Kluwer Arbitration Blog

UNCITRAL, Expedited!

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On 9 July 2021, the United Nations Commission on International Trade Law, better known as UNCITRAL, reached another milestone in its 55-year history. The Commission adopted the 2021 Expedited Arbitration Rules ("EAR") (subject to completion, without objection, of a silence procedure). The EAR modify certain aspects of the UNCITRAL Arbitration Rules ("UAR") and must be read in conjunction with them. The adoption marks the culmination of two and a half years of intensive discussions in UNCITRAL's Working Group No. II. The Commission also adopted, in principle, the Working Group's Explanatory Notes to the EAR, which provide important commentary and guidance on the rules. The Explanatory Notes will be finalized by the Working Group during its fall 2021 session.

While UNCITRAL is known for its pioneering work in the field of arbitration, leading to instruments such as the Model Law, the UAR, and the Mauritius Convention on Transparency, the Commission turned to expedited arbitration rather late in the day. A number of commercial arbitration institutions have already adopted procedural rules on expedited or fast-track arbitration and gathered experience with that format. UNCITRAL's EAR, however, are special in several respects.

A Unique Process

What stands out is the unique setting in which instruments, including the EAR, are elaborated. The Commission's membership consists of sixty Member States elected by the United Nations General Assembly. In addition, other States, international organizations, and non-governmental organizations may attend, and participate in, sessions of the Commission and its working groups. Delegations will often be composed of government officials and renowned experts in their field, both academics and practitioners. The result is a uniquely global, transparent and inclusive process providing a high-quality end product. The EAR, like no other expedited arbitration rules, thus embody a broad consensus, in terms of geographic representation and stakeholder participation, including having benefited from the input of major arbitral institutions.

Under the chairmanship of Andrés Jana from Chile, Working Group II began to tackle the topic of expedited arbitration in February 2019, conducting its habitual bi-annual sessions in Vienna and New York until it was forced to adapt its working methods due to the COVID-19 pandemic. Bearing in mind the nature of UNCITRAL's deliberations and consensus-based decision making process, the transition to a virtual or hybrid discussion format was not simple. The completion of

the project—among the first set of UNCITRAL texts adopted remotely—within the originally envisaged timeframe is therefore an impressive testament to the commitment of, and the spirit of collaboration and collegiality shown by, delegations and the UNCITRAL Secretariat. This was justly highlighted by delegates during last week's session of the Commission, the governing body of UNCITRAL.

Scope of Application and Interaction with the UNCITRAL Arbitration Rules

From the beginning, discussion centred on the question whether to develop a "stand-alone" set of rules or modify the UAR to mandate a more expeditious process. In the end, the Working Group decided to prepare an appendix to the UAR (which will be referred as the UAR "with new article 1, paragraph 5, as adopted in 2021"). Both sets of rules must be read in conjunction with each other. Article 1 of the EAR provides that disputes shall be settled in accordance with the UNCITRAL Arbitration Rules "as modified by these Expedited Rules and subject to such modification as the parties may agree". To help users navigate the interaction between the EAR and the UAR, Article 1 incorporates a footnote listing those provisions of the UARs that do not apply in expedited arbitration.

A second question was whether, following the example of certain institutional rules, the scope of application of the EAR should be tied to a fixed financial threshold or other objective criteria. Yet, this approach was rejected since it can raise a number of practical difficulties in determining the application of the rules in an *ad hoc* setting. Ultimately, it was decided that the rules would come into operation only by express consent, thereby mitigating risks that less-experienced parties (especially small and medium-sized enterprises) may inadvertently subject themselves to the EAR by agreeing to the UAR. The Working Group also felt that the approach would permit the introduction of more stringent rules to expedite the proceedings without raising concerns about due process or the enforceability of awards. Hence, agreement to the 2021 version of the UAR does not automatically encompass the application of the expedited provisions, unless such consent is expressly stated.

Initial Steps of an Arbitration

Article 7 provides that, unless otherwise agreed, there shall be one arbitrator. To facilitate the speedy constitution of the tribunal, the claimant must include, with its notice of arbitration, the proposal of an appointing authority (if one has not already been agreed upon) and the arbitrator. To further expedite the process, the notice of arbitration constitutes, at the same time, the claimant's statement of claim. Even so, evidence must be submitted at that stage only "as far as possible".

