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Settlement of commercial disputes

Draft provisions on expedited arbitration

Note by the Secretariat

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I. Introduction

1. At its fifty-first session, the Commission agreed that Working Group II should be mandated to take up issues relating to expedited arbitration.[1] Accordingly, at its sixty-ninth session, the Working Group commenced its consideration of issues relating to expedited arbitration.[2] 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 (A/CN.9/969, para. 11). The Commission, at its fifty-second session, expressed its satisfaction with the progress made by the Working Group.[3]

2. This Note provides an analysis of the characteristics of expedited arbitration as well as preliminary draft provisions to assist the Working Group in its preparation of a text on expedited arbitration.

II. General considerations

A. Focus of the work

3. The Working Group agreed that its work would aim at improving the efficiency of the arbitral proceedings, which would result in reduction of costs and duration of the proceedings (A/CN.9/969, para. 13). Expedited arbitration was described as a streamlined and simplified procedure with shortened time frame, which made it possible to reach a final resolution of the dispute in a cost- and time-effective manner (A/CN.9/969, para. 14). It was also noted that micro, small and medium-sized enterprises would benefit greatly from expedited arbitration.[4]

4. As to the scope of its work, the Working Group decided to focus preliminarily on international commercial arbitration adopting a generic approach. It was also indicated that the impact of its work on investment and other types of arbitration would be assessed at a later stage of its deliberations (A/CN.9/969, para. 34).

5. The Working Group further agreed that once it completed the work on expedited arbitration, it would consider other procedures, such as emergency arbitrator and adjudication, based on additional information about those procedures, particularly regarding their use in the international context (A/CN.9/969, paras. 18, 19, 33 and 115).

B. Form of the work

6. At the sixty-ninth session, the Working Group agreed that it would focus on establishing an international framework on expedited arbitration, without any prejudice to the form that such work might take (A/CN.9/969, para. 33). It was noted that the work could take the following forms (A/CN.9/969, paras. 105–113):

- A set of rules: Preliminary views were expressed on whether a set of rules on expedited arbitration would result in: (i) the revision of the UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as revised in 2013) (hereinafter, the “UNCITRAL Rules” or the “Rules”), (ii) a stand-alone set of rules, or (iii) both. It was pointed out that the presentation of the set of rules

[1] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17), para. 252.

[2] The deliberations and decisions of the Working Group at its sixty-ninth session are set out in document A/CN.9/969.

[3] *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 17* (A/74/17), under preparation as of the date of this note.

[4] Working Group I is currently addressing legal obstacles faced by micro, small and medium-sized enterprises. Information about that Working Group is available at https://uncitral.un.org/en/working_groups/1/msmes.

would need to be considered in light of their applicability and content (see paras. 13–33 below);

- Model clauses: It was suggested that the preparation of model clauses for use by parties wishing to engage in expedited arbitration could usefully complement the work on a set of rules; and
- Guidance material: Such guidance material could complement existing guidance texts of UNCITRAL, for example, the 2016 UNCITRAL Notes on Organizing Arbitral Proceedings and the 2012 Recommendations to assist arbitral institutions and other interested bodies with regard to arbitrations under the UNCITRAL Arbitration Rules. It was mentioned that the preparation of such guidance material could be carried out by the Secretariat in consultation with experts and preferably follow the preparation of a set of rules on expedited arbitration (A/CN.9/969, para. 114).

7. In summary, it was noted that the possible forms of work were not mutually exclusive and that there might be benefit in preparing multiple types of texts that would complement each other. It was generally felt that work could begin on the preparation of a set of rules on expedited arbitration, the presentation of which would need to be considered at a later stage. It was further noted that the rules on expedited arbitration should have a linkage to the UNCITRAL Rules to provide sound alternatives as well as flexibility to the parties (A/CN.9/969, para. 114).

8. Accordingly, this Note includes possible draft provisions which could be included in a set of rules on expedited arbitration (hereinafter referred to generally as the "expedited arbitration rules"), without prejudice to the decision by the Working Group on the final form of its work.

9. There are different ways that the expedited arbitration rules could be presented. While the draft provisions in this Note have been prepared in line with the UNCITRAL Rules and to form part of the Rules (for instance, in a separate section or an appendix[5]) for the sake of simplicity, that is again without prejudice to the decision by the Working Group on how the expedited arbitration rules should eventually be presented. If the expedited arbitration rules were to be presented as stand-alone text (similar to the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, hereinafter the "Transparency Rules"), there would need to be some linkage with the UNCITRAL Rules (A/CN.9/969, para. 114). For example, the stand-alone text may need to reproduce some of the provisions in the UNCITRAL Rules or list them as continuing to apply in expedited arbitration.

C. Preserving due process and fairness

10. Throughout the deliberations at the sixty-ninth session, the notions of due process and fairness were stressed as important elements of international arbitration that should not be overlooked in streamlining the arbitration procedure. The need to balance on the one hand, the efficiency of the arbitral proceedings and on the other, the rights of the parties to due process (including the right to fully present their case) and to fair treatment was constantly emphasized (A/CN.9/969, para. 23).

11. In addressing the recognition and enforcement of arbitral awards resulting from expedited arbitration, the Working Group may wish to consider providing guidance on the conduct of expedited arbitration while preserving due process and fairness, particularly in light of potential challenges against awards and decisions by the tribunal (A/CN.9/969, para. 24).

12. The limited number of case law where due process in the context of expedited arbitration was mentioned indicates that, in their scrutiny of awards, enforcement

[5] At present, the "annex" to the UNCITRAL Rules includes: (i) a model arbitration clause for contracts; (ii) possible waiver statement; and (iii) a model statement of independence pursuant to article 11 of the Rules. To avoid confusion, the term "appendix" is used.

courts have sought to strike a balance between, on the one hand, the arbitrators' powers and discretion in implementing expedited procedure and giving effect to the policy of time and cost efficiency and, on the other hand, the requirements of due process and fairness.[6]

III. Draft provisions on expedited arbitration

A. Scope of application

13. A question that the Working Group may wish to address is how and when a dispute would be resolved through expedited arbitration (A/CN.9/969, paras. 90–101). The Working Group may wish to decide whether to address that question first as discussed in this section (also linked with the question of presentation) or to consider the draft provisions on expedited arbitration as provided in sections B to J first before it considers the applicability question.

1. Application of expedited arbitration

(a) Parties' agreement to expedited arbitration

14. At the sixty-ninth session of the Working Group, it was widely felt that the parties' agreement should be the determining factor for the application of expedited arbitration (A/CN.9/969, para. 95). It was also stated that express consent of the parties would be necessary for expedited arbitration to apply (A/CN.9/969, para. 27). If the parties had agreed in advance to resolve their disputes through expedited arbitration (for example, by agreeing to a set of rules which contain relevant procedure), that agreement would trigger the expedited procedure. It would be the same if the parties agreed to expedited arbitration after a dispute has arisen.

15. The point in time for determining the application of expedited arbitration would need to be carefully considered (A/CN.9/969, para. 28). This is because the parties might not be in a position to know whether expedited arbitration should apply to their dispute when they are entering into a transaction.

