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## **Draft Explanatory Note to the UNCITRAL Expedited Arbitration Rules**

**Note by the Secretariat**

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This note contains the revised text of the Explanatory Note to the UNCITRAL Expedited Arbitration Rules reflecting the deliberations and decisions of the Commission at its fifty-fourth session (*Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 17 (A/76/17)*, under preparation). All sections except section N (Period of time for making of the award) have been adopted by the Commission at that session. The Commission agreed that section N as well as other parts of the explanatory note would need to be adjusted and updated to reflect the deliberations and decisions of the Commission, particularly those on article 16 of the UNCITRAL Expedited Arbitration Rules. At the end of its deliberation, the Commission decided to approve the explanatory note in principle and to task Working Group II to finalize the text at its seventy-fourth session. The Commission also requested the Secretariat to publish the Expedited Rules along with the explanatory note upon finalization of the text by the Working Group.

## **Explanatory Note to the UNCITRAL Expedited Arbitration Rules**

1. Expedited arbitration is a streamlined and simplified procedure with a shortened time frame, which makes it possible for the parties to reach a final resolution of the dispute in a cost- and time-effective manner. The UNCITRAL Expedited Arbitration Rules (hereinafter the “Expedited Rules”) provide a set of rules which parties may agree for expedited arbitration. The Expedited Rules balance on the one hand, the efficiency of the arbitral proceedings and on the other, the rights of the parties to due process and fair treatment.
2. Article 1(5) of the UNCITRAL Arbitration Rules (hereinafter the “UARs”) incorporates the Expedited Rules, which are presented as an appendix to the UARs. The phrase “where the parties so agree” in that paragraph emphasizes the need for the parties’ express consent for the Expedited Rules to apply to the arbitration.
3. In the following, any reference to “article(s)” is to that in the Expedited Rules, unless otherwise expressly indicated.

### **A. Scope of application**

#### **Article 1**

4. Article 1 provides guidance on when the Expedited Rules apply. Express consent of the parties is required for the application of the Expedited Rules.
5. Parties are free to agree on the application of the Expedited Rules at any time even after the dispute has arisen (see model arbitration clause in the annex to the Expedited Rules). For example, parties that had concluded an arbitration agreement or had initiated arbitration under the UARs before the effective date of the Expedited Rules (19 September 2021) can subsequently agree to refer their dispute to arbitration under the Expedited Rules. Likewise, a party may propose to the other party or parties that the Expedited Rules shall apply to the arbitration.
6. However, parties should be mindful of the consequences when changing from non-expedited to expedited arbitration. For example, a notice of arbitration communicated in accordance with article 3 of the UARs might not meet the requirements in article 4 of the Expedited Rules, whereby the claimant has to communicate proposals for the designation of an appointing authority and for the appointment of a sole arbitrator. Therefore, it would be prudent for the parties to agree on how such requirements could be met, should they agree to refer their dispute to arbitration under the Expedited Rules after the proceedings had begun. Similarly, if a three-member arbitral tribunal was constituted in accordance with the UARs, the parties need to agree whether to preserve the three-member tribunal (which is possible under article 7) or to appoint a sole arbitrator in accordance with article 8. If the

constitution of the tribunal is changed, the parties may also need consider the status of statements and evidence submitted to the former tribunal.

7. Article 1 indicates that the UARs generally apply to expedited arbitration, unless and as modified by the Expedited Rules. The phrase “as modified by these Expedited Rules” means that rules in the UARs and the Expedited Rules need to be read in conjunction for the proper conduct of the proceedings. The rules in the UARs are either supplemented or replaced by those in the Expedited Rules. For the avoidance of doubt, the footnote to article 1 provides a list of articles in the UARs that would not apply in the context of expedited arbitration. However, parties retain the flexibility to tailor the rules to their proceedings.

8. As the Expedited Rules are presented as an appendix to the UARs, reference to “the Rules” or “these Rules” in the UARs (see articles 1(2), 1(3), 1(4), 2(6), 4(2), 6(3), 6(4), 6(5), 10(3), 17(1), 17(2), 30(1), 30(2), 32 and 41(4)(b) of the UARs) include the Expedited Rules in the context of expedited arbitration.

9. In relation to article 1(2) of the UARs, parties to an arbitration agreement concluded before the entry into force of the Expedited Rules will not be presumed to have referred their dispute to the Expedited Rules, even though the Expedited Rules are presented as an appendix to the UARs. This is because the Expedited Rules only apply when so expressly agreed by the parties. On the other hand, if a subsequent version of the Expedited Rules were to be prepared, article 1(2) of the UARs would apply, which means that the Expedited Rules in effect on the date of commencement of the expedited arbitration would apply, unless the parties have agreed on the current or any other version of the Expedited Rules.

## **Article 2**

10. Even when the parties had initially agreed to refer their dispute to arbitration under the Expedited Rules, the circumstances may be such that the Expedited Rules are not appropriate to resolve the particular dispute. Article 2 addresses such circumstances, with paragraph 1 allowing parties to agree to withdraw from expedited arbitration.

11. In accordance with paragraph 2, a party that had agreed to refer the dispute to arbitration under the Expedited Rules may subsequently request withdrawal from expedited arbitration, when the circumstances evolved in a manner that would make expedited arbitration no longer suitable for resolving the dispute (see also para. 91 below). While there is no time limit within which a party can request withdrawal, the arbitral tribunal should consider at which stage of the proceedings the request is being made.

12. The phrase “in exceptional circumstances” means that the party requesting withdrawal should provide convincing and justified reasons for the request and that the arbitral tribunal should uphold the request only in limited circumstances. It introduces a high threshold for allowing a unilateral withdrawal from expedited arbitration.

