DUE PROCESS CONSIDERATIONS IN EXPEDITED ARBITRATIONS

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Abstract

Arbitration is a preferred method for resolving international commercial disputes. However, it has been criticized as being too lengthy and costly for the efficient resolution of these disputes. To address these concerns, a number of leading arbitration institutions have adopted expedited procedures to shorten the process and make it more efficient. However, the concern is that by shortening the process, these rules may prevent parties from presenting their cases fully and thus deny them due process. This note looks at the due process considerations in four recently adopted or drafted expedited arbitration rules and examines how the due process concerns may be addressed.

I. Introduction

Expedited arbitration procedures are a relatively new feature in international commercial arbitration. They respond to the frequently heard mantra of saving time and costs in arbitration and recognize that a "*one size*" arbitration procedure does not fit all cases. A survey conducted in 2019 of users of arbitration in construction disputes found that a principal objection was that arbitrations of construction disputes involving claims below USD 10 million were too costly, and that the cost of those arbitrations was a barrier to justice and a fair resolution of the dispute.[1]

Currently, expedited arbitration rules have been adopted by a number of leading arbitration institutions, including the International Chamber of Commerce ["**ICC**"],[2] the Arbitration Institute of the Stockholm Chamber of Commerce,[3] the Singapore International Arbitration Centre,[4] the Hong Kong International Arbitration Centre,[5] the American Arbitration Association,[6] the International Centre for Dispute Resolution,[7] the International Institute for Conflict Prevention and Resolution ["**CPR**"],[8] the World Intellectual Property Organization,[9] and Judicial Arbitration and Mediation Services.[10] The London Court of International Arbitration ["**LCIA**"] has expedited

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1 Queen Mary University of London & Pinsent Masons, *2019 International Arbitration Survey – International Construction Disputes* (2019), at 5, 15–16, *available at* http://www.arbitration.qmul.ac.uk/research/2019.

2 *See* International Chamber of Commerce (ICC), Arbitration Rules 2021, art. 30 & app. VI [*hereinafter* "ICC Rules"].

3 *See* Arbitration Institute of Stockholm Chamber of Commerce (SCC), Rules for Expedited Arbitrations 2017 [*hereinafter* "SCC Expedited Rules"].

4 *See* Singapore International Arbitration Centre (SIAC), Arbitration Rules 2016, r. 5 [*hereinafter* "SIAC Rules"].

5 *See* Hong Kong International Arbitration Centre (HKIAC), Administered Arbitration Rules 2018, art. 42 [*hereinafter* "HKIAC Rules"].

6 *See* American Arbitration Association (AAA), Commercial Arbitration Rules and Mediation Procedures 2013, arts. E-1–E-10.

7 *See* International Centre for Dispute Resolution (ICDR), International Dispute Resolution Procedures (Including Mediation and Arbitration Rules) 2014, arts. E-1–E-10.

8 *See* International Institute for Conflict Prevention and Resolution (CPR), Fast Track Administered Arbitration Rules 2020 [*hereinafter* "CPR Fast Track Rules"].

9 *See* World Intellectual Property Organization (WIPO), Expedited Arbitration Rules 2020.

10 *See* JAMS Comprehensive Arbitration Rules and Procedure 2021, rr. 16.1 & 16.2; JAMS Engineering and Construction Arbitration Rules & Procedures For Expedited Arbitration 2021.

rules only for the formation of the tribunal and the replacement of arbitrators,[11] and leaves it to the tribunal to use the flexibility of the LCIA rules to streamline the process.

Part II of this note will examine the principal features of expedited arbitration rules and how they are drafted to provide due process to the expedited procedure by using four examples – the ICC Expedited Procedure Rules ["**ICC Expedited Rules**"], the CPR Fast Track Administered Arbitration Rules 2020 ["**CPR Fast Track Rules**"], the United Nations Commission on International Trade Law ["**UNCITRAL**"] Expedited Arbitration Rules 2021 ["**UNCITRAL Expedited Rules**"][12] and the Rules on the Efficient Conduct of Proceedings in International Arbitration 2018 ["**Prague Rules**"].[13] Part III of this note analyses the due process considerations in expedited arbitration procedures and, in Part IV, it provides some concluding comments.

