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Report of Working Group II (Dispute Settlement) on the work of its sixty-ninth session (New York, 4–8 February 2019)

Contents

I. Introduction

1. At its fifty-first session, the Commission took note of the suggestions for possible future work in the field of dispute resolution expressed by the Working Group at its sixty-eighth session (A/CN.9/934, paras. 149–164), as well as of proposals for work, in particular on expedited arbitration (A/CN.9/959) and on the conduct of arbitrators, with a focus on questions of impartiality and independence (A/CN.9/961). It was pointed out that the aim of the proposals was to improve the efficiency and quality of arbitral proceedings.[1]

2. Regarding expedited arbitration, it was suggested that the work could consist of providing information on how the UNCITRAL Arbitration Rules could be modified (including by parties) or incorporated into contracts via arbitration clauses that provided for expedited procedures or in guidance to arbitral institutions adopting such procedures, in order to ensure the right balance between fast resolution of the dispute and respect for due process. Reference was also made to the possibility of considering jointly the topics of expedited arbitration and adjudication, as expedited arbitration would provide generally applicable tools for reducing cost and time of arbitration, while adjudication would constitute a specific method that had demonstrated its utility in efficiently resolving disputes in a specific sector.[2]

3. After discussion, the Commission agreed that Working Group II should be mandated to take up issues relating to expedited arbitration.[3]

II. Organization of the session

4. The Working Group, which was composed of all States members of the Commission, held its sixty-ninth session in New York, from 4–8 February 2019. The session was attended by the following States members of the Working Group: Argentina, Australia, Austria, Brazil, Burundi, Cameroon, Canada, Chile, China, Colombia, Czechia, Ecuador, France, Germany, Honduras, Hungary, India, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Kuwait, Libya, Malaysia, Mexico, Namibia, Nigeria, Pakistan, Philippines, Republic of Korea, Romania, Russian Federation, Singapore, Spain, Sri Lanka, Switzerland, Thailand, Turkey and United States of America.

5. The session was attended by observers from the following States: Algeria, Bahrain, Belgium, Croatia, Cyprus, Dominican Republic, Equatorial Guinea, Finland, Iraq, Madagascar, Morocco, Netherlands, Norway, Saudi Arabia, Senegal and Viet Nam.

6. The session was also attended by observers from the following international organizations:

(a) *Intergovernmental organization*: International Cotton Advisory Committee (ICAC) and Permanent Court of Arbitration (PCA).

(b) *Invited non-governmental organizations*: American Arbitration Association/International Centre for Dispute Resolution (AAA/ICDR), Association for the Promotion of Arbitration in Africa (APAA), Beijing Arbitration Commission/Beijing International Arbitration Center (BAC/BIAC), Belgian Centre for Arbitration and Mediation (CEPANI), Chartered Institute of Arbitrators (CIARB), China International Economic and Trade Arbitration Commission (CIETAC), Comité Français de l'Arbitrage (CFA), Construction Industry Arbitration Council (CIAC), European Law Students' Association (ELSA), Forum for International Conciliation and Arbitration (FICA), Hong Kong Mediation Centre (HKMC), Inter-American Bar Association (IABA), International Chamber of Commerce (ICC), International

[1] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17), para. 244.
[2] Ibid., para. 245.
[3] Ibid., para. 252.

Council for Commercial Arbitration (ICCA), International Dispute Resolution Institute (IDRI), International Institute for Conflict Prevention & Resolution (CPR), International Law Institute (ILI), International Union of Notaries (UILN), Jerusalem Arbitration Centre (JAC), Law Association for Asia and the Pacific (LAWASIA), London Court of International Arbitration (LCIA), Miami International Arbitration Society (MIAS), Milan Club of Arbitrators (MCA), New York City Bar Association (NYCBA), New York International Arbitration Center (NYIAC), Panel of Recognised International Market Experts in Finance (P.R.I.M.E. Finance), Russian Arbitration Association (RAA), Singapore International Mediation Institute (SIMI) and Swedish Arbitration Association (SAA).

7. The Working Group elected the following officers:

Chairperson: Mr. Andrés Jana (Chile)

Rapporteur: Mr. Takashi Takashima (Japan)

8. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.206); and (b) a note by the Secretariat regarding issues relating to expedited arbitration (A/CN.9/WG.II/WP.207).

9. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of issues relating to expedited arbitration.
5. Other business
6. Adoption of the report.

III. Deliberations and decisions

10. The Working Group considered agenda item 4 on the basis of the note by the Secretariat (A/CN.9/WG.II/WP.207). The Working Group commended the outstanding quality of work done by the Secretariat in preparing that note, which provided a solid basis for its discussion at the session.

11. The deliberations and decisions of the Working Group with respect to agenda item 4 are reflected in chapter IV. The Secretariat was requested to prepare draft texts on expedited arbitration and to provide relevant information based on those deliberations and decisions.

12. The deliberations of the Working Group respect to agenda item 5 are reflected in chapter V.

IV. Issues relating to expedited arbitration

A. Preliminary discussion on the scope of work

1. Introduction

13. Based on the mandate that it consider issues relating to expedited arbitration (see para. 3 above), the Working Group engaged in a preliminary discussion on the scope of its work. It was generally felt that the work should focus on improving the efficiency of the arbitral proceedings, which would result in the reduction of the cost and duration of the proceedings.

14. It was generally understood that expedited arbitration was a streamlined and simplified procedure with shortened time frame that made it possible to reach a final resolution of the dispute in a cost- and time-effective manner. It was stated that several

arbitral institutions had introduced innovative features to expedite arbitral proceedings, which should shed light on the work by the Working Group.

