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, 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 issues appear in the UARs and to the extent possible, have the same heading as the UARs to help 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 have been captured in the explanatory note to the extent possible. 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 final version for its consideration at a future session after the EAPs have been adopted by the Commission.

4. Annex I 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.9/969, para. 13). 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 to the UARs¹ (A/CN.9/1043, para. 22). In so doing, the Working Group may wish to take due account of their user-friendliness, particularly when considering whether to present a rule in the EAPs or to provide guidance in the explanatory note (A/CN.9/1003, para. 18).

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.

¹ 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). 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 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 once the proceedings have begun. Similarly, if a three-member arbitral tribunal has been 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).

(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 a proper conduct of the proceedings. In some cases, the rule in the UARs are supplemented by the EAPs. In some cases, the rules in the UARs are replaced by those in the EAPs unless otherwise agreed by the parties (see paras. ** below). Similar to the UARs, parties have the flexibility to any of the provisions to tailor to the proceedings (A/CN.9/1043, para. 17).

(5) In relation to article 1(2) of the UARs, parties to an arbitration agreement concluded before the entry into force of the EAPs shall 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.

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2 The Working Group may wish to decide that the references to previous reports of the Working Group would not need to appear in the final version of the explanatory note.

3 A mere reference to the UNCITRAL Arbitration Rules would not be sufficient for the EAPs to apply as not all parties would be aware that they were subjecting their dispute to an expedited process (A/CN.9/1010, para. 21).
The Expedited Arbitration Provisions in the appendix shall apply to the arbitration where the parties so agree.

Remaining issue 2 – interaction with the UARs

12. 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.

13. Broadly speaking, the rules in the EAPs can be categorized into three different types. The first type is rules that relate only to expedited arbitration, for example, draft provisions 1 to 3.

14. The second type is rules that need to be read in conjunction with the relevant rule in the UARs. Such rules make reference to the UARs (or notions therein) or clarify the discretion of the arbitral tribunal in the context of expedited arbitration. For example, draft provisions [8, 9-11]. Draft provision 16 introduces a new requirement in relation to awards in expedited arbitration, thus supplementing the rule in article 34 of the UARs.

15. The third type is rules that replace the rule in the UARs. Such rules change the time frame in the UARs, introduces limitations or additional requirements in the context of expedited arbitration and thus intend to replace the rule in the UARs. For example, draft provisions [4, 5, 6]. For example, draft provision 7 providing the default rule of a sole arbitrator replaces article 7 of the UARs. Draft provision 6(1) deviates from the rule in article 6(2) of the UARs in cases where the parties have not agreed on the choice of an appointing authority.

16. The explanatory note provides some guidance on these interactions. Nonetheless, it would be difficult to illustrate the various instances, particularly as parties are free to modify any of the rules. One way of providing clarity on this interaction would be to include a paragraph in the explanatory note (or a provision at the end of the EAPs), which could be formulated as follows:

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(1); Article 8(1); Article 20(1) first

\[4\] Replaced by draft provision 4(1).
\[5\] Replaced by draft provision 6(1).
\[6\] Replaced by draft provision 7.
B. Non-application of the Expedited Arbitration Provisions

17. 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 ([Non-application of the Expedited Arbitration Provisions][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.

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 [to the extent possible] and conduct the arbitration in accordance with the UNCITRAL Arbitration Rules.

18. The Working Group may wish to consider the heading of draft provisions 2 (A/CN.9/1043, para. 36) and the placement of the draft provision to follow draft provision 1 (A/CN.9/1043, para. 30).

19. 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).

20. 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).

21. 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

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7 Replaced by draft provision 7. {Question: Applicability of art. 7(2) in expedited arbitration}
8 Replaced by draft provision 5(2).
9 Replaced by draft provision 12.
10 Replaced by draft provision 13.
11 Replaced by draft provision 15(2).
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 subpara. 23(4) below, A/CN.9/1010, paras. 44–48; A/CN.9/1043, para. 49).

22. 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).

23. 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):

(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, for example, 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.

(3) The phrase “in exceptional circumstances” means that the party requesting withdrawal should provide convincing and justified reasons for the requests and that the arbitral tribunal should uphold the request only in limited circumstances (A/CN.9/1043, para. 44).

(4) When making the determination, 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) and in so doing, 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) and its proportionality to the expected cost of arbitration;
- 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 list is a non-exhaustive list of elements that can be taken into account (A/CN.9/1003, paras. 49–50; A/CN.9/1010, para. 46; A/CN.9/1043, para. 43)

13 Another suggestion was that a party would be allowed to request withdrawal only when it had agreed to expedited arbitration “before” the dispute arose but that it would be barred to make such a request if it had agreed to expedited arbitration “after” the dispute had arisen (A/CN.9/1010, para. 43).
and it would not be necessary for the arbitral tribunal to consider all those elements.

(6) When making the determination, the arbitral tribunal may be able to decide that the EAPs in their entirety would no longer apply or that certain provisions would no longer apply to the arbitration (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 in the arbitration agreement that triggers 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 making the appointment in accordance with draft provision 8(2) (see also article 10(3) of the UARs), the appointing authority will make a prima facie determination 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), which means that the EAPs would apply to the arbitration until a contrary determination is made by the arbitral tribunal.

