REPORT OF THE FORUM FOR INTERNATIONAL CONCILIATION AND ARBITRATION (FICA) TASK FORCE ON ISSUES RELATED TO EXPEDITED ARBITRATION IN CONNECTION WITH THE UNCITRAL RULES AS CONSIDERED BY THE 68TH SESSION OF UNCITRAL WORKING GROUP II (4-8 FEBRUARY 2019).

Dated: 15 September 2019

Introduction

FICA is a non-profit, non-governmental organization founded in 1998. In 2002, FICA was granted Observer status to attend UNCITRAL Working Groups. Through its members and the publication and dissemination of position papers, articles and comments, FICA participates in the negotiation and development of international instruments impacting all forms of transnational dispute resolution. More information is available on the FICA website: www.fica-disputeresolution.com.

FICA provides the comments in this Report on issues relating to expedited arbitration discussed in UNCITRAL Working Group II at the 69th session in February 2019 on the basis of the Note prepared by the Secretariat (A/CN.9/WG.II/WP.207 of 16 November 2018). An updated Note by the Secretariat (A/CN.9/WG.II/WP.209 of 25 July 2019) will be the basis for further discussions at the upcoming session of Working Group II in Vienna. FICA's comments are presented generally following the questions that were raised by the Miami International Arbitration Society (MIAS) its report dated 29 January 2019, which was provided at the 69th session of Working Group II.

1. Should the UNCITRAL rules address Expedited Procedures?

Most definitely, yes.

The reason for the growth of expedited rules throughout various arbitration institutions is that parties are concerned with the cost and length of international arbitration. It used to be said that arbitration was a more economic and faster option when compared with litigation. This is unfortunately not always the case. Many arbitration proceedings have become complex and time consuming proceedings due to a number of factors: parties often request document production or expert and party witness hearings, and arbitral tribunals often organize interim hearings or render interim awards; also in a great number of arbitrations a three-member tribunal is appointed with the resulting accompanying cost and time delay as opposed to single-member tribunals.

There certainly are some additional costs where three-member tribunals are appointed. However, those additional costs should always be weighed against the need for parties in different jurisdictions to believe that their interests are being considered by a three-member arbitral tribunal as opposed to a single-person tribunal. Perceived and actual bias is a major concern to international parties. The opportunity to choose an arbitrator who may have a track record for impartiality and fair dealing is very important for parties and is one of the reasons to promote international arbitration, which is not available when a local judiciary is in charge of the

proceedings. The fact that such an arbitrator is a participant in a three-member arbitral tribunal does undoubtedly give some measure of assurance to a party. Expedited rules can and are adapted to suit three-member tribunals (as well as single-arbitrator tribunals) and the emphasis placed by some institutions upon the need for single member tribunals should be carefully weighed.

2. Should the expedited procedure cover commercial and treaty disputes or just commercial disputes?

Any expedited procedure should be available to encompass all disputes.

As pointed out in the Miami International Arbitration Society (MIAS) Report, in any Bilateral Investment Treaty (BIT) or International Investment Agreement (IIA) dispute, the parties would "opt in" to an expedited procedure.

Parties are therefore not precluded from avoiding such procedures in the BIT or IIA dispute resolution process.

Arbitration must recover from the negative perception that is currently growing that the overall cost of "normal" arbitration outweighs its benefits. The only effective manner to reduce such costs – and these costs relate to legal representation as well as the costs of the tribunal -- is to ensure that there is a strict and effective expedited timetable capable of practical administration by a tribunal. The FICA Task Force believes that the comments contained in this Report should refer both to commercial and BIT/IIA dispute arbitrations.

3. How should Expedited Procedures be incorporated into the UNCITRAL Arbitration Rules?

The UNCITRAL Arbitration Rules (hereafter "the Rules") are widely used and accepted as an effective method of dispute resolution whether for ad hoc Tribunals or tribunals appointed under the aegis of an institution. Arbitration agreements will sometimes refer simply to the Rules or, where the agreements are prepared by knowledgeable advisors, to a particular set of Rules designated by the year of promulgation.

