

# Expedited Arbitration – Meeting the Needs of SMEs

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## 1 Introduction

International commercial arbitration is, in essence, a private adjudication service provided by arbitrators and arbitral institutions to companies and individuals, who seek alternative means to traditional court litigation when resolving disputes arising from their commercial contracts. Enforcement is a necessary component of arbitration so that the successful party can obtain the rights granted to it in the arbitral award, should the losing party refuse to honour the decision. As the system of private enforcement has long been abandoned, states generally recognise arbitral awards by law and offer the successful party the use of public power in order to have the arbitral award enforced. Thus, one could say that arbitration is a state-sanctioned private dispute resolution regime.<sup>1</sup>

Although international commercial arbitration is believed to have a number of clear advantages over court litigation, which may or may not be relevant for the parties in a particular dispute, one key advantage is common to all arbitrations where the parties are of different nationalities and where their respective states do not recognise and allow for the direct enforcement of court judgments of the other state: namely the recognition and direct enforcement of arbitral awards under the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”). Most countries in the world have ratified the New York Convention.<sup>2</sup> Although full and proper adherence to its principles by courts and enforcement authorities cannot be assured in all countries, international commercial arbitration owes its usefulness and popularity, and thus its *raison d’être*, to the New York Convention.

Despite its popularity, international commercial arbitration is expensive. Of course, “expensive” is a relative term and in many cases, the monetary value of the dispute, the financial power of the parties or other material aspects of the case are likely to justify the high cost of arbitration. In other cases, traditional, full-scale arbitration is simply too expensive in order to pass the optimal cost-benefit test, in particular for small and medium-sized enterprises (or “SMEs”). In such instances, the cost of arbitration is likely to be disproportionate to or may even exceed the amount in dispute. Further, full-scale arbitration tends to be increasingly lengthy, which adds to its unattractiveness for fast-moving, capital-short SMEs.

The purpose of this article is to discuss the pressing need of SMEs for timely and cost-effective arbitration. It will discuss the characteristics of SMEs in this context, set out the main features of arbitration and evaluate the key advantages

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1 Regarding the philosophical foundations of international arbitration as a self-standing and binding international dispute resolution regime, see Gaillard, Emmanuel, *Aspects philosophiques du droit de l’arbitrage international*, Martinus Nijhoff Publishers, Leiden/Boston, 2008.

2 As of October 2016, the Contracting States were 158, see “[www.newyorkconvention.org/list+of+contracting+states](http://www.newyorkconvention.org/list+of+contracting+states)”.

and disadvantages of expedited arbitration as a means to offer SMEs a more timely and cost effective international commercial arbitration.<sup>3</sup>

## **2 The Role of SMEs in the Global Economy**

SMEs are important players in the global economy, although well-known multinationals attract most of the attention from politicians and the media alike. For instance, in the European Union, SMEs together account for 99.8% of all companies, they employ 67% of the workforce and contribute 58.1% of the economic output.<sup>4</sup> In the United States, SMEs contribute around 50% of the economic output<sup>5</sup> and similar trends can be found in Japan, China, many African countries and elsewhere in the world.<sup>6</sup>

SMEs play an important role in innovation and new technologies and as the OECD has stated:

*“New firms and innovating SMEs are best seen as agents for change in the economy, introducing new products and services and more efficient ways of working. They underpin the adaptation of our economies and societies to new challenges and drive economic development.”<sup>7</sup>*

Therefore, it is of a particular importance that SMEs can have access to timely and cost-effective arbitration options in the context of their cross-border contracts.

## **3 SMEs and Cross-border Contracts**

SMEs operate in all industries, both in the physical and the digital world. They enter into various kinds of contracts in relation to their products and services, such as sale, distribution and agency agreements, services agreements, software licences, development agreements, IP licences and assignments, consultancy agreements, together with investment and funding agreements, to name a few.

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3 The author is a practicing lawyer, advising a broad range of SMEs. It is a complex legal and commercial task to advise such companies on dispute resolution options in relation to their international commercial contracts, in particular for the reasons set out in this article.

