UNCITRAL EXPEDITED ARBITRATION RULES

Agility, flexibility and expeditious resolution are key features for resolving disputes. This is why over the last few years, multiple arbitral institutions have adopted expedited arbitration rules, allowing for accelerated procedures. On July 9, 2021, the United Nations Commission on International Trade Law ("UNCITRAL") incorporated the expedited procedure (see Expedited Arbitration Rules or "Expedited Rules") to the UNCITRAL Arbitration Rules (the “UARs”). As stated in the Draft Explanatory Note issued in the 74th Session of the Working Group II (the “Explanatory Note”), the Expedited Rules attempt to balance both the efficiency of the arbitral proceedings and the need to preserve due process and fair treatment (see Explanatory Note, ¶ 1).

BACKGROUND

The Working Group II considered whether to present the Expedited Rules as a stand-alone text (as done by the Stockholm Chamber of Commerce with the 2017 SCC Expedited Arbitration Rules or by the International Centre for Dispute Resolution with the 2014 ICDR International Expedited Procedures); or as part of the institutional arbitration rules, either as an independent section (as done by the Singapore International Arbitration Centre 2016 SIAC Rules or by the Hong Kong International Arbitration Centre 2018 HKIAC Administered Arbitration Rules) or in the form of an appendix (as done by the International Chamber of Commerce with the 2021 ICC Arbitration Rules, Appendix VI). It was decided that the Expedited Rules would be incorporated as an appendix to the UARs, amending Article 1 of the UARs to include subsection 5, which provides that “[t]he Expedited Arbitration Rules in the appendix shall apply to the arbitration where the parties so agree.” With this amendment, the general UARs apply except when overridden by the specific provisions of the Expedited Rules and, helpfully, Article 1 of the Expedited Rules references the Articles of the UARs inapplicable to expedited arbitration.

Arbitration rules from different arbitral institutions take a variety of approaches when deciding which cases qualify for expedited arbitration. Under the opt-out approach, the expedited procedure is automatically applied to cases below certain financial threshold (see, for example, the 2021 ICC Arbitration Rules, Art. 30 and Art. 1 of Appendix VI). In contrast, the opt-in approach makes the application of an expedited procedure dependent on the parties’ consent (see, for example, the 2017 SCC Rules for Expedited Arbitrations, Preamble and Art. 11). In other instances, the application of an expedited procedure is based on the arbitral institution’s assessment of objective criteria (see, for example, the 2016 SIAC Rules, Art. 5(2)). As explained below, the Working Group II has adopted a consent_requirement approach for the application of the Expedited Rules.

KEY PROVISIONS

❖ Parties’ Consent (Article 1). At the sessions of the Working Group II, “it was widely felt that the parties’ agreement should be the determining factor for the application of expedited arbitration” (see the Report of Working Group II on the work of its 69th session, ¶ 95). This requirement of express consent by the parties has been embodied in Article 1 of the Expedited Rules.

❖ Reverting to a non-expedited procedure (Article 2). The Expedited Rules provide for the option of reverting to a non-expedited procedure, which can be done either by agreement of the parties or by the tribunal’s determination upon request by a party. However, the Explanatory Note highlights some of the consequences and complexities of transitioning from one proceeding to another (see Explanatory Note, ¶ 6).

❖ Conduct of the parties and the arbitral tribunal (Article 3). In the Expedited Rules, the parties and the tribunal are commanded to act expeditiously throughout the proceeding. The arbitral tribunal is given discretion to resort to technological means to conduct the proceedings, including holding remote
hearings (see Explanatory Note, ¶ 24). Due process considerations should always be kept in mind and the Expedited Rules require the tribunal to invite the parties to express their views on any such proposal and to take into account the circumstances of the case.

**Notice of arbitration, response thereto and statements of claim and defense (Articles 4 and 5).** Pursuant to Article 4(1), the claimant’s notice of arbitration must include a proposal for the designation of an appointing authority, unless the parties have previously agreed on one, and a proposal for the appointment of an arbitrator. This departs from the general regime of the UARs, which considers these elements optional under Article 3(4).

Together with its notice of arbitration, the claimant must jointly submit its statement of claim, according to Article 4(2), and communicate both to the arbitral tribunal as soon as it is constituted (Article 4(3)).

Article 5(1) provides respondent with a 15-day period from the receipt of the notice of arbitration to file its response. Article 5(2) establishes a 15-day limit from the constitution of the tribunal for respondent to submit its statement of defense.

In an attempt to streamline the process even more, the claimant and respondent can elect to combine its respective written submissions, treating them as a single document, as long as they comply with the requirements of the statement of claim and the statement of defense, respectively (see Explanatory Note, ¶¶ 32 and 39).

**Designating and appointing authorities (Article 6).** The Expedited Rules simplify the process provided for designating an appointing authority in absence of agreement by the parties. While the general rule establishes a two-step procedure, under the Expedited Rules, any party might directly request the Secretary-General of the Permanent Court of Arbitration (“PCA”) to designate or serve as appointing authority. The Secretary-General might reject to serve as an appointing authority and decide to designate one “in view of the circumstances of the case.”

**Number of arbitrators and appointment (Articles 7 and 8).** The Working Group II agreed that the rule for expedited arbitration procedures should be that of a sole arbitrator tribunal. Some institutions allow for an agreement of the parties to the contrary (see, for example, the Commercial Arbitration Rules and Mediation Procedures of the AAA, E-4), while other institutions impose the appointment of a sole arbitrator (see, for example, the 2021 ICC Arbitration Rules, Art. 2(1) of Appendix VI). The discussion revolved around whether this rule should be mandatory or set forth as a default rule (see the Report of Working Group II on the work of its 70th session, ¶§ 53-55).

