United Nations A/CN.9/1010

General Assembly

Distr.: General
12 February 2020

Original: English

United Nations Commission on International Trade Law
Fifty-third session
New York, 6–17 July 2020

Report of Working Group II (Dispute Settlement) on the work of its seventy-first session (New York, 3–7 February 2020)

Contents

V.20-01309 (E) 170220 180220

I. Introduction

1. At its fifty-first session, the Commission took note of the suggestions for possible future work in the field of dispute resolution expressed by the Working Group at its sixty-eighth session (A/CN.9/934, paras. 149–164), as well as of proposals for work, in particular on expedited arbitration (A/CN.9/959) and on the conduct of arbitrators, with a focus on questions of impartiality and independence (A/CN.9/961). It was pointed out that the aim of the proposals was to improve the efficiency and quality of arbitral proceedings.[1]

2. Regarding expedited arbitration, it was suggested that the work could consist of providing information on how the UNCITRAL Arbitration Rules could be modified (including by parties) or incorporated into contracts via arbitration clauses that provided for expedited procedures or in guidance to arbitral institutions adopting such procedures, in order to ensure the right balance between fast resolution of the dispute and respect for due process. Reference was also made to the possibility of considering jointly the topics of expedited arbitration and adjudication, as expedited arbitration would provide generally applicable tools for reducing cost and time of arbitration, while adjudication would constitute a specific method that had demonstrated its utility in efficiently resolving disputes in a specific sector.[2] After discussion, the Commission agreed that Working Group II should be mandated to take up issues relating to expedited arbitration.[3]

3. Accordingly, at its sixty-ninth session (New York, 4–8 February 2019), the Working Group commenced its consideration of issues relating to expedited arbitration with a preliminary discussion on the scope of its work, characteristics of expedited arbitration, and possible form of the work. At that session, the Secretariat was requested to prepare draft texts on expedited arbitration and to provide relevant information based on the deliberations and decisions of the Working Group.

4. 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.[4]

5. At its seventieth session (Vienna, 23–27 September 2019), the Working Group considered the draft provisions on expedited arbitration prepared by the Secretariat (A/CN.9/WG.II/WP.209). At the end of that session, the Secretariat was requested to update the draft provisions based on the deliberations, illustrating how they could appear as an appendix to the UNCITRAL Arbitration Rules and also how those provisions could be presented in a stand-alone set of rules on expedited arbitration.

II. Organization of the session

6. The Working Group, which was composed of all States members of the Commission, held its seventy-first session in New York, from 3–7 February 2020. The session was attended by the following members of the Working Group: Algeria, Australia, Austria, Belgium, Brazil, Canada, Chile, China, Colombia, Côte d'Ivoire, Croatia, Czechia, Dominican Republic, Ecuador, Finland, France, Germany, Hungary, India, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Malaysia, Mauritius, Mexico, Philippines, Republic of Korea, Romania, Russian Federation, Singapore, Spain, Switzerland, Thailand, Turkey, Ukraine, United States of America, Viet Nam and Zimbabwe.

[1] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17), para. 244.
[2] Ibid., para. 245.
[3] Ibid., para. 252.
[4] Ibid., *Seventy-fourth Session, Supplement No. 17* (A/74/17), paras. 156–158.

7. The session was attended by observers from the following States: Armenia, Bahrain, Cambodia, Cyprus, Democratic Republic of the Congo, El Salvador, Equatorial Guinea, Eswatini, Ethiopia, Gabon, Georgia, Greece, Iraq, Malta, Morocco, Netherlands, Norway, Paraguay, Qatar, Moldova (Republic of), Saudi Arabia, Senegal and Uruguay.

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

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

(a) *Intergovernmental organizations*: Asian-African Legal Consultative Organization (AALCO), International Cotton Advisory Committee (ICAC) and Permanent Court of Arbitration (PCA); and

(b) *Invited non-governmental organizations*: American Arbitration Association/International Centre for Dispute Resolution (AAA/ICDR), Arbitral Women, Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Belgian Centre for Arbitration and Mediation (CEPANI), Center for International Investment and Commercial Arbitration (CIICA), Chartered Institute of Arbitrators (CIArb), CISG Advisory Council (CISG-AC), Comité Français de l'arbitrage (CFA), European Law Students' Association (ELSA), 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), ICC International Court of Arbitration (ICCWBO), Inter-American Bar Association (IABA), Inter-American Arbitration Commission (IACAC), International Council for Commercial Arbitration (ICCA), International Insolvency Institute (III), International Institute for Conflict Prevention & Resolution (CPR), Korean Commercial Arbitration Board (KCAB), Law Association for Asia and the Pacific (LAWASIA), Madrid Court of Arbitration, Miami International Arbitration Society (MIAS), Milan Chamber of Arbitration (CAM), Netherlands Arbitration Institute (NAI), New York City Bar Association, New York International Arbitration Center (NYIAC), P.R.I.M.E Finance Foundation, Regional Centre for International Commercial Arbitration – Lagos (RCICAL), and Russian Arbitration Center at the Russian Institute of Modern Arbitration (RAC at RIMA).

10. The Working Group elected the following officers:

Chairperson: 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.211); (b) a note by the Secretariat on draft provisions on expedited arbitration (A/CN.9/WG.II/WP.212 and Add.1).

12. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of the expedited arbitration provisions.
5. Adoption of the report.

III. Deliberations and decisions

13. The Working Group considered agenda items 4 on the basis of the note by the Secretariat (A/CN.9/WG.II/WP.212 and Add.1). The deliberations and decisions of the Working Group with respect to item 4 are reflected in chapter IV.

14. At the end of the 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, which shall be without prejudice to the decision by the Working Group on the final presentation of the expedited arbitration provisions. 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.

IV. Consideration of the expedited arbitration provisions

15. While noting that the expedited arbitration provisions (EAPs) were presented respectively as an appendix to the UNCITRAL Arbitration Rules and as a stand-alone text in document A/CN.9/WG.II/WP.212/Add.1, the Working Group decided to consider the EAPs as they would appear as an appendix to the UNCITRAL Arbitration Rules and based on the commentary provided in document A/CN.9/WG.II/WP.212. It was reiterated that this would be without prejudice to the decision by the Working Group on the final presentation of the EAPs.