4 Edinburgh Group, *Growing the global economy through SMEs*, Issue 7 [publication year missing].

5 Small Business and Entrepreneurship Council, “[www.sbecouncil.org](http://www.sbecouncil.org)”.

6 Jia Chen, *Development of Chinese small and medium-sized enterprises*, in *Journal of Small Business and Enterprise Development* 13(2), 2006, p.140; SME growth key to Africa’s future, says African Guarantee Fund, *World Finance*, “[www.worldfinance.com/banking/sme-growth-key-to-africas-future-says-african-guarantee-fund](http://www.worldfinance.com/banking/sme-growth-key-to-africas-future-says-african-guarantee-fund)”; Robin Wigglesworth, *Big gains from growth of small business*, in *Financial Times*, 27 January 2010 (discussing SMEs in the Gulf Region).

7 OECD, *SMEs, Entrepreneurship and Innovation*, Paris: OECD 24 (2010).

Such contracts can either be local (both parties are located in the same country) or cross-border (the parties are located in separate countries). Whereas parties of local contracts can opt for the jurisdiction of their local courts without this being controversial in most cases, parties of cross-border contracts must negotiate which national court should have jurisdiction or, alternatively, they may opt for alternative dispute resolution such as international arbitration.

As mentioned earlier, the key benefits of arbitration over court litigation in relation to international contracts lie in the fact that mutual recognition and enforcement of international arbitral awards is almost universal under the New York Convention. Conversely, the mutual recognition and enforcement of court judgments is relatively limited and although it exists under a number of more geographically limited international conventions or regimes, such as the Lugano Convention, which applies to the EU member states together with Iceland, Norway and Switzerland<sup>8</sup>, the mutual recognition and enforcement of judgments which exists to some extent within the British Commonwealth and other such regional enforcement regimes, its scope is much narrower.<sup>9</sup> For instance, no such international conventions or regimes cover the mutual recognition and enforcement of court judgments between any of the Nordic countries, on the one hand, and countries such as the US, Canada, Russia, China, Japan, Australia and the whole of African and South-American countries, on the other.

Therefore, when SMEs negotiate with counterparties from countries which are outside of such mutual recognition and enforcement regimes, international arbitration may be the only realistic option when it comes to negotiating the parties' dispute resolution mechanism.<sup>10</sup>

#### **4 Dispute Resolution for SMEs**

Although no companies wish to be embroiled in lengthy and costly disputes, SMEs are particularly sensitive to contentious matters, as they are usually faced with the double Achilles' heel of limited resources and a limited scope for acceptable delays in the development of their technology and business. This means that SMEs' competitive advantage can be materially hampered if they get caught in costly dispute resolution and, in some instances, this can prove fatal to

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8 Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, signed in Lugano on 30 October 2007.

9 The international community has made several attempts to set up a regime of mutual recognition and enforcement of state court judgments similar to that of international arbitral awards under the New York Convention, such as the Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters and the Hague Convention of 30 June 2005 on Choice of Court Agreements. Only a small handful of states have signed and ratified these conventions and, as of today, no such attempts have been successful. See, for instance, Zeynalova, Yuliya, *The Law on Recognition and Enforcement of Foreign Judgments – Is It Broken and How Do We Fix It?*, in *Berkeley Journal of International Law*, Vol. 31:1 (2013), p. 150-205.

10 Of course, the parties could opt for alternative options, such as a non-exclusive jurisdiction clause (e.g. either party can sue the other party in that other party's home jurisdiction) or a non-binding mediation process, but such options are outside the scope of this article.

their operations. This fact makes such companies vulnerable, increases their operational risk, reduces their appeal and value as an investment opportunity and generally weakens their position in the market. Therefore, SMEs are often unable to protect and enforce their rights, unless more timely and cost-effective dispute resolution options are available.

In contracts with larger counterparties, such as multinationals who seek to negotiate with SMEs in order to outsource part of their functions, accelerate their technology development or improve their products and services, the counterparties often suggest or try to impose full-scale international arbitration as the dispute resolution mechanism in the contract. There may be a number of reasons for this. For instance, the in-house counsel or external legal advisors tend to opt for the “safe option” in such circumstances when advising the multinational. Also, in some instances at least, there is no doubt that the multinational prefers full-scale and thus relatively costly and time-consuming international arbitration in order to improve its bargaining position and to gain a competitive advantage over the SME, should a dispute arise.