II. Features of Expedited Arbitration Procedures

The main purpose the expedited arbitration rules is to shorten the length of time between the commencement of a case in arbitration and the issuance of the award, thereby reducing costs. Essentially, there are six common features to accomplish this:

First, the expedited arbitration rules abbreviate the process of selecting the tribunal and show a strong preference for the tribunal to consist of a sole arbitrator.[14]

Second, they compress the procedures at the outset of the arbitration by requiring the claimant to "*front- load*" its claim at the time it commences the arbitration and the respondent to do the same with its defence and counterclaim, and impose constraints on the ability of parties to amend their pleadings or submit later pleadings.[15] This means that the initial submissions should include a summary of facts to be proven and legal grounds supporting the claim, defence or counterclaim. The party making the initial submission should also provide the names of fact witnesses and the issues as to which they will testify or, alternatively, provide copies of their witness statements with the initial submission.[16] They also require copies of the documents to support claims, defenses or counterclaims—or at least a reference to them—to accompany the initial submission.[17]

Third, the expedited arbitration rules significantly discourage discovery or disclosure requests. To the extent allowed, they are limited to documents that are relevant and known to be in the possession of the other party, and the request must be proportionate to the amount in

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11 *See* London Court of International Arbitration (LCIA), Arbitration Rules 2020, arts. 9A & 9C.

12 United Nations Comm'n on Int'l Trade Law (UNCITRAL), Expedited Arbitration Rules, U.N. Doc. A/76/17 (Sept. 19, 2021), *available at* https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral_ear-e_website.pdf [*hereinafter* "UNCITRAL Expedited Rules"].

13 *See* Rules on the Efficient Conduct of Proceedings in International Arbitration (Dec. 14, 2018), *available at* http://praguerules.com/upload/medialibrary/9dc/9dc31ba7799e26473d92961d926948c9.pdf [*hereinafter* "Prague Rules"]. The Prague Rules are not designed to replace arbitration rules. They are an independent set of rules adopted by an ad hoc group of lawyers principally from Eastern Europe and Russia which are intended to provide a framework or guidance for arbitral tribunals and parties on how to increase the efficiency of arbitration by encouraging a more active role for arbitral tribunals in managing the proceedings.

14 *See, e.g.,* CPR Fast Track Rules, r. 3.2; ICC Rules, app. VI, art. 2: SIAC Rules, art. 5.2(b); HKIAC Rules, art. 42.2(a); SCC Expedited Rules, art. 17.

15 *See, e.g.,* CPR Fast Track Rules, rr. 2.3, 2.4 & 2.5; UNCITRAL Expedited Rules, art. 13.

16 *See, e.g.,* CPR Fast Track Rules, r. 2.3 (d).

17 *See, e.g., id.* r. 2.3 (f).

controversy.[18] In other words, requests for "*any and all*" documents in the possession of the other party (i.e., a "*fishing expedition*") are prohibited.

Fourth, while the rules usually do not eliminate the holding of a hearing during the arbitration, they allow the tribunal to render the award solely on the basis of the papers submitted.[19]

Fifth, they require the final award to be issued within a relatively short period of time after the commencement of the arbitration and in some cases permit the award to be succinct, i.e., an award that is shorter in length than would be the case in a non-expedited arbitration.[20]

Sixth, the rules often expressly permit the tribunal to impose costs on a party that did not cooperate with the expedited treatment of the case.[21]

The four examples of expedited arbitration rules referred to earlier illustrate these principles but handle the subject in somewhat different ways.