(8) When the EAPs no longer apply to the arbitration pursuant to paragraphs 1 or 2, the arbitral tribunal shall conduct the arbitration in accordance with the UNCITRAL Arbitration Rules. However, this does not mean that section II of the UARs on the composition of the arbitral tribunal would become applicable (A/CN.9/1043, para. 54). Instead, the arbitral tribunal, if already constituted, shall remain in place. The phrase “to the extent possible” intends to capture 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). It also captures the possibility of an arbitrator resigning, if that arbitrator appointed under the EAPs is not in a position to conduct non-expedited arbitration (A/CN.9/1043, para. 53).

(9) A non-expedited proceeding should usually commence at the stage where the expedited proceeding was terminated (A/CN.9/1010, para. 50). Decisions made during the expedited proceeding should remain applicable to the 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

24. 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 in expedited arbitration)

1. The parties shall act expeditiously and economically throughout the proceedings [so as to achieve a fair and efficient resolution of the dispute].

2. The arbitral tribunal shall conduct the proceedings expeditiously and economically taking into account the parties’ [expectations when they agreed][agreement] to refer their dispute to expedited arbitration.

25. 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 14 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.

26. The latter part of paragraph 2 underlines the need for the arbitral tribunal to take into account the expectations or intention of the parties when they agreed to refer their dispute to arbitration under the EAPs. Considering that expectations or intentions could introduce subjectivity, it is suggested that reference be made to the agreement to refer their dispute to expedited arbitration. This would also underline the need for the arbitral tribunal to be mindful of the time frames in the EAPs (A/CN.9/1043, para. 29).

27. 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 and economically (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 efficiency of the proceeding as well as for a swift resolution of the dispute, particularly in ad hoc arbitration where there would be 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, parties’ intentions and expectations when they chose such 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 in expeditiously and economically (see article 6(7) of the UARs).

Remaining issue 1 - Availability of the arbitrator and the need to revise the model statement of independence

28. 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 whether the draft provisions 3 and 9(3) combined with the model statement of independence pursuant to article 11 of the UARs served that purpose (A/CN.9/1010, para. 69; A/CN.9/1043, paras. 32-34). In that context, it was also mentioned that it would be preferable not to distinguish 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 standards (A/CN.9/1043, para 33).
29. The Working Group may wish to consider whether the additional language in the guidance document (see para. 27(4) above) would suffice for this purpose (A/CN.9/1043, para. 32) or whether the Note to the model statement of independence pursuant to article 11 of the UARs\(^\text{15}\) should be revised 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.*

Remaining issue 2 – Use of technology in expedited arbitration

30. There was general support for providing a general rule in the EAPs that would address the possibility for the arbitral tribunal to utilize different means of communication during the proceedings and to make use of virtual or remote hearings (A/CN.9/1043, paras. 95-96). In that context, it was stated that:

- the use of technology to streamline the process and to save cost and time of the proceedings should be further explored;
- providing such a rule was particularly timely in light of the current COVID-19 pandemic; and
- such a rule would reinforce the discretion of the arbitral tribunal in utilizing a wide range of technological means in expedited proceedings.

31. The Working Group wish to consider the following formulation to be inserted as paragraph 3 in draft provision 3:

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

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

32. Paragraph 3 would clarify the discretion provided to the arbitral tribunal regarding the use of a range of technological means as provided for 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. In that light, the Working Group may wish to consider whether draft provision 9(2) might be redundant if paragraph 3 were to be inserted.

33. If Working Group decides to include the rule in draft provision 3, the explanatory note could read as follows:

*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. This will likely streamline the process and avoid unnecessary delay and expense, which is 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*  

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\(^{15}\)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.*
overall circumstances of the particular case. The inclusion of such a rule in the EAPs does not imply that the use of technological means is only available to arbitral tribunals in expedited arbitration (A/CN.9/1043, para. 96).

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

34. 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 already agreed on the choice of an appointing authority; 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.

35. 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.

(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 already agreed on one) and the appointment of the arbitrator. It is important for the claimant to include such information in its notice of arbitration because the [ ]-day time frames in draft provision 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 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 provide that the statement of claim should be communicated within a period of time to be determined by the arbitral tribunal. This is to accelerate 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). 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 4 of the UARs (see second sentence of article 20(1) of the UARs).

(5) In summary, when initiating recourse to arbitration, the claimant would need 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 art. 3(3)(a) & 20(2)(a))

Identification of the arbitration agreement that is invoked (UARs art. 3(3)(c));

Identification of any contract or other legal instrument out of or in relation to which the dispute arises or, 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) & 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 already agreed on the choice of an appointing authority (EAPs art. 4(1)(a));

A proposal for the appointment of an arbitrator (EAPs art. 4(1)(b));

A statement of the facts supporting the claim (UAR art. 20(2)(b));

The points at issue (UAR art. 20(2)(c));

The legal grounds or arguments supporting the claim (UAR art. 20(2)(e));

A copy of any contract or other legal instrument out of or in relation to which the dispute arises and of the arbitration agreement shall be annexed to the statement of claim (UAR art. 20(3));

As far as possible, all documents and other evidence relied upon by the claimant, or references to them (UAR art. 20(4)).

(6) 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).

(7) With respect to the last item on the above list, it should be understood that 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 any witness whose testimony it would rely on, the subject matter of the testimony and any substance 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.

(8) 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 their appointment.
36. 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 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.