1. Incorporation of the EAPs into the UNCITRAL Arbitration Rules (A/CN.9/WG.II/WP.212, para. 10)

16. The Working Group considered the formulation of an additional paragraph to be included in article 1 of the UNCITRAL Arbitration Rules, which would incorporate the EAPs as an appendix. It was generally felt that the formulation, which followed the approach taken with regard to the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("Transparency Rules"), was suitable for the purpose. However, doubts were also expressed noting that the Transparency Rules were prepared as a stand-alone text and not as an appendix and that the current formulation using the word "include" would be inappropriate as the EAPs would be part of the UNCITRAL Arbitration Rules. It was questioned whether the phrase "subject to provision 1" would be necessary, if the Working Group were to determine that the express consent of the parties would be required for the application of the EAPs.

17. After discussion, the Working Group agreed to retain draft article 1(5) with possible adjustments to reflect its decision on draft provision 1 with regard to the application of the EAPs.

18. During the deliberation, a question was raised on how the Transparency Rules would apply in the context of expedited arbitration, if the UNCITRAL Arbitration Rules were to incorporate both the Transparency Rules and the EAPs. It was suggested that there should be a possibility for the disputing parties to exclude the application of the Transparency Rules when agreeing to the application of the EAPs, if the EAPs were to be presented as an appendix to the UNCITRAL Arbitration Rules. Noting that the focus of the current work was on commercial arbitration, the Working Group decided to revisit the issue at a later stage of its consideration of the EAPs.

2. Scope of application (A/CN.9/WG.II/WP.212, paras. 13–32)

Consent of the parties

19. The Working Group considered the circumstances in which the EAPs would apply to an arbitration.

20. One view was that it would be sufficient for the parties to refer to the UNCITRAL Arbitration Rules, which would include a provision similar to draft article 1(5) alerting the parties that the EAPs could apply and provide for a mechanism for the parties to opt-out of expedited arbitration. It was stated that requiring express consent to the EAPs might limit their application as it would be more likely that arbitration agreements and relevant clauses would simply refer the dispute to the UNCITRAL Arbitration Rules without mentioning the EAPs.

21. Another view was that express consent of the parties to the EAPs should be the determining factor in their application and that it should be the sole criterion. In support, it was suggested that the possibility of the EAPs applying to an arbitration without the explicit consent of the parties should not be foreseen, as parties would be uncertain whether the EAPs would apply to their dispute. It was also stated that a mere reference to the UNCITRAL Arbitration Rules would not be sufficient for the EAPs to apply as not all parties would be aware that they were subjecting their dispute to an expedited process. The need to protect those parties (particularly micro-, small- and medium-sized enterprises) from inadvertently being subject to expedited arbitration was emphasized. It was also said that requiring express consent of the parties to the EAPs would make it possible to introduce more stringent rules therein, without raising concerns about due process and the enforceability of the eventual award.

Draft provision 1(1)

22. Considering the wide support for requiring the express consent of the parties for the application of the EAPs, it was felt that draft provision 1(1) would need to be revised accordingly. It was also pointed out that the current draft provision 1(1) addressed the temporal scope of the EAPs; that they would only apply when the arbitration agreement was concluded on or after the date the EAPs entered into force. However, in light of the requirement for express consent, it was questioned whether there would be a need for such a clause, which aimed to limit any unintended retroactive application.

23. A number of drafting suggestions were made to reflect the consent required of the parties. The Secretariat was requested to take those suggestions into account in revising draft provision 1(1). It was suggested that the revised provision should be simple and provide clear guidance on when the EAPs would apply. In relation, it was suggested that there would be a need to clarify the relationship between the UNCITRAL Arbitration Rules and the EAPs, for example, indicating that certain articles of the UNCITRAL Arbitration Rules were modified pursuant to the provisions in the EAPs or that the UNCITRAL Arbitration Rules applied generally to expedited arbitration unless modified by the EAPs.

24. While a suggestion was made that there should be a limit on when the parties could agree to the application of the EAPs (for example, after the dispute arose), it was generally felt that the parties should be free to agree on their application at any time (either before and after the dispute). It was, however, pointed out that it would be practically difficult for the parties to agree on their application after the dispute had arisen.

25. A question was raised whether the EAPs should address the interpretation or determination of whether there was consent by the parties. One view was that such a provision might be necessary, particularly where the tribunal was not yet constituted or where there was a dispute between the parties on the number of arbitrators. In support, it was said that guidance could be provided on how the parties could agree to the application of the EAPs (possibly in the model arbitration clause) and how the tribunals could determine whether there was consent of the parties. Another view was that there was no need for the EAPs to address such a situation. It was said that similar to the question of whether there existed a valid agreement to arbitrate, the question of whether the parties agreed to apply the EAPs was typically not addressed in arbitration rules. It was further stated that the determination should be left to the arbitral tribunal.

26. While it was generally felt that the express consent of the parties should be the exclusive basis for the application of the EAPs in an ad hoc context, it was suggested that arbitral institutions that would be modelling their institutional rules based on the EAPs might consider the automatic triggering of expedited arbitration when certain conditions are met, as the institutions would be in a position to safeguard the interest

of the parties involved. It was suggested that providing such recommendations to arbitral institutions could be considered at a later stage.

27. After discussion, it was agreed that for the EAPs to apply, the express agreement of the parties would be required, and that agreement would be the sole criterion for determining their application. It was, therefore, agreed that draft article 1(5) of the UNCITRAL Arbitration Rules and draft provision 1(1) would need to be adjusted accordingly, although without necessarily using the words "explicit" or "express" consent. It was also agreed that there would be no need to include a temporal scope clause in draft provision 1(1) as the EAPs would only apply when there was consent of the parties. It was further agreed that the relationship between the UNCITRAL Arbitration Rules and the EAPs should be clarified either in the EAPs or in a guidance text for reference by the parties.

