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United Nations Commission on International Trade Law
Working Group II (Dispute Settlement)
Seventy-second session
Vienna (online) 21–25 September 2020

Draft summary

I. Introduction

1. The Commission, at its fifty-first session in 2018, agreed that Working Group II should be mandated to take up issues relating to expedited arbitration.[1] Accordingly, the Working Group commenced its consideration of issues relating to expedited arbitration at its sixty-ninth session (New York, 4–8 February 2019) and had a preliminary discussion on the scope of its work, characteristics of expedited arbitration, and possible form of the work.

2. At its fifty-second session, the Commission considered the report of the Working Group on the work of its sixty-ninth session (A/CN.9/969) and expressed its satisfaction with the progress made by the Working Group and the support provided by the Secretariat.[2]

3. At its seventieth (Vienna, 23–27 September 2019) and seventy-first (New York, 3–7 February 2020) sessions, the Working Group continued its deliberations on draft provisions on expedited arbitration. At the end of the seventy-first session, the Secretariat was requested to prepare a revised draft of the expedited arbitration provisions as they would appear as an appendix to the UNCITRAL Arbitration Rules. In addition, the Secretariat was requested to address the interaction between the expedited arbitration provisions and the UNCITRAL Arbitration Rules and to provide an overview of the different time frames that would be applicable in expedited arbitration (A/CN.9/1010, para. 14).

4. At its fifty-third session, the Commission considered the report of the Working Group on the work of its seventieth and seventy-first sessions (respectively A/CN.9/1003 and A/CN.9/1010) and expressed its satisfaction with the progress made by the Working Group and the support provided by the Secretariat.[3] The Commission requested the Working Group to continue its work on preparing the draft provisions on expedited arbitration and to suggest how those provisions could be presented in connection with the UNCITRAL Arbitration Rules.[4] The Commission further

[1] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17), para. 252.
[2] Ibid., *Seventy-fourth Session, Supplement No. 17* (A/74/17), paras. 156–158.
[3] Ibid., *Seventy-fifth Session, Supplement No. 17* (A/75/17), under preparation, paras. ***.
[4] Ibid., paras. ***.

requested the Working Group to briefly review the draft texts on international mediation[5] at its seventy-third session in 2021, so as to facilitate speedy adoption of those texts at the fifty-fourth session of the Commission in 2021.[6]

II. Organization of the session

5. The Working Group, which was composed of all State members of the Commission, held its seventy-second session in Vienna, from 21 to 25 September 2020 in line with the decision on the format, officers and methods of work of the UNCITRAL working groups during the coronavirus disease 2019 (COVID-19), adopted on 19 August 2020 by the State members of UNCITRAL (contained in document A/CN.9/1038). Arrangements were made to allow delegations to participate in person and remotely.

6. The session was attended by the following State members of the Working Group: Algeria, Argentina, Australia, Austria, Belgium, Brazil, Canada, Chile, China, Colombia, Côte d'Ivoire, Croatia, Czechia, Dominican Republic, Finland, France, Germany, Honduras, Hungary, India, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Lebanon, Libya, Malaysia, Mexico, Peru, Republic of Korea, Romania, Russian Federation, Singapore, Spain, Sri Lanka, Switzerland, Thailand, Turkey, Ukraine, United States of America, Venezuela (Bolivarian Republic of), Viet Nam and Zimbabwe.

7. The session was attended by observers from the following States: Bahrain, Burkina Faso, El Salvador, Egypt, Madagascar, Mozambique, Myanmar, Netherlands, Nicaragua, Norway, Paraguay, Somalia, South Sudan and Uruguay.

8. The session was also attended by observers from the Holy See.

9. The session was further attended by observers from the following invited international organizations:

(a) *Intergovernmental organization*: Eastern and Southern African Trade and Development Bank, Economic Commission for Latin America and the Caribbean (ECLAC), International Centre for Settlement of Investment Disputes (ICSID), Mexican Section of the TMEC Secretariat, Permanent Court of Arbitration (PCA), Secretaría de Integración Económica Centroamericana (SIECA) and South African Development Community (SADC);

(b) *Non-governmental organizations*: Alumni Association of the Willem C. Vis International Commercial Arbitration Moot (MAA), Arbitral Women, Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Asian International Arbitration Centre (AIAC), Association of the Bar of the City of New York (NYCBAR), Beijing Arbitration Commission/Beijing International Arbitration Center (BAC/BIAC), Belgian Centre for Arbitration and Mediation (CEPANI), Cairo Regional Centre for International Commercial Arbitration (CRCICA), Chartered Institute of Arbitrators (CIARB), China International Economic and Trade Arbitration Commission (CIETAC), CISG Advisory Council (CISG-AC), Construction Industry Arbitration Council (CIAC), Florence International Mediation Chamber (FIMC), Forum for International Conciliation and Arbitration (FICA), Georgian International Arbitration Centre (GIAC), German Arbitration Institute (DIS), Hong Kong International Arbitration Centre (HKIAC), Hong Kong Mediation Centre (HKMC), Inter-American Arbitration Commission (IACAC-CIAC), International Academy of Mediators (IAM), International Bar Association (IBA), International Council for Commercial Arbitration (ICCA), International Insolvency Institute (III), International Institute for Conflict Prevention & Resolution (CPRADR), Korean Commercial

[5] Draft UNCITRAL Mediation Rules (A/CN.9/1026); draft UNCITRAL Notes on Mediation (A/CN.9/1027); and draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018) (A/CN.9/1025).

[6] *Official Records of the General Assembly, Seventy-fifth Session, Supplement No. 17* (A/75/17), under preparation, para. ***.

Arbitration Board (KCAB), Law Association for Asia and the Pacific (LAWASIA), Madrid Court of Arbitration, Miami International Arbitration Society (MIAS), New York International Arbitration Center (NYIAC), Russian Arbitration Association (RAA) and Vienna International Arbitration Centre (VIAC).

