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Report of Working Group II (Dispute Settlement) on the work of its seventy-third session (New York (online), 22–26 March 2021)

Contents

I. Introduction

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

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

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

4. At its fifty-third session, the Commission considered the reports of the Working Group on the work of its seventieth and seventy-first session (respectively A/CN.9/1003 and A/CN.9/1010) and expressed its satisfaction with the progress made by the Working Group and the support provided by the Secretariat.[3] The Commission requested the Working Group to continue its work on preparing the draft provisions on expedited arbitration and to suggest how those provisions could be presented in connection with the UNCITRAL Arbitration Rules.[4] The Commission further requested the Working Group to briefly review the draft texts on international mediation[5], so as to facilitate speedy adoption of those texts at the fifty-fourth session of the Commission in 2021.[6]

5. At its seventy-second session (Vienna, 21–25 September 2020), the Working Group considered the draft provisions on expedited arbitration as prepared by the Secretariat (A/CN.9/WG.II/WP.214 and its addendum). At the end of that session, the Secretariat was requested to update the draft provisions based on the deliberations (A/CN.9/1043, para. 110). In addition, the Secretariat was requested to prepare draft texts that could be included in a guidance document and to prepare a model arbitration clause for expedited arbitration.

II. Organization of the session

6. The Working Group, which was composed of all States members of the Commission, held its seventy-third session from 22 to 26 March 2021. The session was organized in accordance with decisions by States members of the Commission on 19 August 2020 (A/CN.9/1038, Annex I) and by the Commission at its fifty-third

[1] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17), para. 252.
[2] Ibid., *Seventy-fourth Session, Supplement No. 17* (A/74/17), paras. 156–158.
[3] Ibid., *Seventy-fifth Session, Supplement No. 17* (A/75/17), part two, para. 29.
[4] Ibid., paras. 29 and 84.
[5] Draft UNCITRAL Mediation Rules (A/CN.9/1026); draft UNCITRAL Notes on Mediation (A/CN.9/1027); and draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018) (A/CN.9/1025).
[6] *Official Records of the General Assembly, Seventy-fifth Session, Supplement No. 17* (A/75/17), part two, paras. 15(d) and 30.

session, both of which were amended on 9 December 2020. Arrangements were made to allow delegations to participate remotely as well as in person at the Vienna International Centre.

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

8. The session was attended by observers from the following States: Andorra, Armenia, Azerbaijan, Bahrain, Benin, Bulgaria, Burkina Faso, Comoros, Costa Rica, Cuba, Cyprus, El Salvador, Guatemala, Haiti, Iraq, Kyrgyzstan, Lithuania, Madagascar, Mauritania, Morocco, Myanmar, Netherlands, Nicaragua, Norway, Paraguay, Qatar, Saudi Arabia, Senegal, Sudan, Uruguay and Yemen.

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

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

(a) United Nations System: International Centre for Settlement of Investment Disputes (ICSID);

(b) *Intergovernmental organization*: Eastern and Southern African Trade and Development Bank (TDB), Energy Charter Secretariat, International Development Law Organization (IDLO), Interparliamentary Assembly of Member Nations of the Commonwealth of Independent States (IPA CIS), and Permanent Court of Arbitration (PCA);

(c) *Non-governmental organizations*: Alumni Association of the Willem C. Vis International Commercial Arbitration Moot (MAA), American Bar Association (ABA), Arbitral Women, Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Asian International Arbitration Centre (AIAC), Beijing Arbitration Commission/Beijing International Arbitration Center (BAC/BIAC), Belgian Centre for Arbitration and Mediation (CEPANI), Cairo Regional Centre for International Commercial Arbitration (CRCICA), Center for International Investment and Commercial Arbitration (CIICA), Center for International Legal Studies (CILS), Centro de Estudios de Derecho, Economía y Política (CEDEP), Chartered Institute of Arbitrators (CIARB), China Council for the Promotion of International Trade (CCPIT), China International Economic and Trade Arbitration Commission (CIETAC), European Law Students' Association (ELSA), Forum for International Conciliation and Arbitration (FICA), Georgian International Arbitration Centre (GIAC), German Arbitration Institute (DIS), Hong Kong International Arbitration Centre (HKIAC), Hong Kong Mediation Centre (HKMC), Inter-American Arbitration Commission (IACAC-CIAC), Inter-American Bar Association (IABA), International Academy of Mediators (IAM), International Chamber of Commerce (ICC), International Council for Commercial Arbitration (ICCA), International Insolvency Institute (III), International Institute for Conflict Prevention & Resolution (CPR), International Law Institute (ILI), Madrid Court of Arbitration, Miami International Arbitration Society (MIAS), New York City Bar Association (NYCBAR), New York International Arbitration Center (NYIAC), Nigerian Institute of Chartered Arbitrators (NICArb), Queen Mary University of London-School of International Arbitration, Swiss Arbitration Association (ASA), Ukrainian Arbitration Association (UAA), Union Internationale du Notariat (UINL) and Vienna International Arbitration Centre (VIAC).