13. When making the determination, the arbitral tribunal should consider whether the Expedited Rules are no longer appropriate for the resolution of the dispute. It may wish to take into account, among others, the following:

- The urgency of resolving the dispute;
- The stage of the proceedings at which the request is made;
- The complexity of the dispute (for example, the anticipated volume of documentary evidence and the number of witnesses);
- The anticipated amount in dispute (the sum of claims made in the notice of arbitration, any counterclaim made in the response thereto as well as any amendment or supplement);

The terms of the parties' agreement to expedited arbitration and whether the current circumstances could have been foreseeable at the time of the agreement; and

- The consequences of the determination on the proceedings.

14. The above is a non-exhaustive list of elements that can be taken into account and it would not be necessary for the arbitral tribunal to consider all the elements therein.

15. When making the determination, the arbitral tribunal, in accordance with article 17(1) of the UARs, may decide that the Expedited Rules in their entirety would no longer apply or that certain articles would no longer apply to the arbitration. When deciding that certain articles of the Expedited Rules would no longer apply, the arbitral tribunal should make clear to the parties how the arbitration would be conducted and on the basis of which articles.

16. If the arbitral tribunal is not yet constituted, the determination would need to be made after it is constituted. However, if the parties are not able to reach an agreement on the arbitrator or if there is a disagreement between the parties on (i) whether the Expedited Rules apply or (ii) whether the criteria in the arbitration agreement triggering the application of the Expedited Rules are met, the appointing authority may be involved in constituting the arbitral tribunal in accordance with article 10(3) of the UARs. The appointing authority will make a prima facie decision on whether the arbitration would be conducted under the Expedited Rules. However, the ultimate determination on the application of the Expedited Rules would be left to the arbitral tribunal.

17. When the Expedited Rules no longer apply to the arbitration pursuant to paragraph 1 or 2, the arbitral tribunal shall conduct the arbitration in accordance with the UARs. However, this does not mean that the arbitral tribunal, if already constituted, would have to be re-constituted in accordance with the UARs. Instead, the arbitral tribunal shall remain in place in accordance with paragraph 3. There may, however, be instances where the parties agree to replace any arbitrator or reconstitute the arbitral tribunal. There may also be instances where the arbitrator resigns, for example, if the arbitrator appointed under the Expedited Rules believes that his or her schedule of future commitments does not allow for the conduct of non-expedited arbitration.

18. Unless the arbitral tribunal decides otherwise, the non-expedited proceeding should resume at the stage where the expedited proceeding was when the parties agreed to withdraw or the arbitral tribunal made the determination. Decisions made during the expedited proceeding should remain applicable to the non-expedited proceedings, unless the arbitral tribunal decides to depart from its earlier decisions or from a decision made by the previous tribunal.

## **B. General provision on expedited arbitration**

19. Considering that a fair and efficient resolution of the dispute is a common goal of arbitration under both the UARs and the Expedited Rules, article 3 highlights the expeditious nature of the proceedings under the Expedited Rules and emphasizes the obligation of the parties and the arbitral tribunal to act expeditiously.

20. Paragraph 1 is a reminder to parties that when referring their dispute to arbitration under the Expedited Rules, they are agreeing to cooperate in ensuring the efficiency of the proceeding as well as for a swift resolution of the dispute, particularly in an ad hoc setting where there is no administering institution to further expedite the process.

21. Paragraph 2 should be read along with article 17(1) of the UARs. Therefore, arbitral tribunals in expedited arbitration have the same duty to conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and

efficient process to resolve the dispute. The arbitral tribunal should also comply with any due process requirements.

22. Arbitral tribunals, when conducting arbitration under the Expedited Rules, should be mindful of the objectives of the Expedited Rules, of the parties' intentions and expectations when they chose the Expedited Rules and of the time frames therein, particularly those in article 16 with regard to the rendering of the award. The annex to the Expedited Rules includes a model statement which parties could request the arbitrator to add to the statement of independence. The model statement highlights that the arbitrator would conduct the arbitration expeditiously and in accordance with the time frames in the UARs and the Expedited Rules.

23. Designating and appointing authorities as well as arbitral institutions administering arbitration under the Expedited Rules should also be mindful of the objectives of the Expedited Rules as well as any applicable time frames (see para. 58 below).

24. Paragraph 3 emphasizes the discretion provided to the arbitral tribunal to make use of a wide range of technological means to conduct the proceeding, including when communicating with the parties and when holding consultations and hearings. It also mentions that consultations and hearings can be held without the physical presence of the parties as well as remotely. The inclusion of such a rule in the Expedited Rules does not imply that the use of technological means is available to arbitral tribunals only in expedited arbitration. The rule aims to assist the arbitral tribunal in streamlining the proceedings and avoiding unnecessary delay and expense, both of which are in line with the objectives of expedited arbitration. The arbitral tribunal should be mindful that the use of technological means is subject to the rules in the UARs to provide for a fair proceeding and to give each party a reasonable opportunity to present its case. Thus, the arbitral tribunal should also be mindful of any due process requirements. In that light, the arbitral tribunal should give the parties an opportunity to express their views on the use of such technological means and consider the overall circumstances of the case, including whether such technological means are at the disposal of the parties.

### **C. Notice of arbitration, response thereto, statements of claim and defence**

#### **Article 4**

25. Article 4 addresses the initiation of recourse to arbitration by the claimant and modifies articles 3(4) and 20(1) of the UARs.

26. Two elements, which are optional under article 3(4) of the UARs, are required in the notice of arbitration. This is to facilitate the speedy constitution of the arbitral tribunal in expedited arbitration. In accordance with paragraph 1, the claimant is required to propose an appointing authority (unless the parties have previously agreed thereon) and the arbitrator. It is important for the claimant to include such information in its notice of arbitration because the 15-day time frames in articles 6 and 8 begin with the receipt by the respondent of the respective proposals.