A. ICC Expedited Rules

The ICC Expedited Rules are very succinct and appear as Annexure VI to the 2021 ICC Arbitration Rules.[22] This means that an ICC expedited arbitration will be conducted according to the ICC Arbitration Rules except to the extent they are expressly modified by the ICC Expedited Rules.[23] The ICC Expedited Rules are applicable when the amount in dispute at the time the arbitration agreement was concluded is USD 3 million or less.[24] A distinguishing characteristic is that they are an "*opt out*" set of rules, meaning that they will apply to each case where the amount in dispute is at or below the threshold amount, unless the parties agree to opt out or the ICC Court of Arbitration, on its own motion or upon the request of a party, and after consultation with the parties and the tribunal, determines that it is inappropriate to apply them to that case.[25] At the expense of party autonomy, the ICC Expedited Rules provide that the tribunal will be a sole arbitrator even where the arbitration clause in the contract specifies a three-member tribunal.[26] This is in contrast to the rules of other institutions that, while expressing a preference for the tribunal to be a sole arbitrator, give primacy to party autonomy or empower the institution to decide on the number of arbitrators depending on the complexity of the case.[27] The ICC Expedited Rules require that the award be must be rendered within six months after the date of the case management conference and eliminate the requirement in the ICC Arbitration Rules that the tribunal must prepare terms of reference for submission to the ICC Secretariat at the outset of the

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18 *See, e.g., id.* r. 5.3.
19 *See, e.g.,* CPR Fast Track Rules, r. 6.2; HKIAC Rules, art. 42.2(e).
20 *See, e.g.,* CPR Fast Track Rules, r. 7.1.
21 *See, e.g., id.* r. 8.
22 ICC Rules, app. VI [*hereinafter* "ICC Expedited Rules"].
23 *Id.* art. 30; ICC Expedited Rules, art. 1(1).
24 ICC Rules, art. 30(2); ICC Expedited Rules, art. 1(2). The USD 3,000,000 limit is for arbitrations commenced on or after January 1, 2021. For cases filed between 2017 and 2021, the limit was USD 2,000,000.
25 ICC Rules, art. 30(2); ICC Expedited Rules, art. 1(4). Since Article 30(2) of the ICC Rules provides that the ICC Expedited Procedure takes precedence over any contrary term of the arbitration agreement, parties are restricted from opting out of parts of the ICC Expedited Rules only allowing them to opt out completely.
26 ICC Expedited Rules, art. 2.
27 *See, e.g.,* CPR Fast Track Rules, r. 3.2.

arbitration.[28] The tribunal is given the authority, after consulting with the parties, to adopt any procedural measures that it deems appropriate. These measures may include limiting document production and the number, length and scope of submissions, requiring written witness evidence, and deciding the dispute without holding a hearing.[29] When a hearing is to be held, the arbitral tribunal may conduct it by videoconference, telephone or similar means of communication.

B. CPR Fast Track Rules

The CPR Fast Track Rules are lengthier than the ICC Expedited Rules, but like the ICC Expedited Rules they are tied into the CPR Administered Arbitrations Rules, which apply except to the extent they are expressly modified by the CPR Fast Track Rules. Unlike the ICC Expedited Rules, the CPR Fast Track Rules are "*opt-in*" rules, although at any time during the proceedings, the parties may mutually agree to opt out of the rules, and the tribunal in exceptional cases and at the request of a party may determine that these rules should not apply to a given case. A list of the non-exclusive factors that the tribunal may consider in making this determination include (i) the complexity of the case, (ii) the stage of the proceedings, (iii) whether the parties could foresee the circumstances relied upon to support the request when they agreed to adopt these rules, (iv) the urgency of the need to resolve the dispute, (v) the need for efficiency and expedition and (vi) the need to ensure due process and procedural fairness.[30] Further, there is no threshold limit in the CPR Fast Track Rules, meaning that the rules may be used for large as well as smaller cases. The CPR Fast Track Rules specify that the parties may pick a date between 90 and 180 days after the tribunal has been constituted for the delivery of the award, and that absent any such designation, the award shall be delivered within 90 days after the constitution of the tribunal (which is a much shorter period of time than under the ICC Expedited Rules).[31] They call for a sole arbitrator but CPR, at the request of a party, may determine that three arbitrators shall be appointed, and the factors that CPR shall consider will be the legal or factual complexity of the case and the total amount in dispute.[32] They require enhanced information to be disclosed at the outset, including a summary of the facts to be proven, names and addresses of known potential fact witnesses, and identification of the issues that may be the subject of expert witness testimony. They contain limitations on document discovery or disclosure, and provide that the award must be succinct.[33]

