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Expedited dispute resolution – How disputes can be resolved quickly in the energy and commodities sector

At a Glance...

One of the most common complaints about litigation and arbitration proceedings is the length of time it can take to resolve a dispute and get to a final judgment or award. Prolonged proceedings almost inevitably result in increased costs, the draining of a company's management resources and distraction from the business.

However, in the energy and commodities sector, there are a variety of expedited or fast-track procedures available to enable and promote faster dispute resolution.

Some of these procedures have been available to the industry – for certain, specific types and sizes of dispute – for many years. Others are more recent developments. For example, the SIAC Rules 2016, which came into effect on 1 August 2016, introduced a new expedited procedure (see our previous alert on this [here](#)) and the ICC followed suit with its expedited procedure provisions on 1 March 2017 (for a more detailed review, see our recent alert [here](#)). Last year also saw the English High Court commence trial of a Shorter Trials Scheme (the STS) aimed at streamlining procedural timetables¹.

This alert seeks to:

- identify and compare the key features of the main expedited disputes processes available to participants in the energy and commodities sector – namely those under the STS and the SIAC, ICC, LMAA, GAFTA and FOSFA arbitration rules and procedures²; and
- highlight some of the overarching themes relevant to those expedited procedures.

Overarching themes***Certain expedited procedures can be used even in the face of opposition from the counterparty***

Given the importance of party autonomy and consent in dispute resolution, it might be expected that a party's express consent would be needed to use an expedited procedure, whether evidenced within the dispute resolution clause or arbitration agreement itself, or by way of an opt in after a particular dispute has arisen. While this is certainly a requirement under some of the rules (e.g., the LMAA³ Fast and Low Cost Arbitration (FALCA) Rules) for certain procedures (e.g., the English High Court STS and the SIAC Rules 2016), one party to the dispute can make a unilateral application which, if successful, will mean the dispute is submitted to an expedited procedure even if the other side objects.

The value of the claim is just one of a number of factors in determining whether an expedited procedure can be used

The value of the claim is one of the factors used to indicate whether a particular expedited or fast track procedure might be used. For example, the LMAA FALCA clause allows the parties to choose the value of the claim to which the FALCA Rules will apply. If no figure is inserted those rules will apply to claims under US\$250,000. Similarly, the ICC expedited procedure applies to claims under US\$2 million and SIAC suggests a maximum value in dispute of S\$6 million (around US\$4.4 million⁴).

However, this is merely one of a number of factors to be considered in determining whether an expedited procedure should or can be used. Other factors include the complexity of the issues and, in particular, whether or not the expedited process is suitable for the nature and type of dispute. For example, on the face of it, an expedited process is unlikely to be suitable for disputes involving allegations of fraud or dishonesty (where disclosure will be important) or multiple issue or multiparty disputes.

Limited evidence – documents, witnesses and experts

In all of the expedited procedures addressed within this alert, the scope of disclosure is expressly limited or is expected to be more limited than non-fast track or expedited disputes processes. In some instances, the requirement to produce documents is limited to those served with submissions or documents which parties' rely on or agree to disclose.

In a number of the processes analysed, witness and expert evidence is limited to written reports or statements only, and/or confined to identified issues or topics.

Curtailed use of oral hearings

In certain expedited procedures, an oral hearing can be avoided where not considered to be necessary. For example, the LMAA FALCA Rules provide that

there shall be no oral hearing unless the arbitrator, in its absolute discretion, requires one. There are however different approaches: under the STS a hearing date is fixed at the case management conference (CMC) and under the SIAC and ICC rules the decision whether to have a hearing is left to the discretion of the tribunal.

Comparison of key features of expedited disputes processes

The below table compares the key features of the expedited processes under the STS and the SIAC, ICC, LMAA, GAFTA and FOSFA arbitration rules and procedures.