As Expedited Arbitration Proceedings differ in a number of aspects from regular arbitration proceedings, in particular as the arbitral tribunal will have certain powers to limit or exclude document production and written witness evidence and have discretionary power to decide on the basis of documents only, without necessarily organising a hearing, the FICA Task Force considers that the Expedited Arbitration Rules can only be applicable if the parties agree.

There are many concerns whether there should be a financial limit placed upon disputes referred to Expedited Procedures. If the Expedited Arbitration Rules are applicable only when parties haven chosen for their application, they can do so for whatever amount in dispute.

It is proposed that the Expedited Procedures be incorporated into the Rules as an Annex and that Article 1 be amended to add a new paragraph 5 as follows:

"*Five. The Parties are free to choose for the application of rules on Expedited Procedures, contained in Annex I,*

4. Should there be more than a sole arbitrator under Expedited Procedures?

Yes.

There should be such an option as one of the main reasons for parties opting for arbitration is the opportunity to appoint an arbitrator who is known for impartiality and fairness and indeed perhaps someone with whom the party is already familiar. However, it is acknowledged that a single-member tribunal can frequently manage the Expedited Procedures more speedily than a three-member tribunal.

A clear schedule of costs appropriate to three-person tribunals will often allay the fears of parties as to the extent of the tribunal's costs outweighing the value of the dispute or having a disproportional effect upon the costs of the arbitration.

Arbitrators are prepared to be appointed to tribunals where costs awarded to them are governed by a strict schedule often equated to the value of the amount in dispute.

5. What if the arbitration agreement requires three arbitrators?

The FICA Task Force considers that the parties should be free to determine the number of arbitrators for the arbitration proceedings, also for expedited arbitration

Where the parties are agreed at the outset that a single arbitrator can suitably resolve their dispute, then the arbitration agreement can and should be drafted in a way, which encompasses that agreement.

If, however, the parties have at the outset decided that they wish a three-person tribunal then any Expedited Procedures should make allowances for that requirement unless, of course, the parties themselves at the time that the dispute arises agree to an amendment to the arbitration agreement to permit dispute resolution by a single-member tribunal.

It is emphasised that the promulgation of Expedited Procedures should not be constrained by any *a priori* notion that they require a single person tribunal.

The key aspect of Expedited Procedures is to save costs and to provide a speedy resolution of the dispute. As stated earlier the costs of arbitration are composed of two elements, namely: (i) the arbitral tribunal's costs and (ii) those of the parties' representatives including their legal team.

A fixed scale of charges for the costs of the tribunal addresses the first issue. However, parties' representatives would be unlikely to agree to a fixed scale of charges.

MIAS proposes that where agreements are entered into before the adoption of the Expedited Procedures then an "opt-in" procedure would be available. The FICA Task Force agrees.

6. What is the financial ceiling for application of Expedited Procedures?

The FICA Task Force recommends that there is no financial ceiling or limitation. However, the parties are empowered to place a financial threshold upon such use of Expedited Procedures in the arbitration agreement should they agree. But the Expedited Procedures should not be limited by any financial ceiling for their applicability.

There is frequently a dispute as to the meaning of a term in the contract, which will have a disproportionate effect upon the resolution of the dispute. Is it really necessary to have a full-blown arbitration to decide a matter, which could be addressed by Expedited Procedures even where the result of the decision could affect a dispute worth $500 million? Common sense dictates that the answer must be no. Parties are not irrational. They are driven by commercial common sense. For the reasons set out above the FICA Task Force disagrees with the reasons for the US$5 million ceiling described in the MIAS Report.

7. How should the ceiling be determined?

As indicated above, the FICA Task Force recommends that there is no financial ceiling or limitation of the application of the Expedited Arbitration Rules.

8. Who decides whether Expedited Procedures are applicable?

The FICA Task Force believes that the arbitration agreement should make clear when Expedited Procedures should take effect. The concept of party autonomy is fundamental to the arbitration dispute resolution process.