15. While it was widely felt that the focus of the work would be expedited arbitration, the deliberations evolved around (i) whether the work should be generic in nature or should focus on international commercial arbitration; (ii) whether other types of procedure, which also resulted in efficient resolution of disputes, should be included in the scope of work; (iii) elements of expedited arbitration; and (iv) the possible form of work.

2. Commercial and investment arbitration

16. The Working Group considered whether the scope of its work should differentiate between commercial and investment arbitration. In that context, views were expressed that the focus of the work should be on international commercial arbitration. It was stated that the Working Group should not seek to address expedited procedures in the context of investment arbitration, as Working Group III was currently tasked with considering reform of investor-State dispute settlement. In addition, it was questioned whether expedited procedures would be appropriate in the context of investment arbitration, where disputes were complex, dealt with public policy issues, and involved States. It was also noted that work to improve efficiency in investment arbitration was currently being undertaken in other forums; for example, the International Centre for Settlement of Investment Disputes (ICSID) was in the process of considering amendments to its Rules and Regulations.

17. It was pointed out that if the work by the Working Group would eventually result in amendments to the UNCITRAL Arbitration Rules, caution should be taken as the Rules were generic in nature, with wide application, including to investment arbitration and arbitration between States. The Working Group considered it premature to decide whether any generic rules on expedited arbitration should apply to investment arbitration.

3. Other types of procedure

Emergency arbitrator

18. Support was expressed to include procedural aspects relating to emergency arbitrator in the scope of the work. It was stated that emergency arbitrator was a mechanism that could improve the efficiency of arbitral proceedings. It was pointed out that many arbitral institutions already provided rules for emergency arbitrator, who would render an interim order before the constitution of the arbitral tribunal. It was stated that the procedural aspects relating to emergency arbitrator usually entailed the intervention of an arbitral institution, which should be taken into account by the Working Group.

Adjudication

19. Support was expressed to include adjudication in the scope of the work. It was noted that adjudication was used mainly in the construction and engineering field but also had the potential for application in long-term contracts in other fields. It was further noted that adjudication allowed parties to refer a dispute to an independent third party who was required to make a decision in a limited time frame. It was stated that certain procedural aspects of adjudications as well as decisions rendered by the independent third party could shed light on expedited arbitration.

Early dismissal

20. It was generally felt that the work could cover early dismissal, a tool provided to arbitral tribunals to dismiss claims and defences that lacked merit. It was stated that early dismissal could be used in different types of proceedings including in expedited arbitration. It was, however, cautioned that early dismissal raised due process concerns (particularly when the parties had not agreed to the use of such tool)

and might create complications at the enforcement stage. It 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. It was, however, 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 (see also para. 116 below).

Preliminary determination

21. It was further pointed out that the work could cover not only early dismissal but also preliminary determination by arbitral tribunals, while there would be a need to clearly identify the types of procedure that would be considered by the Working Group.

4. Elements of expedited arbitration

22. The Working Group considered that the following elements should be included in its scope of work on expedited arbitration.

Due process and fairness

23. Throughout the deliberations, it was stressed that the notions of due process and fairness were important elements of international arbitration that should not be overlooked in streamlining the arbitration procedure. The 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 was emphasized.

Recognition and enforcement of arbitral awards resulting from expedited arbitration

24. It was generally felt that the work should address the aspects relating to the recognition and enforcement of arbitral awards resulting from expedited arbitration. It was pointed out that while such awards would generally be enforceable under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), they could be refused recognition and enforcement if the expedited procedure resulted in the breach of due process or fairness requirements. Therefore, it was suggested that careful consideration be given to such aspects. In that context, it was suggested that the Working Group could consider providing recommendations to States on the matter, similar to the 2006 Recommendation regarding the interpretation of article II (2) and article VII (1) of the New York Convention.

25. It was further pointed out that recognition and enforcement of decisions by an emergency arbitrator and those resulting from adjudication also raised specific issues that could be considered by the Working Group.

Application of expedited arbitration procedure

26. The Working Group discussed how expedited arbitration procedure would apply to a dispute. It was noted that different approaches had been adopted by arbitral institutions in determining the application of expedited arbitration procedure. For example, monetary thresholds and other criteria were mentioned as triggering such procedure. It was said that in certain instances, the application of expedited arbitration procedure might be triggered by the arbitral institution based on its assessment of the case and relevant circumstances. In that context, it was mentioned that disputes that could be resolved through such expedited procedure were not necessarily limited to low-value disputes; high-value disputes could also be resolved through a simplified procedure.

27. It was stated that the express consent of the parties would be necessary for expedited arbitration procedure to apply. In addition, it was underlined that parties should be given flexibility to opt out of such procedure at a later stage, if they considered it inappropriate for resolving the dispute.

28. It was said that the point in time for determining the application of expedited arbitration procedure should be carefully considered. For example, parties might not be in a position to know whether expedited arbitration procedure should apply to their dispute when they were entering into a contract and they may need the flexibility to choose such procedure after the dispute arose. However, it was also mentioned that it would be quite difficult for parties to agree to expedited arbitration procedure once the dispute had arisen and thus, the need for including a reference to the expedited procedure in the contract was stated.

