



REPORT OF THE FORUM FOR INTERNATIONAL CONCILIATION AND ARBITRATION (FICA) TASK FORCE ON ISSUES RELATED TO EXPEDITED ARBITRATION IN CONNECTION WITH THE UNCITRAL RULES AS CONSIDERED BY THE 73RD SESSION OF UNCITRAL WORKING GROUP II (22-26 MARCH 2021)

Dated: 4 January 2021

Introduction

FICA is a non-profit, non-governmental organization founded in 1998. In 2002, FICA was granted Observer status to attend UNCITRAL Working Groups. Through its members and the publication and dissemination of position papers, articles and comments, FICA participates in the negotiation and development of international instruments impacting all forms of transnational dispute resolution. More information is available on the FICA website: www.fica-disputeresolution.com.

In 2019, FICA submitted and presented a report on issues relating to expedited arbitration discussed in UNCITRAL Working Group II at the 69th session in February 2019 on the basis of the Note prepared by the Secretariat (A/CN.9/WG.II/WP.207 of 16 November 2018). FICA's Report, dated 15 September 2019, is available on the FICA website: www.fica-disputeresolution.com.

FICA provides the comments in this Report to the Note prepared by the Secretariat on draft provisions on expedited arbitration for discussion in UNCITRAL Working Group II at the 73rd session on 22-26 March 2021 (A/CN.9/WG.II/WP.216 of 10 December 2020).

1. Scope of application

The UNCITRAL Working Group has not yet decided whether the Expedited Arbitration Provisions (EAPs) should be integrated in the generic UNCITRAL Arbitration Rules (UARs) or whether they should be contained in an Annex thereto.

The Secretariat's Note is made on the basis of the assumption that the EAPs are incorporated into the UARs as an appendix, but requests comments as to whether or not an additional paragraph should be inserted in article 1 of the UAR stating that the EAPs in the Annex apply where the parties so agree (para. 10-11).

In its previous Report, FICA expressed support for including the EAPs in an appendix to the Rules and to add an additional paragraph in article 1 of the UARs stating that the EAPs in the appendix apply where the parties so agree (FICA Report of 15 September 2019, section 3).

2. Non-application of the Expedited Arbitration Provisions

Draft provision 2 provides the possibility for the parties to agree, at any time during the proceedings, that the EAPs shall no longer apply to the arbitration. Moreover, it provides the



possibility for the arbitral tribunal to determine, in exceptional circumstances and after having invited the parties to express their views, that the EAPs shall no longer apply (para. 17).

The FICA Task Force previously expressed its support for providing the possibility for parties to agree to withdraw from the EAPs as party autonomy is fundamental to the procedure (FICA Report of 15 September 2019, section 17).

FICA considers that the arbitral tribunal should never be able to overturn or reject party autonomy. If the parties agreed to EAPs, then they apply unless and until the parties agree otherwise.

3. General provision on expedited arbitration

Draft provision 3 sets out general guiding principles on the conduct of expedited arbitrations, providing that the parties and also the arbitral tribunal should act expeditiously and economically throughout the proceedings.

The Secretariat's Note raises the question whether the model statement of independence pursuant to article 11 of the UARs should be revised for expedited arbitration or whether the language proposed in para. 27(4) of the Secretariat's Note for inclusion in the explanatory note on draft provision 3 would be sufficient (para. 28 and 29).

As already set out in its Report of 15 September 2019 (section 10), FICA considers that candidate arbitrators in expedited arbitrations should provide written commitments that they will comply with the short time limits set for the rendering of an award in expedited proceedings

Also, the Secretariat's Note raises the question whether it is not appropriate to include an additional paragraph providing that the arbitral tribunal may, after inviting the parties to express their views, utilize any technological means as it considers appropriate to communicate with the parties and to hold consultations and hearings remotely (para. 30 and 31).

FICA supports the insertion of such provision which makes it clear that a hearing may be held remotely or virtually, even if the parties do not consent thereto. As the generic UARs do not yet contain such provision, it is appropriate to include a similar provision in the generic rules.

4. Notice of arbitration, response thereto, statement of claim and defence

The Working Group has already approved draft provision 4 on the notice of arbitration (para. 34 and 35) and draft provision 5 on the Response to the Notice of arbitration (para. 36 and 37). The Secretariat now provides texts for the explanatory notes thereto and also raises a remaining issue, namely the question when the 15-day time frame for submitting the statement of defence should start running (para. 38).

FICA has previously recommended that the 15-day time limit should start running from the date of receipt by the respondent party of the notice of arbitration (FICA Report of 15 September 2019, section 15).

The Secretariat's Note points out in this respect that this may require the respondent to submit its statement of defence even prior to the constitution of the arbitral tribunal. FICA considers that



there is no problem with the respondent being required to submit its statement of defence prior to the constitution of the arbitral tribunal. This may contribute even to making a more appropriate constitution of the arbitral tribunal.

