Kluwer Arbitration Blog

UNCITRAL Working Group II: Procedural Tradeoffs to Reach Efficiency in Expedited Arbitration and Why Financial Threshold Should Not Be the Only Triggering Factor

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Expedited arbitration is often associated with smaller value disputes. For example, the International Chamber of Commerce suggests expedited arbitration for disputes of $2 million or less, while the Hong Kong International Arbitration Centre has a $3 million threshold for expedited arbitration. Expedited arbitration makes procedural tradeoffs that are deemed warranted because there isn't that much money at stake or the issues are not considered particularly complex. In general, an expedited arbitration offers a timetable with a streamlined written case, truncated document disclosure, and an option (maybe even a preference) for deciding the dispute without a hearing. Tighter deadlines are also imposed on the parties as well as the arbitrators.

Associating expedited arbitration with simpler, smaller disputes should not be viewed as a concession that efficiency can only be had if the stakes are low enough or the matter is uncomplex.

Indeed, even if under the draft provisions on expedited arbitration under consideration by the UNCITRAL Working Group II ("WG II") the express consent of the parties is the only triggering factor (draft provision 1), the WG II discusses if and where guidance could be offered to parties on when to refer a dispute to expedited arbitration, such guidance to be potentially offered by the administering institution, the arbitral tribunal or the appointing authority (see A/CN.9/969, para. 94, A/CN.9/1003, paras. 26-31).

The criteria currently put forward for consideration by the WG II is: (i) the complexity of the transactions and the number of parties involved; (ii) the need to hold hearings; (iii) the possibility of joinder or consolidation; and (iv) the likelihood of an award being rendered within the time frames provided in the expedited arbitration provisions, with the anticipated amount in dispute being just one of few other factors in draft provision 3(3). During the discussions at previous sessions, the WG II refrained from recommending a threshold value beneath which arbitration should be expedited. Under the current draft provisions, the amount in dispute is merely one factor to consider when guiding parties whether to expedite (or for the tribunal to analyze a request by a party to no longer expedite, as per draft provision 3).

WG II appears to be taking a broad view as to the number of situations to which expedited arbitration may apply if the parties agree with the guidance offered to this end. This reflects the reality that the promise of arbitration is tied to its ability to overcome the knock that it is neither faster nor less expensive than court proceedings.

This post is intended to build on the concept that even complex and high value arbitrations can be more efficiently conducted. It looks at some of the procedural tradeoffs posed by expedited arbitration and whether they may be more widely incorporated to deliver better value to arbitration users without sacrificing the strategic benefits of a more traditional arbitration.

The written record can be streamlined

The written submissions in international arbitration are at times unconstrained by good judgment. Pleadings and witness statements can sprawl for hundreds of pages and the exhibit volumes are at times better characterized by what you didn't include in the record as opposed to what you did include. The dual prongs of due process paranoia and advocate insecurity may be conspiring here but the reality is that you damage your case if the arbitrators are incapable of finding it through the din of over argument and manic exhibit designation.

Arbitrators also have a responsibility to do a better job of limiting the scope of written pleadings and narrowing the issues for determination. Tighter controls over the presentation of duplicative evidence and reasonable limitations on the length of pleadings and the number of witness statements could go a long way toward building in more efficiency.

Consolidate the written pleadings

The draft provisions on expedited arbitration that the WG II will discuss at the next session starting on 21 September, provide that that the notice of arbitration is to be accompanied by the statement of claim. On the other hand, the statement of defense is not filed at the same time as the answer under the draft provisions. Rather, a response to the notice of arbitration is filed first, addressing procedural issues, with a statement of defense coming later, 15 days after the constitution of the arbitration tribunal.

The draft provisions under discussion at the WG II have a loosely similar structure to the SCC Rules of the Stockholm Chamber of Commerce that has a feature in its expedited procedures that could be broadly adopted in all cases – namely the consolidation of the request for arbitration and the answer and counterclaim with the statement of claim and statement of defense/statement of counterclaim.

In many arbitrations, the initial filings add little to the overall case and the request for arbitration/answer phase become superfluous after the filing of the statement of claim and the statement of defense. By consolidating or eliminating a first written phase, 60-90 days could be eliminated from the schedule with little to no impact on the strategic considerations for the case other than causing claimant to accelerate the preparation of its case.

Replacing the request for arbitration phase with a more substantive start to the arbitration may also help the arbitrators manage the case better. If arbitrators are holding their case management conferences after a first round of full written submissions are lodged, the arbitrators will also have more information about a case from which to base their future scheduling decisions. In short, the arbitrators may have learned enough about the case to ferret out extraneous issues and to guide the parties on what the arbitrators deem important issues to focus on for the rest of the proceedings.

Impose/Enforce Deadlines on the Timing for Issuance of the Award

We have all seen the ubiquitous letters from arbitral organizations noting that the timeline for issuing the arbitral award shall be extended. No deadline has become more meaningless in dispute resolution than the deadline for issuing an arbitral award. But why in a scenario where the parties fund the entire infrastructure of a dispute, is there still little accountability or effort to make such deadlines meaningful? A system with consequences for non-compliance is sorely needed here.

The draft provisions for expedited arbitration being considered by WG II include the concept that the arbitration proceedings must retain flexibility with respect to timeframes (draft provision 10) but also propose a six or nine-month timeframe for the issuance of an award after the constitution of the tribunal (draft provision 16). This would be aggressive in complex disputes but setting some outer boundaries that have consequences if ignored is warranted.