5. Possible form of work

29. During the discussion, a number of suggestions were made with regard to the form that the work might take. References were made to a comprehensive set of rules separate from the UNCITRAL Arbitration Rules, amendments to the UNCITRAL Arbitration Rules, guidelines to parties and arbitral tribunals (also taking note of the 2016 UNCITRAL Notes on Organizing Arbitral Proceedings), model clauses for parties to adopt in their agreements, and recommendations to arbitration institutions that would administer expedited arbitration. It was also mentioned that the work could involve the preparation of more than one type of instrument mentioned above. It was felt that it was premature to consider the form of the work and thus it was suggested that the Working Group should first focus on the elements that would constitute expedited arbitration (see also para. 105-114 below).

30. During the discussion on possible form of work, the need to preserve the generic nature of the UNCITRAL Arbitration Rules was stressed. It was also recalled that the UNCITRAL Arbitration Rules were prepared mainly for ad hoc arbitration and therefore, did not envisage an administering institution. It was stated that those aspects as well as the possible role of appointing authorities should be taken into account, as the Working Group explored ways to incorporate expedited arbitration into the UNCITRAL Arbitration Rules.

31. It was also suggested that work on expedited arbitration could aim at both providing incentives for more efficient handling of the disputes as well as sanctions for non-compliance of deadlines.

32. It was further mentioned that the work should aim at responding to the needs of developing States that were in their initial stages of implementing a legislative framework for dispute resolution.

6. Summary of the preliminary discussion

33. After discussion, the Working Group agreed that it would first focus on establishing an international framework on expedited arbitration, without any prejudice to the form that such work might take. It was further agreed that the Working Group would then consider aspects relating to emergency arbitrator, adjudication, early dismissal and preliminary determination by arbitral tribunal (see also para. 115 below).

34. It was generally agreed that the work by the Working Group should focus on international arbitration adopting a generic approach. It was indicated that while the preliminary focus of the work would be on international commercial arbitration, its impact on investment and other types of arbitration would be assessed at a later stage depending on the outcome of the work.

B. Characteristics of expedited arbitration

35. The Working Group undertook a preliminary consideration of key aspects that characterized expedited arbitration as a basis of its work.

1. Composition and appointment of the arbitral tribunal

36. The Working Group considered issues relating to the composition of the arbitral tribunal, including the number of arbitrators, the appointment mechanism and issues pertaining to the availability of arbitrators.

Number of arbitrators

37. It was widely felt that an arbitral tribunal composed of a sole arbitrator should be the general rule for expedited arbitration. It was noted that this also reflected the trend in expedited arbitration rules.

38. It was pointed out that arbitration with 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. The appointment process for a sole arbitrator was also described as being simpler but possibly requiring the intervention of the appointing authority. It was further indicated that, according to statistics, arbitral awards were rendered in a slightly reduced time frame when issued by a sole arbitrator. It was, however, pointed out that in the experience of certain institutions, some three-member tribunals had handled expedited proceedings and rendered awards within rather a short deadline. It was also pointed out that the presiding arbitrator in a three-member tribunal could have a role in expediting certain procedural aspects of arbitration.

39. The Working Group considered the flexibility that the parties should have in appointing more than one arbitrator in expedited arbitration. The widely held view was that the appointment of a sole arbitrator should be the default rule, while providing flexibility to the parties to agree on more than one arbitrator. It was noted that arbitral institutions had adopted different approaches where the arbitration agreement included provisions contrary to the appointment of a sole arbitrator. Some institutions considered it inappropriate to proceed with expedited arbitration if the arbitration agreement provided for a tribunal consisting of more than one arbitrator; some institutions encouraged parties to agree on the appointment of a sole arbitrator; and others had a rule prescribing the appointment of a sole arbitrator, which might be imposed on the parties regardless of their agreement. In relation to the last approach, the view was expressed that the choice by the parties of the set of arbitration rules, which included such imposition, was sufficient to indicate the agreement of the parties on the appointment of a sole arbitrator. A question was raised with regard to whether a party should be given flexibility to request a three-member tribunal, when that party considered the appointment of a sole arbitrator inappropriate for the resolution of the dispute even when it had initially agreed to expedited arbitration.

40. The Working Group noted that the composition of the arbitral tribunal was a key procedural issue, which touched upon due process, and was sensitive in light of article V(1)(d) of the New York Convention, which provided that a court might refuse to recognize and enforce an arbitral award if the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties. It was pointed out that party autonomy should be respected, and that parties should remain free to determine the number of arbitrators, in light of various elements including cost and the preference for collective decision-making considering the particulars of the dispute. Statistics provided by an institution indicated that the amount at stake in the dispute was a factor in determining the number of arbitrators.

41. Various comments were made regarding the UNCITRAL Arbitration Rules, based on the assumption that the work by the Working Group could take the form of a complement to the Rules or of a separate set of rules. It was pointed out that the UNCITRAL Arbitration Rules operated in an ad hoc context. It was recalled that article 7 of the Rules provided for the default rule of three arbitrators. It was said that should the default rule for expedited arbitration be a sole arbitrator, the relevant article could indicate that the dispute would be decided by a sole arbitrator, unless otherwise agreed by the parties. Another option would be for the relevant article to simply indicate that the dispute was to be decided by a sole arbitrator, with the understanding the parties were free to agree on any modifications to the rules. If an appointing

authority mechanism were to be introduced for the composition of the arbitral tribunal, it could provide that the authority could decide on the number of arbitrators and appoint such arbitrator(s) at the same time.