As mentioned earlier, international arbitration is thought to have certain advantages over court litigation. SMEs benefit from those advantages, as do other users of international arbitration, but the question here is whether the disadvantages of traditional full-scale arbitration may generally outweigh the benefits for SMEs.

## **5 Advantages of Full-scale International Arbitration**

Traditionally, the advantages of full-scale international arbitration are believed to be as follows:<sup>11</sup>

### ***5.1 Neutrality of the Forum***

The neutrality of international arbitration as a forum for resolving the parties’ dispute, compared to court litigation in either of the parties’ home jurisdiction, is a key advantage of arbitration. Parties of international contracts often fear (rightly or wrongly, as the case may be) that the home courts of the other party may be partial and rule in favour of that other party. This is the key reason as to why parties generally wish to avoid the home jurisdiction of the other party, even if it would facilitate enforcement of any court judgment against that party.

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<sup>11</sup> See, for instance, Moses, Margaret L., *International Commercial Arbitration*, 2nd ed., Cambridge University Press, 2012, p. 3-4.

## **5.2 Recognition and Enforcement**

As discussed earlier, arbitration has a clear advantage over court litigation in relation to international contracts, as international arbitral awards are generally directly recognised and enforceable under the New York Convention.

## **5.3 Choice of Governing Law**

Although this advantage is sometimes overlooked, the parties have a greater choice of governing law of the contract in the case of arbitration, which may facilitate an acceptable choice of law for both parties. In the case of court litigation, although some law other than the national law of the court in question could be chosen in principle, this is generally not advisable as the national judge is only professionally competent to adjudicate on the basis of the national law of the forum. Therefore, when the parties have chosen some other governing law of the contract, the parties and the judge must usually undertake the complex, legally (and thus commercially) risky and cumbersome exercise of having the existence and contents of the foreign law proven as a fact before the court.

In arbitration, in contrast, the choice is “free” so to speak, as it is open to the parties to appoint arbitrators who have knowledge of the governing law of the contract in question.

## **5.4 Confidentiality**

Arbitral proceedings and arbitral awards generally remain confidential and only in exceptional cases are the material details of arbitration made public (such as in relation to legally binding disclosure obligations of listed companies who are parties to arbitration).

This is in stark contrast to court proceedings, which usually are public and where judgments are published and generally accessible.

## **5.5 Expertise**

Arbitration offers the possibility to appoint arbitrators with specific knowledge and expertise in specific areas, which are relevant to the dispute at hand, such as IP and technology matters.

In this context, it should be noted that various specialised courts exist in a number of countries, such as specialised commercial courts and courts specialising in intellectual property matters. However, this very much depends on the country in question and access to the same type of expertise and experience as exists in arbitration cannot be guaranteed in the state court system.

## **5.6 Flexibility**

Most arbitration clauses refer to the procedural rules of the arbitral institution chosen by the parties. However, if they so wish, the parties can tailor the arbitral proceedings to their specific needs and preferences according to a detailed arbitration agreement, which can be included either in the original contract or entered into once a dispute has arisen.

## **5.7 Speed**

It very much varies to what extent speed continues to be a material, positive factor in arbitration, as arbitration has become increasingly “institutionalised” in many cases, mirroring court proceedings to a lesser or greater extent and where litigation tactics may cause additional delays. The International Court of Arbitration of the International Chamber of Commerce states as follows on its website: “Arbitral tribunals usually take less time than national courts to reach a final decision”. Although an empirical study of this issue falls outside of the scope of this article, the general validity of this statement can be doubted in relation to modern-day, full-scale arbitration, for instance compared to the speed of court litigation in the Nordic countries.<sup>12</sup>

Also, speed in arbitration is a relative concept and must be compared to speed in court litigation in a comparable dispute. Speed of court litigation considerably varies from country to country, but the length of traditional, full-scale arbitration has become such that in many cases it is no shorter than court litigation, although appeals to higher courts (which is not an option in arbitration) may add some considerable time to court litigation.