Therefore, whenever possible the parties should decide when Expedited Procedures should apply or replace the full-blown arbitration procedures. Arbitration institutions or appointing institutions should not take this decision. By doing so the institutions will be subsuming party autonomy to themselves.

Further, there are many occasions when there are no appointing institutions for the reason that the arbitration agreement either deliberately excludes an appointing institution or does not refer to such an institution. These arbitrations then become *ad hoc* arbitrations.

Recalling the importance of party autonomy, it may well be that the parties themselves were unwilling to select an appointing institution for their own personal reasons.

It is believed that the requirement of Article 6.1 to identify an appointing authority does address some of the concerns raised by others except that there is no time limit for such an identification.

Therefore, the FICA Task Force emphasises the importance of the arbitration agreement in addressing the use or otherwise of the Expedited Procedures.

9. How should the appointing authority make the determination to apply the Annex on Expedited Procedures?

The FICA Task Force argues that it should not do so for the simple reason that by doing so the appointing authority curtails party autonomy. If the parties themselves have not identified and described the use of Expedited Procedures in the arbitration agreement then the parties should bear the responsibility for failing to do so.

10. How will the arbitrator(s) be appointed?

The FICA Task Force considers that arbitrators in Expedited Proceedings should be appointed within a shorter time period than under the normal arbitration rules. Whereas Article 8.1 of the Rules provides that, if parties have agreed that a sole arbitrator is to be appointed and if within 30 days after receipt by all other parties of a proposal for the appointment of a sole arbitrator the parties have not reached agreement thereon, a sole arbitrator shall at the request of a party, be appointed by the appointing authority, the FICA Task Force considers that in Expedited Proceedings this time limit should be reduced to 15 days. The FICA Task Force considers that where the Expedited Procedure is being considered then Article 8.2 may be utilised.

Article 8.2 of the Rules provides for the use of a procedure identifying a list of arbitrators unless the parties have decided that the procedure should not be used or where the appointing authority determines in its discretion that the use of a list procedure is not appropriate for the case.

The suggestion that it will take up to 3 months to appoint a tribunal after the appointment of an appointing authority is concerning. Surely the use of an Expedited Procedure suggests the requirement for expedition and thus it would be expected that the arbitrator or three-member arbitral tribunal would be appointed within 4 to 6 weeks of the initial application to a notional appointing authority.

Article 4.3 ensures that the failure of the respondent to respond to a notice of arbitration does not prevent the establishment of the arbitral tribunal. Therefore, there is no procedural inhibition upon the appointing authority in that situation.

The FICA Task Force agrees with MIAS that candidate arbitrators in Expedited Procedures should provide written commitments that they will comply with the short time limits set for the rendering of an award in Expedited Proceedings

11. What time limits should be imposed, if any, on the issuance of an award?

The FICA Task Force considers that the whole point of this procedure is expedition. Therefore, the time limit for the provision of an award in draft as this is now the accepted procedure should be six months from the date the arbitral tribunal has held a case management conference with the parties and an extension of the time limit will only be permitted by agreement of the parties or exceptional good cause. It goes without saying that such agreement by the parties for an extension of the time limit is unlikely to be forthcoming and should not readily be granted.

12. If the parties request more time in the course of the Expedited Procedure, should the arbitrator have discretion to extend the time period for issuance of the award?

Yes, for good cause shown. The FICA Task Force suggests that this is not a matter of arbitral discretion. If the parties have agreed that they need more time in the course of the Expedited Procedure, then the arbitrator or three-member arbitral tribunal must concur. Party autonomy must always play a role and if the parties agree upon something when the arbitrator or the three-member arbitral tribunal must accept that direction.

However, in case the parties request an extension of time for the filing of submissions, they should bear the consequence that the time limit of six months for the rendering of the arbitral award may have to be extended as well.

13. If the arbitrator fails to meet the deadline for issuance of the award should there be any consequence?

The FICA Task Force suggests that Article 41 does not meet the circumstance. That Article addresses fees and expenses. It does not address the situation where there has been a delay on the part of the arbitral tribunal. It is difficult to read into Article 41 direct authority for the appointing authority to act in such a way so as to impose a sanction upon the arbitral tribunal.