5. Designating and appointing authorities

The Working Group has already approved draft provision 6 on designating and appointing authorities (para. 40).

The Secretariat now provides text for the explanatory notes thereto and also raises a remaining issue, namely the question when the 15-day time frame for the appointing and designating authorities should start running (para. 42-48). The proposed provision 6(1) provides that the 15-day time frame commences when the claimant receives the proposal from the respondent in accordance with draft provision 6 (i.e., with respondent's statement of defence).

FICA supports this proposal.

Also, the Secretariat submits the question whether a party should be able to request the Secretary-General of the PCA to serve as appointing authority, in case the designated appointing authority refuses or fails to act. The Secretariat proposed a provision 6(3) in this respect (para. 67 and 68), while pointing out that the generic UARs do not contain a similar provision.

FICA supports this proposal.

6. Number of arbitrators

Draft provision 7 on the number of arbitrators provides that unless otherwise agreed by the parties, there shall be one arbitrator (para. 49).

FICA supports this proposal. This is consistent with what FICA set out in its Report of 15 September 2019 (section 15), namely that the parties should be free to determine the number of arbitrators for the arbitration proceedings also for expedited arbitration.

7. Appointment of the arbitrator

The Working Group has already approved draft provision 8 on the appointment of the arbitrator (para. 51), but the Secretariat raises the question whether this is really necessary because the text is already contained in article 8 of the generic UARs.

FICA supports the insertion of this provision in the Annex on the EAPs.

8. Consultation with the parties and the provisional timetable

The Working Group has already approved draft provision 9 on consultation with the parties and provisional timetable (para. 56). The Secretariat now provides a text for the explanatory notes thereto (para. 57) and also raises two remaining issues, namely the question in which time



frame the arbitral tribunal should organise a case management conference with the parties: 15 days or 30 days after the constitution of the arbitral tribunal (para. 58-61), and also the question whether the proposed provisions 9(2) and 9(3) are really necessary (para. 62 and 63). The Secretariat suggests that if provision 9(2) is added in the EAPs, it may be appropriate to add a similar provision also to the UARs.

FICA considers it appropriate that in expedited arbitration the case management conference should be organised within 15 days after the constitution of the arbitral tribunal.

FICA considers that it is appropriate to add a provision like the proposed provision 9(2) stating that consultations may be conducted through a meeting in person, in writing, by telephone or videoconference or other means of communication, and that it is appropriate to add a similar provision also to the UARs.

9. Time frames and discretion of the arbitral tribunal

The proposed provision 10 on discretion of the arbitral tribunal with regard to time frames envisages to provide the arbitral tribunal with the power to extend or abridge any time limits prescribed under the EAPs or agreed by the parties (para. 64). The Secretariat wonders whether this provision is redundant with article 17(2) of the UARs and whether it might not suffice to provide guidance in an explanatory note (para. 65).

FICA considers that the whole point of the EAPs is expedition. Therefore, the arbitral tribunal may only extend a time limit set or agreed between the parties if the parties agree thereto or if the arbitral tribunal considers that there is exceptional good cause.

10. Hearings

The proposed provision 11 on hearings provides the possibility for an arbitral tribunal, after having invited the parties to express their views and in the absence of a request to hold hearings, to decide that hearings shall not be held (para 67-69). The Secretariat wonders whether such provision should be included in the EAPs as the proposed provision 3(3) makes it easier for the arbitral tribunal to hold a hearing remotely while using technological means (para. 71).

FICA supports this provision, as this is important for the expeditious nature of expedited arbitration.

11. Counterclaims, claims for the purpose of set-off and amendments to the claim or defence

The Working Group has already approved draft provision 12 on counterclaims or claims for the purpose of set off and draft provision 13 on amendments and supplements to a claim or defence (para. 72). The Secretariat now provides a text for the explanatory notes thereto and also raises a remaining issue, namely the question whether provisions 12(2) and 13(2) are really necessary, because draft provision 10 clarifies that the arbitral tribunal may extend or abridge any period of time prescribed under the EAPs (para. 74).



FICA supports these provisions, including provisions 12(2) and 13(2) as they are important in view of the requirements of due process.

12. Further written statements

The Working Group has already approved draft provision 14 on further written statements (para. 75). The Secretariat now provides a text for the explanatory notes thereto (para. 77).

FICA supports this provision as it is important in view of the requirements of due process.

13. Evidence

The Working Group has already approved draft provision 15 on evidence (para. 78). The Secretariat now provides a text for the explanatory notes thereto (para. 79). The Secretariat raises as a remaining issue the question whether this provision should be maintained in the EAPs or whether the guidance provided therein could be included in the explanatory notes (para. 80).

FICA supports this provision which makes it easier for an arbitral tribunal to impose limitations regarding the taking of evidence and alert the parties that extensive production of documents and other evidence may not be possible in expedited arbitration. The provision should be retained in the EAPs.