## **5.8 Cost**

The cost of traditional, full-scale arbitration has become such that here, again, this is at most a positive factor in comparison to court litigation in high-cost jurisdictions such as the US and England. In many other jurisdictions, such as in the Nordic countries, court litigation can be considerably less costly, although this varies from case to case.

## **6 SMEs and International Commercial Arbitration**

As discussed earlier, traditional, full-scale arbitration proceedings are usually expensive. Although the costs vary (depending on the nature and complexity of the dispute, the governing law, the choice of arbitral institution, the extent of disclosure, the place where any hearings may take place and other such factors), it can be generally argued that the value of the dispute must amount to hundreds

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<sup>12</sup> At “[www.iccwbo.org/faqs/frequently-asked-questions-on-icc-arbitration](http://www.iccwbo.org/faqs/frequently-asked-questions-on-icc-arbitration)”.

of thousands of Euros before opting for traditional, full-scale arbitration becomes commercially reasonable.

In comparison, the contract value in relation to many cross-border contracts entered into by SMEs is often some tens of thousands of Euros or perhaps a few hundreds of thousands of Euros each. Thus, it is evident that traditional institutional arbitration is simply not a viable option in relation to such contracts.<sup>13</sup> Thus, SMEs must have access to other dispute resolution options, unless there is a tacit agreement between the parties that they will not litigate or arbitrate their disputes and, instead, they will either not protect their respective rights or, alternatively, they will be “forced” to reach a settlement in any such future disputes. Therefore, SMEs are often unable to protect and enforce their contractual rights, which may also relate to one or several intellectual property rights.<sup>14</sup>

This means that when advising SMEs, counsel should usually advise against the use of traditional, full-scale, institutional arbitration. They know that their client will most likely not be able to initiate such arbitral proceedings against the other party and if the other party sues the SME in such arbitration, the costs of defending the rights of the SME will be disproportionate, possibly beyond the SME’s financial means and could even lead to the SME’s collapse. Further, although various success fee or conditional fee structures and third-party litigation funding options may be increasingly popular in both litigation and international arbitration<sup>15</sup>, such options should not be taken into consideration when negotiating the arbitration clause on behalf of an SME, as there is no guarantee that any of them will be available once a dispute has arisen.

In addition to the excessive cost of traditional arbitration for SMEs, such proceedings tend to be increasingly lengthy, often spanning 1-2 years at least and often considerably more, although this very much depends on the complexity of the case and other relevant factors. For fast-moving SMEs with limited financial flexibility, being embroiled in lengthy and costly arbitration proceedings may cause a material set-back in the SME’s overall operations. This is especially true if the SME is still a “one-product” company with one core asset (such as a single software solution), which may be the subject-matter of the dispute.

Therefore, and even if SMEs benefit from the other advantages of international arbitration set out above, the time and cost of full-scale arbitration is such that SMEs should consider expedited arbitration as an alternative option to traditional arbitration.

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13 For a discussion on the cost of traditional arbitration in relation to intellectual property cases, see e.g., Trappe, Johannes, *The cost of alternative dispute resolution in intellectual property (I.P.): is it really so cheap?* in *Arbitration* 1996 62(4), p.283.

14 For instance, it is general wisdom that “intellectual property rights are worthless unless one has the means to protect them”.

15 See, for instance, Williams, David A.R. and Walton, John, *Costs and access to international arbitration*, in *Arbitration* 2014, 80(4), p. 434-435.



## **7 Key Features of Expedited Arbitration**

In summary and as the term suggests, expedited arbitration is a shortened and simplified arbitration process compared to traditional, full-scale arbitration. The word “expedited” refers to the time factor of arbitration, but as the overall time is shorter, it also follows that the procedural rules are less complex, various time limits are shorter, there is an expectation that the arbitral awards themselves are shorter and all of the above should reduce the cost of arbitration.