42. It was noted that the agreement by the parties for tribunal composed of more than one arbitrator should not prevent them from benefiting from the application of expedited arbitration. It was highlighted that the composition of the arbitral tribunal should be considered in light of the criteria that would trigger application of expedited arbitration. For instance, parties might have agreed on a three-member tribunal at the time they entered into a transaction, while that might not be a suitable choice considering the actual dispute at hand. It was also pointed out that parties might need at a certain stage of the proceedings to opt out of expedited arbitration, for instance when the case turned out to be complex due to submission of counterclaims or consolidation. It was indicated that the determination of the number of arbitrators was linked to other issues, such as whether a sole arbitrator could make any decision before the quantum of claims had been determined. It was suggested that those situations should be considered further by the Working Group as it progressed in its work.

Appointment mechanism

43. The Working Group considered the default mechanism for appointing arbitrators in expedited arbitration, in situations where the parties could not agree on their selection and appointment.

44. It was suggested that, following article 11 of the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law"), such appointment could be made by the court or competent authority at the place of arbitration. It was underlined that such courts or competent authorities were called under the applicable law to intervene at different stages of the arbitration procedure, and that they could therefore act as appointing authorities in expedited arbitration.

45. In response, it was said that since not all jurisdictions had enacted legislation based on the Model Law, that solution might not be workable in all circumstances, and that providing national courts or competent authorities with such a role might raise difficulties with regard to disputes of an international nature. It was suggested that the UNCITRAL Arbitration Rules contained a mechanism for designating and appointing authorities, which should apply in the context of expedited arbitration. It was however pointed out that the appointing authority might need to assess quantitative as well as qualitative elements before deciding whether the expedited procedure would apply.

46. The Working Group invited the Permanent Court of Arbitration at The Hague (PCA), whose Secretary-General acted as designating authority, and other arbitral institutions, acting as appointing authorities under the UNCITRAL Arbitration Rules, to provide information on their experience including the time and cost involved in the respective mechanism to better assess the role that appointing authorities could play in the appointment of arbitrators in expedited arbitration (see paras. 94, 103 and 104 below).

47. The Working Group decided to examine mechanisms used by arbitral institutions for appointing an arbitral tribunal under their expedited arbitration rules at a later stage of its deliberations.

2. Shorter timelines

48. The Working Group then considered questions relating to timelines that would characterize expedited arbitration. It was indicated that while shorter timelines constituted one of the key characteristics of expedited arbitration, due consideration should be given to preserving the flexible nature of the proceedings and complying with due process requirements.

Overall maximum duration of expedited arbitration

49. It was generally felt that expedited arbitration might benefit from a determined overall duration for the issuance of an award. Several arbitral institutions shared their experience with the deadlines, which varied to a certain extent.

Deadlines for key procedural steps of the proceedings

50. It was noted that the UNCITRAL Arbitration Rules as well as the rules of arbitral institutions contained streamlined time frames for key procedural steps of arbitral proceedings (for example, response to the notice of arbitration and submission of statements). It was further stated that inclusion of fixed timelines in expedited arbitration were useful to permit the arbitrator to impose deadlines on the parties.

51. It was stated that case management conferences and procedural timetables were useful tools for arbitrators and parties to manage the main deadlines of arbitration. It was indicated that timelines for the key stages of expedited arbitration might be difficult to implement, as the time necessary would depend on the characteristics of the case itself. It was therefore suggested that timelines were details to be settled between the parties and the arbitral tribunal when organizing the proceedings and that discretion of arbitral tribunals with regard to those matters should be preserved.

Extension of the timelines

52. It was also felt that flexibility should be provided for extending timelines in expedited arbitration, but only in exceptional circumstances.

53. As to who would have the authority to extend the timelines, different views were expressed. It was noted that, in institutional arbitration, the administering institution would determine whether to grant the extension, whereas in ad hoc arbitration, it would need to be the parties themselves, the arbitral tribunal, the appointing authority or a local authority. It was generally felt that if the parties to the dispute agreed on the extension, it should generally be granted. However, doubts were expressed that in practice, parties would not be able to reach an agreement on such extension during the proceedings. It was further noted that allowing the arbitral tribunal to extend the timelines imposed on it might be questionable. It was generally felt that in ad hoc arbitration, extension of the timelines could be granted by the appointing authority, a matter which the Working Group would need to consider further in light of the different roles that appointing authorities might have in expedited arbitration.

Commencement

54. A number of views were expressed regarding when the timelines in expedited arbitration should commence or be triggered. In the case of institutional arbitration, the time when the notice of arbitration was received by the institution was mentioned as such point in time. It was noted that, in ad hoc arbitration, the time when the arbitral tribunal was composed, when the procedural timetable was agreed upon, or when the statements of claim and defence were transmitted to the tribunal could be points in time that triggered timelines. It was also noted that an important element in that respect was to ensure that the parties to the dispute and the arbitral tribunal were aware of the specific date when the timeline commenced or were triggered.

55. Lastly, the Working Group considered the consequences of non-compliance with the set timelines. It was suggested that, in institutional arbitration, institutions would typically limit the reappointment of the arbitrator who was late in issuing an award. Other sanctions were also mentioned including the reduction of fees of the arbitrator and impact on the reputation of the arbitrator. While the replacement of the arbitrator was also mentioned, it was cautioned that a replacement might result in additional delays.

3. Management of the proceedings and procedural measures

56. It was generally agreed that a case management conference was an important procedural tool, which permitted an arbitral tribunal to give parties a timely indication as to the organization of the proceedings and the manner in which it intended to proceed. It was said that a case management conference would usually establish a procedural timetable, which would be the basis for a common understanding of the procedure among the parties and the arbitral tribunal. It was underlined that a case management conference should lead to a procedural order, which would guide the arbitral tribunal and the parties.