11. According to the decisions made by the States members of the Commission (see para. 6 above), the following persons continued their offices:

Chair: Mr. Andrés Jana (Chile)

Rapporteur: Mr. Takashi Takashima (Japan)

12. The Working Group had before it the following documents: (a) Annotated provisional agenda (A/CN.9/WG.II/WP.215/Rev.1); (b) Draft provisions on expedited arbitration (A/CN.9/WG.II/WP.216); (c) Compilation of comments on the application of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration to expedited arbitration (A/CN.9/WG.II/WP.217); (d) Draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (A/CN.9/1025); (e) Draft UNCITRAL Mediation Rules (A/CN.9/1026), (f) Draft UNCITRAL Notes on Mediation (A/CN.9/1027); and (g) Compilation of comments by Governments on the draft UNCITRAL Mediation Rules and Notes on Mediation (A/CN.9/1031 and addenda). In addition, written comments submitted by delegations upon the invitation by the chair of the Working Group were also available on the UNCITRAL website.

13. The Working Group adopted the following agenda:

1. Opening of the session.
2. Adoption of the agenda.
3. Consideration of issues relating to expedited arbitration.
4. Consideration of the draft texts on international mediation.
5. Adoption of the report.

III. Consideration of issues relating to expedited arbitration provisions

14. The Working Group continued its deliberations of the expedited arbitration provisions (EAPs) as presented in document A/CN.9/WG.II/WP.216. As to the explanatory note contained therein, delegations were invited to submit written comments by 9 April 2021 so as to assist the Secretariat in preparing a revised version following the finalization of the EAPs.

Form of work including denomination and structure

15. As to the form of its work, the Working Group confirmed that the EAPs should be presented as an appendix to the UNCITRAL Arbitration Rules (UARs).

16. The Working Group further confirmed that the EAPs should be titled the "UNCITRAL Expedited Arbitration Rules" and that "provisions" should instead be presented as "articles" following the general structure of the UARs. The Working Group also confirmed that draft provisions 1 and 2 should be placed under the same heading, "Scope of application".

1. Scope of application (A/CN.9/WG.II/WP.216, paras. 8–13)

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

18. While some doubts were expressed about the need for an additional paragraph in the UARs to incorporate the EAPs, the Working Group approved the insertion of a paragraph in article 1 of the UARs as follows: "The Expedited Arbitration Rules in the appendix shall apply to the arbitration where the parties so agree."

19. With regard to the paragraph aimed at providing clarity on the interaction of the EAPs with the UARs (see para. 13 of document A/CN.9/WG.II/WP.216), the need to ensure user-friendliness was highlighted. It was said that including the paragraph in the explanatory note might not gain the attention of the users, despite the significance of the interaction. Accordingly, there was general support to include it as a footnote to draft provision 1 to ensure that the interaction of the EAPs with the UARs was made clear to the users. The Secretariat was requested to conduct a careful analysis of this possibility when presenting the EAPs to the Commission.

2. Withdrawal from expedited arbitration (A/CN.9/WG.II/WP.216, paras. 14–19)

20. The Working Group confirmed that the elements to be taken into account by the arbitral tribunal when making the determination that the EAPs should no longer apply were better placed in the explanatory note than in the EAPs.

21. With respect to draft provision 2(2), it was said that the arbitral tribunal could make a speedier determination if no reasons needed to be given. However, it was generally felt that the arbitral tribunal should be required to provide the reasons for making a determination that the EAPs shall no longer apply. Accordingly, the Working Group approved draft provision 2, including the second sentence of paragraph 2 without the square brackets.