16. Article 1 of the UNCITRAL Rules provides as follows:

> *Article 1 (Scope of application)*
>
> 1. Where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree.
>
> 2. The parties to an arbitration agreement concluded after 15 August 2010 shall be presumed to have referred to the Rules in effect on the date of commencement of the arbitration, unless the parties have agreed to apply a particular version of the Rules. That presumption does not apply where the arbitration agreement has been concluded by accepting after 15 August 2010 an offer made before that date. …

17. If the expedited arbitration rules were to form part of, and complement, the Rules, the presumption provided for in article 1(2) needs to be carefully considered because this may imply that the expedited arbitration rules could apply to disputes, whereby the parties might not have been aware of their existence.

18. To accommodate the view that parties' explicit agreement is required for the application of expedited arbitration, the Working Group may wish to consider whether it would be necessary to clarify that the presumption that parties have referred to the

[6] See English High Court, *Travis Coal Restructured Holding v. Essar Global Fund* (2014) EWHC 2510 (Comm), 24 July 2014; Shanghai No. 1 Intermediate People's Court, *Noble Resources International Pte. Ltd. v. Shanghai Xintai International Trade Co. Ltd.* (2016), 11 August 2017.

Rules in effect on the date of commencement of the arbitration does not apply as far as the expedited arbitration rules are concerned. The Working Group may wish to consider the following formulation: "*The presumption under article 1(2) does not apply to [the expedited arbitration rules], where the arbitration agreement was concluded before [the date in which the expedited arbitration rules come into effect]*."

19. This addition, however, would not prevent a party from suggesting to other parties that the expedited arbitration rules should apply to their dispute. In that context, the Working Group may wish to consider whether a provision on the possibility of the notice of arbitration and the response to that notice containing a proposal that the dispute should be settled in accordance with the expedited arbitration rules would be necessary, along the lines of article 3(4) and 4(2) of the Rules.

20. If the expedited arbitration rules were to be presented as a stand-alone text, parties would need to agree to refer their dispute to arbitration under that text for expedited arbitration to apply. The stand-alone text would need to include a provision on its scope of application. In that case, the Working Group may wish to consider whether the UNCITRAL Rules would need to include a provision similar to article 1(4), so as to have a reference to the stand-alone text. As an illustration, the Working Group may wish to consider the following formulation: "*Where parties have agreed that disputes shall be referred to arbitration under the UNCITRAL Arbitration Rules after [the date in which the stand-alone text comes into effect], these Rules include and are modified by the [expedited arbitration rules], unless otherwise agreed by the parties.*"

(b) Determination by a third party on the application of expedited arbitration

21. Under the expedited arbitration procedures of certain arbitral institutions, the application of expedited arbitration is triggered by the institution based on its assessment of the case and relevant circumstances (A/CN.9/969, para. 26, see Section III of document A/CN.9/WG.II/WP.210). The Working Group may wish to consider whether the expedited arbitration rules should include a mechanism whereby expedited arbitration could apply without the explicit agreement of all the parties or upon the request of one of the parties (A/CN.9/969, para. 97).

22. In the context of the UNCITRAL Rules, such a mechanism would require the involvement of a third party (for example, the arbitral tribunal or an appointing authority). In light of the principle of party autonomy, the Working Group may wish to determine whether a third party could suggest to the parties, or encourage them, to use expedited arbitration and also whether a third party, after consultation with the parties, could have the discretion to determine the application of expedited arbitration (A/CN.9/969, para. 97). For this purpose, the Working Group may wish to consider the following formulation to: "*The [arbitral tribunal or the appointing authority], [on its own initiative or] at the request of any party and after consultation with all the parties, may determine that the dispute shall be settled in accordance with the [expedited arbitration rules]*."

23. If such discretion is to be provided, the Working Group may wish to confirm that "consultation" with all the parties would not necessarily mean the "consent" of all the parties. The Working Group may wish to further consider whether any set criteria should be provided for such determination (see para. 24 below) and whether there should be a limited time period during which the discretion can be exercised.

(c) Establishing criteria for determining the application of expedited arbitration

24. There may be a set of criteria to be used to determine whether expedited arbitration would apply or not. Such criteria may have been included by the parties in their arbitration agreement (A/CN.9/969, para. 95) or provided for in the expedited arbitration rules. While some expedited rules of arbitral institutions have in place a financial threshold which triggers the application of expedited arbitration, doubts were expressed in the Working Group on whether a set of rules to be prepared by the Working Group should or could include such a threshold. Doubts were also expressed

on other criteria as well (for example, the characteristics of the case and relevant circumstances). The main concerns were that: (i) it would be difficult for the Working Group to set a threshold amount or other criteria that would be applicable in a generic manner; (ii) in *ad hoc* arbitration, the absence of an authority to make such a determination posed inherent limitations; and (iii) even objective criteria would be difficult to apply, as it would depend largely on the circumstances of the case (A/CN.9/969, paras. 92 and 93).

2. Non-application of expedited arbitration

25. Whereas the section above has set forth possible situations where expedited arbitration could apply, the following deals with situations where expedited arbitration would not apply even though the parties had initially agreed to expedited arbitration.

(a) Parties' agreement to resort to non-expedited arbitration

26. Circumstances, such as the complexity of the case or the introduction of additional claims and counterclaims, could make non-expedited arbitration more appropriate for resolving a dispute. In such instances, the parties may need the flexibility to agree to opt out of expedited arbitration, which would mean (i) reverting to non-expedited arbitration (on the assumption that there is already an agreement to arbitrate) or (ii) resorting to any other means of dispute settlement as long as all parties agree.

27. This situation is foreseen in the draft formulation in paragraph 20, which provides that the parties may agree otherwise. Therefore, when the parties agree that the expedited arbitration rules would not apply, the UNCITRAL Rules would apply without including or being modified by the expedited arbitration rules. If the expedited arbitration rules were to be presented as a stand-alone text, the Working Group may wish to consider the following formulation, which would provide a link to the UNCITRAL Rules: "*At any time, the parties may agree that the dispute shall be settled in accordance with the UNCITRAL Arbitration Rules subject to such modification as the parties may agree.*"

28. The Working Group may, however, wish to take into consideration a suggestion made at the sixty-ninth session that the expedited arbitration rules would not need to include a provision on reverting or resorting to non-expedited arbitration, if sufficient flexibility were provided for in conducting expedited arbitration (for example, if the parties and arbitral tribunal are able to extend time frames). It should also be noted that reverting or resorting to non-expedited arbitration after the proceedings have begun might pose practical challenges, for example, with regard to the constitution of the arbitral tribunal (A/CN.9/969, para. 100). This may be avoided by providing that its composition would remain unchanged, for example, along the following lines: "*In such a case, the arbitral tribunal shall remain in place unless the parties agree to replace or reconstitute the arbitral tribunal.*"

(b) A party's withdrawal from expedited arbitration

29. While parties' agreement is essential in expedited arbitration, the Working Group may wish to consider whether a party that has agreed to expedited arbitration before the dispute should be free to withdraw after the dispute and, if so, until when.

30. Once a dispute arises, it is less likely that all the parties would agree to expedited arbitration (A/CN.9/969, para. 96). One of the parties may argue that the dispute at hand is not suitable for an expedited procedure. Allowing a party to withdraw from expedited arbitration in such circumstances (in other words, requiring the parties' agreement at that stage) may make it difficult for the party wishing to expeditiously resolve a dispute to pursue expedited arbitration as initially agreed by the parties. It might also result in the limited use of expedited arbitration. In this context, questions for consideration by the Working Group include which authority would determine whether to uphold the request of a party to withdraw from the expedited procedure and what criteria would be applied for that determination.

