Kluwer Arbitration Blog

UNCITRAL Working Group II: Testing Durability: Due Process, Expedited Procedures, and UNCITRAL's Best Fit Model

Rekha Rangachari (New York International Arbitration Center) · Thursday, September 17th, 2020

60 member states and several more non-governmental organizations (NGOs) will soon gather (in person in Vienna and virtually) to commence the 72nd Session of UNCITRAL Working Group II (WGII). The topic and issues of Expedited Arbitration Procedures (EAPs) was primed at the 69th Session of the WGII in New York, including how best to improve the efficiency and quality of proceedings through an expedited timeline – striking the right "balance between fast resolution of the dispute and respect for due process" (A/CN.9/WG.II/WP.207, para. 2; A/CN.9/969, para. 23). Procedural complications can emerge when a matter shifts from regular to expedited schedule, underscoring the need for a fair and equitable process for all parties to present their case (A/CN.9/WG.II/WP.214, para. 7). Due process concerns swirl around expedited arbitration in a similar fashion to, e.g., emergency arbitration, adjudication, and early dismissal, but expedited arbitration is the choice offering for a quicker avenue to comprehensive merits determinations, often tethered by the complexity and amount in controversy.

Taking pen to paper, the WGII was able to pull from a dearth of existing expedited procedures submitted by the NGOs to create their EAPs. Recent sessions have zeroed in on efficiency in the current methodology, streamlining for time and cost balanced against (and not at the expense of) due process and fairness. In recent years, due process and its paranoia have taken a central stage, of particular curiosity when combined with expedited anything (A/CN.9/WG.II/WP.214, para. 93). Most arbitral institutional rules give the tribunal broad procedural discretion to run the case in chief as deemed best (referred by one scholar as the Procedural Judgment Rule).

In spite of this, tribunals often take great care, extending deadlines and other courtesies to protect the award from issues of set-aside and non-enforcement, resulting in, e.g., A Bid for Strong Arbitrators, and a desire for the EAPs to provide tribunals "with a robust mandate to act decisively without fearing that the award would be challenged" (A/CN.9/WG.II/WP.214, para. 93; A/CN.9/1010, para. 95).

In truth, it is infrequent for awards to be stymied by claims of due process violations. This piece looks to the jointed elements of an expedited arbitral process where procedural fairness becomes critical – access and consent, arbitrator selection, and overall structure.

Access and Consent to the EAPs

A threshold issue for delegate consideration was the type of consent needed to access the EAPs. Surveying the landscape of arbitral institutions, in many instances there is a sliding scale amount in controversy that tips a case from regular to expedited proceedings with implied consent. Notwithstanding, the institutional rules offer variety with implied and express consent options, adding layers to party autonomy.

Where UNCITRAL deemed it unsuitable to define small claims (A/CN.9/WG.II/WP.207, para. 24), delegates anchored access to the EAPs squarely on express party consent. To this end, the WGII considered how access and monetary value varies across the global jurisdictions represented by member states, and the manner in which national legislation can subsume UNCITRAL Rules.

Thus, the equitable option across all boundaries, acknowledging expedited arbitration necessarily affords less due process, is express consent by the parties to the EAPs at any time as the sole criterion, without reference to temporal scope and with final determination by the tribunal (Draft Provision 1, A/CN.9/WG.II/WP.214, paras. 9-11; A/CN.9/969, para. 27; A/CN.9/1003, paras. 21-22).

Unilateral withdrawal was also considered in cases with "justifiable" or "exceptional" circumstances, to maintain due process while underscoring the need for finality and certainty, and, in turn, to prevent abuse of process by the parties (A/CN.9/WG.II/WP.214, para. 25; A.CN.9/1010, paras. 36, 43). The Secretariat considered grounds for a party to make such an application and to which body, especially where the tribunal had not been constituted (A.CN.9/1010, paras. 46-50). Of note, the EAPs also reflect the parties' option to waive in advance the right to request withdrawal (A/CN.9/WG.II/WP.214, para. 31; A/CN.9/1010, para. 38) as a measure of streamlining and towards a tighter process. Where the tribunal is constituted, the EAPs enable the tribunal to determine whether the EAPs shall no longer apply in their "entirety," expanding optionality for some provisions to continue to apply, and overall, that the EAPs continue to apply until contrary determination by the tribunal (A/CN.9/WG.II/WP.214, paras. 23, 26).

To assure equal bargaining power, mere reference to the UNCITRAL Arbitration Rules is insufficient to apply the EAPs (A/CN.9/WG.II/WP.214, para. 9), with delegates ever-cautious to protect "micro-, small- and medium-sized enterprises from inadvertently being subject to expedited arbitration" (A.CN.9/1010, para. 21).

Arbitrator Selection

In expedited arbitration under several arbitral institutional rules, the default is a sole arbitrator (consider, e.g., Article 30 read with Appendix VI of the ICC Rules of Arbitration; Article 17 of the 2017 SCC Rules for Expedited Arbitrations; Article E-6 of the 2014 ICDR Expedited Procedures; and Rule 5 of the 2016 SIAC Rules), highlighting another example where party autonomy to each select an arbitrator gives way to economic and procedural efficiency. To safeguard against concerns of fair treatment, while the default under the EAPs is a sole arbitrator (Draft Provision 7, A/CN.9/WG.II/WP.214, para. 70), delegates can consider whether such be qualified by "unless otherwise agreed by the parties," opening the door to additional UNCITRAL guidance on how best to implement. The EAPs do consider the impact, where parties have agreed to the EAPs, of a party requesting a tribunal of more than one arbitrator as ultimately a request for non-application of the EAPs (A/CN.9/WG.II/WP.214, para. 71). To this end, delegates are invited to further consider

whether disagreement on the number of arbitrators under the EAPs defaults to agreement of a sole arbitrator. Rest assured, affirming party autonomy, the appointing authority has no role in choosing the number of arbitrators (A/CN.9/WG.II/WP.212, paras. 39-40; consider also Expedited Procedure Vis-à-Vis Party Autonomy, Enforceable?).