27. A proposal for the appointment of the arbitrator does not mean that a party needs to put forward the name of the arbitrator; rather, a party may suggest a list of suitable candidates or qualifications, or a mechanism to be used by the parties for agreeing on the arbitrator. This would also cater for cases where the parties agreed to more than one arbitrator in expedited arbitration.

28. To further expedite the process, paragraph 2 requires the claimant to communicate its statement of claim along with its notice of arbitration. This modifies the rule in article 20(1) of the UARs, which provides that the statement of claim should be communicated within a period of time to be determined by the arbitral tribunal.

29. In summary, when initiating recourse to expedited arbitration, the claimant needs to include the following in its notice of arbitration and the statement of claim:

- A demand that the dispute be referred to arbitration (UARs art. 3(3)(a));
- The names and contact details of the parties (UARs arts. 3(3)(b) and 20(2)(a));
- Identification of the arbitration agreement that is invoked (UARs art. 3(3)(c)) and a copy thereof (UARs art. 20(3));
- Identification of any contract or other legal instrument out of or in relation to which the dispute arises (UARs art. 3(3)(d)) and a copy thereof (UARs art. 20(3)) – in the absence of such contract or instrument, a brief description of the relevant relationship (UARs art. 3(3)(d));
- A brief description of the claim and an indication of the amount involved, if any (UARs art. 3(3)(e));
- The relief or remedy sought (UARs arts. 3(3)(f) and 20(2)(d));
- A proposal as to the number of arbitrators, language and place of arbitration, if the parties have not previously agreed thereon (UARs art. 3(3)(g));
- A proposal for the designation of an appointing authority, unless the parties have previously agreed thereon (Expedited Rules art. 4(1)(a));
- A proposal for the appointment of an arbitrator (Expedited Rules art. 4(1)(b));
- A statement of the facts supporting the claim (UARs art. 20(2)(b));
- The points at issue (UARs art. 20(2)(c));
- The legal grounds or arguments supporting the claim (UARs art. 20(2)(e)); and
- As far as possible, all documents and other evidence relied upon by the claimant, or references to them (UARs art. 20(4)).

30. In light of article 7 which provides a default rule of a sole arbitrator, the claimant would not need to propose the number of arbitrators in its notice of arbitration, unless it wishes to suggest the constitution of an arbitral tribunal of more than one arbitrator.

31. With respect to the last item on the above list, the objective is to require the presentation of the complete case for the sake of efficiency. It does not, however, mean that all evidence has to be communicated at this stage, which may be burdensome and counterproductive. This is highlighted by the words “as far as possible” and the claimant may decide to make reference to the evidence to be relied upon. For example, witness statements need not be submitted at this stage. The claimant could instead identify in its statement of claim: (i) any witness whose testimony it would rely on; (ii) the subject matter of the testimony; and (iii) any subject matter for which the claimant intends to submit expert reports. It would be preferable to determine which evidence is to be submitted during the consultation between the arbitral tribunal and the parties (see para. 62 below).

32. The claimant may elect to treat its notice of arbitration as its statement of claim, as long as the notice of arbitration complies with the requirement of the statement of claim (see second sentence of article 20(1) of the UARs). In that case, the claimant would be communicating a single document combining its notice of arbitration and statement of claim.

33. Paragraph 3 requires the claimant to communicate its notice of arbitration and statement of claim to the arbitral tribunal as soon as it is constituted. In the case that the arbitral tribunal consists of more than one arbitrator, the claimant would, in practice, communicate its notice of arbitration and statement of claim to each of the arbitrators upon his or her appointment.

## Article 5

34. Article 5 addresses the actions required by the respondent upon receipt of a notice of arbitration and a statement of claim from the claimant. It envisages a two-stage reply with a shorter time frame for the response to the notice of arbitration (hereinafter the “response”) and a longer one for the statement of defence. This is to facilitate the speedy constitution of the tribunal and to provide sufficient time for the respondent to prepare its case.

35. The respondent is required to communicate a response within 15 days of the receipt of the notice. Article 5(1) thus modifies article 4(1) of the UARs, which provides for a 30-day time frame. A shorter time frame is imposed on the response, as it addresses procedural issues, in particular those relating to the constitution of the arbitral tribunal.

36. The response shall respond to the information set forth in the notice of arbitration. As article 4(1) of the Expedited Rules requires a claimant to include in its notice of arbitration proposals on an appointing authority and the appointment of the arbitrator, the respondent is required to include a response to those proposals. If the respondent disagrees with the proposals, the respondent is free to make its own proposals in accordance with article 4(2)(b) and (c) of the UARs.

37. In summary, the respondent would need to provide, within 15 days of the receipt of the notice of arbitration, the following in the response:

- The name and contact details of each respondent (UARs art. 4(1)(a));
- A response to the information set forth in the notice of arbitration, pursuant to article 3(3)(c) to (g) of the UARs (UARs art. 4(1)(b)); and
- A response to the information set forth in the notice of arbitration, pursuant to article 4(1)(a) and (b) of the Expedited Rules (Expedited Rules art. 5(1)).

38. To provide the respondent with sufficient time to prepare its statement of defence and to ensure equality of the process, the respondent has 15 days from the constitution of the arbitral tribunal to communicate its statement of defence. Article 5(2) introduces a 15-day time frame in contrast to article 21(1) of the UARs, which provides that the statement of defence shall be communicated within a period of time to be determined by the arbitral tribunal. If the respondent requests for additional time, the arbitral tribunal may extend the 15-day time frame in accordance with article 10.

