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## **Settlement of commercial disputes**

### **Draft provisions on expedited arbitration**

#### **Note by the Secretariat**

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## I. Introduction

1. At the close of its seventy-second session (Vienna, 21-25 September 2020), the Secretariat was requested to prepare a revised version of the expedited arbitration provisions (EAPs) as they would appear as an appendix to the UNCITRAL Arbitration Rules (UARs), which would be without prejudice to the decision by the Working Group on their final presentation (A/CN.9/1043, para. 110). The Secretariat was requested to prepare draft texts that could be included in a guidance document to the EAPs (referred to below as the “explanatory note”) and to prepare a model arbitration clause for expedited arbitration (A/CN.9/1043, paras. 14 and 110; A/CN.9/1003, para. 19).

2. Accordingly, this note presents a revised version of the EAPs that could appear as an appendix to the UARs. The draft provisions follow the order in which the relevant issue appears in the UARs and to the extent possible, have the same heading as the UARs to assist users on how the EAPs interact with the UARs.

3. The commentary to each provision aims to assist the Working Group in considering any remaining issue. The commentary also includes a draft explanatory note, which has been prepared based on the previous deliberations by the Working Group. The interaction of the EAPs with the related articles of the UARs is also captured in the explanatory note. Considering that the explanatory note would need to be further revised to reflect the final decisions made by the Working Group and the Commission on the EAPs, the Working Group may wish to approve the explanatory note in substance and request the Secretariat to prepare a revised version following the adoption of the EAPs.

4. Annex I of this note reproduces the EAPs for ease of reference. Annex II provides an overview of the different time frames in the EAPs, which could also be included in the explanatory note.

## II. General considerations

### A. Focus of the work

5. The Working Group agreed that its work would aim at improving the efficiency of the arbitral proceedings, which would result in reduction of costs and duration of the proceedings (A/CN.9/1043, para. 22). Expedited arbitration was described as a streamlined and simplified procedure with a shortened time frame, which made it possible to reach a final resolution of the dispute in a cost- and time-effective manner (A/CN.9/969, para. 14).

### B. Form of the work

6. **The Working Group may wish to confirm that the EAPs should be presented as an appendix<sup>1</sup> to the UARs (A/CN.9/1043, para. 22).** In so doing, the Working Group may wish to consider the user-friendliness of the EAPs, taking into account the fact that an explanatory note is also being prepared to accompany the EAPs.

### C. Preserving due process and fairness

7. The EAPs have been prepared to balance on the one hand, the efficiency of the arbitral proceedings and on the other, the rights of the parties to due process and to fair treatment.

<sup>1</sup> At present, the “annex” to the UNCITRAL Arbitration Rules includes: (i) a model arbitration clause for contracts; (ii) a possible waiver statement; and (iii) a model statement of independence pursuant to article 11 of the UNCITRAL Arbitration Rules. To avoid confusion, the term “appendix” is used.

### III. Draft provisions on expedited arbitration

#### A. Scope of application

8. The Working Group approved the following formulation relating to the application of the EAPs (A/CN.9/1043, para. 19):

Draft provision 1 (Scope of application)

*Where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the UNCITRAL Expedited Arbitration Provisions, then such disputes shall be settled in accordance with the UNCITRAL Arbitration Rules as modified by these Provisions and subject to such modification as the parties may agree.*

9. The Working Group may wish to consider the following text for the explanatory note on draft provision 1:

- (1) *Draft provision 1 provides guidance on when the EAPs apply (A/CN.9/1010, para. 23).<sup>2</sup> It notes that express consent of the parties is required for the application of the EAPs (A/CN.9/1010, paras. 21 and 27).*
- (2) *Parties are free to agree on the application of the EAPs at any time even after the dispute has arisen (A/CN.9/1010, para. 24). For example, parties that had concluded an arbitration agreement or had initiated arbitration under the UARs before the effective date of the EAPs can subsequently refer their dispute to arbitration under the EAPs (A/CN.9/1003, para. 31). Likewise, a party may propose to the other party or parties that the EAPs shall apply to the arbitration (A/CN.9/1043, para. 18).*
- (3) *However, parties should be mindful of the consequences when changing from non-expedited to expedited arbitration (A/CN.9/1010, para. 32). For example, a notice of arbitration communicated in accordance with article 3 of the UARs might not meet the requirements of draft provision 4, which requires the claimant to communicate proposals for the designation of an appointing authority and for the appointment of a sole arbitrator. Therefore, it would be prudent for the parties to agree on how such requirements could be met, should they agree to refer their dispute to arbitration under the EAPs after the proceedings had begun. Similarly, if a three-member arbitral tribunal was constituted, the parties need to agree whether to preserve the three-member tribunal (which is possible under draft provision 7) or to appoint a sole arbitrator in accordance with draft provision 8 (A/CN.9/1010, paras. 50 and 54). If the constitution of the tribunal is changed, the parties may also need consider the status of statements and evidence submitted to the former tribunal.*
- (4) *Draft provision 1 indicates that the UARs generally apply to expedited arbitration, unless and as modified by the EAPs (A/CN.9/1010, para. 23). The phrase “as modified by these Provisions” means that rules in the UARs and the EAPs need to be read in conjunction for the proper conduct of the proceedings. In some cases, the rule in the UARs are supplemented by the EAPs. In other cases, the rules in the UARs are replaced by those in the EAPs (see paras. 11-13 below). Similar to the UARs, parties have the flexibility to tailor any of the provisions to their proceedings (A/CN.9/1043, para. 17).*

<sup>2</sup> The Working Group may wish to confirm that the references to previous reports of the Working Group need not appear in the final version of the explanatory note.

(5) *In relation to article 1(2) of the UARs, parties to an arbitration agreement concluded before the entry into force of the EAPs will not be presumed to have referred their dispute to the EAPs, even if the EAPs are presented as an appendix to the UARs in effect on the date of commencement of the arbitration. The EAPs only apply when so agreed by the parties (A/CN.9/1003, para. 25; A/CN.9/1010, para. 28; A/CN.9/1043, para. 57).*

#### Remaining issue 1 – additional paragraph in the UARs

10. The Working Group considered two possible approaches to incorporate the EAPs into the UARs as an appendix. One approach was to present the EAPs as an appendix with no additional paragraph in the UARs and another was to insert an additional paragraph in article 1 of the UARs (A/CN.9/1043, paras. 20-21). Based on the general support expressed for the latter approach (A/CN.9/1043, paras. 22 and 24), **the Working Group may wish to confirm the following formulation for insertion in article 1 of the UARs:**

*The Expedited Arbitration Provisions in the appendix shall apply to the arbitration where the parties so agree.*

#### Remaining issue 2 – interaction with the UARs

11. During the consideration of the interaction between the EAPs and the UARs, some concerns were expressed that it was not clear whether and how an article (or paragraphs therein) of the UARs would apply in expedited arbitration. As draft provision 1 indicates, the UARs would generally apply to expedited arbitration as modified by the EAPs. Therefore, the EAPs need to be applied together with the relevant articles of the UARs for a proper conduct of the proceedings.

12. Some provisions in the EAPs can be applied on their own (for example, draft provisions 1-3 and 17). Certain provisions clarify the discretion of the arbitral tribunal in the context of expedited arbitration (for example, draft provisions 10, 11, 14 and 15). And some provisions replace the rule in the UARs, for example, by introducing shortened time frames (draft provisions 5, 8, 12 and 13) or additional requirements (draft provisions 4, 9 and 16). Lastly some provisions deviate from the rule in the UARs (for example, draft provisions 6 and 7).

13. While the explanatory note could provide some guidance on these interactions, it might be difficult to illustrate the various instances, particularly as parties are free to modify any of the rules. Nonetheless, **the Working Group may wish to consider the following formulation for insertion in the EAPs or in the explanatory note to provide some clarity on this interaction:**

*For the avoidance of doubt and unless otherwise agreed by the parties, the following rules in the UARs do not apply to arbitration under the EAPs: Article 3(4)(a) and (b)<sup>3</sup>; Article 6(2)<sup>4</sup>; Article 7<sup>5</sup>; Article 8(1)<sup>6</sup>; first sentence of Article 20(1)<sup>7</sup>; first sentence of Article 21(1)<sup>8</sup>; Article 21(3)<sup>9</sup>; first sentence of Article 22<sup>10</sup>; and second sentence of Article 27(2)<sup>11</sup>.*

*The phrase “these Rules” as found in the UARs<sup>12</sup> should be read to include the EAPs in the context of expedited arbitration.*

<sup>3</sup> Replaced by draft provision 4(1).

<sup>4</sup> Replaced by draft provision 6(1).

<sup>5</sup> Replaced by draft provisions 7 and 8(2).

<sup>6</sup> Replaced by draft provision 8(2).

<sup>7</sup> Replaced by draft provision 4(2) and (3).

<sup>8</sup> Replaced by draft provision 5(2).

<sup>9</sup> Replaced by draft provision 12.

<sup>10</sup> Replaced by draft provision 13.

<sup>11</sup> Replaced by draft provision 15(2).

<sup>12</sup> Articles 1(3), (4), 2(6), 4(2), 6(3), (4), (5), 10(3), 17(1), (2), 30(1), (2), 32 and 41(4)(b) of

## B. Withdrawal from expedited arbitration

14. The Working Group may wish to consider the following provision addressing the situations where the EAPs would no longer apply to the arbitration and instead the UARs would apply without being modified by the EAPs:

Draft provision 2 (Withdrawal from expedited arbitration)

*1. At any time during the proceedings, the parties may agree that the Expedited Arbitration Provisions shall no longer apply to the arbitration.*

*2. At the request of a party, the arbitral tribunal may, in exceptional circumstances and after inviting the parties to express their views, determine that the Expedited Arbitration Provisions shall no longer apply to the arbitration. [The arbitral tribunal shall state the reasons upon which that determination is based.]*

*3. When the Expedited Arbitration Provisions no longer apply to the arbitration pursuant to paragraph 1 or 2, the arbitral tribunal shall remain in place and conduct the arbitration in accordance with the UNCITRAL Arbitration Rules.*

15. The Working Group approved paragraph 1 which allows parties to withdraw from expedited arbitration when they all so agree, even though they had initially agreed to refer their dispute to arbitration under the EAPs (A/CN.9/1003, para. 43; A/CN.9/1010, para. 33; A/CN.9/1043, para. 37).

16. Paragraph 2 reflects the understanding that the EAPs should provide a mechanism allowing a party that had initially agreed to the application of the EAPs to subsequently request withdrawal from expedited arbitration (A/CN.9/1010, paras. 34–37 and 49; A/CN.9/1043, para. 40). The arbitral tribunal would make the determination on whether to uphold the request for withdrawal, as it would likely be aware of the overall circumstances of the case and could make an informed decision on the most suitable procedure (A/CN.9/1003, para. 36; A/CN.9/1010, paras. 40 and 49).

17. The phrase “in exceptional circumstances” reflects the agreement in the Working Group that the grounds justifying the request for withdrawal should be limited and that the mechanism should be designed to prevent any delays or misuse (A/CN.9/1010, paras. 37 and 42; A/CN.9/1043, paras. 40, 41 and 44). It aims to set a high threshold preventing parties from withdrawing from EAPs easily and would only allow parties with persuasive grounds to resort to non-expedited arbitration (A/CN.9/1003, para. 47; A/CN.9/1010, para. 36; A/CN.9/1043, para. 49). The arbitral tribunal would also need to consult the parties in making the determination (A/CN.9/1003, para. 49; A/CN.9/1043, para. 41). **The Working Group may wish to confirm that the elements to be taken into account by the arbitral tribunal are better placed in the explanatory note than in the draft provision** (see para. 19(4) below, A/CN.9/1010, paras. 44–48; A/CN.9/1043, para. 49). **Furthermore, the Working Group may wish to consider whether the arbitral tribunal should be required to provide the reasons for its determination** (A/CN.9/1043, para. 42).