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

(1) Draft provision 5 addresses the reply 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 (the “response”) and a longer one for the statement of defence. This is to facilitate the speedy constitution of the tribunal on the one hand and to provide sufficient time for the respondent to prepare its case on the other (A/CN.9/1043, paras. 67-68).

(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 a 30-day time frame (A/CN.9/1010, paras. 55-56; 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.16

(3) The response 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 on the appointment of the arbitrator, the respondent is also required to include a reply to those proposals. If the respondent disagrees with the proposals, the respondent is free to make its own proposals in accordance with the 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 names 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))
- A response to the information set forth in the notice of arbitration, pursuant to draft provision 4, paragraphs 1 (a) and (b) (EAPs art. 5(1))

(5) To provide the respondent with sufficient time to prepare its statement of defence and thus 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). This modifies the rule in article 21(1) of the UARs which provides that the statement of defence should 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

16 Subparagraphs (b) and (c) of article 4(2) of the UARs would no longer be applicable in light of draft provision 5(2). The remainder of article 4 would apply unchanged to expedited arbitration.
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 extension should generally not exceed 45 days as stipulated in article 25 of the UARs.

Remaining issue

38. With respect to draft provision 5(2), it was mentioned that the 15-day time frame for submitting the statement of defence 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). To address this concern, one suggestion was that the time frame could begin on the date of receipt of the notice of arbitration (instead of the constitution of the tribunal) with a longer time period (for example, 30 days). However, this may result in the respondent being required to communicate its statement of defence even 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 limits the ability of the respondent to delay the constitution of the arbitral tribunal. Lastly, the explanatory note to the EAPs could highlight that the 15-day time frame could be extended by the arbitral tribunal (see para. 37(6) above). Based on 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

39. 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).

40. The Working Group approved the following formulation regarding designating and appointing authority (A/CN.9/1043, para. 74):

Draft provision 6 (Designating and appointing authorities)

1. 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.

2. If requested to serve as appointing authority in accordance with paragraph 1 [or 3], the Secretary-General of the Permanent Court of Arbitration would serve as appointing authority unless it determines that in view of the circumstances of the case, it would be more appropriate to designate an appointing authority.

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

(1) Draft provision 6 simplifies the two-stage process in article 6 of the UARs in expedited arbitration (A/CN.9/1010, para. 78; A/CN.9/1043, para. 72). It provides a streamlined and flexible process, while providing a level of discretion to the Secretary-General of the Permanent Court of Arbitration (PCA) in that process. As such, article 6(2) of the UARs is replaced by draft provision 6(1). Remaining paragraphs of article 6 of the UARs continue to apply to expedited arbitration (A/CN.9/1043, para. 73).

(2) [explanatory note on paragraph 1 to be inserted, see paras. ** below]
(3) Paragraph 2 provides a level of discretion to the Secretary-General of the PCA to address practical questions that could arise in the operation of paragraph 1. For example, the Secretary-General of the PCA would have the discretion to designate an appointing authority instead of serving as one in the following scenarios: (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.

(4) In exercising its 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. 63). Any proposal made by the parties on the appointment of the sole arbitrator should thus be taken into account.

(5) When appointing an arbitrator for expedited arbitration, the appointing authority shall make 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 and economically in accordance with draft provision 3(2).

Remaining issue 1 – time frame

42. The Working Group approved draft provision 6(1) with the understanding that: (i) the 15-day time frame 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 and (ii) the respondent would be required to include such a proposal in its response to the notice of arbitration in accordance with draft provision 5. However, this poses two challenges.

43. 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”.

44. 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 triggered as soon as that proposal is received by all other parties, which would be in line with article 6(2) of the UARs.

45. To address these challenges, the Working Group may wish to consider the following reformulation of draft provision 6(1):

1. If all parties have not agreed on the choice of an appointing authority [Option A: within 30 days after a proposal] [Option B: 15 days after a proposal] on an appointing authority 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.
46. The above formulation would be more in line with article 6(1) of the UARs, which allows a party to propose an appointing authority at any time. Furthermore, the time frame commences with a proposal on an appointing authority rather than the notice or the response thereto. This caters for instances where the proposal of an appointing authority is not included in the notice or the response. The formulation would encourage parties, particularly the claimant, to comply with the requirements in draft provisions 4(1) and 5(1).

47. The Working Group may wish to consider the two options in square brackets. Option A would be the same time frame as provided in article 6(2) of the UARs. Option B aims to expedite the process by allowing any party to engage the Secretary-General of the PCA any time after 15 days have lapsed from the receipt by all parties of the proposal. In practice, this means that a claimant that has included in its notice of arbitration a proposal for an appointing authority is able to engage the Secretary-General of the PCA 15 days after the receipt by the respondent and does not need to wait 30 days. While this rule could facilitate a prompt engagement of the Secretary-General of the PCA in the process, it should be noted that the respondent has 15 days to respond to the notice of arbitration (see draft provision 5(1)). So unless the respondent accepts the proposal of the claimant, the claimant would be able to engage the Secretary-General of the PCA right after the response by the respondent regardless of the reply therein or a proposal for another appointing authority.

48. The Working Group may also wish to bear in mind the time frame in draft provision 8(2) on the appointment of the sole arbitrator (A/CN.9/1043, paras. 77-78).

