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UNCITRAL Working Group II: Investment Disputes and Expedited Arbitration: A Probable Symbiosis?

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Arbitrating investment disputes has its peculiarities stemming out of the nature of the dispute, as well as from the parties involved, which become relevant when assessing the feasibility of implementing expedited arbitration provisions. ICSID Arbitration Rules and UNCITRAL Arbitration Rules, the main arbitration rules currently used for investment arbitration proceedings, are in the process of approving their first sets of expedited arbitration rules. This post will discuss these developments.

Peculiarities of Investment Disputes: Short Considerations

In addressing the viability and potential use of expedited arbitration rules for investment disputes, certain elements directly affecting the efficiency of the proceedings must be considered, in addition to other factors which are not specific to investment arbitration proceedings, such as the intricacy of the factual background, bifurcation of proceedings, management of the arbitration proceedings etc.

State party involvement is the main element which should be factored in, with a view of the complexity of State apparatus, complex internal organization, approvals and authorizations to be cleared before any decision, and which usually translate in longer periods required for submission of memorials and evidence. Investment arbitration proceedings may raise specific issues outside of the procedural framework but which may have a direct consequence on it, such as the public interest in the underlying dispute, in some cases translated in the participation of *amici curiae* in the arbitration or transparency obligations under the applicable treaty or rules.

Further, the consent to arbitrate investment disputes is usually the result of the offer of the host State to arbitrate under an international investment agreement (IIA), followed by the acceptance of the offer by the investor by submitting the dispute to arbitration. As such, for an investment dispute to be resolved under an expedited arbitration, the offer of the host State would have to incorporate an expedited procedure.

UNCITRAL Reforms and the ICSID Amendment Process at Glance

Reforms to implement expedited arbitration procedures in investor-State arbitration are particularly likely to emerge from the two major reform processes currently underway at UNCITRAL and ICSID.

At the fifty-first session of the UNCITRAL in 2018, it was agreed that the Working Group II would take up issues relating to expedited arbitration. The work of Working Group II is aimed "at improving the efficiency of the arbitral proceedings, which would result in reduction of costs and duration of the proceedings", and expedited arbitration, "as a streamlined and simplified procedure with shortened time frame", could ensure this efficiency goal.

The UNCITRAL Working Group III on Investor-State Dispute Settlement (ISDS) Reform is also addressing concerns with costs and duration of investment disputes as ongoing concerns with the ISDS system, in addition to the outcome of the arbitration proceedings – inconsistency in arbitral decisions and the lack of predictability of such outcome -, and the arbitrators appointed in the investment arbitration cases. At its 37th session, the UNCITRAL Working Group III discussed a wide range of possible mechanisms to improve the efficiency of ISDS, including the option of expedited procedures for low-value claims. To this end, it was highlighted that such procedures might not be practicable for States when they require more time to prepare their cases. At the 38th session, the UNCITRAL Working Group III included expedited arbitration as one of the possible reform options. Referring to this, the Secretariat emphasized that such expedited procedures may be considered for smaller claims and non-complex cases, as well as the development of rules to streamline the procedures and expedite certain of its aspects. Further, such reform option could be implemented as a stand-alone reform or in conjunction with any other reform options.

While the mandate of the Working Group II is focused "preliminarily on international commercial arbitration", still the relevance of the proposed rules on investment and other types of arbitration is reserved for the later stage of the discussions. This cautious approach is understandable and recognized as such by the Working Group II, given the parallel work of the UNCITRAL Working Group III, as mentioned above, and that certain issues might overlap. This would become relevant in particular with regard to the application of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. If the expedited rules would be presented as an appendix to the UNCITRAL Arbitration Rules, then the UNCITRAL Rules on Transparency would apply to the expedited proceedings, unless expressly excluded by the parties.[1)]

At the same time, the ICSID Arbitration Rules Amendment Process, now at an advanced stage (the last step being a 4th Working Paper published in February 2020), is proposing a set of expedited arbitration rules for ICSID investment arbitration proceedings. This is in line with the overall amendment process of the ICSID Arbitration Rules, and, in particular, with the efforts of reducing the duration of the arbitration proceedings, where possible.

The ICSID Arbitration Rules Amendment Process that commenced in 2018 has, among other, the objective to reduce time and cost, by implementing amendments which address the constitution of the arbitral tribunals, provide for a general obligation for parties and arbitrators to conduct the proceedings in an expeditious manner, incorporate more flexibility in the organization of hearings and witness examination, and introduce expedited arbitration provisions. By implementing the expedited procedure, the arbitration proceedings could conclude within 470-530 days after the date of registration of the Request for arbitration. Compared to 49 months, the average duration of an arbitration procedure, the proposal of expedited proceedings appears to substantially contribute to

addressing the concern with the length of the arbitration proceedings and to strike a balance between the expedited nature of the proceedings and "a realistic schedule for investment disputes given their special characteristics". Nevertheless, expedited arbitration will continue to be an 'arbitration' for the purposes of the ICSID Convention.