18. Paragraph 3 addresses the consequences when the EAPs no longer apply. The aim is to ensure continuity of the proceedings so as to avoid delays, while safeguarding party autonomy (A/CN.9/1043, para. 50). However, resorting to non-expedited UNCITRAL arbitration after initiating expedited proceedings can pose practical challenges, for example, with regard to the constitution of the arbitral tribunal (A/CN.9/969, para. 100; A/CN.9/1003, para. 44).

19. The Working Group may wish to consider the following text for the explanatory note on draft provision 2 (A/CN.9/1043, paras. 38-55):

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the UARs.

- (1) *Even when the parties had initially agreed to refer their dispute to arbitration under the EAPs, the circumstances may be such that the EAPs are not appropriate to resolve the particular dispute. Draft provision 2 addresses such circumstances, with paragraph 1 allowing parties to agree to withdraw from expedited arbitration.*
- (2) *In accordance with paragraph 2, a party that had agreed to refer the dispute to arbitration under the EAPs may subsequently request withdrawal from expedited arbitration, particularly when the dispute evolved in a manner that would make expedited arbitration no longer suitable (A/CN.9/1010, para. 36). There is no time limit within which a party can request withdrawal (A/CN.9/1003, para. 49; A/CN.9/1010, para. 39). Nonetheless, the arbitral tribunal should consider at which stage of the proceedings the request is being made (see subpara. (4) below).*
- (3) *The phrase “in exceptional circumstances” means that the party requesting withdrawal should provide convincing and justified reasons for the request and that the arbitral tribunal should uphold the request only in limited circumstances (A/CN.9/1043, para. 44).*
- (4) *The arbitral tribunal should consider whether the EAPs are no longer appropriate for the resolution of the dispute (A/CN.9/1043, paras. 41, 46 and 49). When making the determination, the arbitral tribunal may wish to take into account, among others, the following:*
- *The urgency of resolving the dispute;*
  - *The stage of the proceedings at which the request is made;*
  - *The complexity of the dispute (for example, the anticipated volume of documentary evidence and the number of witnesses);*
  - *The anticipated amount in dispute (the sum of claims made in the notice of arbitration, any counterclaim made in the response thereto as well as any amendment or supplement);*
  - *The terms of the parties’ agreement to expedited arbitration and whether the current circumstance could have been foreseeable at the time of agreement; and*
  - *The consequences of the determination on the proceedings.*
- (5) *The above is a non-exhaustive list of elements that can be taken into account (A/CN.9/1003, paras. 49 and 50; A/CN.9/1010, para. 46; A/CN.9/1043, para. 43) and it would not be necessary for the arbitral tribunal to consider all the elements therein.*
- (6) *When making the determination, the arbitral tribunal, in accordance with article 17(1) of the UARs, may decide that the EAPs in their entirety would no longer apply or that certain provisions would no longer apply to the arbitration (see also para. 46(3) below, A/CN.9/1010, para. 48; A/CN.9/1043, para. 39)*
- (7) *If the arbitral tribunal is not yet constituted, the determination would need to be made after it is constituted. However, if the parties are not able to reach an agreement on the arbitrator or if there is a disagreement between the parties on (i) whether the EAPs apply or (ii) whether the criteria triggering the application of the EAPs are met, the appointing authority may need to be involved (A/CN.9/1003, para. 33; A/CN.9/1010, para. 25). In constituting the arbitral tribunal in accordance with article 10(3) of the UARs, the appointing authority will make a prima facie decision on whether the arbitration would be conducted under the EAPs. However, the ultimate determination on the application of the EAPs would be left to the arbitral tribunal (A/CN.9/1010, para. 41).*

- (8) *When the EAPs no longer apply to the arbitration pursuant to paragraph 1 or 2, the arbitral tribunal shall conduct the arbitration in accordance with the UARs. However, this does not mean that the arbitral tribunal, if already constituted, would have to be re-constituted in accordance with the UARs (A/CN.9/1043, para. 54). Instead, the arbitral tribunal shall remain in place in accordance with paragraph 3. There may, however, be instances where the parties agree to replace any arbitrator or reconstitute the arbitral tribunal (A/CN.9/1003, paras. 44 and 51; A/CN.9/1010, para. 50; A/CN.9/1043, paras. 51 and 52). There may also be instances where an arbitrator resigns, for example, if the arbitrator appointed under the EAPs believes his schedule of future commitments does not allow him to conduct non-expedited arbitration (A/CN.9/1043, para. 53).*
- (9) *Unless the arbitral tribunal decides otherwise, the non-expedited proceeding should resume at the stage where the expedited proceeding was when the parties agreed to withdraw or the arbitral tribunal made the determination (A/CN.9/1010, para. 50). Decisions made during the expedited proceeding should remain applicable to the non-expedited proceedings, unless the arbitral tribunal decides to depart from its earlier decisions or from a decision made by the previous tribunal (A/CN.9/1043, para. 54).*

### C. General provision on expedited arbitration

20. The Working Group agreed that a general provision on the guiding principles of expedited arbitration should be retained in the EAPs with some drafting improvements (A/CN.9/1003, paras. 78 and 112; A/CN.9/1010, para. 96; A/CN.9/1043, para. 35). It may wish to consider the following reformulation:

Draft provision 3 (Conduct of the parties and the arbitral tribunal)

1. *The parties shall act expeditiously throughout the proceedings.*
2. *The arbitral tribunal shall conduct the proceedings expeditiously taking into account the fact that the parties agreed to refer their dispute to expedited arbitration and the time frames in the Expedited Arbitration Provisions.*
3. *In conducting the proceedings, the arbitral tribunal may, after inviting the parties to express their views and taking into account the circumstances of the case, utilize any technological means as it considers appropriate to communicate with the parties and to hold consultations and hearings remotely.*

21. The Working Group may wish to recall that the General Assembly resolution on the 2010 UARs refers to the UARs contributing to a harmonized framework for the “fair and efficient” settlement of international commercial disputes<sup>13</sup> and that article 17(1) of the UARs requires the arbitral tribunal to conduct the proceedings so as to provide a “fair and efficient” process for resolving the dispute. Draft provision 3 introduces an additional obligation in expedited arbitration: for the parties to act expeditiously and the arbitral tribunal to conduct the proceedings expeditiously.

22. The latter part of paragraph 2 underlines the need for the arbitral tribunal to take into account the circumstances under which the parties agreed to refer their dispute to arbitration under the EAPs, including their expectations or intentions. It further emphasizes the need for the arbitral tribunal to be mindful of the time frames in the EAPs (A/CN.9/1043, para. 29).

23. Paragraph 3 reflects the general support for providing a general rule in the EAPs that would address the possibility for the arbitral tribunal to utilize different

<sup>13</sup>Resolution of the General Assembly (A/RES/65/22).



means of communication during the proceedings and to make use of virtual or remote consultations and hearings (A/CN.9/1043, paras. 95 and 96). Paragraph 3 would clarify and reinforce the discretion provided to the arbitral tribunal regarding the use of a range of technological means in article 17(1) of the UARs for the conduct of the arbitration and in article 28(4) of the UARs for witness examination in hearings.

24. The Working Group may wish to consider the following text for the explanatory note on draft provision 3:

- (1) *Considering that a fair and efficient resolution of the dispute is a common goal of both arbitration under the UARs and the EAPs, draft provision 3 highlights the expeditious nature of the proceedings under the EAPs and emphasizes the obligation of the parties and the arbitral tribunal to act expeditiously (A/CN.9/1003, paras. 78 and 112; A/CN.9/1043, para. 27).*
- (2) *Paragraph 1 is a reminder to parties that when referring their dispute to arbitration under the EAPs, they are agreeing to cooperate in ensuring the efficiency of the proceeding as well as for a swift resolution of the dispute, particularly in ad hoc setting where there is no administering institution to expedite the process (A/CN.9/1043, paras. 27 and 29).*
- (3) *Paragraph 2 should be read along with article 17(1) of the UARs which states: "..., the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute."*
- (4) *Arbitral tribunals, when conducting arbitration under the EAPs, should be mindful of the objectives of the EAPs, of the parties' intentions and expectations when they chose expedited proceedings and of the time frames in the EAPs, in particular that in draft provision 16 for the rendering of the award.*
- (5) *Designating and appointing authorities as well as arbitral institutions administering arbitration under the EAPs should also be mindful of the objectives of the EAPs as well as any applicable time frames (A/CN.9/1043, para. 31, 33 and 35). For example, when appointing an arbitrator for expedited arbitration, the appointing authority shall have regard to such considerations as are likely to secure an arbitrator who would be available and ready to conduct the arbitration expeditiously (see article 6(7) of the UARs).*
- (6) *Paragraph 3 emphasizes the discretion provided to the arbitral tribunal to make use of a wide range of technological means to communicate with the parties and to hold consultations and hearings without requiring physical presence at any stage of the proceedings. The inclusion of such a rule in the EAPs does not imply that the use of technological means is available to arbitral tribunals only in expedited arbitration (A/CN.9/1043, para. 96). The rule aims to assist the arbitral tribunal in streamlining the proceedings and avoiding unnecessary delay and expense, both of which are in line with the objectives of expedited arbitration. However, the arbitral tribunal should be mindful that the use of technological means is subject to the rules in the UARs as well as the EAPs to provide for a fair proceeding and to give each party a reasonable opportunity to present its case. In that light, the arbitral tribunal should give the parties an opportunity to express their views on the use of such technological means and consider the overall circumstances of the case.*

Remaining issue - availability of the arbitrator and the need to revise the model statement of independence

25. In expedited arbitration, arbitrators are usually required to formally confirm their availability and readiness to ensure the expeditious conduct of the arbitration (A/CN.9/1043, paras. 32-34). Differing views were expressed as to whether draft provision 3 combined with the model statement of independence pursuant to article 11 of the UARs<sup>14</sup> served that purpose (A/CN.9/1010, para. 69; A/CN.9/1043, paras. 32-34). In that context, it was mentioned that it would be preferable not to distinguish between non-expedited arbitration under the UARs and expedited arbitration under the EAPs, as it could give the misperception that arbitrators under the UARs were not subject to the same standard (A/CN.9/1043, para 33). A separate model statement for expedited arbitration may also pose practical challenges when the EAPs no longer apply to the arbitration.

