

**Note by the Secretariat: The following contains a submission received by the Secretariat on 28 January 2020 from the Government of the Kingdom of Bahrain in preparation for the seventy-first session of Working Group II. It is in the form in which the submission was received and in English only.**

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## **Issues relating to expedited arbitration: comments by the Kingdom of Bahrain to Working Group II of UNCITRAL**

### **I. Introduction**

1. In this submission, the Kingdom of Bahrain provides its perspective on issues relating to expedited arbitration. For this purpose, it will set out how the 2017 Rules of Arbitration of the Bahrain Chamber for Dispute Resolution (“the 2017 BCDR-AAA Rules” or “the Rules”) improve efficiency in the conduct of arbitral proceedings, whilst safeguarding due process. Bahrain’s aim, in sharing how arbitral proceedings are conducted under the BCDR-AAA Rules, is to illustrate best practices and common principles in these areas. The submission focuses on expedited arbitration under Article 6 of the Rules (“Expedited procedure”) and summary determination of issues under Article 18 of the Rules (“Summary procedure”). It will also draw upon BCDR-AAA’s responses to the recent UNCITRAL questionnaire on expedited arbitration.<sup>1</sup>
2. The present submission has seven sections:
  - Section I is the present introduction.
  - Section II considers the demand for improvements in procedural efficiency, whilst recognizing the need to safeguard due process, the enforcement of arbitral awards, and the integrity of arbitral proceedings.
  - Section III considers briefly why BCDR-AAA revised its Rules.
  - Section IV provides an overview of the provisions of the Rules specifically aimed at improving procedural efficiency; starting with the general duty of arbitrators to treat each party equally and to respect the right of each party to be heard (Art. 16.1 of the Rules), whilst avoiding unnecessary delay and expense (Art. 16.2 of the Rules), and the parallel obligation on the parties to avoid unnecessary delay and expense (Art. 16.4 of the Rules). Reference is also made to the sanctions available to arbitral tribunals faced with obstructive or non-participating parties (Arts. 16.5 and 17.7 of the Rules), or party representatives (Arts. 21.4 and 21.5 of the Rules).
  - Section V considers the scope and application of expedited arbitration (Art. 6 of the Rules), and the balance to be achieved between party autonomy and the authority of the Chamber and the arbitral tribunal to provide for streamlined arbitration in appropriate cases.
  - Section VI discusses summary procedure (Art. 18 of the Rules), in light of the Working Group’s having expressed an interest in such procedures.

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<sup>1</sup> See UNCITRAL, *Responses to the UNCITRAL questionnaire on expedited arbitration (as of July 29, 2019)*, available at [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/responses\\_to\\_questionnaire\\_11\\_september.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/responses_to_questionnaire_11_september.pdf) (hereinafter “Working Group II Questionnaire”). For BCDR-AAA responses to the questionnaire (dated June 19, 2019) see: at 9-10 (response to Question 1); at 16-17 (response to Question 2); at 23-24 (response to Question 3); at 32 (response to Question 4); at 43 (response to Question 5); at 51 (response to Question 6); at 56 (response to Question 7); at 61 (response to Question 8); and at 65 (response to Question 9).

- Section VII addresses the wider issue of the enforcement of arbitral awards rendered in expedited arbitration, focusing on (i) due process concerns where the conduct of expedited arbitration may be argued to restrict the ability of a party to present its case (Art. V(1)(b) of the New York Convention); and (ii) party autonomy where expedited arbitration is before a sole arbitrator, even though there exists an agreement specifically providing for a three-member tribunal (Art. V(1)(d) of the New York Convention).

### **An overview of BCDR-AAA**

3. In partnership with the American Arbitration Association (“AAA”), the Bahrain Chamber for Dispute Resolution (“BCDR” or “the Chamber”) provides independent dispute resolution services. Established in 2009 by Legislative Decree, BCDR has two distinct and separate functions: a specialized court (“the BCDR Court”) and an international arbitration center (“BCDR-AAA”). The BCDR Court has statutory jurisdiction over disputes that exceed 500,000 Bahraini Dinar (approximately USD 1,300,000), and in which at least one party is a financial institution licensed by the Central Bank of Bahrain, or the dispute is of an international commercial nature. BCDR-AAA administers cases under the BCDR-AAA Arbitration Rules and Mediation Rules.
4. BCDR-AAA has a team of case managers proficient in Arabic, English, and French, who oversee each arbitration from commencement to conclusion, whether by award or settlement. In line with current best practice, parties to arbitral proceedings before BCDR-AAA are free to select and nominate arbitrators of their choosing (subject to the arbitrator’s independence, impartiality and availability). The Chamber also maintains a pool of arbitrators from which parties may nominate, or from which the Chamber may select and appoint an arbitrator when it is required to do so. In addition to its dispute resolution services, the Chamber publishes the *BCDR International Arbitration Review*, a scholarly journal that seeks to enhance BCDR’s mandate in promoting international dispute settlement. BCDR also holds conferences, seminars, and training in Bahrain and the wider MENA region, frequently collaborating with other organizations, including AAA, UNCITRAL, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), and the Organisation for Economic Co-operation and Development (OECD). The Board of Trustees of BCDR (“the Board”) is responsible for developing and implementing the Chamber’s overall strategy, approving its rules of arbitration and mediation, and overseeing the financial affairs of the institution. The Board includes international arbitration specialists of both Bahraini and non-Bahraini nationality.
5. BCDR-AAA operates in an arbitration-friendly legal environment, with a pro-arbitration judiciary. Bahrain is a contracting State of the New York Convention, and has adopted the UNCITRAL Model Law on International Commercial Arbitration for both international and domestic arbitration.

## **II. The demand for greater efficiency in international arbitration**

### **A. The views of the international arbitration community and the results of the Queen Mary University of London and White & Case 2015 and 2018 surveys on international arbitration**

6. There is increasing demand from the users of arbitration for improvements in the efficiency of the proceedings, with a consequent reduction in duration and cost. As has been highlighted in the Swiss-US proposal to Working Group II on future work before the Commission’s sixty-eighth session, “there is a wide concern among practitioners about rising costs and lengthier timelines making arbitration more burdensome and too similar to litigation.”<sup>2</sup> The UNCITRAL Secretariat has similarly noted the “pressure” that faces international arbitration

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<sup>2</sup> UNCITRAL, *Possible future work, Proposal by the Governments of Italy, Norway and Spain: future work for Working Group II, Note by the Secretariat*, A/CN.9/959, Apr. 30, 2018, ¶ 18 (quoting the concerns of the joint proposal by Switzerland and the United States of America to Working Group II of UNCITRAL at the sixty-eighth session of the Commission).

with regards to efficiency in the conduct of arbitration.<sup>3</sup> Commentators have also observed that users seek reforms that improve efficiency at all stages of arbitral proceedings.<sup>4</sup>

7. The results of the Queen Mary University of London and White & Case ‘International Arbitration Surveys’ of 2015<sup>5</sup> and 2018<sup>6</sup> (“the Surveys”) demonstrate concerns about the lack of speed and escalating costs in arbitral proceedings, and the lack of effective sanctions for deliberate delaying tactics.
8. In the 2015 and 2018 Surveys, respectively, 763 and 922 respondents completed the on-line questionnaires, and 105 and 142 were interviewed. The results of the Surveys are at a minimum highly indicative of, and arguably accurately reflective of, the shared experience and sentiment of stakeholders in international arbitration.
9. Bahrain summarizes below the results of the Surveys in relation to (i) preferences for resolving cross-border disputes; (ii) the most valuable characteristics of international arbitration; and (iii) the worst characteristics of international arbitration.