Draft provision 1(2)

28. As the Working Group had decided that the application of the EAPs would be triggered only by the explicit consent of the parties (see para. 27 above), it was stated that the presumption in article 1(2) of the UNCITRAL Arbitration Rules would not pose a problem as the parties' consent would in any case be required. Accordingly, the Working Group decided that draft provision 1(2) of the EAPs was not necessary.

Draft provision 1(3)

29. Based on the decision by the Working Group to require express consent of the parties for the application of the EAPs (see para. 27 above), the Working Group further discussed whether to retain draft provision 1(3) and if so, how it could be revised.

30. One view was that draft provision 1(3) would not be necessary, as it would be stating the obvious that parties were free to agree on the application of the EAPs or of the general UNCITRAL Arbitration Rules at any stage of the proceeding. It was stated that the provision would be redundant in light of article 1(1) of the UNCITRAL Arbitration Rules as well as draft provision 1(1).

31. Another view was that draft provision 1(3) could be revised to explicitly mention that the parties that had agreed to EAPs might at any stage of the proceedings resort to non-expedited arbitration or agree to modify the provision in the EAPs to better suit their dispute. It was suggested that in such a case, the parties would be "agreeing" to not apply the EAPs rather than "determining" whether the EAPs would apply.

32. As a general point, it was suggested that the parties should be aware of the possible consequences of changing between expedited and non-expedited arbitration once the proceedings had begun.

33. After discussion, it was agreed that draft provision 1(3) should be revised to indicate the possibility of the parties agreeing to resort to non-expedited arbitration (upon which the EAPs would no longer apply). The Working Group agreed to consider at a later stage whether to retain that provision in the EAPs.

Draft provisions 1(4) to 1(6)

- *Possibility to withdraw from expedited arbitration*

34. The Working Group discussed whether a party that had agreed to the application of the EAPs would be allowed to subsequently request their non-application.

35. One view was that a party should be bound by its agreement to expedited arbitration and therefore should not be given the opportunity to withdraw from expedited arbitration. It was also mentioned that allowing the party to request non-application could unduly delay the proceedings and that it might be difficult to set forth the limited circumstances under which the non-application could be granted.

36. Another view was that a party should be allowed to withdraw from expedited arbitration, where there were justifiable circumstances for resorting to non-expedited arbitration. It was said that such a mechanism would comfort parties entering into an agreement to expedited arbitration and would only allow parties with persuasive grounds to resort to non-expedited arbitration. In support, it was also explained that parties might not have been able to foresee the complexity of their dispute and that the dispute might have evolved in a manner that would make expedited arbitration no longer suitable. It was further mentioned that obliging a party to proceed with expedited arbitration under such circumstances would not be fair.

37. In considering that question, the need to balance the interest of the parties and to preserve due process was highlighted. It was also mentioned that if such a mechanism were to be introduced, it should be designed to prevent against any abuse by the parties.

38. It was suggested that even if such a withdrawal mechanism were to be provided in the EAPs, it should be possible for the parties to agree to not utilize that mechanism, meaning that parties could waive their right to request withdrawal from expedited arbitration. While it was suggested that this possibility could be reflected in a model arbitration clause, some doubt was expressed as the parties would in any case be free to modify the EAPs in accordance with article 1(1) of the UNCITRAL Arbitration Rules.

- *Time frame for requesting withdrawal*

39. On whether there should be a limited period during which a party could make the request for withdrawal, it was generally felt that the EAPs should not contain any fixed time frame and discretion should be left to the arbitral tribunal on whether to accept such a request. It was said that if the request was made at a later stage of the proceedings, that would be an element to be taken into account by the arbitral tribunal in making the determination of non-application.

- *Determination of non-application by the arbitral tribunal*

40. Upon the request of a party to withdraw from expedited arbitration, a decision would need to be made on whether the EAPs would continue to apply to the arbitration or not. With respect to that question, it was generally felt that the arbitral tribunal would be best placed to make the determination and reference was made to article 17 of the UNCITRAL Arbitration Rules, which provided the arbitral tribunal with broad discretion on how to conduct the arbitration.

41. While it was suggested that the appointing authority could have a role in making the determination, particularly when the arbitral tribunal had not yet been constituted, doubts were expressed. It was suggested that if the arbitral tribunal had not been constituted, the determination would need to be made by the arbitral tribunal after it was constituted in accordance with the EAPs. Some other options were suggested, for example, (i) a sole arbitrator or a three-member tribunal appointed for the purpose of making the determination, and (ii) an arbitration institution or any other authority agreed by the parties.

- *Circumstances for making the request for withdrawal and a set of criteria for making the determination on non-application of the EAPs*

42. The Working Group considered the circumstances in which a request for withdrawal by a party would be justified and a set of criteria that could be used for determining the non-application of the EAPs. It was agreed that the grounds for allowing a party to resort to non-expedited arbitration when that party had originally agreed to expedited arbitration should be limited.

43. As to the circumstances in which an arbitral tribunal would determine that the EAPs would no longer apply to the arbitration, a wide range of views were expressed. While it was suggested that it would be sufficient for the EAPs to state that the arbitral

tribunal could make such a determination if there were “exceptional circumstances”, it was said that the phrase was vague and should be further elaborated. In that context, it was suggested that “an unforeseeable change of facts” could be one circumstance, which would justify the request for withdrawal. Another suggestion was that a party would be allowed to request withdrawal only when it had agreed to expedited arbitration “before” the dispute arose but that it would be barred to make such a request if it had agreed to expedited arbitration “after” the dispute had arisen.

44. Differing views were expressed on the need for the EAPs to include a set of criteria to guide the arbitral tribunal in making the determination.

45. One view was that it would be unnecessary, and that discretion could be left to the arbitral tribunal to determine whether the request of the party was justified. It was also suggested that the arbitral tribunal would need to take into account the overall circumstances of the cases, which would largely differ.