Remaining issue 2

67. With regard to article 6(4) of the UARs, the Working Group may wish to note that the Secretary-General of the PCA has a role of designating a substitute appointing authority, when the appointing authority refuses or fails to act. In light of draft provision 6(1), the Working Group may wish to consider whether a party should be able to request the Secretary-General of the PCA to serve as appointing authority in such circumstances and if so, the following formulation:

Draft provision 6 (Designating and appointing authorities)

3. When making a 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.

67. Draft provision 6(3) would modify article 6(4) of the UARs. The Working Group agreed that draft provision 6 need not address the consequences where the Secretary-General of the PCA refused to act or failed to appoint an arbitrator within the time frame (A/CN.9/1043, para. 73). Therefore, the explanatory note could clarify that while draft provision 6(3) provides an additional option to the parties, it would not operate where the Secretary-General of the PCA serves as the appointing authority in accordance with draft provision 6(1).

F. Number of arbitrators

49. 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.

50. 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). 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). As such, article 7(1) of UARs is replaced by draft provision 7.

(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. 54–55) and should appoint a sole arbitrator in accordance with draft provisions 7 and 8. While the appointing authority may make a prima facie determination 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 (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 the respondent does not reply to the proposal of the claimant on the appointment of a sole arbitrator within the 30-day time frame and fails to appoint a second arbitrator, the appointing authority may, at the request of a party, appoint a sole arbitrator in accordance with article 8(2) of the UARs.

G. Appointment of the arbitrator

51. The Working Group approved the following formulation regarding the appointment of the arbitrator in expedited arbitration (A/CN.9/1010, para. 58; A/CN.9/1043, para. 80):

Draft provision 8 (Appointment of the sole arbitrator)

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.

52. 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 sets out the rule that the parties should agree on the sole arbitrator (A/CN.9/1003, para. 57). While it may be difficult to do so, they are encouraged to reach an agreement (A/CN.9/1003, para. 57).

(3) Paragraph 2 provides a mechanism in the absence of an agreement by the parties on the sole arbitrator. It introduces a 30-day time frame during which the parties shall agree on the sole arbitrator (A/CN.9/1003, paras. 58 and 61-62; A/CN.9/1010, paras. 59-60). The 30-day time frame commences when the respondent receives the notice of arbitration, which should include a proposal for the appointment of a sole arbitrator in accordance with draft provision 4(1)(b) (A/CN.9/1043, para. 77). The respondent has 15 days to communicate a response to the notice, which needs to include a reply to the proposal for the appointment of a sole arbitrator.
(4) The involvement of the appointing authority can only be triggered by a request by one of the parties. Any party may request the appointing authority to appoint the sole arbitrator upon the expiry of the 30-day time frame, during which the parties shall agree on the sole arbitrator (A/CN.9/1010, para. 62). Parties are free to request the involvement of the appointing authority even before the lapse of the 30-day time frame, if it is obvious that an agreement cannot be reached (A/CN.9/1003, paras. 60 and 62; A/CN.9/1010, para. 61).

(5) In practice, should there be no agreement by the parties on the appointing authority and the sole arbitrator 30 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 (draft provision 6(1)). In the latter case, the party can also request the appointment of the sole arbitrator in accordance with draft provision 8(2), which could facilitate a speedy constitution of the arbitral tribunal.

(6) Article 8(2) of the UARs, which provides a list-procedure, for the appointment of a sole arbitrator, applies to expedited arbitration unchanged (A/CN.9/1010, para. 62).

Remaining issue 1 – shortened time frame

53. The Working Group may wish to consider whether draft provision 8, in its current form, needs to be included in the EAPs. This is because it simply emphasizes the need for the parties to agree on the sole arbitrator and reiterates the rule in article 8(1) of the UARs in light of the fact that the proposal for the appointment of a sole arbitrator is required in the notice of arbitration in expedited arbitration. Furthermore, article 8(2) of the UARs continues to apply to expedited arbitration unchanged.

54. An alternative to expedite the process would be to make it possible for a party to request the involvement of an appointing authority earlier (see paras. 42-48 above with regard to the involvement of the Secretary-General of the PCA). If so, the Working Group may wish to consider the following reformulation for draft provision 8(2):

Draft provision 8 (Appointment of the sole arbitrator)

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, 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.

Remaining issue 2 – time frames in arts. 9 and 10 of the UARs

55. The Working Group may wish to confirm that the time frames in articles 9 and 13 of the UARs would apply unchanged in the context of 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 and the provisional timetable

56. The Working Group approved the following formulation regarding consultation with the parties except for the square bracketed text in paragraph 1 (A/CN.9/1043, para. 83, 86 and 88):

Draft provision 9 (Consultation with the parties and provisional timetable)

1. Promptly after and [Option A: within 15 days of its constitution][Option B: within 15 days after the statement of defence is communicated or is to be communicated in accordance with draft provision 5, paragraph 2], the arbitral tribunal shall consult the parties, including through a case management conference, on the manner in which it will conduct the arbitration.

2. Such consultations may be conducted through a meeting in person, in writing, by telephone or videoconference or other means of communication. In
the absence of an agreement of the parties, the arbitral tribunal shall determine the appropriate means by which the consultations will be conducted.

[3. In establishing the provisional timetable in accordance with article 17(2) of the UNCITRAL Arbitration Rules, the arbitral tribunal shall take into account the time frames in the Expedited Arbitration Provisions.]

