# Submission from the representative of Switzerland

# to the seventy-second session of Working Group II

## COMMENTS ON THE DRAFT PROVISIONS ON EXPEDITED ARBITRATION (WP.214)

1. In its work on expedited arbitration the Working Group identified the principal measures to expedite the proceedings under the UNCITRAL Arbitration Rules (UAR) and discussed drafts of Expedited Arbitration Provisions (EAP). The Secretariat prepared a revised version of the latest draft (WP.214) for further consideration at the WG II session from 21 – 24 September 2020. At this stage it may be useful to examine, from the perspective of arbitration practice, the procedure, as it emerges from this latest draft. Such an examination should bear in mind the overall objective of the WG: "to balance on the one hand, the efficiency of the arbitral process and on the other, the rights of the parties to due process and to fair treatment" (WP. 214, paragraph 7).

2. Further to the invitation by the Chair of the Working Group, the present comments are communicated in advance of the September 2020 session. They look at the procedure according to the draft provisions in their interaction. From this perspective, some rearrangement of the provision may be desirable.

### A. General comment on the presentation of the parties's cases in EAP proceedings:

3. According to the approach adopted by the WG the claimant must present at the outset its full case (notice of arbitration and statement of claim) before the respondent is required to take position and present its defence in the arbitration. This was the situation under the 1976 UAR and was one of the most important reasons for revising these rules. This sequence puts the claimant in a difficult position of having to develop its case, and present its evidence, without knowing what will be contested in the arbitration and what allegations need be proven.

4. In the EAP the requirement for the claimant to present its complete case at the very start of the arbitration is nevertheless justified in order to achieve the speedy and efficient conduct of the proceedings.

5. The respondent may be in a similarly difficult position in preparing its statement of defence which, like the statement of claim, must present its complete case: in some cases, the dispute has been the subject of exchanges and discussions before the claimant introduces the arbitration so that the respondent has at least some idea of the case before it receives the notice of arbitration; in others that notice may come as a surprise to the respondent. The draft provisions allow some time for the preparation of the statement of defence, since it must be communicated only 15 days after the constitution of the arbitral tribunal (draft provision 5, paragraph 3). If the parties do not agree on the sole arbitrator and have not agreed on an appointing authority, the respondent may have comfortable time for preparing its statement. Otherwise the time for that statement may be much shorter.

6. In the discussion of the WG the difficulties were highlighted that arise when the parties are required to set out their full case, including the evidence relied upon, at the very beginning of the arbitration (see e.g. WP.214, paragraphs 52 and 58). While the requirement is justified in expedited

arbitration, it mandates some flexibility and responsiveness from the arbitral tribunal when deciding on the procedure to be adopted after the exchange of the initial statements. This flexibility must apply both with respect to further submissions and to evidence.

B. Further written statements (draft provision 14):

7. Article 24 UAR provides that the arbitral tribunal "shall decide which further written statements … shall be required". This approach starts with the assumption that the statements of claim and defence may be sufficient, and the production of additional written statements must be justified.

8. Draft provision 14 reverts the approach: it says that the arbitral tribunal "may limit" the presentation of further written statements. This seems to indicate that there is a right or at least an expectation of the parties that further statements may be produced and the arbitral tribunal must justify why it limits their presentation. Such an inversion of the burden to justify further written statements would be unfortunate as it risks to increase the "due process paranoia" and thus counters the effect of the WG's decision of requiring the claimant to present its full case in its statement of claim when presenting the notice of arbitration.

9. It is therefore suggested to revert to the approach adopted in Article 24 UAR and provide that, after the submission of the statements of claim and defence, the arbitral tribunal decides whether any further submissions are required or permitted.

C. Evidence (draft provision 15), Witness statements (paragraph 1):

10. UAR Article 27 (2), second sentence provides that the statements by witnesses and experts may be presented in writing. EAP draft provision 15 (1) makes this a requirement ("shall be presented in writing"). In the interest of limiting the scope of the hearing (if any), this is a useful provision. It must be borne in mind, however, that the preparation of witness statements often is a time-consuming exercise that requires additional efforts from the party, the witness and counsel.

11. Like the UAR, the EAP draft does not say when the witness statements must be produced. The provisions on the statements of claim and defence, by referring to the corresponding UAR, require that these statements be accompanied not only by all documents but also by "other evidence relied upon". This may be understood to include witness evidence and, in the context of the EAP, may require that witness statements be presented together with these statements. The requirement is, however, qualified by the words "as far as possible". It is therefore well possible that, in the short time frames within which the two statements are prepared, the presentation of witness statements is accepted as not being possible.

12. A solution could be to require that the statements of claim and defence be accompanied also by written statements of any witnesses and experts on which the respective party intends to rely. This would seem, however, to be excessive. Indeed, in the understanding of the WG "the parties should be provided sufficient time to present witness statements" (WP 214, paragraph 118). A compromise solution could be to require that in the statements of claim and defence any witnesses and the subjects of their testimony be identified. When determining further submissions, the arbitral tribunal may then determine which witness statements have to be presented. The same provision could apply with respect to any experts.