31. Should the Working Group consider that a party that had initially agreed to expedited arbitration should be able to withdraw from expedited arbitration after the dispute has arisen, it may wish to consider the following formulation: "*The [arbitral tribunal] [the appointing authority], at the request of a party and after consultation with all the parties, shall determine whether the [expedited arbitration rules] would apply to the dispute.*"

32. If the expedited arbitration rules were to be presented as a stand-alone text, the Working Group may wish to consider the following formulation, which would provide a link to the UNCITRAL Rules: "*The [arbitral tribunal][appointing authority], at the request of a party and after consultation with all the parties, may determine that dispute shall be settled in accordance with the UNCITRAL Rules.*"

(c) Determination by a third party on the non-application of expedited arbitration despite the parties willing to proceed with expedited arbitration

33. The Working Group may wish to consider whether the expedited arbitration rules should include the possibility of a third party determining to proceed with non-expedited arbitration on its own initiative, when it considers expedited arbitration inappropriate for the dispute. Such a determination, despite the will of the parties to proceed with expedited arbitration, may however pose challenges in the enforcement stage. Should the Working Group decide to take such an approach, the words "on its own initiative or" could be added before the words "at the request of a party" in the draft formulations in paragraphs 31 and 32.

B. Number of arbitrators

34. The Working Group may wish to consider the following formulation regarding the number of arbitrators:

Draft provision 1 (Number of arbitrators)

1. [Unless otherwise agreed by the parties,] there shall be one arbitrator.

2. Upon the request of a party, the [appointing authority] may determine the number of arbitrators, in view of the circumstances of the case.

35. Draft provision 1(1) is based on the understanding of the Working Group that an arbitral tribunal composed of a sole arbitrator should be the rule for expedited arbitration (A/CN.9/969, para. 37). This was based on the assumption that arbitration with a sole arbitrator permits cost-savings, makes it easier for the arbitrator to handle the proceedings in a time-efficient manner, and removes scheduling difficulties that could arise in three-member tribunals (A/CN.9/969, para. 38). In this regard, the Working Group may wish to recall its discussion when revising the UNCITRAL Rules in 2010, after which it decided to retain the default of three arbitrators in article 7(1).[7]

More than one arbitrator in expedited arbitration

36. Compared to a sole arbitrator, it usually takes longer to constitute a three-member tribunal and it is rather difficult for a three-member tribunal to render an award in a short time frame. The Working Group may, however, wish to note that: (i) in the experience of certain institutions, some three-member tribunals have handled expedited proceedings and rendered awards within rather a short time frame and (ii) the presiding arbitrator in a three-member tribunal could have a role in expediting certain procedural aspects (A/CN.9/969, para. 38). Taking these into account, the

[7] See A/CN.9/614, paras. 59–61. In support of retaining the default composition of three members, it was said that the default rule of three arbitrators was a well-established feature of the UNCITRAL Arbitration Rules, reproduced in the Model Law, and ensured a certain level of security by not relying on a single arbitrator. In favour of inclusion of a default rule of a sole arbitrator, it was said that such a rule would render arbitration less costly and thus make it more accessible, particularly to poorer parties and in less complex cases.

Working Group may wish to consider whether the appointment of a sole arbitrator should be the default rule, while the parties should be free to agree on more than one arbitrator in expedited arbitration. This possibility is reflected in the square-bracketed phrase in draft provision 1(1). If this approach is taken, the Working Group may wish to further confirm that a tribunal composed of more than one arbitrator should not be an obstacle to the application of the remaining parts of the expedited arbitration rules.

37. The Working Group may wish to further consider whether a party that has agreed to expedited arbitration (with the default rule of one arbitrator) should be given flexibility to request a tribunal of more than one arbitrator, when it considers the appointment of a sole arbitrator inappropriate. In that context, the Working Group may wish to also consider whether the appointing authority may have any role in determining the number of arbitrators, including whether the tribunal could be composed of more than one arbitrator. This is reflected in draft provision 1(2) and should be read in conjunction with article 7(2) of the UNCITRAL Rules.

38. In considering this issue, the Working Group may wish to take into account the fact that arbitral institutions have adopted different approaches where the arbitration agreement included provisions contrary to the appointment of a sole arbitrator. Some institutions consider it inappropriate to proceed with expedited arbitration if the arbitration agreement provides for more than one arbitrator;[8] some institutions encourage parties to agree on the appointment of a sole arbitrator;[9] and others have a rule prescribing the appointment of a sole arbitrator, which might be imposed on the parties regardless of their agreement to the contrary.[10]

39. The last approach would need to be carefully considered in the context of article V(1)(d) of the New York Convention, which provides that a court might refuse to recognize and enforce an arbitral award if the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties. Therefore, one approach would be that party autonomy should be respected, and that parties should remain free to determine the number of arbitrators, in light of particulars of the dispute including cost and the preference for collective decision-making. A different approach would be that the choice by the parties of the set of arbitration rules, which include such imposition, would be sufficient to indicate the agreement of the parties on the appointment of a sole arbitrator.[11]

C. Appointment of the arbitrator

40. The Working Group may wish to consider the following formulation regarding the appointment of the arbitrator:

Draft provision 2 (Appointment of the arbitrator)

1. The parties shall jointly agree on the arbitrator.

2. If within [**] days after receipt by all other parties of a proposal for the appointment of a sole arbitrator the parties have not reached agreement thereon, a sole arbitrator shall, at the request of a party, be appointed by the appointing authority.

41. Draft provision 2(1) is based on the understanding that the appointment of the arbitrator should be jointly agreed upon by the parties. The Working Group may wish

[8] See, for instance, Rule 75.2(2) in Chapter VI of the JCAA Commercial Arbitration Rules (2015).

[9] See, for instance, HKIAC Administered Arbitration Rules (2018) and the Vienna Rules (2018).

[10] See, for instance, the ICC Arbitration Rules (2017), Appendix VI, Article 2(1) and the ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration § 82–84 (October 2017).

[11] The relevant provision on expedited procedure of the SIAC Rules was scrutinized by the Singapore High Court in the *AQZ v. ARA* case where a party was seeking to set aside the award rendered by a sole arbitrator. The Court ruled that the award did not violate the agreement of the parties: incorporating SIAC Rules in the agreement was equated to agreeing that these Rules should take precedence where expressly so prescribed. Case available at: https://www.singaporelawwatch.sg/Portals/0/Docs/Judgments/[2015]%20SGHC%2049.pdf.

to consider whether the draft provision should require the notice of arbitration to include a proposal regarding the sole arbitrator as a way to expedite the appointment process.[12]

42. While the appointment process for a sole arbitrator might be simpler than for a three-member tribunal, it may still require the intervention of the appointing or other authority.[13] Draft provision 2(2) provides the default mechanism for situations where the parties could not agree on the selection and appointment of the sole arbitrator. Draft provision 2(2) is based on article 8(1) of the UNCITRAL Rules with the understanding that article 8(2) of the Rules would also be applicable in expedited arbitration. The Working Group may wish to consider whether the period of 30 days in draft provision 2(2) should be shortened.