C. UNCITRAL Expedited Rules

In 2018, the UNCITRAL Commission mandated its Working Group II (Dispute Settlement) take up issues relating to expedited arbitrations in order to take into account the experience and feedback of many arbitral institutions, to strike a balance between efficiency and due process, and to encourage institutions to adopt or modify their rules on expedited arbitration.[34] The Working Group held sessions in Vienna and New York in 2019 and 2020 to prepare provisions on expedited arbitrations, and in March 2021 Working Group II finalized the draft UNCITRAL Expedited

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28 ICC Expedited Rules, art. 3(1); ICC Rules, art. 31(2).

29 ICC Expedited Rules, arts. 3(4) & 3(5).

30 CPR Fast Track Rules, r. 1.6.

31 *See, e.g.,* CPR, Commentary for CPR Fast Track Rules for Administered Arbitration, Objective of Rules, *available at* https://www.cpradr.org/resource-center/rules/arbitration/fast-track-administered-arbitration-rules.

32 CPR Fast Track Rules, r. 3.2.

33 *Id.* rr. 2.3, 5.1, 5.2 & 7.1.

34 *See* UNCITRAL, Draft Explanatory Note to the UNCITRAL Expedited Arbitration Rules, Note by the Secretariat, ¶ 1, U.N. Doc. A/CN.9/WG.II/WP.219 (Apr. 15, 2021) [*hereinafter* "Draft Explanatory Note"].

Rules for submission to the Commission. These were adopted in July 2021 and entered into force on September 19, 2021. Like both the ICC Expedited Rules and the CPR Fast Track Rules, the UNCITRAL Expedited Rules are presented as an appendix to the UNCITRAL Arbitration Rules 2010 ["**UNCITRAL Arbitration Rules**"], meaning that the latter will apply except to the extent expressly modified by the former. Like the CPR Fast Track Rules, the UNCITRAL Expedited Rules are "*opt-in*" rules and there is no threshold limit above which they would not be applicable.[35] At any time during the proceedings, the parties may agree that the UNCITRAL Expedited Rules shall no longer apply.[36] A party may also request the tribunal to determine whether the UNCITRAL Expedited Rules shall no longer apply, in which case the tribunal is directed to take into account a number of factors in making its determination.[37] These include the complexity of the dispute, the anticipated amount in dispute, the urgency of resolving the dispute and the stage of the proceedings at which the request is made.[38] If the expedited rules no longer apply to the arbitration, the tribunal will remain in place, and the arbitration will be conducted in accordance with the UNCITRAL Arbitration Rules.[39] The UNCITRAL Expedited Rules specify that the award shall be made within six months from the date of the case management conference, but in exceptional circumstances this limit may be extended to nine months.[40] They contain many of the same limitations in the two other expedited rules discussed in Parts II.A and II.B above. On the subject of whether hearings shall be held, the UNCITRAL Expedited Rules provide that the tribunal, after inviting the parties to express their views and in the absence of a request to hold hearings, may decide that hearings shall not be held.[41] In other words, the tribunal must hold hearings if a party requests. By contrast, the ICC Expedited Rules and the CPR Fast Track Rules allow the tribunal to proceed with determining issues solely on the basis of documents and written submissions without a hearing provided it has consulted with the parties beforehand.[42]

D. Prague Rules

The Prague Rules are stand-alone rules not connected with any arbitration institute or international organization, and they do not supplement to an existing set of arbitration rules. Unlike the arbitration rules of most arbitration institutions, which are required to be applied in whole and may not be used only in part, parties may choose to apply some parts of the Prague Rules while agreeing not to apply other parts.[43] They may be used in administered and non-administered arbitrations. A special feature of the Prague Rules is that they give the tribunal extensive authority, far more than in any other set of expedited rules. The tribunal is encouraged to be pro-active and inquisitorial. It can establish the facts and express its view at an early stage of the proceedings on the allocation of the burden of proof between the parties, on the relief sought, on the disputed issues and on the weight and relevance of evidence submitted by the parties.[44] It is encouraged to establish the facts in a case which it considers relevant for the resolution of the dispute. It can call