Case management conference in expedited arbitration

57. Diverging views were expressed on whether a case management conference would be an essential tool for the conduct of expedited arbitration and whether rules on expedited arbitration should require such a conference and prescribe a timeline.

58. A view was that while a case management conference was useful, it should not be an essential element of expedited arbitration and thus should not be mandatory. It was explained that a case management conference might not be appropriate or not even necessary in certain types of disputes, which could be decided in a short timeframe.

59. A contrary view was that there was value in requiring a case management conference, as it would contribute to streamlining the procedure and providing certainty to the parties. Accordingly, it was suggested that a case management conference should be made mandatory, while leaving some flexibility to the arbitral tribunal in its organization.

60. As a general matter, it was stated that a balance needed to be found, as providing certainty on the procedural steps should not be at the detriment of the flexibility in the process.

Flexibility in organizing a case management conference

61. Various views were expressed regarding the degree of flexibility that should be left to the arbitral tribunal in organizing a case management conference.

62. Regarding timing, it was generally agreed that a case management conference should be held at a very early stage of the proceedings. Some expressed preference for a strict deadline within which the conference should be held, for instance, within 15 days, or as soon as possible, after the commencement of the proceedings. Others expressed the view that flexibility should be left to the arbitral tribunal on when to hold a case management conference on the basis that no specific timelines for key procedural steps of expedited arbitration should be set out and that arbitral tribunals should be able to adjust the timing depending on the circumstances of the case.

63. Regarding logistics, it was noted that a case management conference in expedited arbitration would not need to be held in person, considering that one of the objectives of expedited arbitration was to reduce costs. Therefore, it was suggested that the option of holding case management conferences remotely or by exchange of emails could be sought.

64. It was stated that there could be merit in providing a list of issues to be considered at a case management conference.

Discretion of the arbitral tribunal with regard to procedural matters

65. During the discussions on case management conference, a general remark was made that arbitral tribunals in expedited arbitration might need to impose procedural measures on the parties and enforce strict deadlines. It was explained that even though arbitral tribunals generally had the discretion to conduct arbitral proceedings as they considered appropriate (for instance, under article 17 of the UNCITRAL Arbitration Rules), it might be necessary to reiterate or reinforce such discretion in the context of

expedited arbitration, as that would limit the risk of challenges at the enforcement stage.

4. Additional claims, counterclaims and late submissions

Treatment of additional claims and counterclaims in expedited arbitration

66. The Working Group then considered how additional claims or counterclaims should be treated in expedited arbitration. As a general remark, it was noted that additional claims and counterclaims typically resulted in delays in the proceedings and the extent to which they should be allowed should be carefully considered in light of both the accelerated nature of the procedure and due process requirements. It was also noted that the earlier the arbitral tribunal had knowledge of the additional claims and counterclaims, the easier it would be for it to determine whether expedited arbitration was appropriate for resolving that dispute.

67. It was suggested that, in expedited arbitration, the notice of arbitration should serve as the statement of claim. It was also suggested that respondents should be required to raise counterclaims in their response to the notice of arbitration, which would allow the arbitral tribunal to have a better understanding of the dispute. There was a general understanding that given the expedited nature of the proceedings, there should be limitations on the ability of parties to present additional claims and counterclaims.

68. Various views were expressed regarding the degree of flexibility that should be left to the arbitral tribunal in accepting additional claims or counterclaims. Some suggested that discretion should be left to the arbitral tribunal regarding their admissibility, while others expressed preference for a prescriptive approach to the effect that such claims should only be acceptable in exceptional circumstances (upon the occurrence of new events and presentation of new factual evidence) and only before a fixed deadline. In that light, it was suggested that a flexible approach might be preferable as a restrictive approach might run contrary to due process requirements and the right of access to justice.

Late submissions

69. The Working Group also considered the treatment of submissions by parties that did not meet the deadline set forth in expedited arbitration. One view was that late submissions should not be accepted by the arbitral tribunal, while another view was that the arbitral tribunal should have the flexibility to accept such submissions in certain circumstances. It was stated that the arbitral tribunal should consider: (i) the reason why it was not possible for the party to make the submissions before the deadline; (ii) at which stage of the proceedings the submissions were being made; (iii) the impact of rejecting the submissions on the right of parties to present their case; and (iv) the likelihood that the procedure could be continued in an expedited form.

5. Taking of evidence

70. The Working Group then considered the taking of evidence in expedited arbitration. It was noted that rules on expedited arbitration usually did not address how evidence was to be taken. However, it was mentioned that the Working Group might benefit from information on the taking of evidence in practice.

71. It was suggested that a requirement in expedited arbitration could be that all evidence should be submitted with the notice of arbitration. However, it was said that it would not be reasonable to expect that the response to the notice could be accompanied by all documents and other evidence to be relied upon by the respondent.

72. A few examples were provided on how the taking of evidence could be adjusted in expedited arbitration, including restricting requests to produce documents and reducing the evidence to documents, written testimonies and expert opinions.

73. It was suggested that flexibility should be left to the arbitral tribunal on the taking of evidence. For example, parties might need time to present witness statements or expert opinions. Therefore, it was generally felt that it would be more useful to provide guidance on taking of evidence, than including a specific provision in rules on expedited arbitration.

