Kluwer Arbitration Blog

An International Framework for Adjudication: Are We Moving in the Right Direction?

Giuseppe Giancarlo Franco · Friday, February 24th, 2023

This blog post covers UNCITRAL's current work on adjudication, whose declared goal is to ensure enforcement of decisions concluding the adjudication procedure, especially in the context of cross-border, long-term projects. The post first gives an overview of the model clauses drafted by UNCITRAL, explaining the role played by the UNCITRAL Expedited Arbitration Rules ("**Expedited Rules**"). Then, it addresses UNCITRAL's approach, contemplating on whether model legislation could have been a more appropriate tool to ensure uniformity across jurisdictions. Finally, the post comments on the latest draft model clause, whose provisions were discussed during the 77th session of Working Group II ("**WGII**").

UNCITRAL's Current Work on Adjudication

From 6 to 10 February 2023, WGII convened at the United Nations headquarters for its 77th session. In line with the two previous sessions, the inaugural meeting of 2023 also devoted time to adjudication. WGII is currently working on a proposal made during its 68th session, where delegates suggested focusing on

> "*facilitating the use of adjudication in the context of long-term projects, in particular construction projects*" (§152).

WGII thus focused on ensuring provisional enforcement of the decision concluding the adjudication process, while preserving the unsuccessful party's right to obtain a review of the decision (§161).

In February 2022, UNCITRAL Secretariat correctly acknowledged that

> "*in jurisdictions without statutory adjudication (…) the main issue is the lack of a framework regarding the enforceability of decisions by adjudicators*" (§9).

It then formulated a series of questions to be addressed by its work. First, it questioned whether a harmonized legal framework to facilitate the international use of adjudication was desirable and feasible. Then, it asked how adjudication decisions could be enforced while still being potentially challenged (§11).

The First Model Clause

A few months later, it was decided that WGII's work had to build on existing UNCITRAL texts (§79), and specifically on the Expedited Rules (§225). At the 76th session, the secretariat first came up with model clause 1, which provided for an arbitral tribunal to resolve any dispute through a 'preliminary award' (§12). WGII also considered the possibility that the dispute was determined by a third-party neutral appointed by the arbitral tribunal or by the parties themselves (§14). The clause further established that the award became final and binding unless one of the parties objected within a short period. The model clause did not set exact timeframes but suggested 60 days to render the preliminary award and 30 days to file the objection. The last provision of the model clause contained an innovative feature whereby the right to object was made conditional on compliance, or commitment to comply, with the award within a timeframe set by the parties (§18).

The 76th session's report provided insights into the discussion within WGII. It should not be surprising that delegates cast doubts on the overall enforceability of the mechanism. It was affirmed that if the decision was rendered by a third-party neutral and not by arbitrators, it could not be regarded as an 'award', and its enforcement would be contingent upon the parties' voluntary compliance (§62). Indeed, this commentary was consistent with the approach adopted with the New York Convention whereby only decisions made by arbitrators are to be considered 'awards' (UNCITRAL Guide on the New York Convention, §22). Concerns were also raised about the meaning of 'preliminary award' given the uncertainties on the enforceability of such awards in both domestic and cross-border contexts (§58). Additional concerns were raised about due process as delegates questioned whether the 'comply-before-challenge' requirement would have unjustly restricted the right to access arbitration of the unsuccessful party (§64). To address some of these issues, it was suggested to cut short and contain the entire model clause under the framework of the Expedited Rules (§65).

The Specialist Determination and its Enforcement

In view of the 77th session, the UNCITRAL Secretariat presented revised draft model clauses, one of which, model clause B, aims at construing a full-fledged, multi-tier dispute resolution mechanism (§18). The new procedure first provides for determination by a neutral specialist appointed by the parties or by an institution chosen by the parties (the procedure is called 'specialist determination' in the model clause). Upon referral of the request for determination, the specialist is appointed and must consult with the parties. After that, the responding party must communicate its views and, within the next 21 days, the specialist has to render its determination, which shall be binding on the parties. In its entirety, the process is designed to last less than 30 days.

If a party does not comply with the determination, the model clause entitles the successful party to refer the failure to comply to arbitration under the Expedited Rules and to request an award giving effect to the specialist determination. To prevent parallel proceedings, parties can use this fast-track procedure only if they are unable to access the full-fledged arbitration provided under paragraph 3 (§30). In addition, to ensure that the project is not disrupted by arbitration, paragraph 3 makes arbitration contingent upon a condition chosen by the parties, such as completion of the project or lapse of a certain period (§32). Contrary to the previous draft, model clause B does not require compliance with the specialist determination as a precondition to arbitration.