10. According to the decision made by the State members of the Commission (see para. 5 above), the following persons continued their offices:

Chair: Mr. Andrés Jana (Chile)

Rapporteur: Mr. Takashi Takashima (Japan)

11. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.213); and (b) a note by the Secretariat on draft provisions on expedited arbitration (A/CN.9/WG.II/WP.214 and Add.1). Upon invitation by the chair of the Working Group on 27 August 2020, written comments were submitted by delegations, which were made available on the UNCITRAL website.

12. The Working Group adopted the following agenda:

1. Opening of the session.
2. Adoption of the agenda.
3. Consideration of issues relating to expedited arbitration.

III. Consideration of issues relating to expedited arbitration provisions

1. General

13. While noting that it had yet to determine the final presentation of the expedited arbitration provisions (EAPs), the Working Group decided to consider the EAPs as they would appear as an appendix to the UNCITRAL Arbitration Rules based on document A/CN.9/WG.II/WP.214 and to discuss the form and presentation at a later stage of its deliberations.

14. It was generally felt that it would be useful to prepare an accompanying guidance material or explanatory note to the EAPs. It was stated that while the EAPs themselves needed to be clear and easily understandable, such guidance material could assist the users of the EAPs, particularly those not familiar with such procedure.

15. During the discussion, it was mentioned that the work of the Working Group should avoid any overlap with the work of other working groups, in particular that of Working Group III (ISDS Reform).

2. Scope of application

16. The Working Group then considered draft provision 1 addressing the scope of application of the EAPs.

17. In response to a suggestion that the phrase “and subject to such modification as the parties may agree” could be deleted in the context of the EAPs, it was said that the flexibility provided to the parties under the UARs would also need to be retained in the EAPs, particularly in relation to draft provision 3.

18. On the question of whether it would be necessary for the UARs to refer to the possibility of a party proposing to the other party or parties that the EAPs should apply to the arbitration, it was generally felt that there was no need to include such language in the UARs. It was said that such information could be usefully provided in a guidance document. It was also widely felt that the consequences of the parties agreeing to apply the EAPs after initiating non-expedited arbitration could be addressed in a guidance document.

19. The Working Group approved draft provision 1, unchanged.

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Addendum

III. Consideration of issues relating to expedited arbitration provisions (*continued*)

3. Incorporation of the EAPs into the UARs (A/CN.9/WG.II/WP.214, para. 34)

1. The Working Group considered two possible approaches to incorporate the EAPs into the UARs. One approach was to present the EAPs as an appendix to the UARs with no additional paragraph in the UARs. In support, it was noted that article 1(1) of the UARs provided the parties with the flexibility to modify the UARs. It was also said that even if the EAPs were to become an appendix to the UARs, it would not amount to an amendment of the UARs and thus no reference was necessary in the UARs.

2. Another approach was to insert an additional paragraph in article 1 of the UARs along the following lines: "Where the parties so agree, the Expedited Arbitration Provisions in the appendix shall apply to the arbitration." It was said that such wording would alert the parties that they needed to explicitly agree to the application of the EAPs in order for them to apply to the dispute. It was suggested that the drafting of article 1(4) of the UARs with regard to the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration could be a model to follow, as a new appendix would amount to an amendment of the UARs. While support was expressed for this approach as being clear and user-friendly, it was also said that the insertion of an additional paragraph in article 1 of the UAR could lead to ambiguity when interpreting the intention of the parties on which procedure they opted for. In particular, a concern was raised that, by referring to the EAPs in the UARs, the EAPs might be deemed to apply when the parties had agreed to the application of the UARs. In response, it was clarified that the application of the UARs would not imply any automatic application of the EAPs as consent was required for the application of the EAPs, as stipulated in both the additional paragraph by the words "so agree" and draft provision 1.

3. Views were expressed that the incorporation of the EAPs into the UARs might need to be revisited once the Working Group had determined the form and presentation of the EAPs. In that context, a number of delegations expressed the

preference to have the EAPs presented as an appendix for reasons of clarity and also to enable their promotion.

4. It was mentioned that the inclusion of an additional paragraph in the UARs might need to be considered in conjunction with other suggested amendments to the UARs. In response, it was underlined that the inclusion of a reference to the EAPs in article 1 of the UARs would not constitute a substantive amendment, and therefore a decision on that matter did not necessarily need to be deferred to a later stage when possible amendments to the content of the UARs would be considered.

5. While there was general support for including an additional paragraph in article 1 of the UARs to incorporate the EAPs, the Working Group agreed to revisit the matter after its consideration of the form and presentation of the EAPs.

4. General provision on expedited arbitration (A/CN.9/WG.II/WP.214, paras. 14–18)

6. The Working Group considered draft provision 2 which included a general provision on the guiding principles of expedited arbitration applicable to the parties and to the arbitral tribunal.

7. Some doubts were expressed regarding the need for draft provision 2, on the basis that it would be redundant in light of article 17(1) of the UARs. It was suggested that to the extent possible, repetitions of wording in the UARs should be avoided in the EAPs. Accordingly, it was suggested that the substance of draft provision 2 should be included in a guidance document.

8. A widely shared view was that there would be merit in retaining draft provision 2 in the EAPs, as it highlighted the expeditious and effective nature of the proceedings, and the obligation of the parties and the arbitral tribunal to act in an expeditious manner. It was also mentioned that draft provision 2 should be read in conjunction with article 17(1) of the UARs. Furthermore, it was pointed out that draft provision 2, by referring to fairness, aimed to strike a balance between an expeditious and a fair process. It was also said that draft provision 2 included additional elements of "expeditiousness" and "effectiveness", which distinguished it from article 17(1) of the UARs. It was further noted that the inclusion of draft provision 2(1) would make it possible for the arbitral tribunal to remind the parties of their duty to cooperate for a swift resolution of the dispute, particularly in the context of ad hoc arbitration where there would be no administering institution to expedite the process.