46. Another view was that it would be useful to include a set of criteria which would set out the conditions justifying the withdrawal in an objective manner. It was suggested that the set of criteria in draft provision 1(5) provided a good starting point for discussion, while it would need to be adjusted as it was drafted to apply in both opt-in and opt-out scenarios. As to the elements to be taken into account by the arbitral tribunal, a number of suggestions were made: (i) time-sensitiveness of resolving the dispute; (ii) the legal and factual complexity of the dispute; (iii) the agreement of the parties to expedited arbitration and any limitation contained therein with regard to the authority of the tribunal; (iv) whether it had been foreseeable that the dispute would not be appropriate for expedited arbitration; (v) at which stage of the proceedings, the request was made; and (vi) any due process requirements including procedural fairness to the parties. At the same time, some doubts were expressed about a financial threshold or the urgency of the resolution of the dispute as being elements to be considered by the arbitral tribunal.

47. In that context, it was reiterated that the parties could include a set of criteria in their arbitration agreement, which would trigger the application or non-application of the EAPs. Along the same lines, it was suggested that to facilitate the use of EAPs, it might be useful to include such set of criteria in a model arbitration clause providing for the circumstances under which the parties might wish to agree to the application of the EAPs.

48. It was stated that when making the determination, the arbitral tribunal should take into account the consequences its decision could have on the overall arbitration process. To provide more flexibility to the arbitral tribunal, it was suggested that the arbitral tribunal should be able to determine that: (i) all or some of the EAPs would no longer applied to the arbitration; or (ii) some of the provisions would be modified. With regard to possible modification of the provisions, it was noted that such modifications could also be agreed by the parties and the arbitral tribunal during the case management conference. It was also said that since the arbitral tribunal had sufficient flexibility to respond to the change of circumstances, it could address the need for non-application of the EAPs through its management of the different time frames.

- *Summary*

49. After discussion, it was agreed that the EAPs should include a mechanism which would allow a party to withdraw from expedited arbitration, yet in limited circumstances and subject to a determination by the arbitral tribunal. The Secretariat was requested to reflect the views expressed and to provide different drafting options, combining the elements found in draft provisions 1(4) to (6). It was also suggested that as the withdrawal mechanism was not directly related to the scope of application of the EAPs, it should be placed in a separate provision.

50. It was also agreed that draft provision 1(7) should be further elaborated to address the consequences of the non-application of the EAPs as well as the

consequences of the application of the EAPs when the parties that had initiated non-expedited arbitration agreed to their application.

3. Notice of arbitration (A/CN.9/WG.II/WP.212, paras. 33–36)

51. Regarding whether the notice of arbitration should be treated as a statement of claim in expedited arbitration, it was generally felt that that could effectively accelerate the procedure by eliminating the need for the claimant to produce a separate statement of claim. Support was expressed for the formulation in draft provision 2. It was generally felt that it would be sufficient to require the claimant to provide documents and other evidence to the extent possible, as stated in article 20(4) of the UNCITRAL Arbitration Rules.

52. In response to a suggestion that the particulars to be required in a notice of arbitration should be listed in draft provision 2 so as to guide the parties, it was stated that including a cross-reference to the relevant provisions of the UNCITRAL Arbitration Rules was sufficient if the EAPs were to be presented as an appendix. However, it was suggested that the articulation between the provisions in the UNCITRAL Arbitration Rules and the EAPs would need to be more clearly outlined (for example, whether and how the other paragraphs in arts. 3 and 20 of the UNCITRAL Arbitration Rules related to the notice of arbitration in draft provision 2).

53. In considering the issue, the usefulness of a case management conference was highlighted as a tool for not only organizing the procedural aspects but also identifying what should be contained in the statements of claim and of defence.

54. With regard to a situation where one of the parties in non-expedited arbitration included a proposal to apply the EAPs in its notice of arbitration, it was understood that the claimant would not need to comply with the requirements in draft provision 2. However, it was noted that a problem might arise if the respondent eventually accepted the proposal to apply the EAPs, as the claimant would then not have complied with the requirements in draft provision 2 and it was questioned when the claimant would be required to submit its statement of claim.

55. The following suggestions were made with regard to the response to the notice of arbitration in expedited arbitration. One was that similar to the requirement that the notice of arbitration should comply with the requirements of a statement of claim, the respondent should be required to produce a response to the notice complying with the requirements of a statement of defence. Another was that the time frame for the response should be shortened (for example, two weeks) as the respondent would have agreed to expedited arbitration and would be aware of the requirements in the EAPs. Yet another suggestion was that the current two-stage structure of a response to the notice of arbitration and of a statement of defence should be retained, yet with different time frames. A shorter time frame could be imposed on the response, which would address procedural issues, in particular those relating to the appointment of the arbitrator. The statement of defence would provide for the response to the substance of the dispute. In that regard, it was emphasized that sufficient time should be provided to respondents (particularly States) to produce a statement of defence to ensure the equality of the parties in the proceedings.

56. After discussion, it was agreed that the notice of arbitration and response thereto as well as the statements of claim and of defence in the context of expedited arbitration should be examined more comprehensively taking into account the time frames in the EAPs (including those that would be determined by the arbitral tribunal) and the need to ensure an expedited process. The Secretariat was requested to provide possible options for further consideration by the Working Group reflecting the views expressed. It was noted that while the fact that the parties had expressly agreed to expedited arbitration should be taken into account in designing different options, there was also the need to provide sufficient time for parties to make their claims and to respond to those claims. It was further stressed that one of the goals in designing the options would be that the tribunal was constituted in an expedited fashion, as it would

need to make a number of procedural decisions, including certain time frames to be imposed on the parties.

4. Number of arbitrators (A/CN.9/WG.II/WP.212, paras. 37–40)

57. The Working Group approved draft provision 3 in substance and agreed that it would not be necessary to include an additional paragraph addressing the request by a party that had agreed to a sole arbitrator to constitute a tribunal of more than one arbitrator. It was explained that such a request should be considered along the same lines as a request for the non-application of the EAPs (see paras. 33–49 above).