39. The respondent may elect to treat its response to the notice of arbitration as its statement of defence, as long as the response complies with the requirement of article 21(2) of the UARs (see second sentence of article 21(1) of the UARs).

## D. Designating and appointing authorities

40. The appointing authority has a significant role in expediting the proceedings, especially with regard to the constitution of the arbitral tribunal. Therefore, it is important that the parties agree on the choice of an appointing authority (see model arbitration clause, paragraph (a)). When the parties have not agreed on that choice, article 6 of the Expedited Rules provides a mechanism for the Secretary-General of the Permanent Court of Arbitration (PCA) to designate an appointing authority or to serve as one, both of which would lead to an earlier engagement of the appointing authority.

41. Article 6(1) simplifies the process provided for in article 6(2) of the UARs by allowing a party to request the Secretary-General of the PCA to serve as the appointing authority. It provides a streamlined and flexible process, while providing a level of discretion to the Secretary-General of the PCA.

42. The process is accelerated by allowing any party to engage with the Secretary-General of the PCA any time after 15 days have lapsed from the receipt by all parties of a proposal on an appointing authority. In practice, this means that a claimant that has included in its notice of arbitration a proposal for an appointing authority in accordance with article 4(1) is able to make the request to the Secretary-General of the PCA 15 days after the receipt of the notice by the respondent.

43. It should, however, be noted that article 5(1) provides the respondent 15 days to respond to the notice of arbitration, which should also include a response to the proposal for an appointing authority. Therefore, it would be prudent for the claimant to consider such response before engaging the Secretary-General of the PCA. In any case, the Secretary-General of the PCA in exercising its functions under article 6(1) would be required to give the parties an opportunity to present their views, including any proposals on the appointing authority.

44. Similar to article 6(1), article 6(2) modifies article 6(4) of the UARs and allows a party to request the Secretary-General of the PCA to designate a substitute appointing authority or to serve as one, where the appointing authority refuses or fails to act. However, this would not be possible when the Secretary-General of the PCA is already serving as the appointing authority.

45. Paragraph 3 provides a level of discretion to the Secretary-General of the PCA to address practical questions that could arise, for example, (i) when a party has previously rejected or rejects a proposal for the Secretary-General of the PCA to serve as appointing authority; (ii) when a party requests the Secretary-General of the PCA to serve as appointing authority and the other party requests it to serve as designating authority; and (iii) when a party requests the Secretary-General of the PCA to either designate an appointing authority or to serve as an appointing authority.

46. Paragraphs 1, 3, 5, 6 and 7 of article 6 of the UARs continue to apply to expedited arbitration.

## **E. Number of arbitrators**

47. Article 7 provides that an arbitral tribunal composed of a single arbitrator is the default rule in expedited arbitration. As such, article 7(1) of the UARs is replaced by article 7 of the Expedited Rules. Parties, however, can agree on more than one arbitrator, in light of the particulars of the dispute and if collective decision-making is preferred. However, they should be mindful that proceedings involving an arbitral tribunal composed of more than one arbitrator may be less expeditious (see para. 59 below).

48. When the parties have referred their dispute to arbitration under the Expedited Rules and there is no separate agreement on the number of arbitrators, the appointing authority should not have any role in determining that number and should appoint a sole arbitrator in accordance with articles 7 and 8. While the appointing authority may make a prima facie decision on whether the arbitration is to be conducted under the Expedited Rules, the ultimate determination on the application of the Expedited Rules would be left to the arbitral tribunal (see para. 16 above).

49. Article 7(2) of the UARs continues to apply in expedited arbitration when the parties agreed to constitute the arbitral tribunal with more than one arbitrator.

## **F. Appointment of the arbitrator**

50. Article 8 addresses how a sole arbitrator is to be appointed in expedited arbitration. If the parties agreed on more than one arbitrator, articles 9 and 10 of the UARs apply.

51. Paragraph 1 encourages the parties to reach an agreement on the sole arbitrator.

52. Paragraph 2 provides a mechanism in the absence of an agreement by the parties on a sole arbitrator. Any party may request the engagement of the appointing authority 15 days after a proposal for the appointment of a sole arbitrator has been received by all other parties. This is shorter than the 30-day time frame in article 8(1) of the UARs. The involvement of the appointing authority can only be triggered by a request by one of the parties.

53. Considering that the claimant is required to include a proposal for the appointment of a sole arbitrator in the notice of arbitration (see article 4(1) and para. 27 above), if there is no agreement within 15 days after the respondent's receipt of the notice of arbitration, the claimant would be able to make a request to the appointing authority, if previously agreed by the parties. If a proposal is not included in the notice, the 15-day time frame would commence when the proposal is made.

54. It should, however, be noted that article 5(1) provides the respondent 15 days to respond to the notice of arbitration, which should also include a response to the claimant's proposal of a sole arbitrator. Therefore, it would be prudent for the claimant to consider the response before engaging with the appointing authority. If the respondent foresees that an agreement cannot be reached, it could also engage with the appointing authority at the same time it communicates the response to the notice of arbitration.

55. If there is no agreement by the parties on the appointing authority and the sole arbitrator 15 days after the receipt of the notice by the respondent, any party may request the Secretary-General of the PCA to designate the appointing authority or to serve as appointing authority in accordance with article 6(1). In the latter case, a party can also request the appointment of a sole arbitrator in accordance with article 8(2), which would likely facilitate a speedy constitution of the arbitral tribunal.

56. Article 8(2) of the UARs, which mentions a list-procedure for the appointment of a sole arbitrator, also applies to expedited arbitration.

57. In exercising the functions under the Expedited Rules, the appointing authority and the Secretary-General of the PCA should be mindful of article 6(5) of the UARs, which requires them to give the parties and, where appropriate, the arbitrators an opportunity to present their views. Any proposal made by the parties on the appointment of a sole arbitrator should thus be taken into account.