**Table 1 – Preferred method for resolving cross-border disputes<sup>7</sup>**

Preferred type of dispute resolution	2015 Survey	2018 Survey
International arbitration	56%	48%
International arbitration together with other ADR	34%	49%
Mediation	5%	[No figure]
Cross-border litigation together with ADR	2%	3%
Cross-border litigation	2%	1%

**Table 2 – The “most valuable” characteristics of international arbitration<sup>8</sup>**

Theme	2015 Survey	2018 Survey
Enforceability of awards	65%	64%
Avoiding specific legal systems / national courts	64%	60%
Flexibility	38%	40%
Selection of arbitrators	38%	39%
Confidentiality and privacy	33%	36%
Neutrality	25%	25%
Finality	18%	16%
Speed	10%	12%

<sup>3</sup> Ibid. ¶¶ 5-6 (Secretariat noting that “[a]rbitration is under a double pressure: on the one hand, arbitral proceedings are getting increasingly complicated, and they expand both in terms of time frame and in terms of volume of documentation. This challenges one of the traditional advantages of arbitration as opposed to court litigation, namely efficiency. On the other hand [...] [t]he goal of ensuring efficient arbitration may lead to taking steps that compromise the quality of arbitration. This, in turn, may erode the trust in arbitration as a method for settlement of disputes, a trust that is the very foundation of the success of arbitration”). See also UNCITRAL, *Report of Working Group II (Dispute Settlement) on the work of its sixty-ninth session*, A/CN.9/969, Feb. 18, 2019, ¶ 13 (noting that “[i]t was generally felt that work should focus on improving the efficiency of the arbitral proceedings, which would result in the reduction of the cost and duration of proceedings”).

<sup>4</sup> Mark. W. Friedman, *Expedited Procedure*, BCDR International Arbitration Review, vol. 4, no. 2 (2017), 261-282, at 265 (hereinafter “Friedman”) (noting that “arbitration users are demanding greater efficiency at all stages of the arbitration and from all of its participants – arbitral institutions, parties and counsel alike”). See also Yas Banifatemi, *Chapter 1: Expedited Proceedings in International Arbitration*, in Laurent Lévy and Michael Polkinghorne (eds), *Expedited Procedures in International Arbitration*, Dossiers of the ICC Institute of World Business Law, Vol. 1, Kluwer Law International, International Chamber of Commerce (2017), 9-33, at 18 (hereinafter “Banifatemi”) (noting that “[a]s a preliminary matter, it is important to emphasize that, where recent statistics are available, they show solid user demand for expedited procedure rules.” (internal citations omitted)).

<sup>5</sup> Queen Mary University of London School of International Arbitration and White & Case, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* (hereinafter “2015 Queen Mary/White & Case survey”), available at [http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015\\_International\\_Arbitration\\_Survey.pdf](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf).

<sup>6</sup> Queen Mary University of London School of International Arbitration and White & Case, *2018 International Arbitration Survey: The Evolution of International Arbitration* (hereinafter “2018 Queen Mary/White & Case survey”), available at [http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-\(2\).PDF](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF).

<sup>7</sup> *Supra* n. 5 (2015 Queen Mary/White & Case survey at 5). *Supra* n. 6 (2018 Queen Mary/ White & Case survey, at 5).

<sup>8</sup> For the 2015 results see *supra* n. 5, at 6. For the 2018 results see *supra* n. 6, at 7.

Cost	2%	3%
Other	2%	2%

**Table 3 – The “worst” characteristics of international arbitration<sup>9</sup>**

Theme	2015 Survey	2018 Survey
Cost	68%	67%
Lack of effective sanctions during the arbitral process	46%	45%
Lack of insight into arbitrators’ efficiency	39%	30%
Lack of speed	36%	34%
Lack of power in relation to third parties	[No figure]	39%
National court intervention	25%	23%
Lack of third-party mechanism	24%	[No figure]
Lack of insight into how institutions select and appoint arbitrators	[No figure]	15%
Lack of appeal mechanism on the merits	17%	14%
Lack of insight into institutions’ efficiency	12%	11%
Other	9%	7%
Lack of flexibility	3%	2%

10. Taken together, the results of the Surveys reveal many positive attributes of international arbitration. An overwhelming majority (93.5%) of respondents showed a clear preference for arbitration for the resolution of international commercial disputes (alone, or in conjunction with some other form of ADR). Enforceability of awards (64.5%) is seen as arbitration’s most valuable characteristic, followed by the avoidance of specific legal systems/national courts (62%), flexibility (39%), and party autonomy in the selection of arbitrators (38.5%). Overall, therefore, users appear satisfied with the general concept and framework of international arbitration. However, when faced with certain procedural aspects, “they find much room for improvement.”<sup>10</sup>
11. Thus, the Surveys reveal a number of negative impressions. The cost of arbitral proceedings is seen as the worst feature of international arbitration (67.5% across the two Surveys), followed by a lack of effective sanctions (45.5%), lack of speed (35%), and a lack of insight into arbitrators’ efficiency (34.5%).
12. The consensus emerging from the 2018 Survey is that improving the “overall efficiency” of arbitral proceedings should “indeed be a top concern for all stakeholders involved.”<sup>11</sup> Respondents to the Surveys complained about the role of parties and their lawyers in delaying arbitral proceedings and escalating costs, and about arbitral tribunals’ failure to take the lead in sanctioning obstructive behavior. For example, a “large majority” of respondents participating in the 2018 Survey believed that improper conduct by a party or its counsel during arbitral proceedings “should be taken into account by the arbitral tribunal when allocating costs.”<sup>12</sup> Respondents complained in particular about “dilatatory tactics” employed by counsel for the parties that “go unsanctioned,” either because arbitrators are “reluctant” to order appropriate sanctions or because tribunals “do not possess the right instruments to do so.”<sup>13</sup> A “considerable number” of respondents “pleaded for the broadening of arbitrators’ powers [...] as well as encouraging them to make better use of these powers.” Many respondents believed that arbitrators need to “adopt a bolder approach” to conducting arbitral proceedings and, if needs be, to “apply monetary sanctions” for the “dilatatory tactics” employed by counsel.<sup>14</sup>

<sup>9</sup> For the 2015 results see *supra* n. 5, at 7. For the 2018 results see *supra* n. 6, at 8.

<sup>10</sup> *Supra* n. 6, at 35.

<sup>11</sup> *Supra* n. 6, at 37.

<sup>12</sup> *Supra* n. 6, at 35.

<sup>13</sup> *Supra* n. 6, at 8, 27 (“many users are of the opinion that the bigger problem is that arbitrators do not make sufficient use of the sanctioning powers they already possess”) (international citations omitted).

<sup>14</sup> *Supra* n. 6, at 27.

13. One way in which arbitral institutions have sought to remedy the concerns of users is to amend their rules of arbitration to include, among others, express provisions for expedited arbitration. By way of example, the ICC,<sup>15</sup> SCC,<sup>16</sup> and SIAC<sup>17</sup> now provide for expedited procedures, and, in 2019, the Tashkent International Arbitration Centre,<sup>18</sup> the Japan Commercial Arbitration Association<sup>19</sup> and the Chartered Institute of Arbitrators (Bermuda Branch)<sup>20</sup> have followed suit. As one commentator has observed, “[u]nlike just a few years ago, expedited procedures are now the norm – at least for institutional rules primarily geared to governing commercial arbitrations.”<sup>21</sup>

## **B. Ensuring the right balance between expeditious resolution of disputes and respect for due process**

14. Due process is a fundamental tenet of arbitration. Namely, that every party has a right to have its claim heard and to respond to any claim made against it.<sup>22</sup> It is, in the view of Bahrain, vital that efforts to promote efficiency must not compromise due process, the effective enforcement of arbitral awards, or the integrity of arbitral proceedings.<sup>23</sup> As the UNCITRAL Secretariat has observed, “the notions of due process and fairness” are “important elements of international arbitration that should not be overlooked in streamlining the arbitration procedure.”<sup>24</sup> Furthermore, there are legitimate concerns that the pursuit of greater efficiency may come at the cost of the enforcement of arbitral awards.<sup>25</sup> There is also a related concern that reform itself may lead to international arbitration becoming overregulated. Most importantly, the pursuit of greater efficiency must not “erode the trust in arbitration as a method for settlement of disputes, a trust that is the very foundation of the success of arbitration.”<sup>26</sup> For all of these reasons, Bahrain agrees with the Secretariat that there is a “need to balance on the one hand, the efficiency of the arbitral proceedings and on the other, the rights of the parties to due process (including the right to present their case) and fair treatment [...]”<sup>27</sup>

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<sup>15</sup> 2017 ICC Rules of Arbitration, Art. 30 (“Expedited Procedure”), and Appendix VI (“Expedited Procedure Rules”).

