**Update on UNCITRAL Working Group II (Arbitration and Conciliation/Dispute Settlement)**

73rd Session on 22–26 March 2021 in New York

The first session of Working Group II (69th Session – February 2019, New York) last year considered issues relating to expedited arbitration. This work continued at the 70th Session of the Working Group in Vienna in September 2019, in the 71st Session of the Working Group in New York in February 2020, in the 72nd Session of the Working Group in Vienna in September 2020 and in the 73rd Session of the Working Group in New York in March 2021. In addition to expedited arbitration the Working Group is also reviewing the *UNCITRAL Model Law on International Commercial Conciliation* 2002, particularly in light of the *United Nations Convention on International Settlement Agreements Resulting from Mediation* 2018 (“the Singapore Convention”).

**The purpose of considering expedited arbitration**

The goal of expedited arbitration is to improve the efficiency of arbitral proceedings by reducing their cost and duration. Many arbitral institutions have now adopted rules to expedite arbitral proceedings. In some cases these rules are additions to existing arbitral rules of general application which contain special provisions for expedition. In other cases they are contained in a completely separate set of arbitral rules, which are distinct and separate from the rules of general application. In New York in March 2021 the Working Group reaffirmed that the expedited arbitration provisions (“EAPs”) should be presented as an appendix to the *UNCITRAL Arbitration Rules* 2010 (“UARs”).[[1]](#footnote-1)

**Issues relating to expedited arbitration**

In its preliminary and subsequent discussions the Working Group considered the characteristics of expedited arbitration comprehensively:

* whether a sole arbitrator is sufficient and how arbitrators are to be appointed;
* how and when shorter procedural timelines (and permissible extensions) ought be imposed;
* the tribunal’s procedural discretion and the flexible use of case management conferences;
* a limited ability for parties to file additional claims, counterclaims and late submissions;
* restrictions on the evidence beyond that which is submitted with the notice of arbitration;
* party agreement or default rules on having no hearing, and limited or remote hearings;
* awards with summary reasons or without reasons, or final offer selection arbitration;
* criteria for applying expedited arbitration and resort to non-expedited arbitration;
* enforcement of awards resulting from expedited arbitrations;
* the role of institutions and other appointing authorities in expedited arbitration; and
* the application of the UNCITRAL Rules on Transparency to expedited arbitration.

In many of these areas the Working Group noted that time and cost-effective dispute resolution ought not be pursued at the expense of flexibility and, perhaps more importantly, due process. In relation to flexibility it is observed on many occasions in the Working Group deliberations that Article 17 of the UARs confers very broad powers on the arbitral tribunal, to manage the proceedings in all respects, in the following terms:

*1. Subject to these Rules, 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.*

*2. As soon as practicable after its constitution and after inviting the parties to express their views, the arbitral tribunal shall establish the provisional timetable of the arbitration. The arbitral tribunal may, at any time, after inviting the parties to express their views, extend or abridge any period of time prescribed under these Rules or agreed by the parties.*

*3. If at an appropriate stage of the proceedings any party so requests, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.*

*4. All communications to the arbitral tribunal by one party shall be communicated by that party to all other parties. Such communications shall be made at the same time, except as otherwise permitted by the arbitral tribunal if it may do so under applicable law.*

*5. The arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds, after giving all parties, including the person or persons to be joined, the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties. The arbitral tribunal may make a single award or several awards in respect of all parties* *so involved in the arbitration.*

As can seen, on one view the extensive powers conferred by these provisions of the UARs enable and seek to achieve expeditious and cost-effective arbitral proceedings and so special rules for expedited arbitration may be regarded as unnecessary. The difficulty, however, with the existing provisions, such as Article 17, is that expedition in this rules environment requires expedition to be driven by the arbitral tribunal which, in some cases, may be difficult in the face of a recalcitrant or obstructionist party or parties. Specially formulated expedited arbitration rules do not remove the need for an arbitral tribunal to drive the process of expedition but they do assist the tribunal, strengthen its hand and reduce the risk of a hard-driven expeditious procedure being a basis for resisting recognition and enforcement on the basis of a denial of procedural fairness. In some respects there is an analogy with Australian domestic legislation in the court sphere, such as the *Civil Procedure Act* 2010 (Victoria), and interstate and federal counterparts, which have the advantage of express provisions for, among other things, expedition and proportionality in litigation, which the courts are able to point to and rely upon. Again, this strengthens the hand of the courts in expeditious litigation management, even though extensive powers which might also be utilised to achieve this position also lie in court rules and the inherent jurisdiction of the Supreme Courts.