3. General provision on expedited arbitration (A/CN.9/WG.II/WP.216, paras. 20–26)

22. With regard to draft provision 3(2), it was pointed out that the phrase following the word "expeditiously" merely repeated the need for an expeditious conduct of the proceedings and did not highlight the need to balance expeditiousness with fairness. In response, it was mentioned that draft provision 13(2) should be read together with article 17 of the UARs. While a proposal was made to combine paragraphs 1 and 2 of draft provision 3, it was generally felt that the two paragraphs should remain separate as one dealt with how the parties should act in the proceedings and the other dealt with how the arbitral tribunal should conduct the proceedings. It was further stated that paragraph 2 adequately highlighted the need for the tribunal, while enjoying a level of discretion, to respect the parties' agreement to refer their dispute to the EAPs, particularly in light of Article V(1)(d) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

23. With regard to draft provision 3, a suggestion was made to delete the word "remotely" at the end of paragraph 3 to avoid unduly limiting the use of technological means to where consultations or hearings were held only remotely. On the other hand, it was said that paragraph 3 should include a reference to remote consultations and hearing. To accommodate both views and to ensure a broadened scope for the use of technological means, it was suggested that the word "including" be inserted after the word "appropriate", which received general support.

24. Subject to the above-mentioned change (see para. 23 above), the Working Group approved draft provision 3.

25. With regard to the availability of arbitrators, it was generally felt that a separate note to the model statement of independence should be prepared in the context of expedited arbitration as an annex to the EAPs along the lines of paragraph 26 of document A/CN.9/WG.II/WP.216.

4. Notice of arbitration, response thereto, statements of claim and defence (A/CN.9/WG.II/WP.216, paras. 27–31)

26. The Working Group approved draft provision 4, unchanged.

27. With regard to draft provision 5, the Working Group confirmed that the 15-day time frame for communicating the statement of defence should begin with the constitution of the arbitral tribunal. Draft provision 5 was approved, unchanged.

5. Designating and appointing authorities (A/CN.9/WG.II/WP.216, paras. 32–38)

28. The Working Group approved draft provision 6, unchanged.

6. Number of arbitrators (A/CN.9/WG.II/WP.216, paras. 39 and 40)

29. The Working Group approved draft provision 7, unchanged.

7. Appointment of the arbitrator (A/CN.9/WG.II/WP.216, paras. 41–44)

30. The Working Group approved draft provision 8, unchanged.

31. The Working Group confirmed that the time periods in article 9 of the UARs on the constitution of a three-member arbitral tribunal and article 13 of the UARs setting out the procedure for challenging arbitrators would apply unchanged to expedited arbitration. In that context, it was suggested that the explanatory note should mention that the time periods in article 9(2) and (3) of the UARs might need to be reduced by the parties to facilitate an expedited proceeding.

8. Consultation with the parties (A/CN.9/WG.II/WP.216, paras. 45 and 46)

32. A suggestion was made to revise the last sentence of subparagraph 4 in paragraph 46 along the following lines: "…, the arbitral tribunal may decide to hold further consultations with the parties, particularly if agreement on a provisional timetable has been deferred pending the arbitral tribunal's review of the statement of defence or if a timetable already agreed requires revision following such review."

33. The Working Group approved draft provision 9, unchanged.

9. Time frames and the discretion of the arbitral tribunal (A/CN.9/WG.II/WP.216, paras. 47–49)

34. The Working Group approved draft provision 10, unchanged.

10. Hearings (A/CN.9/WG.II/WP.216, paras. 50–53)

35. The Working Group approved draft provision 11, unchanged.

11. Counterclaims, claims for the purpose of set-off and amendments to the claim or defence (A/CN.9/WG.II/WP.216, paras. 54 and 55)

36. The Working Group approved draft provision 12, unchanged.

37. With respect to draft provision 13, questions were raised with regard to its interaction with article 22 of the UARs, particularly whether parties would have an unqualified right to amend or supplement their claim or defence within the 30-day time frame provided in paragraph 1. One view was that amendments and supplements made within the 30-day time frame should be subject to the same standard as provided in article 22 of the UARs, meaning that they would be allowed unless the arbitral tribunal considered them inappropriate. Amendments and supplements made after the 30-day time frame would be subject to a different standard in paragraph 2, meaning that they would be allowed only when the arbitral tribunal considered them appropriate. Another view was that with the introduction of a short time frame in draft provision 13, parties should have an unlimited right to make amendments and supplements during that period. Yet another view was that the standard provided in draft provision 13(2) should apply to all amendments and supplements regardless of when they were made.

