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UNCITRAL Working Group II: Does Expedited Equal Efficient?

Gretta Walters, Erin Valentine (Chaffetz Lindsey LLP) · Friday, September 18th, 2020

UNCITRAL's Working Group II ("WGII") resumes next week its work on drafting expedited arbitration provisions ("EAPs") for use with the UNCITRAL Arbitration Rules ("UARs"). One of the key "aims" underlying development of these procedures is "to improve the efficiency and quality of arbitral proceedings." This post examines why efficiency matters, how the EAPs encourage efficiency, and whether those tools will be effective.

Why Efficiency Matters

A perceived loss of efficiency—and the increased time and costs that come with it—has been a major concern of international arbitration users for years. Although there has been extensive discussion regarding how to improve efficiency, the concern remains. For example, a 2006 survey reported that "[e]xpense and the length of time to resolve disputes are the two most commonly cited disadvantages of international arbitration". Yet, nearly a decade later, that survey was still reporting the same user concerns, identifying costs and lack of speed as some of the worst attributes of international arbitration.

In response, many major arbitration rules, such as those of the ICDR, ICC, and SCC, have been amended in recent years to include new or revised expedited procedures. Although the procedures have different nuances, they have a common goal: to directly address efficiency concerns by offering mechanisms that reduce the time and costs of an arbitration. These mechanisms take various forms but typically include features such as provision for a sole arbitrator (versus three), shortened times for exchange of written submissions and for rendering the final award, limited or no document disclosure, and options to eliminate the hearing.

The expedited procedures, when they apply, appear to work. For example, the SCC reported that 95% of its expedited cases in 2019 concluded in less than six months from referral to the tribunal (with 50% reaching conclusion in less than three months). This is compared to the up to twenty-four months required for 95% of cases to reach conclusion under the "regular" rules. Similarly, the ICDR reports that its

expedited procedures can result in a final award in as little as 135 days from initiation of the arbitration. Likewise, the ICC reports that 37 of its first 50 expedited arbitrations reached a final award within six months from the case management conference. This is a significant reduction from the ICC's non-expedited cases, which in 2019 averaged 26 months until final award.

How the EAPs Encourage Efficiency

The draft EAPs make clear that efficiency is at the heart of the new procedures. We refer below to the latest draft EAPs prepared by the Secretariat for discussions scheduled to start on 21 September at the seventy-second session of the WG II. For example, draft provision 2 expressly obligates the parties to "*act in an expeditious and effective manner so as to achieve a fair and efficient resolution of the dispute*." Likewise, the arbitral tribunal is instructed to "*conduct the proceedings in an expeditious and effective manner further taking into account the parties' expectations.*"

In addition to this broad obligation on the parties and tribunal, the EAPs include specific provisions for a more streamlined and less time-consuming and costly process. The following summarizes the key tools aimed at reducing time and costs.

1. ***Sole arbitrator (draft provision 7)***

The EAPs presume that there will be a sole arbitrator absent agreement by the parties to appoint three. This contrasts with the UARs, which default to three arbitrators.

2. ***Streamlined written submissions (draft provisions 4, 5, 13 & 14)***

The EAPs provide for streamlined written submissions under shortened deadlines. The Statement of Claim is due at the same time as the Notice of Arbitration. Respondent has 15 days from receipt of the Notice of Arbitration to submit its Response to the Notice of Arbitration and 15 days from the constitution of the tribunal to submit the Statement of Defense, which must also include any counterclaims or claims for set-off. Draft provision 13 allows for amendments or supplements to a claim or defense within 30 days of the Statement of Defense. Following this window, the parties may not amend or supplement their claims unless the tribunal considers it appropriate. Further, draft provision 14 empowers the tribunal to limit the number of rounds of written submissions. Under this schedule, limited party submissions could be complete in two to three months (depending on the tribunal's constitution).

3. ***Time frame to render the award (draft provision 16)***

Draft provision 16 introduces a timeframe for making the award and a mechanism for extending that deadline. While the ultimate deadline is still being discussed, it appears likely that the EAPs will require the award to be rendered within six or nine months from the date of the tribunal's constitution, absent extension. The draft provision allows parties to agree to modify this deadline and permits the tribunal to extend it "in exceptional circumstances," which is currently undefined.