Expedited arbitration should be of a particular interest to SMEs. Its popularity has grown over the last few years, as it brings arbitration closer to its historical roots of timely, cost-effective and commercially orientated dispute resolution. As complex, lengthy and costly litigation and arbitration have become the norm, it is time to try and strike a new balance in this context and where international arbitration serves the needs of the whole of the international business community. A number of arbitral institutions have now separate rules governing expedited arbitration.<sup>16</sup> This is a direct response to the increased demand for such alternative, faster and less-costly arbitration in the international business community and serves the needs of SMEs in particular.

For Nordic SMEs, expedited arbitration under the auspices of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), on the one hand, and the Arbitration and Mediation Center of the World International Arbitration Organization (WIPO) on the other, are of particular interest.

## **8 SCC Expedited Arbitration**

Expedited arbitration under the auspices of Arbitration Institute of the Stockholm Chamber of Commerce has grown to the extent that it now counts for almost one-third of all arbitration cases administered by the institution. In 2015, in 62% of the cases, the arbitral award was rendered 3-6 months from the registration of the case and in 26% of the cases, this time was 6-9 months. Thus, in 88% of cases, the arbitral award was rendered within 9 months from the registration of the case. In comparison, in full-scale arbitration at the SCC, in 52% of the cases the award was rendered 6-12 months from the registration of the case and in 35% of the cases, this time was 12-18 months.<sup>17</sup> Thus, there is a stark contrast between the duration of SCC expedited arbitration, on the one hand, and SCC full-scale arbitration, on the other, which could render SCC expedited arbitration the first choice for Nordic SMEs when negotiating the relevant dispute resolution clause.

In terms of costs, in arbitration where the amount in dispute is EUR200,000, the average costs of arbitration (i.e. arbitrator and administrative fees) is

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16 In this context, it is notable that the International Court of Arbitration of the International Chamber of Commerce has yet to introduce expedited arbitration as part of its services, despite the ICC’s mission as “the world business organization” and although the ICC does considerable and valuable work in promoting and assisting SMEs in various other areas.

17 The Arbitration Institute of the Stockholm Chamber of Commerce, *SCC Statistics 2015*, “[www.sccinstitute.com/statistics](http://www.sccinstitute.com/statistics)”.

EUR19,608 in a single member full-scale arbitration, EUR35,133 in a three-member full-scale arbitration and EUR13,515 in an expedited arbitration (where there is always a single arbitrator).<sup>18</sup>

Hence in terms of these basic costs, there is a material difference between the cost of full-scale, three-member arbitration, on the one hand, and expedited arbitration, on the other. The difference is much less in full-scale, one-member arbitration, but both lower counsel fees and shorter duration of expedited arbitration is likely to tip the balance in favour of expedited arbitration for many SMEs.

Counsel fees for each party (and which will be borne by the parties as decided by the arbitral tribunal and based on the outcome of the case) are additional to the fees set out above. Although counsel fees very much vary, it could be roughly estimated that counsel fees in expedited arbitration are between 30-40% less than in full-scale arbitration, due to the greater procedural simplicity and the shorter time-span of expedited arbitration.

The key features of SCC expedited arbitration compared to SCC full-scale arbitration and which have a material impact on the time and cost of arbitration are that the arbitral tribunal consists of a sole arbitrator in all cases. Further, as a general rule, each party may only submit one written statement, including a statement of evidence, in addition to its statement of claim or statement of defence. In all cases should statements be brief and the time limits within which the documents are to be submitted may as a general rule not exceed 10 working days. A hearing will be held only if requested by a party and if deemed necessary by the arbitrator. Finally, the award is to be made within three months from the date upon which the arbitration was referred to the Arbitrator and a party may request a reasoned award. The Board of Directors of the SCC may extend this time limit upon a reasoned request from the arbitrator, or if otherwise deemed necessary.<sup>19</sup>

## 9 WIPO Expedited Arbitration

WIPO arbitration is tailored for IP and technology disputes (and not least in the benefit of SMEs), although it also administers general commercial disputes. Expedited arbitration has grown particularly popular at WIPO and now amounts to roughly 50% of all arbitration cases.