58. When appointing an arbitrator for expedited arbitration, the appointing authority shall make an effort to secure not only an independent and impartial arbitrator in accordance with article 6(7) of the UARs but also an arbitrator who is available and ready to conduct the arbitration expeditiously in accordance with article 3(2) of the Expedited Rules.

59. The time frames in article 9 of the UARs on the constitution of a three-member arbitral tribunal apply to expedited arbitration. However, parties may wish to reduce the time frames therein to expedite the constitution of a three-member arbitral tribunal.

## **G. Consultation with the parties**

60. Consultation between the arbitral tribunal and the parties at an early stage of the proceedings is particularly key to an efficient and fair organization of expedited arbitration. The terms "consult" and "consultation" are used in article 9 to highlight the interactive nature of the engagement between the arbitral tribunal and the parties when discussing how the arbitration would be conducted. In general, the phrase "after inviting the parties to express their views" is used throughout the UARs as well as in articles 2, 3, 10, 11, 14 and 16 of the Expedited Rules to refer to a situation where the arbitral tribunal is required to give the parties an opportunity to express their support, concerns or objections before the arbitral tribunal takes a decision on a certain matter.

61. Article 9 requires the arbitral tribunal to consult the parties on how to organize the proceedings. It thus conveys the expectation that the arbitral tribunal will engage actively with the parties rather than to simply invite them to express their views. A case management conference is one way of conducting such consultation and can be an important procedural tool, particularly in expedited arbitration, as it 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.

62. A number of issues could be discussed during consultations so as to create a basis for a common understanding of the proceedings, for example: (i) a list of points at issue including those that need to be addressed with priority; (ii) the need for further written statements and evidence; (iii) whether and how to conduct further consultations as well as hearings, including whether they would be in person or using technological means, including remotely; (iv) other procedural issues as well as the timetable. Similarly, the parties could indicate the witnesses that they will present to testify as well as the content of their testimony.

63. Article 9 introduces a short time frame within which the tribunal should consult the parties as it is useful for this to be done at the very early stages of the proceedings. The arbitral tribunal should conduct the consultation with the parties promptly after and within 15 days of its constitution. In certain cases, the respondent might not yet have communicated its statement of defence as it is to be communicated within 15 days of the constitution of the arbitral tribunal (see article 5(2)). Nonetheless, it would be useful for the arbitral tribunal to consult the parties at an early stage based on the notice of arbitration, response thereto as well as the statement of claim. Upon receipt of the statement of defence from the respondent, further consultations may be required, particularly if an agreement on a provisional timetable has been deferred pending the arbitral tribunal's review of the statement of defence or if the agreed timetable requires an update following such review.

64. Consultations may be conducted through a meeting in person, in writing, by telephone or videoconference or other means of communication as provided for in article 3(3). Considering that sufficient flexibility is provided to the arbitral tribunal, it should not be burdensome to meet the 15-day time frame in article 9.

65. In accordance with article 17(2) of the UARs, the arbitral tribunal should establish the provisional timetable. In so doing, the tribunal should be mindful of the time frames in the Expedited Rules, in particular those in article 16. Similarly, following the consultations, the arbitral tribunal should communicate to the parties the outcome of the consultations to ensure that the parties are fully aware of the time frames and avoid delays.

## **H. Time frames and the discretion of the arbitral tribunal**

66. Article 10 addresses the discretion of the arbitral tribunal with regard to time frames in expedited arbitration. It should be read along with the second sentence of article 17(2) of the UARs.

67. As such, article 10 clarifies that the arbitral tribunal may extend or abridge any period of time prescribed under the UARs and the Expedited Rules or agreed by the parties. Even after a time frame has been fixed in accordance with article 10, flexibility is provided to adjust the time period when the adjustment is justified. However, this discretion is subject to article 16, which provides a specific rule with regard to the time frames for rendering the award and their extensions (see paras. 84–94 below).

68. Article 10 clarifies and reinforces the discretionary power of the arbitral tribunal to adapt the proceedings to the circumstances of the case, further limiting the risk of challenges at the enforcement stage. In other words, it provides the arbitral tribunal with a robust mandate to act decisively without fearing that its award could be set aside for a breach of due process.

69. While shorter time frames constitute one of the key characteristics of expedited arbitration, arbitral tribunals should preserve the flexible nature of the proceedings and comply with due process requirements.

70. With regard to the consequences of non-compliance by the parties with the time frames, article 30 of the UARs on default applies to expedited arbitration. With regard to late submissions, considering that flexibility is provided to the arbitral tribunal in setting and modifying time frames, the arbitral tribunal can reject or disregard such submissions, while such discretion should be exercised with care.

## **I. Hearings**

71. Article 11 emphasizes the discretionary power of the arbitral tribunal to not hold hearings in expedited arbitration in the absence of a request by any party. It should be read together with article 17(3) of the UARs, which provides that: (i) the arbitral tribunal shall hold hearings if any party so requests at an appropriate stage of the proceedings; and (ii) in the absence of such a request, the arbitral tribunal shall decide whether to hold hearings. Parties themselves may agree to hold hearings, in which case that agreement is binding on the arbitral tribunal.

72. A hearing may cause delays particularly if the scheduling of the parties and the arbitral tribunal need to be coordinated. A hearing may be useful, however, when witness testimony and expert opinions are critical for the tribunal's decision-making. Moreover, a direct exchange between the parties and the arbitral tribunal at a hearing (whether in person or remotely) may facilitate a better understanding of the case and make the proceedings more efficient.

73. Considering the short time frame of six months for rendering the award in expedited arbitration, the arbitral tribunal may wish to decide at an early stage of the proceedings whether to hold hearings. A request to hold a hearing at a later stage may delay the proceedings and may have a negative impact on the arbitral tribunal complying with that time frame.