<sup>16</sup> 2017 SCC Rules for Expedited Arbitrations.

<sup>17</sup> 2016 SIAC Rules, Art. 5 (“Expedited Procedure”).

<sup>18</sup> See 2019 Rules of Arbitration of the Tashkent International Arbitration Centre, Art. 32 (“Expedited Proceedings”), available at <https://static1.squarespace.com/static/5c02f6d29772ae05d0a897a8/t/5ca49a6be4966b6cccef1aea/1554291353473/TIAC+Rules+of+Arbitration.pdf>.

<sup>19</sup> See (amended) 2019 Commercial Arbitration Rules of the Japan Commercial Arbitration Association, Part 2 (“Expedited Arbitration Procedures”), Arts. 83-87, available at [http://www.jcaa.or.jp/e/arbitration/docs/Commercial\\_Arbitration\\_Rules.pdf](http://www.jcaa.or.jp/e/arbitration/docs/Commercial_Arbitration_Rules.pdf).

<sup>20</sup> See 2019 Chartered Institute of Arbitrators (Bermuda Branch), CI Arb Cost-Controlled Expedited Arbitration Rules, available at <https://www.ciarb.org/media/4854/ciarb-cost-controlled-expedited-arbitration-rules-bermuda-final.pdf>.

<sup>21</sup> *Supra* n. 4 (Friedman, at 280).

<sup>22</sup> See, for example, 2017 BCDR-AAA Rules, Art. 16.1; 2017 ICC Arbitration Rules, Art. 22.4; 2014 LCIA Arbitration Rules, Art. 14.4; and 2017 SCC Arbitration Rules, Art. 23.2.

<sup>23</sup> One commentator has framed the challenge regarding improving efficiency in international arbitration in the following terms: “[i]ssues of time and costs have always topped the concerns of international arbitration users. It is indeed paradoxical in two ways. First, arbitration, at its inception, was presented as an expedited, cost effective, flexible and constructive out-of-court dispute settlement mechanism, yet, in time, arbitration became costly, procedurally laborious and temporally protracted. Secondly, once institutions intervene to address users’ concerns by regulating expedited proceedings to promote efficiency and reduce time and costs, users flag the self-proclaimed autonomous nature of the proceedings and invoke the parties’ unfettered right to vary this packaged regulation. This contravenes the desired objective of utmost efficiency, on the premise that law, justice and due process can only be served if autonomy remains absolutely unreserved. In essence, the forces of regulation and autonomy continue causing friction that brings about myriad challenges and prospects for procedural efficiency.” Mohamad Salahudine Abdel Wahab, *Chapter 6: Expedited Institutional Arbitral Proceedings Between Autonomy and Regulation*, in Laurent Lévy and Michael Polkinghorne (eds), *Expedited Procedures in International Arbitration*, Dossiers of the ICC Institute of World Business Law, Vol. 1, Kluwer Law International, International Chamber of Commerce (2017), 133-157, at 133 (hereinafter “Abdel Wahab”).

<sup>24</sup> UNCITRAL, *Report of Working Group II (Dispute Settlement) on the work of its sixty-ninth session*, A/CN.9/969, Feb. 18, 2019, ¶ 23.

<sup>25</sup> See Section VII *infra*.

<sup>26</sup> UNCITRAL, *Possible future work, Proposal by the Governments of Italy, Norway and Spain: future work for Working Group II, Note by the Secretariat*, A/CN.9/959, Apr. 30, 2018, ¶ 6.

<sup>27</sup> UNCITRAL, *Report of Working Group II (Dispute Settlement) on the work of its sixth-ninth session* (New York, 4-8 February 2019), A/CN.9/969, Feb. 18, 2019, ¶ 23.

### III. The 2017 BCDR-AAA Rules

15. The first edition of the BCDR-AAA rules of arbitration was adopted in 2010 and was closely modelled on the then-existing rules of arbitration of the International Centre for Dispute Resolution (“ICDR”).<sup>28</sup> Since 2010, many other leading arbitral institutions have published new arbitration rules, including the ICC (in 2012), the LCIA (in 2014), ICDR (in 2014), SIAC (in 2016) and SCC (in 2017). In order to bring BCDR-AAA in line with procedural advances made in these new rules, the Board, in early 2016, established a Rules Review Committee<sup>29</sup> (“the Committee”) tasked with reviewing and revising the BCDR-AAA rules. The Committee, taking into consideration current best practices, and examining recent developments, drafted revised rules of arbitration, first publicized at the IBA 2016 Annual Conference in Washington D.C., inviting comments from users and the wider international arbitration community. Following adjustments to the draft rules made in the light of comments received, the Board adopted the revised rules, including a revised fee schedule and a model arbitration clause, effective as of October 1, 2017.<sup>30</sup> The Rules are available in Arabic,<sup>31</sup> English<sup>32</sup> and French,<sup>33</sup> with all three languages equally authoritative.

### IV. Facilitating efficiency, whilst safeguarding due process – arbitral tribunals’ broad powers under Art. 16 and related provisions of the 2017 BCDR-AAA Rules

16. Whilst BCDR-AAA has express provisions governing expedited arbitration (Art. 6) and summary procedure (Art. 18), improving efficiency at all stages of arbitral proceedings is at the core of the Rules.<sup>34</sup> Thus, under the Rules, arbitral tribunals have been given a variety of powers and obligations aimed at facilitating efficient arbitration, with concurrent duties on parties and their legal representatives to avoid unnecessary delay and expense, backed up by additional powers of the arbitral tribunal to sanction parties for non-compliance with the Rules, subject always to safeguarding due process.
17. The following is a commentary on the overriding duties of arbitral tribunals and parties under Art. 16 of the Rules (“Conduct of the arbitration”), and on other provisions relating to efficiency and the powers of arbitral tribunals to sanction parties for breach for non-compliance.

#### **Conducting the arbitration as the tribunal “deems appropriate” provided that the right to due process is respected – Art. 16.1 of the 2017 BCDR-AAA Rules**

18. Under Art. 16.1 of the Rules, the arbitral tribunal has flexibility to “conduct the arbitration in whatever manner it considers appropriate,” whether in expedited or non-expedited arbitration, provided that due process is protected. As one author has observed, Art. 16.1 “permits” the arbitral tribunal “the maximum latitude in the conduct of the arbitration, subject always to the fundamental principles of due process, which it recites – namely, that the parties are treated with equality and that each party has the right to be heard and a fair opportunity to present its

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<sup>28</sup> The 2010 edition of the Rules of Arbitration of BCDR-AAA is available at <https://www.bcdr-aaa.org/wp-content/uploads/2010-BCDR-AAA-Arbitration-Rules-English-1.pdf>.

<sup>29</sup> The Rules Review Committee of BCDR-AAA consisted of Nassib G. Ziadé, Antonio R. Parra and Adrian Winstanley.

<sup>30</sup> The 2017 edition of the Rules of Arbitration of BCDR-AAA is available at <https://www.bcdr-aaa.org/2017-arbitration-rules/>.

<sup>31</sup> The Arabic text of the 2017 edition of the Rules of Arbitration of BCDR-AAA is available at [https://www.bcdr-aaa.org/downloads/2017\\_BCDR-AAA\\_Arbitration\\_Rules\\_-\\_Arabic.pdf](https://www.bcdr-aaa.org/downloads/2017_BCDR-AAA_Arbitration_Rules_-_Arabic.pdf).

<sup>32</sup> The English text of the 2017 edition of the Rules of Arbitration of BCDR-AAA is available at [https://www.bcdr-aaa.org/downloads/2017\\_BCDR-AAA\\_Arbitration\\_Rules\\_-\\_English.pdf](https://www.bcdr-aaa.org/downloads/2017_BCDR-AAA_Arbitration_Rules_-_English.pdf).