What Are We Missing?

Adjudication is a powerful tool in the context of long-term projects, where it is critical to avoid disruptions by rapidly dealing with disputes. Under English law, for example, the adjudicator decides within 28 days, though parties may agree to extend the timeframe. Most of the time, parties acknowledge that they can live with the adjudicator's decision, which is binding but not final upon them, and comply voluntarily (King's College London's Report on Construction Adjudication in the UK, p. 57). In those few instances in which the unsuccessful party does not comply, the successful party is entitled to request the court to issue a summary judgment, namely a court's order to observe the adjudicator's decision. During the summary judgment, the defendant is not entitled to ask the court to review the merits of the dispute and can thus resist enforcement only by challenging the adjudicator's jurisdiction or alleging a breach of natural justice. The unsuccessful party, however, maintains the right to request a full review of the decision by further submitting the dispute to arbitration or litigation.

WGII's attempt to develop model adjudication clauses is praiseworthy. In particular, model clause B contains several interesting features, of which the most innovative one is the fast track to the enforcement of specialist determinations. However, WGII's approach is not immune from criticism.

First of all, by opting for model clauses instead of model legislation, WGII seems to have missed the opportunity of construing a comprehensive, harmonized legal framework for statutory adjudication. Indeed, as the common law experience shows, the success of statutory adjudication is mainly due to its integration with the court system, which ensures the enforceability of the adjudicator's decision. Hence, drafting a model law of adjudication might have been the perfect occasion for setting an international standard thereby promoting uniformity across jurisdictions.

Secondly, model clause B may appear to complicate things rather than make them more straightforward. Indeed, if the second tier of the process is expedited arbitration, why should someone accept to go through specialist determination? Arguably, if parties bypassed the specialist determination phase and referred the dispute straight to expedited arbitration, they would obtain an enforceable decision more quickly. This is without mentioning the cost savings that derive from paying only one decision-maker. In this regard, it is worth recalling that the use of specialist (i.e., non-arbitrators) is more sensible in the context of the so-called 'standing dispute board' whereby a panel of experts is appointed by the parties at the time when they enter into the construction contract. The standing dispute board thus supervises the entire execution of the project and, being familiar with the contract documentation, is in the best position to settle the technical disputes that may arise on the construction site. However, model clause B does not provide for a standing

dispute board. Hence, provided that the expedited arbitral process remains time- and cost-effective, it seems unlikely that parties will be inclined to agree on a mechanism that requires them to first refer the dispute to the specialist determination.

Thirdly, as correctly highlighted by Switzerland, model clause B may want to clarify that parties are entitled to request an award ordering compliance with the specialist determination even if the full-fledged arbitration has already commenced (§10).

Finally, even if expedited arbitration appears to be one of the best solutions to reproduce adjudication in a cross-border context, this option entails a risk as the legal nature and enforceability of an award rendered under expedited arbitration is still subject to debate. Despite this, expedited and emergency arbitration are growing in popularity, and so is the domestic courts' inclination to uphold these procedures. Therefore, lawmakers are starting to review domestic arbitration laws to facilitate the use of these mechanisms. In the UK, for example, emergency arbitration is one of the topics touched on by the Review of the Arbitration Act 1996 (§7.40). One of the proposals to enhance compliance with emergency arbitrators' decisions is to set up a mechanism that, in the case of non-compliance, would rapidly convert the decision into a court order (§7.91). Such a mechanism would indeed be suitable to ensure the enforceability of the expedited arbitral award rendered under the framework of model clause B.

Concluding Remarks

WGII chose the least time-consuming approach. Indeed, even if model clauses do not guarantee an all-encompassing approach, they are time-efficient because UNCITRAL delegates do not have to reach consensus on lengthy, complex texts. Moreover, contrary to model legislation, model clauses do not need to undergo parliamentary procedures to be implemented, as parties can easily insert them into their contracts. However, the success of any pre-arbitral mechanism that seeks to deal with disputes in parallel with the execution of the long-term contract ultimately depends on the enforceability of the decisions (for example, this is one of the critical issues in international construction disputes, as reported by a recent survey (pp. 18-19).

This entry was posted on Friday, February 24th, 2023 at 8:41 am and is filed under Adjudication, Enforcement, English Arbitration Act, Expedited arbitration, Multi-tiered clauses, New York Convention, Pre-arbitral procedure, UNCITRAL Arbitration Rules, UNCITRAL WG II Series
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.