5. Appointment of the arbitrator (A/CN.9/WG.II/WP.212, paras. 41–59)

58. The Working Group approved draft provision 4(1) in substance, which provided that the parties should jointly agree on a sole arbitrator in expedited arbitration.

59. With regard to draft provision 4(2), which provided a mechanism for the appointment of a sole arbitrator in the absence of an agreement by the parties, the Working Group considered the time frame for the parties to reach an agreement and when that time frame should commence. Considering the expedited nature of the proceedings, it was generally felt that a short time period should be provided in the EAPs.

60. On when that time frame should commence, some preference was expressed for when the respondent received the notice of arbitration, as that would be quite early in the proceedings and ensure a speedy composition of the arbitral tribunal. However, it was noted that the time frame should be linked with the proposal for the appointment of the arbitrator (for example, which could include a list of suitable candidates or the mechanism to be used for agreeing on the arbitrator). In that context, it was noted that if the EAPs were to require such a proposal to be included in the notice of arbitration and/or response thereto, the time frame could commence upon the receipt by the parties of the proposal. However, some caution was expressed that requiring such a proposal in the notice and response thereto might be overly prescriptive and the parties might prefer not to include such a proposal.

61. Regarding the question of how an appointing authority would become involved in the appointment of the sole arbitrator, it was agreed that the involvement should be based on the request by one of the parties and that it would not be realistic to consider the appointing authority being automatically involved after the lapse of the time period. It was also noted that the parties would be free to request the involvement of the appointing authority even before the lapse of the time period if it was obvious that an agreement would not be reached.

62. With regard to how the appointing authority would appoint the arbitrator, the Working Group agreed that the list procedure in article 8(2) of the UNCITRAL Arbitration Rules would apply to expedited arbitration.

Domestic courts functioning as appointing authority

63. The Working Group considered whether the EAPs should include a reference to the possibility of domestic courts functioning as an appointing authority in expedited arbitration.

64. One view was that domestic courts were often designated as the default appointing authority in the laws of certain jurisdictions as envisaged in article 11(4) of the UNCITRAL Model Law on International Commercial Arbitration (the “Model Law”) and that such a reference in the EAPs could be useful.

65. Another view was that there was no need to include an express reference in the EAPs as domestic courts would not be precluded from functioning as the appointing authority in accordance with those laws and that there was no justification to depart from the UNCITRAL Arbitration Rules. It was stated that domestic courts might not be best placed for the appointment of an arbitrator in expedited arbitration and such

process could delay the proceedings. It was also stated that such a mechanism might not work in the context of international arbitration. In addition, it was pointed out that in some jurisdictions, (i) bodies other than courts were designated as the default appointing authority; and (ii) courts when serving as appointing authority relied on other bodies.

66. After discussion, the Working Group agreed that there would be no need to include an express reference to the possibility of domestic courts serving as an appointing authority in the EAPs.

UNCITRAL Arbitration Rules articles 9 to 14

67. The Working Group agreed that articles 9 to 14 of the UNCITRAL Arbitration Rules would apply to expedited arbitration, unchanged.

68. As to the time frames in articles 9 and 13, the Working Group agreed that they need not be shortened in the context of expedited arbitration but agreed to revisit them once it had considered other time frames in the EAPs.

Availability of the arbitrator

69. With regard to how an arbitrator would formally confirm its availability and readiness to conduct expedited arbitration, it was stated that the model statement of independence pursuant to article 11 of the UNCITRAL Arbitration Rules could be adjusted to include references to the EAPs and the need to conduct the arbitration in an expedited fashion.

Designating and appointing authority

70. The Working Group considered whether article 6 of the UNCITRAL Arbitration Rules on designating and appointing authorities would need to be adapted for expedited arbitration.

71. It was recalled that the Working Group, when revising the 1976 UNCITRAL Arbitration Rules, had considered suggestions to alter the two-stage process involving a designating authority and an appointing authority but agreed to retain the mechanism in light of the global applicability of the UNCITRAL Arbitration Rules and based on the notion that the UNCITRAL Arbitration Rules should not contain a rule to the effect that one institution would be singled out as the default appointing authority.

72. Along the same lines, views were expressed that article 6 of the UNCITRAL Arbitration Rules should apply equally to expedited arbitration and that it need not be adjusted. It was said that the two-stage process had functioned well and that there was no reason to take a different approach. In support, it was stated that the two-stage process had ensured regional balance as well as diversity and that it provided much flexibility, which ought to be preserved. It was said that the process was not burdensome and could be further expedited by introducing shorter time frames. It was also noted that it would be sufficient to alert parties of the importance to agree on an appointing authority in expedited arbitration.

73. Another view was that there might be benefit in simplifying the process in the context of expedited arbitration, possibly by eliminating the designation process and providing for a default appointing authority in the EAPs. It was said that this could save time and cost, which would be in line with the objectives of expedited arbitration.

74. Based on the broad support expressed for simplifying the two-stage process, the Working Group considered the different options as provided for in draft provision 5(2).

75. In light of the role envisaged under the UNCITRAL Arbitration Rules (as the default designating authority and with respect to the fees and expenses of arbitrators) and also in light of the global and regional presence of the PCA, it was suggested that its Secretary-General could service as the default appointing authority in expedited

arbitration. However, it was also noted that a number of arbitral institutions had gained experience in administering and serving as appointing authority under the UNCITRAL Arbitration Rules. Therefore, it was suggested that those institutions with local expertise and more accessible to the parties, could also function as default appointing authority. Accordingly, some support was expressed for option B.

76. However, it was widely felt that option A, which provided the possibility for a party to request the Secretary-General of the PCA to either designate the appointing authority as provided for in article 6(2) of the UNCITRAL Arbitration Rules or to serve as the appointing authority, could be a sound compromise reflecting the divergence of views. In support, it was stated that taking option A would also preserve the flexibility provided for in article 6 of the UNCITRAL Arbitration Rules.

77. During the consideration of option A, it was suggested that the Secretary-General of the PCA should have the discretion to determine whether it wishes to designate an appointing authority or to serve as an appointing authority.