<sup>33</sup> The French text of the 2017 edition of the Rules of Arbitration of BCDR-AAA is available at [https://www.bcdr-aaa.org/downloads/2017\\_BCDR-AAA\\_Arbitration\\_Rules\\_-\\_French.pdf](https://www.bcdr-aaa.org/downloads/2017_BCDR-AAA_Arbitration_Rules_-_French.pdf).

<sup>34</sup> For example, in both the joinder and consolidation provisions, arbitral tribunals must consider whether joinder, or consolidation “would serve the interests of justice and efficiency.” See 2017 BCDR-AAA Rules, Art. 28.4 (“Joinder”); Art. 29.3 (“Consolidation”).

case.”<sup>35</sup> Art. 16.1 is an uncontroversial provision, parallels to which are to be found in the rules of most other major arbitral institutions,<sup>36</sup> in the UNCITRAL Arbitration Rules,<sup>37</sup> and in the UNCITRAL Model Law.<sup>38</sup> BCDR-AAA has, itself, an important role in monitoring arbitral proceedings to ensure compliance with this provision and with its Rules in general.<sup>39</sup>

#### **The obligation to expedite the arbitration, avoiding unnecessary delay and expense – Art. 16.2 of the 2017 BCDR-AAA Rules**

19. Pursuant to Art. 16.2 of the Rules, all arbitral proceedings “shall be” conducted with “a view to expediting the arbitration,” and to avoiding “unnecessary delay and expense.” Regardless of the form of the arbitration, the substance remains the same: the arbitral tribunal must facilitate an expedited arbitration consistent with its obligation to protect the parties’ rights under Art. 16.1 of the Rules.

#### **The express power of the Chamber to remove an arbitrator for failure to comply with the Rules – Art. 12.1(e) of the 2017 BCDR-AAA Rules**

20. Arts. 16.1 and 16.2 of the Rules have, self-evidently, important and weighty ramifications for tribunals. Under Art. 12.1(e) of the Rules, the Chamber may, on its own initiative, remove an arbitrator if he or she “is no longer able to fulfill his or her functions”, is “not acting independently or impartially towards a party” or “is not participating in the arbitration” in accordance with the tribunal’s overriding duties under Arts. 16.1 and 16.2 of the Rules. This authority ensures that the Chamber retains an important supervisory role for those (rare) occasions where an arbitrator’s conduct falls below acceptable standards.

#### **The requirement to hold an early procedural conference – Art. 16.3 of the 2017 BCDR-AAA Rules**

21. Art. 16.3 of the Rules requires the arbitral tribunal “promptly after being appointed” to conduct a preliminary conference with the parties, in person or remotely, to seek to agree upon the procedural timetable, with a view to issuing what is commonly referred to as “Procedural Order No. 1.” This Article gives the tribunal the express authority to “agree or to direct procedures in line with its duty to conduct the arbitration without unnecessary delay and expense.”<sup>40</sup> Furthermore, the Chamber itself, like other administering institutions, “monitor[s] the proceedings and compliance with the procedural timetable” and will “notify the parties and the tribunal of any slippage.”<sup>41</sup>

#### **The parallel duty on parties, and their legal representatives, to avoid unnecessary delay and expense – Arts. 16.4 and 21.4(e) of the 2017 BCDR-AAA Rules**

22. Parties and their legal representatives have parallel duties to ensure efficient arbitration under the 2017 BCDR-AAA Rules. Under Art. 16.4 of the Rules, it is incumbent upon parties to “make every effort to avoid unnecessary delay and expense in the arbitration.” Art. 21.4(e) of the Rules specifically addresses the role of parties’ representatives, providing that every party

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<sup>35</sup> Adrian Winstanley, *Conduct of the Proceedings*, BCDR International Arbitration Review, vol. 4 no. 2 (2017), 337-346, at 339 (hereinafter “Winstanley”).

<sup>36</sup> For example, see 2017 ICC Arbitration Rules, Art. 22(4): “In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.”; 2014 LCIA Arbitration Rules, Art. 14.4: “Under the Arbitration Agreement, the Arbitral Tribunal’s general duties at all times during the arbitration shall include: (i) a duty to act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent(s) [...]”; 2017 SCC Arbitration Rules, Art. 23.2: “In all cases, the Arbitral Tribunal shall conduct the arbitration in an impartial, efficient and expeditious manner, giving each party an equal and reasonable opportunity to present its case.”

<sup>37</sup> UNCITRAL, Arbitration Rules 2013, Art. 17.1: “Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity to present its case.”

<sup>38</sup> UNCITRAL Model Law, Art. 18: “The parties shall be treated with equality and each party shall be given a full opportunity of presenting its case.”

<sup>39</sup> BCDR-AAA responses to Question 7 of Working Group II’s Questionnaire (noting that “[a]s administering institution, [BCDR-AAA] has, itself, a vital role in monitoring proceedings, including expedited arbitrations, to ensure that the arbitrator fulfils all his or her obligations under the Rules [...]”). *Supra* n. 1, at 56.

<sup>40</sup> *Supra* n. 35 (Winstanley, at 341).

<sup>41</sup> BCDR-AAA response to Question 5 of Working Group’s II Questionnaire, *Supra* n. 1, at 43.

must require its legal representatives to agree that they will not (among other matters) “create unnecessary delay or expense.” A party representative in breach of Art. 21.4 of the Rules faces the possibility of sanction by the arbitral tribunal in accordance with Art. 21.5 of the Rules.<sup>42</sup>

**The power to move arbitral proceedings forward in the face of an obstructive or recalcitrant party – Arts. 16.4 and 17.7 of the 2017 BCDR-AAA Rules**

23. Once a party is engaged in arbitral proceedings, it is expected and required to comply with the timeliness agreed with or ordered by the arbitral tribunal. However, for perceived tactical advantage or mere recalcitrance, a party may sometimes seek to obstruct the proceedings, causing unnecessary delay and cost. In such circumstances, Art. 17.7 of the Rules gives the tribunal the power to move the arbitration forward, including to the point of rendering an arbitral award.<sup>43</sup> Art. 17.7 is another example, therefore, of how the Rules buttress streamlined proceedings in the face of any non-compliance with the Rules, or attempted frustration of the arbitration.

**The power to sanction parties, and/or their legal representatives, for breach of the Rules – Arts. 16.5 and 21.5 of the 2017 BCDR-AAA Rules**

24. One criticism made by users of international arbitration is that obstructive behavior and the dilatory tactics and conduct of parties or their lawyers go unsanctioned.<sup>44</sup>

25. The Rules give arbitral tribunals a number of powers to sanction the improper conduct of parties and their legal representatives. Art. 16.5 of the Rules empowers the tribunal, in order to “protect the efficiency and integrity of the arbitration” to draw adverse inferences, to impose cost penalties and to take any additional step as may be necessary in the conduct of the arbitration.<sup>45</sup> Art. 21.5 gives the arbitral tribunal the power, after giving the parties a reasonable opportunity to express their views, to sanction any legal representative who is in breach of Art. 21.4 of the Rules. The range of sanctions available is deliberately widely-drawn.<sup>46</sup> Pursuant to Art. 21.5, the tribunal may “draw such inference” from a breach of Art. 21.4 as it considers appropriate;<sup>47</sup> may consider how the legal representative’s actions impact the apportionment of costs (including legal costs);<sup>48</sup> and may take any other measures considered appropriate “to preserve the fairness and integrity of the arbitration.”<sup>49</sup>

26. However, such sanctions must be applied with due care. Thus, Art. 21.6 of the Rules requires the arbitral tribunal, in determining whether to apply any of the sanctions under Art. 21.5, to take into account the “nature and seriousness” of the breach; the “potential impact” of the sanction on the rights of the parties; the enforceability of the award; and “such other matters” as the tribunal considers appropriate in the circumstances.<sup>50</sup> Art. 21.6, therefore, provides an important safeguard to due process by allowing the arbitral tribunal to weigh the severity and consequences of a party representative’s breach with the impact of the sanctions available to it.