The respondent then has 15 days to file its response to the notice of arbitration. The respondent must also address the claimant's proposals regarding the appointing authority and the arbitrator. If the parties reach agreement on the arbitrator, the tribunal is constituted within the first 15 days of the arbitration. Otherwise, any party may request the intervention of the appointing authority. The respondent's statement of defence is due within 15 days of the constitution of the tribunal.

Designating and Appointing Authorities

The appointing authority in international arbitration plays an essential role in ensuring the efficient conduct and integrity of proceedings. It allows the parties to avoid procedural impasses without the need to resort to domestic courts. The UAR entrust the Secretary-General of the Permanent Court of Arbitration ("PCA") with the power to designate the appointing authority if one has not been agreed upon by the parties. Since 2010, the UAR also expressly clarify that the parties can directly agree that the PCA Secretary-General shall act as appointing authority.

The Working Group decided to simplify this process in the context of expedited arbitration. When the parties have not agreed on an appointing authority, Article 6(1) of the EAR authorizes any party to request the PCA Secretary-General to (a) designate the appointing authority or (b) serve as appointing authority. Furthermore, Article 6(3) states that, if the PCA Secretary-General is requested to serve as appointing authority, it will do so "unless it determines that in view of the circumstances of the case, it is more appropriate to designate an appointing authority". Thus, the EAR abolish the default two-step designation/appointment procedure, empowering the PCA Secretary-General to act directly as appointing authority at the request of a party. The approach combines a streamlined process with a degree of residual discretion on the part of the PCA Secretary-General.

Tribunal Discretion in Shaping the Proceedings

Article 10 provides broad discretion to the tribunal to extend or abridge any period of time, with the exception of the timeframe for the issuance of the award, specifically regulated under Article 16.

Article 11 empowers the tribunal to decide that no hearings shall be held, after having consulted the parties and in the absence of a request from a party. In such case, the arbitration is conducted on the basis of documents and other materials.

Article 15 clarifies the discretionary power of the tribunal with regard to the taking of evidence, including a reaffirmation of its power to reject a phase for the production of documents.

These provisions entrust a tribunal with a robust mandate to balance expeditiousness and due process, thus contributing to legal certainty and mitigating risks at the enforcement stage.

Time Period for Rendering the Award

Article 16 was arguably the most debated provision of all. It regulates the important issue of the time limit for the tribunal to render its award. There was early consensus in the Working Group that, as a general rule and unless otherwise agreed, the award must be made within six months from the date of the constitution of the tribunal.

However, it was apparent that a mechanism to accommodate unwanted, but sometimes inevitable, extensions had to be designed. Institutional rules provided no guidance in that respect, as by design no administering institution that could authoritatively extend time limits is provided for in the

EAR. The Working Group was divided between those who favored a hard-limit on the extension of the expedited proceedings (with a total duration of the proceedings ranging from 9 to 12 months being envisaged); and those who supported granting the tribunal the power to authorize further extensions (possibly under strict conditions).

After extensive discussion, initially at Working Group level and then in the Commission session, an innovative solution that combines elements of both approaches was achieved. Article 16(3) and (4) provide that, if the tribunal considers that it is at risk of not rendering an award within nine months, it shall propose an additional – final – extended time limit. If all parties agree to the proposal, the extension is considered adopted. If a party objects to the extension, however, any party may make a request that the EAR no longer apply to the arbitration. After hearing the parties, the tribunal may then make a determination that it will instead conduct the proceedings in accordance with the UAR.

Conclusion

The EAR are a carefully balanced set of procedural rules, which have every potential of sharing the success of the popular UAR. Their adoption, taking effect on 19 September 2021 upon translation of the final text into all six official UN languages, is particularly timely in circumstances where the international dispute settlement system has had to accommodate the unprecedented challenges posed by the COVID-19 pandemic. Parties now have the ability to refer in their contracts to a procedural framework bearing the UNCITRAL “quality seal”, to settle their disputes in a predictable, yet less costly and more expeditious manner.

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