The approach of the Working Group is that there should be specific expedited arbitration rules and that they should take the form of a set of rules as an addition to the existing UNCITRAL Arbitration Rules – probably as an Appendix to the Rules – together with a “guidance document” to assist users (see A/CN.9/1043, paras 13-14). It would follow that there would be no amendment to the provisions of the UARs and, consequently a new edition would not be required. This position also has the advantage of avoiding creating possible confusion as to which edition of the Rules parties may have adopted – or intended to adopt - in their arbitration agreement.

In taking this approach the Working Group decided that it would initially confine its work to commercial arbitration and that investor-state and other types of arbitration might be treated separately at a later stage (see A/CN.9/1003, para 14); and that it was premature to decide whether any generic rules on expedited arbitration should apply to investment arbitration (see A/CN.9/969, para 16). It is anticipated that guidance documents and model clauses may also be developed to supplement these new rules – a matter which was discussed further at the 72nd Session of the Working Group (see A/CN.9/WG.II/WP.214, paras 32–49; and A/CN.9/1043, paras 57–60).

Prior to the deliberations of the Working Group in New York in February 2020 a draft set of provisions to be contained in an Appendix to the Rules was published (see A/CN.9/WG.II/WP.212 (21 November 2019) and A/CN.9/WG.II/WP.212/Add.1 (22 November 2019)) together with the Report of Working Group II (Dispute Settlement) on the work of its 71st Session (New York, 3-7 February 2020) A/CN.9/1010; on the work of its 72nd Session (Vienna, 21-25 September 2020) A/CN.9/1043; together with a draft of the Appendix to the Rules, containing the provisions for Expedited Arbitration (A/CN.9/WG.II/WP.214/Add.1); and on the work of its 73rd Session (New York, 22-26 March 2021) A/CN.9/WG.II/WP.216 and A/CN.9/1049 (all of which are available at [www.uncitral.un.org](http://www.uncitral.un.org)).

**Ongoing Working Group deliberations and approvals on expedited arbitration**

***Consent of the parties***

There have been varying views expressed in the Working Group in relation to the need for consent of the parties to the application of the expedited rules. It did, however, emerge as common ground in New York during its 71st Session that it is essential that parties know with certainty whether or not they are consenting to expedited rules when they adopt, by mere reference, the *UNCITRAL Arbitration Rules*. This position remained an important underpinning of the further work of the Working Group at its 72nd Session and so it is useful to recall the concluding position on this issue as set out in the Report on the 71st Session (A/CN.9/1010, paras 25–27):

25. A question was raised whether the EAPs should address the interpretation or determination of whether there was consent by the parties. One view was that such a provision might be necessary, particularly where the tribunal was not yet constituted or where there was a dispute between the parties on the number of arbitrators. In support, it was said that guidance could be provided on how the parties could agree to the application of the EAPs (possibly in the model arbitration clause) and how the tribunals could determine whether there was consent of the parties. Another view was that there was no need for the EAPs to address such a situation. It was said that similar to the question of whether there existed a valid agreement to arbitrate, the question of whether the parties agreed to apply the EAPs was typically not addressed in arbitration rules. It was further stated that the determination should be left to the arbitral tribunal.

26. While it was generally felt that the express consent of the parties should be the exclusive basis for the application of the EAPs in an ad hoc context, it was suggested that arbitral institutions that would be modelling their institutional rules based on the EAPs might consider the automatic triggering of expedited arbitration when certain conditions are met, as the institutions would be in a position to safeguard the interest of the parties involved. It was suggested that providing such recommendations to arbitral institutions could be considered at a later stage.

27. After discussion, it was agreed that for the EAPs to apply, the express agreement of the parties would be required, and that agreement would be the sole criterion for determining their application. It was, therefore, agreed that draft article 1(5) of the UNCITRAL Arbitration Rules and draft provision 1(1) would need to be adjusted accordingly, although without necessarily using the words “explicit” or “express” consent. It was also agreed that there would be no need to include a temporal scope clause in draft provision 1(1) as the EAPs would only apply when there was consent of the parties. It was further agreed that the relationship between the UNCITRAL Arbitration Rules and the EAPs should be clarified either in the EAPs or in a guidance text for reference by the parties.

The question was again raised for consideration in the 72nd Session of the Working Group and a draft rule proposed whereby express consent would be required to expedited arbitration. The issue was again discussed at the 73rd Session of the Working Group and a draft provision to this effect approved (A/CN.9/1049, paras 17-19; and see A/CN.9/WG.II/WP.216, paras 14-19).

As in the 71st Session and subsequently, an issue also arose in this context - which is in reality an issue as to the ambit and extent of party autonomy - whether parties could subsequently agree to non-expedited arbitration. This is, of course, an important issue because as an arbitral proceeding develops through the process of claim, defence, reply and perhaps a counterclaim or set off and consequent notices/pleadings the suitability of the application of the expedited rules to the dispute between the parties may look very different from when the initial notice of arbitration was given. Consequently, there is continuing agreement that the expedited arbitration rules should accommodate the possibility of the parties agreeing to resort to non-expedited arbitration (A/CN.9/1049, paras 20-21; and see A/CN.9/WG.II/WP.216, paras 14-19).

