

Are Specific Fast-Track Arbitration Rules Necessary?

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INTRODUCTION

Today, ten years after the excitement generated by fast-track arbitrations in cases involving multi-millions of U.S. dollars submitted to the International Chamber of Commerce (“ICC”) for arbitration, and after several practitioners have shared their interesting experiences in obtaining rapid decisions, is fast-track arbitration still being sought by parties, and are specific fast-track arbitration rules necessary?

Celerity – one of the benefits of arbitration – is clearly what parties expect from arbitration proceedings. The general tendency is to accelerate the procedures whenever possible. Nevertheless, *speed* does not necessarily mean fast-track arbitration; a fast-track procedure may last a few days or weeks, as opposed to a normal arbitration procedure that can last months or years. Parties who are inexperienced in accelerated procedures may think that adapted fast-track rules can encourage disputes to be submitted to such a procedure more often. Is this true and/or desirable?

The following notes are intended (i) to examine whether specific rules for fast-track arbitration are necessary, or whether some guidelines would suffice; (ii) to examine whether the Rules of Arbitration of the ICC (“ICC Rules”) can be applied to expedited procedures; and (iii) to observe the ICC experience in fast-track arbitrations and in disputes involving high technology.

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I. WHAT RULES SHOULD APPLY FOR FAST-TRACK ARBITRATIONS?

At the outset, one should recall (a) what fast-track arbitration is, (b) why, when, what, how, and for whom expedited procedures are intended, before (c) considering whether rules or guidelines can be proposed, (d) the practical considerations that the parties should keep in mind before opting for fast-track arbitration, and (e) given such practical considerations, what weaknesses are presented by the European Organization for the Safety of Air Navigation (“EUROCONTROL”) draft Arbitration Policy.¹

A. *What is Fast-Track Arbitration?*

According to a number of authors,² the main characteristics of fast-track procedures have been summarized as follows.³ The term “fast-track arbitration” is used to refer to an arbitration which has been commenced on the basis of a specific type of arbitration clause, defining which disputes may be submitted to fast-track procedures, and within what time-limits. These potential disputes referred to in a contract are considered by the parties to require, and be capable of, expedited resolution. There is an assumption that the potential users of fast-track procedures are highly sophisticated international actors and that their lawyers have the necessary resources to support the accelerated resolution of the disputes. The arbitrators entrusted with the resolution of fast-track disputes must be individuals with relevant expertise, capable of conducting the procedure in an expedited manner until its conclusion, and available to do so. The same authors have added that fast-track procedures are more likely to be conducted in an expedited manner if submitted to institutional arbitration, rather

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1. EUROCONTROL Arbitration Policy, draft presently under discussion in EUROCONTROL [hereinafter EUROCONTROL draft Arbitration Policy], reproduced as Annex II in this volume.
 2. See, e.g., Benjamin Davis, former counsel at the Secretariat of the ICC International Court of Arbitration, *published with* R. Amoussou-Guenou, B.G. Affaki, R.T. Madaan, M. Sawano, F. Mantilla Serrano, O. Lagacé Glain, D. Brown and R.H. Smit, *International Fast-Track Commercial Arbitration*, in *COMPARATIVE LAW YEARBOOK OF INTERNATIONAL BUSINESS* p. 357 (Susan Cotter ed., Kluwer Academic Publishers 1995).
 3. See Benjamin Davis, Odette Lagacé, Michael Volkovitsch, *When Doctrines Meet: Fast Track Arbitration and the ICC Experience*, 10(4) *J. INT'L ARB.* p. 69 (1993). Davis distinguished between fast-track, expedited and accelerated procedures.

than to an *ad hoc* arbitration, unless the parties have provided in their arbitration clause for all contingencies regarding the organization of the various procedural steps.⁴

Expedited procedures for the resolution of disputes are not a recent development. Short procedures were, for instance, already utilized in Venice between the 12th and 16th centuries, where decisions were rendered within very short time-limits. Two Italian authors have studied hundreds of awards from that period and noted that all of the disputes were resolved within days or a few weeks; a case was even found in which the arbitrators were free to do whatever they wished “*stando, sedendo et deambulando*,” provided their decision was rendered within a week.⁵

B. Why, When, What, How and for Whom are Expedited Procedures Intended?

Why fast-track arbitration? The reason why parties may be interested in an expeditious procedure is the advantage of a rapid decision allowing them to continue their business when – in a financial and strategic sense – every day counts. Parties who must continue working together in the future are more inclined to fully cooperate in order to achieve the goal of a speedy resolution.

When is it appropriate to initiate a fast-track procedure? Even where a fast-track procedure has not been incorporated into an arbitration clause, the parties may still agree on a speedy procedure to resolve their dispute as soon as it arises and before their relationship sours. It also depends much on the parties involved. However, where both parties are motivated to move expeditiously, the fact of being either claimant or respondent is irrelevant.⁶

4. *Id.*

5. FABRIZIO MARRELLA & ANDREA MOZZATO, *ALLE ORIGINI DELL'ARBITRATO COMMERCIALE INTERNAZIONALE. L'ARBITRATO A VENEZIA TRA MEDIO EVO ED ETA MODERNA* (Cedam, Padova 2001).

6. Moses Silverman, *The Fast-Track Arbitration of the International Chamber of Commerce – the User's Point of View*, 10(4) J. INT'L ARB. p.113 (1993).

What kind of disputes can be dealt with speedily? Normally, even in the most factually complex cases, fast-track arbitration is possible. Some practitioners tend to the view that any and all disputes can be resolved on an expeditious basis. Depending on the nature of the dispute, its complexity and the circumstances of the case, fast-track arbitration may or may not be appropriate. Fast-track treatment is for instance suited to a dispute concerning price-fixing, but probably not to a multi-million dollar contract with a term of twenty years.⁷

How can a dispute be resolved rapidly? The dispute resolution instruments which parties normally use are negotiation, mediation, conciliation or arbitration procedures, but they may also submit their disagreement to expertise. Some institutions, such as the ICC International Center for Technical Expertise,⁸ offer the administration of such services.

For whom is fast-track arbitration intended? It would not be advisable to take the risk of testing fast-track procedures should neither the parties, their lawyers, the arbitrators nor the arbitration institution have experience in expedited procedures – especially when the dispute is complex. Fast-track arbitration is to be taken seriously. The losing party may feel that its counsel did not sufficiently argue an important point, and counsel is unlikely to attribute that to having had too little time to prepare for the hearing. The party must be satisfied that all arguments were duly put forward, however short the deadline. Every participant must be able to provide the necessary input for the fast-track procedure to be successful within the fixed time-limits. However, for some countries, speed is a luxury; it is expensive, and cultural differences and language difficulties may give rise to further impediments.