4. ***Possibility of no hearing (draft provision 11)***

The expedited rules issued by many arbitral institutions presume that an expedited arbitration will be decided on documents only, without an oral hearing. The EAPs take a different approach. As currently drafted, the tribunal has discretion to decide a case on written submissions, but only where neither party objects to doing so. Should a party request a hearing or affirmatively object to decision only on written submissions, the tribunal must hold a hearing. As to the conduct of the hearing, UAR article 28 applies to expedited arbitrations and the tribunal has flexibility to conduct the hearing in an efficient manner.

5. ***Arbitrator discretion in managing proceedings (draft provisions 9, 10, 14, 15, 18)***

The EAPs explicitly provide the arbitral tribunal with broad discretion to manage the proceedings consistent with its provision 2 efficiency obligations. For example, the tribunal can modify the prescribed deadlines, limit written submissions and evidentiary exchanges, hold conferences remotely, and consider arguments for early dismissal or preliminary determination where claims are manifestly without merit, which can improve efficiency and discourage frivolous claims. The EAPs also permit the arbitral tribunal to consider a party's conduct in its allocation of costs.

Will the EAPs Promote Efficiency?

The tools outlined above unquestionably can lead to quicker and less expensive arbitrations. For example, a sole arbitrator's fees are generally less than those of three arbitrators. Moreover, a sole arbitrator offers time savings from fewer scheduling conflicts and potentially quicker deliberations. Likewise, compressed schedules for written submissions and filing certain submissions together (such as the Statement of Claim with Notice of Arbitration) cut down on the time and costs often expected with briefing schedules that span many months if not years in a "regular" arbitration.

Nonetheless, whether the draft EAPs will result in more efficient arbitrations remains to be seen. One issue that WGII has grappled with is that many of the EAPs' efficiency tools, such as the tribunal's authority to limit written submissions, are already available in "regular" arbitration proceedings. WGII considered, however, that the more explicit provisions in the EAPs "*underline*" and "*reinforce*" "*the discretionary power of the arbitral tribunal*" and "*make it easier for the arbitral tribunal to impose limitations*" (A/CN.9/WG.II/WP.214, at ¶¶ 95, 115, 118). The hope is that expressly empowering the tribunal to impose stricter time limits and condensed procedural benchmarks will reduce the risk of challenge and give the arbitrators more confidence to expedite the proceedings. As explained above, a number of institutions have reported that similar expedited procedures have worked to reduce time and costs, so there is reason to believe that the EAPs will also lead to more efficient arbitrations.

The current draft of the EAPs differs from other expedited rules in several ways, however, each of which could undermine the EAPs' efficiency goals. For example, the

EAPs are silent as to the consequence for non-compliance with the deadlines provided therein. This contrasts to the ICC's and SCC's expedited procedures, which provide that arbitrators can be penalized for non-compliance with deadlines. Further differences that could affect efficiency include the availability of an oral hearing upon party request, even despite an order by the tribunal that no hearing is necessary, and application of the EAPs only where the parties expressly "opt in." (A/CN.9/WG.II/WP.214/Add.1, Draft provision 11).[1)] Another underlying key difference is that the EAPs will often apply in non-administered arbitrations, which can present unique efficiency challenges (for example, in resolving applicability of the rules or arbitrator challenges). These differences will likely be points of discussion at the upcoming WGII session.

Ultimately, however, many of these differences may not matter because, critically, the EAPs empower arbitrators with broad flexibility to manage the proceedings. No one approach ensures an "efficient" arbitration; rather, efficiency will depend on a number of factors, including the facts of the case, the parties' conduct, and the tribunal's decisions. The draft EAPs' approach preserves procedural flexibility to confront a myriad of circumstances (some unique to non-administered arbitration) that impact efficiency. But making sure that such flexibility is properly balanced against other efficiency tools will be a key discussion for WGII in finalizing the EAPs.

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References

↑1 This differs from other expedited procedures that apply by default based on the amount in dispute. *See, e.g.*, ICDR Rules, Art. 1(4); ICC Rules, App'x VI Art. 1.

This entry was posted on Friday, September 18th, 2020 at 6:00 am and is filed under Arbitration, Arbitration Institutions and Rules, Efficiency, Expedited arbitration, Reform, UNCITRAL, UNCITRAL WG II Series, Working Group II
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