**26. The Working Group may wish to consider whether draft provision 3(2) and the text in the explanatory note (see para. 24(4) above) would suffice for this purpose (A/CN.9/1043, para. 32). Otherwise, it may wish to revise the note to the model statement of independence as follows for expedited arbitration:**

*Note: Parties should consider requesting from the arbitrator the following addition to the statement of independence:*

*I confirm, on the basis of the information presently available to me, that I can devote the time necessary to conduct this arbitration diligently, efficiently, expeditiously and in accordance with the time limits in the Rules and the Provisions.*

**D. Notice of arbitration, response thereto, statements of claim and defence**

27. The Working Group had approved draft provision 4 regarding the notice of arbitration and statement of claim in expedited arbitration (A/CN.9/1043, para. 66). **The Working Group may wish to consider a simpler formulation which also follows the order of the proceedings:**

Draft provision 4 (Notice of arbitration and statement of claim)

*1. A notice of arbitration shall also include:*

*(a) A proposal for the designation of an appointing authority, unless the parties have previously agreed thereon; and*

*(b) A proposal for the appointment of an arbitrator.*

*2. When communicating its notice of arbitration to the respondent, the claimant shall also communicate its statement of claim.*

*3. The claimant shall communicate the notice of arbitration and the statement of claim to the arbitral tribunal as soon as it is constituted.*

28. The Working Group may wish to consider the following text for the explanatory note on draft provision 4:

*(1) Draft provision 4 addresses the initiation of recourse to arbitration by the claimant and modifies certain rules in articles 3(4) and 20(1) of the UARs.*

<sup>14</sup>Note: *Any party may consider requesting from the arbitrator the following addition to the statement of independence:*

*"I confirm, on the basis of the information presently available to me, that I can devote the time necessary to conduct this arbitration diligently, efficiently and in accordance with the time limits in the Rules."*

- (2) *Two elements, which are optional under article 3(4) of the UARs, are required in the notice of arbitration. This is to facilitate the speedy constitution of the arbitral tribunal in expedited arbitration. In accordance with paragraph 1, the claimant is required to propose an appointing authority (unless the parties have previously agreed thereon) and the arbitrator. It is important for the claimant to include such information in its notice of arbitration because the 15-day time frames in draft provisions 6 and 8 both begin with the receipt by the respondent of the respective proposals.*
- (3) *A proposal for the appointment of the arbitrator does not mean that a party needs to put forward the name of the arbitrator; rather, a party may suggest a list of suitable candidates/qualifications, or a mechanism to be used by the parties for agreeing on the arbitrator. This would also cater for cases where the parties agreed to more than one arbitrator in expedited arbitration (A/CN.9/1043, para. 64).*
- (4) *To further expedite the process, the claimant is required to communicate its statement of claim along with its notice of arbitration. This modifies the rule in article 20(1) of the UARs, which provides that the statement of claim should be communicated within a period of time to be determined by the arbitral tribunal. This accelerates the proceedings by eliminating the need for the claimant to produce a separate statement of claim (A/CN.9/969, para. 67; A/CN.9/1010, para. 51).*
- (5) *The claimant may, of course, elect to treat its notice of arbitration as its statement of claim, as long as its notice of arbitration complies with the requirement of paragraphs 2 to 4 of article 20 of the UARs (see second sentence of article 20(1) of the UARs).*
- (6) *In summary, when initiating recourse to arbitration, the claimant needs to provide the following:*
- *A demand that the dispute be referred to arbitration (UARs art. 3(3)(a))*
  - *The names and contact details of the parties (UARs arts. 3(3)(b) and 20(2)(a))*
  - *Identification of the arbitration agreement that is invoked (UARs art. 3(3)(c)) and a copy thereof (UARs art. 20(3));*
  - *Identification of any contract or other legal instrument out of or in relation to which the dispute arises (UARs art. 3(3)(d)) and a copy thereof (UARs art. 20(3)) - in the absence of such contract or instrument, a brief description of the relevant relationship (UARs art. 3(3)(d));*
  - *A brief description of the claim and an indication of the amount involved, if any (UARs art. 3(3)(e));*
  - *The relief or remedy sought (UARs arts. 3(3)(f) and 20(2)(d));*
  - *A proposal as to the number of arbitrators, language and place of arbitration, if the parties have not previously agreed thereon (UARs art. 3(3)(g));*
  - *A proposal for the designation of an appointing authority, unless the parties have previously agreed thereon (EAPs DP 4(1)(a));*
  - *A proposal for the appointment of an arbitrator (EAPs DP 4(1)(b));*
  - *A statement of the facts supporting the claim (UARs art. 20(2)(b));*
  - *The points at issue (UARs art. 20(2)(c));*

- *The legal grounds or arguments supporting the claim (UARs art. 20(2)(e)); and*
- *As far as possible, all documents and other evidence relied upon by the claimant, or references to them (UARs art. 20(4)).*

(7) *In light of draft provision 7 providing a default rule of a sole arbitrator, the claimant would not need to propose the number of arbitrators in its notice of arbitration, unless it wishes to suggest the constitution of an arbitral tribunal of more than one arbitrator (A/CN.9/1010, para. 57, A/CN.9/1043, para. 75).*

(8) *With respect to the last item on the above list, the presentation of the complete case is being required for the sake of efficiency. It does not, however, mean that all evidence has to be communicated at this stage, which may be burdensome and counterproductive. This is highlighted by the words "as far as possible" and the claimant may decide to only make reference to the evidence to be relied upon (A/CN.9/1003, paras. 81 and 101; A/CN.9/1043, para. 63). For example, written witness statements need not be submitted with the notice of arbitration. In practice, the claimant would identify in its statement of claim (i) any witness whose testimony it would rely on, (ii) the subject matter of the testimony and (iii) any subject matter for which the claimant intended to submit expert reports (A/CN.9/1043, para. 62). It would be preferable to determine which evidence is to be submitted during the consultation between the arbitral tribunal and the parties (see para. 46(3) below).*

(9) *Paragraph 3 requires the claimant to communicate its notice of arbitration and statement of claim to the arbitral tribunal as soon as it is constituted. In the case that the arbitral tribunal consists of more than one arbitrator, the claimant would, in practice, communicate its notice of arbitration and statement of claim to each of the arbitrators upon his or her appointment.*

29. The Working Group had approved draft provision 5 regarding the response to the notice of arbitration and statement of defence (A/CN.9/1043, para. 71). **The Working Group may wish to consider a simpler formulation:**

Draft provision 5 (Response to the notice of arbitration and statement of defence)

*1. Within 15 days of the receipt of the notice of arbitration, the respondent shall communicate to the claimant a response to the notice of arbitration, which shall also include a response to the information set forth in the notice of arbitration pursuant to draft provision 4, paragraphs (1)(a) and (b).*

*2. The respondent shall communicate its statement of defence to the claimant and the arbitral tribunal within 15 days of the constitution of the arbitral tribunal.*

30. The Working Group may wish to consider the following text for the explanatory note on draft provision 5:

(1) *Draft provision 5 addresses the actions required by the respondent upon receipt of a notice of arbitration and a statement of claim from the claimant. It envisages a two-stage reply with a shorter time frame for the response to the notice of arbitration and a longer one for the statement of defence. This is to facilitate the speedy constitution of the tribunal and to provide sufficient time for the respondent to prepare its case (A/CN.9/1043, paras. 67 and 68).*

(2) *The respondent is required to communicate a response within 15 days of receipt of the notice. Draft provision 5(1) thus modifies article 4(1) of the UARs, which provides for a 30-day time frame (A/CN.9/1010, paras. 55 and*

56; A/CN.9/1043, para. 68). A shorter time frame is imposed on the response, as it addresses procedural issues, in particular those relating to the constitution of the arbitral tribunal.

- (3) The response to the notice of arbitration shall include a response to the information set forth in the notice of arbitration (see art. 4(1) of the UARs). As draft provision 4(1) of the EAPs requires the claimant to include in its notice of arbitration proposals on an appointing authority and the appointment of the arbitrator, the respondent is also required to include a response to those proposals. If the respondent disagrees with the proposals, the respondent is free to make its own proposals in accordance with article 4(2)(b) and (c) of the UARs (A/CN.9/1043, para. 70).
- (4) In summary, the respondent would need to provide, within 15 days of the receipt of the notice of arbitration, the following:
- The name and contact details of each respondent (UARs art. 4(1)(a));
  - A response to the information set forth in the notice of arbitration, pursuant to article 3, paragraphs 3 (c) to (g) (UARs art. 4(1)(b)); and
  - A response to the information set forth in the notice of arbitration, pursuant to draft provision 4, paragraphs 1 (a) and (b) (EAPs DP 5(1)).
- (5) To provide the respondent with sufficient time to prepare its statement of defence and to ensure equality of the process, the respondent has 15 days from the constitution of the arbitral tribunal to communicate its statement of defence (A/CN.9/969, para. 71; A/CN.9/1003, para. 81; A/CN.9/1010, para. 56). It introduces a fixed time frame in contrast to article 21(1) of the UARs, which provides that the statement of defence shall be communicated within a period of time to be determined by the arbitral tribunal. The respondent may, of course, elect to treat its response to the notice of arbitration as its statement of defence, as long as the response complies with the requirement of article 21(2) of the UARs (see second sentence of article 21(1) of the UARs).
- (6) The 15-day time frame for the statement of defence could be extended by the arbitral tribunal, for example, if the respondent requests for more time to prepare its statement of defence (see draft provision 10). The extended period should generally not exceed 45 days as stipulated in article 25 of the UARs.

#### Remaining issue

31. Concerns had been expressed that the 15-day time frame beginning with the constitution of the tribunal could result in the respondent tactically delaying the constitution of the arbitral tribunal (A/CN.9/1043, para. 69) and thus, one suggestion was that the time frame could instead begin on the date of receipt of the notice of arbitration with a longer time period (for example, 30 days). However, this may result in the respondent being required to communicate its statement of defence prior to the constitution of the arbitral tribunal as there is no fixed time frame for its constitution in the EAPs. Furthermore, draft provision 8(2) provides a mechanism for a party to request the involvement of the appointing authority quite early in the proceedings, which will limit the ability of the respondent to delay the constitution of the arbitral tribunal. **In light of the above, the Working Group may wish to confirm that the 15-day time frame for communicating the statement of defence shall begin with the constitution of the arbitral tribunal.**

## E. Designating and appointing authorities

32. With respect to article 6 of the UARs on designating and appointing authorities, broad support was expressed for simplifying the two-stage process in the context of expedited arbitration and the Working Group considered a number of ways to do so for saving time and cost of the proceedings (A/CN.9/1010, paras. 70-78; A/CN.9/1043, para. 72). Accordingly, the Working Group had approved draft provision 6 in document A/CN.9/WG.II/WP.214 (A/CN.9/1043, para. 74).

33. However, a further analysis of the provision called for some modifications. The Working Group had approved draft provision 6(1)<sup>15</sup> with the understanding that: (i) the respondent would be required to include a proposal (or a response to such proposal by the claimant) in its response to the notice of arbitration in accordance with draft provision 5 and (ii) the 15-day time frame in draft provision 6 would begin when the respondent's proposal on an appointing authority is received by all other parties thus modifying the 30-day time frame in article 6(2) of the UARs.

34. However, this poses two challenges. The first challenge is that there may be instances where the respondent fails to communicate a response to the notice of arbitration or to propose an appointing authority. In such a case, a party would not be able to engage with the Secretary-General of the PCA pursuant to draft provision 6(1). An alternative would be that the 15-day time frame begins from when the response (including the proposal) ought to have been communicated. This would allow a claimant to make the request to the Secretary-General of the PCA 30 days after the respondent receives the notice of arbitration, even if the respondent does not provide a response or include a proposal on the designation of an appointing authority therein. While this safeguards the right of the claimant to make the request despite non-compliance by the respondent, it introduces some ambiguity on when the request can be made, as that would depend on the response and the proposal being communicated and received by all parties. The second challenge relates to the interaction with the UARs. The 30-day time frame in article 6(2) of the UARs begins when a proposal is received by all other parties, not when there is a reply to the proposal or a counterproposal. Considering that draft provision 4(1) of the EAPs requires the claimant to include in its notice of arbitration a proposal for the appointing authority, the time frame should be triggered as soon as that proposal is received by all other parties, which would make it more in line with article 6(2) of the UARs.