9. A number of drafting suggestions were made with regard to draft provision 2. It was suggested that the heading of the draft provision could refer to "expeditiousness" and/or "efficiency". While a suggestion was made that the two paragraphs in draft provision 2 could be merged, it was also suggested that they should be separated as paragraph 1 dealt with the obligations of the parties and paragraph 2 with those of the arbitral tribunal taking into account the expectations of the parties.

10. It was suggested that draft provision 2 should highlight the need for the parties to cooperate in ensuring efficiency of the process and for the arbitral tribunal to be mindful of the time frames in the EAPs. It was further proposed that the obligation to act in an expeditious and effective manner should be linked with the obligation to act "in accordance with the EAPs". Drafting suggestions to replace the word "expectations" at the end of paragraph 2 with the word "intention" or the words "agreement to apply the EAPs" were also made.

11. Regarding the placement of draft provision 2, it was suggested that it would be better placed after draft provision 3, as both draft provisions 1 and 3 dealt with the application of the EAPs.

Expansion of draft provision 2 to cover designating and appointing authorities

12. The Working Group considered the question of whether draft provision 2 should be expanded to cover designating and appointing authorities. A number of delegations

expressed the view that such expansion was not necessary, on the basis that article 8(2) of the UARs sufficiently addressed that matter. In response, it was pointed out that it would be useful to stress that those authorities were also expected to act more expeditiously in expedited arbitration and reference was made to the time frames in article 6 of the UARs.

Availability of the arbitrators

13. The Working Group considered whether the arbitrators might be requested to formally confirm their availability and readiness to ensure an expeditious conduct of the arbitration in a statement, possibly combined with the statement of independence. One view was that there was no need to prepare a separate model statement for expedited arbitration as draft provisions 2 and 9(3) combined with the model statement of independence pursuant to article 11 of the UARs served that purpose. It was suggested that it would be preferable not to distinguish non-expedited arbitration under the UARs and expedited arbitration under the EAPs, as it could give the misperception that arbitrators under the UARs were not subject to the same standards. It was therefore suggested that the matter could be included in the guidance document.

14. On the other hand, it was stated that it would be useful to have a model statement for expedited arbitration, which would acknowledge the expeditious nature of the proceedings and highlight the commitment of the arbitrator to undertake the duties required under the EAPs. It was suggested that the EAPs (possibly in draft provision 8) could include an affirmative requirement that the arbitrator would devote the time necessary and would comply with the time frame in draft provision 16 to render an award.

15. Experience of arbitral institutions administering expedited arbitration was shared. It was highlighted that most institutions required confirmation from potential arbitrators of their availability to conduct expedited arbitration. However, most institutions indicated that the same model statement was used for both general and expedited arbitration, while the latter could contain more stringent language.

Conclusions

16. It was generally felt that draft provision 2 should be retained in the EAPs with some drafting improvements (see paras. ** above). It was also agreed that draft provision 2 should not be expanded to cover designating and appointing authorities. It was said that the need for designating and appointing authorities to act expeditiously in accordance with the time frames and more generally with the spirit of the EAPs could be mentioned in the guidance document.

5. Non-application of the Expedited Arbitration Provisions (A/CN.9/WG.II/WP.214, paras. 19–31)

17. The Working Group considered draft provision 3 addressing circumstances where the EAPs would no longer apply as well as the potential consequences. It was clarified that draft provision 3 addressed situations where the parties had agreed to the application of the EAPs, but afterwards they agreed to withdraw from the expedited proceeding or one of the parties wished to withdraw from it. In that context, it was pointed out that the heading of draft provision 3 ought to be amended to better capture the notion that the EAPs would no longer apply rather than using the word “non-application”.

Draft provision 3(1) – Agreement of the parties on non-application

18. The Working Group approved draft provision 3(1) unchanged.

Draft provision 3(2) – Request by a party for non-application

19. The Working Group considered draft provision 3(2), which provided a mechanism for a party that had initially agreed to the application of the EAPs to subsequently request their non-application to the arbitral tribunal.

20. It was pointed out that paragraph 2 only provided for the possibility of the arbitral tribunal to determine that the EAPs would no longer apply in their "entirety" and that flexibility should be provided to the tribunal to determine that some of the EAPs would continue to apply or would not apply to the arbitration. Accordingly, it was suggested that the words "or parts thereof" should be inserted after the words "Expedited Arbitration Provisions". In response, it was mentioned that arbitral tribunal already had the discretion to conduct the arbitration in a manner it considered appropriate and that providing such flexibility explicitly in the EAPs might cause confusion to the parties on whether the proceedings were being conducted under the UARs or under the EAPs. It was suggested that the matter should be revisited when considering draft provision 10, which addressed the discretion of the arbitral tribunal with regard to time frames.

21. A view was expressed that while draft provision 3(1) would be based on party autonomy, draft provision 3(2) would run contrary to the notion of party autonomy, mainly the agreement of the parties to resolve their disputes under the EAPs. It was said that leaving the decision on the suitable procedure in the hand of arbitral tribunals could lead to uncertainties. In response, it was observed that draft provision 3(2) reflected the understanding of the Working Group to provide a mechanism for a party to request withdrawal from the EAPs only in limited instances, which would comfort parties entering into an agreement on expedited arbitration. It was stressed that draft provision 3(2) would only allow parties with persuasive and justified grounds to resort to non-expedited arbitration. It was further mentioned that without such a provision, the time period in draft provision 16 could be quite demanding in certain cases.