The EAPs underscore the importance of the parties agreeing on an appointing authority (A/CN.9/WG.II/WP.214, para 68; A/CN.9/1003, para. 68; A/CN.9/1010, para. 79). Absent party agreement within 15 days and underscoring efficiency, the EAPs confirm the role of the PCA to designate or serve as appointing authority similar to the UNCITRAL Arbitration Rules (Draft Provision 6, A/CN.9/WG.II/WP.214, paras. 62-64). Of note, in past sessions, there was some discussion whether UNCITRAL should contemplate alternate appointing authorities in addition to the PCA – as a means to offer a more localized experience, especially where regional arbitral institutions have grown considerably in recent years (A/CN.9/WG.II/WP.212, paras. 54-58)).

Procedural Structure

The EAPs memorialize the robust delegate discussions on procedural tools, efficiency, and party engagement to address the shortened procedural calendar, underscoring the need for party consultation (perhaps via "case management conference," although the nomenclature was met with rebuffs) within 15 days after tribunal constitution to discuss timelines for the submission of pleadings, hearings, and award issuance (Draft Provision 9, A/CN.9/WG.II/WP.214, paras. 83-85; A/CN.9/WG.II/WP.212, paras. 62, 64; consider also UNCITRAL Notes Organizing Arbitral Proceedings).

Broad discretion is afforded the tribunal to set timelines, with further discussion left for enforcement of these timelines and late submissions (Draft Provision 10, A/CN.9/WG.II/WP.214, paras. 90-93, 95-96). Of note, the Notice of Arbitration serves as the Statement of Claim, with provision at filing of documents and other evidence to the extent possible (Draft Provision 4, A/CN.9/WG.II/WP.214, paras. 50-54; A/CN.9/WG.II/WP.212, para. 34). Similarly, the Statement of Defense includes Counterclaims, submitted within 15 days after tribunal constitution (Draft Provision 13, A/CN.9/WG.II/WP.214, paras. 108-111). (In past sessions, delegates discussed whether a response alone on the issue of (non)applicability of the expedited procedures was sufficient, or in the alternative, extending the timeline for the responsive pleadings (A/CN.9/WG.II/WP.212, para. 35)). As the consent to the EAPs is possible at any stage, there was also discussion how parties that did not consent in advance to use of the EAPs could adopt them by joint proposal in the submissions (A/CN.9/WG.II/WP.212, para. 36).

Taking note of how some institutional rules permit a documents-only process, the EAPs capture the tribunal's discretion not to hold hearings – absent party request, exceptional circumstances, or party objection to lack of hearing within 15 days after tribunal determination – as well as the conduct of any such hearing (Draft Provision 11, A/CN.9/WG.II/WP.214, paras. 98-106; A/CN.9/WG.II/WP.212, paras. 92-94). It will be interesting to see how new studies – like the ICCA study evaluating "Does a Right To a Physical Hearing Exist in International Arbitration?" – can influence evaluation and evolution of processes, even in expedited form. Said another way, does a reasonable opportunity to present one's case warrant an in-person hearing (even if on request of one party) in furtherance of due process?

Turning next to the issue of award issuance, there was consensus amongst the delegates that, similar to arbitral institutional rules, it was prudent to emphasize the timely (and even rapid) issuance of an award within a fixed time frame after constitution of the arbitral tribunal. An discussion item remains as to a 6 or 9 month timeline – "unless otherwise agreed by the parties" (Draft Provision 16, A/CN.9/WG.II/WP.214, paras. 121-124; A/CN.9/WG.II/WP.212, para. 101). Noting the special nature of ad hoc proceedings, the expedited procedures emphasize tribunal discretion and flexibility against the delegates' preference for reasoned awards (i.e. more compatible with domestic legislations) –emblematic of creating a due process record (A/CN.9/WG.II/WP.214, paras. 130-131; A/CN.9/WG.II/WP.212, paras. 107-108). There is no mention of non-compliance by the arbitral tribunal of the award deadline (and any consequences flowing therewith), also open for further delegate discussion (A/CN.9/WG.II/WP.214, para. 128).

Closing

UNCITRAL's EAPs take the form of rules (or more aptly provisions) rather than guidelines, applied via express party consent. Absent an administering body and in ad hoc, guaranteeing procedural fairness remains a top priority. Key stakeholders at UNCITRAL's upcoming 72nd session will continue to evaluate access and advocacy to expedited procedures, taking into consideration dilatory tactics against the backdrop of the due process paranoia. The EAPs symbiotically can give way to the UNCITRAL Arbitration Rules when priorities shift – towards more structure and less focus on speed/cost/efficiency. The provisional agenda is available here. Stay tuned for more from the front lines.

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

This entry was posted on Thursday, September 17th, 2020 at 6:00 am and is filed under Arbitration, Arbitration Institutions and Rules, Due process, Expedited arbitration, Reform, UNCITRAL, UNCITRAL WG II Series, Working Group II
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