However, the Secretariat's note for the upcoming session of the WG II outlines that the current draft provisions do not address the consequences of non-compliance by the arbitral tribunal of the time frame and for failing to meet award deadlines and that the WG may wish to confirm that such consequences need not be addressed in the draft provisions on expedited arbitration (A/CN.9/WG.II/WP.214, para. 128). It was previously discussed in the WG II that, in institutional arbitration, institutions would typically limit the reappointment of the arbitrator who was late in issuing an award. Other sanctions were also mentioned including the reduction of fees of the arbitrator and impact on the reputation of the arbitrator. (A/CN.9/969, para 55). In adhoc such measures might be difficult to put in place. Replacing the arbitrator was generally considered to go against efficiency (A/CN.9/969, para. 55, A/CN.9/1003, para. 108, A/CN.9/WG.II/WP.214, para. 128).

Err on the side of live testimony

Expedited arbitration rules often state a preference for resolving a case on the written evidence, absent a hearing. Oral hearings are, in this common law practitioner's view, the most effective way of testing and weighing the credibility of the evidence. If, in principle, matters are to be resolved without an oral hearing, much of the credibility testing function will be lost. This is important because parties may feel more inclined to stretch certain positions made only in writing if they don't need to defend those positions during live hearing testimony, subject to cross examination. There is probably a bigger risk of making a matter overly complex and placing more matters in dispute if there is no in-person credibility to stress test the evidence.

Efforts at reforming arbitration, such as the Prague Rules, look at the adversarial system and the presentation of live testimony and cross-examination as an efficiency drag. The Secretariat's note for the upcoming WG II discussions expresses some agreement with the idea that not holding hearings should be a desired feature of expedited arbitration. The WG II draft provisions only require a hearing to be held if one party so requests. As outlined above, this is not a view I would endorse. If done correctly, presenting and testing evidence through live testimony is not incompatible with efficiency.

Strictly Apply the IBA Rules on the Taking of Evidence

With the advent of the Prague Rules, there has been a lot of debate about the role of document disclosure and arbitral efficiency. However, if properly applied, the IBA Rules on the Taking of Evidence should already limit document disclosure/discovery. A specific document may be requested that is shown to be relevant and material to the outcome of the dispute, that is not public, and is within the possession, custody or control of the party to whom the request is directed.

In many instances arbitrators order document disclosure based merely on relevancy or even potential relevancy, with no regard to materiality or a showing that the requested documents exist at all. They also order the production of categories of documents, which is inconsistent on its face with the IBA Rules. If arbitrators more stringently apply the IBA Rules, document disclosure should already be efficient.

On the same token, the draft provision 15 para. 2 of the expedited arbitration provisions to be discussed by the WG II alerts the parties that extensive production of documents and other evidence would not be possible as the arbitral tribunal may limit requests for the production of documents, exhibits or other evidence.

Conclusion

In sum, there are numerous opportunities to make arbitration more efficient. While some institutions have created a relationship between expedited arbitration and the amount in dispute, efforts at making international arbitration more efficient should not be so limited. The WG II has so far taken a wide view of the situations to which expedited arbitration might apply if parties so agree. This is consistent with feedback from users of arbitration that consistently seek faster and more cost-effective dispute resolution solutions. Efficiency comes at some costs, as various procedural tradeoffs are sometimes required, as briefly discussed above.

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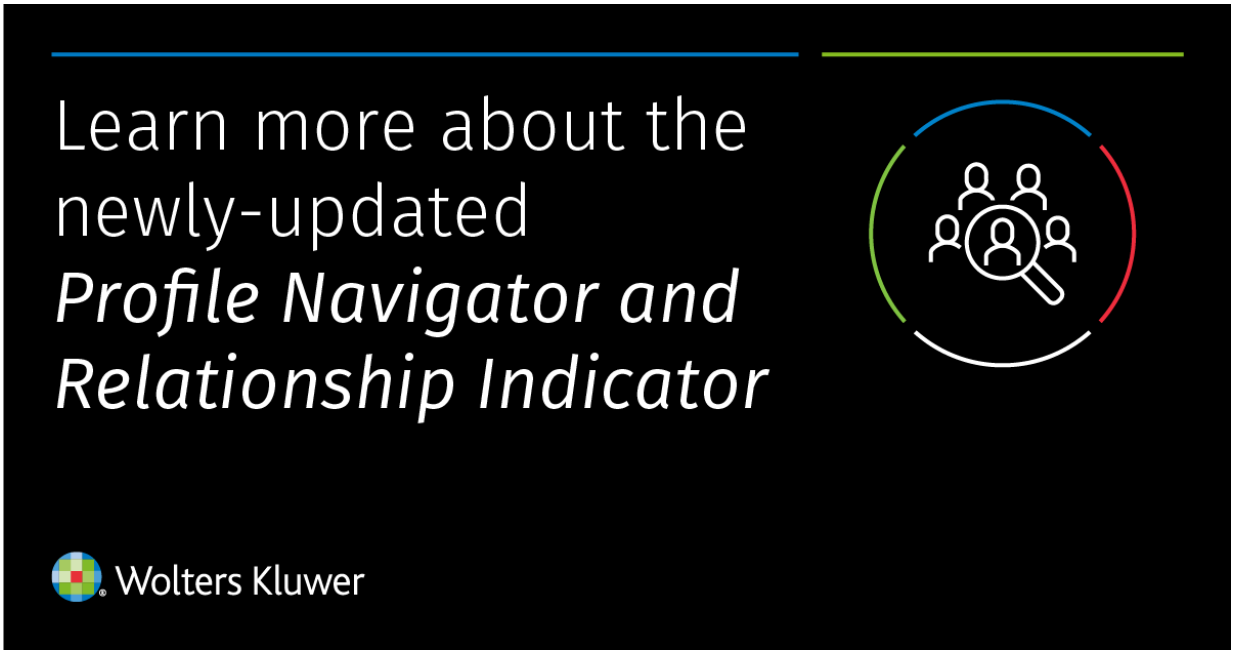

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