43. To provide a shortened time frame for the appointment, the Working Group may wish to consider the following formulation of draft provision 2: "*Within [**] days after the receipt by the respondent of the notice of arbitration, the parties shall jointly agree on the sole arbitrator, failing which the appointing authority would appoint the arbitrator pursuant to the procedure provided for in article 8 of the UNCITRAL Rules.*"

44. If the Working Group determines that the parties would be able to agree on more than one arbitrator in expedited arbitration (see paras. 36–39 above), it should consider whether the procedure provided for in articles 9 and 10 of the UNCITRAL Rules would be applicable in expedited arbitration.

45. The Working Group may wish to take note of the information provided by the Permanent Court of Arbitration at The Hague (PCA) on its role for the appointment of sole arbitrators under the UNCITRAL Rules (see Section II of document A/CN.9/WG.II/WP.210) to better assess the role that appointing authorities could play in the appointment process in expedited arbitration.

Availability of the arbitrator and disclosures by the arbitrator

46. In expedited arbitration, arbitrators are usually required to formally confirm their availability to ensure the expeditious conduct of the arbitration and to give due regard to the expedited nature of the proceedings. The Working Group may wish to consider whether the phrase provided for in the model statements of independence pursuant to article 11 of the UNCITRAL Rules[14] would be sufficient for that purpose. The Working Group may wish to further consider the consequences of non-compliance by the arbitrator in this regard as with other time frames.

47. The Working Group may also wish to consider whether article 11 of the UNCITRAL Rules on disclosure by arbitrators would need to be adapted for expedited arbitration.

Challenges of arbitrators and replacement of an arbitrator

48. The Working Group may wish to review whether the articles 12 and 13 of the UNCITRAL Rules on challenges of arbitrators would need to be adapted for expedited arbitration, possibly with shorter time frames. The Working Group may also wish to review whether article 14 of the UNCITRAL Rules regarding the replacement

[12] Article 3(4)(b) of the UNCITRAL Rules provides that the notice of arbitration "may" include a proposal for the appointment of a sole arbitrator.

[13] At the sixty-ninth session, a suggestion was made that, following article 11 of the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law"), such appointment could be made by the court or competent authority at the place of arbitration. In response, it was noted that not all jurisdictions had enacted legislation based on the Model Law and that providing national courts or competent authorities with such a role might raise difficulties with regard to disputes of an international nature (A/CN.9/969, paras. 44–45).

[14] The phrase reads: "I confirm, on the basis of the information presently available to me, that I can devote the time necessary to conduct this arbitration diligently, efficiently and in accordance with the time limits in the Rules."

of the arbitrator would need to be adapted for expedited arbitration, taking into account that the default rule would be a sole arbitrator.

D. Case management conference and procedural timetable

49. The Working Group may wish to consider the following formulation regarding case management conference:

Draft provision 3 (Case management conference)

1. [Within ** days] [As soon as practicable] after its constitution, the arbitral tribunal may convene a case management conference to consult the parties on the manner in which the arbitral tribunal would conduct the arbitration in accordance with article 17(1) of the UNCITRAL Rules.

2. During or following such conference, the arbitral tribunal shall establish the [procedural][provisional] timetable of the arbitration.

3. [Such a conference may be conducted through a meeting in person, by video conference, telephone or similar means of communication. In the absence of an agreement of the parties, the arbitral tribunal shall determine the means by which the conference will be conducted. The arbitral tribunal may request the parties to submit case management proposals in advance of a case management conference and may request the attendance at any case management conference of the parties in person or through an internal representative.]

Case management conference

50. Draft provision 3 reflects the understanding that a case management conference is an important procedural tool, which permits an arbitral tribunal to give parties a timely indication as to the organization of the proceedings and the manner in which it intends to proceed (A/CN.9/969, para. 56).[15] It is also based on the understanding that case management conferences and procedural timetables are useful tools for arbitrators and parties to manage the key time frames of the proceedings (A/CN.9/969, para. 51). The Working Group may wish to confirm whether the use of the term "case management conference" in the draft provision is appropriate.[16]

51. At the sixty-ninth session, diverging views were expressed on whether a case management conference should be an essential (thus mandatory) tool for the conduct of expedited arbitration. One view was that requiring a case management conference would contribute to streamlining the procedure and providing certainty to the parties. Another view was that a case management conference might not be appropriate or not even be necessary in certain types of disputes, which could be decided in a rather short period (A/CN.9/969, para. 58). The Working Group may wish to consider that the word "may" in draft provision 3(1) reflects the view that the arbitral tribunal should be given flexibility and discretion in organizing a case management conference.

52. With regard to the timing of the case management conference, the usefulness of holding one at the very early stages of the proceedings was shared by the Working Group. However, different views were expressed on whether there should be a fixed time frame. Some favoured a strict time frame (for instance, within 15 days, or as soon as possible, after the commencement of the proceedings or constitution of the tribunal) while others expressed the view that flexibility should be left to the arbitral tribunal on when to hold a case management conference, which would depend largely on the circumstances of the case (A/CN.9/969, para. 62). The Working Group may

[15] See Note 1 of the UNCITRAL Notes on Organizing Arbitral Proceedings (2016, hereinafter "the 2016 UNCITRAL Notes"), available at: http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-2016-e.pdf. Note 1 highlights the importance of holding case management meetings at which the parties and the arbitral tribunal can establish strict time limits.

[16] The Notes on Organizing Arbitral Proceedings uses the term "procedural meetings".

wish to consider whether draft provision 3(1) should include a time frame for holding a case management conference.

Procedural timetable

53. Draft provision 3(2) reflects the understanding that during or following a case management conference, a procedural timetable should be established forming the basis for a common understanding of the procedure among the parties and the arbitral tribunal.[17] The Working Group may wish to consider whether draft provision 3(2) is necessary in light of the fact that article 17(2) of the Rules already provides for the establishment of a provisional timetable (see para. 60 below).

54. The Working Group may also wish to discuss whether draft provision 3 should address how to record the outcome of the case management conference, for example, as a procedural order of the tribunal.[18]

Logistics relating to the case management conference

55. Draft provision 3(3) elaborates on the notion that a case management conference does not need to be held in person (A/CN.9/969, para. 63). The Working Group may wish to consider whether the options of holding case management conferences remotely or by written exchanges would need to be elaborated further in the draft provision.

E. Time frames and related issues

56. At its sixty-ninth session, the Working Group considered issues relating to time frames (time limits) in expedited arbitration. It was indicated that while shorter time frames constituted one of the key characteristics of expedited arbitration, due consideration should be given to preserving the flexible nature of the proceedings and complying with due process requirements (see paras. 10–12 above).

57. The UNCITRAL Rules as well as the expedited rules of arbitral institutions contain time frames for key procedural steps to streamline the proceedings. Some rules introduce deadlines for key procedural steps, giving discretion to the arbitral institution to extend or shorten them. Others provide for an overall duration rather than setting time frames for each procedural stage.