Finally, fast-track procedures should not be undertaken at all costs, because the risks are too numerous. Among the risks that have been cited are the difficulty of finding experienced arbitrators, the risk of an unsatisfactory decision due to pressures of time, limits to work intensity (as lawyers may be able to add to manpower resources, but arbitrators are not), the risk of missing

7. Moses Silverman, *Fast-Track Arbitration: Different Perspectives*, 3(2) ICCBULL. p. 11 (1992).

8. The ICC International Center for Technical Expertise provides services to parties or arbitral tribunals wishing to appoint experts either to assist in finding solutions to a dispute, or for establishing facts in the course of arbitration.

deadlines, and the risk of surprise for the respondent.⁹ Among other risks are, for example, the unfair time-limits imposed on respondents for the preparation of their defense in the absence of a complete *exposé* of the claimant's case,¹⁰ and the lack of responsiveness in the exchange of submissions between parties.

C. Rules or Guidelines for Accelerated Procedures?

One author, the chairman of the arbitral tribunal in a famous ICC fast-track case, took the view that an appropriate mechanism for fast-track arbitration is preferable, especially when the parties are not cooperative. He also acknowledged that his experience in this particular fast-track procedure showed that, even under usual rules, a complicated case can be resolved in a very short time.¹¹ Some commentators believe that an institutionalized fast-track procedure should have a special set of rules, while others consider that model supplementary procedures should be proposed in addition to arbitration rules.¹² Certain practitioners prefer to draft their own fast-track arbitration clauses and fix suitable deadlines; others consider it too risky to set time-limits.¹³

Establishing a specific set of arbitration rules for fast-track arbitration would probably be helpful for parties who prefer not to draft a tailor-made clause. However, rules fixing short deadlines would risk creating attractive rules that are not adaptable to all situations. Usual arbitration rules, which do not impose short time-limits, do not present such a risk. An unfamiliar user tempted by a prompt decision concerning a dispute may not be aware of the consequences or constraints of such an accelerated procedure. Even if the specific set of arbitration rules referred to a particular arbitration institution, while the institution could assist the parties to organize their proceedings expeditiously and

9. Pierre Yves Tschanz, *The Chamber of Commerce and Industry of Geneva's Arbitration Rules and their Expedited Procedure*, 10(4) J. INT'L ARB. p. 51 (1993).

10. Stephen Bond, *Counsel's Responsibilities in Regard to the Speed of an International Arbitration*, in IMPROVING INTERNATIONAL ARBITRATION – LIBERAMICORUMMICHELGAUDET, p. 113 (ICC Publishing 1998) [hereinafter LIBERAMICORUMGAUDET].

11. Hans Smit, *Fast-Track Arbitration*, 2(2) AM. REV. INT'L ARB. p. 138 (1991).

12. D.C. Downie, *Fast Track International Commercial Arbitration: Proposed Institutional Rules*, 2(4) AM. REV. INT'L ARB. p. 473 (1991).

13. Davis et al., *supra* note 3.

appoint arbitrators with relevant expertise, it could not help parties unfamiliar with fast-track procedures to prepare their case within a short time-limit.

In general, parties who use fast-track procedures are not novices but seasoned practitioners who choose expedited procedures because they have used them before or know in what circumstances they can be used. Tailor-made provisions, duly negotiated by the parties, seem to be better suited, more acceptable to the parties (who can agree upon the time-limits), and better adapted to the realities of their situation.

There are thus a number of questions to be considered. First, what is the feature which distinguishes a normal arbitration procedure from a fast-track arbitration procedure? The simple answer is: shorter time-limits. The second question derives from the first: what would a specific set of arbitration rules bring over traditional arbitration rules? The answer, again, is shorter time-limits. Finally, is it therefore necessary to establish a specific set of rules? The answer depends upon who could benefit from such rules and in which circumstances.

Other questions which have a bearing on the analysis of the possible need for specific rules – and which will deliberately not be answered in this paper – can be posed as follows. Assuming that specific rules establishing shorter time-limits are drafted, what time-limits should be imposed and how should they be determined? For example, is a period of fifteen days too long for the submission of an answer? Should there be a definition of a “proper” request for arbitration so as to allow a respondent to prepare its defense? Would the fifteen days be adaptable to any field of dispute or should different time-limits apply to different sectors? How many days should be given for the constitution of the arbitral tribunal? How many days, weeks or months should be granted to the arbitral tribunal to establish the facts and render a decision? Would separate fast-track rules for different types of disputes need to be drafted? Would they suit the needs of all potential users, from different cultures and different legal systems,¹⁴ and would the concept of time be understood in the same way by different cultures?¹⁵

14. Cf. Samir Saleh, *Connaissance des obstacles: tremplin pour l'avenir*, in LIBER AMICORUM GAUDET, *supra* note 10, at p. 209.

15. *Id.*

Thus, the hesitation in affirming that specific fast-track arbitration rules are indispensable derives from the fact that there are numerous risks, and that fast-track arbitration remains possible without necessarily referring to fast-track arbitration rules, either by the foresight of incorporating a fast-track arbitration clause or by parties agreeing on such a procedure after the dispute has arisen.

These issues notwithstanding, and taking into consideration the need for speed, expedited procedures are undergoing rapid change and it may be that, in the future, arbitration institutions will find it helpful to establish specific fast-track arbitration rules if they do not have them already.

It would be interesting to gauge the experience of those arbitration institutions which already do have specific fast-track arbitration rules (even if some rules are fast-track only for small claims), such as the World Intellectual Property Organization (“WIPO”), the Chamber of Commerce and Industry of Geneva (“CCIG”), the Arbitration Institute of the Stockholm Chamber of Commerce (“SCC”), or the American Arbitration Association (“AAA”).¹⁶ In his comments concerning WIPO expedited arbitration, one author deplored the serious situation in which those who are responsible for drafting international contracts simply ignore the solutions available to them under these new rules.¹⁷

D. Practical Considerations

Parties who wish to draft a fast-track arbitration clause, or who agree on an expedited procedure once the dispute occurs, should bear in mind certain practical considerations that have been thoroughly addressed by some authors and to which drafters may refer.¹⁸ Arbitration is a consensual process which allows the parties to agree on any deadline for an expeditious procedure, provided they anticipate some particular difficulties set forth below.

1. Competence of Parties

16. An interesting comparison was made by Eva Müller in *Fast-Track Arbitration – Meeting the Demands of the Next Millennium*, 15(3) J. INT’L ARB. p. 5 (1998).

17. Jan Paulsson, *Fast-Track Arbitration in Europe (with Special Reference to the WIPO Expedited Arbitration Rules)*, 18(4) HASTINGS INT’L & COMP. L. REV. p. 713 (1995).

18. Davis et al., *supra* note 2, and Davis et al. *supra* note 3.

Each party should ensure that the other party is capable of handling a fast-track procedure, and that both have similar interests in “fast-tracking” their potential disputes.¹⁹ Both should also consider whether to accelerate the process, and if so, to what extent.²⁰

2. No Legal impediments

Before agreeing to a fast-track arbitration, the parties must ensure that there are no provisions against fast-track arbitration in the applicable law of the place of arbitration, the law of the contract and the law of the possible places of enforcement.²¹

3. Carefully Drafted Clause

It is essential to fully negotiate the fast-track arbitration clause and to be able to prove that it has been carefully drafted, in case the award is challenged on that ground.