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35 *See* UNCITRAL Arbitration Rules, art. 1 ¶ 4.
36 UNCITRAL Expedited Rules, art. 2.1.
37 *Id.* art. 2.2.
38 *See* Draft Explanatory Note, *supra* note 34, ¶ 13.
39 UNCITRAL Expedited Rules, art. 2.3.
40 *Id.* arts. 16.1 & 16.2.
41 *Id.* art. 11.
42 ICC Expedited Rules, art. 3(5); CPR Fast Track Rules, r. 6.2.
43 Prague Rules, Preamble, at 3.
44 *Id.* art. 2.4(e).

witnesses, and it can even exclude a witness if it considers that the testimony of that witness would be irrelevant, immaterial, unnecessarily burdensome or duplicative, or for any other reasons not necessary for the resolution of the dispute.[45] It may appoint one or more independent expert witnesses at the cost of the parties, and require the parties to provide the expert witness so appointed with all the information and documents that the expert needs to prepare its report.[46] While a party is able to appoint an expert witness, this will not prevent the tribunal from appointing its own expert witness. The parties are encouraged to avoid any form of document production, including e-discovery.[47] If a party in a particular case needs certain documents from the other party, it should indicate this at the case management conference and provide reasons to the satisfaction of the tribunal as to why such documents are needed. Such a request cannot be made at a later stage, unless the requesting party proves to the satisfaction of the tribunal that the existence of exceptional circumstances prevented the party from making its request at the case management conference.[48] While hearings are not prohibited, the tribunal and the parties are encouraged to seek to resolve the dispute on a documents-only basis.[49] The Prague Rules contain an express provision—*iura novit curia*, i.e., the court knows the law—permitting the tribunal to apply legal provisions not pleaded by the parties, if it finds it necessary, including, but not limited to public policy rules, provided it seeks the parties' views on the legal provisions it intends to apply.[50] This proviso is particularly important as it may limit the use by the tribunal of *iura novit curia* and thus insulate the award from being vacated or being held unenforceable on the grounds that the tribunal exceeded its mandate. The Prague Rules also encourage amicable settlement of the dispute, permit any member of the tribunal to act as a mediator in the settlement discussions, and even permit that member to return as an arbitrator in the arbitration proceedings in the event the mediation is unsuccessful, provided that all the parties give their written consent to this at the end of the mediation.[51] Thus, the Prague Rules, by giving the tribunal tighter control over the proceeding, may be more efficient than other forms of expedited arbitration in a case where the parties are earnest in their pursuit of an expedited resolution of the dispute.

III. Due Process Considerations in Expedited Arbitration

Before examining the due process considerations involved in expedited arbitration proceedings, we should look at the main features of due process. While there is no specific definition of due process, it has been called an umbrella concept in the arbitration context, covering various guarantees of procedural justice that are disbursed across the arbitration framework.[52] Due process is the opposite of arbitrary and capricious. We find elements of due process in national laws, for example, the Federal Arbitration Act ["**FAA**"] of the United States[53] and the Arbitration Act 1996

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45 *Id.* art. 5.3.
46 *Id.* art. 6.2(d).
47 *Id.* art. 4.2
48 *Id.* arts. 4.3 & 4.4.
49 *Id.* art. 8.1.
50 *Id.* art. 7.2.
51 *Id.* art. 9.
52 *See* Dietmar Czernich, Franco Ferrari & Friedrich Rosenfeld, *Chapter 1: General Report*, *in* DUE PROCESS AS A LIMIT TO DISCRETION IN INTERNATIONAL COMMERCIAL ARBITRATION 2 (Franco Ferrari, Friedrich Rosenfeld & Dietmar Czernich eds., 2020) [*hereinafter* "Czernich et al."].
53 *See* Federal Arbitration Act 1925, 9 U.S.C. Ch. 1 (U.S.) [*hereinafter* "Federal Arbitration Act"].

