

Swiss Proposal for Adjudication Procedure

The Swiss delegation to UNCITRAL and Working Group II proposes that, once the Rules and Notes on Expedited Arbitration are adopted, Adjudication Procedure be examined with the objective of adopting Rules for International Adjudication. These rules may be adopted as an extension to the UNCITRAL Expedited Arbitration Rules.

Justification and Purpose of the proposed rules

International commercial arbitration, as it is conducted today, ensures full protection of the parties' procedural rights at the price of often long drawn out and costly proceedings. The Expedited Arbitration Rules, as they are about to be adopted by UNCITRAL, can be expected to provide some relief to the time and cost problem in international commercial arbitration. The present proposal seeks to reduce further the time by which an enforceable award is issued. At the same time, it offers the party dissatisfied with the outcome the possibility of a full-fledged arbitration, provided it complies with the Adjudicator's decision (the Adjudicator's award) before commencing the arbitration. In other words, the Adjudicator's award is either accepted by the parties voluntarily or, if it is not, it reverses the cash flow situation, depriving the original debtor of the comfortable position in which it can withhold payment until the arbitration is completed.

At present various rules and mechanisms exist to provide rapid decisions; as examples one may mention the rules for emergency arbitrators or dispute boards. These mechanisms are useful and are applied successfully in various circumstances. Their principal shortcoming, however, is that they are not enforceable.

A legislative enactment, as it is applied very successfully in the United Kingdom, may provide a solution on the domestic level. UNCITRAL may examine such a solution, for instance by an addition to the Model Law. As broad international application of this approach requires enactment in many different countries, the present proposal seeks to resolve the issue through a set of rules that can be adopted by the parties to an international contract or offered by arbitral institutions as part of its arbitration services.

The problem which the present proposal seeks to resolve is the following: fast decisions, as they are issued in adjudication or similar proceedings, are –“rough justice”, in which the parties' rights to present their case are restricted. The parties may nevertheless feel that they can live with the result. A safeguard must, however, be provided for those cases where the short and rough procedure and the restriction of the parties' procedural rights led to a result which at least one of the parties finds unacceptable. Preserving the right of recourse to ordinary arbitration or litigation therefore would seem to be a necessity; contractual arrangements for adjudication and similar procedures reserve such recourse. Decisions that are not final but may be submitted again to arbitration or court proceedings, however, normally are not enforceable under the mechanism provided by the New York Convention. As a result, an essential element for the success of rapid decisions is lost.

The present proposal seeks to face these difficulties by a set of rules which seek to provide immediate enforcement in the international framework of the New York Convention and nevertheless provide the possibility of a review of the decision in proceedings that ensure due process. The mechanism consists in turning the adjudicator's decision into a binding award, enforceable under the New York Convention, unless it is challenged, and the dispute is brought in an ordinary arbitration. Such

challenge, however, is available only if the award debtor complies with the Adjudicator's decision within the specified period and before commencing the arbitration.

In other words, the proposed mechanism reverses the cash-flow situation: the debtor of, say, a monthly progress payment, the payment for the delivery in a long term supply contract or of a periodic licence fee, no longer enjoys the comfortable position of retaining the payment until the arbitration is completed; that position is shifted to the creditor. The debtor may resort to arbitration; but in the arbitration the roles are reversed, the debtor is out of pocket and seeks to recover the amount it paid on account of the adjudication award. The Adjudicator thus may invert the creditor/debtor position, depending on the conclusion reached in the simplified proceedings of an adjudication.

In addition to the possibility of resorting to ordinary arbitration in case of an unbearable result, two further protections are built into the proposal: (i) the Adjudicator may determine that a matter is not ready or suitable for an award in adjudication proceedings and (ii) the Adjudicator may make the enforcement of the award subject to guarantees by the beneficiary of the award.

The proposed mechanism does not seem to have been tested and the rules proposed below are a first draft. It is suggested, however, that they provide a solution to a major problem in international arbitration by combining a very quick decision without abandoning altogether the protection of due process as it is ensured for instance by the UNCTIRAL Arbitration Rules. The process of adjudication may be applied in all cases where rapid decisions are particularly important. That is the case in construction projects, but it may be equally useful in other long-term contracts providing for recurring payments such as license agreements, long term delivery contracts and the like.

Geneva, 28 June 2021

Proposed draft provisions

If agreed by the Parties, any dispute may be decided by an Adjudicator, according to the UNCITRA Rules on Expedited Arbitration, modified as follows:

- 1. Adjudication may be started by the claimant communicating to the respondent a Notice of Adjudication, stating the Claimant's case in full and identifying the legal basis and the evidence on which the Claimant relies in support of its allegations. The Notice shall be accompanied by a copy of the contract to which the dispute relates and the evidence for the Adjudication agreement. Other documents, critical for the understanding of the requests made, may also be attached. Where the Claimant relies on witness evidence or expert opinions, it shall identify the witnesses and the experts and the subject matters on which they may be heard.**
- 2. Within two weeks following the receipt of the Notice of Adjudication, the respondent shall submit its Answer, setting out its full defence, specifying contested legal and factual allegations and containing any counterclaim the Respondent intends to pursue. The provision on the factual evidence and expert opinions concerning the Notice of Adjudication shall apply also to the Answer.**
- 3. The dispute shall be submitted to a sole Adjudicator, named in the adjudication agreement. If the parties have not agreed on an Adjudicator by the time the Notice of Adjudication is communicated to the respondent, the**

Adjudicator shall be appointed, at the request of either party, by the appointing authority and, if no appointing authority has been agreed by the time of the Notice of Adjudication, by the Secretary General of the Permanent Court of Arbitration (PCA).

4. Within one week after the expiration of the time for the Answer, the Adjudicator shall hold a case management conference. At that occasion, the Adjudicator shall, after having heard the Parties, identify the issues on which further evidence and argument is to be heard and determine whether any of the witnesses and experts named by the parties shall be heard. The Adjudicator shall determine the further procedure and relevant time limits, including the time for the claimant's response to any counterclaim. At the request of the Parties or on his/her own motion, the Adjudicator may determine that the case or some issues may be decided on documents alone and without a hearing.

5. At any time after the case management conference the Adjudicator may, upon request of a Party or on his/her own motion, decide any issues that, on the basis of the evidence and argument produced or announced, it determines to be ready for decision.

6. Within six weeks following the case management conference or any longer period agreed by the parties [or: by the claimant or the counterclaimant] the Adjudicator shall issue a preliminary award, deciding all issues that, in the Adjudicator's opinion, are ready to be decided. All matters not so decided may be pursued according to the UNCITRAL Arbitration Rules, before the Adjudicator or, if the Parties so decide, by an arbitral tribunal constituted according to the Arbitration Rules.

7. Thirty days following the notification of any preliminary award or at the expiration of any longer period that the Adjudicator may determine, the preliminary award shall become final and binding and may be enforced as an award, unless a Party (i) objects to it and requires that the issues decided be submitted to arbitration under the UNCITRAL Arbitration Rules and, (ii) within the specified period, complies with any orders contained in the preliminary award. In exceptional circumstances, the Adjudicator may permit that such compliance be subject to appropriate guarantees by the beneficiary of the award.