78. After discussion, the Working Group agreed that the EAPs should provide that if the parties were not able to agree on the choice of an appointing authority within a fixed time period, any party could make a request to the Secretary-General of the PCA either to designate the appointing authority or to serve as an appointing authority. The Secretariat was requested to examine further any issues that might arise in the operation of that provision (for example, (i) when a party had already proposed the Secretary-General of the PCA to serve as the appointing authority under draft provision 5(1) and the other party had not agreed; (ii) when one party requested the Secretary-General of the PCA to serve as the designating authority and the other party requested it to serve as the appointing authority; and (iii) the role of the Secretary-General of the PCA envisaged in article 6(4) of the UNCITRAL Arbitration Rules) and to provide drafting options for further consideration by the Working Group. It was further agreed that the time frame in draft provision 5(2) could be shortened to 15 days, for further consideration by the Working Group, once it had considered other time frames to be provided in the EAPs.

79. Lastly, it was agreed that considering the importance of the parties agreeing on an appointing authority in expedited arbitration, the Working Group would consider how that aspect could be further emphasized in the model arbitration clause.

6. Case management conference and provisional timetable (A/CN.9/WG.II/WP.212, paras. 60–66)

80. Diverging views were expressed on whether the arbitral tribunal should be required to hold a case management conference in expedited arbitration. In favour, it was stated that a case management conference could contribute to streamlining the overall procedure and that if sufficient flexibility were provided to the arbitral tribunal on how to hold a case management (for example, as provided in draft provision 6(2)), it would not pose a burden.

81. While noting the usefulness of a case management conference, another view was that flexibility should be left to the tribunal on whether to hold one, as that would depend on the circumstances of the case. It was further noted that a case management conference might not be appropriate or not even be necessary in certain types of disputes and that requiring a case management conference might be too prescriptive.

82. As a way to address the divergence in views, a suggestion was made that draft provision 6(1) could require the arbitral tribunal to consult with the parties and note that one way would be through a case management conference, when deemed necessary. That suggestion received some support.

83. As to when a case management conference should be held, some support was expressed for the phrase “as soon as practicable” as it provided flexibility to the arbitral tribunal, whereas it was also suggested that the phrase was too vague and thus, a short time frame (for example, 15 days after the constitution of the tribunal) could be introduced.

84. Questions were raised on whether the first sentence of draft provision 6(3) was necessary in light of the first sentence of article 17(2) of the UNCITRAL Arbitration Rules, which were in essence identical. It was suggested that the drafting of that provision could be improved to simply state that in establishing the timetable in accordance with article 17(2), the arbitral tribunal should take into account any time frames in the EAPs. The introduction of a short time frame within which the arbitral tribunal would be required to establish a timetable was also suggested due to the vagueness of the term "as soon as practicable". More generally, it was questioned whether there would be any merit in retaining draft provision 6, as it merely provided guidance to the arbitral tribunal on how to implement article 17 of the UNCITRAL Arbitration Rules.

85. After discussion, the Working Group agreed that draft provision 6(1) should be redrafted to state that the arbitral tribunal should be required to consult with the parties on how it would conduct the proceedings, and that one possible way to do so was through a case management conference. With regard to when to hold the consultation, it was agreed that the Working Group would consider introducing a short time frame within which the tribunal should consult the parties. The Working Group further agreed that draft provision 6(2) should be retained to provide guidance to the arbitral tribunal on how the consultations (including a case management conference) could be conducted. It was further agreed that draft provision 6(3) should be redrafted taking into account article 17(2) of the UNCITRAL Arbitration Rules.

7. Time frames and discretion of the arbitral tribunal (A/CN.9/WG.II/WP.212, paras. 67–78)

86. The Working Group discussed whether the EAPs should include draft provision 7, which provided an overall time frame for expedited arbitration, in light of draft provision 13, which provided a time frame for rendering the award.

87. It was stated that there could be merit in retaining both the overall time frame and the time frame for rendering the award, as to manage the expectation of the parties and to provide guidance to the arbitral tribunal in the conduct of the arbitration. The need to ensure compliance with the overall time frame as well as the need to allow extensions, when necessary, were both underlined.

88. However, it was generally felt that if a time frame for rendering of the award were to be provided in the EAPs, there would not be much benefit in introducing an overall time frame.

89. As to the time period to be included in the EAPs, different views were expressed ranging from 3 to 12 months. It was said that the time period should be short to convey the expedited nature of the proceedings, while providing the possibility of extensions.

90. As to when the time frames would commence, it was widely felt that the time frames in expedited arbitration should commence upon the constitution of the tribunal. It was explained that in ad hoc arbitration, there would be no entity to impose the time frames prior to the constitution of the tribunal.

91. With regard to draft provision 7(2), which provided that the arbitration proceedings would terminate with the rendering of the award, concerns were expressed that it could run the risk of the arbitral tribunal not being able to function subsequent to the issuance of the award, for example, when requested to provide correction or interpretation of the award.

92. After discussion, the Working Group agreed that there would be no need for the EAPs to introduce an overall time frame as provided for in draft provision 7 as long as the time frame for rendering the award was retained in the EAPs. It was generally felt that that time frame should commence upon the constitution of the tribunal. The Working Group agreed to consider related issues (the duration of the time period, the consequences of non-compliance, and possible extension) when it considered draft provision 13 (see paras. 111–120 below).

Non-compliance with the time frame

93. A suggestion was made that article 30 of the UNCITRAL Arbitration Rules might need to be adjusted in the context of expedited arbitration.

Discretion of the arbitral tribunal in expedited arbitration

94. The Working Group considered draft provision 8(1), which expressly set out the discretionary power of the arbitral tribunal to impose time frames on the parties in expedited arbitration.

95. One view was that draft provision 8(1) was not necessary, as such discretion was already provided for under articles 17, 24, 25 and 27 of the UNCITRAL Arbitration Rules. However, it was also pointed that there could be merit in retaining the paragraph as it clarified and reinforced the discretion provided in the above-mentioned articles and also addressed the time frames in the EAPs. It was emphasized that draft provision 8(1) could help address the so-called "due process paranoia" and provide tribunals with a robust mandate to act decisively without fearing that the award would be challenged. Another suggestion was that it could be merged with draft provision 6 which addressed the establishment of a procedural timetable. After discussion, the Working Group agreed to consider whether to retain draft provision 8(1) at a later stage, also taking into account the time frames in the EAPs.