of the United Kingdom.[54] We also find it in treaties such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**New York Convention**"],[55] in soft law instruments such as the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration ["**IBA Guidelines**"],[56] and in the rules of arbitration institutions. For example, Section 10 of the FAA provides that a U.S. district court may vacate an arbitration award where the award was procured by corruption, fraud, or undue means; where there was evident partiality in the arbitrators or any of them; where the arbitrators were guilty of misconduct in refusing to postpone the hearing or refusing to hear evidence; and where the arbitrators exceeded their authority.[57] Another example is found in Article V(1)(b) of the New York Convention, which provides that recognition and enforcement of an award may be refused if "*[t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present its case.*"[58]

A. Elements of Due Process

In general, the elements of due process cover five important concepts: (i) the arbitrator or arbitral tribunal must be independent and impartial, (ii) a proper notice of the proceedings must have been given; (iii) the parties have a right to equal treatment, including that all applicable procedural rules will be available to both sides unless waived or overridden by the tribunal, (iv) except in very rare and exceptional circumstances, there must be no *ex parte* contacts between a party and the arbitral tribunal, and (v) the parties have the right to be heard.[59] This last concept itself has four components: (a) the right to make submissions and evidentiary offers in support of one's case, (b) the right to comment on the submissions and evidentiary evidence offered by the opposing party, (c) the right to comment on the findings of the tribunal and (d) the tribunal has a duty to take cognizance of and consider the parties' submissions and evidentiary offers.[60]

B. Balancing Due Process, Efficiency and Party Autonomy

In an expedited arbitration it is necessary to strike a balance between these rights on the one hand, particularly the right to be heard, and the speed and efficiency of the expedited process on the other hand. In the first three examples, viz. the ICC Expedited Rules, CPR Fast Track Rules and UNCITRAL Expedited Rules, the principal due process objection seems to be that the deadlines and time frames in a given case may be too rigid, and one of the parties may find that it cannot present its case fully. However, since a party has the right to request the ICC Court to remove the case from the expedited procedures or, in the case of a CPR or UNCITRAL expedited arbitration where the parties have opted in, they may mutually agree to opt out or one of the parties may ask the tribunal to remove the case from the expedited proceedings. Thus, the parties have some degree of protection against the process becoming too abbreviated to allow a party to present its case. In such a situation, the parties would find themselves back in the non-expedited rules of the

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54 *See* Arbitration Act 1996, c. 23, §§ 33 & 68(2)(a) (Eng.).

55 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 6, 1958, 330 U.N.T.S. 38 [*hereinafter* "New York Convention"].

56 Int'l Bar Ass'n (IBA), Guidelines on Conflicts of Interest in International Arbitration (Oct. 23, 2014) [*hereinafter* "IBA Guidelines"].

57 Federal Arbitration Act, §§ 10(a)(1)–(3).

58 New York Convention, art. V(1)(b).

59 Czernich et al., *supra* note 52, § 1.03, at 19–38.

60 *Id.*

institution with its expanded time frames. Doing that would slow down the process and might benefit the party seeking to delay, but it could be detrimental to the party who had selected an expedited arbitration because it wanted to have the case heard and determined in a relatively short period of time. A potential due process issue arises where one of the parties does not agree to opt out of the expedited proceedings, and the ICC Court or the tribunal in CPR or UNCITRAL proceedings does not convert the proceedings to a non-expedited arbitration. In such a situation, the party denied the ability to have a non-expedited arbitration might argue that its due process rights were violated because it was not given the right to present its case fully. It is hoped that when parties consider whether to use an expedited process for their arbitration, irrespective of whether the process is opt-in or opt-out, they will carefully evaluate the trade-offs in using a more expeditious process and will conclude at the outset of their case that they should be able to present their case fully within the abbreviated schedule.

