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UNCITRAL Working Group II: Early Dismissal and Preliminary Determination in Expedited Arbitration?

Giuditta Cordero-Moss (University of Oslo) · Saturday, September 19th, 2020 · Institute for Transnational Arbitration (ITA)

Introducing a regulation of early determination in the context of expedited proceedings, highlights a series conflicting interests. Therefore, the UNCITRAL Working Group II on dispute resolution has not yet taken a final position on whether such a regulation should be inserted in the context of expedited arbitration, or whether it should rather be considered as a tool applicable to arbitration in general. In my opinion, an explicit regulation of early determination in expedited arbitration is not desirable.

Background

At its fifty-first session, the United Nations Commission on International Trade Law (UNCITRAL) gave to the Working Group II the mandate to develop proposals that can enhance the efficiency of arbitration, while at the same time ensuring the quality of the proceedings.

This mandate reflects the development that arbitration is undergoing: after having been acclaimed, for decades, as the preferred method of settling international commercial disputes, arbitration is increasingly criticised for, among other things, being too lengthy, time consuming and overregulated; moreover, the legitimacy of arbitration is more and more frequently questioned. The UNCITRAL's decision to work on efficiency and quality of arbitration is meant to respond to this criticism – enabling quicker and simpler proceedings, without compromising the principle of due process.

To start with, the Commission directed the Working Group II to take up issues relating to expedited arbitration. Work on efficiency in arbitration in general may follow.

Expedited arbitration is generally considered to be particularly appropriate for small disputes. It is certainly true that small disputes benefit from being solved through a mechanism with relatively low costs. The fees in expedited arbitration are lower than in ordinary arbitration, and the counsels' fees are probably lower if the number of submissions and the length of hearings are reduced. However, even small disputes may be complicated, and therefore not ideal to be solved through a simplified proceedings. Also, the opposite may be true: disputes involving large values may be relatively simple, and could therefore benefit of simplified proceedings.

Expedited arbitration is a simplified form of proceedings, already introduced by a number of arbitral institutions. It is meant to permit rendering the award within a shorter time frame than ordinary arbitration, and thus to be less costly. A variety of features permit to expedite the proceedings – for example, providing for a sole arbitrator instead of a panel of three, reducing the time limits for the various actions related to the proceedings (appointments, submissions, etc.), reducing the number of submissions, etc. Some of these measures can arguably be decided by the arbitral tribunal in the framework of its discretion to manage the case, even if they are not expressly permitted in the rules. However, it is generally felt that it can be useful to spell out the power to streamline the proceedings. Otherwise, it is feared that some arbitral tribunals, to avoid being accused of breaching due process (the infamous "due process paranoia"), may not dare taking case management measures such as rejecting requests by the parties or imposing restrictions to submissions.

Early dismissal is a procedure permitting the arbitral tribunal to dismiss claims and defences at the outset, without considering them in detail, if they manifestly lack merits. Early dismissal is regulated, for example, in the ICSID Rules (article 41(5)) and in the SIAC Arbitration Rules (rule 29).

Preliminary determination is a procedure permitting the arbitral tribunal to decide an issue of law or of fact without going through all usual procedural steps. Preliminary determination is regulated, for example, in the SCC Rules for Expedited Arbitrations (article 40) and in the HKIAC Administered Arbitration Rules (article 43).

As a matter of fact, not all arbitration rules regulate early determinations. For example, the ICC Rules do not have a specific regulation of the tribunal's power to make early determinations, as this power is deemed to be well within the tribunal's broad discretion in conducting the case.

Analysis of WG II process on early dismissal and preliminary determination: good intentions do not always lead to good outcomes

The Working Group initially discussed early dismissal and preliminary determination as separate issues. However, because there is a certain overlap, the latest draft provisions on expedited arbitration (A/CN.9/WG.II/WP.214) have merged these two measures into one provision, called "Pleas as to the merits and preliminary rulings" (article 18). The draft (without taking final position on whether this will be inserted in the final document) gives a party the possibility to request an early determination in case a claim or an issue manifestly has no merits or is irrelevant, or evidence is inadmissible.

Depending on the complexity of the dispute, early determination can be a very useful tool, permitting to deal at an early stage with preliminary issues, to sort out irrelevant matters, etc. This is useful especially if the dispute is complex. If the dispute is simple, however, as disputes subject to expedited arbitration are supposed to be, it is questionable whether early determination permits to enhance efficiency or even is useful.

Admittedly, it is in any case part of the arbitral tribunal's inherent powers to determine issues whenever the tribunal considers it appropriate. Furthermore, the already mentioned general consideration that spelling out the content of inherent powers may encourage arbitral tribunals to make use of them without succumbing to due process paranoia, is valid also in this context.

However, it can be questioned whether the cure of due process paranoia exposes to risks that are worse than the disease.

By spelling out the power to make early determinations, the draft also creates a duty for the arbitral tribunal to invite the other party to comment on the requests for such early determinations, and a duty for the arbitral tribunal to consider these submissions. In proceedings where the timetable is trimmed to the utmost, and the award is expected to be rendered within six (or nine) months from the date of constitution of the tribunal, adding a procedure for early determination can easily have the effect of distracting the other party and the tribunal from the main issues, or of forcing to extend the time limit for the award. A procedure within the procedure necessarily disturbs the balance when proceedings are expected to be finalised within a short timeframe, because resources cannot be employed on the main proceedings. If the early determination leads to a clear simplification of the case, or even to a final award, this procedure within the procedure will have succeeded in enhancing efficiency of the proceedings. However, if the early determination does not lead to clarification or exclusion of certain issues, this procedure within the procedure has not contributed to simplifying the proceedings; to the contrary, it has complicated them. This can be subject to abuse by parties whose interest is to avoid an efficient process.

To meet this concern, the new draft requires the requesting party to specify as precisely as possible the grounds justifying the request for early determination (article 18 (3)). The intention is to address the concerns about the possible abuse of the tool by the parties resulting in delays. However, this requirement could have precisely the opposite effect. While the intention is to discourage frivolous requests, a party may consider this as a basis to submit lengthy and complicated justifications for its request. This in turn will force the other party to respond to all issues raised, irrespective of how solid they are. In turn, this will force the tribunal to consider lengthy submissions.

In the latest draft provisions on expedited arbitration, to be discussed starting with 21 September at the seventy-second session of the WG II, the request for early determination is regulated in two phases: first the tribunal decides whether to admit the plea, and then the tribunal decides the merits of the plea. In each of these phases, the tribunal has to invite the other party to comment. Resources are thus deviated from the main proceedings twice, causing two exchanges of submissions (assuming that the tribunal admits the request). In its Note accompanying the latest draft provisions, the Secretariat suggests that the Working Group consider whether the two stages could be combined into one. This would reduce the impact of the request on the process, but it does not eliminate the effects of having a procedure within the procedure.

A possible way to reduce these effects is to give the tribunal the power to admit a request for early determination without hearing the other party. While permitting to be more expeditious, this solution may raise issues of due process. Considering the Working Group's mandate to balance efficiency and due process, this alternative does not seem appropriate. Of the arbitration rules mentioned above, only the SIAC Rules give the tribunal the discretion to admit a request, without expressly providing that the other party shall be heard.

The intention to discourage frivolous claims is commendable, and the tribunal's power to make early determination is, generally, an appropriate tool to achieve this aim. In the context of expedited arbitration, however, due to the very short timeframe within which the proceedings are supposed to be finalised, this tool seems to be less appropriate. As the power to determine issues throughout the proceedings is inherent to the arbitral tribunal, it does not seem necessary to spell it

out, thus avoiding to invite possible abuse.

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