35. Accordingly, draft provision 6(1) has been revised so that the time frame commences with the receipt of a proposal on an appointing authority rather than the receipt of the notice or the response thereto. This also caters for instances where the proposal on an appointing authority is not included in the notice or in the response thereto. The formulation would further encourage parties, particularly the claimant, to comply with the requirements in draft provision 4(1).

36. The Working Group may wish to further note that article 6(4) of the UARs provides the Secretary-General of the PCA with a role of designating a substitute appointing authority where the appointing authority refuses or fails to act. Considering that the Working Group decided to simplify the two-stage process in draft provision 6(1), the same should apply such scenario.

37. **Considering the above, the Working Group may wish to confirm the following formulation regarding designating and appointing authorities in expedited arbitration (A/CN.9/1043, para. 74):**

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<sup>15</sup> The text of draft provision 6(1) read: "If all parties have not agreed on the choice of an appointing authority within 15 days after a proposal made in accordance with draft provision 5 has been received by all other parties, any party may request the Secretary-General of the Permanent Court of Arbitration to designate the appointing authority or to serve as appointing authority."

## Draft provision 6 (Designating and appointing authorities)

*1. If all parties have not agreed on the choice of an appointing authority 15 days after a proposal for the designation of an appointing authority has been received by all other parties, any party may request the Secretary-General of the Permanent Court of Arbitration (hereinafter called the "PCA") to designate the appointing authority or to serve as appointing authority.*

*2. When making the request under article 6, paragraph 4 of the UNCITRAL Arbitration Rules, a party may request the Secretary-General of the PCA to serve as appointing authority.*

*3. If requested to serve as appointing authority in accordance with paragraph 1 or 2, the Secretary-General of the PCA will serve as appointing authority unless it determines that in view of the circumstances of the case, it is more appropriate to designate an appointing authority.*

38. The Working Group may wish to consider the following text for the explanatory note on draft provision 6:

- (1) The appointing authority has a significant role in expediting the proceedings, especially with regard to the constitution of the arbitral tribunal. Therefore, it is important that the parties agree on the choice of an appointing authority. When the parties have not agreed on that choice, draft provision 6 provides a mechanism for the Secretary-General of the Permanent Court of Arbitration (PCA) to designate an appointing authority or to serve as one, both of which would lead to an earlier engagement of the appointing authority.*
- (2) Draft provision 6(1) simplifies the process provided for in article 6(2) of the UARs by allowing a party to request the Secretary-General of the PCA to serve as the appointing authority. It provides a streamlined and flexible process, while providing a level of discretion to the Secretary-General of the PCA.*
- (3) The overall process is accelerated by allowing any party to engage with the Secretary-General of the PCA any time after 15 days have lapsed from the receipt by all parties of a proposal on an appointing authority. In practice, this means that a claimant that has included in its notice of arbitration a proposal for an appointing authority (in accordance with draft provision 4(1)) is able to make the request to the Secretary-General of the PCA 15 days after the receipt of the notice by the respondent.*
- (4) It should, however, be noted that draft provision 5(1) provides the respondent 15 days to respond to the notice of arbitration, which should also include a response to the proposal for an appointing authority. Therefore, it would be prudent for the claimant to consider such response before engaging the Secretary-General of the PCA. In any case, the Secretary-General of the PCA in exercising its functions under draft provision 6(1) would be required to give the parties an opportunity to present their views, including any proposals on the appointing authority.*
- (5) Similar to draft provision 6(1), paragraph 2 modifies article 6(4) of the UARs and allows a party to request the Secretary-General of the PCA to designate a substitute appointing authority or to serve as one, where the appointing authority refuses to or fails to act. However, this would not be possible when the Secretary-General of the PCA is already serving as the appointing authority.*
- (6) Paragraph 3 provides a level of discretion to the Secretary-General of the PCA to address practical questions that could arise, for example, (i) when a party has previously rejected or rejects a proposal for the Secretary-*

*General of the PCA to serve as appointing authority; (ii) when a party requests the Secretary-General of the PCA to serve as appointing authority and the other party requests it to serve as designating authority; and (iii) when a party requests the Secretary-General of the PCA to either designate an appointing authority or to serve as an appointing authority.*

(7) Paragraphs 1, 3, 5, 6 and 7 of article 6 of the UARs continue to apply to expedited arbitration unchanged (A/CN.9/1043, para. 73).

## F. Number of arbitrators

39. The Working Group approved the following formulation regarding the number of arbitrators (A/CN.9/1010, para. 57; A/CN.9/1043, para. 75):

Draft provision 7 (Number of arbitrators)

*Unless otherwise agreed by the parties, there shall be one arbitrator.*

40. The Working Group may wish to consider the following text for the explanatory note on draft provision 7:

(1) *Draft provision 7 provides that an arbitral tribunal composed of a single arbitrator is the default rule in expedited arbitration (A/CN.9/969, paras. 37–38; A/CN.9/1003, paras. 53 and 55; A/CN.9/1043, para. 75). As such, article 7(1) of UARs is replaced by draft provision 7. Parties, however, can agree on more than one arbitrator, in light of the particulars of the dispute and if collective decision-making is preferred (A/CN.9/969, para. 40; A/CN.9/1003, para. 53).*

(2) *When the parties have referred their dispute to arbitration under the EAPs and there is no separate agreement on the number of arbitrators, the appointing authority should not have any role in determining that number (A/CN.9/1003, paras. 54 and 55) and should appoint a sole arbitrator in accordance with draft provisions 7 and 8. While the appointing authority may make a prima facie decision on whether the arbitration is to be conducted under the EAPs, the ultimate determination on the application of the EAPs would be left to the arbitral tribunal (see para. 19(7) above, A/CN.9/1010, para. 41).*

(3) *Article 7(2) of the UARs would continue to apply in the context of expedited arbitration when the parties agreed to constitute the arbitral tribunal with more than one arbitrator. Accordingly, if no other parties responded to a party's proposal to appoint a sole arbitrator and the party or parties concerned have failed to appoint a second arbitrator, the appointing authority may, at the request of a party, appoint a sole arbitrator.*

## G. Appointment of the arbitrator

41. The Working Group approved draft provision 8 regarding the appointment of the arbitrator in expedited arbitration (A/CN.9/1010, para. 58; A/CN.9/1043, para. 80).<sup>16</sup> However, paragraph 2 would merely be reiterating the rule in article 8(1) of the UARs, considering that in expedited arbitration the claimant is required to include a proposal for the appointment of a sole arbitrator in the notice of arbitration. An alternative to expedite the process would be to make it possible

<sup>16</sup> The text of draft provision 8 read: “ 1. The sole arbitrator shall be appointed jointly by the parties. 2. If within 30 days after receipt by the respondent of the notice of arbitration the parties have not reached agreement on the appointment of a sole arbitrator, the arbitrator shall, at the request of a party, be appointed by the appointing authority in accordance with article 8(2) of the UNCITRAL Arbitration Rules.”



for a party to request the involvement of an appointing authority at an earlier stage.

**42. The Working Group may wish to consider the following reformulation for draft provision 8:**

Draft provision 8 (Appointment of a sole arbitrator)

*1. A sole arbitrator shall be appointed jointly by the parties.*

*2. If the parties have not reached agreement on the appointment of a sole arbitrator 15 days after a proposal has been received by all other parties, a sole arbitrator shall, at the request of a party, be appointed by the appointing authority in accordance with article 8(2) of the UNCITRAL Arbitration Rules.*

43. The Working Group may wish to consider the following text for the explanatory note on draft provision 8:

- (1) *Draft provision 8 addresses how a sole arbitrator is to be appointed in expedited arbitration. If the parties agreed on more than one arbitrator, articles 9 and 10 of the UARs apply (A/CN.9/1003, paras. 64–65; A/CN.9/1010, para. 67).*
- (2) *Paragraph 1 encourages the parties to reach an agreement on the sole arbitrator (A/CN.9/1003, para. 57).*
- (3) *Paragraph 2 provides a mechanism in the absence of an agreement by the parties on a sole arbitrator. Any party may request the engagement of the appointing authority 15 days after a proposal for the appointment of a sole arbitrator has been received by all other parties. This is shorter than the 30-day time frame in article 8(1) of the UARs. The involvement of the appointing authority can only be triggered by a request by one of the parties.*
- (4) *Considering that the claimant is required to include such a proposal in the notice of arbitration, if there is no agreement within 15 days after the respondent's receipt of the notice of arbitration, the claimant would be able to make a request to the appointing authority. If a proposal is not included in the notice, the 15-day time frame would commence when a proposal is made.*
- (5) *It should, however, be noted that draft provision 5(1) provides the respondent 15 days to respond to the notice of arbitration, which should also include response to the claimant's proposal of a sole arbitrator. Therefore, it would be prudent for the claimant to consider such response before engaging with the appointing authority (if previously agreed by the parties). If the respondent foresees that an agreement cannot be reached (A/CN.9/1003, paras. 60 and 62; A/CN.9/1010, para. 61), it could engage with the appointing authority at the same time it communicates the response to the notice of arbitration.*
- (6) *In practice, if there is no agreement by the parties on the appointing authority and the sole arbitrator 15 days after the receipt of the notice by the respondent, any party may request the Secretary-General of the PCA to designate the appointing authority or to serve as appointing authority in accordance with draft provision 6(1). In the latter case, a party can also request the appointment of a sole arbitrator in accordance with draft provision 8(2), which would likely facilitate a speedy constitution of the arbitral tribunal.*
- (7) *Article 8(2) of the UARs, which mentions a list-procedure for the appointment of a sole arbitrator, applies to expedited arbitration unchanged (A/CN.9/1010, para. 62).*

- (8) *In exercising the functions under the EAPs, the appointing authority and the Secretary-General of the PCA should be mindful of article 6(5) of the UARs, which requires them to give the parties and, where appropriate, the arbitrators an opportunity to present their views (A/CN.9/1043, para. 73). Any proposal made by the parties on the appointment of a sole arbitrator should thus be taken into account.*
- (9) *When appointing an arbitrator for expedited arbitration, the appointing authority shall make an effort to secure not only an independent and impartial arbitrator in accordance with article 6(7) of the UARs but also an arbitrator who is available and ready to conduct the arbitration expeditiously in accordance with draft provision 3(2).*

Remaining issue – time frames in arts. 9 and 13 of the UARs

44. **The Working Group may wish to confirm that the time frames in articles 9 and 13 of the UARs would apply unchanged to expedited arbitration (A/CN.9/1003, paras. 61 and 64; A/CN.9/1010, para. 68; A/CN.9/1043, para. 79).**

## H. Consultation with the parties

45. **The Working Group may wish to confirm the following formulation regarding consultation (A/CN.9/1043, paras. 83, 86 and 88):**

Draft provision 9 (Consultation with the parties)

*Promptly after and within 15 days of its constitution, the arbitral tribunal shall consult the parties, through a case management conference or otherwise, on the manner in which it will conduct the arbitration.*

46. The Working Group may wish to consider the following text for the explanatory note on draft provision 9:

- (1) *Consultation between the arbitral tribunal and the parties at an early stage of the proceedings is particularly key to an efficient and fair organization of expedited arbitration (A/CN.9/1043, para. 81). Draft provision 9 provides guidance to the arbitral tribunal on how to implement article 17 of the UARs in the context of expedited arbitration.*
- (2) *Draft provision 9 requires the arbitral tribunal to “consult” the parties on how to organize the proceedings and mentions that one way would be through a case management conference (A/CN.9/1003, para. 75; A/CN.9/1010, paras. 82 and 85). A case management conference can be an important procedural tool, which permits an arbitral tribunal to give parties a timely indication as to the organization of the proceedings and the manner in which it intends to proceed (A/CN.9/969, para. 56).<sup>17</sup>*
- (3) *A number of issues could be discussed during a case management conference. If there is disagreement between the parties on the application of the EAPs or if the arbitral tribunal considers that certain provisions in the EAPs should not apply to the proceedings, the parties and the arbitral tribunal can discuss and agree which rules would apply to the proceedings. How to conduct further consultations as well as hearings could be discussed, including whether they would be in person or through*

<sup>17</sup>See Note 1 of the UNCITRAL Notes on Organizing Arbitral Proceedings available at: [www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-2016-e.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-2016-e.pdf). Note 1 highlights the importance of holding case management meetings at which the parties and the arbitral tribunal can establish strict time limits.