4. Nature of the Contract

The parties should consider the nature of their contract and whether a dispute arising thereunder can be resolved in an expedited manner. Whatever the nature of the contract, the parties should segment the types of potential disputes and clearly state which claims can be dealt with in a fast-track manner and which claims cannot. This indication will spare the arbitrators the obligation of examining their jurisdiction with regards to the claims falling under the fast-track procedure.²² Some practitioners are of the view that submitting all disputes to expedited procedures is very risky, as it is very difficult to anticipate

19. Benjamin Davis, *Fast-Track Arbitration and Fast-Tracking your Arbitration*, 9(4) J. INT'L ARB. p. 43 (1992).

20. Lawrence W. Newman, *Fast Track Arbitration – Part II: The ICC Court's Experience to Date*, 5(8) WORLD ARB. & MEDIATION REP. p. 190 (1994).

21. Davis et al., *supra* note 3.

22. Davis et al., *supra* note 3.

the complexity of all potential disputes that may arise and whether they can be dealt with expeditiously.²³

5. Reasonable Time-Limits

It is also fundamental to set reasonable time-limits, specifying when they start and when they end. Some practitioners find it useful to set deadlines for everything, such as answering the request for arbitration, constitution of the arbitral tribunal, filing any challenge and deciding upon it, a time starting from which the award should be rendered, any possible extension and the authority that has the power to grant such extensions, deadlines for submissions and hearings, and so on. However, providing a single deadline for the rendering of the decision is probably sufficient, as this will determine the rhythm which the proceedings should take in order to meet such time-limit.

Whatever the perception of fast-track procedures at the place of arbitration, it is advisable that the parties foresee in their arbitration clause the consequences of failure to render an award within the fixed time-limit, and which authority should have the power to extend any deadline, should the dispute not be submitted to institutional arbitration with the power to grant such extensions.²⁴ There should also be some flexibility for extension of time-limits where appropriate, especially if they are unrealistic from the outset.²⁵ The parties must also be aware that in international arbitration the lawyers may not be familiar with a particular legal system, so short time-limits for the parties' submissions in this circumstance would thus be unreasonable.

Limiting the proceedings to written submissions only, and doing away with hearings, clearly helps to hasten the procedure. The appropriateness of this depends, however, on the nature of the dispute and its complexity. On the other hand, an express provision may limit the number and length of hearings, and prohibit the introduction at the hearing of any document or information that has not been disclosed earlier.²⁶ The parties should bear in mind that discovery is

23. Davis et al., *supra* note 3.

24. Davis et al., *supra* note 2.

25. Davis, *supra* note 19.

26. Smit, *supra* note 11.

not compatible with accelerated procedures²⁷ unless it is spontaneous and does not require an order from the arbitral tribunal, which should set a specific time-limit for such discovery. A fast-track procedure is thus achievable provided that extensive discovery is not required.

Whatever time-limits may apply, due process remains fundamental. To avoid challenge of the award on grounds of a due process violation, the parties may for instance confirm that they had sufficient opportunity to present their case before closing of the proceedings. Nevertheless, should any of the time-limits be considered as mandatory and not able to be reduced, such declaration would have no effect.²⁸ Expeditious treatment of a dispute is tempting, but what would a decision be worth if due process had been violated and a party challenged the award on the ground that it was precluded from appointing an arbitrator, preparing its defense or appearing at a hearing?²⁹ The effect of the rapid resolution would be lost, and time and money would be wasted.

6. Appropriate Framework

The parties should study the available arbitration rules in order to choose those that may be adapted to fast-track arbitration, or select an institution capable of administering fast-track procedures.³⁰

7. Time-Saving Measures

The parties may gain time with the procedural aspects of the arbitration if they draft a clear and unequivocal arbitration clause and thereby avoid wasting time finding the exact arbitration institution and requiring the arbitrators to examine their jurisdiction. The parties will also save time by foreseeing from the outset, rather than having to agree or obtain a decision upon, (i) the place of arbitration, (ii) the law applicable to the merits of the dispute, (iii) the language

27. Yves Derains, *Les responsabilités des conseils*, in LIBER AMICORUM GAUDET, *supra* note 10, at pp. 119–120.

28. Davis et al., *supra* note 2.

29. Bond, *supra* note 10.

30. Peter J. Nickles, *Fast-Track Arbitration: Different Perspectives*, 3(2) ICC BULL. p. 9 (1992).

of the proceedings, (iv) the number of arbitrators, and (v) the method of their selection.

8. Number of Arbitrators

Restricting the number of arbitrators to a sole arbitrator, if the nature of the potential dispute so permits, will facilitate the expeditious constitution of an arbitral tribunal. The appointment of a sole arbitrator needs less time than the appointment of three, and a sole arbitrator requires less time to render a decision than three arbitrators having to deliberate and draft an award on which they all agree. It is also less complicated to agree on a hearing date with a sole arbitrator than coordinating dates between three arbitrators. Interestingly, most of the expedited arbitration rules indeed provide for a sole arbitrator. However, a sole arbitrator will not have the benefit in complex matters of being able to exchange views with his fellow arbitrators. The parties should thus consider thoroughly the question of the number of arbitrators.

Some practitioners prefer not to fix the number of arbitrators in the arbitration clause but to decide on the number according to the complexity of the issues arising from a dispute. This is wise, provided that the parties are certain that they will be able to reach an agreement quickly on the number of arbitrators when a dispute arises. Further, pre-selecting the arbitrator(s) in a fast-track arbitration clause may not necessarily accelerate the procedure, because the arbitrator(s) may no longer be independent or available once a potential dispute occurs.

9. Independence of Arbitrators

The parties should ensure at the time of constituting the arbitral tribunal that the independence of the arbitrators cannot be called into question and, if possible, to be prepared to propose another arbitrator quickly should the appointment of an arbitrator be questioned.³¹

Some practitioners believe that submitting a further dispute to the same arbitral tribunal allows both the arbitrators and the parties (who already know each other and the domain of the dispute) to facilitate an expedited procedure.

31. *Id.*

Even so, it would still be more prudent not to be bound by any such provision in the arbitration clause, but to leave open the possibility for agreeing on such a practice when a dispute arises.

Before proposing an arbitrator, the parties must also be certain that the arbitrators are experienced in the field of the dispute, fluent in the languages of the arbitration, aware of the short time-limits, capable of conducting an expedited procedure, and available.

10. Available Resources

Finally, the parties, the lawyers, the arbitrators and the arbitration institution should all be capable of drawing on the resources necessary for the accelerated resolution of the dispute and carrying out their tasks quickly and simultaneously.³² Fast-track arbitration may be achievable if the parties are willing to cooperate fully, if the lawyers' submissions are of a high quality, if the arbitrators are authoritarian without being rigid,³³ and if all the participants comply with the tight schedules.

E. EUROCONTROL Draft Arbitration Policy

1. General Observations

The EUROCONTROL draft Arbitration Policy contains some weaknesses which have been highlighted by the panelists and floor leaders at this seminar. If these weaknesses are to be eliminated, a review of the draft is in order. This section will not comment extensively on the draft, but restrict its remarks to the expedited arbitration procedures envisaged therein.

