

UNCITRAL Working Group II: An Introduction and Update

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Mihaela Maravela (Associate Editor) (Mihaela Maravela Law Office)

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Next week, the seventy-second session of the United Nations Commission on International Trade Law's ("UNCITRAL") Working Group II ("WG II"), considering the issue of expedited arbitration, will be held in a hybrid system, with participants being able to take part in the session either in person, in Vienna, or remotely, via an online platform. The measure is of an exceptional and temporary nature, taking into account evolving public health concerns and travel restrictions due to COVID-19. In advance of WG II's meeting, we are running this week a series of posts discussing some of the key issues under consideration by the WG II. This post sets out the background of the WG II process to date and introduces the topics addressed by the posts in this series.

Background and the process so far

By way of background, between September 2015 and February 2018, the WG II worked on instruments for the enforcement of international commercial settlement agreements resulting from mediation, and successfully concluded with the entry into force on 12 September 2020 of the United Nations Convention on International Settlement Agreements Resulting from Mediation (the "Singapore Convention on Mediation").

At the sixty-eighth session, in February 2018, several topics for future work of the WG II had been suggested for the Commission to consider: (i) a possible revision of the UNCITRAL Conciliation Rules (1980) and preparation of notes on mediation to reflect developments in the field ([A/CN.9/934](#), ¶150-151); (ii) expedited arbitration procedure and adjudication, potentially to be discussed together, as the former would provide tools for reducing the cost and time of arbitration, while the latter would facilitate use of a particular tool that has demonstrated its utility in efficiently resolving disputes in a specific sector ([A/CN.9/934](#), ¶152-155); (iii) developing uniform principles on the quality and efficiency of arbitral proceedings in the form of soft law instruments or legislative provisions ([A/CN.9/934](#), ¶156).

There was general support by the member states, at the sixty-eighth session of the WG II and shortly thereafter, for giving priority to work on expedited arbitration in the field of commercial arbitration (with the exclusion of family and consumer law issues, and without impact on the works of the UNCITRAL WG III on ISDS reform), as the work would be timely and reflect the needs of the businesses for streamlined dispute resolution mechanisms.

The Commission agreed and tasked the WG II to consider issues relating to expedited arbitration. The WG II started its work at its sixty-ninth session in February 2019, with the attendance of member states, observer states and observers international organisations. During this session, the WG II had a preliminary discussion on the scope of its work and on the focus, that should be on improving the efficiency of the arbitral proceedings, which would result in the reduction of the cost and duration of the proceedings ([A/CN.9/969](#), ¶13). While there was no decision on the form that the work will take (a set of new rules, model clauses, or guidance material), the WG II agreed that it would focus on establishing an international framework on expedited arbitration and asked the Secretariat to prepare draft texts on expedited arbitration for the WG II to discuss ([A/CN.9/969](#), ¶11).

At its seventieth and seventy-first sessions, the WG II considered the draft provisions on expedited arbitration (“EAPs”) prepared by the Secretariat; while for the seventieth session the Secretariat prepared draft provisions which could be included in a set of rules on expedited arbitration (without prejudice to the decision by the WG II on the final form of its work), for the seventy-first session the Secretariat was tasked to and prepared draft provisions on expedited arbitration both as an appendix to the UNCITRAL Arbitration Rules (“UAR”) and as a stand-

alone set of rules.

Without taking a final decision, the WG II shall consider the expedited arbitration provisions only as an appendix to the UAR, and the Secretariat has prepared the draft accordingly for the next session.

While mindful to preserve due process and fairness in streamlining the arbitration procedure, the WG II is discussing:

- the determining factor for the application of expedited arbitration,
- the number of arbitrators,
- shorter deadlines for submitting written submissions, and timeframe for the rendering of the award,
- possibility to file counterclaims or additional claims,
- other procedural means aimed at making the process more efficient.

A constant criticism over the last decade has been the perceived increased costs and time for the arbitral process to be completed. Even though on the table for a while, the users still view costs as the worst characteristic of international arbitration and lack of speed and lack of insight into arbitrators' efficiency among the top five worst characteristics. In this context, the process at the WG II is of great importance and we hope you will join the debate with our series.

A preview into our WG II Series

It was recently advanced that expedited arbitration will receive this decade a significant amount of attention, as emergency arbitration received in the last decade[fn]Ten Years Later: *Why the 'Renaissance of Expedited Arbitration' Should Be the 'Emergency Arbitration' of 2020*, Hamish Lal and Brendan Casey, 'Ten Years Later: Why the 'Renaissance of Expedited Arbitration' Should Be the 'Emergency Arbitration' of 2020', in Maxi Scherer (ed), *Journal of International Arbitration*, (© Kluwer Law International; Kluwer Law International 2020, Volume 37 Issue 3) pp. 325 – 340.[/fn] and while we have to wait and see if the prediction comes true, we will engage this week in a debate with a stellar line-up of contributors who will explore various aspects of the works of the WG II.

Dr Crina Baltag (Senior Lecturer in International Arbitration, Stockholm University)

discusses the reforms that might lead to implementation of expedited arbitration procedures in investor-State arbitration. The post examines the particularities of investment arbitration, the undergoing reforms concerning expedited arbitration in ISDS, including with reference to the work of the WG II, and whether the overall efficiency of the ISDS process could be obtained with expedited arbitration.

Dr Patricia Shaughnessy (Professor, Stockholm University) will comment upon the form of the EAPs and their linkage to the UARs. The EAPs could take the form of self-contained, “stand alone” rules or could be integrated into the UARs as an addendum (appendix) with cross-references to and modification of the UARs. To date there have been diverging views on how to best achieve a user-friendly approach. The form of the EAPs has drafting implications for some other EAPs provisions, such as the scope of application, initial submissions, appointment of the tribunal, and general provisions of the EAPs.

Rekha Rangachari, Esq. (Executive Director, New York International Arbitration Center) explores how the expedited arbitration process might affect due process.

Further, Gretta L. Walters and Erin Valentine (Chaffetz Lindsey LLP) look at the tools in the EAPs aimed at encouraging efficiency and analyse whether those tools will be effective. They discuss the broad obligation in draft provision 2 and also specific provisions in the draft rules, such as the number of arbitrators, provisions dealing with written submissions, time frame to render the award, possibility of no hearing, procedural provision that provide the arbitral tribunal with broad discretion to manage the proceedings consistent with its provision 2 efficiency obligations.

Giuditta Cordero-Moss (Professor, University of Oslo) takes a look at the discussions in the WG II on early dismissal and preliminary determination. She analyses the latest draft provisions prepared by the Secretariat to determine if a request for an early determination in case a claim or an issue manifestly has no merits or is irrelevant, or evidence is inadmissible, is an appropriate tool in the context of expedited arbitration.

Thomas Allen (Shareholder, Greenberg Traurig, LLP) will look at certain strategy considerations for expedited arbitration that parties should be aware of when determining whether to opt for expedited arbitration. Parties often focus on the costs and schedule efficiencies that a streamlined presentation of a case can

achieve, but efficiency does not come for free. The post looks at the tradeoffs to obtain efficiency with expedited arbitration.

Our contributors this week offer a diverse set of perspectives on the topical issue of ensuring efficiency of international arbitration while making sure due process is observed, as currently under consideration by the WG II. We hope you enjoy the series!

The see our full series of posts on the UNCITRAL WG II process, click [here](#).