*technological means. The extent to which parties would be allowed to present further written statements or be requested to produce documents, exhibits and other evidence could also be discussed. Similarly, the parties could indicate the witnesses that they will present to testify as well as the content of their testimony.*

- (4) *Draft provision 9 introduces a short time frame within which the tribunal should consult the parties as it is useful for this to be done at the very early stages of the proceedings (A/CN.9/969, para. 62; A/CN.9/1003, para. 71; A/CN.9/1010, paras. 83 and 85). The arbitral tribunal should conduct the consultation with the parties promptly after and within 15 days of its constitution. In certain cases, the respondent might not yet have communicated its statement of defence as it is to be communicated within 15 days of the constitution of the arbitral tribunal (see draft provision 5(2)). Nonetheless, it would be useful for the arbitral tribunal to consult the parties at an early stage based on the notice of arbitration, response thereto as well as the statement of claim. Upon receipt of the statement of defence from the respondent, the arbitral tribunal may decide to hold further consultations with the parties, particularly if the provisional timetable requires revision.*
- (5) *Consultations may be conducted through a meeting in person, in writing, by telephone or videoconference or other means of communication as provided for in draft provision 3(3) (A/CN.9/969, para. 63; A/CN.9/1003, para. 74; A/CN.9/1010, para. 85). Considering that sufficient flexibility is provided to the arbitral tribunal, it should not be so burdensome to meet the 15-day time frame (A/CN.9/1003, para. 74).*
- (6) *In accordance with article 17(2) of the UARs, the arbitral tribunal should establish the provisional timetable after inviting the parties to express their views. In so doing, the tribunal should be mindful of the time frames in the EAPs, in particular that in draft provision 16 (A/CN.9/1003, para. 73; A/CN.9/1010, para. 84), which is highlighted in draft provision 3(2). Following the consultations, the arbitral tribunal may wish to communicate to the parties the outcome of the consultations to ensure that the parties are aware of the time frames and would avoid delays.*

## **I. Time frames and the discretion of the arbitral tribunal**

**47. The Working Group may wish to consider the following formulation with respect to time frames in expedited arbitration:**

Draft provision 10 (Discretion of the arbitral tribunal with regard to time frames)

*Subject to draft provision 16, the arbitral tribunal may at any time, after inviting the parties to express their views, extend or abridge any period of time prescribed under these Provisions or agreed by the parties.*

48. Draft provision 10 reflects the support expressed for retaining such a provision in the EAPs yet in a simplified form. The draft provision would highlight and reinforce the discretion of the arbitral tribunal with regard to time frames in expedited arbitration (A/CN.9/1003, para. 78; A/CN.9/1010, para. 95; A/CN.9/1043, para. 91).

49. The Working Group may wish to consider the following text for the explanatory note on draft provision 10:

- (1) *Draft provision 10 addresses the discretion of the arbitral tribunal with regard to time frames in expedited arbitration. It should be read along with the second sentence of article 17(2) of the UARs, which provides that “The*

*arbitral tribunal may ... extend or abridge any period of time prescribed under these Rules or agreed by the parties.”*

- (2) *As such, draft provision 10 clarifies that the arbitral tribunal may extend or abridge any period of time prescribed under the EAPs (for example, the time frame for communicating the statement of defence or for making a counterclaim) (A/CN.9/1003, para. 79). It also reiterates the discretion of the arbitral tribunal to extend or abridge any period of time agreed by the parties in the context of expedited arbitration (A/CN.9/1043, para. 91). Even after a time frame has been fixed in accordance with draft provision 10, flexibility is provided to adjust the time period when the adjustment is justified (A/CN.9/969, para. 52). However, this discretion is subject to a specific rule in draft provision 16 with regard to the time frame for rendering the award, as the extension of that period is only possible in exceptional circumstances.*
- (3) *Draft provision 10 clarifies and reinforces the discretionary power of the arbitral tribunal, thus limiting the risk of challenges at the enforcement stage (A/CN.9/969, para. 50; A/CN.9/1010, para. 95). In other words, it provides the arbitral tribunal with a robust mandate to act decisively without fearing that its award could be set aside for a breach of due process.*
- (4) *Nonetheless, while shorter time frames constitute one of the key characteristics of expedited arbitration, arbitral tribunals should endeavour to preserve the flexible nature of the proceedings and comply with due process requirements (A/CN.9/1003, para. 77).*
- (5) *With regard to the consequences of non-compliance by the parties with the time frames, article 30 of the UARs on default applies to expedited arbitration unchanged (A/CN.9/1003, para. 80, A/CN.9/1043, para. 92). With regard to late submissions, considering that flexibility is provided to the arbitral tribunal in setting and modifying time frames, the arbitral tribunal has the flexibility to accept such submissions but such discretion should be exercised with care (A/CN.9/969, para. 69; A/CN.9/1043, para. 92).*

## J. Hearings

50. The Working Group may wish to consider the following formulation on the holding of hearings in expedited arbitration:

Draft provision 11 (Hearings)

*The arbitral tribunal may, after inviting the parties to express their views and in the absence of a request to hold hearings, decide that hearings shall not be held.*

51. Draft provision 11 is based on the understanding that limitation on hearings is a key characteristic of expedited arbitration, which would distinguish it from non-expedited arbitration (A/CN.9/1003, para. 94). It highlights that in expedited arbitration, hearings are to be held when requested by a party and in the absence of such a request, only in limited instances (A/CN.9/1010, para. 109). Diverging views had been expressed on whether an arbitral tribunal in expedited arbitration should be required to hold a hearing and under which circumstances (A/CN.9/969, para. 75; A/CN.9/1003, paras. 93–95; A/CN.9/1010, paras. 107–111, see also A/CN.9/WG.II/WP.214, paras. 101 and 102).

52. Draft provisions 11 reflects the view that there would be merit in retaining a provision on hearings in the EAPs to emphasize the discretion of the arbitral tribunal to “not” hold hearings (A/CN.9/1043, para. 93). In case a party does not exercise its right to request the holding of a hearing when invited to express its

views, the arbitral tribunal may decide that there will be no hearings in the proceedings.

53. The Working Group may wish to consider the following text for the explanatory note on draft provision 11:

- (1) *Draft provision 11 emphasizes the discretionary power of the arbitral tribunal to “not” hold hearings in expedited arbitration in the absence of a request by any party. It should be read together with article 17(3) of the UARs, which provides that: (i) the arbitral tribunal shall hold hearings if any party so requests at an appropriate stage of the proceedings; and (ii) in the absence of such a request, the arbitral tribunal shall decide whether to hold hearings. Parties themselves may agree to hold hearings, in which case that agreement is binding on the arbitral tribunal.*
- (2) *Considering the short time frame for rendering the award in expedited arbitration, the arbitral tribunal may wish decide at an early stage of the proceedings whether to hold hearings (A/CN.9/1010, para. 110). A request to hold a hearing at a later stage may delay the proceedings and result in the award not being rendered within the time frame. Consequently, an extension of the time frame would need to be sought.*
- (3) *As parties have a right to request the holding of a hearing, draft provision 11 requires the arbitral tribunal to invite the parties to express their views on whether hearings are to be held. This may also be done during the consultation with the parties. If a party so requests at that stage, the arbitral tribunal would need to hold a hearing in accordance with article 17(3) of the UARs. In the absence of such a request prior to and during the consultation, the arbitral tribunal may go ahead and decide to not hold hearings.*
- (4) *This means that the proceedings shall be conducted on the basis of documents and other materials. A request by a party to hold a hearing after a decision by the arbitral tribunal to not hold one can be denied as the request would no longer be considered as being made at “an appropriate stage of the proceedings” (see article 17(3) of the UARs). Draft provision 11 would thus have the effect of limiting the time frame during which requests for holding hearings can be made.*
- (5) *Article 28 of the UARs applies to the conduct of hearings in expedited arbitration (A/CN.9/1003, para. 97). The arbitral tribunal has a broad discretion on how to conduct the hearings in a streamlined manner (A/CN.9/969, para. 65, A/CN.9/1003, paras. 80 and 99; A/CN.9/1010, para. 111). And efforts should be made to limit the duration of the hearing (A/CN.9/1043, para. 95), the number of witnesses as well as cross-examination in line with draft provisions 3(2) and 15(1) (A/CN.9/969, paras. 75 and 82; A/CN.9/1003, para. 97; A/CN.9/1010, para. 111) and at the same time, to maintain a fair process.*
- (6) *As provided for in draft provision 3(3) and article 28(4) of the UARs, the arbitral tribunal may utilize any technological means to hold hearings without the physical presence of the parties or witnesses.*

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

54. The Working Group approved the following formulations regarding counterclaims, claims for the purpose of set-off, and amendments to the claim or defence as they provided a balanced approach taking into account different interests and were flexible enough to address a range of circumstances (A/CN.9/1043, paras. 97-99):

## Draft provision 12 (Counterclaims or claims for the purpose of set off)

*1. A counterclaim or a claim for the purpose of a set-off shall be made no later than in the statement of defence provided that the arbitral tribunal has jurisdiction over it.*

*2. The respondent may not make a counterclaim or rely on a claim for the purpose of a set-off at a later stage in the arbitral proceedings, unless the arbitral tribunal considers it appropriate to allow such claims having regard to the delay in making such claim, prejudice to other parties and any other circumstances.*

## Draft provision 13 (Amendments and supplements to a claim or defence)

*1. Amendments and supplements to a claim or defence, including a counterclaim or a claim for the purposes of set-off, shall be made no later than 30 days after the receipt of the statement of defence.*

*2. After the period of time in paragraph 1, a party may not amend or supplement its claim or defence, including a counterclaim or a claim for the purposes of set-off, unless the arbitral tribunal considers it appropriate to allow such amendment or supplement having regard to the delay in making it, prejudice to other parties and any other circumstances.*