My first impression is one of surprise at the drafters' desire to submit the settlement of disputes to expedited arbitration. Indeed, the draft foresees a period of six months for the settlement of disputes by direct negotiations or any other means,³⁴ as opposed to the very short period (thirty days) permitted for

32. Davis et al., *supra* note 2.

33. Benjamin Davis, *Laying Down a Gauntlet: The Thirty-Six Hour Chairman*, 3(1) AM. REV. INT'L ARB. p. 170 (1992).

34. EUROCONTROL draft Arbitration Policy, *supra* note 1, art. 3.

an expedited arbitration procedure.³⁵ It is hard to envisage that disputes involving states in the complex field of air and space law, if not settled after a six month period of negotiations, may be decided in a few weeks when such important interests are at stake.

The draft Arbitration Policy is supposed to be adopted in accordance with Article 34 of the EUROCONTROL Revised Convention³⁶ and it refers to the Permanent Court of Arbitration (“PCA”) Optional Rules for Arbitrating Disputes between Two States,³⁷ the PCA Optional Rules for Arbitration involving International Organizations and States,³⁸ the PCA Optional Rules for Fact-Finding Commissions of Inquiry³⁹ (collectively, “PCA Optional Rules”) and the Guidelines for Adapting the PCA Arbitration Rules to Disputes Arising under Multilateral Agreements or Multiparty Contracts.⁴⁰ Although it is apparently an Annex to the Revised Convention, the draft Arbitration Policy itself refers to several documents which may render any reference to them confusing. Should the PCA Optional Rules be modified? Which Optional Rules will apply? At the risk of unduly lengthening the draft, some of the confusion might be avoided if the main provisions of the Optional Rules were incorporated into it.

2. Expedited Arbitration Clause

35. EUROCONTROL draft Arbitration Policy, *supra* note 1, art. 9.

36. EUROCONTROL Revised Convention, Brussels, June 27, 1997 (EUROCONTROL Printshop, Sept. 1997), *see* Annex I in this volume.

37. Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two States, effective October 20, 1992, *in* PERMANENT COURT OF ARBITRATION – BASIC DOCUMENTS p. 41 (the Secretary-General and the International Bureau of the Permanent Court of Arbitration, The Hague 1998) [hereinafter PCA BASIC DOCUMENTS].

38. Permanent Court of Arbitration Optional Rules for Arbitration Involving International Organizations and States, effective July 1, 1996, *in* PCA BASIC DOCUMENTS, *supra* note 37, at p. 97.

39. Permanent Court of Arbitration Optional Rules for Fact-finding Commissions of Inquiry, effective December 15, 1997, *in* PCA BASIC DOCUMENTS, *supra* note 37, at p. 171.

40. Guidelines for Adapting the Permanent Court of Arbitration Rules to Disputes Arising from Multilateral Agreements and Multiparty Contracts, *in* PCA BASIC DOCUMENTS, *supra* note 37, at p. 217.

The expedited arbitration clause in the EUROCONTROL draft Arbitration Policy⁴¹ is envisaged “for cases not involving complex issues,” without defining what a complex issue may represent. Moreover, this clause refers to the PCA Optional Rules without specifying which particular Optional Rules apply. With respect to constitution of the arbitral tribunal, the clause indicates that the time-limits foreseen in the PCA Optional Rules shall be halved. It might be more prudent to insert into the draft the actual appointment procedure and the deadlines to be applied.

The expedited arbitration clause provides that “[t]he statement of claim shall be communicated to the other party and each of the arbitrators within 15 calendar days after the Arbitral Tribunal has been established.” Are fifteen days enough? Should there not be a definition of a proper statement of facts in order to allow the respondent to prepare its statement of defense? This concern is also increased by the fact that further written statements are not foreseen unless the arbitral tribunal requires them. Furthermore, are thirty days sufficient for rendering a decision?

The costs of arbitration are to be fixed by the arbitral tribunal in the award.⁴² It is not clear what procedure is envisaged for invoking an advance order on costs, or when such advance should be paid by the parties before the arbitral tribunal begins its work. For disputes involving states, any advance or any payment of costs must be authorized by an official entity, a ministry or a state-owned organization. Can advance payments or costs be made rapidly, or should the arbitrators wait before being remunerated for their work?

Under the draft Arbitration Policy, the award will only be published if the arbitrators agree that publication will not cause any serious prejudice to the party requesting confidentiality.⁴³ However, confidentiality is such a fundamental issue that it is hard to believe that a state would ever consider publication non-prejudicial. For these reasons, a reassessment of the draft appears necessary for addressing the practical considerations raised in this paper and by the other speakers.

41. EUROCONTROL draft Arbitration Policy, *supra* note 1, art. 9.

42. EUROCONTROL draft Arbitration Policy, *supra* note 1, art. 12.

43. EUROCONTROL draft Arbitration Policy, *supra* note 1, art. 11.

II. FAST-TRACK PROCEDURES UNDER THE ICC ARBITRATION RULES

As this section reflects, the ICC (a) administered fast-track procedures under its 1988 Rules of Arbitration⁴⁴ which contained no specific provision for short time-limits; it then (b) aimed to reduce time-limits in its 1998 Arbitration Rules⁴⁵ which expressly provided (c) the possibility of shortening time-limits and (d) the benefit of human and technical resources to allow the handling of accelerated procedures.

A. Accelerated Procedure under the 1988 ICC Arbitration Rules

Under the 1988 ICC Rules, the ICC International Court of Arbitration (“the Court”) and its Secretariat adapted themselves to the requirements of parties and managed several fast-track arbitration cases. The most important two cases, involving multi-millions of U.S. dollars and arbitration clauses expressly providing for fast-track procedures, were dealt with in sixty and seventy-eight days, respectively. These cases have been the subject of ample commentary and they highlight the speed with which the ICC was able to administer accelerated procedures.⁴⁶ One commentator mentioned that the fast-track clauses in these cases could have been viewed as “pathological,” but that the ICC legitimized the clauses and succeeded in administering these fast-track arbitrations, thus proving that this could be accomplished under the 1988 ICC Rules.⁴⁷

It is worth noting the preliminary steps which the parties in these cases initiated prior to inserting an arbitration clause into their contracts. The parties first investigated the different arbitration rules available to them, and then selected those ICC Rules which provided for the combination of flexibility and

44. International Chamber of Commerce Rules of Arbitration, effective January 1, 1988, *ICC Publication No. 447* (1987).

45. International Chamber of Commerce Rules of Arbitration, effective January 1, 1998, *ICC Publication No. 581* (1997).

46. Benjamin Davis, Peter J. Nickles, Moses Silverman, Hans Smit & David K. W. Atkiss, *Fast-Track Arbitration: Different Perspectives*, 3(2) *ICCBULL.* p. 4 (1992). *See also* Final Awards in ICC Arbitration Cases 7385 and 7402, in *XVIII ICCA Y.B. COM. ARB.* p. 68 (1993).