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

(1) In expedited arbitration, consultation between the arbitral tribunal and the parties at an early stage of the proceedings is key to an efficient and fair organization of the overall proceedings (A/CN.9/1043, para. 81). Draft provision 9 should be read together with article 17 of the UARs, as it provides guidance to the arbitral tribunal on how to implement paragraphs 1 and 2 of that article in the context of expedited arbitration.

(2) Draft provision 9(1) highlights the need for the arbitral tribunal to “consult” the parties on how to organize the proceedings and that one way would be through a case management conference, when deemed necessary by the arbitral tribunal (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). It would be possible for the

(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. The arbitral tribunal could discuss with the parties the extent to which they would be requested to produce documents, exhibits and other evidence. Similarly, the parties could indicate the witnesses that they will present to testify as well as the content of their testimony. During the case management conference or at any time thereafter, the arbitral tribunal can shall consult the parties and decide whether further submissions and evidence may be required from the parties or may be presented by them. The arbitral tribunal may also consider and decide whether any of the claims or defences must be dismissed forthwith as manifestly without merit. [To add other issues to be discussed during the case management conference – whether to hold hearings]

(4) [Text on the time frame for holding consultation to be inserted, see para. 58-61 below]

(5) Paragraph 2 provides guidance to the arbitral tribunal on how consultations could be conducted (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 requirement in paragraph 1 that consultations should be held in a short time frame (A/CN.9/1003, para. 74).

(6) Paragraph 3 highlights that in establishing the provisional timetable for the proceedings the arbitral tribunal would need to take into account the time frames in the EAPs, mainly those in draft provisions 13 and 16 (A/CN.9/1003, para. 73; A/CN.9/1010, para. 84).

17See 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. Note 1 highlights the importance of holding case management meetings at which the parties and the arbitral tribunal can establish strict time limits.
Remaining issues 1 – Time limit for holding the consultation

58. The Working Group agreed to introduce a short time frame within which the tribunal should consult the parties as it would be 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). Two drafting options are provided in paragraph 1.

59. Some doubts were expressed about option A, as the time frame for consultation would expire on the same day the statement of defence was to be communicated (see draft provision 5(2); A/CN.9/1043, para. 82). It was said that it would be practically impossible to conduct a meaningful consultation without the statement of defence and that a firm timetable could only be set once the statement of defence is communicated, particularly the time frame for rendering the award (A/CN.9/1043, para. 82). Option B reflects such concerns. As the statement of defence is to be submitted within 15 days after the constitution of the arbitral tribunal, option B would mean that the arbitral tribunal needs to hold the consultations promptly but no later than 30 days after its constitution.

60. On the other hand, it was stated that linking the time frame for consultation with the communication of the statement of defence could result in delays, particularly if the respondent fails to do so. It could pose further challenges if the arbitral tribunal extends the time frame for communicating the statement of defence, which would result in the postponement of the consultation (A/CN.9/1043, paras. 83–84). Furthermore, it was questioned whether the statement of defence was essential for the consultations as article 17(2) of the UARs makes no reference to the statement of defence; rather one of the objectives of the consultation is to establish a provisional timetable to issue procedural order No.1, which could be based on the notice of arbitration, response thereto and the statement of claim which the claimant should have provided upon constitution of the arbitral tribunal. Moreover, it is always possible for the arbitral tribunal to hold additional consultation after the respondent communicates its statement of defence. Thus, support was expressed for option A (A/CN.9/1043, para. 85).

61. In light of the above, the Working Group may wish to confirm the phrase in option A would be more appropriate. A number of concerns raised with regard to that option could be mentioned in the explanatory note, which could read as follows:

The arbitral tribunal should aim to 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 in the early stage of the proceedings 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 needs revision.

Remaining issues 2 – Whether to retain paragraphs 2 and 3

62. The Working Group may wish to consider whether to retain paragraph 2, if it decides to include draft provision 3(3) in the EAPs (see para. 31 above). If paragraph 2 is to be retained in the EAPs, it should be made clear that the different modes of conducting consultation provided therein would also be available for arbitral tribunals in non-expedited arbitration (A/CN.9/1043, para. 87; see last sentence of para. 33 above).

63. The Working Group may wish to further consider whether to retain paragraph 3 in light of draft provision 3(2), which underlines the need for the arbitral tribunal to take into account the parties' agreement to refer their dispute to expedited arbitration. This means that arbitral tribunals should be mindful of the time frames in the EAPs, in particular that in draft provision 16 for the rendering of the award and thus would make paragraph 3 redundant (see para. 27(4) above).
I. Time frames and discretion of the arbitral tribunal

64. 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 the Expedited Arbitration Provisions or agreed by the parties.

65. 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). The Working Group may wish to consider whether draft provision 10 might be redundant in light of article 17(2) of the UARs and the guidance that could be provided in an explanatory note.

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

1) Draft provisions 10 addresses the discretion of the arbitral tribunal with regard to time frames in expedited arbitration. It should be read together 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 the expedited arbitration (A/CN.9/1043, para. 91). Even after a time frame had been fixed in accordance with draft provision 10, flexibility is provided to adjust the time period, but only in exceptional circumstances and when the adjustment was 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.

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 could provide tribunals 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 tribunal 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 for non-compliance by the parties with the time frames, article 30 of the UARs on default would apply 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 should have 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).