D. Evidence, production of documents, exhibits or other evidence (draft provision 15, paragraph 2):

13. The draft provision seems to aim at two different evidentiary issues: the expression "requests for the production of documents" in the draft provision seems to refer to requests by a party seeking from the opponent party documents in the latter's possession (disclosure or discovery). The other issue concerns the evidence produced by a party of its own volition. For this type of production, the expression "requests for production" does not seem appropriate. What is meant is not limiting "requests for the production of […] exhibits or other evidence" but limiting the presentation of such evidence in the arbitration.

14. Moreover, the observation concerning limiting the presentation of further written statements applies here, too. The provision should state that the tribunal shall decide which additional evidence may be produced and not that it "may limit" such production.

15. Since the two substance matters are closely related and should be dealt with early in the arbitration, it is suggested that provisions 14 and 15 can be combined.

16. As the decision on further submissions and evidence should best be taken when the tribunal considers with the parties the organisation of the procedure, the proposed provision could be included in or placed after draft provision 9 (or after draft provision 10).

E. Procedural consultation and case management conference (draft provision 9)

17. For the reasons explained above and as recognised by the WG, an early consultation between the arbitral tribunal and the parties is essential for an efficient and fair organisation of the proceedings. Draft provision 9 requires such consultation.

18. It seems obvious that a useful consultation about the organisation of the proceedings is difficult if not impossible before the position of the respondent is known. Under the present draft the timing seems to exclude this possibility: Draft provision 5 (3) sets the time for the statement of defence "within 15 days of the constitution of the arbitral tribunal". According to draft provision 9 the consultation must take place "promptly after and within 15 days of its constitution". In other words, the time limit for the consultation expires on the day on which the statement of defence (the first expression of the respondent's position) is submitted.

19. The time for the submission of the statement of defence and the consultation should therefore be better coordinated. In order to take account of situation in which the respondent does not submit a statement of defence, the relevant time should be the expiration of the time limit for that submission.

F. Pleas as to the merits and preliminary rulings (draft provision 18)

20. These two procedural means were proposed with the objective of increasing speed and efficiency in EAP. They met with some objections in the discussion of the Working Group. The draft provision calls for the following observations:

(a) Claims or defences that are "manifestly without legal merit" may justify an early dismissal or early acceptance of all or some claims in the arbitration. The same can be said about "issues of fact or law supporting a claim or defence [that] are manifestly without merit". This may bring the arbitration to an early end or may simplify the proceedings by limiting them to the more serious points. If the early determination affects only some of the claims and defences, it may, however, be more effective to proceed with the arbitration and dispose of the claims or defences "manifestly without merit" in the final award.

(b) As was pointed out in previous discussions, the early dismissal of claims and defences "manifestly without legal merit" is a power which arbitrators have under the UAR (Article 17 (1)). Entering a special provision in the EAP may raise doubts about these powers under the UAR where they are not expressly mentioned. If anything is said in the EAP, it would therefore be desirable to express it in the form of a confirmation of inherent powers under the UAR rather then special powers under the EAP.

(c) Providing a special procedure for seeking early dismissal of unmeritorious claims creates additional steps in the proceedings that inevitably will cause delay and additional costs. Parties frequently argue that their opponent's case is "manifestly without legal merit". They will thus feel compelled to apply for early dismissal. The tribunals will have to consider the application and, in many cases, will have to dismiss it and only then turn to the merits of the claim or defence.

21. In view of these considerations, the proposed provision 18 must appear as counterproductive; it should not be included in the EAP. If it were considered desirable to make any reference to early dismissal and preliminary rulings, it is suggested that this could best be done in provision 9 when providing for the consultation with the parties.

## G. Proposed modifications of the draft provisions

22. On the basis of the above considerations the following modifications are suggested to be made in the draft provision:

23. In draft provision 4, at the end of paragraph 1, add the following sentence:

*In that statement the claimant shall also identify any witnesses on whose testimony it relies and the substance matter of their proposed testimony as well as any substance matter for which it intends to submit expert reports.*

24. Similarly, in draft provision 5 (3) the following sentence may be added at the end:

*In that statement the respondent shall also identify any witnesses on whose testimony it relies and the substance matter of their proposed testimony as well as any substance matter for which it intends to submit expert reports.*

25. The following modifications are suggested in draft provision 9

*1. Promptly after and within 15 days of the expiration of the time for the communication of the statement of defence arbitral tribunal shall consult the parties …*

*2.* At this consultation or at any time thereafter, the arbitral tribunal, [considering the requirements of expedited proceedings as prescribed in [draft provision 2]], shall consult the parties and decide whether further submissions and evidence may be required from the parties or may be presented by them. It may direct that the statements of witnesses and experts shall be presented in writing and signed by them. The arbitral tribunal may also consider and decide whether any of the claims or defences must be dismissed forthwith as manifestly without merit.

26. The following paragraphs of draft provision 9 may remain unchanged.

27. Draft provisions 14, 15 and 18 may be omitted.

Geneva, 11 September 2020