47. Arthur W. Rovine, *Fast-Track Arbitration – An ICC Breakthrough*, 61(4) *J. CHARTERED INST. ARB.* p. 286 (1995).

structure likely to accommodate fast-track arbitration. Lastly, they initiated a dialogue with the Court's Secretariat for better understanding of the practice.⁴⁸

In these cases, and pursuant to Article 1.3 of the 1988 ICC Rules, the chairman of the Court decided,⁴⁹ as a first phase (i) that there was a *prima facie* agreement to arbitrate between the parties, (ii) that the fast-track and non-fast-track arbitrations should not be joined, (iii) not to confirm the party nominee against whom objections were raised, (iv) to confirm the other independent co-arbitrator, (v) which ICC National Committee should propose the chairman of the arbitral tribunal, (vi) to confirm the place of arbitration, and (vii) to fix the advance on costs to be paid by the parties. In a second phase, the chairman of the Court appointed the chairman of the arbitral tribunal. In a third phase, the chairman took note of the "terms of reference" and of the fact that the advance on costs was paid by the parties. Finally, in a fourth phase, the committee of the Court scrutinized and approved the draft final award.

How would the same steps be dealt with under the new ICC Rules?

B. 1988 vs. 1998 ICC Arbitration Rules

The 1998 Arbitration Rules permit faster treatment of the different steps of the procedure and aim at reducing unnecessary delays to the greatest extent possible.⁵⁰ A short comparison between the steps under the 1988 and the 1998 Rules will show how the ICC Rules of Arbitration have been improved to enhance acceleration of an arbitration procedure.⁵¹

1. No Waiting Period

48. Nickles, *supra* note 30.

49. For details on the setting in motion of an ICC procedure, see Mirèze Philippe, *Le Rôle de la Cour Internationale d'Arbitrage de la CCI*, 4 RDAI p. 443 (1997).

50. Horacio Grigera Naón, *The Role of the Secretariat of the International Court of Arbitration: The New 1998 ICC Rules of Arbitration*, ICC BULL. (Special Supplement) p. 18 (1997).

51. Mirèze Philippe, *Révision du Règlement d'Arbitrage de la CCI*, *Dalloz Affaires*, p. 1426 (1998).

Under the 1988 Rules, during the thirty day time-limit granted to a respondent for the filing of its answer to the request for arbitration, no decision could be taken with regard to the setting in motion of the procedure. It was only upon receipt of the answer or at the expiry of the thirty day time-limit that the Court was invited to set the procedure in motion.

A waiting period is no longer required under the 1998 Rules and the organization of the procedure may commence with the fixing of a provisional advance by the Secretary General.

2. Existence of a *Prima Facie* Agreement

Under the 1988 Rules, there was a two-tiered procedure for deciding whether a *prima facie* agreement to arbitrate existed: first by the Secretariat, then by the Court. The 1998 Rules no longer require the Secretariat to make such a preliminary examination.

3. Undisputed Procedural Aspects

The Court previously took note of the procedural aspects regarding the number of arbitrators and the place of arbitration referred to in the arbitration clause or agreed on by the parties. The Court no longer takes note of or confirms undisputed procedural aspects.

4. Confirmation of Arbitrators

The Court used to confirm every arbitrator. Under Article 9.2 of the 1998 Rules, however, the Secretary General of the Court may confirm arbitrators nominated by the parties or chairmen nominated by the co-arbitrators once they have filed a statement of independence without qualification or a qualified statement which has not given rise to objections. The decisions made by the Secretary General do not require submission of the case to a session of the Court; they are simply communicated to the Court for information.

5. Conduct of the Arbitration

The 1998 Rules expressly incorporate the former practice of the Court and now specifically provide, in Article 9.1, that before confirming or appointing an

arbitrator, the Court must consider the arbitrator's availability and his ability to conduct the arbitration in accordance with the Rules. In fast-track cases, the potential arbitrators are expressly alerted to the short time-limits prior to their appointment. The Court thus ensures that the arbitrators are aware of the contractually-required deadline for the rendering of the award, and that they are capable of devoting the necessary time to achieve this goal.

The National Committees of the ICC can propose arbitrators within a few days and, when requested, within one day (which was the case in the two specific fast-track ICC cases mentioned above).

6. Setting the Procedure in Motion

Setting in motion the procedure under the 1988 Rules implied the fixing of an advance on costs by the Court, and that the parties were invited to pay in two stages; the first half of the advance was required before sending the file to the arbitrators, and the second half after the terms of reference had been transmitted.

Article 30.1 of the 1998 Rules entrusts the Secretary General of the Court with the fixing of a provisional advance on costs at the time a request for arbitration is filed. Such provisional advance must be paid by the claimant within the thirty day period during which the respondent files its answer, and is intended to cover the costs of arbitration until the drafting of the terms of reference. As soon as practicable, the Court fixes the advance on costs which the parties are then invited to pay in equal shares.

7. Transmission of the File

Under the old Rules, once the preliminary decisions were made and the arbitral tribunal constituted, the file was only transmitted to the tribunal upon receipt of half of the advance on costs that both parties were invited to pay.

Under the new Rules, once all arbitrators are confirmed by the Secretary General or by the Court (in the event of objections against the confirmation of an arbitrator which must be examined by the Court) and the provisional advance has been paid by the claimant, the file is immediately transmitted to the arbitral tribunal.

Consequently, since the introduction of the 1998 Rules, the Secretary General has a most important role to play in the acceleration of a procedure, by (i) fixing a provisional advance on costs, and (ii) confirming the arbitrators.

8. Computation of the Six Month Time-Limit

In the second phase of the procedure, the Court was invited, under the 1988 Rules, to take note of the terms of reference signed by the parties and the arbitrators, and that such terms of reference would only become operative upon full payment of the advance on costs, which event determined the date from which the six month time-limit for rendering the award started to run. No hearings could take place before payment of the total advance on costs.

Both of these steps have been modified under the new Rules. First, the Court is no longer required to take note of the terms of reference, which are now only transmitted to it for information. It is only when a party does not sign the terms of reference that the Court is invited to approve them; that provision has remained unchanged from the 1988 Rules. Second, the Secretariat ensures that the advance on costs fixed by the Court is complied with, but this payment is wholly independent from the terms of reference. The date of signature of the terms of reference or the date on which the Secretariat notifies the arbitral tribunal of their approval by the Court is the date on which computation of the six months time-limit commences (Article 18.3).

9. Timetables

Two new provisions have also helped to encourage parties and arbitrators to comply with prescribed timetables: the first concerns the establishment – as soon as possible or when drawing up the terms of reference – of a provisional timetable for the conduct of the arbitration (Article 18.4); the second concerns an indication by the arbitral tribunal of an approximate date by which the draft award will be submitted to the Court (Article 22.2).

10. Approval of Awards

Under the 1988 Rules, every award had to be approved by the monthly plenary session of the Court rather than a committee of the Court which met three times a month.

Pursuant to Appendix II of the 1998 Rules, which provides that the Court shall determine the decisions that may be taken by a committee, the Court decided to extend the functions of the committees by granting them the power to approve awards.⁵² Thus, awards can now be approved at any weekly meetings of the Court, in committee or plenary session.

All of these improvements helped considerably with accelerating arbitration procedures.

C. Fast-Track Procedures under the ICC Arbitration Rules – Some Statistics

1. No Specific Fast-Track Rules

When the 1998 Rules of Arbitration of the ICC were revised, it was not considered necessary to establish specific rules for fast-track procedures, for a number of reasons.