There is also a further issue where only one party – or, at least, not all parties - seek or seeks to withdraw from expedited arbitration. There were a variety of views expressed in the Working Group discussions at the 71st Session (A/CN.9/1010, paras 34–38):

34. The Working Group discussed whether a party that had agreed to the application of the EAPs would be allowed to subsequently request their non-application.

35. One view was that a party should be bound by its agreement to expedited arbitration and therefore should not be given the opportunity to withdraw from expedited arbitration. It was also mentioned that allowing the party to request   
non-application could unduly delay the proceedings and that it might be difficult to set forth the limited circumstances under which the non-application could be granted.

36. Another view was that a party should be allowed to withdraw from expedited arbitration, where there were justifiable circumstances for resorting to non-expedited arbitration. It was said that such a mechanism would comfort parties entering into an agreement to expedited arbitration and would only allow parties with persuasive grounds to resort to non-expedited arbitration. In support, it was also explained that parties might not have been able to foresee the complexity of their dispute and that the dispute might have evolved in a manner that would make expedited arbitration no longer suitable. It was further mentioned that obliging a party to proceed with expedited arbitration under such circumstances would not be fair.

37. In considering that question, the need to balance the interest of the parties and to preserve due process was highlighted. It was also mentioned that if such a mechanism were to be introduced, it should be designed to prevent against any abuse by the parties.

38. It was suggested that even if such a withdrawal mechanism were to be provided in the EAPs, it should be possible for the parties to agree to not utilize that mechanism, meaning that parties could waive their right to request withdrawal from expedited arbitration. While it was suggested that this possibility could be reflected in a model arbitration clause, some doubt was expressed as the parties would in any case be free to modify the EAPs in accordance with article 1(1) of the UNCITRAL Arbitration Rules.

After discussion the Working Group agreed that a mechanism should be provided in the expedited arbitration rules for a party to withdraw from expedited arbitration, but in limited circumstances. Accordingly, a proposed draft rule was provided for and discussed at the 72nd Session. The draft provided that the parties may, at any time during the proceedings agree to withdrawl from expedited arbitration (Draft provision 3(1)). Unilateral withdrawl was provided for but subject to a determination of the arbitral tribunal (Draft provision 3(2)) having invited the parties to “express their views and to take into account, among others, the following [as set out in Draft provision 3 (3)].” Draft provision 3(2) was cast in the following terms:

At the request of a party, the arbitral tribunal may, in exceptional circumstances, determine that the Expedited Arbitration Provisions shall no longer apply to the arbitration.

Issues arose in the Working Group discussion in relation to the circumstances and extent of any permitted withdrawl. The Report notes (A/CN.9/1043 at paras 38-42 (and paras 43-49 in relation to the criteria as set out in Draft provision 3(3)):

38. The Working Group considered draft provision 3(2), which provided a mechanism for a party that had initially agreed to the application of the EAPs to subsequently request their non-application to the arbitral tribunal.

39. It was pointed out that paragraph 2 only provided for the possibility of the arbitral tribunal to determine that the EAPs would no longer apply in their “entirety” and that flexibility should be provided to the arbitral tribunal to determine that some of the EAPs would continue to apply or would not apply to the arbitration. Accordingly, it was suggested that the words “or parts thereof” should be inserted after the words “Expedited Arbitration Provisions”. In response, it was mentioned that arbitral tribunals already had the discretion to conduct the arbitration in a manner it considered appropriate and that providing such flexibility explicitly in the EAPs might cause confusion to the parties on whether the proceedings were being conducted under the UARs or under the EAPs. It was suggested that the matter should be revisited when considering draft provision 10, which addressed the discretion of the arbitral tribunal with regard to time frames.

40. A view was expressed that while draft provision 3(1) would be based on party autonomy, draft provision 3(2) would run contrary to party autonomy, mainly the agreement of the parties to resolve their disputes under the EAPs. It was said that leaving the decision on the suitable procedure in the hand of the arbitral tribunal could lead to uncertainties. In response, it was observed that draft provision 3(2) reflected the understanding of the Working Group to provide a mechanism for a party to request withdrawal from the EAPs only in limited instances, which would comfort parties entering into an agreement on expedited arbitration. It was stressed that draft provision 3(2) would only allow parties to resort to non-expedited arbitration, if convincing and justified reasons were given in the request for withdrawal. It was further mentioned that without such a provision, the time period in draft provision 16 could be quite demanding in certain cases.