22. It was suggested that any determination by the arbitral tribunal should be based on consultation with the parties as stipulated in paragraph 3. With regard to the words "exceptional circumstances" in paragraph 2, it was generally felt that the words should be retained to highlight the exceptional nature of the request by the party and of the determination by the arbitral tribunal. It was also highlighted that that phrase could prevent any abuse by the parties to delay the process. On the other hand, it was suggested that the paragraph 2 could be further elaborated to address the point that the determination by the arbitral tribunal could be based on the necessity or the reasonableness to rely on a procedure other than expedited arbitration or on the inappropriateness of the EAPs for the resolution of the dispute.

23. Suggestions were also made that the arbitral tribunal, when making the determination under paragraph 2, should be required to provide its reasoning and be bound by the obligation to conduct the proceedings in an expeditious and effective manner.

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Addendum

III. Consideration of issues relating to the expedited arbitration provisions (*continued*)

5. Non-application of the Expedited Arbitration Provisions (A/CN.9/WG.II/WP.214, paras.19-31) (*continued*)

Draft provision 3(3) – Elements to be taken into account when making the determination

1. It was noted that paragraphs 2 and 3 need to be read together and that paragraph 3 did not attempt to list the "exceptional circumstances" mentioned in paragraph 2 but set out the elements to be taken into account by the arbitral tribunal when making a determination in accordance with paragraph 2. It was further clarified that the list in paragraph 3 was illustrative and not exhaustive.

2. It was underlined that the parties' agreement to submit their disputes to the EAPs ought to be complied with and, therefore, withdrawal from the EAPs should only be possible in limited circumstances. It was said that paragraph 3 provided useful guidance to the arbitral tribunal in making that determination and ensured that requests for withdrawal from the EAPs were not misused and did not amount to delays.

3. Diverging views were expressed on whether the list of elements contained in paragraph 3 should be placed in a provision, a footnote or a guidance document. One view was that providing such a list in the EAPs could invite parties to raise a number of justifications for withdrawing and make a quick determination difficult. Another view was that the list in the EAPs provided ample guidance for making the determination and on which elements would be taken into account by the arbitral tribunal.

4. Considering that the notion of "exceptional circumstances" could be interpreted differently, it was suggested that those words could instead refer to circumstances where the EAPs would no longer ensure the parties' expectation of a fair proceeding. In response, it was pointed out that referring to parties' expectation would introduce a subjective criterion, particularly as the expectation of the parties would likely differ.

5. It was suggested that the elements listed in paragraph 3 could be simplified, for example, by referring to the complexity of the dispute, the stage of the proceeding and other relevant circumstances.

6. In response to a suggestion that due process should be another element to be considered by the arbitral tribunal, it was said that caution should be taken as the right of the parties to due process was also preserved in expedited arbitration. In that regard, doubts were expressed about referring to "procedural fairness" in subparagraph (f).

7. After discussion, it was widely felt that draft provisions 3(2) and 3(3) should be revised to set a high threshold limiting parties from withdrawing from EAPs easily and to provide guidance to the arbitral tribunal when making the determination. The Working Group agreed to consider a revised draft at its next session and to further determine whether the elements to be taken into account by the arbitral tribunal should be better placed in the EAPs and, if so, which.

Draft provision 3(4) – Consequences of the non-application

8. The Working Group considered draft provision 3(4), which addressed the consequences of when the EAPs would no longer apply to the arbitration. It was explained that the purpose of that paragraph was to ensure continuity and to avoid delays while also safeguarding party autonomy.

9. It was generally felt that the default rule in case of a change from an expedited to a non-expedited proceeding should be that the arbitral tribunal remain in place. In that context, it was suggested that the words "to the extent possible" should be deleted to reinforce that rule. On the other hand, support was also expressed for retaining those words as they provided flexibility to the parties and the arbitral tribunal when transitioning to non-expedited arbitration.

10. With regard to drafting, it was suggested that since the words "to the extent possible" would be open to interpretation, they could be replaced with text specifying the situations where the arbitral tribunal would no longer remain in place, for example, when the parties agreed to compose a new tribunal (possibly with more than one arbitrator) or when the arbitrator was not available to conduct non-expedited arbitration and had to resign. It was, however, mentioned that such instances were provided for in other parts of the UARs and it would be preferable to mention those instances in a guidance document.

11. Another drafting suggestion was to provide that the non-application of the EAPs would not entail a change in the arbitral tribunal, which would better underline the rights of the parties with regard to the composition of arbitral tribunal. Yet another drafting suggestion was that the words "in accordance with the UARs" would need to be qualified as the arbitral tribunal would have been composed in accordance with the EAPs. Lastly, it was suggested that transition to non-expedited arbitration could be mentioned as an acceptable reason for the arbitrator withdrawing from office.

12. More generally, it was suggested that paragraph 4 should provide that (i) the non-expedited proceeding would commence at the stage where the expedited proceeding ended, and (ii) decisions made during the expedited proceeding would remain applicable. With regard to the latter, it was, however, observed that there might be instances where the arbitral tribunal might need to depart from its earlier decisions.

13. The Working Group approved paragraph 4 in substance and agreed to consider a revised draft taking into account the comments made (see paras. 9–12 above).

Model Clause A

14. The Working Group agreed to defer the consideration of model clause A until a separate model clause for the EAPs was prepared.

6. Issues relating to the application and presentation of the Expedited Arbitration Provisions (A/CN.9/WG.II/WP.214, paras. 35–49)

15. With regard to the issues discussed in paragraphs 43 to 49 of document A/CN.9/WG.II/WP.214, it was generally felt that the contents therein could be usefully placed in a guidance document. It was further agreed that some of the elements that the parties should consider when referring to the EAPs could be formulated into a model clause for the EAPs.

Application of the UNCITRAL Rules on Transparency to expedited arbitration

16. The Working Group considered the question whether the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("Transparency Rules") would apply in the context of expedited arbitration. It was recalled that the Working Group had yet to assess the relevance of its work on expedited arbitration to investment arbitration and that the consideration was not to address that matter.