96. With regard to draft provision 8(2), it was suggested that the paragraph could be rephrased as an overarching general provision, which would: (i) indicate the overall objectives of the EAPs (for example, to provide an expeditious, fair and cost-effective dispute resolution mechanism); and (ii) further state that the parties (by agreeing to refer their dispute to the EAPs) and the arbitral tribunal (by accepting to serve that function under the EAPs) would be bound by those objectives. It was stated that a number of institutional rules included such a provision. While it was suggested that the need to provide the parties with the opportunity to present their case should also be mentioned in such a general provision, it was agreed that article 17(1) of the UNCITRAL Arbitration Rules sufficiently addressed that point. It was further agreed that such a provision should be placed as one of the first provisions in the EAPs.

8. Counterclaims and additional claims (A/CN.9/WG.II/WP.212, paras. 79–84)

97. The Working Group reaffirmed its understanding that the right of the parties to make counterclaims and additional claims should be preserved, while limitations could be introduced in the EAPs leaving the discretion of the arbitral tribunal to lift such limitations. However, it was mentioned that draft provisions 9 and 10 contained references to the response to the notice of arbitration and to the statement of defence. As the Working Group had yet to make a decision on the contents of the response and of the statement of defence as well as on the time frame within which the respondent would be required to communicate those documents, it was agreed that the time frames for submitting counterclaims and additional claims would be reviewed at a later stage.

98. In that context, one suggestion was that the respondent should be provided sufficient time to raise a counterclaim, which could be included in the statement of defence. Another suggestion was that counterclaims should only be allowed in the early stages of the arbitration to ensure the efficiency of the overall procedure. Regardless of the limitations in time, it was generally agreed that the tribunal should have the discretion to accept counterclaims at a later stage.

99. A number of suggestions were made with regard to the time frame for making amendments to the claim or defence, for example, that it should be 30 days after the receipt of the statement of defence, or that the period should be determined by the arbitral tribunal.

100. It was noted that counterclaims and additional claims might result in the expedited arbitration no longer being appropriate for resolving the dispute. It was

noted that in such a circumstance, a party would be able to request the non-application of the EAPs in accordance with draft provision 1(4) (see paras. 33–49 above).

101. With regard to apportioning the cost related to counterclaims and additional claims, there was some support for including in the EAPs the formulation found in paragraph 84 of document A/CN.9/WG.II/WP.212, while it was also suggested that if retained, it should apply to claims more generally.

9. Taking of evidence (A/CN.9/WG.II/WP.212, paras. 85–87)

102. It was widely felt that in expedited arbitration, the arbitral tribunal should be able to limit the parties from presenting further written statements and to limit the production of documents, exhibits or other evidence. While such discretion was provided for in articles 24 and 27 of the UNCITRAL Arbitration Rules, it was agreed to include draft provisions 11(1) and (3) in the EAPs expressly noting the discretionary powers of the arbitral tribunal.

103. It was suggested that the drafting of those paragraphs could be improved, for example, (i) by combining paragraphs 1 and 3; and (ii) indicating in paragraph 3 that the tribunal could exclude the production of evidence entirely. It was also suggested that the drafting should not suggest that a party had a "right" to request document production. In that context, reference was made to article 27(3) of the UNCITRAL Arbitration Rules, which provided that the arbitral tribunal could require such production.

104. While a suggestion was made that paragraphs 1 and 3 could list the circumstances under which the arbitral tribunal could impose the limitation, it was generally felt that the tribunal should have broad discretion based on the overall circumstances of the case.

105. There was also general support that the default rule in expedited arbitration should be written witness statements. Accordingly, wide support was expressed for draft provision 11(2).

106. After discussion, the Working Group approved draft provision 11 in substance.

10. Hearings (A/CN.9/WG.II/WP.212, paras. 88–98)

107. The Working Group considered draft provision 12 with regard to the holding of hearings in expedited arbitration. Diverging views were expressed on whether upon the request of a party to hold a hearing, the arbitral tribunal would be required to hold one or it could decide not to hold one.

108. One view was that the arbitral tribunal should be obliged to hold a hearing to provide that party with the opportunity to be heard. It was said that this would be in line with article 17(3) of the UNCITRAL Arbitration Rules as well as the laws of certain jurisdictions, which provided for the right of the parties to request a hearing. It was further stated that depriving that right could result in the annulment of the award. Reference was also made to article 24(1) of the Model Law. It was said that even if the parties had agreed to refer their dispute to the EAPs, which contained a rule similar to draft provision 12(2), that should not be interpreted as implying an agreement by the parties to not hold hearings.

109. Another view was that considering the accelerated nature of expedited arbitration, discretion should be provided to the arbitral tribunal whether to hold a hearing, which justified a departure from article 17(3) of the UNCITRAL Arbitration Rules. It was also noted that arbitral institutions had taken a similar approach to expedite the process. It was stated that as long as the arbitral tribunal invited the parties to express their views and based its decision on the overall circumstances of the case, it should be able to decide to not hold a hearing. Views diverged on which option in draft provision 12(2) better reflected this idea. It was also suggested that if such discretion were to be provided to the arbitral tribunal, there was no need to retain draft provision 12(3). In that context, a suggestion was made that the EAPs could

highlight that hearings were to be held only in exceptional circumstances and that parties were able to agree that no hearings were to be held.

Time frame for requesting a hearing

110. With regard to whether the EAPs should prescribe a time frame within which a party would be allowed to make a request for a hearing (or object to a decision by the tribunal to not hold one), it was widely felt that there should be no such limitation with the understanding that the request should however be made at an appropriate stage of the proceedings (see art. 17(3) of the UNCITRAL Arbitration Rules). It was mentioned that ideally such a request should be made before or during the arbitral tribunal's consultation with the parties. After discussion, the Working Group agreed that draft provision 12(1) should be deleted.