Time frames within the UNCITRAL Rules

58. The Working Group may wish to consider whether any of the time frames in the UNCITRAL Rules would need to be shortened in the context of expedited arbitration. For example, article 4 and 25 of the UNCITRAL provides as follows:

> *Article 4 (Response to the notice of arbitration)*
>
> 1. Within 30 days of the receipt of the notice of arbitration, the respondent shall communicate to the claimant a response to the notice of arbitration, which shall include: …
>
> *Article 25 (Periods of time)*
>
> The periods of time fixed by the arbitral tribunal for the communication of written statements (including the statement of claim and statement of defence) should not exceed 45 days. However, the arbitral tribunal may extend the time limits if it concludes that an extension is justified.

[17] A procedural timetable may serve, for instance, to indicate time limits for the communication of written statements, witness statements, expert reports and documentary evidence, so that the parties may plan early in the arbitral proceedings. A procedural timetable may include provisional dates for hearings. See the 2016 UNCITRAL Notes, Note 1, para. 13.

[18] Ibid., para. 16.

Discretion of the tribunal with regard to time frames and other matters

59. At the sixty-ninth session of the Working Group, it was noted that including time frames for the key stages of expedited arbitration might be difficult to implement, as the time necessary would differ depending on the dispute at hand (A/CN.9/969, para. 51). It was also suggested that time frames may be better determined by the parties and the arbitral tribunal, for example, during a case management conference.

60. Article 17(1) of the UNCITRAL Rules provides the arbitral tribunal with wide discretion to conduct the arbitration proceedings as it considers appropriate. Article 17(2) provides that the arbitral tribunal should establish the provisional timetable of the arbitration. Articles 24 and 27 provide that the tribunal should fix the period of time for written statements and taking evidence. The Working Group may wish to consider whether it would be necessary or desirable for the expedited arbitration rules to explicitly provide that the arbitral tribunal may impose fixed time frames on the parties and if so, for which stages of the proceedings. One advantage of doing so would be that it could reinforce the discretion of the arbitral tribunal, which would likely limit the risk of challenges at the enforcement stage (A/CN.9/969, para 50).

61. The Working Group may, however, wish to recall that when revising the Rules in 2010, it agreed that the arbitral tribunal should have the authority to modify the periods of time prescribed in the Rules but not the authority to alter the general time frames that might be set by the parties in their agreements without prior consultation with the parties.[19] The Working Group may wish to confirm this understanding.

62. In light of the above, the Working Group may wish to consider an alternative formulation of draft provision 3(2) (see para. 49 above):

> *Draft provision 3 (Case management conference)*
>
> 1. …
>
> 2. During or following such conference, the arbitral tribunal shall establish the [procedural][provisional] timetable of the arbitration, in which the arbitral tribunal may fix the period of time for any stage of the proceedings. The arbitral tribunal may, at any time, after inviting the parties to express their views, extend or abridge any period of time fixed by the arbitral tribunal.

63. In addition to time frames, the Working Group may wish to consider whether the expedited arbitration rules should expressly provide for or reiterate other procedural measures which the arbitral tribunal could impose on the parties in expedited arbitration (A/CN.9/969, para. 65). These could include limitations on the number, length and scope of written submissions and written evidence, or not allowing document production at all.

64. In relation to time frames in expedited arbitration, the Working Group may also wish to consider the following issues.

Commencement of the time frame

65. For the purposes of calculating a time frame in expedited arbitration, it would be necessary to determine when the period beings to run (see article 2(6) of the UNCITRAL Rules). For calculating time frames in expedited arbitration, the Working Group may wish to consider the following points in time: (i) the date on which the notice of arbitration is received by the respondent (article 3(2) of the UNCITRAL Rules); (ii) the date when the arbitral tribunal is composed or constituted; (iii) the date when the procedural timetable is established or agreed upon; and (iv) the date when the statements of claim or defence is communicated to the other party and the

[19] A/CN.9/619, para. 136.

arbitral tribunal. It would be important that the parties and the arbitral tribunal are fully aware of such point in time (A/CN.9/969, para. 54).

Extension of the time frame

66. Another related question is the extension of the time frame. It was generally felt that even when a time frame is fixed in expedited arbitration, flexibility should be provided to extend the time, but only in exceptional circumstances and when the extension is justified (A/CN.9/969, para. 52).

67. In institutional arbitration, the administering institution may have a role in granting such an extension. In *ad hoc* arbitration, the authority to extend the time could lie with the parties themselves, the arbitral tribunal, the appointing authority or the court or competent authority at the place of arbitration, while doubts also were expressed the respective possibilities (A/CN.9/969, para. 53). The Working Group may wish to consider which authority should have the power to grant an extension and the possible role that the appointing authority, if any, could have in this regard.

Non-compliance with the time frame

68. The Working Group may wish to consider whether the expedited arbitration rules should include means for the arbitral tribunal or any other authority to strictly enforce time frames in expedited arbitration. This question is closely related to the consequences for non-compliance by the parties (on the consequences for non-compliance by the tribunal, see para. 99 below).

69. At its sixty-ninth session, the Working Group considered the treatment of submissions by parties that did not meet the fixed time frame ("late submissions", A/CN.9/969, para. 69). One approach was that late submissions should not be allowed to preserve the expeditious nature of the proceedings. Another approach was to provide the arbitral tribunal with the flexibility to accept such submissions, but only in exceptional circumstances and when the extension is justified. In accepting late submissions, the arbitral tribunal would be required to consider: (i) the reason why it was not possible for the party to make the submissions within the time frame; (ii) at which stage of the proceedings the submissions are being made; (iii) the impact of rejecting the submissions on the right of parties to present their case; and (iv) the likelihood that the procedure could be continued in an expedited form (A/CN.9/969, para. 69). The Working Group may wish to consider article 30(3) of the UNCITRAL Rules in that light.

Treatment of the notice of arbitration and response thereto as the statements of claim and of defence

70. Articles 20(1) and 21(1) of the UNCITRAL Rules respectively address situations where the claimant or the respondent elects to treat the notice of arbitration or response thereto as a statement of claim or of defence. Both articles are useful in practice, as they clarify that a party does not need to produce a statement of claim or of defence, if it considers that its notice of arbitration or response thereto already fulfils that purpose.[20] In the context of expedited arbitration, the Working Group may wish to consider the following formulation:

Draft provision 4 (Notice of arbitration and response thereto)

1. The notice of arbitration shall comply with the requirements of article 3, paragraph 3 and article 20, paragraphs 2 and 3. The notice of arbitration should [, as far as possible,] be accompanied by all documents and other evidence relied upon by the claimant, or contain references to them.

2. The response to the notice of arbitration shall comply with the requirements of article 4, paragraph 1 and article 21, paragraph 2. The response to notice of arbitration should [, as far as possible,] be accompanied by all

[20] See A/CN.9/669, para. 19

documents and other evidence relied upon by the respondent, or contain references to them.

71. Draft provision 4(1) reflects the understanding that in expedited arbitration, the notice of arbitration should serve as the statement of claim and that all evidence should be submitted with the notice of arbitration (A/CN.9/969, paras. 67 and 71). Draft provision 4(2) replicates the same requirement for respondents. However, the Working Group may wish to consider the view that it would not be reasonable to expect that the response to the notice could be accompanied by all documents and other evidence to be relied upon by the respondent (A/CN.9/969, para. 71).

72. If the expedited arbitration rules are to be presented as a stand-alone text, the Working Group may wish to consider which elements would need to be required in a notice of arbitration and response thereto.