17. Views were expressed that the analyses of the question in paragraphs 38 to 40 of document A/CN.9/WG.II/WP.214 deserved further consideration. Some delegations indicated that they might make submissions to clarify their position on the matter, mainly that if State parties to an investment treaty were to agree on the application of the EAPs, it should be provided that additional consent would be required for the application of the Transparency Rules.

18. The Working Group agreed to inform Working Group III (Investor-State Dispute Settlement Reform) of the progress made so far after its seventy-third session in 2021.

7. Notice of arbitration, response thereto, statements of claim and defence (A/CN.9/WG.II/WP.214, paras. 50–61)

Draft provision 4

19. The Working Group considered draft provision 4, which required the claimant to communicate its statement of claim along with its notice of arbitration. There was general support for draft provision 4.

20. It was pointed out that it might be challenging for a claimant as draft provision 4(1), by referring to article 20(2) to (4) of the UARs, required a statement of claim to be accompanied by not only documents but also "other evidence relied upon". It was said that such wording could be understood as requiring witness and expert statements to be presented with the statement of claim and reference was made to draft provision 15. Accordingly, a suggestion was made to require a claimant to identify in its statement of claim any witness whose testimony it would rely on, the subject matter of the testimony and any substance matter for which the claimant intended to submit expert reports. It was suggested that a respondent would be required to do the same in its statement of defence.

21. In response, it was stated that draft provision 4(1) was intended to require, for the sake of efficiency, the presentation of the complete case but also provided flexibility to the claimant as the statement of claim should, "as far as possible", be accompanied by all documents and other evidence relied upon by the claimant, "or contain reference to them". Therefore, it was felt that there was no need to add additional language in draft provision 4 and that clarification could be provided in a guidance document.

22. In response to a question on the meaning of draft provision 4(2)(b), it was noted that it should not be read as requiring the claimant to put forward the name of the proposed arbitrator, but rather to suggest a list of suitable candidates/qualifications, or a mechanism to be used by the parties for agreeing on the arbitrator. It was clarified that in case the parties agreed to more than one arbitrator in expedited arbitration, the draft provision would not require the claimant to propose the appointment of a sole arbitrator.

23. As a general point, a question was raised whether the “in writing” requirement would need to be clarified in the EAPs to consider electronic and other means of communication.

24. After discussion, the Working Group approved draft provision 4 in substance.

Draft provision 5

25. The Working Group considered draft provision 5. It was observed that the two-stage reply by the respondent was a particularly adequate solution, as the response to the notice of arbitration engaged the respondent in the constitution of the tribunal and a later date for the statement of defence allowed additional time for the respondent to address the substance of the dispute. There was broad support for draft provision 5.

26. A suggestion was made that the time frame in paragraph 3 might be too short and that sufficient time should be provided to the respondent to prepare its case, also taking into account the volume of documentary evidence. In response, it was explained that the time frame of 15 days begun only after the constitution of the tribunal and therefore, the preparation stage would not be limited to 15 days after the notice of arbitration, which was required of the response to the notice of arbitration.

27. It was mentioned that requiring the statement of defence to be made within a short time frame following the constitution of the arbitral tribunal could result in delays to the constitution of the tribunal. It was, therefore, suggested that a longer time frame could be provided for the statement of defence beginning from the date of receipt of the notice of arbitration. In response, it was mentioned that that could result in requiring the respondent to submit its statement of defence prior to the constitution of the tribunal and that one of the reasons for having the time frame for submission of the statement of defence begin with the constitution of the arbitral tribunal was to allow for the possible extension of that time frame by the arbitral tribunal.

28. Regarding draft provision 5(2)(b), a suggestion was made to add at the end of subparagraph (b) the following phrase: “unless the respondent confirms its agreement for the appointment of an arbitrator proposed by the claimant”.

29. The Working Group approved draft provision 5 in substance.

8. Designating and appointing authority (A/CN.9/WG.II/WP.214, paras. 62–68)

30. With regard to draft provision 6, the Working Group took note of a written submission favouring an approach similar to that in article 11 of the UNCITRAL Model Law on International Commercial Arbitration, which would involve the court or other authority at the place of arbitration. However, the Working Group reaffirmed the need to simplify the two-stage process in article 6 of the UARs in the context of expedited arbitration. It was reiterated that draft provision 6 provided a streamlined and flexible process, while providing a level of discretion to the Secretary-General of the Permanent Court of Arbitration (PCA) in that process. The Secretary-General of the PCA conveyed its willingness to assume the roles as outlined in draft provision 6, including to exercise the necessary discretion foreseen in draft provision 6(2).

31. The Working Group confirmed that paragraphs 3 to 7 of article 6 of the UARs would continue to apply to expedited arbitration. In that context, it was confirmed that (i) draft provision 6 would not need to address the consequences where the Secretary-General of the PCA refused to act or failed to appoint an arbitrator within the time frame; (ii) the time frame provided for in article 6(4) of the UARs would not need to change in the context of expedited arbitration; and (iii) the need for consultation with the parties as provided for in article 6(5) of the UARs should be highlighted in the guidance material to the EAPs.

32. After discussion, the Working Group approved draft provision 6 in substance.

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III. Consideration of issues relating to the expedited arbitration provisions (*continued*)

5. Non-application of the Expedited Arbitration Provisions (A/CN.9/WG.II/WP.214, paras.19-31) (*continued*)

Draft provision 3(3) – Elements to be taken into account when making the determination

1. It was noted that paragraphs 2 and 3 need to be read together and that paragraph 3 did not attempt to list the "exceptional circumstances" mentioned in paragraph 2 but set out the elements to be taken into account by the arbitral tribunal when making a determination in accordance with paragraph 2. It was further clarified that the list in paragraph 3 was illustrative and not exhaustive.