41. It was suggested that any determination by the arbitral tribunal should be based on consultation with the parties as stipulated in paragraph 3. With regard to the words “exceptional circumstances” in paragraph 2, it was generally felt that the words should be retained to highlight the exceptional nature of the request by the party and of the determination by the arbitral tribunal. It was also highlighted that that phrase could prevent any abuse by the parties to delay the process. On the other hand, it was suggested that paragraph 2 could be further elaborated to address the point that the determination by the arbitral tribunal could be based on the necessity or the reasonableness to rely on a procedure other than expedited arbitration or on the inappropriateness of the EAPs for the resolution of the dispute.

42. Suggestions were also made that the arbitral tribunal, when making the determination under paragraph 2, should be required to provide its reasoning and be bound by the obligation to conduct the proceedings in an expeditious and effective manner.

In light of these discussions the Working Group, at its 73rd Session considered a provision as follows (A/CN.9/1049, paras 20-21; and see A/CN.9/WG.II/WP.216, paras 14-19):

*Draft provision 2 (Withdrawal from expedited arbitration)*

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

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

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

An extensive explanatory note was also proposed for consideration (A/CN.9/WG.II/WP.216, para 19).

Further issues which may yet need to be resolved include whether there should be time limits for any withdrawal and in relation to the determination of such an application – particularly if the arbitral tribunal had not been constituted at the time – and whether an already constituted arbitral tribunal should remain in place to continue to conduct the arbitration but according to the Rules in the usual way (see A/CN.9/1043, paras 50–55).

***General provisions***

The Working Group, at its 73rd Session, considered a general provision in relation to expedited arbitration as follows (A/CN.9/1049, paras 22-25; and see A/CN.9/WG.II/WP.216, paras 20-24):

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

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

Draft provision 3(2) prompted discussion at the 73rd Session in that “the phrase following the word ‘expeditiously’ merely repeated the need for expeditious conduct of the proceedings and did not highlight the need to balance expeditiousness with fairness” (A/CN.9/1049, para 22). Reference was made, in discussions, to Article 17 of the UARs (set out previously) which may be thought to address any concerns in this respect. Draft provision 3(3) was approved with the insertion of the word “including” [where indicated above] to ensure that any available technological options were not constrained by these provisions. This provision and these discussions are but a further indication of the extent that remote hearings have been accepted and developed during the Covid-19 pandemic.

***Notice of arbitration***

In the interests of expediting the arbitration process the Working Group, at its 71st Session, considered the desirability of dispensing with the requirement that the claimant produce a separate statement of claim in addition to and following the giving of the notice of arbitration. The important point was made in the discussion on this proposal that, whatever course was settled upon, procedural fairness and equality of treatment of parties needed to be kept very much in mind. The Report notes (A/CN.9/ 1010, para 56):

56. After discussion, it was agreed that the notice of arbitration and response thereto as well as the statements of claim and of defence in the context of expedited arbitration should be examined more comprehensively taking into account the time frames in the EAPs (including those that would be determined by the arbitral tribunal) and the need to ensure an expedited process. The Secretariat was requested to provide possible options for further consideration by the Working Group reflecting the views expressed. It was noted that while the fact that the parties had expressly agreed to expedited arbitration should be taken into account in designing different options, there was also the need to provide sufficient time for parties to make their claims and to respond to those claims. It was further stressed that one of the goals in designing the options would be that the tribunal was constituted in an expedited fashion, as it would need to make a number of procedural decisions, including certain time frames to be imposed on the parties.

This position was reflected in the Working Group discussions in the 72nd Session in relation to Draft provision 4. Discussing paragraph 4(1) of this provision the Working Group noted that it is ‘ … intended to require, for the sake of efficiency, presentation of the complete case but also provide flexibility to the claimant as the statement of claim should, “as far as possible”, be accompanied by all documents and other evidence relied upon by the claimant, “or contain reference to them”’ (A/CN.9/1043, para 63).

Paragraph 4(2) of these provisions also seeks to address the efficient and speedy constitution of the arbitral tribunal by requiring the claimant to suggest a list of suitable candidates/qualifications or a mechanism to be used by the parties for agreeing upon the arbitrator (see A/CN.9/1043, para. 64). These provisions leave open the possibility of the parties agreeing to more than one arbitrator. In the absence of an agreed choice of an appointing authority, the claimant is to provide a proposal for designation of an appointing authority.

Draft provision 5 requires a response to the notice of arbitration within 15 days (half the time otherwise required under Article 4(1) of the Rules for non-expedited arbitrations) which is in accordance, in terms of content, with Article 4 of the Rules. This has the effect of imposing the same requirements as to “pleading” and provision of documents as required of the claimant with respect to the notice of arbitration. Similarly, the respondent is required to provide a proposal for appointment of an arbitrator and, in the absence of an agreed choice of an appointing authority, a proposal for designation of an appointing authority.