## **V. Expedited procedure under Art. 6 of the 2017 BCDR-AAA Rules**

27. One of the most significant innovations of the Rules aimed specifically at promoting efficiency is the introduction of the new mechanism for expedited arbitration found at Art. 6

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<sup>42</sup> See paragraphs 24-26 *infra* of this submission.

<sup>43</sup> *Supra* n. 35 (Winstanley, at 341).

<sup>44</sup> *Supra* n. 6 (2018 Queen Mary/White & Case survey, at 8).

<sup>45</sup> *Supra* n. 35 (Winstanley, at 342-343).

<sup>46</sup> See generally, 2017 BCDR-AAA Rules, Art. 21.5(a)-(d). For a commentary on Article 21 of the Rules, see James E. Castello, *Party Representation: Does Article 21 Mark a Trend?* BCDR International Arbitration Review, vol. 4, no. 2 (2017), 357-376.

<sup>47</sup> 2017 BCDR-AAA Rules, Art. 21.5(b).

<sup>48</sup> 2017 BCDR-AAA Rules, Art. 21.5(c).

<sup>49</sup> 2017 BCDR-AAA Rules, Art. 21.5(d).

<sup>50</sup> 2017 BCDR-AAA Rules, Art. 21.6.

of the Rules.<sup>51</sup> Art. 6 provides the framework for accelerated, fast-track arbitration, the aim of which is to “reduce the duration and cost of the proceedings, whilst preserving the fair and efficient resolution of the dispute.”<sup>52</sup>

### **Expedited arbitration incorporated in the main body of the 2017 BCDR-AAA Rules**

28. So as most clearly to “codify current best practice,”<sup>53</sup> BCDR-AAA has incorporated expedited procedure within the main body of its rules, rather than adopting expedited procedure in a separate set of rules. This approach follows that of a number of other arbitral institutions, including the ICC,<sup>54</sup> SIAC,<sup>55</sup> HKIAC,<sup>56</sup> and CIETAC,<sup>57</sup> as opposed to those which provide for expedited arbitration in separate rules.<sup>58</sup>

### **Scope and application of the expedited procedure – Arts. 6.1, 6.6 and 6.7 of the 2017 BCDR-AAA Rules**

29. Art. 6 of the Rules combines an “opt-out” and “opt-in” approach to the application of the expedited procedure. Under Art. 6.1(a), parties may agree in writing that Art. 6 of the Rules should not apply.<sup>59</sup> In those circumstances, the arbitration proceeds under the non-expedited provisions. Absent such an agreement, the expedited procedure automatically applies to all quantifiable monetary claims in which the amount in dispute does not exceed USD 1million.<sup>60</sup> The financial threshold of USD 1million has the potential of widening access to justice for users with relatively modest claims which may otherwise be deterred from commencing an arbitration out of a concern for costly and lengthy arbitral proceedings.<sup>61</sup> Nevertheless, parties can, by written agreement, “opt-in” to the expedited procedure irrespective of the sums at issue.<sup>62</sup> It is anticipated that giving parties the freedom to opt into the expedited procedure regardless of the amount in dispute will assist small or medium-sized businesses, with limited resources, so extending the uptake of expedited arbitration.<sup>63</sup>

30. Art. 6.6 also provides the flexibility of an “opt-in” approach. If the respondent files with its response to the request for arbitration a counterclaim that increases the total value of the claim above USD 1million, then the arbitral proceedings automatically default to the non-expedited procedure, unless the parties opt-in, in writing, to proceed with the expedited procedure irrespective of the combined value of claim and counterclaim.

31. Automatic reversion to non-expedited procedure, however, only applies at the stage of the respondent’s response. Under Art. 6.7, if either party subsequently amends its claim or

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<sup>51</sup> Art. 16.2 of the previous 2010 edition of the BCDR-AAA Rules merely contained a general power of the arbitral tribunal to conduct the proceedings “with a view to expediting the resolution of the dispute.”

<sup>52</sup> *Supra* n. 4 (Friedman, at 267).

<sup>53</sup> See BCDR-AAA’s response to Question 1 of Working Group II’s Questionnaire, *supra* n. 1, at 10 (noting that “[w]hen drafting the revised versions of its Rules, BCDR-AAA aimed to codify current best practices, which meant including these provisions in the body of the Rules”).

<sup>54</sup> 2017 ICC, Art. 30 and Appendix VI.

<sup>55</sup> 2016 SIAC Rules, Art. 5.

<sup>56</sup> 2013 HKIAC, Administered Arbitration Rules, Art. 41.

<sup>57</sup> 2015 CIETAC, Chapter IV “Summary Procedure” (Arts. 56 to 64).

<sup>58</sup> See, for example, the 2017 SCC Rules for Expedited Arbitrations; the 2018 AIAC Fast Track Arbitration Rules; 2014 ICDR International Expedited Procedures.

<sup>59</sup> 2017 BCDR-AAA Rules, Art. 6(1)(a).

<sup>60</sup> *Ibid.*

<sup>61</sup> Adrian Winstanley has observed that “a party with a relatively modest monetary claim may be deterred from bringing arbitration proceedings, thus potentially being denied access to justice, for fear of lengthy proceedings bringing with them rapidly escalating costs.” BCDR-AAA, *Bahrain Chamber for Dispute Resolution Hosts a Luncheon for Leading Members of the Bahraini Business and Legal Communities*, Oct. 15, 2018 (remarks of Adrian Winstanley), available at <https://www.bcdr-aaa.org/bahrain-chamber-for-dispute-resolution-hosts-a-luncheon-for-leading-members-of-the-bahraini-business-and-legal-communities-2/>.

<sup>62</sup> 2017 BCDR-AAA Rules, Art. 6.(1)(b).

<sup>63</sup> The banking and financial community have “welcomed the introduction of expedited procedure to resolve lower-value disputes, and the option to have these applied irrespective of the sums in dispute.” BCDR-AAA response to Question 2 of Working Group II’s Questionnaire, at *supra* n. 1, at 16.

counterclaim such that the total exceeds USD 1million, the expedited procedure continues to apply, unless the parties jointly agree in writing, or the Chamber, or arbitral tribunal, decides otherwise.<sup>64</sup> Arts. 6.1, 6.6 and 6.7 of the Rules “strike a procedural balance between the need to limit the scope of the expedited procedure provision to a jurisdictional amount, on the one hand, and the need to limit uncertainty or gamesmanship, on the other.”<sup>65</sup> Flexibility is one of the hallmarks of international arbitration,<sup>66</sup> and Art. 6.7 of the Rules maintains such flexibility in the hands of the parties, the Chamber and the arbitral tribunal.

### **Case frontloading and paperless and on-line submission of documents – Arts. 6.2, 6.3, 6.4 and 6.5 of the 2017 BCDR-AAA Rules**

32. “Case frontloading” is a practice aimed at streamlining arbitration. It provides that a claimant’s request for arbitration and a respondent’s response to the request are not preliminary documents, but effectively take the form of the statement of claim and the statement of defense and (if applicable) counterclaim, respectively.<sup>67</sup>
33. Arts. 6.2 and 6.4 of the Rules effectively provide for mandatory case frontloading. Art. 6.2 requires that a request for arbitration “shall include” the claimant’s statement of claim “setting out in detail” the remedies sought and the amount of any monetary claim, the factual and legal basis of the claim, and “accompanied by all documents essential to the claim.” A respondent has the parallel obligation in respect of its response, under Art. 6.4 of the Rules. One commentator has observed that these provisions require the parties “to submit their *entire* case (i.e., *detailed* Statements of Claim and Defense, along with all ‘essential’ documents) simultaneously with the [Request for Arbitration] and the Answer.”<sup>68</sup>
34. These provisions stand in contrast to the position under non-expedited arbitration under the Rules (Art. 2.2), by which a claimant may simply submit a short summary of its claim with its request for arbitration, and thereafter file a detailed statement of claim, together with accompanying evidence, once the tribunal is constituted. Similarly, under Art. 4.2 of the Rules, a respondent may simply file a complete or partial denial of the claim and a brief summary of any counterclaims and “need not include detailed factual support and legal support until such time as the tribunal determines appropriate.”<sup>69</sup> This does not, however,

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<sup>64</sup> Implicit in Art. 6.7 of the BCDR-AAA Rules is that either party may apply to the Chamber, or arbitral tribunal, to remove the case from the expedited procedure to standard arbitration.