2. It was underlined that the parties' agreement to submit their disputes to the EAPs ought to be complied with and, therefore, withdrawal from the EAPs should only be possible in limited circumstances. It was said that paragraph 3 provided useful guidance to the arbitral tribunal in making that determination and ensured that requests for withdrawal from the EAPs were not misused and did not amount to delays.

3. Diverging views were expressed on whether the list of elements contained in paragraph 3 should be placed in a provision, a footnote or a guidance document. One view was that providing such a list in the EAPs could invite parties to raise a number of justifications for withdrawing and make a quick determination difficult. Another view was that the list in the EAPs provided ample guidance for making the determination and on which elements would be taken into account by the arbitral tribunal.

4. Considering that the notion of "exceptional circumstances" could be interpreted differently, it was suggested that those words could instead refer to circumstances where the EAPs would no longer ensure the parties' expectation of a fair proceeding. In response, it was pointed out that referring to parties' expectation would introduce a subjective criterion, particularly as the expectation of the parties would likely differ.

5. It was suggested that the elements listed in paragraph 3 could be simplified, for example, by referring to the complexity of the dispute, the stage of the proceeding and other relevant circumstances.

6. In response to a suggestion that due process should be another element to be considered by the arbitral tribunal, it was said that caution should be taken as the right of the parties to due process was also preserved in expedited arbitration. In that regard, doubts were expressed about referring to "procedural fairness" in subparagraph (f).

7. After discussion, it was widely felt that draft provisions 3(2) and 3(3) should be revised to set a high threshold limiting parties from withdrawing from EAPs easily and to provide guidance to the arbitral tribunal when making the determination. The Working Group agreed to consider a revised draft at its next session and to further determine whether the elements to be taken into account by the arbitral tribunal should be better placed in the EAPs and, if so, which.

Draft provision 3(4) – Consequences of the non-application

8. The Working Group considered draft provision 3(4), which addressed the consequences of when the EAPs would no longer apply to the arbitration. It was explained that the purpose of that paragraph was to ensure continuity and to avoid delays while also safeguarding party autonomy.

9. It was generally felt that the default rule in case of a change from an expedited to a non-expedited proceeding should be that the arbitral tribunal remain in place. In that context, it was suggested that the words "to the extent possible" should be deleted to reinforce that rule. On the other hand, support was also expressed for retaining those words as they provided flexibility to the parties and the arbitral tribunal when transitioning to non-expedited arbitration.

10. With regard to drafting, it was suggested that since the words "to the extent possible" would be open to interpretation, they could be replaced with text specifying the situations where the arbitral tribunal would no longer remain in place, for example, when the parties agreed to compose a new tribunal (possibly with more than one arbitrator) or when the arbitrator was not available to conduct non-expedited arbitration and had to resign. It was, however, mentioned that such instances were provided for in other parts of the UARs and it would be preferable to mention those instances in a guidance document.

11. Another drafting suggestion was to provide that the non-application of the EAPs would not entail a change in the arbitral tribunal, which would better underline the rights of the parties with regard to the composition of arbitral tribunal. Yet another drafting suggestion was that the words "in accordance with the UARs" would need to be qualified as the arbitral tribunal would have been composed in accordance with the EAPs. Lastly, it was suggested that transition to non-expedited arbitration could be mentioned as an acceptable reason for the arbitrator withdrawing from office.

12. More generally, it was suggested that paragraph 4 should provide that (i) the non-expedited proceeding would commence at the stage where the expedited proceeding ended, and (ii) decisions made during the expedited proceeding would remain applicable. With regard to the latter, it was, however, observed that there might be instances where the arbitral tribunal might need to depart from its earlier decisions.

13. The Working Group approved paragraph 4 in substance and agreed to consider a revised draft taking into account the comments made (see paras. 9–12 above).

Model Clause A

14. The Working Group agreed to defer the consideration of model clause A until a separate model clause for the EAPs was prepared.

6. Issues relating to the application and presentation of the Expedited Arbitration Provisions (A/CN.9/WG.II/WP.214, paras. 35–49)

15. With regard to the issues discussed in paragraphs 43 to 49 of document A/CN.9/WG.II/WP.214, it was generally felt that the contents therein could be usefully placed in a guidance document. It was further agreed that some of the elements that the parties should consider when referring to the EAPs could be formulated into a model clause for the EAPs.

Application of the UNCITRAL Rules on Transparency to expedited arbitration

16. The Working Group considered the question whether the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("Transparency Rules") would apply in the context of expedited arbitration. It was recalled that the Working Group had yet to assess the relevance of its work on expedited arbitration to investment arbitration and that the consideration was not to address that matter.

17. Views were expressed that the analyses of the question in paragraphs 38 to 40 of document A/CN.9/WG.II/WP.214 deserved further consideration. Some delegations indicated that they might make submissions to clarify their position on the matter, mainly that if State parties to an investment treaty were to agree on the application of the EAPs, it should be provided that additional consent would be required for the application of the Transparency Rules.

18. The Working Group agreed to inform Working Group III (Investor-State Dispute Settlement Reform) of the progress made so far after its seventy-third session in 2021.

7. Notice of arbitration, response thereto, statements of claim and defence (A/CN.9/WG.II/WP.214, paras. 50–61)

Draft provision 4

19. The Working Group considered draft provision 4, which required the claimant to communicate its statement of claim along with its notice of arbitration. There was general support for draft provision 4.

20. It was pointed out that it might be challenging for a claimant as draft provision 4(1), by referring to article 20(2) to (4) of the UARs, required a statement of claim to be accompanied by not only documents but also "other evidence relied upon". It was said that such wording could be understood as requiring witness and expert statements to be presented with the statement of claim and reference was made to draft provision 15. Accordingly, a suggestion was made to require a claimant to identify in its statement of claim any witness whose testimony it would rely on, the subject matter of the testimony and any substance matter for which the claimant intended to submit expert reports. It was suggested that a respondent would be required to do the same in its statement of defence.