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18 Need to review
J. Hearings

67. 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.

68. 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 exceptional circumstances (A/CN.9/1010, para. 109). Diverging views had been expressed on whether the 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, para. 101-102).

69. 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). Draft provision 11 limits the timeframe during which a party can exercise its right to request the holding of a hearing and in case the party does not exercise its right when invited to express its views, the arbitral tribunal may decide that there will be no hearings in the proceedings.

70. 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.

(2) Parties themselves may agree to hold or to not hold hearings, in which case that agreement will bind the arbitral tribunal.

(3) 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.

(4) As parties have the right to request the holding of a hearing, draft provision 11 requires the arbitral tribunal to invite the parties to express their views on hearings not being 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 that stage, the arbitral tribunal can decide not to hold hearings.

(5) 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”. Draft provision 11 would have the effect of restricting the time frame during which requests for holding hearings can be made.

(6) Article 28 of the UARs would apply 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 it should make efforts 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).

(7) As provided for in draft provision 3(3) (see paras. 31 above) and in 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. Therefore, it should determine the most appropriate means of communication.19

**Remaining issue**

71. The Working Group may wish to decide whether draft provision 11 should be retained in the EAPs, particularly in light of draft provision 3(3), which would make it easier for arbitral tribunals to hold hearing remotely using technological means. A virtual hearing may be less difficult to schedule as well as less time-consuming. In case the Working Group decides to remove draft provision 11 from the EAPs, the explanatory note could be revised to clarify the discretion of the arbitral tribunal with regard to hearings in expedited arbitration under article 17(3).

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

72. 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 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 [necessary][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.

73. 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, (ii) claims for the purpose of set-off and

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19 Such measures were highlighted on day 5 (15 July 2020) of the “Virtual Panels Series: UNCITRAL Texts and COVID-19 Responses and Recovery” held during the fifty-third session of the Commission. Additional details and the link to the recordings of the panel are available at https://uncitral.un.org/en/COVID-19-panels.
(iii) amendments to a claim or defence; yet introduces certain limitations, 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 to claims do not result in delays in the proceedings (A/CN.9/969, paras. 66–67; A/CN.9/1003, para. 88).

(2) Draft provision 12 replaces article 21(3) of the UARs. Draft provision 13 replaces the first sentence of article 22 of the UARs but the second sentence of article 22 of the UARs applies to expedited arbitration.

(3) Draft provision 12 requires the respondent to make any counterclaim or a claim for the purpose of a set-off in its statement of defence (A/CN.9/1010, para. 98), which shall be communicated within 15 days of the constitution of the tribunal in accordance with draft provision 5(2). A counterclaim and a claim for the purpose of a set-off can be made at a later stage of the proceedings, but only when the arbitral tribunal considers it [necessary][appropriate]. {Question to experts: Terminology to be used, particularly in contrast to the phrase “the delay was justified under the circumstances” in article 21(2) of the UARs}

(4) Draft provision 13 introduces a 30-day time frame within which parties can amend or supplement their claim or defence. 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). 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). However, flexibility is provided to the arbitral tribunal in paragraph 2 to extend the time frame for allowing parties to amend or supplement their claim or defence.

(5) Counterclaims, amendments and supplements 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(2) (A/CN.9/1010, para. 100).

Remaining issue – whether to retains paragraph 2 of draft provisions 12 and 13

74. The Working Group may wish to consider whether there is any merit in retaining paragraph 2 of both draft provision 12 and 13, because draft provision 10 clarifies that the arbitral tribunal may extend or abridge any period of time prescribed under the EAPs. It may be sufficient for the explanatory note to mention the circumstances under which the arbitral tribunal should allow counterclaims, amendments and supplements after the lapse of the time frame having regard to the delay in making them, prejudice to other parties and any other circumstances.

L. Further written statements

75. 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 presented by them.

76. 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 statements 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).

77. 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” gives the impression 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.

(2) Draft provision 14 reinforces the discretionary power of the arbitral tribunal under article 24 of the UARs to limit further written statement in expedited arbitration (A/CN.9/1010, para. 102). Accordingly, the two provisions need to be read together to make 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 in non-expedited arbitration.

(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

78. 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 witness statements, documents, exhibits or other evidence that the parties should present.

2. Unless otherwise directed by the arbitral tribunal, statements by witnesses, including expert witnesses, shall be presented in writing signed by them.

3. The arbitral tribunal may decide to limit a party from requesting the other party to produce documents, exhibits or other evidence.

118. 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 apply 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).

79. 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 witness statements, documents, exhibits or other evidence that the parties would present during the proceedings, if any. This is another aspect that could be discussed with the parties during the consultation.
(2) Paragraph 2 provides that the default rule in expedited arbitration is “written” witness statements (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, the arbitral tribunal may wish to make reference to article 9(2) and (3) of the United Nations Convention on the Use of Electronic Communications in International Contracts, which provides for a functional equivalence rule (A/CN.9/1043, para. 103).

(3) Paragraph 2 would require that any witness statements to accompany the statement of claim to be in writing. However, draft provision 4(1) does not require that all written witness statements need to accompany the statement of claim (see para. 35(7) above; A/CN.9/1043, para. 103). A mere reference to any such statement is sufficient.