55. The Working Group may wish to consider the following explanatory note on draft provisions 12 and 13:

- (1) *Draft provisions 12 and 13 preserve the right of the parties to make (i) counterclaims and claims for the purpose of set-off (hereinafter referred to simply as “counterclaims”) and (ii) amendments and supplements to a claim or defence, including a counterclaim or a claim for the purposes of set-off (hereinafter referred to simply as “amendments”). Yet, they introduce limited time frames, which can be lifted by the arbitral tribunal (A/CN.9/1003, para. 88; A/CN.9/1010, para. 97). This is to ensure that counterclaims and amendments do not result in delays in the proceedings (A/CN.9/969, paras. 66 and 67; A/CN.9/1003, para. 88).*
- (2) *Draft provision 12 replaces article 21(3) of the UARs. Paragraph 1 requires the respondent to make any counterclaim at the latest in its statement of defence (A/CN.9/1010, para. 98), which is to be communicated within 15 days of the constitution of the tribunal in accordance with draft provision 5(2). A counterclaim can be made at a later stage of the proceedings, but only when the arbitral tribunal considers it appropriate under the circumstances. This introduces a higher threshold than that provided in article 21(3), which allows a party to make a counterclaim at a later stage if the arbitral tribunal decides that the delay was justified.*
- (3) *Draft provision 13 replaces the first sentence of article 22 of the UARs. It introduces a 30-day time frame within which parties can make amendments.<sup>18</sup> The 30-day time frame commences from the receipt of the statement of defence (A/CN.9/1003, para. 90; A/CN.9/1010, para. 99). As this may pose practical challenges, for example, (i) when a claimant’s reply to the statement of defence that includes counterclaims requires the respondent to supplement or amend its defence or (ii) when a counterclaim is made to any of the amended claims (A/CN.9/1043, para. 98), paragraph 2 provides discretion to the arbitral tribunal to extend that time frame as long as it considers the amendment appropriate under the circumstances. This is the same threshold for allowing counterclaims in draft provision 12.*

<sup>18</sup> The Working Group may wish to confirm that even within the 30-day time frame, amendments would not be allowed if the arbitral tribunal considers them inappropriate (see art. 22 of the UARs).

*The second sentence of article 22 of the UARs applies to expedited arbitration unchanged.*

- (4) *Counterclaims and amendments might result in the expedited arbitration no longer being appropriate for resolving the dispute. In such a circumstance, parties may agree that the EAPs shall no longer apply to the arbitration or a party may request the arbitral tribunal to determine that the EAPs shall no longer apply in accordance with draft provision 2 (A/CN.9/1010, para. 100).*

## **L. Further written statements**

56. The Working Group may wish to consider the following formulation regarding further written statements:

Draft provision 14 (Further written statements)

*The arbitral tribunal may, after inviting the parties to express their views, decide whether any further written statement(s) shall be required from the parties or may be presented by them.*

57. Draft provision 14 is based on the understanding that in expedited arbitration, the arbitral tribunal should be able to limit and entirely prohibit the parties from submitting written statements in addition to the statement of claim and the statement of defence (“further written statements”). While some doubts were expressed on whether draft provision 14 need to be retained in the EAPs (A/CN.9/1043, para. 101), it reflects drafting suggestions made in that regard (A/CN.9/1043, para. 102).

58. The Working Group may wish to consider the following explanatory note on draft provision 14:

- (1) *Article 24 of the UARs provides that the arbitral tribunal shall decide “which further written statements” in addition to the statement of claim and the statement of defence, shall be required from the parties or may be presented by them. The phrase “which further statements” may be understood that the parties have a right to present such further written statements and that more than one round of submissions may be expected in the proceedings. This could delay the process in expedited arbitration.*
- (2) *Draft provision 14 reinforces the discretionary power of the arbitral tribunal under article 24 of the UARs to limit further written statement (A/CN.9/1010, para. 102). It makes it clear that the arbitral tribunal may decide that the statement of claim and the statement of defence are sufficient for the proceedings and that no further written statements shall be required from the parties. It should, however, not be interpreted that the arbitral tribunal does not have such discretion under article 24 of the UARs.*
- (3) *As the draft provision reiterates the discretionary power of the arbitral tribunal, the arbitral tribunal would not need to justify its decision to limit further written statements.*

## **M. Evidence**

59. The Working Group may wish to consider the following formulation regarding the taking of evidence, which was approved in substance (A/CN.9/1010, para. 106):

Draft provision 15 (Evidence)

*1. The arbitral tribunal may decide which documents, exhibits or other evidence the parties should produce. The arbitral tribunal may decide to limit a party from requesting the other party to produce documents, exhibits or other evidence.*

*2. The arbitral tribunal may decide which witnesses, including expert witnesses, shall testify to the arbitral tribunal. Unless otherwise directed by the arbitral tribunal, statements by witnesses, including expert witnesses, shall be presented in writing and signed by them.*

60. The understanding of the Working Group was that flexibility should be left to the arbitral tribunal with regard to the taking of evidence, while the parties should be provided sufficient time to present witness statements and expert opinions (A/CN.9/969, para. 73; A/CN.9/1003, para. 99). Draft provision 15 reflects the understanding that the EAPs should expressly address how the discretionary power of the arbitral tribunal provided for in article 27 of the UARs should be exercised in the context of expedited arbitration. Draft provision 15 would make it easier for the arbitral tribunal to impose limitations regarding the taking of evidence and alert the parties that extensive production of documents and other evidence would not be possible in expedited arbitration (A/CN.9/1003, paras. 80 and 99).

61. The Working Group may wish to consider the following explanatory note on draft provision 15:

- (1) Draft provision 15 addresses aspects with regard to taking of evidence in expedited arbitration. Paragraph 1 states a general rule that the arbitral tribunal may decide which documents, exhibits or other evidence the parties would be required to present during the proceedings, if any. This is an aspect that could be discussed with the parties during the consultation (see para. 46(3) above).*
- (2) Article 27(3) of the UARs provides that at any time during the proceedings, the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within a determined time period. However, this should not be understood as recognizing that the parties have a right to request to the other party production of documents, exhibits or other evidence nor that the arbitral tribunal is required to resolve disputes arising from such requests. This process, often referred to as the “document production” or “discovery” stage, can cause unjustified delays, unless it is truly necessary for a fair resolution of the dispute (A/CN.9/1043, para. 104).*
- (3) The second sentence of draft provision 15(1) reaffirms the discretionary power of the arbitral tribunal under article 27(3) of the UARs to limit the request for the production of documents and other evidence in their entirety or in part (A/CN.9/1010, para. 103). If a party considers that it needs to request certain documents from the other party, it could indicate this to the arbitral tribunal during the consultation providing the reasons. The arbitral tribunal would then make a decision whether to allow such a request and reflect it in the provisional timetable.<sup>19</sup> The*

<sup>19</sup> See, for example, Article of the Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules), which reads as follows:

“4.1 ...

4.2 Generally, the arbitral tribunal and the parties are encouraged to avoid any form of document production, including e-discovery.

4.3 However, if a party believes that it would need to request certain documents from the other party, it should indicate this to the arbitral tribunal at the case management conference and explain the reasons why the document production may be needed in this particular case. If the arbitral tribunal is satisfied that the document production may be needed, it should decide on a procedure for document production and make an appropriate provision for it in the



*inclusion of draft provision 15(3) in the EAPs should, however, not be interpreted as meaning that the arbitral tribunal does not have such discretion under article 27(3) of the UARs.*

- (4) *Draft provision 15(2) states the general rule that the arbitral tribunal may choose which witnesses (including expert witnesses) presented by the parties can testify. It further provides that the default rule in expedited arbitration is that witness statements are to be in “written” form (A/CN.9/1003, para. 100; A/CN.9/1010, para. 105). Paragraph 2 thus replaces the second sentence of article 27(2) of the UARs. While the rules for meeting the requirements of “in writing” and “signature” through electronic communication vary depending on the jurisdiction, it should be noted that article 9(2) and (3) of the United Nations Convention on the Use of Electronic Communications in International Contracts provides a functional equivalence rule (A/CN.9/1043, para. 103).*
- (5) *Any witness statements that are to accompany the statement of claim shall also be in writing. However, draft provision 4(1) does not require that all written witness statements need to accompany the statement of claim and a mere reference to such statement would be sufficient (see para. 28(7) above; A/CN.9/1043, para. 103).*

#### Remaining issue

**62. The Working Group may wish to decide whether draft provision 15 should be retained in the EAPs or whether it would be sufficient to provide guidance in the explanatory note. Following that decision, the Working Group may wish to consider combining draft provisions 14 and 15.**

## **N. Making of the award**

63. The Working Group may wish to consider the following formulation regarding the making of the award in expedited arbitration, which received support (A/CN.9/1043, para. 105):

#### Draft provision 16 (Award)

*1. Unless otherwise agreed by the parties, the award shall be made within six months from the date of the constitution of the arbitral tribunal.*

*2. The period of time for making the award may be extended by the arbitral tribunal in exceptional circumstances after inviting the parties to express their views.*

*[3. The arbitral tribunal shall state the reasons when extending the period of time for making the award.]*

*[4. The period of time for making the award may be extended [once]. The additional period of time shall be no longer than [three] months. In any case, the overall extended period of time shall not exceed 12 months from the date of the constitution of the arbitral tribunal.]*

64. The Working Group may wish to consider the following explanatory note on draft provision 16:

- (1) *Draft provision 16 provides a six-month time frame for making the award and a mechanism for extending that time frame (A/CN.9/969, para. 49; A/CN.9/1003, para. 103). Parties are also free to agree on a time frame different from that in paragraph 1 (A/CN.9/1003, para. 103). The six-month time frame for rendering the award commences with the*

procedural timetable.”

*constitution of the tribunal (A/CN.9/1003, para. 104; A/CN.9/1010, paras. 85–87, 89, 92, 112 and 116).*

- (2) *Paragraph 2 provides the possibility for the arbitral tribunal to extend the time period in paragraph 1. Whereas draft provision 10 provides for a general discretion of the arbitral tribunal to extend or abridge any period of time prescribed under the EAPs, draft provision 16(2) specifically authorizes the arbitral tribunal to extend the time frame for rendering the award, but only in exceptional circumstances (A/CN.9/1003, para.106; A/CN.9/1010, para. 117). Considering that in certain jurisdictions, extension of the time frame could only be granted upon the agreement or consent of the parties or by an entity other than the arbitral tribunal (A/CN.9/1003, para. 107; A/CN.9/1010, para. 120), paragraph 2 underlines that parties, by agreeing to the application of the EAPS, are granting the arbitral tribunal the authority to extend the time period for rendering the award (A/CN.9/1043, para. 107).*
- (3) *Draft provision 16 should be read together with article 34 of the UARs, in particularly paragraph 3. Unless the parties have agreed that no reasons are to be given, arbitral tribunals in expedited arbitration shall also state the reasons upon which the award is based. This is because requiring the arbitral tribunal to provide a reasoned award can assist its decision-making and reassure the parties as they will find that their arguments have been duly considered (A/CN.9/969, paras. 85–86; A/CN.9/1003, para. 110; A/CN.9/1010, para. 121). The absence of reasoning in an award may impede any control mechanism, as the court or other 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.*

#### Remaining issue 1 – time frame for rendering the award

65. With regard to the time frame for rendering the award, paragraph 1 reflects the preference expressed for six months as that would sufficiently highlight the expedited nature of the proceedings and would be in line with the duration provided for in other institutional rules on expedited arbitration (A/CN.9/1003, para. 103; A/CN.9/1010, para. 113; A/CN.9/1043, para. 106). Others preferred nine months, in light of the likely international and ad hoc nature of the proceedings under the EAPs and that a nine-month period would ensure that an extension does not become systematic (A/CN.9/1010, para. 114). The Working Group may wish to confirm that the six-month time frame in paragraph 1 is appropriate.

