04 March 2020

UNCITRAL Working Group II (Dispute settlement)

71st SESSION, 3-7 FEBRUARY 2020, NEW YORK

Report to UNCCA and LAWASIA

1. background

At the 51st UNCITRAL session, the Commission decided that the Working Group should prioritise work on expedited arbitration ([A/CN.9/WG.II/WP.211](https://undocs.org/en/A/CN.9/WG.II/WP.211)). Accordingly, during its 69th session, the Working Group commenced its consideration of issues relating to expedited arbitration with preliminary discussion on the scope of its work, characteristics of expedited arbitration, and possible form of the work ([A/CN.9/WG.II/WP.211](https://undocs.org/en/A/CN.9/WG.II/WP.211)).

The discussions continued throughout the Working Group's 70th session in Vienna in September 2019, in relation to the draft provisions on expedited arbitration.

1. organization of the 71st session

The 71st session of the UNCITRAL Working Group II on Dispute Settlement was held at the UN headquarters in New York from 3-7 February 2020. The Law Association for Asia and the Pacific (**LAWASIA**) was represented by:

* + 1. Mr. Junichi Horie;
    2. Ms. Bianca Trunzo;
    3. Ms. Prescilla Zeitoune; and
    4. Mr. Matyas Szuk,

(together, **We**).

Following on from the 70th session in Vienna in September 2019, the Working Group continued its discussions on expedited arbitration at the 71st session.

The Working Group decided to base its deliberations on the draft provisions provided for in document [A/CN.9/WG.II/WP.212](https://undocs.org/en/A/CN.9/WG.II/WP.212).

1. consideration of the draft provisions on EXPEDITED arbitration
   1. Day 1 (Monday, 3 February 2020)

Approximately 80% of delegate seats were filled on the first day.

*Incorporation of expedited arbitration provisions into UNCITRAL Arbitration Rules*

Israel, Belgium and Japan raised the issue of whether the UNCITRAL Arbitrational Rules (**Rules**) should incorporate both the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (**Transparency Rules**) and the expedited arbitration provisions (**EAPs**). The discussion centred around the issue of whether parties would be able to consent to the EAPs, but not to the Transparency Rules. It was suggested that this should be possible. However, the Working Group decided to park this question and revisit it later when assessing the relevance of the EAPs in other types of arbitration.

*Draft provision 1 (Scope of application)*

The circumstances in which EAPs would apply to arbitration were discussed at great length by the Working Group, almost taking up the entire first day.

The most vocal delegates were Israel, USA, and Belgium. The majority of delegates such as Israel, Japan, Canada, USA, Austria, Singapore, Switzerland, Mexico, Indonesia, Spain and the Republic of Korea agreed that EAPs should be opt-in rather than opt-out, that is the express consent of the parties should be required in order for the EAPs to apply. However, other countries such as Bahrain thought that Expedited Provisions should apply without the express consent of the parties as they would already be deemed to be aware of the existence of the EAPs.

Italy, the Russian Federation and Israel agreed that the arbitrator should make the decision on the issue of disagreement between the parties regarding the applicability of the EAPs. Other delegations such as Bahrain raised scepticism that without automatic application, the EAPs would rarely be applied.

* 1. Day 2 (Tuesday, 4 February 2020)

*Draft provisions 1(4) to 1(6)*

Discussions on draft provisions 1(4) to 1(6) continued until about midday.

Canada introduced the possibility of whether those parties who had already consented to the application of the EAPs could subsequently withdraw that consent. While the Working Group generally agreed, they expressed concerns that the inclusion of such provision could cause inadvertent delays and affect the expedited nature of the procedure themselves. In the end, the Working Group decided to include such provision subject to the tribunal's determination and is only to be applicable in limited circumstances. The majority of arbitral institutions advocated for the idea, based on their own rules, that the automatic application of the EAPs should be based on a financial threshold.

*Draft provision 2 (Notice of arbitration)*

The Dominican Republic raised the possibility to treat the notice of arbitration as the statement of claim. Hence, the notice of arbitration should be accompanied by all documents and other evidence just as the statement of claim as provided for by article 20(4) of the Rules. The Working Group strongly felt that draft provision 2 should be amended accordingly.

*Draft provision 3 (Number of arbitrators)*

The Working Group went through draft provision 3 relatively quickly. The Working Group agreed to retain the draft provision in substance and decided that the arbitral tribunal should contain a sole arbitrator as a default rule. This position was consistent with the previous Working Group's position during its 69th and 70th session.

* 1. Day 3 (Wednesday, 5 February 2020)

*Appointment of the arbitrator - Domestic Courts as appointing authority*

Austria raised the possibility that the EAPs should include a provision which would allow domestic courts to function as an appointing authority in expedited arbitration. In several countries, including Austria, domestic courts were already functioning as an appointing authority. However, other countries such as Israel, Switzerland, Finland, Canada, Ukraine and the Russian Federation objected to domestic courts functioning as an appointing authority. The reasons for rejection included concerns that judges with little international experience would be appointed; that such process would cause delay; and that it would not function in the context of international arbitration.

In the end, the Working Group agreed not to include express reference to domestic courts to functions as an appointing authority in the context of expedited arbitration.

*Appointment of the arbitrator - Availability of the arbitrator*

After the Working Group agreed that articles 9 to 14 of the Rules would apply to expedited arbitration, it turned to the issue of timelines. Israel raised the possibility to include a reference to EAPs in article 11 of the Rules. Furthermore, Israel stressed the importance of the need for the arbitrator to confirm its availability and readiness to conduct the arbitration in an expeditious manner. Several delegations including France and Belgium concurred.