(4) 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. This should not be understood, however, as recognizing the parties’ right to request to the other party production of documents, exhibits or other evidence and as the arbitral tribunal being 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 necessary for a fair resolution of the dispute (A/CN.9/1043, para. 104). Therefore, the arbitral tribunal and the parties should try to avoid any form of document production particularly in the context of expedited arbitration.

(5) Draft provision 15(3) 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 either entirety or in part (A/CN.9/1010, para. 103). If a party feels that it needs to request certain documents from the other party, it could indicate to the arbitral tribunal during the consultation providing the reasons. The arbitral tribunal would then have to make a decision whether to allow such a request and reflect it in the provisional timetable. The inclusion of draft provision 15(3) in the EAPs should, however, not be interpreted that the arbitral tribunal does not have such discretion under article 27(3) of the UARs in non-expedited arbitration.

Remaining issue

80. The Working Group may wish to decide whether draft provision 15(2) should be retained in the EAPs or whether the guidance provided therein could be included 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

20See, 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 procedural timetable.
81. 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. 106):

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 only be extended once and the extended time period should not be longer than [ ] months.

82. 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 upon the 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 provide the possibility of 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 clearly captures the agreement of the parties granting the arbitral tribunal the authority to extend the time period (A/CN.9/1043, para. 107).

(3) Draft provision 16 should be read together with article 34 of the UARs. In particular, article 34(3) of the UARs would apply to expedited arbitration. 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 issues 1 – time frame for rendering the award

83. With regard to the time frame for rendering the award, some preference was 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
The Working Group may wish to consider whether the six-month time frame in paragraph 1 is appropriate.

Remaining issues 2 – circumstances for extending the time frame and the need to provide reasons for the extension

84. 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 guidance document (A/CN.9/1010, para. 118). This should be considered in conjunction with the need to give reasons for extending the time frame (see para. 86 below).

Remaining issues 3 – unintended lapse of the time frame

85. Also with respect to paragraph 2, a question was raised whether the EAPs should address the situation where the time frame might have lapsed against the will of the parties or of the arbitral tribunal. This might result in an unintended termination of proceedings and eventually the annulment of the award if the award was rendered after the lapse of the time frame agreed by the parties (A/CN.9/1010, para. 120). The Working Group may wish to consider whether this question, which could also arise in the context of non-expedited arbitration, would need to be addressed in the EAPs.

Remaining issue 4 – reasons for the extension

86. 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, it could delay the process but on the other, it could limit extensions and be useful for the parties in finding out the reasons for the extension (A/CN.9/1043, para. 108).

Remaining issue 5 – limitations on extension

87. Paragraph 4 addresses the question whether an extension should be allowed only once and whether there should be a limit on the extended period (A/CN.9/1003, para.106; A/CN.9/1010, para. 119). A wide range of views were expressed, including a view that paragraph 4 could be deleted. Differing views were also expressed on the appropriate number of extensions (for example, once or twice) and the time frame of the extension (for example, 3 or 6 months). It was also stated that possibility of the parties agreeing to the terms of the extension should be mentioned (A/CN.9/1043, para. 109).

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

88. 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 or (ii) replacement of the arbitrator which may not necessarily ensure efficiency, A/CN.9/969, para. 55; A/CN.9/1003, para. 108) is better mentioned in the explanatory note.

Remaining issue 7 – other time frames

89. 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.

90. At the close of the session, delegations were invited to provide written comments on draft provisions 17 and 18 as well as other draft provisions, so that those comments could be reflected in the next version of the expedited arbitration provisions (A/CN.9/1043, para. 110). The Working Group may wish to consider paragraphs 132 to 142 of document A/CN.9/WG.II/WP.214.
O. Pleas as to the merits and preliminary rulings

91. At its seventieth and seventy-first sessions, the Working Group considered the provisions on early dismissal\(^{21}\) (a tool for arbitral tribunals to dismiss claims and defences that lacked merit) and preliminary determination\(^{22}\) (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 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).

92. While doubts and concerns were expressed (A/CN.9/969, paras. 20 and 116; A/CN.9/1003, paras. 83–84; 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 arbitration rules 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).

93. 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.

94. 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

\(^{21}\)See ICSID Rules Article 41(5) and Rule 29 of the SIAC Arbitration Rules (2016).

\(^{22}\)See article 40 of the SCC Rules for Expedited Arbitrations (2017) and article 43 of the HKIAC Administered Arbitration Rules (2018).
95. 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.

96. 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).

97. 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).

98. 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.

[Comments from Switzerland on draft provision 17]

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

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

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

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

100. In view of these considerations, the proposed provision 17 must appear as counterproductive; it should not be included in the EAP. If it were considered desirable to make any reference to early dismissal and preliminary rulings, it is
suggested that this could best be done in provision 9 when providing for the consultation with the parties.

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 the non-application of the Expedited Arbitration Provisions.*

101. The statement above reflects the view that even if a withdrawal mechanism were to be provided in the EAPs (see draft provision 2), parties could waive in advance their right to request withdrawal from expedited arbitration (A/CN.9/1010, para. 38). The Working Group may wish to consider whether this clause should be presented along with a model clause to the EAPs taking into consideration possible due process concerns (A/CN.9/1043, para. 56).

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 need to hold hearings];
- The possibility of joinder or consolidation; and
- The likelihood of an award being rendered within the time frames provided in draft provision 16

102. 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). They 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**

103. 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) in investor-State arbitration initiated pursuant to an investment treaty concluded on or after 1 April 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).