<sup>65</sup> *Supra* n. 4 (Friedman, at 270).

<sup>66</sup> See Table 2 *supra* (noting the results from the 2015 and 2018 Queen Mary/White & Surveys that 38% and 40% of respondents that participated in the survey agreed that flexibility is one of the “most valuable characteristics” of international arbitration).

<sup>67</sup> *Supra* n. 4 (Banifatemi, at 14-15 (noting that “[a]nother procedural measure consists in allowing case frontloading, namely ensuring that the request for arbitration is not a preliminary document but already contains the claimant’s full case in the form of a full statement of claim; the same applies to the respondent’s answer, which should contain the respondent’s full case in the form of a statement of defense”).

<sup>68</sup> *Supra* n. 4 (Friedman, at 269 (emphasis added)). The reference in Arts. 6.2 and 6.4 of BCDR-AAA Rules to “all documents” necessarily includes witness statements and any expert reports that a party wishes to rely upon.

<sup>69</sup> *Supra* n. 4 (Friedman, at 269 (citing Arts. 2, 4 and 17 of the 2017 BCDR-AAA Rules)). It is standard practice in international commercial arbitration that a claimant’s request for arbitration, and the respondent’s statement of defense need only include a summary, or a preliminary statement, of their respective cases. Moreover, it is also standard practice that the parties can – at a later stage of the arbitral proceedings – file additional pleadings, together with accompanying evidence. For example, in non-expedited arbitration under the 2017 BCDR-AAA Rules, the claimant’s request for arbitration need only include (among other matters) “a statement *summarizing*” the nature and circumstances of the dispute, and “a statement *summarizing*” the relief or remedy sought and the estimated value of any monetary claim” (2017 BCDR-AAA Rules, Art. 2.2(d)-(e) (emphasis added)). Similarly, a respondent’s response to the request for arbitration need only include (among other matters) “a statement *summarizing*” the circumstances giving rise to any counterclaim.” (2017 BCDR-AAA Rules, Art. 4.2(b)-(c) (emphasis added)). However, there is no express requirement under the BCDR-AAA Rules at the initial stages of non-expedited arbitration that a claimant or respondent file accompanying documents. The obligation on the parties to file detailed pleadings, together with accompanying documents, is found in Art. 17 of the 2017 BCDR-AAA Rules (“Further written statements”). Art. 17 of the Rules provides that the claimant and respondent file a “Statement of Claim” and a “Statement of Defense” “*setting out in detail*” their respective cases, “accompanied by *all documents essential*” to their claim/defense. (2017 BCDR-AAA Rules, Arts. 17.2 and 17.3 (emphasis added)). BCDR-AAA’s approach follows that of other arbitral institutions. See, for example, the position under the 2017 Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (“2017 SCC Rules”). Under Art. 6 of the 2017 SCC Rules, a claimant’s request for arbitration need only include (among other matters) a “*preliminary statement* of the relief sought.” Similarly, a respondent, under Art. 9 of the 2017 SCC Rules, need only file an “Answer” that includes (among other matters) a “*preliminary statement* of any counterclaims or set-off.” However, under Art. 29 of the 2017 SCC Rules (“Written submissions”), both the claimant and respondent “shall submit” in accordance with the arbitral tribunal’s timetable, a statement of claim and a statement of a defence which shall include (unless previously submitted): (i) the specific relief sought; (ii) the factual and legal basis of the parties’ case; and (iii) any evidence relied upon. (emphasis added).

preclude either claimant or respondent from filing a request-qua-statement-of-claim and response-qua-defense-and-counterclaim in non-expedited proceedings should they so wish. By providing for case frontloading, BCDR-AAA's expedited procedure shortens the pleadings-and-documents phase of the arbitration, so also shortening the overall timeframe of the proceedings. As for non-expedited arbitration (Arts. 2.3 and 4.3), Arts 6.3 and 6.5 of the Rules permit the parties to file paperless, online submissions for enhanced procedural efficiency.

#### **The mandatory requirement for a sole arbitrator – Art. 6.8 of the 2017 BCDR-AAA Rules**

35. A tribunal of a sole arbitrator will almost invariably be able to pursue proceedings more expeditiously than a tribunal of three. Accordingly, Art. 6.8 of the Rules stipulates that a sole arbitrator will be appointed “[n]otwithstanding any agreement to the contrary [...]” This is significant, as Art. 6.8 takes precedence over any agreement between the parties, either in the underlying contract, or in a subsequent agreement to arbitrate, for the dispute to be settled by three arbitrators even if such prior agreement contemplates party-nomination.<sup>70</sup> Art. 6.8 of the Rules should, however, be read together with Art. 1 of the Rules (“Scope”), which provides that where parties have agreed in writing to arbitrate under the Rules, or have provided for the arbitration of a dispute by BCDR without designating particular rules, “the arbitration shall take place in accordance with these rules.” As Art. 6.8 of the Rules mandates a sole arbitrator in expedited procedure, this may be taken to constitute the parties’ overriding agreement for these purposes.
36. Bahrain is, therefore, of the view that the appointment of a sole arbitrator in expedited proceedings will “inevitably result in (potentially-significant) savings in time and cost.”<sup>71</sup> As noted by one commentator, “[a] single arbitrator is often a more efficient decision maker than three-member panels for all of the obvious reasons: streamlined procedural decision making, the need to accommodate fewer disparate schedules, reduction of deliberation time, and reduction of award-rendering time in light of the elimination of effort to forge a consensus out of concurring or dissenting opinions.”<sup>72</sup>

#### **Appointment, and removal, of a sole arbitrator – Arts. 6.9 and 6.10 of the 2017 BCDR-AAA Rules**

37. Under Art. 6.9 of the Rules, the parties are able jointly to nominate an arbitrator. Failing such agreement, the default position under the Rules is that the Chamber shall “as soon as practicable after receipt of the Response, appoint an arbitrator of its choosing.” Art. 6.10 of the Rules stipulates that the appointment of the sole arbitrator “shall be promptly confirmed by the Chamber” in a written notice of appointment.
38. A challenge to a sole arbitrator in expedited proceedings is “dealt with in the same way as challenges to arbitrators appointed in non-expedited proceedings.”<sup>73</sup> Under Art. 11 of the Rules, an arbitrator “may be challenged by a party if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence and, if not agreed, the challenge will be determined by the institution, whose decision is final.”<sup>74</sup>

#### **Conduct of the arbitration by the sole arbitrator – Art. 6.11 of the 2017 BCDR-AAA Rules**

39. Art. 6.11 of the Rules gives the tribunal of a sole arbitrator broad powers to conduct the expedited arbitration “as it considers suitable to the nature and circumstances of the case” and in light of the expedited nature of the proceedings. The sole arbitrator determines whether any further submissions should be made by the parties (potentially curtailing additional pleadings) and whether the arbitration should be conducted on the papers only, without any oral hearing.

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<sup>70</sup> *Supra* n. 4 (Friedman, at 270).

<sup>71</sup> See BCDR-AAA’s response to Question 2 of the Questionnaire of Working Group II, *supra* n. 1, at 16.

<sup>72</sup> *Supra* n. 4 (Friedman, at 270). See also UNCITRAL, *Report of Working Group II (Dispute Settlement) on the work of its sixty-ninth session*, A/CN.9/969, Feb. 18, 2019, ¶ 38 (Secretariat noting that a sole arbitrator “permitted cost-savings: made it easier for the arbitrator to handle the proceedings in a time-efficient manner; and removed scheduling difficulties that could arise in three-member tribunals”).

<sup>73</sup> See *supra* n. 1 (BCDR-AAA’s response to Question 4 of Working Group II’s Questionnaire, at 32).