First, Article 32 of the new Rules expressly provides that the parties may agree to shorten the various time-limits set out in the Rules. The only part of the recommended ICC standard clause which must remain is that the disputes “shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce.”⁵³ If the parties have neither foreseen in their fast-track arbitration clause, nor agreed during the procedure, on a possible extension of time-limits, the Court has the power to extend time-limits pursuant to Article 32.2 in order to secure the effectiveness of the procedure and the award when the circumstances so require. Furthermore, Article 1.3 of the Rules, which has remained unchanged since the 1988 Rules, empowers the chairman of the Court (or in his absence one of the vice-chairmen) to make urgent decisions on behalf of the Court, provided such decisions are reported to the next Court session.

52. Horacio Grigera Naón, *Du temps mécanique et du temps existentiel dans l'arbitrage CCI*, in LIBER AMICORUM GAUDET, *supra* note 10, at p. 191.

53. Antonias Dimolitsa, Note on Expedited ICC Arbitration Procedure, report submitted to the ICC Commission on International Arbitration, November 2000.

Second, it was considered that specific rules would not modify the various steps of an arbitration procedure (submission of a request for arbitration and answer, constitution of an arbitral tribunal, establishment of facts and rendering of an award), but that they would simply shorten the time-limits which the parties are free to agree upon in any event.

Third, the view was taken that, despite the lack of specific fast-track arbitration rules, neither the Rules, the Court nor its Secretariat have been an impediment to fast-track arbitrations.⁵⁴

Fourth, when rules do not exist, practice indicates how steps should be undertaken.⁵⁵

2. ICC Statistics

Some statistics of ICC fast-track cases serve as a helpful indication of the demand for them.

In 1994, thirteen cases had been reported.⁵⁶ Since then, fifteen cases have been filed. Thus there have been twenty-eight fast-track cases over the last fifteen years; seventeen submitted under the 1988 Rules and eleven under the 1998 Rules. Five cases are currently pending.

Of these fast-track cases, the origin of the parties was as follows (not counting multiple claimants and multiple respondents when they are of the same origin): one from each of Egypt, Japan, Mexico, Pakistan, the Philippines, Senegal and Turkey, two from Lebanon, three from Korea, fifteen from North America and twenty-eight from Europe. The contracts involved were as follows: one employment, one loan, one maritime, one racing, two management, two shareholding, three commodities, three high technology, three manufacturing, four distribution, and seven construction contracts.

54. Müller, *supra* note 16.

55. Lawrence W. Newman, *International Fast Track Arbitration – Part I: An Overview*, 5(7) WORLD ARB. & MEDIATION REP. p. 165 (1994).

56. Benjamin Davis, *Fast Track Arbitration – Part II: The ICC Court's Experience to Date*, 5(8) WORLD ARB. & MEDIATION REP. p. 190 (1994).

The statistics corroborate the remarks made in this paper: first, that the demand for fast-track arbitration is not important in terms of figures, since the average is less than two cases per year compared with more than five hundred arbitration cases filed overall;⁵⁷ and second, that parties from all countries cannot afford a fast-track arbitration, since almost eighty per cent of the parties are from Europe and North America.

D. The Resources of the Court and its Secretariat

The advantage of ICC institutional arbitration is undeniably the resources of the permanent body, the Court and its Secretariat, which are ready to take any decision, at any time of the procedure and within any deadline, however short. The international capability of this body, thanks to its cosmopolitan composition and the expertise of its members, also permits it rapidly to form an understanding of the matters and the needs of the parties – whatever their regional origins. Additionally, the staff of the Secretariat has doubled in number over the last three years, which makes expeditious handling of arbitration cases easier.

The Secretariat of the Court of Arbitration also benefits from technological resources for an accelerated treatment of arbitration cases, in the form of a case management system implemented over ten years ago. This database helps the Secretariat of the Court to manage all arbitration cases more promptly by allowing it (i) to edit correspondence in a procedure as well as the agendas for the Court's sessions, (ii) to monitor closely the different deadlines in all pending cases, (iii) to access the data of the parties, counsel, arbitrators, experts, members of the Court, stenographers, translators, and so on with the help of keyword searches, (iv) to amass different statistics, and (v) to calculate advances on costs and manage the financial aspects of the cases, among other things.

Last but not least, a new project called "Netcase" will be implemented in 2002, which will assist in expediting even more procedures by enabling rapid communications between the parties, the arbitrators and the Secretariat of the Court through the Internet. Every party and every arbitrator will be assigned a

57. 1999 Statistical Report, ICC BULL. (offprint).

login name and password which will grant them access to their arbitration case on the Netcase, and the ability to exchange documents, send and read messages as soon as they are edited in a secured space, as well as finding a document by help of keywords. All documents of an arbitration case will be stored on the Netcase, and this will enable the arbitrators and the parties to hold a hearing without having to carry voluminous documents; a laptop, login name and password will be sufficient to gain access to all documents filed in a case. Speed is also enhanced by technology and the ICC uses every possible resource to offer the parties in standard, non fast-track cases the celerity they expect from arbitration.

III. ICC EXPERIENCE IN FAST-TRACK PROCEDURES AND IN DISPUTES INVOLVING HIGH TECHNOLOGY

What is the ICC experience (A) in fast-track procedures, and (B) in disputes involving high technology?

A. *ICC Experience in Fast-Track Procedures: Case Studies*

No two fast-track procedures are identical. Fast-track cases submitted to the arbitration of the ICC (aside from the particular cases referred to above) offer some idea about the type of disputes and their length.

– A dispute arose in a case following a shareholding agreement concerning an increase in capital. The parties agreed to submit their dispute to arbitration under the ICC Rules and drafted an arbitration clause in which they foresaw (i) that the dispute be entrusted to a three-member arbitral tribunal, (ii) who the co-arbitrators would be, (iii) that the co-arbitrators would select the chairman, (iv) that they would accept the selection of the co-arbitrators without any reservation, (v) to grant the arbitrators the powers of *amiable compositeur*, (vi) the place of arbitration, and (vii) the language of the procedure. No express reference was made to a fast-track procedure, but the parties submitted a joint request for arbitration determining the issues to be decided, and they organized their procedure to allow for an accelerated treatment of the dispute. The request was filed in May 1987 and the award was rendered in July of the same year.

– In a case concerning exclusive distribution, the claimant sent to the respondent a notice of termination of their agreement. A request for arbitration was filed on July 1, 1991. The respondent did not contest the claimant’s right to terminate and so the main issue was whether the agreement would come to an end on December 31, 1991 as contended by the claimant, or on December 31, 1992 as contended by respondent. There was no fast-track provision in the arbitration clause but, in light of the circumstances and at the request of the parties, the sole arbitrator agreed that an award would be rendered before December 31, 1991, and it was in fact rendered in mid-December.