104. 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 submissions by States on this matter (as of this note, scheduled to be published as A/CN.9/WG.II/WP.217).

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23See also, article 29(6) of the ICC Rules of Arbitration, which allows a party to opt out of the provisions on emergency arbitrator.
Annex


The following reproduces the draft expedited arbitration provisions in the above 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(1); Article 8(1); Article 20(1) first sentence; Article 21(1) first sentence and 21(3); Article 22, first sentence; Article 27(2) second sentence; [Note to the model statement of independence pursuant to article 11 of the UARs].

* In the context of expedited arbitration, references to “these Rules” in the UNCITRAL Arbitration Rules include the Expedited Arbitration Provisions.

Draft provision 2 ([Non-application of the Expedited Arbitration Provisions][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.

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 [to the extent possible] and conduct the arbitration in accordance with the UNCITRAL Arbitration Rules.

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

1. The parties shall act expeditiously and economically throughout the proceedings [so as to achieve a fair and efficient resolution of the dispute].

2. The arbitral tribunal shall conduct the proceedings expeditiously and economically taking into account the parties’ [expectations when they agreed][agreement] to refer their dispute to expedited arbitration.

3. In conducting the proceedings, the arbitral tribunal may, after inviting the parties to express their views, utilize any technological means as it considers

24 Replaced by draft provision 4(1).
25 Replaced by draft provision 6(1).
26 Replaced by draft provision 7.
27 Replaced by draft provision 7.
28 Replaced by draft provision 5(2).
29 Replaced by draft provision 12.
30 Replaced by draft provision 13.
31 Replaced by draft provision 15(2).
appropriate [for the circumstances of the case] 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 already agreed on the choice of an appointing authority; 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 [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.

2. If requested to serve as appointing authority in accordance with paragraph 1 [or 3], the Secretary-General of the Permanent Court of Arbitration would serve as appointing authority unless it determines that in view of the circumstances of the case, it would be more appropriate to designate an appointing authority.

3. When making a 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.

Draft provision 7 (Number of arbitrators)

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

Draft provision 8 (Appointment of the sole arbitrator)

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.

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, 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.

Draft provision 9 (Consultation with the parties and provisional timetable)

1. Promptly after [Option A: within 15 days of its constitution][Option B: within 15 days after the statement of defence is communicated or is to be communicated in accordance with draft provision 5, paragraph 2], the arbitral tribunal shall consult the parties, including through a case management conference, on the manner in which it will conduct the arbitration.

2. Such consultations may be conducted through a meeting in person, in writing, by telephone or videoconference or other means of communication. In the absence of an agreement of the parties, the arbitral tribunal shall determine the appropriate means by which the consultations will be conducted.

3. In establishing the provisional timetable in accordance with article 17(2) of the UNCITRAL Arbitration Rules, the arbitral tribunal shall take into account the time frames in the Expedited Arbitration Provisions.

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 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 [necessary][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 presented by them.

Draft provision 15 (Evidence)

1. The arbitral tribunal may decide which witness statements, documents, exhibits or other evidence that the parties should present.
2. Unless otherwise directed by the arbitral tribunal, statements by witnesses, including expert witnesses, shall be presented in writing signed by them.

3. The arbitral tribunal may decide to limit a party from requesting the other party to produce documents, exhibits or other evidence.

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 only be extended once and the extended time period should not be longer than [ ] months.]

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).

<table>
<thead>
<tr>
<th>Time frames</th>
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<th>Relevant provisions</th>
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<tr>
<td>A+0</td>
<td>Statement of claim to the respondent</td>
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</tr>
<tr>
<td>B</td>
<td>Response to the notice of arbitration (including a proposal for the designation of an appointing authority and the appointment of a sole arbitrator) to the claimant</td>
<td>DP 5</td>
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<tr>
<td>[B+15d]</td>
<td>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.</td>
<td>DP 6</td>
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<tr>
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<td>15d after A1</td>
<td></td>
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<tr>
<td>15d after A1</td>
<td>If no agreement on the arbitrator, any party may request the appointing authority to appoint.</td>
<td>DP 8(2)</td>
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<tr>
<td>[A+30d]</td>
<td>15d after A2</td>
<td>UAR 8</td>
</tr>
<tr>
<td>D+15d</td>
<td>Appointing authority to appoint as promptly as possible</td>
<td></td>
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<td>C</td>
<td>Constitution of the tribunal</td>
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<tr>
<td>C+0</td>
<td>Claimant to communicate its notice of arbitration &amp; statement of claim to the tribunal (as soon as it is constituted)</td>
<td>DP 4; UAR 20</td>
</tr>
<tr>
<td>C+15d</td>
<td>Consultation with the parties including through a case management conference (promptly and within 15 days)</td>
<td>DP 9</td>
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<tr>
<td>D+15d</td>
<td></td>
<td></td>
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<tr>
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<td>D</td>
<td>Respondent to communicate its statement of defence to the claimant and the tribunal (possible extension)</td>
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<tr>
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<tr>
<td>D+30d</td>
<td>Amendments and supplement to a claim or defence (permitted at a later stage, if the tribunal considers it [appropriate])</td>
<td>DP 13</td>
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<tr>
<td>E</td>
<td>Making of the award (with a possible extension)</td>
<td>DP 16</td>
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