<sup>74</sup> *Ibid.*

Even where the tribunal has initially ordered documents-only proceedings, it may nevertheless decide later that an oral hearing on a specific issue may be justified.

**Abridged timelines for issuing an award, and for any interpretation or correction – Arts. 6.12 and 6.13 of the 2017 BCDR-AAA Rules**

40. Art. 6.12 of the Rules stipulates that the tribunal in expedited proceedings must issue its final award no later than thirty days after the close of proceedings, unless otherwise agreed by the parties or determined by the Chamber. This is in contrast with the position under Art. 35.1, whereby arbitral awards in non-expedited proceedings are to be issued within 60 days from the date of the close of proceedings (unless otherwise agreed by the parties or determined by the Chamber).<sup>75</sup> Furthermore, Art. 6.13 of the Rules abridges the time-limit prescribed for any interpretation or correction of arbitral award from thirty days in non-expedited proceedings, to fifteen days in expedited proceedings.

**The possibility for succinct reasons in arbitral awards rendered under the expedited procedure – Art. 35 of the 2017 BCDR-AAA Rules**

41. Under Art. 35.2 of the Rules, the default position for both non-expedited and expedited arbitration, is that any award “shall state the reasons upon which an award is based,” unless the parties have agreed in writing that no reasons need be given. Nevertheless, Art. 35.2 of the Rules leaves open the question of whether such reasons need be extensive or succinct.

## **VI. Summary procedure under Article 18 of the 2017 BCDR-AAA Rules**

### **A. Background**

42. Under a “summary procedure,” arbitrators decide an issue “without necessarily undertaking every procedural step that might otherwise be adopted for the arbitration.”<sup>76</sup> As noted by the UNCITRAL Secretariat, the Working Group considered that its work could cover “early dismissal” through a summary procedure.<sup>77</sup> During the Working Group discussions, “[i]t was said that early dismissal might be more appropriate in the context of investment arbitration, where claims were raised by investors based on investment treaties.”<sup>78</sup> In response, it was “pointed out that the rules of a few arbitral institutions had recently included provisions on early dismissal, which were not necessarily limited to application in investment arbitration.”<sup>79</sup>

43. Among arbitral institutions that handle international commercial arbitrations, the first to introduce rules with a provision of this kind was SIAC.<sup>80</sup> The SIAC provision, Article 29 of the 2016 SIAC Arbitration Rules, was inspired by a provision on the early dismissal of claims in investment arbitration rules, those of ICSID. As amended in 2006, Rule 41(5) of the ICSID Arbitration Rules allows a party to request a tribunal to rule on a summary basis at the outset of the arbitration that a claim is “manifestly without legal merit” and must therefore be dismissed. Rule 41(5) was originally planned just to cover claims that were unmeritorious as to their substance; since its adoption, however, the rule has been interpreted by ICSID tribunals as covering cases that are manifestly untenable as to either jurisdiction or the merits.<sup>81</sup> Building on the example of Rule 41(5) of the ICSID Arbitration Rules, Article 29 of the 2016 SIAC Arbitration Rules provides that a party may seek from the tribunal the “early dismissal” not only of a claim but also of a defense put forward by the other party. Article 29

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<sup>75</sup> 2017 BCDR-AAA Rules, Art. 33.1 defines “close of proceedings” as “[f]ollowing the last submissions, written or oral, made in accordance with the procedural timetable directed by the arbitral tribunal, the arbitral tribunal shall ask the parties if they have any further submissions. Upon receiving negative replies, or if satisfied that the record is complete, the arbitral tribunal shall declare the arbitral proceedings closed, save for the rendering of the final award”).

<sup>76</sup> The quoted words are from the provision of the 2017 SCC Arbitration Rules on summary procedure, Art. 39.

<sup>77</sup> UNCITRAL, *Report of Working Group II (Dispute Settlement) on the work of its sixty-ninth session*, A/CN.9/969, Feb. 18, 2019, ¶ 20.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*

<sup>80</sup> SIAC was later joined in this respect by the HKCIA. See Article 43 of the 2018 HKCIA Rules.

<sup>81</sup> Michele Potestà, *Chapter 9: Preliminary Objections to Dismiss Claims that are Manifestly Without Legal Merit Under Rule 41(5) of the ICSID Arbitration Rules*, in Crina Baltag (ed.), *ICSID Convention after 50 Years: Unsettled Issues*, Kluwer Law International (2016), 249-272, at 256.

furthermore makes it clear that its scope extends to cases that are plainly unsustainable on jurisdictional grounds, as well as the merits.

44. In the Working Group, it has rightly been “highlighted that early dismissal should be distinguished from summary proceedings.”<sup>82</sup> This important point is well brought out by the provision on summary procedure introduced by the SCC in its 2017 Arbitration Rules. Under the provision, Article 39 of the 2017 SCC Arbitration Rules, a party may request that the tribunal decide, by way of such a procedure, “one or more issues of fact or law.” Examples that Article 39 gives of such issues make it clear that the provision can be invoked with a view to securing the early dismissal of a claim or defense.<sup>83</sup> Equally clearly, however, Article 39 does not just serve this purpose. In the words of Article 39, it is more generally aimed at the swift determination of legal or factual issues that would promote “a more efficient and expeditious resolution of the dispute.”<sup>84</sup>

## **B. Article 18 of the 2017 BCDR-AAA Rules**

45. The 2017 BCDR-AAA Rules contain a provision on summary procedure that is similar to the provision in the 2017 SCC Arbitration Rules. In broad and flexible terms, the provision of the BCDR-AAA Rules, Article 18, gives the tribunal “the power, on the written application of a party ... to determine on a summary basis any legal or factual issue considered by the applicant party to be material to the outcome of the arbitration.”<sup>85</sup> As with the SCC provision, Article 18 of the 2017 BCDR-AAA Rules may be deployed with a view to securing an early dismissal of a claim or defense, but it is not limited to that purpose.
46. Like the SCC provision, Article 18 of the BCDR-AAA Rules safeguards due process by requiring the tribunal to give the other party the opportunity to respond to the application for summary procedure.<sup>86</sup> According to Article 18, if the application for summary procedure is allowed, the tribunal must promptly notify the parties of the subsequent procedural steps to be taken for its determination of the legal or factual issue concerned.<sup>87</sup>
47. Given its breadth, flexibility, and in particular its potential for enhancing efficiency across a wide range of different possible situations, Bahrain commends to the Working Group the approach of Article 18 of the BCDR-AAA Rules (and Article 39 of the 2017 SCC Arbitration Rules).

## **VII. Enforcement of arbitral awards rendered in expedited arbitration**

48. Enforceability of arbitral awards under the far-reaching New York Convention is one of the most significant features of international arbitration.<sup>88</sup> There are, however, some concerns that expedited arbitration may negatively impact the effectiveness of arbitral awards.

### **A. Paucity of publicly reported national court decisions on enforcement of arbitral awards in expedited arbitration**

49. Working Group II has requested the Secretariat to “collect additional information on case law on the enforcement of awards resulting from expedited arbitration, particularly where due process requirements were mentioned.”<sup>89</sup> There is, however, limited case-law on the

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<sup>82</sup> UNCITRAL, *Report of Working Group II (Dispute Settlement) on the work of its sixty-ninth session*, A/CN.9/969, Feb. 18, 2019, ¶ 116.

<sup>83</sup> Thus, Article 39(2)(ii) of the 2017 SCC Arbitration Rules lists as one example a request for summary procedure asserting that “even if the facts alleged by the other party are assumed to be true, no award could be rendered in favour of that party under the applicable law.”

<sup>84</sup> Article 39(5) of the 2017 SCC Arbitration Rules.

<sup>85</sup> Article 18.1 of the 2017 BCDR-AAA Rules.

<sup>86</sup> See *ibid*, Article 18.3; SCC 2017 Arbitration Rules, Article 39(4).

<sup>87</sup> See Article 18.4 of the 2017 BCDR-AAA Rules.