74. As parties have a right to request the holding of a hearing, article 11 requires the arbitral tribunal to invite the parties to express their views on whether hearings are to be held. This may also be done during the consultation with the parties (see para. 62 above). If a party so requests at that stage, the arbitral tribunal will need to hold a hearing in accordance with article 17(3) of the UARs. In the absence of such a request prior to and during the consultation, the arbitral tribunal may go ahead and decide to not hold a hearing.

75. This means that the proceedings shall be conducted on the basis of documents and other materials. A request by a party to hold a hearing after a decision by the arbitral tribunal to not hold one can be denied as the request would no longer be considered as being made at "an appropriate stage of the proceedings" (see article 17(3) of the UARs). Article 11 thus has the effect of limiting the time frame during which a request for holding a hearing can be made.

76. As provided for in article 3(3) of the Expedited Rules and article 28(4) of the UARs, the arbitral tribunal may utilize any technological means to hold hearings without the physical presence of the parties or witnesses, including remotely. The remaining paragraphs of article 28 of the UARs also apply to the conduct of hearings in expedited arbitration. The arbitral tribunal has a broad discretion on how to conduct the hearings in a streamlined manner. Efforts should be made to limit the duration of the hearings, the number of witnesses as well as cross-examination and at the same time, to maintain due process.

## **J. Counterclaims and claims for the purpose of set-off**

77. Article 12 preserves the right of the parties to make counterclaims and claims for the purpose of set-off (hereinafter referred to as "counterclaims"), but introduces

certain qualifications, which can be lifted by the arbitral tribunal. This is to ensure that counterclaims do not result in delays in expedited arbitration.

78. Article 12 replaces article 21(3) of the UARs and introduces a higher threshold for counterclaims. Paragraph 1 requires the respondent to make any counterclaim at the latest in its statement of defence. A counterclaim can be made at a later stage of the proceedings, but only when the arbitral tribunal considers it appropriate under the circumstances.

## **K. Amendments and supplements to a claim or defence**

79. Article 13 replaces article 22 of the UARs. It introduces a higher threshold for parties to make amendments and supplements to a claim or defence, including a counterclaim or a claim for the purposes of set-off (hereinafter referred to as “amendments”) in the context of expedited arbitration. Nonetheless, it provides flexibility in its application to different circumstances. Accordingly, a party is not allowed to make amendments unless the arbitral tribunal considers it appropriate to allow such amendments. When determining whether to allow amendments, the arbitral tribunal should take into account at which stage of the proceedings such a request for the amendment is made, prejudice to other parties in allowing the amendment and any other circumstances.

80. Counterclaims and amendments might result in the expedited arbitration no longer being appropriate for resolving the dispute. In such a circumstance, parties may agree that the Expedited Rules shall no longer apply to the arbitration or a party may request the arbitral tribunal to determine that the Expedited Rules shall no longer apply in accordance with article 2 (see paras. 10–14 above).

## **L. Further written statements**

81. Article 14 reinforces the discretionary power of the arbitral tribunal under article 24 of the UARs to limit further written statements. It clarifies that the arbitral tribunal may decide that the statement of claim and the statement of defence are sufficient and that no further written statements are required from the parties. It should, however, not be interpreted that arbitral tribunals do not have such discretion under article 24 of the UARs.

## **M. Evidence**

82. Article 15 clarifies the discretionary power of the arbitral tribunal with regard to taking of evidence in expedited arbitration. Article 27(3) of the UARs provides that the arbitral tribunal may require the parties to produce documents and other evidence during the proceedings. The first sentence of article 15(1) clarifies that the arbitral tribunal may decide which documents or other evidence are to be produced by the parties. The second sentence reaffirms the discretionary power of the arbitral tribunal to reject a request for a document production stage, which can lead to unjustified delays. The inclusion of article 15(1) in the Expedited Rules should, however, not be interpreted as meaning that arbitral tribunals do not have such discretion under article 27(3) of the UARs.

83. Article 15(2) provides that in expedited arbitration, statements by witnesses shall be presented in written form and signed by them. Paragraph 2 thus replaces the second sentence of article 27(2) of the UARs. While the rules for meeting the requirements of “in writing” and “signature” through electronic communication vary depending on the jurisdiction, it should be noted that article 9(2) and (3) of the United Nations Convention on the Use of Electronic Communications in International Contracts provides a functional equivalence rule.

## N. Period of time for making the award

84. Article 16(1) provides for a 6-month time frame for making the award and a mechanism for extending that time frame in certain circumstances. The 6-month time frame for rendering the award commences with the constitution of the arbitral tribunal. Parties are free to agree on a time frame different from that in paragraph 1, which may be shorter or longer depending on their needs.

85. The general discretion provided to arbitral tribunals under article 10 to extend or abridge any period of time prescribed under the Expedited Rules and those agreed by the parties is subject to article 16. The first sentence of article 16(2) specifically authorizes the arbitral tribunal to extend the time frame for rendering the award established pursuant to paragraph 1, but only in exceptional circumstances and after inviting the parties to express their views. It would be up to the tribunal to determine whether the circumstances are exceptional or not. While the arbitral tribunal should generally indicate the reasons when extending the time frame, paragraph 2 does not require reasons so as to provide flexibility to the arbitral tribunal, particularly when the extended time period is rather short.

86. The second sentence of paragraph 2 provides that the maximum overall time frame, including any extended period, should be no longer than 9 months from the date of the constitution of the arbitral tribunal. This responds to the expectations of the parties that an award would be rendered within a short time period, one of the key features of expedited arbitration. Paragraph 2, however, does not impose limitations on the number of extensions within the overall time frame. [As with the time period in paragraph 1, parties are free to agree on a time frame different from 9 months.]