F. Early dismissal and preliminary determination

73. The Working Group may wish to consider the following formulation regarding early dismissal of claims/defences:

Draft provision 5 (Early dismissal)

1. [Unless the parties have agreed otherwise,] a party may, [no later than 30 days after the constitution of the arbitral tribunal, and in any event, no later than the case management conference convened by the arbitral tribunal pursuant to draft provision 3(1)], raise a plea that a claim [or defence] is manifestly without legal merit [or outside the jurisdiction of the arbitral tribunal].

2. The party shall specify as precisely as possible the facts and the legal basis for the plea.

3. The arbitral tribunal, after giving the parties the opportunity to express their views, shall decide whether to allow the plea to proceed.

4. The arbitral tribunal, after giving the parties the opportunity to express their views on the plea, shall notify the parties of its decision on the plea [through an order/award] stating the reasons [in summary form]. The [order/award] shall be made within [**] days of the plea, unless the [arbitral tribunal] [parties] extends the time.

5. The decision of the arbitral tribunal shall be without prejudice to the right of a party to file a plea as to the jurisdiction of the arbitral tribunal under article 23 or to object, in the course of the proceeding, that a claim [or a defence] lacks legal merit.

74. Draft provision 5 is based on the understanding of the Working Group that expedited arbitration rules could include early dismissal, a tool provided to arbitral tribunals to dismiss claims and defences that lacked merit (A/CN.9/969, para. 20).[21] The Working Group may wish to consider the following aspects:

(i) Whether early dismissal is more appropriate in the context of investment arbitration, though a few arbitral institutions have recently introduced provisions on early dismissal not necessarily limited to investment arbitration;

(ii) While early dismissal is a method to expedite the proceedings (see para. 77 below), whether it could be used in different types of proceedings and in non-expedited arbitration (A/CN.9/969, para. 116);

(iii) Whether early dismissal could raise due process concerns, particularly when the parties have not agreed to the use of such tool and in relation to

[21] See ICSID Rules Article 41(5) and Rule 29 of the 2016 SIAC Arbitration Rules. The SIAC rule permits early dismissal of both claims and defences.

paragraph 1, whether to retain the words “unless the parties have agreed otherwise”;

(iv) The time frame in paragraph 1 within which a party can request early dismissal and the terminology to be used to refer to such a request (for example, “raise a plea”[22], “file an objection” or “apply for early dismissal”);

(v) Whether claims and defences should both be subject to early dismissal and whether the basis would be limited to manifest lack of merit or also with regard to lack of jurisdiction (see article 23 of the UNCITRAL Rules);

(vi) In paragraph 4, the form of the decision by the tribunal (order, award, partial award) and the time frame within which the decision is to be made;

(vii) Whether the proceedings should be twofold, with the tribunal deciding on whether to proceed with early dismissal in paragraph 3 and then deciding on the merits in paragraph 4; and

(viii) Whether the party requesting early dismissal should be obliged to inform the other parties.

75. The Working Group may wish to also consider draft provision 6, which reflects the understanding that the expedited arbitration rules could address not only early dismissal but also preliminary determination by the arbitral tribunal (A/CN.9/969, para. 21):[23]

Draft provision 6 (Preliminary or early determination)

1. [Unless the parties have agreed otherwise,] a party may request the arbitral tribunal to decide one or more issues of fact or law without necessarily undertaking every procedural step that might otherwise be required.

2. Such a request may concern issues of [jurisdiction,] admissibility or the merits. It may include, for example, an assertion that:

(i) issues of fact or law [material to the outcome of the case] alleged by the other party are manifestly without legal merit;

(ii) even if issues of fact or law alleged by the other party are assumed to be correct, no award could be rendered in favour of that party; or

(iii) ….]

3. Any request for preliminary determination procedure shall be made [as promptly as possible] [within a time period to be specified] after the relevant issues of law or fact are submitted.

4. The request shall specify the grounds relied on and the proposed procedure to be applied demonstrating that such procedure is efficient and appropriate considering all circumstances of the dispute.

5. After providing the other party an opportunity to submit comments, the arbitral tribunal shall decide either to dismiss the request or to fix the procedure it deems appropriate, taking into account all relevant circumstances, including efficient and expeditious resolution of the dispute. The arbitral tribunal shall make the decision within [**] days from the date of the request, unless the [arbitral tribunal] [parties] extends the time.

6. If the request is granted, the arbitral tribunal shall seek to make its decision [through an order/award] stating the reasons [in summary form], while treating the parties with equality and giving each party a reasonable opportunity of presenting its case. The [order/award] shall be made within [**] days from the

[22] Article 23 of the UNCITRAL Rules uses the phrase “pleas as to the jurisdiction of the arbitral tribunal”.

[23] See article 40 of the SCC Rules for Expedited Arbitrations (2017) and article 43 of the HKIAC Administered Arbitration Rules (2018).

date of the decision to proceed with procedure pursuant to paragraph 5, unless the [arbitral tribunal] [parties] extends the time.

76. Preliminary or early determination allows a party to request the arbitral tribunal to decide on one or more issues or points of law or fact without undergoing every procedural step that the parties and the arbitral tribunal must otherwise follow in an arbitration (also often referred to as "summary procedure"). Draft provision 6 should be reviewed taking into account article 23 of the UNCITRAL Rules on pleas as to the jurisdiction of the arbitral tribunal. The Working Group may wish to consider the term to be used as well as issues outlined in paragraph 74 above, as they are also relevant to draft provision 6.

77. The Working Group may wish to first determine whether draft provision 5 or 6 deserve to be included in the expedited arbitration rules as a means to expedite the procedure. This should be considered also noting that if the plea for early dismissal or request for preliminary determination is unsuccessful, it could lead to delays in the entire process as the tribunal would be required to make decisions in response to the plea or request. The Working Group may also wish to consider whether both draft provisions 5 and 6 should be included, as there may be overlap.

78. In its deliberation, the Working Group may wish to consider whether articles 17(1) and 34(1) of the UNCITRAL Rules, respectively recognizing the broad discretion of the arbitral tribunal to conduct the proceedings and to make separate awards on different issues at different times, allow the tribunal to proceed with early dismissal or preliminary determination and if so, whether there is benefit in including explicit provisions such as draft provisions 5 and 6.[24] Also, as both draft provisions have been prepared requiring one of the parties to raise a plea or make a request, the Working Group may wish to consider whether it should be possible for the tribunal to make a decision on its own motion and, if so, under what circumstances.

G. Counterclaims and additional claims

79. At the sixty-ninth session, it was noted that counterclaims and additional claims typically resulted in delays in the proceedings and the extent to which they should be allowed should be carefully considered in light of both the accelerated nature of the procedure and due process requirements (A/CN.9/969, para. 66). It was also noted that early knowledge about counterclaims and additional claims would make it easier for the parties and the arbitral tribunal to determine whether expedited arbitration was appropriate for resolving the dispute.

80. Draft provisions 7 and 8 below have been prepared on the basis that there should be limitations on the ability of parties to present counterclaims and additional claims given the expedited nature of the proceedings (A/CN.9/969, para. 67).