	English High Court	SIAC ⁵	ICC ⁶	LMAA ⁷	GAFTA ⁸	FOSFA ⁹
Title/Reference of rules or procedure	Shorter Trials Pilot Scheme ¹⁰ .	Rule 5 (Expedited Procedure) of the SIAC Rules 2016	Article 30 and Appendix VI of the ICC Rules 2017	Fast and Low Cost Arbitration (FALCA) Rules	Simple Dispute Arbitration Rules No.126 (June 2014)	Small Claims Single Tier Rules of Arbitration (September 2008)
Is mutual agreement necessary for the expedited process?	The STS guide states that the STS is not mandatory. It appears that mutual agreement may not always be necessary. Claimants can opt in and defendants can apply for an order to transfer a case in, or the court may suggest it ¹¹ .	No – where SIAC arbitration has been chosen, a party can apply to the president to have the dispute referred to the expedited procedure.	No – where ICC arbitration has been chosen, the expedited procedures will apply in certain circumstances (see below), unless the parties agree to opt out.	Yes	Yes	Yes
Conditions or restrictions on use	Unsuitable for claims (inter alia) of fraud or dishonesty, multiple party or multiple issue claims, and public procurement cases.	Prior to the constitution of the tribunal a party may apply to have its dispute heard pursuant to the expedited procedure if the value of the dispute does not exceed S\$6 million or the parties so agree, or in cases of urgency ¹² .	Applies automatically only to arbitration agreements concluded on or after 1 March 2017. Applies where the amount in dispute does not exceed US\$2 million, or the parties agree to apply the expedited procedure. At the outset or at any time during the arbitration, the ICC Court may determine the expedited procedure should not apply.	The FALCA procedure allows the parties to choose for themselves the value of the claim to which the FALCA Rules will apply. If no figure is inserted the rules will apply to claims under US\$250,000. The FALCA procedure aims to encourage quicker and cheaper resolution of the middle range of maritime disputes – those which involve neither very large nor very small amounts of money.	Unsuitable for claims involving complicated legal issues, or lengthy contentions or arguments; gives a quick, simple answer without a fully reasoned award.	None, aside from mutual agreement.

	English High Court	SIAC ⁵	ICC ⁶	LMAA ⁷	GAFTA ⁸	FOSFA ⁹
Appointment of judge or arbitrator	A designated judge is appointed to hear a dispute from start to end, where possible ¹³ . Alternative judges may step in temporarily to hear urgent applications if the designated judge is unavailable.	Usually a sole arbitrator is appointed.	A sole arbitrator will normally be appointed. The ICC Court may override the parties' agreement in any arbitration clause in this regard.	A sole arbitrator is agreed upon or appointed by the president. Should the amount in dispute exceed the level specified in the arbitration clause, either party can (within specified time periods) require the tribunal to be expanded to 3 arbitrators.	Unless otherwise agreed by the parties, GAFTA shall appoint a sole arbitrator.	A sole arbitrator is agreed upon or appointed by FOSFA.
Approximate timing for service of written submissions, pleadings and any procedural hearing (if provided)	Service of submissions within 14 and 28 day time periods. CMCs are 12 weeks from the acknowledgement of service.	Timings in the SIAC arbitration procedure are abbreviated as needed.	There are no terms of reference. The tribunal may adopt such procedural measures as it considers appropriate. Generally, a procedural hearing shall take place no later than 15 days after the date on which the file was transmitted to the tribunal.	Service of submissions within 14 and 28 day time periods. Because of the strict timetable for exchange of written submissions, it is not intended that submissions should be in the form of pleadings or that technical points should be taken ¹⁴ .	Service of submissions within a 7 business day time period for each set of submissions.	The parties' submissions and an agreed common bundle of documents should be given to the arbitrator without delay after the notice claiming arbitration ¹⁵ .
Disclosure	Unlike the standard disclosure process, disclosure is limited to documents relied upon and/or requested, and either agreed or ordered.	The tribunal can order the parties to produce for inspection any relevant document ¹⁶ .	The tribunal may, after consultation with the parties, decide not to allow requests for document production.	Mutual discovery of relevant documents, with the opportunity to apply to the arbitrator for specific documents. Relevance is intended to be interpreted narrowly ¹⁷ .	No disclosure – only those documents served along with submissions.	No disclosure – only those documents served along with submissions. The arbitrator can request further documents from either party.
Witness and expert evidence	Witness statements usually stand as evidence in chief, and may be limited to identified issues or topics ¹⁸ . Expert evidence will be given by written reports. Oral evidence shall be limited to identified issues, as directed or agreed.	No express provisions dealing with witness or expert evidence within Rule 5. Under Rules 25 and 26 of the full SIAC Rules the tribunal may direct witness testimony to be presented in written form and can allow, refuse or limit the appearance of witnesses to give oral evidence and the tribunal can appoint an expert to report on specific issues in a written report.	The tribunal may, after consultation with the parties, decide to limit the number, length and scope of written witness and expert evidence.	Witness statements and expert reports to be exchanged within 6 weeks of discovery, with reply witness statements and expert reports to be exchanged 4 weeks thereafter. The arbitrator has the power to take into account any witness statements or reports whether or not strictly admissible and whether sworn or otherwise.	No witness or expert evidence expressly provided for in the rules.	No witness or expert evidence expressly provided for in the rules. The arbitrator has the power to hear evidence if he so desires and the parties may make a request to present oral evidence.