*[Note to the Working Group: The Working Group may wish to consider whether the last sentence of paragraph 86 should be retained. Parties are free to make modifications pursuant to article 1(1) of the UARs and thus it will be possible for parties to agree on a time frame different from 9 months as provided for in article 16(2). However, should the parties agree to a maximum overall time frame which is shorter than 9 months (either before or after the arbitral tribunal extends the time period in accordance with paragraph 2), that agreement may unduly limit the tribunal's ability to render the award, particularly if the arbitral tribunal can only extend the agreed time period in accordance with paragraph 3. Another question is whether paragraph 3 can be invoked when the parties had agreed to a maximum overall time frame of longer than 9 months (see square-bracketed text in paragraphs 87 and 88 below). There may be a wide range of possible scenarios that could arise by the parties agreeing to a time period other than 9 months and it might not be feasible for the explanatory note to address all possible consequences of the parties agreeing to a time frame other than 9 months.]*

87. In case the arbitral tribunal considers that it is at risk of not rendering an award within the 9-month time frame provided for in paragraph 2 [or any other time frame agreed by the parties], paragraph 3 provides a mechanism whereby that time period could be extended for one last time. This mechanism intends to address a situation where the arbitral tribunal is at risk of not being able to render an award within the time frame, for example, due to unusual circumstances arising near the end of the time frame or if only a short period of time beyond that time frame is required for rendering the award.

88. Parties and the arbitral tribunal should be mindful of the consequence when the 9-month time frame in paragraph 2 [or any other time frame agreed by the parties] lapses without an award being rendered. Depending on the applicable law, this may result in the termination of the proceedings or the award rendered subsequently being the subject of possible annulment. In some jurisdictions, such an award might also be refused enforcement. To avoid such situations, paragraph 3 permits the arbitral tribunal to propose to the parties a final extended time limit, stating the reasons for the proposal. In so doing, it must also fix a time period within which the parties should express their views on the proposal. The proposed extension would only be permitted

when all parties agree to the extension within the fixed time period. It will be the responsibility of the arbitral tribunal to ascertain that the agreement to its proposal is expressed without ambiguity. For example, if in response to the proposal, a party agrees only to a time frame shorter than that proposed by the arbitral tribunal, the arbitral tribunal may invite the other parties to express their agreement to such shorter time frame. In addition, if one party agrees to the proposal within the fixed time period and the other party agrees after the time period has lapsed, the arbitral tribunal may wish to consult the parties to confirm whether it could assume that there was agreement by the parties, thus avoiding a possible application of paragraph 4.

89. Paragraph 3 does not set a maximum time frame that can be proposed by the arbitral tribunal. Nonetheless, the time frame requested should be reasonable and sufficient for it to render the award, because a time frame exceeding that would likely be opposed by the parties.

90. Considering that in certain jurisdictions, extension of the time frame could only be granted upon the agreement or consent of the parties or by an entity other than the arbitral tribunal, paragraphs 2 and 3 underline that parties, by agreeing to the application of the Expedited Rules, are granting the arbitral tribunal the authority to extend the time period established in paragraphs 1 and 2.

91. Paragraph 4 alerts the parties and the arbitral tribunal to the mechanism provided for in article 2(2) of the Expedited Rules, in case there is no agreement by the parties to the extension proposed by the arbitral tribunal. In such a case, any party may make a request to the arbitral tribunal that the Expedited Rules no longer apply to the arbitration. Indeed, the arbitral tribunal may wish to suggest this possibility along with its proposal to extend the time period in accordance with paragraph 3 as the consequence should there be no agreement by the parties. Doing so could avoid a situation where none of the parties makes the request under paragraph 4 despite there being no agreement by the parties on the extension. Paragraph 4 could be particularly useful if one of the parties intentionally delays the proceedings as well as the issuance of the award within the time frame and does not agree to the extension.

92. After inviting the parties to express their views, the arbitral tribunal may determine that the Expedited Rules shall no longer apply to the arbitration, which in effect lifts any time limit for rendering the award in the Expedited Rules including those agreed by the parties. As the arbitral tribunal would have stated the reasons in proposing the extension under paragraph 3, the arbitral tribunal might consider that exceptional circumstances exist as required under article 2(2) and would not need to repeat the reasons when determining that the Expedited Rules shall not longer apply. Should the arbitral tribunal make the determination under paragraph 4, the arbitral tribunal will remain in place and continue to conduct the arbitration but will do so in accordance with the UARs. The proceedings could continue and the arbitral tribunal would be able to render an award even after 9 months from the date of its constitution [or any other time period agreed by the parties].

93. It should be noted that article 16 does not aim to address the instances of de jure or de facto impossibility of the arbitrator to perform his or her functions, which would usually lead to the arbitrator withdrawing from his or her office, the parties agreeing on the termination of his or her services, or a similar decision by the competent authority. Rather, such instances are addressed in article 12(3) of the UARs.

94. Article 16 should be read together with article 34 of the UARs, in particularly paragraph 3, which provides that the parties may agree that no reasons need to be given in the award. This could reduce the time required by the arbitral tribunal in rendering the award and allow the arbitral tribunal to meet the time frame in the Expedited Rules. However, unless the parties have agreed that no reasons are to be given, arbitral tribunals in expedited arbitration shall state the reasons upon which the award is based. Requiring the arbitral tribunal to provide a reasoned award can assist its decision-making and provide comfort to the parties as they will find that their arguments have been duly considered and would be aware of the basis upon which the award was rendered. The absence of reasoning in an award may impede the control

mechanism, as the court or other competent authority would not be in a position to consider whether there are grounds for setting aside the award or refusing its recognition and enforcement.