38. Questions were raised on whether draft provision 13 might limit the right of the claimant to provide a response to a counterclaim made by the respondent in its statement of defence. A suggestion was made that draft provision 13 should only apply to the claimants considering that the time frame begun with the receipt of the statement of defence. Another suggestion was that draft provision 13 should apply to amendments and supplements with regard to a claim or defence but not with regard to a counterclaim.

39. In that context, it was clarified that a response to a counterclaim made by the respondent in its statement of defence was addressed in draft provision 14. It was further noted that whether a counterclaim could be made after the submission of a statement of defence was addressed in draft provision 12(2).

40. It was pointed out that the introduction of a time frame in draft provision 13 posed some concerns, including uncertainties as to its application prior to the commencement of the time frame and after its lapse as well as a possible imbalance

between the parties (particularly as the time frame was triggered by the receipt of the statement of defence). In that light, it was generally felt that draft provision 13 should: (i) aim to limit amendments and supplements to a claim or defence in expedited arbitration; (ii) apply equally to claimants and respondents; and (iii) be structured in a way to provide flexibility in its application to different circumstances.

41. Considering the need to introduce a higher threshold for making amendments and supplements in expedited arbitration, there was general support to revise draft provision 13 along the following lines: "During the course of the arbitral proceedings, 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 when such an amendment or supplement is requested, prejudice to other parties or any other circumstances. However, a claim or defence, including a counterclaim or a claim for the purpose of a set-off, may not be amended or supplemented in such a manner that the amended or supplemented claim or defence falls outside the jurisdiction of the arbitral tribunal." While views were expressed that the second sentence could be superfluous, it was confirmed that the sentence should be retained as draft provision 13 would replace the rule in article 22 of the UARs in the context of expedited arbitration.

42. The Working Group approved draft provision 13 as revised (see para. 41 above).

12. Further written statements (A/CN.9/WG.II/WP.216, paras. 56–58)

43. The Working Group approved draft provision 14, unchanged.

13. Evidence (A/CN.9/WG.II/WP.216, paras. 59–62)

44. With respect to draft provision 15(1), suggestions were made that: (i) the word "further" should be added before the word "document" in the first sentence as some evidence would likely have been produced with the statement of claim and (ii) to avoid interfering in the relationship between the parties, the second sentence should be revised along the following lines: "The arbitral tribunal may decide to limit requests by a party to have the arbitral tribunal order the production of documents by the other party." Those suggestions did not receive support, as it was generally felt that draft provision 15(1) adequately expressed the rule that parties' request for document production could be limited in expedited arbitration.

44. In that context, a proposal was made to revise the second sentence of draft provision 15(1) to clarify the discretion of the arbitral tribunal with respect to document production, which would read as follows: "The arbitral tribunal may reject any request, unless made by all parties, to establish a procedure whereby each party can request another party to produce documents." That proposal received support.

45. With respect to draft provision 15(2), it was generally felt that the second sentence should be retained as the only sentence in that paragraph and that the first sentence should be formulated as a new paragraph 3 along the following lines: "The arbitral tribunal may decide which witnesses, including expert witnesses, shall testify at a hearing, if a hearing is held."

46. Subject to those changes (see paras. 44 and 45 above), the Working Group approved draft provision 15. The Working Group also confirmed that draft provisions 14 and 15 should be retained as separate provisions.

14. Making of the award (A/CN.9/WG.II/WP.216, paras. 63–73)

47. The Working Group considered two possible approaches with regard to draft provision 16. One approach was to require the arbitral tribunal to state the reasons when extending the time frame for rendering the award as provided in paragraph 3 without imposing an overall time frame for the extension (option A). Another approach was to impose an overall time frame for the proceedings as provided in the second sentence of paragraph 4 without requiring the arbitral tribunal to state the

reasons for an extension (option B). It was noted that paragraphs 1 and 2 of draft provision 13 would apply unchanged in both options.

48. With regard to option A, one concern was that if draft provision 16 provided no fixed overall time frame and granted unlimited flexibility to the arbitral tribunal to extend the time period, it would not respond to the expectations of the parties that an award would be rendered within a short time period, one of the most important features of expedited arbitration. In response, it was mentioned that paragraph 1 provided for a six-month time frame for rendering the award and that there were certain safeguards (for example, paragraph 2 of draft provision 13 as well as articles 12 and 41 of the UARs), which would ensure that an award would be rendered in a short time period.