At its 73rd Session the Working Group approved a simplified version of draft provision 4 (omitting draft paragraph 4(2)) and 5 together with an extensive explanatory notes for each of these draft provisions (A/CN.9/1049, paras 26-27; and see A/CN.9/WG.II/WP.216, paras 27-31).

In relation to draft provision 5 the Working Group confirmed that the 15 day time period for communicating the defence should begin at the date upon which the arbitral tribunal is constituted.

Draft provision 6, providing for designation of an appointing authority, was discussed and explained by the Working Group (A/CN.9/1043, paras 72-73):

72. With regard to draft provision 6, the Working Group took note of a written submission favouring an approach similar to that in article 11 of the UNCITRAL Model Law on International Commercial Arbitration, which would involve the court or other authority at the place of arbitration. Nonetheless, the Working Group reaffirmed the need to simplify the two-stage process in article 6 of the UARs in the context of expedited arbitration. It was reiterated that draft provision 6 provided 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. The Secretary-General of the PCA conveyed its willingness to assume the roles as outlined in draft provision 6, including to exercise the necessary discretion foreseen in draft provision 6(2).

73. The Working Group confirmed that paragraphs 3 to 7 of article 6 of the UARs would continue to apply to expedited arbitration. In that context, it was confirmed that (i) draft provision 6 would not need to address the consequences where the Secretary- General of the PCA refused to act or failed to appoint an arbitrator within the time frame; (ii) the time frame provided for in article 6(4) of the UARs would not need to change in the context of expedited arbitration; and (iii) the need for consultation with the parties as provided for in article 6(5) of the UARs should be highlighted in a guidance document to the EAPs.

A draft provision 6, following this formulation, was approved at the 73rd Session of the Working Group and an explanatory note on its provisions proposed (A/CN.9/1049, para 28; and see A/CN.9/WG.II/WP.216, paras 37-38).

***Number of arbitrators***

The default position agreed is that the expedited arbitration rules would provide for a sole arbitrator. It was, however, agreed that provision should be made for a request by a party to constitute a tribunal of more than one arbitrator; which may entail a procedure similar to that applicable to an application by one party to withdraw from an expedited arbitration (see A/CN.9/1010, para 57). This position was reaffirmed at the 72nd Session of the Working Group in its approval of draft provision 7 which provides that, in the absence of party agreement to the contrary, the default position is a sole arbitrator. Moreover an appointing authority is not to have any role in determining the number of arbitrators (see A/CN.9/WG.II/WP.214, paras 69-72; and A/CN.9/1043, para 75). This approach as set out in this draft provision 7 was approved at the 73rd Session of the Working Group and an explanatory note on its provisions proposed (A/CN.9/1049, para 29; and see A/CN.9/WG.II/WP.216, paras 39-40).

***Appointment of the Arbitrator***

As to the process of appointment, the Working Group Report of the 71st Session notes (A/CN.9/1010, paras 58–62):

58. The Working Group approved draft provision 4(1) in substance, which provided that the parties should jointly agree on a sole arbitrator in expedited arbitration.

59. With regard to draft provision 4(2), which provided a mechanism for the appointment of a sole arbitrator in the absence of an agreement by the parties, the Working Group considered the time frame for the parties to reach an agreement and when that time frame should commence. Considering the expedited nature of the proceedings, it was generally felt that a short time period should be provided in the EAPs.

60. On when that time frame should commence, some preference was expressed for when the respondent received the notice of arbitration, as that would be quite early in the proceedings and ensure a speedy composition of the arbitral tribunal. However, it was noted that the time frame should be linked with the proposal for the appointment of the arbitrator (for example, which could include a list of suitable candidates or the mechanism to be used for agreeing on the arbitrator). In that context, it was noted that if the EAPs were to require such a proposal to be included in the notice of arbitration and/or response thereto, the time frame could commence upon the receipt by the parties of the proposal. However, some caution was expressed that requiring such a proposal in the notice and response thereto might be overly prescriptive and the parties might prefer not to include such a proposal.

61. Regarding the question of how an appointing authority would become involved in the appointment of the sole arbitrator, it was agreed that the involvement should be based on the request by one of the parties and that it would not be realistic to consider the appointing authority being automatically involved after the lapse of the time period. It was also noted that the parties would be free to request the involvement of the appointing authority even before the lapse of the time period if it was obvious that an agreement would not be reached.

62. With regard to how the appointing authority would appoint the arbitrator, the Working Group agreed that the list procedure in article 8(2) of the UNCITRAL Arbitration Rules would apply to expedited arbitration.