81. The Working Group may wish to consider the following formulation regarding counterclaims:

Draft provision 7 (Counterclaims)

The respondent may make a counterclaim or rely on a claim for the purpose of a set-off [provided that the arbitral tribunal has jurisdiction over it] in its response to the notice of arbitration [statement of defence]. A counterclaim or claim for the purpose of a set-off may be made at a later stage of the proceedings, only if the arbitral tribunal decides that the delay was justified under the circumstances.

[24] For example, the ICC Note to Parties and Arbitral Tribunals on the Conduct of Arbitration mentions that the power to immediately dismiss manifestly unmeritorious claims or defences is available through the case management power accorded to arbitral tribunals under article 22 of the ICC Arbitration Rules.

82. Under draft provision 7, a respondent would be required to raise counterclaims in their response to the notice of arbitration. An extension of the time frame could be provided by the arbitral tribunal under justifiable circumstances. In considering draft provision 7, the Working Group may wish to take into account article 21(3) of the UNCITRAL Rules as well as draft provision 4 on the treatment of the response to the notice of arbitration as statement of defence (see para. 70 above).

83. The Working Group may wish to consider the following formulation regarding additional claims:

Draft provision 8 (Additional claims)

A party may not amend or supplement its claim or defence, including a counterclaim or a claim for the purpose of a set-off, unless the arbitral tribunal considers it appropriate to allow such amendment or supplement having regard to the delay in making it and prejudice to other parties or any other circumstances.

84. Under draft provision 8, claimants and respondents will be restricted from amending or supplementing their claim or defence in expedited arbitration unless allowed by the tribunal. As an alternative, the Working Group may wish to consider prescribing a time frame within which a party may amend or supplement its claim (for example, a short period of time after the receipt of the response to the notice of arbitration or within a period of time determined by the arbitral tribunal).

85. In both draft provisions 7 and 8, some degree of flexibility is left to the arbitral tribunal in allowing additional claims or counterclaims. This is because a restrictive approach (for example, to the effect that such claims would only be acceptable in exceptional circumstances, such as the occurrence of new events and presentation of new factual evidence) might run contrary to due process requirements and the right of access to justice. In that context, the Working Group may wish to consider whether in allocating the costs in expedited arbitration, the arbitral tribunal may apportion the cost related to the counterclaim or additional claims to the party requesting it, if the claims were found to be frivolous.

H. Hearings

86. The Working Group may wish to consider the following formulation regarding the holding of hearings in expedited arbitration:

Draft provision 9 (Hearing)

Option A: Unless otherwise agreed by the parties, the proceedings shall be conducted on the basis of documents and other materials [only] [without any hearing]. Upon the request of a party, the arbitral tribunal shall decide whether to hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument.

Option B: Unless otherwise agreed by the parties, the arbitral tribunal may decide that the proceeding shall be conducted on the basis of documents and other materials [only] [without any hearing]. If a party objects, the arbitral tribunal shall [decide whether to] hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument.

87. Draft provision 9 reflects the understanding that limitations on hearings are a key characteristic of expedited arbitration (A/CN.9/969, para. 75). Draft provision 9 is based on article 17(3) of the UNCITRAL Rules, which foresees the possibility of the arbitral tribunal not holding a hearing in the absence of a request from any party to hold one. Under option A, the default would be that there is no hearing in expedited arbitration. Under option B, the arbitral tribunal would have the discretion to proceed with no hearing. In both options, it would still be possible for the parties to agree to

hold hearings, which will be binding on the arbitral tribunal (and hence, the phrase "unless otherwise agreed by the parties").

88. Even if the parties had agreed in advance not to hold hearings (or to leave that determination to the arbitral tribunal in option B), a party may still request to hold a hearing and the arbitral tribunal may not be in the position to refuse (A/CN.9/969, para. 76). Such may be the case if the right of a party to present its case through a hearing is considered a non-waivable right in a jurisdiction. Depriving a party of that right could result in the violation of due process requirements and the principle of equal treatment of the parties (see article 18 of the Model Law and article V(1)(b) of the New York Convention).[25] Draft provision 9 thus provides that a party that wishes to hold a hearing may make that request to the tribunal (option A) or object to the decision by the tribunal not to hold hearings (option B).

89. In that context, the Working Group may wish to consider whether it should be provided that, when allocating the costs in expedited arbitration, the arbitral tribunal may apportion the cost of the hearing to the party requesting it, if the hearing proved to be superfluous. This may deter frivolous requests for hearings in expedited arbitration.

90. At the sixty-ninth session, the benefit of holding a hearing in arbitral proceedings was also emphasized. It was noted that hearings were useful and could expedite the process, as they provide the arbitral tribunal and the parties the occasion to communicate as well as the tribunal the opportunity to consider a number of issues in an expeditious fashion (A/CN.9/969, para. 76). A hearing could also reduce or avoid the need for written witness statements.

91. A hearing in expedited arbitration could be limited to a specific purpose or limited in time (for example, a single hearing within a short time frame or with limited number of witnesses or restricted cross-examinations), all of which would likely ensure the efficiency of the overall process (A/CN.9/969, paras. 75 and 82). There are also different means of holding a hearing, including remotely and thus not requiring the physical presence of the parties. The Working Group may wish to consider whether article 28 of the UNCITRAL Rules would be applicable to hearings in expedited arbitration and whether further guidance on how to organize hearings should be provided.[26]

I. Taking of evidence

92. Rules on expedited arbitration usually do not address how evidence is to be taken (A/CN.9/969, para. 73). Moreover, approaches of arbitration laws and practices vary on the taking of evidence.[27] In light of this, the Working Group may wish to consider the means of avoiding extensive production of documents and multiple cross-examinations of fact and expert witnesses, taking into account the differences between the legal traditions of the parties involved in international arbitration.[28]

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[25] In contrast, the Svea Court of Appeal in Sweden ruled that when deciding not to hold a hearing, the arbitrator applied the SCC Rules for Expedited Arbitrations and the applicable law the parties agreed upon and further found that the decision by the arbitrator not to hold a hearing did not contradict the arbitration rules applicable to the proceedings and rejected the challenge (Case No. T6238-10, 24 February 2012, summary and English translation available here).

[26] See the 2016 UNCITRAL Notes, Note 17.

[27] The 2016 UNCITRAL Notes, Note 13. See also the IBA Rules on the Taking of Evidence in International Arbitration which have sought over the years to bring a more harmonized approach among various legal traditions and the recent Rules on the Efficient Conduct of Proceedings in International Arbitration ("The Prague Rules").

[28] For example, the Svea Court of Appeal in Sweden found that the fact that the parties have agreed on expedited arbitration, does not in of itself preclude the right of a party to move for an order of disclosure (Case No. Ö 4004-09, 23 March 2010, summary and English translation available here).

93. At the sixty-ninth session, a number of suggestions were made including, requiring all evidence to be submitted with the notice of arbitration (see draft provision 4 in para. 70 above), limiting requests to produce documents and reducing evidence to documents, written testimonies and expert opinions. The Working Group may wish to consider whether the relevant articles in the UNCITRAL Rules would need to be adjusted for expedited arbitration. For example, article 24 may be adjusted to limit the tribunal from requesting further written statements or limiting the time frame during which such request could be made. Similarly, articles 27(2) and (3) could be modified so that witness statements are to be submitted in writing only and there is a time frame during which the tribunal could require parties to produce documents, exhibits or other evidence.