21. In response, it was stated that draft provision 4(1) was intended to require, for the sake of efficiency, the presentation of the complete case but also provided flexibility to the claimant as the statement of claim should, "as far as possible", be accompanied by all documents and other evidence relied upon by the claimant, "or contain reference to them". Therefore, it was felt that there was no need to add additional language in draft provision 4 and that clarification could be provided in a guidance document.

22. In response to a question on the meaning of draft provision 4(2)(b), it was noted that it should not be read as requiring the claimant to put forward the name of the proposed arbitrator, but rather to suggest a list of suitable candidates/qualifications, or a mechanism to be used by the parties for agreeing on the arbitrator. It was clarified that in case the parties agreed to more than one arbitrator in expedited arbitration, the draft provision would not require the claimant to propose the appointment of a sole arbitrator.

23. As a general point, a question was raised whether the “in writing” requirement would need to be clarified in the EAPs to consider electronic and other means of communication.

24. After discussion, the Working Group approved draft provision 4 in substance.

Draft provision 5

25. The Working Group considered draft provision 5. It was observed that the two-stage reply by the respondent was a particularly adequate solution, as the response to the notice of arbitration engaged the respondent in the constitution of the tribunal and a later date for the statement of defence allowed additional time for the respondent to address the substance of the dispute. There was broad support for draft provision 5.

26. A suggestion was made that the time frame in paragraph 3 might be too short and that sufficient time should be provided to the respondent to prepare its case, also taking into account the volume of documentary evidence. In response, it was explained that the time frame of 15 days begun only after the constitution of the tribunal and therefore, the preparation stage would not be limited to 15 days after the notice of arbitration, which was required of the response to the notice of arbitration.

27. It was mentioned that requiring the statement of defence to be made within a short time frame following the constitution of the arbitral tribunal could result in delays to the constitution of the tribunal. It was, therefore, suggested that a longer time frame could be provided for the statement of defence beginning from the date of receipt of the notice of arbitration. In response, it was mentioned that that could result in requiring the respondent to submit its statement of defence prior to the constitution of the tribunal and that one of the reasons for having the time frame for submission of the statement of defence begin with the constitution of the arbitral tribunal was to allow for the possible extension of that time frame by the arbitral tribunal.

28. Regarding draft provision 5(2)(b), a suggestion was made to add at the end of subparagraph (b) the following phrase: “unless the respondent confirms its agreement for the appointment of an arbitrator proposed by the claimant”.

29. The Working Group approved draft provision 5 in substance.

8. Designating and appointing authority (A/CN.9/WG.II/WP.214, paras. 62–68)

30. With regard to draft provision 6, the Working Group took note of a written submission favouring an approach similar to that in article 11 of the UNCITRAL Model Law on International Commercial Arbitration, which would involve the court or other authority at the place of arbitration. However, the Working Group reaffirmed the need to simplify the two-stage process in article 6 of the UARs in the context of expedited arbitration. It was reiterated that draft provision 6 provided a streamlined and flexible process, while providing a level of discretion to the Secretary-General of the Permanent Court of Arbitration (PCA) in that process. The Secretary-General of the PCA conveyed its willingness to assume the roles as outlined in draft provision 6, including to exercise the necessary discretion foreseen in draft provision 6(2).

31. The Working Group confirmed that paragraphs 3 to 7 of article 6 of the UARs would continue to apply to expedited arbitration. In that context, it was confirmed that (i) draft provision 6 would not need to address the consequences where the Secretary-General of the PCA refused to act or failed to appoint an arbitrator within the time frame; (ii) the time frame provided for in article 6(4) of the UARs would not need to change in the context of expedited arbitration; and (iii) the need for consultation with the parties as provided for in article 6(5) of the UARs should be highlighted in the guidance material to the EAPs.

32. After discussion, the Working Group approved draft provision 6 in substance.

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Draft summary

Addendum

III. Consideration of issues relating to the expedited arbitration provisions (*continued*)

9. Number of arbitrators (A/CN.9/WG.II/WP.214, paras. 69–72)

1. The Working Group reaffirmed its approval of draft provision 7. It was further confirmed that in case of disagreement between the parties on the number of arbitrators under the EAPs, the parties would be deemed to have agreed to a sole arbitrator.

10. Appointment of the arbitrator (A/CN.9/WG.II/WP.214, paras. 73–82)

2. The Working Group considered draft provision 8(2). With regard to the meaning of "an agreement on the arbitrator", it was explained that the phrase addressed the situation where an arbitrator, identified by the parties, accepted the appointment.

3. With regard to the two options described in paragraphs 77 and 78 of document A/CN.9/WG.II/WP.214, there was general support for option A. It was said that under option A, the respondent would not be in a position to delay the process and it would be possible to involve the appointing authority even when the respondent failed to communicate its response. It was also said that the time frame in option A would be early in the proceedings and would ensure a speedy constitution of the arbitral tribunal.

4. It was mentioned that option B, which would allow the appointing authority to be aware of the views of all the parties, would be better tailored for multi-party arbitration. In response to the concern that option B might allow the respondent to delay the process, it was suggested that the 15-day time frame could begin at the end of the time frame provided for the response to the notice of arbitration. It was stated that such a rule would also be useful in cases where the claimant under the UARs proposed to the other party the application of the EAPs.

5. The Working Group agreed to revisit the suitability of the time frames in articles 9 and 13 of the UARs in the context of expedited arbitration once it had considered other time frames in the EAPs.

6. The Working Group approved draft provision 8 in substance, with the understanding that it would be revised to reflect the general support expressed for option A in paragraph 2.

