

UNCITRAL Working Group II (Dispute Settlement) – 70th Session

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A. Introduction

The 70th session of UNCITRAL Working Group II was a continuation of the Working Group's discussion on expedited arbitration which began at the 69th session. The session was held at the United Nations headquarters in Vienna, Austria, between 23 and 27 September 2019.

The Working Group's discussions at the 70th session focused on determining the scope and default positions under the prospective UNCITRAL expedited procedural rules (**expedited rules**), which will be debated in draft form at the Working Group's 71st session in February 2020. The Working Group is still considering whether these new expedited rules will be an annexure to the existing UNCITRAL Arbitration Rules or whether they will be standalone rules (albeit with a referral mechanism to the UNCITRAL Arbitration Rules where the parties opt-out of the expedited rules).

B. Scope of application of expedited procedure

The Working Group was adamant that the expedited rules were applicable only where the parties have agreed to opt-in and would only apply prospectively (unless the parties' agreed otherwise). Express consent was the favoured default position, rather than allowing for a mechanism which contemplated presumed or implied agreement, although some doubts were raised regarding how express consent could become an evidentiary issue in this case.

The involvement of appointing authorities in determining the application of the expedited rules was disfavoured, with the Working Group considering that the tribunal would have jurisdiction to determine this matter under the doctrine of *kompetenz-kompetenz*.

i. Applicability to investor-state arbitration

There was strong resistance to the expedited rules being applicable to investor-state disputes. In this regard, it was acknowledged that it would need to be considered how the finalised expedited rules would interact with investor-state disputes under the UNCITRAL Arbitration Rules at a later stage to

avoid unintentional conflation, but that the decision of which Working Group considered this should be determined by UNCITRAL.

ii. Criteria for the application of expedited procedure

The Working Group considered whether the fulfilment of certain criteria would trigger the application of expedited procedure in an arbitration. While monetary thresholds were suggested by various with reference to various established institutional rules, there was consensus that such a threshold would be both difficult and arbitrary determine. Concerns were also expressed to the inclusion of qualitative (i.e. non-monetary) criteria, in terms of drafting and in determining their application in practice. It was suggested that a more effective method would be to include guidance on appropriate criteria in the explanatory material to the UNCITRAL EP Rules.

iii. Withdrawal from expedited procedure

The Working Group agreed that a party could not unilaterally withdraw its agreement to expedited procedure. However, there was also consensus that a mechanism for withdrawal should be included, likely requiring an application by one of the parties to the arbitral tribunal or appoint authority, who would then decide based on the requirements of the case. Emphasis was placed on the need for a party's request for withdrawal only to be allowed in exceptional circumstances.

Where parties have agreed to resort to non-expedited arbitration, there was consensus that the parties should have the freedom to decide on the procedural effects, including whether the tribunal would remain constituted or be reformed.

C. Number of arbitrators

The Working Group considered that a sole arbitrator would be the default rule in expedited procedure, unless the parties have agreed otherwise. This was consistent with the Working Group's position from the 69th session. Emphasis was placed on the need to keep to the key characteristics of expedited arbitration as an efficient, cheaper option to non-expedited arbitration.

D. Appointment of the tribunal

The mechanism for appointment of the tribunal caused considerable debate amongst the Working Group, with several options being considered. While it was suggested that it could be mandatory for the notice of arbitration to include a nomination for the tribunal, the general consensus was that a

process similar to the existing UNCITRAL Arbitration Rules, but with abbreviated time periods, was preferable. This would mean the parties had a short period to agree on the sole arbitrator (or tribunal as required), before the appointing authority would become involved. There was some debate as to whether the appointing authority's involvement would occur automatically or only upon request, but this was left to UNCITRAL's discretion in drafting the expedited rules for the 71st session.

i. Designation of an appointing authority

The Working Group noted that, where the parties failed to agree on an appointing authority, the average time for appointing of an appointing authority was five to six weeks, which was a significant period in terms of expedited arbitration. Without a firm agreement to any course, the Working Group discussed whether the current mechanism under the UNCITRAL Arbitration Rules could be reproduced with shortened timelines and simplified steps, the 'model clause' under the expedited rules could require the parties to nominate an appointing authority, or whether the Permanent Court of Arbitration should be made the default appointing authority under the expedited rules (instead of the nominating authority).

E. Case management

The Working Group considered it was necessary for the arbitrator to consult the parties as soon as practicable after being constituted to determine procedural timetable. However, it was against a mandatory requirement requiring the tribunal to hold a case management conference or issue a procedural order, where it was not necessary to arrange the proceedings.

It was noted that the means of communications of this consultation should not be restricted in any way, and parties should be encouraged to use whatever means they have at their disposal.

F. Procedural timeframes

It was agreed that the tribunal should have the discretion to determine procedural timeframes, rather than specifying time periods for various procedural steps within the expedited rules. This discretion was noted as being broad enough to allow the arbitrator to modify party-agreed timeframes where necessary, but only after consultation with the parties.

G. Early dismissal and preliminary determination

A mechanism for early dismissal or preliminary determination of claims was tentatively approved for inclusion in the draft expedited rules for the 71st session, but without firm agreement on its inclusion in any final product. There was general agreement that preliminary determination mechanisms were relevant to arbitration generally, and the Chair determined it was more appropriate to discuss the topic in full after further research had been conducted by UNCITRAL and the various delegations.

H. Claims and counterclaims

There was no consensus on the number of written claims and counterclaims past the opening claim and defence. It was suggested notice of arbitration could include the claimant's statement of claim, and the response to the notice of arbitration the respondent's defence (and counterclaim). However, it was noted that the lack of constituted tribunal at this time, as well as the potential for the respondent to be unprepared for the dispute, could pose due process issues.

I. Hearings

There was no consensus as to whether parties should have an absolute right to hearings or whether it should be left to the discretion of the arbitral tribunal. However, it was noted that many national arbitration laws require a party to be afforded a hearing if it requests one.

J. Taking of evidence

The Working Group considered that tribunal's discretion on evidence under the existing UNCITRAL Arbitration Rules was also appropriate in expedited arbitration, but also stressed that guidance on the scope of this discretion may be necessary for arbitrators to rely on, particularly in an ad hoc context. There was some preference that all evidence would by default be in documentary form only, subject to the tribunal's discretion. It was noted that, while it be more efficient to require all evidence to be produced by each party when filing their first written claim, it could be inappropriate to make this mandatory, as the tribunal would be best positioned to determine the scope of evidence after its first consultation with the parties.

K. Award deadline

The Working Group considered whether expedited rules should provide for an express award deadline. There was some inclination to have a deadline of six months, with a majority considering that the timeframe would commence when the tribunal was constituted.

i. Extending the award deadline

Several delegations expressed a preference for the tribunal to extend the award deadline in consultation with the parties, taking into account the ad hoc nature of UNICTRAL rules. An alternative position was that the appointing authority should determine any award extensions to avoid any risk of nonchalance on the part of the tribunal. It was pointed out that the rules should expressly provide that failure to render an award within the deadline would not constitute a ground for annulment of the award, although there was no express agreement on this point.

L. Form of the award

Many delegations opposed any default rule which provided for an unreasoned or summarily reasoned award, due to enforcement concerns. However, it was agreed that the parties could agree to an unreasoned award. The Working Group considered the accompanying explanatory text to the expedited rules should encourage awards to be given in a succinct manner, providing this was sufficient to explain the basis of the decision.

There was some suggestion of allowing an award to be rendered, with reasons being provided later, or for an award interpretation mechanism allowing for parties to better comprehend unreasoned or summarily reasoned awards.