94. The Working Group may, however, wish to take account of the view that flexibility should be left to the arbitral tribunal on taking of evidence, which would also provide parties sufficient time to present witness statements or expert opinions (A/CN.9/969, para. 73). In that context, the Working Group may wish to consider whether guidance should be provided on taking of evidence rather than including a specific provision in the form of rules.

J. Rendering of the award

95. The Working Group may wish to consider the following formulation regarding the rendering of the award in expedited arbitration:

Draft provision 10 (Award)

1. The award shall be rendered within [**] days from the [time to be specified], unless the [arbitral tribunal in consultation with the parties] [appointing authority] [parties] extends the time limit.

2. The arbitral tribunal shall state the reasons upon which the award is based in summary form, unless the parties have agreed that no reasons are to be given.

96. Draft provision 10 deals with the rendering of the award in expedited arbitration reflecting the views that rendering of the award is one of the most time-consuming stages of arbitration and that reducing that time could shorten the overall duration of the proceedings.[29] Arbitral institutions have endeavoured to expedite proceedings by requiring arbitral tribunals to render the award within a set time frame and/or by providing discretion to arbitral tribunals on giving reasons in the award (A/CN.9/969, para. 83).

97. Draft provision 10(1) should be read in conjunction with article 34(2) of the UNCITRAL Rules. Paragraph 1 reflects the Working Group's understanding that expedited arbitration might benefit from a fixed time frame for the issuance of the award (A/CN.9/969, para. 49). The Working Group may wish to consider whether to introduce such a time frame in expedited arbitration and if so: (i) the appropriate period of time; (ii) from which date that period should begin; and (iii) the mechanism to extend the time frame (see paras. 65–67 above).

98. Time frames implemented by arbitral institutions for rendering of the award vary. Time frames can usually be extended but only in case of exceptional circumstances. With regard to the authority to extend the time frame under draft provision 10(1), the Working Group could consider the tribunal in consultation with the parties or the appointing authority. While draft provision 10(1) also foresees the parties as having the authority to extend the time frame, it may be practically difficult for the parties to agree to such at the rendering stage.

[29] The Working Group may, however, recall that when it revised the UNCITRAL Arbitration Rules in 2010, it agreed that it would not be feasible to set a maximum duration for the proceedings given the generic nature of the Rules and that there would be no institution to deal with possible extensions of the time limit (A/CN.9/614, para. 118).

99. The Working Group may wish to consider whether the consequences of non-compliance by the arbitral tribunal with the time frame should be prescribed in draft provision 10 (for example, reduction of arbitrator's fees or replacement of the arbitrator, A/CN.9/969, para. 55).

100. Draft provision 10(2) reflects the understanding that not requiring the arbitral tribunal to give reason or to give reasons in summary form would likely accelerate the arbitration procedure, particularly when the dispute is not complex or when it is to render an award on agreed terms (A/CN.9/969, para. 83). It should be read in conjunction with article 34(3) of the UNCITRAL Rules and article 31(2) of the Model Law, both of which provide the possibility of no reasons being stated in the award when the parties have agreed. An alternative to draft provision 10(2), which would make non-reasoned award a default rule in expedited arbitration would be as follows: "The reasons upon which the award is based do not need to be given, unless otherwise agreed by the parties." In any case, the arbitral tribunal would not be prevented from explaining its decisions in the award.

101. At the sixty-ninth session, it was stated that the law of certain jurisdictions required awards to be accompanied by reasons in some form. It was also mentioned that providing reasons was a duty of the tribunal to the parties and that requiring the tribunal to state the reasons could assist it in its decision-making and comfort the parties as they would find that their arguments had been duly considered (A/CN.9/969, paras. 85–86). It was also mentioned that the absence of reasons could impede the control mechanism with respect to the award, as the court or other competent authority would not be in a position to consider whether there were grounds for setting aside the award or refusing its recognition and enforcement. The Working Group may wish to take these aspects into account when considering draft provision 10(2).

102. The words "in summary form" in draft provision 10(2) reflects the understanding that awards in expedited arbitration should contain reasons but that they need not be long nor detailed (A/CN.9/969, para. 87). According to draft provision 10(2), the default rule would be that arbitral tribunals had the discretion to render the award providing reasons in a succinct and concise manner allowing the parties to understand the rationale behind the decision of the arbitral tribunal, with the possibility of the parties agreeing that no reason need to be given. The phrase "in summary form" would not mean that all of the reasons would need to be provided or that the reasons should reflect all arguments made by the parties (A/CN.9/969, para. 88). The Working Group may wish to provide further guidance on the meaning of that phrase as some viewed the phrase as not being objective, creating uncertainty about when that standard is met. The Working Group may also wish to consider the suggestion of having two separate time frames: one for rendering of the award and another for providing the reasons upon which the award is based (A/CN.9/969, para. 89).

103. In considering the issues relating to the award, the Working Group may wish to consider whether relevant provisions of the UNCITRAL Rules (article 37 on interpretation of the award, article 38 on correction of the award, article 39 on additional award) and the time frame prescribed therein should be adjusted for expedited arbitration.

IV. Responses to the questionnaire on expedited arbitration

104. Upon request by the Working Group to collect information on the different roles undertaken by arbitral institutions in administering expedited arbitration (A/CN.9/969, para. 103), the Secretariat circulated a questionnaire on 26 April 2019 and received responses from 18 institutions as of the date of this note. With the aim of assisting the Working Group in its deliberations, the responses to the questionnaire are available on the UNCITRAL website in English. Other institutions interested in providing their responses are also invited to submit their responses to the Secretariat.

<Questions asked in the questionnaire>

1. Does your institution have a procedure or mechanism in place to expedite arbitral proceedings? If so, are the provisions on expedited arbitration included in the institutional rules, or are they presented in a separate set of rules? Was there a particular reason for such an approach? If your institution administers cases under the UNCITRAL Arbitration Rules, does your institution adopt a specific procedure to accelerate arbitral proceedings under those Rules?

2. Please share with us your experience in administering expedited arbitration including acceptance and use by parties and how expedited arbitration has resulted in the reduction of cost and duration of the proceedings. Please provide any statistics, if available.

3. Under what circumstances does expedited arbitration apply? Is there a set of criteria or are the parties free to choose when expedited arbitration would apply? What role does your institution play in determining whether the expedited procedure would apply?

4. What role does your institution have in appointing, as well as challenges to, the arbitrator in expedited arbitration? If your institution has functioned as an appointing authority under the UNCITRAL Arbitration Rules, how long and how much does it cost, in average, for such an appointment?

5. Do your institutional rules impose timelines for the arbitral proceeding and if so, are they for certain stages of the proceedings or for the overall process? How does your institution ensure compliance with timelines, if any, and does your institution have a role in extending the timelines?

6. Can an arbitral award be rendered in summary form or without giving any reason? If so, on what basis? Please indicate any statistics, if available.

7. In administering expedited arbitration, does your institutions have a role in ensuring due process and fairness as well as the quality of the award?

8. As a procedural tool, can arbitral tribunals dismiss claims and defences that lack merit under your institutional rules? If so, how often is this used?

9. If your institution is aware of any court decisions relating to the use of expedited arbitration, please provide us with a short summary or a link to the relevant decision.