Therefore, the FICA Task Force suggests that there should be an addition to Article 41 which spells out in terms that the appointing authority will have the power to reduce the arbitral fees, in the event of a failure to produce or issue the award on time.

14. Should the arbitrator or arbitral tribunal hold a case management conference?

Yes. It is good practice to organise a case management conference with the parties as soon as the arbitral tribunal is constituted, in particular in an Expedited Arbitration. It will matter to determine as rapidly as possible how many submissions the parties will be able to make, and in what size and within what time limit. Also, it will have to be discussed as rapidly as possible whether there will be a document process and whether or not there will be written witness statements and whether or not a hearing for oral arguments will be organised.

15. How should the arbitration be conducted?

An annex to the Rules should set out what powers the arbitral tribunal has in conducting the Expedited Arbitration procedure. This should be different from Article 17-of the Rules so to mark the difference with the regular arbitration

The FICA Task Force considers that the arbitral tribunal should be empowered to carry out an Expedited Procedure with a view to respecting the six-month time limit within which the arbitral award should be rendered.

The FICA Task Force considers that the arbitral tribunal will have to discuss with the parties during a case management conference shortly after its appointment how the Expedited Arbitration procedure shall be conducted. The arbitral tribunal shall at this case management

conference or shortly thereafter have to fix a procedural calendar, which should allow the rendering of the arbitral award within the set time limit of six months. If parties wish more time for certain steps in the proceedings, they should reach agreement on an extension of this six-month time limit.

The claimant should be aware from the outset that a statement of claim will be required and if properly advised will ensure that the statement of claim will replicate the notice of arbitration and allowance for such a requirement can be made in the Expedited Procedure rules.

In other words, the Annex to the Rules on Expedited Arbitration should state that the notice of arbitration will stand as the statement of claim. The Annex can then authorise the respondent to respond with a defence and counterclaim, where necessary, within, for example, 21 days.

It is not always sufficient for a tribunal to be able to glean what is the defence of the respondent unless the respondent is given a clear and distinct opportunity to respond in terms of the claim.

The flexibility inherent within the scheme will indeed allow for the tribunal to make such directions as will limit discovery and the number of witnesses and length of witness testimony. It must be appreciated that in most arbitral proceedings the parties are in control.

The arbitral tribunal should have the discretion to proceed without a hearing. If a party objects, the arbitral tribunal shall hold a hearing or shall decide whether or not to hold a hearing for the presentation of evidence or for oral argument.

16. What should happen if there are amendments to claims or counterclaims, or a party seeks to raise additional claims or counter claims after the Expedited Procedure has been determined to be applicable?

Such amendments should be allowed on such terms as to be fair and equitable to the other party, consistent with the parties' agreement to expedited arbitration.

17. Can the parties exit the Expedited Procedure and revert to the Rules excluding any proposed Annex?

The FICA Task Force concludes that the answer must be yes for the same reason as emphasised throughout this Report that party autonomy is fundamental to the procedure.

18. What kind of award should be rendered?

The award must be reasoned, except in the case of an award on agreed terms.

19. Should the working group address emergency arbitrators or adjudication?

~~T~~he Working Group should reserve the possibility to address emergency arbitration and adjudication after having completed its work on expedited arbitration. These two other types of

dispute resolution are also interesting methods and it would be useful if the Working Group could also deal with this in the nearby future work.

20. Is there a place for the concept of sanctions for non-compliance with the Expedited Procedure?

There are two aspects to this question. The first addresses non-compliance of the parties or a party to a direction of the arbitral tribunal. In that instance there should be allowance for an award of costs against the offending party, prior to the final award.

However, the other aspect of the question addresses the situation where the tribunal itself or arbitrator has failed to comply with the Expedited Procedure by not conducting the tribunal in a manner fitting to the Expedited Procedure and/or further failing to produce the award in a timely manner.

The first question is dealt with within the Rules and does not need further collaboration.