After discussion, it was decided that there was no need to include any express reference to the possibility of domestic courts serving as an appointing authority under the expedited arbitration rules. There is, of course, no difficulty if the parties agree on an appointing authority. The Working Group addressed the possibility of agreement not being forthcoming and also to encourage agreement, as the Report notes (A/CN.9/1010, paras 78 and 79):

78. After discussion, the Working Group agreed that the EAPs should provide that if the parties were not able to agree on the choice of an appointing authority within a fixed time period, any party could make a request to the Secretary-General of the PCA either to designate the appointing authority or to serve as an appointing authority. The Secretariat was requested to examine further any issues that might arise in the operation of that provision (for example, (i) when a party had already proposed the Secretary-General of the PCA to serve as the appointing authority under draft provision 5(1) and the other party had not agreed; (ii) when one party requested the Secretary-General of the PCA to serve as the designating authority and the other party requested it to serve as the appointing authority; and (iii) the role of the   
Secretary-General of the PCA envisaged in article 6(4) of the UNCITRAL Arbitration Rules) and to provide drafting options for further consideration by the Working Group. It was further agreed that the time frame in draft provision 5(2) could be shortened to 15 days, for further consideration by the Working Group, once it had considered other time frames to be provided in the EAPs.

79. Lastly, it was agreed that considering the importance of the parties agreeing on an appointing authority in expedited arbitration, the Working Group would consider how that aspect could be further emphasized in the model arbitration clause.

In light of this discussion, the Working Group, at its 72nd Session, considered a further draft, draft provision 8, in which the favoured option was that “… the respondent would not be in a position to delay the process and it would be possible to involve the appointing authority even where the respondent failed to communicate its response.”(A/CN.9/1043, para 77). There was also support for a 30 day time limit on the process, at least as between the parties (rather than with respect to any appointing authority). This approach as now set out in draft provision 8 was approved at the 73rd Session of the Working Group, but with a 15 day time limit, and an explanatory note on its provisions proposed (A/CN.9/1049, para 30; and see A/CN.9/WG.II/WP.216, paras 42-43).

***Consultation with the parties (Case management******conference) and the provisional timetable***

It was agreed by the Working Group, at its 71st Session, that the arbitral tribunal should be required under the expedited arbitration rules to consult with the parties on how to conduct the proceedings. One possible means of achieving this is through a case management conference. It was also agreed that the rules should permit a case management conference to be conducted through a meeting in person, by telephone, by video conference or other means of communication; but that absent agreement between the parties determination of the means would be a matter for the arbitral tribunal.

These matters were developed further in Draft provision 9, which was discussed at the 72nd Session and approved subject to further consideration of time limits on the process of consultation and the extent to which procedural aspects of the process should be included in guidelines rather than rules. This approach as now set out in draft provision 9 was approved at the 73rd Session of the Working Group and an explanatory note on its provisions proposed (A/CN.9/1049, paras 32-33; and see A/CN.9/WG.II/WP.216, paras 45-46).

***Time frames and discretion of the arbitral tribunal***

The balancing of the requirement of flexibility to meet particular circumstances by the conferral of discretion on the arbitral tribunal and the need to mandate expedition with a degree of inflexibility in rules is difficult. In some situations more inflexibility in rules enables an arbitral tribunal to drive the expedition process more strongly; but too much may sacrifice procedural fairness, hence enforceability of the award, and too little may sacrifice the effectiveness of the expedited rules. As a result of its discussions at the 71st Session, the Working Group came to the following position, as the Report notes (A/CN.9/1010, paras 94-96):

94. The Working Group considered draft provision 8(1), which expressly set out the discretionary power of the arbitral tribunal to impose time frames on the parties in expedited arbitration.

95. One view was that draft provision 8(1) was not necessary, as such discretion was already provided for under articles 17, 24, 25 and 27 of the UNCITRAL Arbitration Rules. However, it was also pointed that there could be merit in retaining the paragraph as it clarified and reinforced the discretion provided in the   
above-mentioned articles and also addressed the time frames in the EAPs. It was emphasized that draft provision 8(1) could help address the so-called “due process paranoia” and provide tribunals with a robust mandate to act decisively without fearing that the award would be challenged. Another suggestion was that it could be merged with draft provision 6 which addressed the establishment of a procedural timetable. After discussion, the Working Group agreed to consider whether to retain draft provision 8(1) at a later stage, also taking into account the time frames in the EAPs.

96. With regard to draft provision 8(2), it was suggested that the paragraph could be rephrased as an overarching general provision, which would: (i) indicate the overall objectives of the EAPs (for example, to provide an expeditious, fair and cost-effective dispute resolution mechanism); and (ii) further state that the parties (by agreeing to refer their dispute to the EAPs) and the arbitral tribunal (by accepting to serve that function under the EAPs) would be bound by those objectives. It was stated that a number of institutional rules included such a provision. While it was suggested that the need to provide the parties with the opportunity to present their case should also be mentioned in such a general provision, it was agreed that article 17(1) of the UNCITRAL Arbitration Rules sufficiently addressed that point. It was further agreed that such a provision should be placed as one of the first provisions in the EAPs.