49. With regard to option B, one concern was that if an award was not rendered within the fixed time frame, it could result in an unintended termination of the proceedings. It was further explained that if an award were to be rendered after the lapse of the fixed time frame, the award might be annulled or refused enforcement depending on the applicable law. It was further mentioned that a fixed time frame could lead to abuse by a party to obstruct the rendering of the award. In response, it was noted that a fixed overall time frame would facilitate an expedited rendering of the award as the arbitrator and the parties would be aware of the limited time period in the EAPS and the risk posed by failing to render an award within that time period.

50. It was suggested that the concerns expressed about the two options could be addressed in the explanatory note. For example, it was mentioned that the explanatory note to option A could suggest that the extended time period should generally be three to six months taking into account the expectation of the parties for an expeditious resolution of the dispute. Similarly, explanatory note to option B could clarify that if it was expected that the time frame would lapse, parties could agree to an extension beyond the time frame in draft provision 16 or one of the parties could request withdrawal from expedited arbitration pursuant to draft provision 2. In the same vein, a suggestion was made that draft provision 16 should include an explicit reference to draft provision 2.

51. Considering the divergence in views, a further suggestion was that option A could be supplemented by a model clause which would suggest to the parties to consider adding in their arbitration clause that the overall time frame of the arbitration, including any extension pursuant to draft provision 16(2), should not exceed nine/twelve months from the date of the constitution of the arbitral tribunal. Another suggestion was that the involvement of an institution could be sought to make a determination on the extension. Yet another suggestion was that the explanatory note could highlight the relevance of the applicable law at the place of the arbitration, including the possibility of the involvement of the local court.

52. A number of suggestions were made to further bridge the difference in the approaches of options A and B.

53. With regard to option A, to limit the discretion of the arbitral tribunal to extend the time period, it was suggested that the extension could be based on a request by a party. Another suggestion was that option A could be supplemented by a rule that the arbitral tribunal would not be able to extend the time frame beyond 9 months if all the parties objected to such an extension.

54. With regard to option B, it was suggested that the draft provision should indicate that beyond the 9-month time frame, the proceedings could continue with the agreement of the parties, as there was no reason to not respect the agreement of the parties to extend the mandate of the arbitral tribunal beyond that time frame. Another suggestion was to allow for an extension beyond 9 months but at the same time impose a higher threshold and a maximum time frame. It was further suggested that the model arbitration clause could provide for the possibility for the parties to not impose an overall maximum frame.

55. With regard to both options A and B, a suggestion was made that paragraph 2 should be revised to make it clear that it would be up to the tribunal to determine whether the circumstances were exceptional or not.

56. After discussion, the Working Group approved draft provision 16 as follows: (i) paragraphs 1 and 2 would remain unchanged; and (ii) paragraph 3 would provide that the overall extended period of time should not exceed nine months from the date of the constitution of the arbitral tribunal unless otherwise agreed by the parties.

57. The Secretariat was requested to further improve the language of draft provision 16 as well as the accompanying explanatory note based on comments received, particularly to address the concerns expressed about the consequences of a lapse of the overall time frame (including the possible annulment of the award) and the behaviour of the parties causing the lapse of the time. In that light, the Secretariat was further requested to consider suggesting an additional paragraph in the model arbitration clause for the parties to opt-out of the overall time frame in paragraph 3.

15. Pleas as to the merits and preliminary rulings (A/CN.9/WG.II/WP.216, paras. 74–81)

58. Recalling the previous deliberations on draft provision 17 and the divergence in views on whether such a rule should be placed in the EAPs, the Working Group decided to not include draft provision 17 in the EAPs. This was also based on the fact that views had been expressed that the appropriate placement of such a rule would be in the UARs and not in the EAPs.

59. The Working Group recalled that the Commission, at its fifty-third session, had requested the Working Group to consider how the EAPs could be presented in connection with the UARs.[7] Considering the support that had been expressed in the Working Group for providing arbitral tribunals with tools to dismiss non-meritorious claims and defences as well as to make preliminary determinations, the Working Group decided to suggest to the Commission that it be mandated to consider and develop draft provision 17 further for possible inclusion in the UARs at its next session.

