UNCITRAL Working Group II: Expedited Arbitration Provisions as Stand-Alone Rules, or Appendix and When Should They Apply?

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The UNCITRAL Working Group II ("WG II") will continue its work on drafting expedited arbitration provisions (EAPs) at its next session in Vienna on September 21 – 25, 2020. This post briefly considers some of the key points that will be addressed at the session relating to the form and scope of the EAPs. This discussion is primarily based on the Secretariat's Note prepared for the session and made available on July 23, 2020.

Expedited arbitration procedures have become commonplace in arbitration institutional rules, offering parties an opportunity to resolve less complicated and lower-value disputes with a "fast-track" procedure. This provides greater efficiency and lower costs, while ensuring due process, fairness and effectiveness. Introducing expedited provisions to parties who chose to arbitrate under the UNCITRAL Arbitration Rules (UARs) would offer the option of a streamlined process. However, the ad hoc nature of the UNCITRAL Rules poses a challenge to introducing expedited provisions. Unless the parties have agreed to have their UNCITRAL case administered by an institution, there is no administrative body

empowered to decide gateway issues, such as the applicability of the EAPs in a case.

Form of the EAPs

Expedited provisions in institutional rules are either a set of separate, "stand alone" rules, or are integrated into the regular arbitration rules, typically as an appendix. Of the 59 institutions surveyed by ICCA at the request of the Secretariat, a majority offer expedited procedures integrated into the regular rules.[fn]Of 59 arbitral institutions surveyed, 23 indicated they had "stand alone" expedited rules, while 36 have "integrated" expedited provisions in the regular rules. For example, the ICC has an integrated approach, while the SCC has a "stand alone" approach.[/fn] There are currently diverging views in the WG II as to whether the EAPs should be "stand alone" rules (self-contained or with cross references to the UARs) or integrated into the UARs. While this issue remains open, the current working draft presents the EAPs as an appendix to the UARs, but without prejudice to the final form.

The WG II identified advantages and disadvantages to both approaches, although the need for user-friendliness was highlighted (e.g. A/CN.9/WG.II/WP.214, ¶6). The EAPs need to be user-friendly as the users will include micro, small and medium companies, as well as individuals, who may have limited experience with arbitration and may engage less specialized counsel. Stand-alone rules may be more user-friendly by providing a comprehensive set of rules easy to refer to, as well as easier to promote. However, many of the UARs provisions would need to be duplicated in the EAPs. Integrating the EAPs into the UARs, would avoid this repetition, while needed linkage to the UARs would be easy to address. Some considered that it would be easy to design a mechanism to allow parties to use both the UARs and EAPs, depending on the dispute, putting them on equal footing and that integrated rules allow parties to identify the rules that are specific to the EAPs. However, to use integrated rules, the user needs to study both the EAPs and the UARs to identify the modifications and linkage between the two. This could be confusing for less sophisticated users.

Scope of application of the EAPs

Concerns were raised that the EAPs should not apply retroactively, as Article 1(2) of the UARs contains a presumption to apply the Rules in effect at the date of the commencement of the arbitration. This issue has been addressed by the requirement of "express consent" of the parties to subject their dispute to the EAPs. This requirement can be compared to some institutional rules, (such as the ICC Rules), which provide for an "opt-out" approach if a dispute meets certain criteria, typically based on the value of the dispute. Draft provision 1 of the EAPs provides that the sole criterion for the application of the EAPs is the parties' agreement. The UARs will generally apply, subject to the EAPs modifications and "such modifications as the parties may agree". The parties may agree to apply the EAPs even if their arbitration agreement pre-dated the entry into force of the EAPs.

An issue could arise where a party disputes whether there is in fact an express agreement to use the EAPs. Before an arbitral tribunal is constituted, a decision-maker would not exist to determine whether there was express consent for applying the EAPs. Similarly, prior to the constitution of the tribunal, when the parties agree to convert from the UARs to the EAPs, there would not be a decision-maker to determine the time periods and other matters. The arbitral tribunal would need to make these decisions. If the parties cannot agree on the appointment of a sole arbitrator, then an appointing authority will need to be appointed (if the parties did not designate one). In appointing an arbitrator, the appointing authority would have to make a prima facie determination on whether the arbitration should proceed under the UARs or EAPs; a determination which the arbitrator would ultimately make [A/CN.9/WG:II/WP.214, ¶49)].