#### Remaining issue 2 – circumstances for extending the time frame

66. The Working Group may wish to consider whether the words “in exceptional circumstances” in draft provision 16(2) needs to be further elaborated in the EAPs or in the explanatory note (A/CN.9/1010, para. 118). For example, the Working Group may wish to consider whether some of the elements to be considered by the arbitral tribunal upon request by a party to withdraw from expedited arbitration (see para. 19(4) above) could apply in this context. Alternatively, some examples of circumstances which would justify an extension of the time period could be provided in the explanatory note.

#### Remaining issue 3 – unintended lapse of the time frame

67. With respect to paragraph 2, a question was raised whether the EAPs should address the situation where the time frame has lapsed against the will of the parties or of the arbitral tribunal. A lapse might result in an unintended termination of proceedings or the annulment of the award if it was rendered after the time frame (A/CN.9/1010, para. 120). The Working Group may wish to

confirm that this question does not need to be addressed in the EAPs nor in the explanatory note.

#### Remaining issue 4 – reasons for the extension

68. Paragraph 3 is in square brackets as it reflects differing views expressed with regard to whether the tribunal would be required to provide the reasons for extending the time frame for the rendering of the award (A/CN.9/1003, para.106; A/CN.9/1010, para. 118). On the one hand, such a requirement could delay the process as providing reasons could be time-consuming. On the other, it could limit extensions and be useful for the parties as they would be aware of the reasons for the extension (A/CN.9/1043, para. 108).

#### Remaining issue 5 –limitations on extension

69. Paragraph 4 addresses the questions of whether the number of extensions should be limited and whether there should be a limit on the extended period (A/CN.9/1003, para.106; A/CN.9/1010, para. 119). The general aim is to preserve the expeditious nature of the proceedings and to prevent a prolonged process due to multiple, unlimited extensions.

70. A wide range of views were expressed, including a view that paragraph 4 could be deleted to provide flexibility with regard to the extensions and in light of the various circumstances that could arise. On the other hand, it was pointed out that without such limitations, it would be difficult to ensure that awards are rendered in a short time frame as arbitral tribunals could in practice extend the time frame indefinitely.

71. Differing views were also expressed on the appropriate number of extensions (for example, once or twice) and the maximum time period of an extension (for example, 3 or 6 months). The possibility of limiting the overall extended period while allowing for multiple extensions was also mentioned. It was also stated that the parties could be involved in determining the terms the extension (A/CN.9/1043, para. 109).

#### Remaining issue 6 – consequences of non-compliance by the arbitral tribunal

72. Draft provision 16 does not address the consequences of non-compliance by the arbitral tribunal of the time frame therein. The Working Group may wish to confirm that such consequences (for example, (i) reduction of arbitrator's fees with the possible involvement of the appointing authority provided for in article 41(3) of the UARs or (ii) replacement of the arbitrator which may not necessarily ensure efficiency, A/CN.9/969, para. 55; A/CN.9/1003, para. 108) are better mentioned in the explanatory note.

#### Remaining issue 7 – other time frames

73. The Working Group may wish to consider whether the time frames prescribed in the UARs (article 37 on the interpretation of the award, article 38 on the correction of the award and article 39 on an additional award) need to be modified in expedited arbitration.

## **O. Pleas as to the merits and preliminary rulings**

74. At its seventieth and seventy-first sessions, the Working Group considered the provisions on early dismissal<sup>20</sup> (a tool for arbitral tribunals to dismiss claims and defences that lacked merit) and preliminary determination<sup>21</sup> (a tool that would allow a party to request the arbitral tribunal to decide on one or more issues or points of law or fact without undergoing every procedural step) (A/CN.9/969, paras. 20 and 21; A/CN.9/1003, paras. 82–87; A/CN.9/1010, paras. 122–129). This was without prejudice to the decision by the Working Group on whether

<sup>20</sup>See ICSID Rules Article 41(5) and Rule 29 of the SIAC Arbitration Rules (2016).

<sup>21</sup>See article 40 of the SCC Rules for Expedited Arbitrations (2017) and article 43 of the HKIAC Administered Arbitration Rules (2018).

those provisions would be included in the EAPs or would apply more generally to arbitration under the UARs (A/CN.9/1003, para. 87; A/CN.9/1010, para. 122).

75. While doubts and concerns were expressed (A/CN.9/969, paras. 20 and 116; A/CN.9/1003, paras. 83 and 84; A/CN.9/1010, para. 124), it was also felt those tools could improve the overall efficiency of arbitration (A/CN.9/1010, para. 123). It was viewed that while the use of those tools would be within the inherent power of the arbitral tribunals under article 17(1) of the UARs, providing them explicitly in the EAPs could make it easier for the tribunals to utilize them and could discourage frivolous claims by parties (A/CN.9/1003, para. 85; A/CN.9/1010, para. 123).

76. The Working Group may wish to consider the following formulation regarding pleas as to the merits and preliminary rulings:

Draft provision 17 (Pleas as to the merits and preliminary rulings)

*[1. A party may raise a plea that:*

*(a) A claim or defence is manifestly without legal merit;*

*(b) Issues of fact or law supporting a claim or defence are manifestly without merit;*

*(c) Certain evidence is not admissible;*

*(d) No award could be rendered in favour of the other party even if issues of fact or law supporting a claim or defence are assumed to be correct;*

*(e) ...*

*2. A party shall raise the plea as promptly as possible and no later than 30 days after the submission of the relevant claim/defence, issues of law or fact or evidence. The arbitral tribunal may admit a later plea if it considers the delay justified.*

*3. The party raising the plea shall specify as precisely as possible the facts and the legal basis for the plea and demonstrate that a ruling on the plea will expedite the proceedings considering all circumstances of the case.*

*4. After inviting the parties to express their views, the arbitral tribunal shall determine within [15] days from the date of the plea whether it will rule on the plea as a preliminary question.*

*5. Within [30] days from the date of the plea, the arbitral tribunal shall rule on the plea. The period of time may be extended by the arbitral tribunal in exceptional circumstances.*

*6. A ruling by the arbitral tribunal on a plea shall be without prejudice to the right of a party to object, in the course of the proceeding, that a claim or defence lacks legal merit.]*

77. Draft provision 17 is based on suggestions made by the Working Group that the two provisions in document A/CN.9/WG.II/WP.212 respectively providing for early dismissal and preliminary determination should be merged to avoid overlap (A/CN.9/1010, para. 125). The Working Group may wish to confirm this approach.

78. The term “pleas as to the merits and preliminary rulings” is used to capture both tools, mirroring article 23 of the UARs on “pleas as to the jurisdiction of the arbitral tribunal”. It is assumed that article 23 of the UARs will apply unchanged in expedited arbitration along with draft provision 17.

79. Paragraph 1 lists the type of pleas that a party can raise. The Working Group may wish to develop the list further. As to the standard to be applied, it was

considered that the “manifestly without merit” standard provided a sound basis (A/CN.9/1010, para. 127).

80. Paragraph 2 introduces a time frame within which a party would be able to raise a plea. The Working Group may wish to consider whether the time frame is appropriate in 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 (A/CN.9/1010, para. 126). Paragraph 3 requires the party raising the plea to provide grounds justifying the plea. This would address concerns about the possible abuse of the tool by the parties resulting in delays (A/CN.9/1010, para. 124).

81. Paragraphs 4 and 5 provide for a two-stage process with the arbitral tribunal first determining whether to consider the plea and then deciding on the merits. Both paragraphs include a time frame within which a decision (on procedure and on the merits of the plea) needs to be made by the arbitral tribunal. The Working Group may wish to consider whether the two stages should be combined into a single stage with a single time frame.

## P. Model arbitration clause for expedited arbitration

### Model arbitration clause for contracts

*Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Expedited Arbitration Provisions.*

*Note. Parties should consider adding:*

- (a) The appointing authority shall be . . . [name of institution or person];*
- (b) The place of arbitration shall be . . . [town and country];*
- (c) The language to be used in the arbitral proceedings shall be . . .*

### Possible waiver statement

*The parties hereby waive the right to request withdrawal from of expedited arbitration as provided in draft provision 2.*

82. The statement above reflects a suggestion that even if a withdrawal mechanism were to be provided in the EAPs (see draft provision 2), it should be mentioned that parties could waive in advance their right to request withdrawal from expedited arbitration (A/CN.9/1010, para. 38). However, the inclusion of such a statement in the EAPs may compel parties with less bargaining power to agree to waive their rights in advance. **The Working Group may thus wish to consider whether the above statement should be presented along with a model clause to the EAPs or mentioned in the explanatory note to draft provision 2.**

### Elements to be considered when parties refer their dispute to arbitration under the EAPs

*When considering whether to refer their dispute to arbitration under the EAPs, the parties should take into account, among others, the following elements (A/CN.9/1003, paras. 30, 40 and 41; A/CN.9/1010, para. 47; A/CN.9/1043, para. 57);*

- The urgency of resolving the dispute;*
- The complexity of the transactions and the number of parties involved;*
- The anticipated complexity of the dispute;*

- *The anticipated amount of the dispute;*
- *The financial resources available to the party in proportion to the expected cost of the arbitration;*
- *The possibility of joinder or consolidation;*
- *The likelihood of an award being rendered within the time frames provided in draft provision 16; and*
- *[Other business considerations.]*

83. The list above can be useful for the administering institution or the arbitral tribunal when suggesting expedited arbitration to the parties (A/CN.9/1003, paras. 28 and 31). The list could also provide a basis for arbitral institutions that model their institutional rules based on the EAPs and wish to include a set of criteria which would automatically trigger expedited arbitration (A/CN.9/1010, para. 26). Arbitral institutions may also consider introducing a financial threshold, which has the advantage of providing a clear and objective standard (A/CN.9/1003, para. 38).

## **Q. Application of the UNCITRAL Rules on Transparency to expedited arbitration**

84. At its previous session, the Working Group considered the application of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (“Transparency Rules”) to expedited arbitration (A/CN.9/1043, paras. 58-60) based on paragraphs 35 to 41 of document A/CN.9/WG.II/WP.214 as summarized below:

- The suitability of the EAPs for investment arbitration is a question to be determined by the disputing parties;
- The Transparency Rules form part of the UARs (article 1(4) of the UARs);
- Article 1 of the Transparency Rules addresses the applicability of the Transparency Rules to “investor-State arbitration initiated under the UNCITRAL Arbitration Rules”;
- If the EAPs are presented as an appendix to the UARs and an investor-State arbitration is initiated under the EAPs, it would be considered as being initiated under the UARs and the Transparency Rules could apply;
- If the investor-State arbitration is initiated pursuant to an investment treaty concluded on or after 1 April 2014, the Transparency Rules would apply unless the States Parties to the treaty have agreed otherwise. The proceedings would be subject to both the Transparency Rules and the EAPs;
- If the investor-State arbitration is initiated pursuant to an investment treaty concluded before 1 April 2014, the Transparency Rules would only apply when the disputing parties have agreed to their application or the States Parties to the treaty have agreed to their application after 1 April 2014. The proceedings would be subject to the EAPs but not the Transparency Rules unless the above-mentioned conditions are met; and
- Disputing parties in investor-State arbitration would have limited flexibility in excluding the application of the Transparency Rules under the EAPs (A/CN.9/1010, para. 18, for example, by referring a dispute to the 2010 UARs as modified by the EAPs<sup>22</sup>) in investor-State arbitration initiated pursuant to an investment treaty concluded on or after 1 April

<sup>22</sup> See also, article 29(6) of the ICC Rules of Arbitration, which allows a party to opt out of the provisions on emergency arbitrator.