There was also discussion as to how the expedited arbitration rules should provide for the calculation of time frames, a discussion which continued at the 72nd Session of the Working Group. Concluding, the Report of that Session notes (A/CN.9/1043, para 92):

92. After discussion, the Working Group agreed to replace draft provision 10 with the simplified text and to add wording that the tribunal could extend or abridge any period of time agreed by the parties. It was further confirmed that article 30 of the UARs on default should apply to expedited arbitration unchanged and that there was no need to include a provision pertaining to late submissions in the EAPs.

This approach as now set out in draft provision 10 was approved at the 73rd Session of the Working Group and an explanatory note on its provisions proposed (A/CN.9/1049, para 34; and see A/CN.9/WG.II/WP.216, paras 48-49).

***Counterclaims and additional claims, the taking of evidence and hearings***

In relation to counterclaims and additional claims it was agreed at the 71st Session of the Working Group that although the rights of the parties in these respects should be preserved, limitations could be introduced but at the same time leaving a discretion in the arbitral tribunal to lift limitations. A similar approach with respect to the powers of the arbitral tribunal was taken with respect to the taking of evidence in terms of the desirability of a rule enabling it to limit the parties from presenting further written statements and to limit the production of documents, exhibits or other evidence. As indicated at the 72nd Session of the Working Group, these matters will be the subject of further discussion and clarification at subsequent Sessions.

There was also general support for a default rule in expedited arbitration for written witness statements. There is ongoing discussion on whether the arbitral tribunal should be required to hold a hearing. Nevertheless, in relation to the time frame for requesting a hearing and the conduct of the hearing, the following views were expressed; as noted in the Report of the 71st Session of the Working Group (A/CN.9/1010, paras 110–111):

110. With regard to whether the EAPs should prescribe a time frame within which a party would be allowed to make a request for a hearing (or object to a decision by the tribunal to not hold one), it was widely felt that there should be no such limitation with the understanding that the request should however be made at an appropriate stage of the proceedings (see art. 17(3) of the UNCITRAL Arbitration Rules). It was mentioned that ideally such a request should be made before or during the arbitral tribunal’s consultation with the parties. After discussion, the Working Group agreed that draft provision 12(1) should be deleted.

111. Regardless of whether the arbitral tribunal would be required to hold a hearing or not, it was widely felt that the arbitral tribunal should be given broad discretion on how to conduct the hearings in a streamlined manner. For example, the arbitral tribunal would have the flexibility to determine the most appropriate means (including the possibility to hold a hearing remotely without the physical presence of the parties) and to limit the duration of the hearing, the number of witnesses as well as   
cross-examination. It was stated that if hearings could be conducted in such a limited fashion, that could alleviate the concerns expressed with regard to the view that arbitral tribunals should be obliged to hold a hearing upon the request by a party.

Discussions with respect to the conduct of hearings continued at the 72nd Session of the Working Group, particularly in the context of experience during the current Covid-19 pandemic. As the Report of that Session notes (A/CN.9/1043, paras 95-96):

95. With regard to the formulation provided in paragraph 106 of [the Note by the Secretariat with respect to the 72nd Session – A/CN.9/WG.II/WP.214 – as to the flexibility accorded to the arbitral tribunal to determine the most appropriate means for the conduct of hearings] … it was suggested that a guidance document on EAPs could mention that hearings in expedited arbitration could be short and could be done without the physical presence of the parties. Furthermore, it was stated that the use of technology to streamline the process and to save cost and time of the proceedings needed to be further explored. In support, it was said that providing such possibility was particularly timely in light of the current COVID-19 pandemic and suggestions were made to include a general provision in the EAPs on the use of technological means in expedited arbitration. It was further suggested that considering the nature of expedited arbitration, remote means should be the preferred option. It was stated that such a provision would reinforce the discretion of the arbitral tribunal in utilizing a wide range of technological means in expedited proceedings.

96. After discussion, 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. It was further noted that a guidance document to the EAPs should make it clear that the inclusion of such a rule in the EAPs did not imply that the use of technological means was available to arbitral tribunals only in expedited arbitration.

In this respect it is relevant to note the provisions of Article 19.2 of the *London Court of International Arbitration Rules 2020* which empower the arbitral tribunal to require remote hearings, in spite of any objection or lack of agreement by the parties:

19.2   The Arbitral Tribunal shall organise the conduct of any hearing in advance, in consultation with the parties. The Arbitral Tribunal shall have the fullest authority under the Arbitration Agreement to establish the conduct of a hearing, including its date, duration, form, content, procedure, time-limits and geographical place (if applicable). As to form, a hearing may take place in person, or virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places (or in a combined form). As to content, the Arbitral Tribunal may require the parties to address specific questions or issues arising from the parties’ dispute. The Arbitral Tribunal may also limit the extent to which questions or issues are to be addressed.