The form of the EAPs affects drafting the provisions and the need for cross-references and modifications to the UARs.

Upon filing a notice of arbitration pursuant to the UARs, a party may propose to the other party that the EAPs be used. This may justify revising Articles 3(4) and 4(2) of the UARs to provide that the notice of arbitration and the response to the notice may include a suggestion to use the EAPs. If the parties agree to convert to the EAPs, issues may arise regarding the content of the notice of arbitration and the response, which would have been subject to Articles 3 and 4 of the UARs. Draft provision 4 of the EAPs provides that together with the notice of arbitration, the claimant should communicate its statement of claim in accordance with Article 20 of the UARs. Pursuant to Draft provision 5 of the EAPs, the respondent should communicate the response to the notice together with the statement of defense

pursuant to Article 21 of the UARs. The time for filing these pleadings, as well as the designation of an appointing authority (if not already done), and appointing a sole arbitrator would all need to be adjusted from the UARs time periods to the EAPs.

Draft provision 3(1) provides for the non-application of the EAPs, entitling a party to request, at any time during the proceedings, that the EAPs should no longer apply. The arbitral tribunal may, in exceptional circumstances, grant the request. The draft provision provides six non-exclusive criteria that the tribunal may consider (EAP 3(3) (a – f)). However, there are divergent views on whether to include this guidance for the tribunal in exercising its discretion. Should the EAPs no longer apply, "the arbitral tribunal shall remain in place to the extent possible and conduct the arbitration in accordance with the UNCITRAL Arbitration Rules." [A/CN.9/WG:II/WP.214, Draft Provision 3(4)]. The tribunal may also decide to apply some provisions of the EAPs by exercising its discretion in accordance with Article 17 of the UARs, as well as Draft provision 10 of the EAPs, which could be agreed at the case management conference [A/CN.9/WG:II/WP.214, ¶26]. The request for non-application of the EAPs could be raised prior to the constitution of the tribunal. The proposed solution is that the EAPs would apply until the tribunal made a contrary decision.

Success of the expedited rules rests in the hands of the users

The aim of the EAPs is to improve efficiency and reduce costs and duration of proceedings. This aim could be undermined by parties disputing over whether the EAPs or the UARs should apply and whether applicable provisions have been complied with. Disputes regarding the applicable procedural rules can be quite thorny and have significant implications, leading to delays and increased costs.

The EAPs contain a general provision, Draft provision 2, requiring that both the parties and the arbitral tribunal shall act in an expeditious and effective manner to achieve a fair and efficient resolution of the dispute. Arbitrators will need to conduct the proceedings proactively with strong managerial skills to resolve procedural issues efficiently and effectively with regard to the parties' due process rights and expectations. Ideally, from the start of the case, the tribunal can facilitate a cooperative approach between the parties with the goal to efficiently

and fairly resolve the dispute.

Regardless of the form of the EAPs, they will be linked to the UARs both in the minds of users and in practice. Many of the draft EAPs refer to UAR provisions. In the UNCITRAL Secretariat Note, references are made for each EAP provision to its "interaction with the UARs". The UARs will generally apply to the EAPs except as modified or supplemented by the EAPs.

As with launching any new rules, the success will depend in part on their "user-friendliness", practicability, and predictability. This will be enhanced through education and guidance. The EAPs have great potential to provide useful tools to enhance efficient, cost-effective and fair dispute resolution, particularly suitable for users with less complicated and lower value cases. These users will need to have access to information and guidance about the rules in order to ensure that the EAPs can fulfill their potential. WG II has agreed to consider other related work including model clauses and guidelines for the EAPs. These instruments will be needed to facilitate the use of EAPs, but the arbitration community will also need to contribute to spreading information about the use of the EAPs to both parties and their counsel.

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