C. Prague Rules: Tipping the Balance

The Prague Rules present added issues. Here, when considering the right to be heard, there are many norms in traditional non-expedited arbitrations, especially in common law jurisdictions, that are turned on their head. Control over the process is moved from the parties to the tribunal which is directed to act in a pro-active and inquisitorial manner. If the tribunal expresses its preliminary views on the allocation of the burden of proof between the parties, on the relief sought or the disputed issues, or on the weight and relevance of the evidence submitted by the parties, it could give rise to the ground that the tribunal was biased and potentially lead to a vacatur of the award. The Prague Rules, however, specifically provide that the tribunal "*expressing such preliminary views shall not by itself be considered as evidence of the tribunal's lack of independence or impartiality, and cannot constitute grounds for disqualification.*"[61] The question is raised whether a court considering vacatur of an award or an arbitral institution considering the removal of an arbitrator—on the ground that the arbitrator was biased because it had expressed its views at a preliminary stage of the proceedings—will accept this provision in the Prague Rules on the grounds that the parties agreed to it by agreeing to the application of the Prague Rules, and thereby deny vacatur of the award or exculpate the arbitrator from being removed. Another example of where the Prague Rules differs from customary practice in both common law and civil law jurisdictions is that they allow the tribunal to refuse to hear a factual witness if it feels that the witness's testimony would be "*irrelevant, immaterial, unreasonably burdensome, duplicative or for any other reasons not necessary for the resolution of the dispute.*"[62] This takes control of the arbitration away from the parties and counsel, and places it in the hands of the tribunal and is perhaps the strongest reason why the Prague Rules are not favoured in common law jurisdictions where counsel for the parties customarily take the lead on the selection, examination and cross examination of witnesses. Yet another example of where the Prague Rules differ from the practice in many jurisdictions and the IBA Guidelines is where they allow an arbitrator, who has become the mediator in a dispute that has moved from arbitration to mediation, to return to being an arbitrator if the mediation fails to result in a settlement of the case. The Prague Rules expressly allow the mediator to return to being an arbitrator in the case provided all the parties have consented in writing to this after the mediation has concluded.[63] The

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61 Prague Rules, art. 2.4(e).
62 *Id.* art. 5.3.
63 *Id.*

arbitrator, as mediator, however, will likely have gained a significant amount of inside information while acting as mediator, potentially making that mediator biased when he or she becomes the arbitrator again. The unresolved issue is whether the requirement of written consent by all the parties after the mediation has concluded to permit the mediator to return to his or her prior statues as arbitrator will be adequate grounds to avoid a vacatur of the award by reason of bias.

Thus, in addition to the due process considerations listed above in the case of an ICC, CPR or UNCITRAL expedited arbitration, which should be able to be accommodated by careful planning by the parties and their counsel, the Prague Rules present additional due process concerns by moving control over the process from the parties and their counsel and placing it in the hands of the tribunal, thereby potentially limiting the parties' right to be heard in fundamental ways.

IV. Conclusion

Expedited arbitration rules play a very valuable role in resolving international commercial disputes by providing a streamlined procedure for the resolution of such disputes by arbitration. Arbitration is a preferred method for resolving international commercial disputes because it can provide confidentiality, party autonomy, and forum selection and the selection of decision makers who are knowledgeable in the field of the dispute. However, users have become increasingly wary of using arbitration because of the length of time it takes to reach a decision and the relatively high costs involved. Expedited forms of arbitration can save time and costs. But not all cases are suitable for an expedited process, especially large complex matters with voluminous documents and many witnesses. Trying to fit such a case into an expedited process will likely deprive a party of a fair opportunity to present its case, which could lead to an infringement of due process and a denial of justice. But for smaller cases, or for cases where there is an ongoing relationship between the parties that should be preserved, the resolution of the dispute through an expedited procedure is ideally suited because they will be resolved relatively quickly and without a large expenditure of funds. It should be possible to structure an expedited arbitration for those cases in ways that are not only efficient and less costly, but also ensure that the parties are provided with due process.