The duration of WIPO expedited arbitrations is around 7 months on average. In relation to expedited arbitration where the amount in dispute is EUR200,000, the average cost is around EUR22,000 (i.e. arbitrator and administrative fees).<sup>20</sup>

Similarly to SCC expedited arbitration, the key features of WIPO expedited arbitration compared to WIPO full-scale arbitration, which are likely to reduce the time and cost of arbitration, are that there is always a sole arbitrator. Further,

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18 See SCC's cost calculator, at "[www.sccinstitute.com/dispute-resolution/calculator](http://www.sccinstitute.com/dispute-resolution/calculator)".

19 See the *SSC 2010 Rules for Expedited Arbitrations*, at "[www.sccinstitute.com/media/49817/expedited\\_rules\\_eng\\_web.pdf](http://www.sccinstitute.com/media/49817/expedited_rules_eng_web.pdf)".

20 See "[www.wipo.int/amc/en/arbitration/fees](http://www.wipo.int/amc/en/arbitration/fees)".

the statement of claim must accompany the claimant's request for arbitration and the defendant's statement of defence must accompany the answer to the claimant's request for arbitration. (Thus, the proceedings are very much "front loaded".) Any hearings before the arbitrator are condensed and may not, save in exceptional circumstances, exceed three days. The arbitral proceedings should, whenever reasonably possible, be declared closed within three months of either the delivery of the statement of defence or the appointment of the arbitrator, whichever occurs later. Finally, the award should, whenever reasonably possible, be made within one month thereafter.

## 10 Conclusion

Users of international arbitration have become increasingly dissatisfied with the growing cost and time and hence the decreased overall efficiency of international arbitration.<sup>21</sup> As discussed in this article, expedited arbitration may be the only commercially realistic arbitration option for SMEs in many instances and despite its limits, it is certainly better to have access to imperfect justice than to no justice at all.

The key disadvantage of expedited arbitration is the possible increased procedural risk, where the bottom line is increased commercial risk for the parties, to the extent that the increased speed and procedural simplicity may lead to a greater risk of legally and/or factually incorrect arbitral awards by a single arbitrator. This risk should not be overlooked and expedited arbitration indeed has its limits. The greater the factual complexity and/or value of the dispute is, the less attractive expedited arbitration becomes. Where the tipping point lies is difficult to say and this very much depends on the parties in each case and the likely overall cost of arbitration compared to the amount in dispute.

There are clear signs that expedited arbitration is growing in popularity and it may well happen that it becomes mainstream in certain sectors or in relation to relatively simple and low value disputes. For instance, in 2015, the Financial Sector Branch of the association Arbitration Club in London, UK, introduced its "Financial Services Expedited Arbitration Procedure".<sup>22</sup> As one pair of commentators notes:

*"With the [expedited arbitration] Procedure, the [Financial Sector Branch] addresses the perceived insufficiency of conventional arbitral processes and institutional rules to meet the efficiency and cost requirements of the financial services sector. The Procedure offers a tailored, faster and (likely) cheaper option for arbitration, which the [Financial Sector Branch] hopes will attract more financial service providers to this form of dispute resolution. This efficiency*

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21 See, for instance, Greenwood, Lucy, *The rise, fall and rise of international arbitration: a view from 2030*, in *Arbitration* 2011, 77(4), p. 435-441; McIlwrath, Michael, *Faster, cheaper: global initiatives to promote efficiency in international arbitration*, in *Arbitration*, 2010, 76(3), p. 532-537, and Davison, Michael, *International arbitration: how can it deliver on its promise*, in *Arbitration* 2009, 75(2), p. 163-168.

22 See "[www.arbitrationclub.org.uk/financial-sector/eplaunch](http://www.arbitrationclub.org.uk/financial-sector/eplaunch)".

*comes, however, at the expense of procedures and protections that may be important to the just resolution of complex and high-stakes disputes.”<sup>23</sup>*

Hence it is clear that expedited arbitration is entering new territories in a direct response to the growing discontent with traditional, full-scale arbitration and it is likely to go even beyond the purpose of meeting the needs of SMEs.

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<sup>23</sup> Alexander, Jay and Frey, Laurie, *New expedited arbitration procedure aims to promote arbitration among financial service provider with quicker and possibly cheaper arbitration process*, in *International Arbitration Law Review* 2016, 19(1), N1-N3.