6. Hearings

74. A wide range of differing views were expressed regarding the issue of holding a hearing in expedited arbitration.

Limitations on hearing

75. One view was that limitations on hearing were a key characteristic of expedited arbitration. Consequently, it was suggested that the default rule of expedited arbitration could be to proceed without any hearing or on the basis of documents only. It was also suggested that a hearing in expedited arbitration could be held for a specific purpose (for example, for hearing oral submissions only) or limited in time (for example, a single hearing lasting for a day or two), both of which would ensure the efficiency of the overall process. It was generally felt that limitations on hearing would not pose any problem, where the parties had agreed to not hold hearings. In the same vein, it was widely felt that if both parties had agreed to hold a hearing, the arbitral tribunal would be bound by the will of the parties.

76. Another view was that limitations on hearing should be addressed cautiously, as such limitations could raise due process concerns at the enforcement stage. In that context, it was suggested that the general rule in article 17(3) of the UNCITRAL Arbitration Rules could also apply to expedited arbitration. It was said that if one of the parties requested a hearing, the arbitral tribunal would not be able to make a contrary decision. It was said that this would also be the case even where the parties had agreed in advance not to hold a hearing, as the right of a party to present its case in a dispute was a right that could not be waived. It was further said that depriving a party of that right would violate due process requirements and the principle of equal treatment of the parties. In that context, reference was made to article 18 of the Model Law and article V(1)(b) of the New York Convention. Accordingly, doubts were expressed about the suggestion that the default rule in expedited arbitration should be that there would be no hearing. It was stated that, instead the assumption should be that a hearing would occur, unless (i) both parties agreed not have a hearing; or (ii) the arbitral tribunal considered it unnecessary to conduct a hearing with none of the parties objecting to that decision. An alternative rule suggested was that the arbitrator could decide that no hearing would take place, unless both parties requested otherwise. It was stated that such an approach could remove potential risks of allegation of abuse of process and difficulties at the recognition and enforcement stage.

77. In that context, it was pointed out that awards rendered through expedited arbitration with no hearing were rarely refused recognition and enforcement on that basis.

General remarks on hearing

78. Some general remarks were made with regard to hearings in expedited arbitration.

79. It was mentioned that hearings in arbitral proceedings were useful and could expedite the process, as they provided the arbitral tribunal and the parties the occasion to communicate as well as the tribunal the opportunity to consider a number of issues in an expeditious fashion. Along the same lines, it was suggested that the benefits of holding a hearing in arbitration should not be overlooked.

80. It was also stated that arbitral tribunals should have some discretion regarding whether and how to hold a hearing. It was suggested that some guidance could be provided to arbitral tribunals on the criteria to be used in making such decisions (for

example, the opinion of the parties, the impact on the parties' right to be heard, and the efficiency of the process). Different means of holding a hearing were mentioned, including remotely, which would not require the physical presence of the parties. It was mentioned that the flexibility to organize hearings as the arbitral tribunal deemed fit would ensure the goal of expedited resolution of the dispute.

81. It was suggested that allocating the cost of the hearing to the party requesting it, if the hearing proved to be superfluous, could be a deterrent to frivolous requests for hearings.

82. Lastly, it was mentioned that the conduct of a hearing would depend largely on the purpose of the hearing, whether it was for the presentation of evidence by witnesses or for oral argument. In that context, it was mentioned that if hearings were held for witness testimony, it could be difficult for an arbitral tribunal to limit the number of witnesses or restrict cross-examinations, as it could pose due process concerns.

7. Arbitral award

83. The Working Group discussed the rendering of awards in expedited arbitration. It was noted that the stage of preparing an award was one of the most time-consuming stages of arbitration and thus reducing that time could shorten the overall duration of arbitration. It was noted that arbitral institutions had endeavoured to expedite the proceedings by requiring arbitral tribunals to render the award within a set time frame or by providing discretion to arbitral tribunals on giving reasons in the award.

Rendering an award without giving any reason

84. It was suggested that an arbitral tribunal in expedited arbitration should have discretion to render awards without giving reasons, as this would accelerate the procedure. In support, it was stated that giving reasons would not be necessary where the dispute was uncomplicated. It was further said that awards on agreed terms could dispense the need for reasons. In that context, reference was made to article 31(2) of the Model Law. Nonetheless, it was mentioned that the arbitral tribunal should be able to explain its decisions even when the parties had agreed that the award could be rendered without giving any reason.

85. Despite the time savings that could be achieved by allowing the arbitral tribunal to render awards without giving any reason, it was widely felt that this should be possible only when the parties had agreed that no reasons needed to be provided. It was stated that the law of certain jurisdictions required awards to be accompanied by reasons in some form. It was suggested that allowing the arbitral tribunal to render an award without giving any reason posed concerns, as providing reasons was considered a duty of the tribunal to the parties. It was also pointed out that requiring the arbitral tribunal to provide reasonings could assist the arbitral tribunal in its decision-making and comfort the parties as they would find that their arguments had been duly considered.

86. In addition, it was highlighted that the absence of reasons in an award could impede the control mechanism with respect to the award. It was noted that the court or competent authority would not be in a position to consider whether there were grounds for setting aside the award or refusing its recognition and enforcement (in particular, whether the award was contrary to public policy).

Rendering an award with reasons given in summary form

87. Accordingly, it was suggested that awards in expedited arbitration should contain reasons but that they need not be long nor detailed. As such, the default rule could be that arbitral tribunals had the discretion to render an award providing reasons in summary form.