The Expedite Rules establish a sole-arbitrator tribunal by default, providing flexibility to the parties to agree on more than one arbitrator should they wish so. Article 8 addresses the appointment of the sole arbitrator, requiring a joint appointment by the parties or, alternatively, by the appointing authority if an agreement is not reached between the parties. Where parties have agreed to more than one arbitrator, Articles 9 and 10 of the UARs apply (see Explanatory Note, ¶ 50).

**Conduct of the proceedings (Articles 9 and 10).** Within 15 days of the tribunal’s constitution, the tribunal, in consultation with the parties, will determine how will the arbitration be conducted. This would typically take place through a case management conference.
The Expedited Rules provide discretion to the tribunal with regards to the time limits of the proceeding, empowering the tribunal to extend or reduce the time limits (Article 10). This flexibility is, however, subject to the limitations of Article 16 of the Expedited Rules (see Explanatory Note, ¶ 67).

**Hearings (Article 11).** The Expedited Rules also provide the tribunal with the power to resolve the dispute without conducting a hearing, absent a request to that effect by a party. In such cases, the proceeding will be based in documents and other materials submitted by the parties.

However, pursuant to Article 17(3) of the UARs, should a party request at an appropriate stage of the proceedings that a hearing be conducted, or where there is an agreement by the parties to conduct a hearing, a hearing should take place (see Explanatory Note, ¶ 71). Such hearing could be remote and conducted through technological means (Article 3(3)), as it has often occurred during the COVID-19 pandemic.

**Other procedural steps (Articles 12, 13 and 14).** The Expedited Rules attempt to limit the number of procedural steps to streamline the proceedings. To that end, Article 12 establishes that the respondent should make any counterclaim or a claim for the purpose of a set-off in its statement of defense, provided, however, that the tribunal has jurisdiction over it. These can only be submitted at a later stage of the arbitration with the tribunal’s leave.

Similarly, amendments and supplements to claims or defenses are not allowed unless the tribunal considers these appropriate (Article 13). In making this determination, the Explanatory Note requires the tribunal to take into account at which stage of the proceedings is the request made, whether the other parties would be prejudiced by allowing the amendment, and any other circumstances (see Explanatory Note, ¶ 79).

Article 14 emphasizes the discretionary power of the tribunal under Article 24 of the UARs to decide, in consultation with the parties, on the number of written statements to be submitted by the parties.

**Evidence (Article 15).** The tribunal is also granted broad discretion regarding the taking of evidence in expedited arbitration. Article 15(1) establishes that the tribunal may decide which documents, exhibits or other evidence the parties should produce.

The tribunal may also reject requests for establishing a document production procedure, unless a request is made by all parties.

Article 15(2) provides that, unless otherwise directed by the tribunal, witness statements and expert reports shall be presented in writing. The arbitral tribunal may decide which fact or expert witnesses testify to the tribunal if a hearing is held (Article 15(3)).

**Period of time for making the award (Article 16).** Strict timelines are typical features of fast-track proceedings. Under Article 16 of the Expedited Rules, the general rule is that the award must be made within six months from the date of the constitution of the tribunal. While views were expressed in favor of nine months, a shorter timeframe of six months received more support, emphasizing the expeditious nature of the proceedings (see the Report of Working Group II on the work of its 72nd session, ¶ 106). The six-month period is a common limit among arbitral institutions (see, for example, the 2021 ICC Arbitration Rules, Art. 4 of Appendix VI or the 2021 Swiss Rules, art. 42(2)(e)).

As for extensions, inconvenient but often inevitable, there were two main approaches within the Working Group II. To empower the tribunal to grant extensions stating the reasons for doing so but without
an overall time limit on the proceedings. Or to impose an overall timeframe on the proceedings without requiring stating the reasons for granting extensions over the six-month default period (see the Report of Working Group II on the work of its 73rd session, ¶ 48). A combination of both approaches has been adopted and the Expedited Rules establish a second time limit of nine months to accommodate extensions decided by the tribunal “in exceptional circumstances and after inviting the parties to express their views” (Article 16(2)). The number of the extensions within the overall timeframe is not limited (see Explanatory Note, ¶ 86).

However, a third option is provided for cases in which there is a risk of not rendering an award within nine months. In those cases, the period for rendering an award might be extended with the agreement of the parties (16(3)). This enables the tribunal and the parties to avoid the early termination of the proceeding and potential challenges to the award (see Explanatory Note, ¶ 88). If no agreement is reached by the parties, Article 16(4) enables any party to request the tribunal that the Expedited Rules no longer apply to the arbitration.

- **Model Clause.** The Expedited Rules Appendix includes an annex containing a model arbitration clause for parties to include in their arbitration agreement. In addition to the model clause, parties are encouraged to include the appointing authority, the place of arbitration and the language of the proceedings. This would facilitate conducting the arbitration and potentially avoid the interpretation of pathological clauses. The annex also contains a model statement of independence for the arbitrator.

- **Investment Arbitration.** The decision of whether the Expedited Rules are suitable for investment arbitration is left to the parties. States should include explicit reference to these rules in their investment treaties in order to consent to their application (see Explanatory Note, ¶ 99). The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration may also apply to arbitrations under the Expedited Rules, provided that the parties have agreed so or the relevant treaty provides for their application (see Explanatory Note, ¶ 100).

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