11. Consultation with the parties and the provisional timetable (A/CN.9/WG.II/WP.214, paras. 83–88)

7. The Working Group considered draft provision 9(1) and confirmed that in expedited arbitration, an early-stage consultation between the arbitral tribunal and the parties was essential for an efficient and fair organization of the proceeding. However, one view was that there was no need to include a specific time frame for consultation in the EAPs as the flexibility provided in article 17 of the UARs would suffice.

8. Doubts were expressed about the phrase "within 15 days of its constitution", as the time frame for consultation would expire on the same day on which the statement of defence was to be submitted in accordance with draft provision 5(3). It was suggested that it would be preferable for the arbitral tribunal to have both statements of claim and of defence when it consulted the parties. In support, it was said that that would allow the arbitral tribunal to formulate a firm timetable, which could meet the time frame for rendering the award and might not need to be adjusted after receipt of the statement of defence.

9. Accordingly, a suggestion was made that the reference to the constitution of the tribunal in paragraph 1 should be replaced by referring to expiration of the time for the communication of the statement of defence. It was said that the revision would allow some time for the tribunal to review the statements of claim and of defence. Some support was expressed for the revised text.

10. Questions were raised on whether the revised text could tailor for instances where the statement of defence was submitted prior to the constitution of the tribunal. In addition, since the time frame for submission of the statement of defence could be extended by the arbitral tribunal, it was said that the revised text would only work if no extension was granted.

11. In addition, it was said that linking the deadline for consultation with the statement of defence could result in delays. The need to expedite the process and to give certainty was stressed and preference was expressed for a time frame beginning from a fixed event (e.g. the constitution of the arbitral tribunal). The need for the arbitral tribunal to have been presented with the statement of defence was also questioned as under the UARs, the tribunal would usually conduct the consultation with the parties based only on the notice of arbitration and response thereto and proceed to issue procedural order No. 1.

12. Acknowledging that the point to be emphasized in the EAPs was the need for consultation to be held as promptly as possible after its constitution, the Working Group agreed to retain the current draft in paragraph 1 and include the suggested revision mentioned above in square brackets for further consideration.

13. With respect to draft provision 9(2), it was mentioned that its content could be included in a guidance document, but if retained in the EAPs, it should be made clear that the different modes of conducting consultation provided therein would also be available for arbitral tribunals in non-expedited arbitration.

14. Subject to paragraph 12 above, the Working Group approved draft provision 9.

12. Time frames and discretion of the arbitral tribunal (A/CN.9/WG.II/WP.214, paras. 89–96)

15. The Working Group considered draft provision 10 as well as the alternative, simplified wording as provided for in paragraph 93 of document A/CN.9/WG.II/WP.214 (the "simplified text").

16. One view was that draft provision 10 was redundant in light of article 17(2) of the UARs as well as draft provision 9(3) on the procedural timetable. It was further

mentioned that if there was no possibility for a party to withdraw from the EAPs, draft provision 10 would be more meaningful.

17. Support was expressed for retaining draft provision 10 but in a simplified form as it would highlight and reinforce the discretion of the arbitral tribunal with regard to time frames in the EAPs. It was clarified that the simplified text aimed to supplement the second sentence of article 17(2) of the UARs and thus did not repeat the rule contained therein. Nonetheless, it was said that there was need to highlight the discretion of the arbitral tribunal to extend or abridge any period of time agreed by the parties, as no reference to such possibility could be interpreted to mean that the arbitral tribunal in expedited arbitration would not have such a discretion.

18. After discussion, the Working Group agreed to replace draft provision 10 with the simplified text and to add wording that the tribunal could extend or abridge any period of time agreed by the parties. It was further confirmed that article 30 of the UARs on default should apply to expedited arbitration unchanged and that there was no need to include a provision pertaining to late submissions in the EAPs.

13. Hearings (A/CN.9/WG.II/WP.214, paras. 97–107)

19. With regard to draft provision 11, the view was reiterated that the text was redundant in light of article 17(3) of the UARs and could be included in a guidance document. On the other hand, it was mentioned that there was merit in retaining a provision on hearings in the EAPs to emphasize the discretion of the arbitral tribunal to "not" hold hearings in expedited arbitration. It was stated that the current text of draft provision 11 attempted to accommodate the different views expressed in the Working Group so far.

20. A number of suggestions were made. One was to shorten the text so that it did not repeat what was already stated in article 17(3) of the UARs. Doubts were also expressed about the need to retain paragraph 2, as paragraph 1 required the arbitral tribunal to consult the parties before deciding to not hold hearings. It was also stated that providing the parties with the right to request a hearing and also to object to a decision to not hold a hearing could be overly complicated. Diverging views were expressed on the time frame for objection in paragraph 2.

21. With regard to the formulation provided in paragraph 106 of document A/CN.9/WG.II/WP.214, it was suggested that a guidance document on EAPs could mention that hearings in expedited arbitration could be short and could be done without the physical presence of the parties. Furthermore, it was stated that the use of technology to streamline the process and to save cost and time of the proceedings needed to be further explored. In support, it was said that providing such possibility was particularly timely in light of the current COVID-19 pandemic and suggestions were made to include a general provision in the EAPs on the use of technological means in expedited arbitration. It was further suggested that considering the nature of expedited arbitration, remote means should be the preferred option. It was stated that such a provision would reinforce the discretion of the arbitral tribunal in utilizing a wide range of technological means in expedited proceedings.

22. After discussion, there was general support for providing a general rule in the EAPs that would address the possibility for the arbitral tribunal to utilize different means of communication during the proceedings and to make use of virtual or remote hearings. It was further noted that a guidance document to the EAPs should make it clear that the inclusion of such a provision in the EAPs would not imply that the use of technological means would not be available to arbitral tribunals in non-expedited arbitration.