2014, as only States Parties to the treaty are able to opt out of the Transparency Rules and not the disputing parties (see article 1(1) of the Transparency Rules).

85. During the deliberations, views were expressed that it would be important to allow the parties to agree to the EAPs without agreeing to the application of the Transparency Rules; and that if State parties to an investment treaty were to agree on the application of the EAPs, it should be provided that additional consent would be required for the application of the Transparency Rules. The Working Group may wish to consider whether such aspects would need to be mentioned in the explanatory note.

## Annex

### I. Draft Expedited Arbitration Provisions

The following reproduces the draft expedited arbitration provisions for ease of reference.

#### Appendix to the UNCITRAL Arbitration Rules

##### Draft provision 1 (Scope of application)

*Where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the UNCITRAL Expedited Arbitration Provisions, then such disputes shall be settled in accordance with the UNCITRAL Arbitration Rules as modified by these Provisions and subject to such modification as the parties may agree.*

*[\* For the avoidance of doubt and unless otherwise agreed by the parties, the following rules in the UARs do not apply to arbitration under the EAPs: Article 3(4)(a) and (b); Article 6(2); Article 7; Article 8(1); first sentence of Article 20(1); first sentence of Article 21(1); Article 21(3); first sentence of Article 22; and second sentence of Article 27(2).*

*The phrase “these Rules” as found in the UARs should be read to include the EAPs in the context of expedited arbitration.]*

##### Draft provision 2 (Withdrawal from expedited arbitration)

*1. At any time during the proceedings, the parties may agree that the Expedited Arbitration Provisions shall no longer apply to the arbitration.*

*2. At the request of a party, the arbitral tribunal may, in exceptional circumstances and after inviting the parties to express their views, determine that the Expedited Arbitration Provisions shall no longer apply to the arbitration. [The arbitral tribunal shall state the reasons upon which that determination is based.]*

*3. When the Expedited Arbitration Provisions no longer apply to the arbitration pursuant to paragraph 1 or 2, the arbitral tribunal shall remain in place and conduct the arbitration in accordance with the UNCITRAL Arbitration Rules.*

##### Draft provision 3 (Conduct of the parties and the arbitral tribunal)

*1. The parties shall act expeditiously throughout the proceedings.*

*2. The arbitral tribunal shall conduct the proceedings expeditiously taking into account the fact that the parties agreed to refer their dispute to expedited arbitration and the time frames in the Expedited Arbitration Provisions.*

*3. In conducting the proceedings, the arbitral tribunal may, after inviting the parties to express their views and taking into account the circumstances of the case, utilize any technological means as it considers appropriate to communicate with the parties and to hold consultations and hearings remotely.*

##### Draft provision 4 (Notice of arbitration and statement of claim)

*1. A notice of arbitration shall also include:*

*(a) A proposal for the designation of an appointing authority, unless the parties have previously agreed thereon; and*

*(b) A proposal for the appointment of an arbitrator.*

*2. When communicating its notice of arbitration to the respondent, the claimant shall also communicate its statement of claim.*

*3. The claimant shall communicate the notice of arbitration and the statement of claim to the arbitral tribunal as soon as it is constituted.*



**Draft provision 5 (Response to the notice of arbitration and statement of defence)**

1. *Within 15 days of the receipt of the notice of arbitration, the respondent shall communicate to the claimant a response to the notice of arbitration, which shall also include responses to the information set forth in the notice of arbitration pursuant to draft provision 4(1)(a) and (b).*

2. *The respondent shall communicate its statement of defence to the claimant and the arbitral tribunal within 15 days of the constitution of the arbitral tribunal.*

**Draft provision 6 (Designating and appointing authorities)**

1. *If all parties have not agreed on the choice of an appointing authority 15 days after a proposal for the designation of an appointing authority has been received by all other parties, any party may request the Secretary-General of the Permanent Court of Arbitration (hereinafter called the "PCA") to designate the appointing authority or to serve as appointing authority.*

2. *When making the request under article 6, paragraph 4 of the UNCITRAL Arbitration Rules, a party may request the Secretary-General of the PCA to serve as appointing authority.*

3. *If requested to serve as appointing authority in accordance with paragraph 1 or 2, the Secretary-General of the PCA will serve as appointing authority unless it determines that in view of the circumstances of the case, it is more appropriate to designate an appointing authority.*

**Draft provision 7 (Number of arbitrators)**

*Unless otherwise agreed by the parties, there shall be one arbitrator.*

**Draft provision 8 (Appointment of a sole arbitrator)**

1. *A sole arbitrator shall be appointed jointly by the parties.*

2. *If the parties have not reached agreement on the appointment of a sole arbitrator 15 days after a proposal has been received by all other parties, a sole arbitrator shall, at the request of a party, be appointed by the appointing authority in accordance with article 8(2) of the UNCITRAL Arbitration Rules.*

**Draft provision 9 (Consultation with the parties)**

*Promptly after and within 15 days of its constitution, the arbitral tribunal shall consult the parties, through a case management conference or otherwise, on the manner in which it will conduct the arbitration.*

**Draft provision 10 (Discretion of the arbitral tribunal with regard to time frames)**

*Subject to draft provision 16, the arbitral tribunal may at any time, after inviting the parties to express their views, extend or abridge any period of time prescribed under the Expedited Arbitration Provisions or agreed by the parties.*

**Draft provision 11 (Hearings)**

*The arbitral tribunal may, after inviting the parties to express their views and in the absence of a request to hold hearings, decide that hearings shall not be held.*

**Draft provision 12 (Counterclaims or claims for the purpose of set off)**

1. *A counterclaim or a claim for the purpose of a set-off shall be made no later than in the statement of defence provided that the arbitral tribunal has jurisdiction over it.*

2. *The respondent may not make a counterclaim or rely on a claim for the purpose of a set-off at a later stage in the arbitral proceedings, unless the arbitral tribunal considers it appropriate to allow such claims having regard to the delay in making such claim, prejudice to other parties and any other circumstances.*

**Draft provision 13 (Amendments and supplements to a claim or defence)**

1. *Amendments and supplements to a claim or defence, including a counterclaim or a claim for the purposes of set-off, shall be made no later than 30 days after the receipt of the statement of defence.*

2. *After the period of time in paragraph 1, a party may not amend or supplement its claim or defence, including a counterclaim or a claim for the purposes of set-off, unless the arbitral tribunal considers it appropriate to allow such amendment or supplement having regard to the delay in making it, prejudice to other parties and any other circumstances.*

**Draft provision 14 (Further written statements)**

*The arbitral tribunal may, after inviting the parties to express their views, decide whether any further written statement(s) shall be required from the parties or may be presented by them.*

**Draft provision 15 (Evidence)**

1. *The arbitral tribunal may decide which documents, exhibits or other evidence the parties should produce. The arbitral tribunal may decide to limit a party from requesting the other party to produce documents, exhibits or other evidence.*

2. *The arbitral tribunal may decide which witnesses, including expert witnesses, shall testify to the arbitral tribunal. Unless otherwise directed by the arbitral tribunal, statements by witnesses, including expert witnesses, shall be presented in writing and signed by them.*

**Draft provision 16 (Award)**

1. *Unless otherwise agreed by the parties, the award shall be made within six months from the date of the constitution of the arbitral tribunal.*

2. *The period of time for making the award may be extended by the arbitral tribunal in exceptional circumstances after inviting the parties to express their views.*

*[3. The arbitral tribunal shall state the reasons when extending the period of time for making the award.]*

*[4. The period of time for making the award may be extended [once]. The additional period of time shall be no longer than [three] months. In any case, the overall extended period of time shall not exceed 12 months from the date of the constitution of the arbitral tribunal.]*

**Draft provision 17 (Pleas as to the merits and preliminary rulings)**

*[1. A party may raise a plea that:*

*(a) A claim or defence is manifestly without legal merit;*

*(b) Issues of fact or law supporting a claim or defence are manifestly without merit;*

*(c) Certain evidence is not admissible;*

*(d) No award could be rendered in favour of the other party even if issues of fact or law supporting a claim or defence are assumed to be correct;*

*(e) ...*

2. *A party shall raise the plea as promptly as possible and no later than 30 days after the submission of the relevant claim/defence, issues of law or fact or evidence. The arbitral tribunal may admit a later plea if it considers the delay justified.*

3. *The party raising the plea shall specify as precisely as possible the facts and the legal basis for the plea and demonstrate that a ruling on the plea will expedite the proceedings considering all circumstances of the case.*

4. *After inviting the parties to express their views, the arbitral tribunal shall determine within [15] days from the date of the plea whether it will rule on the plea as a preliminary question.*

5. *Within [30] days from the date of the plea, the arbitral tribunal shall rule on the plea. The period of time may be extended by the arbitral tribunal in exceptional circumstances.*

6. *A ruling by the arbitral tribunal on a plea shall be without prejudice to the right of a party to object, in the course of the proceeding, that a claim or defence lacks legal merit.]*

## II. Time frames in the Expedited Arbitration Provisions

The following provides an overview of the different time frames in the EAPs. In the “time frame” column, “A + number (days(d)/months(m))” indicates “within” the number of days/months from stage A (in certain cases, receipt thereof).

	Time frames	Stages of the proceedings and procedural actions	Relevant provisions
<b>A</b>		Notice of arbitration (including a proposal for the designation of an appointing authority (A1) and the appointment of a sole arbitrator (A2)) to the respondent	DP 4(1); UAR 3
	A+0	Statement of claim to the respondent	DP 4(1); UAR 20
<b>B</b>	A+15d	Response to the notice of arbitration (including response to the proposal for the designation of an appointing authority and the appointment of a sole arbitrator) to the claimant	DP 5(1)
<b>C</b>	15d after A1 or any other proposal	If no agreement on the appointing authority, any party may request the Secretary-General of PCA to designate appointing authority or to serve as appointing authority.	DP 6(1)
<b>D</b>	15d after A2 or any other proposal	If no agreement on the arbitrator, any party may request the appointing authority to appoint. → Appointing authority to appoint as promptly as possible	DP 8(2) UAR 8
<b>E</b>		Constitution of the tribunal	DP 8; UAR 8 & 9
	E+0	Claimant to communicate its notice of arbitration & statement of claim to the tribunal (as soon as it is constituted)	DP 4(2); UAR 20
	E+15d	Consultation with the parties through a case management conference or otherwise (promptly after and within 15 days) → Establishment of a provisional timetable (as soon as practicable)	DP 9 UAR 17(2)
<b>F</b>	E+15d	Respondent to communicate its statement of defence to the claimant and the tribunal (possible extension)	DP 5(2); UAR 21
	F+0	Counterclaim or a claim for purposes of set-off to be included in the statement of defence (permitted at a later stage, if tribunal considers that it appropriate)	DP 12
	F+30d	Amendments and supplement to any claim or defence including a counterclaim or a claim for the purposes of set-off (permitted at a later stage, if the tribunal considers it appropriate)	DP 13
<b>E</b>	E+6m	Making of the award (with a possible extension)	DP 16