16. Model arbitration clause for expedited arbitration (A/CN.9/WG.II/WP.216, paras. 82–83)

60. A suggestion to include a statement in the model arbitration clause, whereby parties would waive the right to request withdrawal from expedited arbitration, did not receive support.

61. Subject to any additional paragraph to reflect the deliberations on draft provision 16 (see para. 57 above), the model arbitration clause for expedited arbitration was approved, unchanged.

17. Application of the UNCITRAL Rules on Transparency to expedited arbitration (A/CN.9/WG.II/WP.216, paras. 84-85)

62. It was generally felt that the text in paragraph 84 of document A/CN.9/WG.II/WP.216 should form the basis of the explanatory note on the application of the UNCITRAL Rules on Transparency to expedited arbitration. It was also suggested that the explanatory note could reiterate the need for the parties to consent to the EAPs for them to apply to treaty-based investor-State arbitration.

63. Furthermore, it was suggested that the explanatory note could mention that parties that have agreed to refer an investor-State dispute to arbitration under the EAPs might agree that the UNCITRAL Rules on Transparency should not apply to the arbitration (see section II.2 in document A/CN.9/WG.II/WP.217). Broad support was expressed for that suggestion. On the other hand, a suggestion to include such a

[7] *Official Records of the General Assembly, Seventy-fifth Session, Supplement No. 17* (A/75/17), part two, para. 29.

rule in draft provision 1 of the EAPs did not receive such support (see section II.1 in document A/CN.9/WG.II/WP.217).

64. Lastly, it was suggested that the explanatory note could point out that the EAPs were prepared with a focus on commercial arbitration rather than investment arbitration.

18. Conclusions

65. At the close of the deliberation on expedited arbitration, the Secretariat was requested to prepare a revised version of the EAPs and the model clause based on the deliberations at the session and to present them to the Commission at its upcoming session.

66. With regard to the explanatory note to the EAPs, the Secretariat was requested to prepare a revised version based on all the comments received (see para. 14 above) and present it to the Commission. Should the Commission not be in a position to finalize and adopt the explanatory note at the upcoming session, the Working Group recommended that it be mandated to finalize the explanatory note at its session in the second half of 2021.

IV. Consideration of the draft texts on international mediation

67. The Working Group undertook a review of the draft UNCITRAL Mediation Rules, the draft UNCITRAL Notes on Mediation and the draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018).

68. With regard to the draft UNCITRAL Rules on Mediation, it was suggested that:

- Articles 1, 8, 10 and 12 should be more closely aligned with the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (the “Model Law”) and the United Nations Convention on International Settlement Agreements Resulting from Mediation (the "Singapore Convention on Mediation");
- Article 2 should clarify when the 30-day time frame would expire;
- Article 3(3) should be simplified so as to not regulate the appointment of mediators in detail;
- Reference to “expertise in the subject matter” in article 3(4)(a) should be deleted, as a mediator did not necessarily need to be an expert on the subject matter;
- The second sentence of article 3(5) should further clarify the elements to be considered by the selecting authority in ensuring the diversity of candidates, which should include gender and geographical regions;
- Article 4 should highlight that mediation could take place remotely and through the use of technological means, along the lines of draft provision 3(3) of the EAPs;
- Article 5(3) should require the mediator to keep such information confidential by using the word “shall”;
- Article 7(5) should be deleted as the mediator should not make a judgment on the parties’ behaviour;
- The time period in article 9(e) should be further clarified; and
- Article 11 should highlight that the costs of mediation (and not only the fees of the mediator) should be reasonable and add cost for translation and interpretation services in the list of potential costs.

69. With regard to the draft UNCITRAL Notes on Mediation, it was suggested that:

- Corresponding changes should be made to reflect revisions on the draft Rules;

- The Notes should address the possibility of parties agreeing on timing, including time frames;

- The Notes should provide more clarity, for example, on confidentiality of experts and other stakeholders invited to participate in the mediation; and

- The section on mediation in the investor-State dispute settlement context should be deleted or be considered further by the Commission, particularly as that topic was currently being discussed by Working Group III.

70. With regard to the draft Guide to Enactment, a few suggestions were made particularly to better address the interaction between the Model Law and the Singapore Convention on Mediation.

Conclusion

71. At the close of the session, the Secretariat was requested to prepare a revised version of the three instruments on mediation based on the comments received and to present them to the Commission at its upcoming session.