– In another case, the parties to a joint venture agreement agreed to cooperate to undertake the installation, operation and commercial exploitation of a cellular mobile telephone service in a particular country. The request for arbitration was filed in June 1993 and the dispute concerned several issues. The arbitration clause foresaw the constitution of the arbitral tribunal within ten days from the date of the notice sent by the party requesting arbitration. The following two provisions in the arbitration clause bear highlighting, as they tended to save time both in the process of selecting arbitrators and in the preparation of the request: (i) “no arbitrator shall be related to, employed by or have (or had) a substantial or ongoing business relationship with any party hereto or any of their respective affiliates,” and (ii) that the written notice requesting the dispute to be submitted to arbitration clearly stated the issue in dispute. No further stipulation was made with regard to an accelerated treatment of the matter. The ICC succeeded in constituting the arbitral tribunal within the fixed deadline. The terms of reference were signed in August 1993, following which the parties informed the arbitral tribunal and the ICC that they wished to negotiate and requested that the case be held in abeyance. The parties reached an amicable settlement and withdrew their case in February 1994.

– In a dispute concerning the purchase of gas, the parties agreed with the arbitral tribunal on a calendar which turned the case into a fast-track procedure. In their agreement concerning the procedure and the schedule, the parties foresaw (i) the deadline for submission of the respondent’s answer, (ii) the claimant’s submission one month later of all the evidence upon which it would rely, including affidavits and exhibits and its written argument, (iii) the respondent’s submissions of the same a month later, (iv) the claimant’s submission of any evidence or written argument in reply to the respondent’s submission fifteen days later, (v) that “given the expedited nature of this

arbitration, discovery will only proceed to the extent the parties agree or the Tribunal in its sole discretion orders it,” (vi) holding the hearings fifteen days later, (vii) organization of the hearings, and finally (viii) rendering of the award seven days after the hearings. The case began in November 1996. The arbitral tribunal was constituted two months later and drafted the terms of reference in three weeks from the transmission of the file. A first day of hearings took place and during the next day of hearings, the parties informed the tribunal that they had reached an agreement.

– In a construction case, the parties foresaw in their arbitration clause ten days for the nomination by each party of an arbitrator, and ten days for the selection by the co-arbitrators of the chairman of the arbitral tribunal, starting from the date of their confirmation by the Court. It was also stipulated that the award should be rendered within a period of 120 days from the date of filing of the request for arbitration. One of the co-arbitrators filed a qualified statement of independence indicating that the claimant’s counsel had been an associate attorney with his law firm. The parties were invited to comment within three days and the respondent submitted a list of questions to which it wished the co-arbitrator to respond. The co-arbitrator declined to respond in detail to each of the questions and confirmed his previous statement in light of the queries raised. He also confirmed his independence from the party that nominated him. The respondent stated that it could not comment further without precise answers from the co-arbitrator. Taking into consideration that the respondent did not oppose the co-arbitrator’s appointment, that the claimant’s counsel and the co-arbitrator worked in the same law firm but in different countries, and that the two had never worked together, the Court confirmed the co-arbitrator. A few days later the respondent filed a challenge against the co-arbitrator based on facts that had come to its attention after the co-arbitrator’s confirmation. The comments of the parties and the arbitrators were requested, on the basis of which the Court examined the challenge and upheld it. The case commenced in September 1997. The terms of reference were signed in January 1998 and the case concluded in May 1998.

– In another case relating to a manufacturing agreement, it was agreed in the arbitration clause that

“it is a mutual desire of the parties that the arbitration should be conducted from start to completion as expeditiously as possible. The

arbitrators shall before accepting appointment agree to render their decision to the parties in writing together with the underlying reasoning, including separate statements of findings of facts and conclusions of law, no later than 60 days after completion of hearings, but in no event later than 180 days from the date of appointment of the last of the arbitrators to be appointed. The parties agree to use their reasonable commercial efforts to assure that the arbitration procedure set forth herein, once commenced, shall be completed as expeditiously as possible.”

The arbitral tribunal was fully constituted in June 2000 and it submitted its award within the 180 days deadline. Taking into consideration that the award reached the ICC on the last day of such deadline, the parties agreed that the period be extended by a few days to enable the Court to scrutinize and approve the award, the arbitrators to sign it, and the Secretariat to notify the parties of the originals of the award.

– In another matter, several parties executed a shareholders’ agreement organizing cooperation among themselves in the field of mobile telephones and internet services. It was contended that one of the parties breached its contractual obligation of information *vis-à-vis* the other parties by entering into negotiations with a third party. Compensation for damages was consequently sought. The arbitration clause is interesting and it serves as a reminder of all the cautions that should be taken by the parties with respect to fast-track procedures: among others, providing for an extension of time should the short time-limit not be respected. The clause provided that:

“[t]he parties agree and shall stipulate in any request concerning a dispute arising exclusively in relation to clause [a specific clause in the contract] the urgent nature of the dispute and shall request that the Arbitral Tribunal conduct all arbitration proceedings with respect to the claim raised in the request on a fast-track basis, such arbitration to be conducted as expeditiously as possible, time being of the essence. Any request shall further provide that the fast-track arbitration shall be conducted during a period that shall not exceed 6 months, commencing on the date upon which the files relating to the matters in dispute have been received by all three arbitrators and expiring on the date upon which the ICC Secretariat notifies the parties to the arbitration proceedings of the final award. The parties agree that the Arbitral

Tribunal may, in its sole discretion, determine the schedule by which all procedural steps involved in the arbitration process shall be undertaken and completed during such 6-month period. The parties agree that any failure to comply with the fast-track procedures described above shall not deprive the Arbitral Tribunal of jurisdiction over the disputed matter and that any arbitration proceedings commenced hereunder shall be continued under the ICC Rules in accordance with the standard rules and procedures of the ICC to the extent permissible, as if fast-track procedures had not previously been commenced. The parties shall comply as promptly as practicable with all requests or requirements made or imposed by the Arbitral Tribunal appointed hereunder or by the Court, including any requests to produce documentary evidence, witnesses, expert witnesses, or any other requests. Each party agrees to waive to the fullest extent permitted under applicable law, any and all claims or causes of action it may have in connection with any violation or alleged violation of such party's due process rights resulting from the conduct of any fast-track arbitration proceedings hereunder."

The case is still pending.

– In a dispute concerning a claimant supplying software, consultation and operation services for the respondent's information technology transportation system, the following provision was indicated in the arbitration clause:

"the duration of the arbitral proceeding shall not exceed 90 days commencing from the date of the last arbitrator accepting his or her appointment. If the arbitral award is not issued within such 90 days, then the arbitration proceeding shall be automatically renewed for another 90 days. Evidence may not be taken in the arbitral proceeding except in the presence of both parties."

The request was filed in March 2000. The co-arbitrators could not agree on the chairman who finally had to be appointed by the Court, and the arbitral tribunal was only constituted in July 2000. After transmission of the file to the tribunal, it established the terms of reference within two weeks. Thereafter the parties requested that no further steps be taken as they had commenced settlement discussions. The case was finally withdrawn in February 2001.

This illustration leads to the following observations: first, an expedited procedure can be requested at any time, either in the arbitration clause or when the dispute occurs, or even during the procedure; second, deadlines do not all have to be of the same length, as one can be set for the constitution of the arbitral tribunal and another for the rendering of the award, or a single one can be set for the rendering of the award (as has already been observed⁵⁸); third, entrusting the ICC with the arbitration procedure is reassuring, knowing that any procedural aspect, including challenges, can be dealt with promptly to secure the rendering of a decision within the contractual deadline; and fourth, the effect of accelerating the process can sometimes lead the parties to negotiation and amicable settlement of their dispute.