	English High Court	SIAC ⁵	ICC ⁶	LMAA ⁷	GAFTA ⁸	FOSFA ⁹
Hearings or trials	Maximum length is 4 days including reading time. Trials should be held no more than 8 months after the CMC.	Whether a hearing is necessary is decided by the tribunal in consultation with the parties. The tribunal decides whether to hear a dispute on a documents-only basis or if a hearing is required.	The tribunal can, at its discretion, decide the dispute on documents alone, with no hearing or examination of witnesses.	No oral hearing unless and to the extent that the arbitrator in his absolute discretion requires an oral hearing and/or the oral examination of any witness or expert.	Parties wishing to present their case orally may do so at the date of arbitration set by GAFTA. The parties are not permitted to be represented by counsel, solicitors or any members of the legal profession.	The arbitrator shall give reasonable notice of the date, time and place when any oral evidence may be heard. The parties are not permitted to be represented by counsel, solicitors or any members of the legal profession.
Time for judgment and awards	The court will endeavour to hand down judgment within 6 weeks of the trial or (if later) final written submissions.	Within 6 months from constitution of the tribunal.	Within 6 months of the CMC (subject to the court's power to extend).	Within 7 months of notice of the arbitrator's appointment where there is no counterclaim or otherwise within 8 months.	Within 7 days of the conclusion of the arbitration.	For quality and condition claims, awards shall be sent for typing within 28 days from the date of the claim (or publication of the standard average for the month of shipment if applicable).
Fees and costs	Usual court fees apply. Costs will be assessed summarily by the trial judge. Usual cost management rules do not apply under the STS.	Determined in accordance with the fees schedule to the SIAC Rules. No express provisions relating to costs are contained in Rule 5 (Expedited Procedure), but Rules 35 and 37 of the main terms do contain guidance as to how the tribunal shall deal with costs.	Fixed according to the scales of administrative expenses and arbitrator's fees for the expedited procedure, and rules as to costs more generally, as set out in Appendix III.	No express provisions relating to fees are contained within the FALCA Rules, although other LMAA rules and procedures contain guidance on fees ¹⁹ . The arbitrator may make an award as to costs in his absolute discretion (see Rule 19 of the FALCA Rules).	The total costs and fees for the arbitration shall be as laid down by the Council from time to time. No express provisions relating to legal costs are contained within the Simple Dispute Arbitration Rules. The main GAFTA Arbitration Rules provide that the costs of legal representation are not recoverable unless expressly agreed between the parties ²⁰ .	The arbitrator can assess and award its fees and determine by whom these and any other fees/expenses and costs shall be paid. The federation's fees are currently £250.