Conduct of the hearing

111. Regardless of whether the arbitral tribunal would be required to hold a hearing or not, it was widely felt that the arbitral tribunal should be given broad discretion on how to conduct the hearings in a streamlined manner. For example, the arbitral tribunal would have the flexibility to determine the most appropriate means (including the possibility to hold a hearing remotely without the physical presence of the parties) and to limit the duration of the hearing, the number of witnesses as well as cross-examination. It was stated that if hearings could be conducted in such a limited fashion, that could alleviate the concerns expressed with regard to the view that arbitral tribunals should be obliged to hold a hearing upon the request by a party.

11. Making of the award (A/CN.9/WG.II/WP.212, paras. 99–109)

Time frame for rendering the award

112. It was recalled that the Working Group had agreed that there would be no need to include an overall time frame for expedited arbitration as long as a time frame was provided for rendering the award (see paras. 85–87 above). During that discussion, it was generally felt that the time frame for rendering the award should commence upon constitution of the tribunal (see para. 89 above). On that basis, there was general support for draft provision 13(1), particularly as a provision that would symbolize the core of expedited arbitration.

113. With regard to the period of time, some preference was expressed for six months (see also para. 88 above). It was stated that six months would sufficiently highlight the expedited nature of the proceedings and that it would be in line with the duration provided for in numerous institutional rules on expedited arbitration. It was also noted that as the Working Group had agreed to allow a party to request the non-application of the EAPs (see para. 48 above), the six-month period would not pose any particular problem.

114. Another view was that six months might be too short, taking into account the likely international and ad hoc nature of the proceedings under the EAPs. Accordingly, some preference was expressed for nine months as a more realistic period, which would also ensure that an extension would not become systematic under the EAPs.

115. During the discussion, other views were also expressed that: (i) the time frame could be shorter for example, three months, considering that it would be possible to extend the time period; and (ii) there was no need for a fixed time frame and discretion should be left to the arbitral tribunal.

116. Having concluded that there would be a time frame for rendering the award, which would commence upon the constitution of the arbitral tribunal, the Working Group agreed that there was no need to include a separate time frame as provided for in draft provision 13(2) which would commence upon the closure of the hearing. It was said that introducing such a time frame might overly complicate the management

of the proceedings and that it might create a discrepancy in the expectations of the parties and of the arbitral tribunal.

Extension of the time frame

117. It was generally felt that the EAPs should provide for the possibility to extend the time frame for rendering the award in limited circumstances, as stipulated in draft provision 13(3). It was also widely felt that the arbitral tribunal (and not the appointing authority) should make the decision whether to extend the time frame, after inviting the parties to express their views.

118. With regard to the phrase "under exceptional circumstances", one view was that it could be further elaborated (possibly listing what those circumstances would be) and that a distinction should be made if the same wording were to be included in draft provision 1(4). In response, it was said that flexibility should be given to the arbitral tribunal in determining whether there existed such an exceptional circumstance and the tribunal should be required to provide the reasons for the extension as provided for in draft provision 13(4).

119. Other suggestions were made with respect to extensions. One was that extension should be allowed only once, while another suggestion was that there should be a limit on the extended period. However, views were also expressed that there should be no such limitations to provide flexibility.

120. In considering the issues related to the extension of the time frame, a question was raised whether the EAPs should address the situation where the time frame might have lapsed against the will of the parties or of the arbitral tribunal, which might result in an unintended termination of proceedings. It was further mentioned that in certain jurisdictions, an award rendered after the lapse of the time frame agreed by the parties could be annulled. It was also mentioned that in certain jurisdictions, extension of the time frame could only be granted upon the agreement of the parties or by an entity other than the arbitral tribunal.

Reasoned award

121. The Working Group reaffirmed its understanding that article 34(3) of the UNCITRAL Arbitration Rules would apply to expedited arbitration, unchanged.

12. Early dismissal and preliminary determination (A/CN.9/WG.II/WP.212, paras. 110–113)

122. The Working Group considered draft provisions X (early dismissal) and Y (preliminary determination), without prejudice to the decision by the Working Group on whether those provisions would be included in the EAPs or would apply more generally to arbitration under the UNCITRAL Arbitration Rules.

123. It was reiterated that those tools could improve the overall efficiency of the arbitration and the practical experience of certain institutions were shared. It was stated that while the use of those tools would be within the inherent power of the arbitral tribunals, providing them explicitly in the arbitration rules could make it easier for the tribunals to utilize them. It was also stated that the introduction of such tools could have a positive impact of discouraging frivolous claims by parties.

124. On the other hand, some doubts were expressed about introducing such procedural tools, which parties might not be familiar with and might pose due process concerns. It was also noted that the use of those tools might not be limited to expedited arbitration. It was further suggested that the tools could be subject to abuse by the parties and might result in additional delays. It was noted that as the arbitral tribunals had the inherent power to make use of those tools, some of the issues that were to be addressed by utilizing the tools could be dealt with during a case management conference.

125. On whether both draft provisions X and Y should be included as they served different purposes, it was noted that there could be merit in merging them to avoid overlap. It was also suggested that the terminology to refer to the tools could be improved.

126. With regard to whether there should be a time frame within which a party would be allowed to request the use of the tools, the benefit of having the request earlier in the proceedings was highlighted, while it was also suggested that there should be no fixed time frame.

127. As to the standard to be applied, it was suggested that the "manifest lack of merit or jurisdiction" could provide a good basis, whereas other standards were also mentioned. In that context, it was noted that article 23 of the UNCITRAL Arbitration Rules already covered pleas as to the jurisdiction.

128. On whether the proceedings should be two-fold with the arbitral tribunal deciding on whether to proceed with the use of the tools and then deciding on the merits, diverging views were expressed. Regardless, it was suggested that there should be a time frame within which a decision would need to be made by the arbitral tribunal.

129. After discussion, the Working Group agreed to consider the issues further at its next session.