B. Disputes Involving High Technology Submitted to the ICC

The subject of this paper is not disputes involving high technology. Nevertheless, considering the seminar's main topic, it is worthwhile to mention the types of disputes submitted to ICC arbitration in this field.

It is interesting first to revisit certain dispute resolution projects undertaken in the field of telecommunications. An evaluation of the opportunities for self-regulation in the resolution and avoidance of disputes in the telecommunication industry was undertaken in 1998 by a Working Group on Dispute Resolution established by the European Telecommunications Platform ("ETP"),⁵⁹ in which several key arbitration institutions participated, such as AAA, ICC, LCIA, SCC, WIPO and other organizations. The objectives of this survey were to identify and describe existing procedures, and to produce a written report analyzing the feasibility of applying those various methods. The International Forum on Dispute Resolution in Telecommunications, which also contributed to this survey, established a Memorandum of Understanding for Dispute Resolution in Telecommunications,⁶⁰ proposing different mechanisms for expeditious dispute

58. Davis et al., *supra* note 3.

59. Inventory of Dispute Resolution Mechanisms: What are the Choices for the Telecom-munication Sector? Information can be obtained at the European Telecommunication Platform, c/o Fabrimetal, rue des Drapiers 21, 1050 Brussels, Belgium.

60. Memorandum of Understanding for Dispute Resolution in Telecommunications, Proposed by the International Forum on Dispute Resolution in Telecommunications

resolution, such as dispute avoidance, mediation, non-binding expert determination, fast-track ninety-day arbitration, nine-month arbitration, and last offer arbitration.

In an analysis undertaken the same year by the Working Group of the ICC Commission on International Arbitration, it was considered that the establishment of an arbitration mechanism specific to the telecommunications sector is not necessary, given the flexibility of the existing ICC Arbitration Rules.⁶¹ With respect to the experience of the ICC in the field of high technology, there has been an increase in disputes in recent years, with thirty-one cases related to the telecommunications industry filed in 1998, thirty-three in 1999 and fifty in 2000, which represented 9.3% of the total number of arbitration cases filed in 2000. Arbitration is very well adapted to dispute resolution in this particular economic sector, as is evidenced by a few examples of cases submitted to ICC arbitration that give an idea of the type of disputes and the relief sought.

- Following a pre-bid agreement entered into by the parties to collaborate in the submission of a bid for the supply of telecommunication cables and services, it was agreed that if the claimant was awarded the contract, the parties would negotiate, in good faith, the final conditions for their supply. The claimant was awarded the contract, but it was alleged that the parties could not reach an agreement on the conditions. The claimant sought declaratory relief, stating that the pre-bid agreement did not give the respondent any rights whatsoever and that it was free to negotiate the supply of cables and services with any other qualified supplier.
- Following a contract in which the claimant and the respondent were to provide a mobile earth station, the parties disputed the precise nature and extent of their relationship.

(R. Hill ed., June 17, 1999); available at <http://www.icc-uk.com/download/ARBWORKU.html> (visited November 1, 2001).

61. Herman Verbist & Christophe Imhoos, *Arbitration, Telecommunications and Electronic Commerce*, 10(2) ICC BULL. p. 20 (1999).

- In a case in which the claimant agreed to provide the respondent with telecommunications services, including international call-back services, the respondent refused to pay for the services rendered, leading the claimant to terminate the agreement. In its request for arbitration, the claimant sought payment of the amounts due. It is interesting to note that in their arbitration clause the parties had foreseen that “one arbitrator knowledgeable in the field of international telecommunications” would resolve the dispute. This requirement was taken into consideration by the ICC Court for the appointment of the sole arbitrator.
- In another case, the parties had a joint development agreement for the development of a digital cellular system. The claimant alleged that the respondent had breached the agreement and sought payment of damages.
- In a case in which the respondent agreed to grant the claimant access to the telephone network in a limited region of a country, the claimant alleged that the respondent had granted privileges to some competitors in the form of a more favorable access to the network. The claimant requested the respondent to extend the access and grant it the same privileges as provided to its competitors.
- Another case concerned an agreement to cooperate in the fields of research and development, international networks, data communication, information systems and so on. The parties extended their strategic alliance through the establishment of a cross shareholding. The claimant filed a request for arbitration, claiming that the respondent had breached the cooperation and shareholding agreements by proposing a merger to a third party in breach of the express terms of the agreement. The claimant sought a declaration that the agreements were terminated, as well as payment of damages.
- In an aerospace industry case, the litigants disagreed about the price that would apply in one of their agreements. The respondent was to have promised the claimant the same price as was applied by the previous supplier. Pursuant to the non-fulfilment by the respondent of his obligation, the claimant wished to terminate the contract and sought a declaration that the termination was justified.

- In a joint venture agreement in the field of telecommunications, in which the parties had included a non-competition clause, the issue concerned violation of the clause by the respondent who allegedly entered into negotiations with a non-party competitor.

- Following an agreement pursuant to which the respondent provided the claimant with telecommunication equipment and related software, the claimant alleged that the equipment had never functioned properly and that the respondent's attempts to repair it had only aggravated the situation. The claimant alleged that it suffered lost profits and irrecoverable costs as a result of the respondent's breach, and sought reparation.

These examples allow the following conclusions to be drawn: first, the types of disputes involved are similar to any other type of contractual dispute, *i.e.*, breach of contract, claims for damages, declarations that an agreement is terminated, non-fulfilment of contractual obligations, etc.; second, the disputes were dealt with in accordance with the ICC Arbitration Rules like any other dispute to which the parties referred; and third, the parties did not request that the disputes be dealt with expeditiously because of the nature of the contract.

IV. CONCLUSION

Assuming that a specific set of fast-track arbitration rules is useful, and notwithstanding the fact that fast-track arbitration is attractive, this mode is still not advisable in all circumstances. The opinions given in this paper are intended to draw attention to the difficulties practitioners may face with regard to fast-track arbitration – not to discourage them from having an expedited procedure. As long as it is possible to reduce unnecessary delays and accelerate the rhythm of a procedure using normal arbitration rules with the help of arbitration institutions such as the ICC, do the parties really need to go faster?

Before opting for fast-track arbitration, and considering the points raised in this paper, the preliminary questions the practitioner should be able to answer affirmatively and without any doubts are:

1. Do I want to go faster? Yes, definitely.

2. Do I have a good reason for doing this? Yes, definitely.
3. Will I be able to cope with such an expeditious procedure?
Yes, I am sure I can.
4. Will the opposing party also be capable of this? Yes, it will also certainly be capable.

If the answers to these questions are negative, and given the numerous risks posed, *e.g.*, by the different cultures of the parties in international arbitrations, the careful thought that must go into the drafting of a fast-track arbitration clause, the unrealistic deadlines that may be fixed when due process is the primary concern, the unavoidable conclusion is that fast-track arbitration is not a solution for everyone. I therefore leave it to the future to convince us of the contrary.