This second question has been addressed in this Report (Item 13).

21. Final offer selection arbitration, where the arbitrator has to choose between one of the parties' final offer.

The FICA Task Force considers that where the parties have agreed to insert in their arbitration agreement for expedited arbitration a direction to the arbitrator that the arbitrator may, after a certain period has expired, exercise his or her discretion to choose one of the parties' final offers, then that choice should be honoured.

This provision is predicated upon a scenario where there has been a claim and where the responding party has made an offer to settle the claim which has not been accepted by the claimant.

A situation where both parties will make offers is not usual in an arbitration. There may well be a claim and a counterclaim. In those circumstances it may well be feasible for the arbitrator, and indeed it would be right and proper for the arbitrator, to adjudge between the competing pleadings and arrive at a decision as to which party pays which party on a proportional success determination.

22. The treatment of a dissenting opinions.

It is the opinion of the FICA Task Force that dissenting opinions should be possible and should be released, to the extent that the arbitration law does not forbid dissenting opinions of arbitrators. However, the arbitral tribunal should check whether the dissenting opinion(s) do not jeopardize the arbitral process and the decision it renders.

It is considered that it is proper that a losing party should have the benefit of all opinions whose determination has arrived at the settlement of the dispute.

It should be made clear that this view is not advocating a dissent in any event in order to facilitate appeals and thus further delay.

23. The need for a brief time frame for the correction or interpretation of the award

There is definitely a need for such a timeframe. The majority of laws enacted under the UNCITRAL Model Arbitration Law envisage a period of four weeks for correction and interpretation.

24. The timeframe for providing the award and reasoning (particularly, if different).

In an expedited procedure an award should be rendered within 30 days of the close of the hearing if a hearing is held. If no hearing is held, the reasoned award should be rendered wthin six months from date of the case management conference.

In case of urgency, the parties should have the possibility to agree that the reasoning of the awards is published after the decision itself of the arbitral tribunal. The reasoning should follow no later than 30 days after the communication of the dispositive part. In such case, it should be considered that the time limit for seeking recourse against the arbitral award starts running only as from the date when the reasoning of the arbitral award is communicated.

A strict time limit for the production of reasons ensures that the tribunal is mindful that the decision must be cogent, coherent and consistent.

25. Should the expedited procedure rules include Early Dismissal and Preliminary Determination?

The expedited procedure rules should include the concepts of “Early Dismissal” or “Preliminary Determination,” unless the parties opt out of including those concepts when agreeing to expedited arbitration or otherwise agree not to include them in their dispute resolution process. In disputes where a party’s claim or defense is without merit, whether as a legal or factual matter, the opposing party should have a means available to present to the arbitrator or tribunal the issue and the opportunity to expeditiously and cost-effectively resolve that issue or issues, whether on a final or preliminary basis. Further, if Early Dismissal and Prelimnary Determination were not included in expedited procedure rules, the arbitrator or tribunal would be forced to wait until the final award to render a decision in a dispute that should have otherwise been decided months earlier. Non-inclusion of these concepts also would permit a party to potentially force the other party to resolve the dispute in order to save the time and expense of otherwise proceeding to a final award.

The FICA Task Force considers that it would be appropriate to insert a similar new provision also in the ordinary Arbitration Rules of UNCITRAL.

Conclusion

FICA fully supports the work of UNCITRAL Working Group II to examine how arbitrations can be conducted in a more time- and cost-effective manner.

In the opinion of the FICA Task Force, it is appropriate to add an Annex to the UNCITRAL Arbitration Rules setting out rules on an "opt in" basis for expedited arbitrations.

The FICA Task Force believes that its comments in this Report can usefully contribute to elaborate an appropriate instrument by UNCITRAL.

Respectfully submitted,

The Forum for International Conciliation and Arbitration (FICA) Task Force on issues related to Expedited Arbitration in connection with the UNCITRAL Rules

Ben Beaumont, Chairperson
Alan Anderson
Tim Lemay
Herman Verbist
Rumiana Yotova