<sup>88</sup> Respondents that participated in the 2015 and 2018 Queen Mary/White & Case surveys on international arbitration stated that enforceability of arbitral awards was international arbitration’s most valuable characteristics (64% and 65% respectively). See *Supra*. Table 1.

<sup>89</sup> UNCITRAL, *Report of Working Group II (Dispute Settlement) on the work of its sixty-ninth session*, A/CN.9/969, Feb. 18, 2019, ¶ 102.

relationship between procedural efficiency, party autonomy and due process,<sup>90</sup> and that which is available is far from exhaustive, presenting something of an obstacle to the Working Group's desired analysis.

## **B. The balance between respect for due process and efficiency – Art. V(1)(b) of the New York Convention**

50. As is well known to the Working Group, NYC Art. V(1)(b) provides that the enforcement court may refuse enforcement 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 his case.*”<sup>91</sup> Successful challenges under NYC Art. V(1)(b) are, however, rare.<sup>92</sup> There is also a concern that parties may abuse due-process set-aside applications, and that, as a result of anxiety to ensure the enforceability of an arbitral award, tribunals may suffer from “due process paranoia,” described as “a reluctance by tribunals to act decisively in certain situations for fear of the arbitral award being challenged on the basis of a party not having had the chance to present its case fully.”<sup>93</sup> Indeed, one commentator has observed that there is a growing trend in international arbitration towards a “routine, often incessant and shrill, invocation of multiple procedural complaints under the banner of due process.”<sup>94</sup>
51. The inherent nature of expedited arbitration, including documents-only proceedings, case-frontloading, limited disclosure and limited submissions, may create pressure for challenges to arbitral awards for violations of due process. Thus, “the manner in which arbitrators conduct arbitral proceedings may compel the parties to present their case within certain constraints and parameters which may then provide grounds to a losing party to seek to set aside the award on the basis of a lack of due process.”<sup>95</sup>
52. Whilst there may be a need for tribunals “to cautiously apply the expedited proceedings taking into account consideration of the complexity of the case, the circumstances and the

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<sup>90</sup> See *supra* n. 1, at 63-69 (response to question 9 of Working Group II Questionnaire).

<sup>91</sup> Emphasis added.

<sup>92</sup> Albert Bates and R. Zachary Torres-Fowler, *Abuse of Due Process in International Arbitration: Is Due Process Paranoia Irrational?* American Journal of Construction Arbitration & ADR, Dec. 2017, Vol. 1, No. 2, 245-272, at 246 (hereinafter Bates and Torres-Fowler) (noting that “[a]lthough Article V(1)(b) of the New York Convention is a relatively common ground upon which to challenge an arbitration award, by in large, those challenges are rarely successful. However, parties’ willingness to challenge an award for lack of procedural fairness or a denial of due process has given rise to an unwelcome trend in international arbitration.” *Ibid.* at 247 (noting that “it is exceptionally rare for local courts to set aside or refuse enforcement on violation of due process grounds.” (internal citations omitted)).

<sup>93</sup> *Supra* n. 5 (2015 Queen Mary/White & Case survey, at 10).

<sup>94</sup> Lucy Reed, *Ab(use) of Due Process: Sword vs Shield*, 33 *Arbitration International* 261 (2017), at 363. Albert Bates and R. Zachary Torres-Fowler explain the concern of due process paranoia in the following terms: “Tribunals are aware of the need to balance these competing interests; however, what frequently goes unspoken is that the current international system creates strong incentives for tribunals to always err on the side of the protection of due process – even in unreasonable cases – at the expense of efficiency and expediency when considering allegations of due process violations. The reason is primarily twofold. First, arbitrators almost uniformly view increased costs and delays as preferable to the increased risk of an unenforceable award; the reason being, if an award is successfully challenged, the parties will inevitably re-litigate the dispute, only further increasing costs and delaying the resolution of the case. Second, because arbitrators are frequently appointed by reputation within the international arbitration community, a vacated or unenforceable award may negatively affect those arbitrators’ reputations. This inherent structural pressure has unfortunately given rise to a strategy by some parties to raise numerous procedural applications under the guise of due process to gain a perceived strategic advantage in the arbitration or at the set aside/enforcement stage. Importantly, these contrived strategies are not applications concerning legitimate and fundamental due process concerns, such as a lack of notice. Instead, the strategy generally involves repeated applications over issues concerning mundane administrative or procedural disputes through which, whether expressly or implicitly, a party argues that the failure to grant the requested relief would result in a violation of that party’s due process rights. From afar, it is abundantly clear that the denial of such applications do not result in an even plausible violation of a party’s due process rights. However, if the ultimate goal is to ensure that its award is ‘bullet-proof,’ a tribunal could rationally conclude that the time and expense in granting an inconsequential application may be acceptable”). *Supra* n. 92 (Bates and Torres-Fowler, at 251-252).

<sup>95</sup> *Supra* n. 4 (Banifatemi, at 19).

specificities of the transaction,”<sup>96</sup> arbitral institutions and arbitrators must have the confidence to strike the right balance between efficiency and due process.<sup>97</sup>

### **C. Party autonomy in respect of the constitution of the tribunal – Art. V(1)(d) of the New York Convention**

53. Art. V(1)(d) of the NYC gives an enforcement court the discretionary power to refuse enforcement if “the composition of the arbitral authority or the arbitral procedure *was not in accordance with the agreement of the parties*.”<sup>98</sup> The question arises, therefore, whether a losing party may successfully challenge an arbitral award based on the arbitral institution’s choice of a sole arbitrator in circumstances where the arbitration agreement provided for, or the parties otherwise agree to the appointment of, a three-member tribunal.
54. Bahrain makes two brief observations on the application of Art. V(1)(d) with respect to the appointment of a sole arbitrator in face of the party agreement for a three-member tribunal. *First*, commentators have opined that, by agreeing to the application of an arbitral institution’s rules, the parties have expressly agreed to have their dispute determined by a sole arbitrator if those rules include expedited procedures that require it and the criteria for the application of these procedures are met.<sup>99</sup> *Secondly*, in order to mitigate the risk of set-aside or annulment, Bahrain recommends that the rules of arbitral institutions should make it clear to the parties that, by agreeing to arbitrate disputes under their expedited procedure, they are deemed to have agreed to the conduct of their dispute by a sole arbitrator, irrespective of any other agreement to the contrary.<sup>100</sup> For these reasons, parties and their lawyers should ensure that they are fully informed about the opt-in and opt-out alternatives in respect of the appointment of the tribunal in expedited proceedings.

### **Concluding remarks**

55. It has been said that “[t]he most excellent institutions should always be conscious of reform.”<sup>101</sup> International arbitration is no different. Provisions in institutional rules for expedited arbitration and summary procedure demonstrate that international arbitration can, indeed, meet the demand for greater efficiency whilst continuing to ensure respect for due process. In summary, Bahrain submits that provisions relating to expedited proceedings and summary procedure are welcome developments in the evolution of international arbitration and should become the norm.

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<sup>96</sup> *Supra* n. 23 (Abdel Wahab, at 146).

<sup>97</sup> *Supra* n. 92 (Bates and Torres-Fowler, at 247) (noting that “[e]fficiency, flexibility, impartiality, and finality are the hallmarks of international arbitration, and each of these attributes can be achieved while simultaneously safeguarding each party’s opportunity to present its claims and defenses fairly”).

<sup>98</sup> Emphasis added.

<sup>99</sup> *Supra* at n. 92 (Bates and Torres-Fowler, at 137) (noting that by agreeing to institutional rules that provide for expedited arbitration, the parties have chosen “by their will, a self-contained system, whose principles and provisions may not be varied, unless so permitted by the rules themselves”).

<sup>100</sup> BCDR-AAA Rules make this clear to parties in 2017 BCDR-AAA Rules, Art. 1 (“Scope”) and Art. 6.8 (“[n]otwithstanding any other agreement to the contrary, the arbitral tribunal shall comprise a sole arbitrator”).

<sup>101</sup> Jan Paulsson, *Assessing the Usefulness and Legitimacy of CAS*, Schieds VZ 2015, Heft 6, 263-269, at 267.