upon a reasoned request from the EPP tribunal. While the ICC Court may extend the 15-day time limit on its own initiative, it may be advisable that the EPP tribunal notifies, as soon as possible, the Secretariat of any delay, and provides the reasons for such delay. Such information shall be notified to the ICC Court, if and when it is invited to extend the time limit to hold the CMC.

89. Similarly, under **Article 1(4) of Appendix VI**, the final award shall be rendered within six months from the date of the CMC. However, the ICC Court may extend the time limit on its own initiative or upon a reasoned request from the EPP tribunal. While the ICC Court shall be invited to extend the time limit in the event the final award is likely not to be rendered within the time limit provided by the Rules, it may be advisable that, as soon as possible, the EPP tribunal notifies the Secretariat of any delay to the rendering of the final award and provides the reasons for such delay. Such information shall be notified to the ICC Court when it may be invited to extend the time limit.

3.13.3 For general guidance on ICC Arbitration practice

90. One of the pertinent features of ICC Arbitration is the excellence and availability of the members of the Secretariat. Their involvement provides for monitoring of cases, on a daily basis, and takes place by reference to established procedures and practices in recurring circumstances or specific situations. As such, guidance from the Secretariat is highly valuable and may be obtained by the EPP tribunal whenever a doubt arises as to best practices in relation to ICC Arbitration in general and expedited procedures in particular. By way of example, an EPP tribunal may wish to inquire about the practice as to the form of a decision that it has to render (either in the form of an order or an interim or partial award), and obtaining guidance from the Secretariat could be helpful.

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