## **O. Model arbitration clause for expedited arbitration**

95. The annex to the Expedited Rules contains a model arbitration clause for parties to include in their arbitration agreement to agree to expedited arbitration under the Expedited Rules. The model arbitration clause notes that the parties should agree on the appointing authority, the place and the language of arbitration.

96. When considering whether to refer their dispute to arbitration under the Expedited Rules, the parties should take into account, among others, the following elements:

- The urgency of resolving the dispute;
- The complexity of the transactions and the number of parties involved;
- The anticipated complexity of the dispute;
- The anticipated amount of the dispute;
- The financial resources available to the party in proportion to the expected cost of the arbitration;
- The possibility of joinder or consolidation; and
- The likelihood of an award being rendered within the time frames provided in article 16 of the Expedited Rules.

## **P. The Expedited Rules and the Transparency Rules**

97. The suitability of the Expedited Rules for investment arbitration is a question left to the disputing parties, as express consent of the parties is required for the Expedited Rules to apply (see paras. 2, 4 and 5 above). States could refer to and consent to the Expedited Rules in their respective investment treaty, based on which an investor claimant may consent to refer a dispute under the Expedited Rules. However, a reference to the UARs in investment treaties (regardless of whether the reference was included prior to or after the effective date of the Expedited Rules) should not be construed as consent by the State Parties to the Expedited Rules as express consent is necessary for the application of the Expedited Rules.

98. According to article 1(4) of the UARs (as adopted in 2013), the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (“Transparency Rules”) form part of the UARs. Article 1 of the Transparency Rules addresses the applicability of the Transparency Rules to “investor-State arbitration initiated under the UNCITRAL Arbitration Rules”. As the Expedited Rules are presented as an appendix to the UARs, an investor-State arbitration initiated under the Expedited Rules should be considered as being initiated under the UARs and therefore, the Transparency Rules could apply.

99. If the investor-State arbitration is initiated pursuant to an investment treaty concluded before 1 April 2014, the Transparency Rules would only apply when the disputing parties have agreed to their application or the States Parties to the treaty have agreed to their application after 1 April 2014. Therefore, even if the disputing parties agree to the application of the Expedited Rules, the proceedings would not be subject to the Transparency Rules unless above-mentioned conditions are met.

100. If the investor-State arbitration is initiated pursuant to an investment treaty concluded on or after 1 April 2014, the Transparency Rules would apply unless the States Parties to the treaty have agreed otherwise. In other words, if States Parties to

the treaty have not agreed otherwise and the disputing parties agree to the application of the Expedited Rules, the proceedings would be subject to the Transparency Rules.

101. Parties that have agreed to refer an investor-State dispute to arbitration under the Expedited Rules may agree that the Transparency Rules shall not apply to the arbitration. For example, States could include a reference to the Expedited Rules in their investment treaties, while opting out of the Transparency Rules, for example, by making a reference to (i) the 2010 version of the UARs as modified by the Expedited Rules or (ii) the Expedited Rules without article 1(4) of the UARs.

102. However, the flexibility for the disputing parties to opt out of the Transparency Rules in investor-State arbitration initiated pursuant to an investment treaty concluded on or after 1 April 2014 which includes a reference to the UARs will be restricted, if the States Parties to that treaty have not opted out of the Transparency Rules. For example, if two States conclude a treaty after 1 April 2014 allowing an investor to refer a dispute to the UARs and the States have not opted out of the Transparency Rules, it would not be possible for a claimant investor and the respondent State to agree to the Expedited Rules without being subject to the Transparency Rules.

## Q. Time frames in the Expedited Rules

The following provides an overview of the different time frames in the Expedited Rules. In the “time frame” column, “A + number (days(d)/months(m))” indicates “within” the number of days/months from stage A (in certain cases, receipt thereof).

<i>Time frame</i>	<i>Stages of the proceedings and procedural actions</i>	<i>Relevant articles</i>
A	Notice of arbitration (including a proposal for the designation of an appointing authority (A1) and the appointment of a sole arbitrator (A2)) to the respondent	Expedited Rules 4(1)
A+0d	Statement of claim to the respondent	Expedited Rules 4(2)
B	A+15d Response to the notice of arbitration (including responses to A1 and A2) to the claimant	Expedited Rules 5(1)
C	15d after A1 or any proposal If no agreement on the appointing authority, any party may request the Secretary-General of PCA to designate appointing authority or to serve as appointing authority	Expedited Rules 6(1)
D	15d after A2 or any proposal If no agreement on the arbitrator, any party may request the appointing authority to appoint the sole arbitrator → Appointing authority to appoint as promptly as possible	Expedited Rules 8(2)
E	Constitution of the tribunal	Expedited Rules 8; UAR 8 & 9
E+0d	Claimant to communicate its notice of arbitration & statement of claim to the tribunal (as soon as it is constituted)	Expedited Rules 4(3)
E+15d	Consultation with the parties through a case management conference or otherwise (promptly after and within 15 days) Establishment of a provisional timetable (as soon as practicable)	Expedited Rules 9 UAR 17(2)
F	E+15d Respondent to communicate its statement of defence to the claimant and the tribunal (possible extension)	Expedited Rules 5(2); 10
F+0d	Counterclaim or a claim for purposes of set-off to be included in the statement of defence (permitted at a later stage, if tribunal considers that it appropriate)	Expedited Rules 12
G	E+6m Making of the award	Expedited Rules 16(1)
E+9m	Possible extension of the time period for making of the award (exceptional circumstances)	Expedited Rules 16(2)
E+9m+final extended time limit	Possible extension of the time period for making of the award (at risk of not rendering an award within nine months)	Expedited Rules 16(3)