Certain Points of Consideration

Consent for advancing an investment dispute under (ICSID or UNCITRAL) expedited rules may be one of the preliminary points of discussion between the parties at the start of an arbitration. Proposed ICSID Rule 75(1) provide for an opt-in model for expedited arbitration, meaning that an agreement is needed in addition to the agreement to arbitrate. Reference to the expedited arbitration may be contained in the arbitration agreement, if there is a contract between the parties, or in the State's offer to arbitrate, be it in an IIA or in the domestic legislation of the host State. Proposed provision 1 of the UNCITRAL Expedited Arbitration Provisions also advances consent as the exclusive criterion for the application of the provisions. It was considered that an express consent will guarantee that awareness of the parties as to the application of the provisions, with the consequences deriving from this.

Both ICSID and UNCITRAL drafts preserve the possibility of opting out of the expedited proceedings under certain circumstances. Proposed ICSID Rule 86 provides for the situations for exiting the expedited arbitration and includes (i) the joint notification by the parties; (ii) upon request of a party, allowing the arbitral tribunal to decide that an arbitration no longer be expedited, based on the complexity of the issues, the stage of the proceedings and all other relevant circumstances. Similarly, provision 3 of the UNCITRAL Expedited Arbitration Provisions provides that (i) at any time during the proceedings, the parties may agree that the expedited proceedings no longer apply, and that (ii) in exceptional circumstances, a party may request the arbitral tribunal to determine that the Expedited Arbitration Provisions shall not apply to the arbitration, in which case, consideration should be given to the overall circumstances of the case, including the amount in dispute, the urgency of the resolution of the dispute and the proportionality of the amount in dispute to the estimated cost of arbitration, procedural fairness, etc.

Both ICSID and UNCITRAL proposals advance an arbitral tribunal composed of a sole arbitrator. Proposed ICSID Rule 76 gives the parties the option to proceed with a sole arbitrator or with a three-member arbitral tribunal and provide for the sole-arbitrator tribunal as the default option, if the parties fail to agree on either option. Proposed provision 7 of the UNCITRAL Expedited Arbitration Rules refers to one arbitrator, unless otherwise agreed by the parties. Sole-arbitrator tribunals are, indeed, associated with lower costs and speedier proceedings, as also reflected in the new generation of international investment agreements, such as CETA, which provides for the sole-arbitrator rule when the investor is a small or medium-sized enterprise or the compensation or damages claimed are relatively low.

As to the management of the proceedings, both UNCITRAL and ICSID drafts have included in provisions addressing the procedural timetable. For example, proposed ICSID Rules 80 and 81 provide that bifurcation of the proceedings is not allowed under the expedited provisions, nor is the objection that a claim manifestly lacks legal merit under current ICSID Arbitration Rule 41(5). Further, the ICSID proposal keeps the hearing on the merits as the default option and provides that it shall be held within 60 days as of the filing of the last submission, that is nine months after the

first session. Proposed provision 11 of the UNCITRAL Expedited Arbitration Rules provides that hearing on the merits shall be held if requested by the parties, thus, reflecting the understanding that the absence of hearings is a characteristic of expedited arbitration proceedings. As to the written submission, proposed ICSID Rule 81 limits the round of submissions to two, with an additional limitation in the second round, on the number of pages submitted – 100 pages. Similarly, interpretation, revision and annulment of arbitral awards rendered in ICSID expedited proceedings have adjusted time limits, in the light of the expedited nature of the proceedings. Proposed provision 14 of the UNCITRAL Expedited Arbitration Rules allows the arbitral tribunal to limit the number of written submissions in the proceedings.

Brief Conclusions

Expedited arbitration proceedings for investment disputes could be a valid response to the concerns with duration and costs, as highlighted by UNCITRAL Working Groups II and III, as well as by ICSID.[2)] The adoption of expedited arbitration rules, however, should not exclude solutions which are available at the pre-arbitration stage, nor should it discourage addressing time and costs of regular arbitration proceedings. Further, one must also consider, in particular for investment disputes, which bear their inherent complexities, that short proceedings are not automatically better proceedings. As such, expedited arbitration proceedings should be flexible (or tailored) enough to respond to the peculiarities of resolving investment disputes.

The see our full series of posts on the UNCITRAL WG II process, click here.

References

?1 For a detailed discussion on the intersection between the UNCITRAL Arbitration Rules, UNCITRAL Transparency Rules and the future UNCITRAL Expedited Rules, see UNCITRAL A/CN.9/WG.II/WP.214, p. 9.

?2 Additional considerations are presented in the forthcoming paper "*Expedited Arbitration Rules for Investment Disputes: ICSID Amendment Process and UNCITRAL Working Group II*" by the author, to be published in the Stockholm Arbitration Yearbook 2020 (Kluwer Law International).

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