The approach as now set out in draft provision 11 which was, as previously discussed by the Working Group, approved at its 73rd Session and an explanatory note on its provisions proposed (A/CN.9/1049, para 35; and see A/CN.9/WG.II/WP.216, paras 50-53).

***Making of the award***

The Working Group, at its 71st Session, reaffirmed its understanding that Article 34(3) of the UARs which requires a reasoned award, would apply with respect to an expedited arbitration. There has also been ongoing discussion in the Working Group Sessions in relation to the fixing of time for the making of an award and also the need for some flexibility in the time frame for making awards – formulated in such a way as not to detract from the need for expedition to be embedded in the EAPs. The formulation of provisions designed to balance practicality and the requirement of expedition remains an ongoing discussion at the conclusion of the 73rd Session of the Working Group (A/CN.9/1049, paras 47-57; and see A/CN.9/WG.II/WP.216, paras 63-73).

***Early dismissal and preliminary determination***

At the 70th and 71st Sessions of the Working Group the possibility of rules for early dismissal and preliminary determination was raised. At the 73rd Session it was decided that provisions of this nature should, if they are to be provided, be contained in the UARs rather than the EAPs; provisions which might be included in the former at the next revision of those rules (A/CN.9/1049, paras 58-59; and see A/CN.9/WG.II/WP.216, paras 74-81).

***Other aspects with respect to the expedited rules***

The 73rd Session of the Working Group also considered draft provisions with respect to counterclaims and set-offs, evidence, written statements, a model arbitration clause for expedited arbitration and the application of the UNCITRAL Rules on Transparency to expedited arbitration (see A/CN.9/1049, paras 36-42, 43-46, 60-64; and see A/CN.9/WG.II/WP.216, paras 54-62, 82-85). At its 72nd Session the Working Group considered the relationship between the transparency rules and the EAPs (A/CN.9/WG.II/WP.216, paras 84-85). The position reached in discussions at the 73rd Session was that parties should be able to agree to the EAPs without automatically attracting the transparency rules.

***International mediation***

The Working Group, at its 73rd Session, considered issues with respect to international mediation (A/CN.9/1049, paras 67-71):

67. The Working Group undertook a review of the draft UNCITRAL Mediation Rules, the draft UNCITRAL Notes on Mediation and the draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018).

68. With regard to the draft UNCITRAL Rules on Mediation, it was suggested that:

- Articles 1, 8, 10 and 12 should be more closely aligned with the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (the “Model Law”) and the United Nations Convention on International Settlement Agreements Resulting from Mediation (the "Singapore Convention on Mediation");

-  Article 2 should clarify when the 30-day time frame would expire;

-  Article 3(3) should be simplified so as to not regulate the appointment of mediators in detail; - Reference to “expertise in the subject matter” in article 3(4)(a) should be deleted, as a mediator did not necessarily need to be an expert on the subject matter;

- The second sentence of article 3(5) should further clarify the elements to be considered by the selecting authority in ensuring the diversity of candidates, which should include gender and geographical regions;

- Article 4 should highlight that mediation could take place remotely and through the use of technological means, along the lines of draft provision 3(3) of the EAPs;

- Article 5(3) should require the mediator to keep such information confidential by using the word “shall”;

- Article 7(5) should be deleted as the mediator should not make a judgment on the parties’ behaviour;

-  The time period in article 9(e) should be further clarified; and

-  Article 11 should highlight that the costs of mediation (and not only the fees of the mediator) should be reasonable and add cost for translation and interpretation services in the list of potential costs.

69. With regard to the draft UNCITRAL Notes on Mediation, it was suggested that:

- Corresponding changes should be made to reflect revisions on the draft Rules;

- The Notes should address the possibility of parties agreeing on timing, including time frames;

- The Notes should provide more clarity, for example, on confidentiality of experts and other stakeholders invited to participate in the mediation; and

- The section on mediation in the investor-State dispute settlement context should be deleted or be considered further by the Commission, particularly as that topic was currently being discussed by Working Group III.

70. With regard to the draft Guide to Enactment, a few suggestions were made particularly to better address the interaction between the Model Law and the Singapore Convention on Mediation.

*Conclusion*

71. At the close of the session, the Secretariat was requested to prepare a revised version of the three instruments on mediation based on the comments received and to present them to the Commission at its upcoming session.

**\* \* \* \* \* \* \***

**Professor the Hon Dr Clyde Croft AM SC**

*Chair, UNCCA Expert Advisory Committee to support UNCITRAL Working Group II (Dispute Settlement)*

*Convenor, Monash University Law Faculty Commercial Disputes Group*

10 May 2021

1. Report on the Working Group at its 73rd Session (A/CN.9/1049, paras 17-19). [↑](#footnote-ref-1)