14. Making of the award

The proposed provision 16 on awards is controversial insofar as it provides the possibility for an arbitral tribunal to extend the time limit (proposed to be fixed at six months) in exceptional circumstances by the arbitral tribunal (para. 81).

The Secretariat's Note raises a number of remaining issues for discussion: i) the time frame for the rendering of the award (para. 83); ii) circumstances for extending the time frame and the need to provide reasons for the extension (para. 84); iii) unintended lapse of the time frame (para. 85); iv) reasons for the extension (para. 86); v) limitations on extensions (para. 87); vi) consequences of non-compliance by the arbitral tribunal (para. 88); vii) other time frames (para. 89).

FICA considers that the whole point of the EAPs is expedition. Therefore, an extension of the time limit set or agreed for the rendering of the arbitral award by the arbitral tribunal will only be permitted by agreement of the parties or by exceptional good cause. FICA considers that a standard should be set for what may constitute exceptional circumstances and that the arbitral tribunal should explain with reference to this standard whether there is "exceptional good cause" for extending the period for making the award.

FICA supports the proposal to fix a time limit of six months, which may be extended only once with an additional three-month period.



The Secretariat's Note raises the question whether the time frames prescribed in the UARs (article 37 on the interpretation of an award, article 38 on the correction of the award and article 39 on an additional award) need to be modified in expedited arbitration (para. 90).

FICA considers that the 30-day time frame foreseen in the generic UARs for the interpretation of an award, the correction of an award and an additional award can also apply to expedited arbitration and suggests a reduction to 15 days.

15. Pleas as to the merits and preliminary rulings

The Working Group has not yet decided whether to include the proposed provision on pleas as to merits and preliminary rulings (para. 91-93). The Secretariat wonders whether this provision should be included in the EAPs or whether it is more appropriate to include this provision in the generic UARs.

The Secretariat's Note asks whether the pleas that a party can raise should be further developed (para. 96), and proposes a time frame of 30 days for a respondent to raise such plea (para. 97), whereupon the arbitral tribunal shall determine within 15 days whether it will rule on the plea as a preliminary question, followed by a time limit of 30 days within which a decision on merits of the plea must be made. The Secretariat wishes to know whether the two stages should be combined into a single stage with a single time frame (para. 98).

Also, the Secretariat's Note raises the question whether the 30-day time frame for raising a plea as to the merits is appropriate in the light of the time period for rendering the award in draft provision 16 (either six or nine months) and, if not, how it should be adjusted (para. 97).

Switzerland suggests to limit the provision in the EAPs to a statement that this power of the arbitral tribunal is an inherent power of the arbitral tribunal under article 17(1) of the generic UARs rather than a special power under the EAPs (para. 99).

FICA supports the introduction of this provision both in the UARs and in the EAPs. The introduction of such provision in the EAPs may, however, not affect the expeditious nature of expedited arbitration and not give a cause for an extension of the six-month time limit to render the final award.

16. Model arbitration clause for expedited arbitration

The Secretariat's Note proposes a model clause for expedited arbitration, with a possible waiver of the right to withdraw from the EAPs (para. 101).

Moreover, the Secretariat's Note lists elements that can be considered by parties when they consider to refer their dispute to arbitration under the EAPs (para. 102). The Secretariat thereby considers introducing a financial threshold.

FICA has no comment on this proposed model clause and on the proposed list of elements to be considered when parties refer their dispute to arbitration under the EAPs. However, FICA does not believe that a unilateral withdrawal mechanism should be included in the EAPs. Once agreed, parties should be permitted to withdrawal only upon mutual agreement. That is the nature arbitration, which is a creature of party autonomy. FICA also does not support the



introduction of a financial threshold for expedited arbitration, consistent with its position previously expressed in its Report of 15 September 2019, section 6.

17. Application of the UNCITRAL Rules on Transparency to expedited arbitration

The last section of the Secretariat's Note deals with the question of the application of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration to expedited arbitration. The Note sets out that whilst the Transparency Rules form part of the UARs (Article 1(4) of the UARs), the suitability of the EAPs for investment arbitration is a question to be determined by the disputing parties.

As already set out in its previous Report, FICA believes that the expedited arbitration provisions should refer both to commercial and BIT/IIA dispute arbitrations (FICA Report of 15 September 2019, section 2).

Conclusion

FICA fully supports the work of UNCITRAL Working Group II to examine how arbitrations can be conducted in a more time- and cost-effective manner.

The FICA Task Force believes that its comments in this Report can usefully contribute to the preparation of an appropriate instrument by UNCITRAL.

Respectfully submitted,

The Forum for International Conciliation and Arbitration (FICA) Task Force on issues related to Expedited Arbitration in connection with the UNCITRAL Rules

**Ben Beaumont, Chairperson
Alan Anderson
Timothy Lemay
Herman Verbist
Rumiana Yotova**