*Draft Provision 5 (Designating and appointing authorities)*

In the afternoon the discussions concentrated on whether article 6 of the Rules should be adopted for expedited arbitration.

Broad consensus was expressed for option A, that is a party could request the Secretary-General of the Permanent Court of Arbitration to either designate the appointing authority as prescribed by article 6(2) of the Rules, or to serve as the appointing authority.

*Draft provision 6 (Case management conference and provisional timetable)*

The Working Group expressed various views on whether to hold a case management conference in the context of expedited arbitration.

The Working Group views differed on whether to use the wording “may“ and thereby provide more flexibility, or use the word “shall“, and make it mandatory for the tribunal to convene a case management conference as soon as practicable after its constitution. It was agreed that draft provision 6(1) should be amended so as to require the arbitral tribunal to consult with the parties on how to conduct the proceedings, with one proposed way being through a case management conference.

*Draft provision 7 (Overall period of time and calculation of the period)*

The Working Group agreed that the overall time frame should be as short as possible, taking into account the expedited nature of the dispute. While some countries expressed a desire for a time frame to be as long as 12 months, most countries have opted for an overall time frame of 6 months or less. The Working Group agreed to revisit the issue when discussing draft provision 13.

* 1. Day 4 (Thursday, 6 February 2020)

The day started with a discussion on Article 8. There were less delegates by the end of the week. Israel, Switzerland, Belgium and France were the main contributors.

*Draft provision 8 (Discretion of the arbitral tribunal)*

Australia suggested the rewording of draft provision 8(2) as an overarching general provision. As an example, Australia referred the Working Group to section 3 of the ACICA Arbitration Rules (**ACICA Rules**), which outlines the overriding objective of the ACICA Rules. Section 3 of the ACICA Rules states that its overriding objective "is to provide arbitration that is quick, cost effective and fair, considering especially the amounts in dispute and complexity of issues or facts involved."

Australia noted that such a provision should be positioned at the beginning of the EAPs so as to make the expeditious nature of the proceedings clear to the tribunal.

*Draft provision 9 (Counterclaims) and draft provision 10 (Amendments to the claim or defence)*

The Working Group expressed broad support for including draft provisions 9 and 10 with limitations.

The Working Group (including Switzerland and Israel) felt that raising such claims could stop expedited arbitration from being appropriate for resolving disputes. Hence, the Working Group noted that these draft provisions should contain an opt-out mechanism.

*Draft provision 11 (Further written statements and evidence)*

While the Working Group agreed to retain the draft provision subject to minor changes, it noted that the tribunal should have the ability to limit document production or other evidence, or to exclude them entirely.

*Draft provision 12 (Hearings)*

Different views were expressed on whether the tribunal should have the right to call a hearing, when requested by a party. Delegations such as Australia and Finland noted that parties should not have an absolute right to an oral hearing. The expedited nature of the proceedings should be taken into account and oral hearings should be an exception rather than the norm. The Working Group agreed to revisit the issue at its next meeting in Vienna later this year.

*Draft provision 13 (Award)*

Regarding the time frame for an award to be made, while Mexico seemed to be the only delegation with no preference for a fixed time frame, the rest of the delegations generally agreed for the award to be made within 6 months from the date of the constitution of the arbitral tribunal. The Working Group agreed to retain draft provision 13(1).

In relation to an extension of the time frame for issuing the award, while the Working Group agreed to keep draft provision 13(3), the Republic of Korea suggested that the wording of "exceptional circumstances" should be elaborated upon further, by including a list that outlines those circumstances.

* 1. Day 5 (Friday, 7 February 2020)

This day was the shortest and quietest of the sessions with the least number of delegates in attendance. The focus of this session was for the Chair to affirm the adoption of various paragraphs/provisions. Israel was the main contributor followed by Switzerland.

1. new york international arbitration centre panel discussions

On 6 February 2020, we were informed by the chairperson, Andres Jana, that the New York International Arbitration Centre would hold a talk on expedited arbitration that evening.

It was titled "Assessing the State of Play – UNCITRAL’s Working Group II (WGII) and Institutional, Expedited Arbitrations" and it consisted of two panel discussions. The first panel discussion was on institutional perspectives and the second was on updates from WGII – Delegates and Practitioners.

On behalf of LAWASIA, Mr. Junichi Horie attended the second panel discussion and the networking and reception session afterwards. The second panel discussion was comprised of practitioners including chairperson Andres Jana and Norway delegate Ms Giuditta Cordero-Moss. Discussions centred around updates from Working Group II on institutional and expedited arbitrations.

1. observers lunch

Dr. Herman Verbist, delegate of the Forum for International Conciliation and Arbitration organised a lunch for observers on 5 February 2020. It was attended by about 30 participants. This lunch occurs twice a year during the meetings of Working Group II in New York and in Vienna. It was held at the Delegates Dining Room inside the United Nations headquarters. The lunch was exceptional and we had excellent views of the East River.

1. final remarks

We are extremely grateful to LAWASIA, UNCCA and particularly to UNCCA Deputy Chair, Dr Dalma R Demeter LLM, SJD, GCTE and to Working Group II Chair, the Hon Dr Clyde Croft AM SC for the opportunity to represent LAWASIA at UNICITRAL's Working Group II session in New York.