

## **Commentary from the Delegation of Mexico, regarding the draft expedited arbitration provisions, provided in working document A/CN.9/WG.II/WP.214.**

### **General**

1. The purpose of the expedited arbitration provisions should be to simplify and enhance the flexibility of the procedure, reducing the time and costs of the arbitration.
2. From that perspective, the provisions should be the minimum and indispensable to save costs, time and formalities that are necessary for non-expedited arbitrations, conducted under the Rules. To that end, the more adequate instrument would be an appendix to the Rules, or some Rules for Expedited Arbitration, that would entail the subsidiary application of the Rules, in all which has not been modified by the provisions.
3. The paraphrasing of the provisions of the Rules would not serve such purpose. Even less adding provisions that establish more or different formalities, which would create a hidden legal obstacle to the expedited and flexible conduction of the expedited arbitration. It would be absurd to submit expedited arbitration to more formalities than arbitration under the Rules.
4. The Rules have been successfully applied, experimented with and interpreted, since they were issued decades ago. To repetition or paraphrasing of its provisions would be an invitation to new interpretations that would only create uncertainty.
5. It is very important that these minimum provisions that provide flexibility in the application of the Rules, be accompanied by a commentary or guide. Expedited arbitration, as it is being developed nowadays, is not sufficiently known. A commentary or guide would be very illustrative for the users of the new provisions.

### **Appointing authority in expedited arbitration**

1. The best solution is that the parties agree on its designation. But the loopholes need to be considered
2. The option towards which the working group seems to have leaned is for the Permanent Court of Arbitration (PCA) to be the default appointing authority. The Mexican Delegation has the following observations:
  - 2.1. The PCA has functioned quite well as appointing authority. However, it may not be the best option in the case of expedited arbitration. When the Rules were adopted for the first time in 1976, the arbitration practice and culture were very different.
  - 2.2. Nowadays the growth of arbitration and the number of proceedings, may create problems due to the procedures and lack of immediacy between the PCA, parties and the seat of arbitration.
  - 2.3. In 1976, when the Rules were issued, the world lacked a uniform legal system, which we have today as a consequence of the Model Law. Back then, it would have been quite imprudent to designate the national authority of the seat of arbitration as the appointing authority.
  - 2.5. In 1985, when the Model Law was adopted, it was decided to convey the functions of the appointing authority, to the entity designated by each State when adopting the Model Law. The system has functioned quite well, as a consultation of the CLOUT or 2012 Digest demonstrates.
  - 2.6. In addition to the foregoing, a considerable number of arbitral institutions with regional or global presence, have acquired a considerable experience as appointing authorities under the Rules.
3. In coherence with previous interventions, the Mexican Delegation suggests to adopt the system of the Model Law; and not to bypass the role that could be covered by certain arbitral institutions. Some revisions would need to be made.

- 3.1. The appointing authority would be the entity with similar or compatible functions of an appointing authority at the seat of arbitration.
- 3.2. In case that no such authority exists in terms of paragraph 3.1., the appointing authority would be the PCA].

### **Time frame for making the award**

1. It appears that the working group is leaning towards establishing a deadline for making and notifying the award. The Mexican Delegation has serious problems with such proposal.
2. Some institutional rules provide for a time frame for the arbitration or the making of the award.
3. These rules provide the arbitral institutions with the authority to extend the time frame, which avoids the risks to which we refer below. It is common for the institutions to grant these extensions, which demonstrates that the time frames are often not complied with.
4. Expedited arbitration under an appendix to the Rules does not provide for an administering entity with the authority to extend the time frame.
5. A provision that provides for a time frame for the arbitration or the making of the award in these circumstances, must be accompanied by an explicit provision regarding the consequences of not meeting it; that is, which are the consequences of the expiration of the stipulated time frame, without the award being made and notified to the parties?
6. In some previous interventions, it has been suggested that this problem is solved by the law of the seat of arbitration; the Mexican Delegation could not find uniform, clear jurisprudence that settles the issue.
7. The most obvious opinion is that the late rendering of the award will entail that the arbitration was not conducted in accordance with the agreement of the parties. The application of the New York Convention and, in the countries that have implemented the Model Law or with similar legislation, the consequence would be the annulment of the award or its non recognition and enforcement (New York Convention, V.1.d, Model Law, articles 34.2.iv y 36.1.a.iv.).
8. The Mexican Delegation considers that, unless the problem of the consequences of not meeting the deadline for making the award, is dealt with satisfactorily, no time frame should be provided in the provisions.