88. It was stated that the phrase "in summary form" would generally mean that the reasons should be set forth in a succinct and concise manner, allowing the parties to understand the rationale behind the decision of the arbitral tribunal. It was also stated that the phrase would not necessarily mean that all of the reasons needed to be provided or that the reasons should reflect all arguments made by parties. It was, however, noted that the phrase "in summary form" was subjective and could be understood differently, creating uncertainty when determining whether that standard had been met. Therefore, it was suggested that some guidance should be provided on the meaning of that phrase.

Other issues

89. During the deliberations, questions were raised on whether the work by the Working Group with regard to awards in expedited arbitration could consider: (i) final offer selection arbitration, where the arbitrator had to choose between one of the parties' offer; (ii) the treatment of dissenting opinions; (iii) the need for a brief time frame for the correction or interpretation of the award; and (iv) the time frame for providing the award and reasoning (particularly, if different).

8. Mechanism for the application of expedited arbitration

90. The Working Group considered the circumstances in which expedited arbitration would become applicable to a dispute.

Criteria to determine application

91. The Working Group first considered the criteria that would determine when expedited arbitration would apply.

92. While it was noted that many expedited rules of arbitral institutions had in place a financial threshold which would trigger the application of expedited arbitration, doubts were expressed on whether work by UNCITRAL should include such threshold. Doubts were also expressed on whether other criteria (for example, the characteristics of the case and relevant circumstances) could be used to determine the applicability of expedited arbitration.

93. Those doubts were expressed on the basis that it would be difficult for UNCITRAL to determine a threshold amount that would be applicable in all circumstances. It was also pointed out that even disputes involving high-value claims could be resolved through expedited arbitration. The practice of arbitral institutions in allowing parties to opt in to expedited arbitration even when the claim was over the financial threshold was mentioned. More generally, it was said that developing and applying objective criteria would be difficult, as the determination would largely depend on the circumstances of the case.

94. Furthermore, it was stated that in ad hoc arbitration, the absence of an authority to determine the applicability of expedited procedure posed inherent limitations. Even if an authority were to be agreed upon by the parties, how that authority would make the determination would need to be carefully examined. In that context, it was suggested that information on the role that arbitral institutions played in administering expedited arbitration could be useful. Arbitral institutions were invited to provide information on the criteria they used in determining the application of expedited proceedings (see also paras. 46-47 above and paras. 103-104 below).

The agreement of the parties to expedited arbitration

95. In light of the above, it was widely felt that that parties' agreement should be the determining factor for the application of expedited arbitration. It was suggested that the parties could also include in their arbitration agreement objective criteria such as a financial threshold, which would trigger the application of expedited arbitration.

96. However, it was questioned whether requiring the parties' agreement to expedited arbitration would be practical. First, it would be difficult to assume that parties would agree to expedited arbitration after the dispute had arisen. Second, in cases where the parties had agreed to expedited arbitration before the dispute, there might be instances where the dispute at hand was not suitable for expedited arbitration. Third, even when the parties had initially agreed to expedited arbitration and the relevant criteria were met, some arbitral institutions took the decision to proceed with non-expedited arbitration.

97. Therefore, the Working Group decided to consider mechanisms whereby expedited arbitration could apply without the explicit agreement of all parties. It was suggested that there could be some role to be performed by the administering institution, the appointing authority or the arbitral tribunal in determining that expedited arbitration would apply. However, doubts were expressed. For example, it was mentioned that it would be burdensome for an arbitral tribunal to make such a determination, which could lead to delays. It was stressed that the administering institution, the appointing authority or the arbitral tribunal should not have the power to impose expedited arbitration on parties, while they could have the discretion to suggest to the parties, or encourage them, to use expedited arbitration.

Resorting to the non-expedited procedure

98. On the question of whether it would be possible for parties in expedited arbitration to resort to non-expedited arbitration, it was generally felt that the parties should have the flexibility to opt out of expedited arbitration if they so wished. It was mentioned that circumstances, such as additional claims, counterclaims and complexity of the dispute, could make non-expedited arbitration more appropriate.

99. Doubts were expressed on whether an administering institution, an appointing authority or the arbitral tribunal could make a decision to proceed with non-expedited arbitration when it considered expedited arbitration inappropriate or when only one of the parties made such a request. In that regard, it was stressed that the will of the parties should prevail.

100. It was suggested that if sufficient flexibility were to be provided in expedited arbitration, there might not be the need to resort to non-expedited arbitration, for example, if parties and arbitral tribunal were able to extend timelines. It was also mentioned that resorting to non-expedited arbitration after the expedited proceedings had begun could pose practical complications, for example, with regard to the constitution of the arbitral tribunal.

Applicability and form of work

101. It was reiterated that the issue of applicability of expedited arbitration was closely related to the form that the work by the Working Group would take. It was also mentioned that some of the questions regarding the applicability could be addressed in the instrument to be developed, for example, if it were to be stand-alone rules or a complement to the UNCITRAL Arbitration Rules.

9. Enforcement

102. The Working Group noted that questions in relation to the enforcement of arbitral awards were constantly raised during its deliberation on the different characteristics of expedited arbitration. It was reiterated that the agreement of the parties to expedited arbitration was a crucial element to be considered and possible means to record such agreement were mentioned. In that regard, the Secretariat was requested to collect additional information on case law on the enforcement of awards resulting from expedited arbitration, particularly where due process requirements were mentioned.

10. Role of institutions and other authority in expedited arbitration

103. The Secretariat was requested to collect information on the different roles undertaken by arbitral institutions in administering expedited arbitration. The Secretariat was also asked to collect information on appointing authorities under the current UNCITRAL Arbitration Rules, including which entities performed that role, the resources, and the time and cost required for appointing arbitrators. It was said that such information could be useful in assessing whether appointing authorities could undertake certain functions in expedited arbitration, which were usually handled by the administering institution (see paras. 46, 47 and 94 above).