Concluding remarks

In summary, the following points are worth considering for those active in the energy and commodities sector:

- There are a number of different processes which can be used to expedite litigation or arbitration proceedings.
- This may therefore be a good time to revisit any standard contract terms and/or to consider more generally when contracting whether any of the expedited procedures addressed above might be appropriate to try to save on time and costs of dispute resolution and to seek to alleviate the aggravation and business disruption associated with lengthy, drawn-out disputes.

- Similarly, once a dispute has arisen, particularly for low value transactions, parties should not be afraid to discuss the potential use or adoption of expedited disputes processes with their counterparties.
- Any drafting of, or changes to, a dispute resolution clause should be undertaken with care. In particular, real thought should be given to how any expedited process might fit within a tiered dispute resolution clause which allows, or requires, the parties to utilise more than one type of process to try to resolve a dispute (such as amicable discussions, management negotiations or mediation). The use, value and benefit of each of those steps needs to be revisited and tested in light of the potential use of an expedited procedure.

¹ The STS is operating in the Commercial Court, the Technology and Construction Court, the Chancery Division and the Mercantile Court until 30 September 2018.

² This alert does not cover arbitration under the Rules of the London Court of International Arbitration (LCIA), although the LCIA website confirms that the LCIA Secretariat will discuss any modifications to its standard clauses to provide for expedited procedures. The LCIA Rules also contain provisions covering the expedited formation of the arbitral tribunal or the expedited appointment of a replacement arbitrator.

³ London Maritime Arbitrators Association.

⁴ Exchange rate calculated as at 29 July 2017.

⁵ The Singapore International Arbitration Centre; also offers full terms, terms tailored to international investment disputes and disputes related to the Singapore Exchange (SGX), and mediation terms.

⁶ The International Chamber of Commerce; the expedited procedure is found within its main terms.

⁷ The London Maritime Arbitrators Association; also offers full terms, intermediate claims terms, small claims procedure and mediation terms.

⁸ The Grain and Feed Trade Association; also offers full terms, mediation terms and an arbitration service for maritime disputes arising under the GAFTA Charterparty.

⁹ Federation of Oils, Seeds and Fats Association; also offers full terms and specific rules of arbitration for brokerage commissions and interest claims.

¹⁰ See CPR 51, Practice Direction 51N – note also that the English High Court is concurrently trialling the Flexible Trials Scheme (the FTS) pursuant to the same practice direction; this is intended to be a slightly less stringent (although still cost-effective) scheme for expedited dispute resolution.

¹¹ See the Shorter and Flexible Trial Procedure guide, page 3, paragraph 3. Once a claimant has opted in, an unwilling defendant has a right promptly to apply to transfer the case out of the scheme on the grounds of suitability – see CPR 51 Practice Direction 51N paragraph 2.10.

¹² This is pursuant to Rule 5.1 of the SIAC Rules 2016 – the president shall have regard to the views of the parties and the circumstances of each case when deciding whether to grant a party's application.

¹³ In English court proceedings not under the STS, judges are appointed as needed and, therefore, different judges will typically hear the proceedings as and when they come before the court, for example in interim applications, the CMC and the trial.

¹⁴ See Rule 810 of the Commentary on the LMAA FALCA Rules.

¹⁵ Note that for quality and condition claims in particular, this should usually be done within 14 days of the commencement of arbitration. The respondent then has an opportunity to reply either without delay or within seven days of submissions, depending on the type of claim.

¹⁶ See general Rule 27.f of the SIAC Rules 2016.

¹⁷ See Rules 11 and 12 of the Commentary on the LMAA FALCA Rules.

¹⁸ Although in ordinary court proceedings the court has a wide power to control evidence pursuant to CPR 32.1, under the STS the starting assumption is that evidence will be limited to some degree.

¹⁹ See the note on fees on the LMAA website at <http://www.lmaa.london/notes-on-fees.aspx>

²⁰ See GAFTA Arbitration Rules No.125, Rule 17.

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