Designating and appointing authority under the UNCITRAL Arbitration Rules

104. The Working Group heard an intervention by the PCA explaining its role as designating authority and appointing authority under article 6 of the UNCITRAL Arbitration Rules. It was indicated that appointing authorities were generally designated by the Secretary General of the PCA within two weeks from the time it received a request for the designation containing all required documents, through a process which involved obtaining the comments of the other party within a 5- to 10-business days. It was also noted that where the Secretary-General of the PCA acted as appointing authority in arbitrations with a sole arbitrator, the list procedure was used in most cases, which had the advantage of involving the parties in that process.

C. Possible form of work on expedited arbitration

105. The Working Group had a preliminary discussion on the possible form that its work on expedited arbitration could take.

A set of rules

106. Suggestions were made that the work could consist of preparing a set of rules on expedited arbitration. Views diverged on whether such set of rules would result in an amendment to the UNCITRAL Arbitration Rules, would be a stand-alone instrument, or possibly both (following the model of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration).

107. It was stated that including a set of rules as a separate section or an annex to the UNCITRAL Arbitration Rules would have the following advantages: (i) repetition of provisions that applied to both non-expedited and expedited proceedings could be avoided and the linkage between the two procedures easily addressed; (ii) it would be easier to design a mechanism allowing parties to utilize both the non-expedited and expedited proceedings depending on the dispute, putting both types of proceedings on an equal footing; and (iii) it would allow parties to easily identify the rules specific to expedited arbitration.

108. A further suggestion was that rules that did not pertain only to expedited arbitration (for example, rules on organization of case management conferences and early dismissal) could be newly added to the UNCITRAL Arbitration Rules to apply to both expedited and non-expedited proceedings.

109. It was stated that a stand-alone instrument on expedited arbitration would have the following advantages: (i) as a comprehensive set of rules, it would be easier for the parties to use; (ii) it would be easier to promote; and (iii) it would be more convenient for the parties to specifically refer to the set of rules on expedited arbitration.

110. It was questioned whether a stand-alone text would need to repeat provisions already contained in the UNCITRAL Arbitration Rules or be more limitative, leaving matters to be covered by the applicable arbitration law.

111. It was generally felt that it was premature to indicate a preference on the presentation of the set of rules, as that was closely linked to issues of applicability

and content of the rules. It was underlined that the outcome of the work should aim at providing maximum certainty and clarity to the parties.

Model clauses

112. A suggestion was made that the work could also take the form of model clauses for use by parties that wished to engage in expedited arbitration. It was said that that approach would entail clarifying the procedural matters that needed to be agreed in advance by the parties to adapt to expedited arbitration. It was further noted that the preparation of model clauses could usefully complement the work on preparing a set of rules.

Guidance document

113. It was also suggested that guidance on expedited arbitration could be provided, either by modifying existing guidance texts of UNCITRAL or by preparing a stand-alone text. It was pointed out that the aim of such guidance would be to set out the benefits of expedited arbitration, and how expedited arbitration rules could be used. It was suggested that such work would not necessarily need to be carried out by the Working Group and instead could be undertaken by the Secretariat, in consultation with experts.

Summary

114. It was noted that the possible forms suggested were not mutually exclusive and that there might be benefit in preparing multiple instruments that could complement each other. It was generally felt that work could begin on the preparation of a set of rules on expedited arbitration, the presentation of which would need to be considered at a later stage. It was further noted that rules on expedited arbitration should have a linkage to the UNCITRAL Arbitration Rules to provide sound alternatives as well as flexibility to the parties. It was mentioned that guidance on the application of the rules on expedited arbitration could be better provided once the rules had been prepared.

D. Possible work on other types of procedure

115. Recalling its earlier discussion on emergency arbitrator and adjudication (see paras. 18, 19 and 33 above), the Working Group agreed that priority should be given to work on expedited arbitration. It was, however, suggested that relevant issues could be raised when discussing similar aspects in expedited arbitration. Noting that emergency arbitrator and adjudication were procedures that could also be used in non-expedited arbitration, it was further suggested that additional information on those types of procedures, particularly of their use in the international context, would be useful.

116. Recalling its earlier discussion on early dismissal (see para. 20 above), it was highlighted that early dismissal should be distinguished from summary proceedings. It was suggested that caution should be taken when using the relevant terminology to refer to such types of procedural tools. It was reiterated that the use of such procedural tools was not necessarily limited to expedited arbitration but could also be applied in non-expedited proceedings. Therefore, it was suggested that if the work by the Working Group were to take the form of a set of rules, consideration should be given whether to include provisions on such procedural tools in the current UNCITRAL Arbitration Rules. The Secretariat was requested to gather information about such procedural tools and how they were applied, so that the Working Group could consider the relevant issue at a later stage.

V. Other business

117. The Working Group recalled that the Commission at its forty-ninth session, in 2016, approved a joint project with the Swiss Arbitration Association (“ASA”), the aim of which was to promote the revised UNCITRAL Notes on Organizing Arbitral

Proceedings.[4] The project consisted in the development of an online toolbox designed for the needs of arbitrators, counsel and in-house counsel. The Working Group was informed that ASA was currently testing the toolbox. Delegations were invited to participate and to inform the Secretariat accordingly.

[4] *Ibid., Seventy-first Session, Supplement No. 17* (A/71/17), para. 160.