

Report on the 73rd Session of The UNCITRAL Working Group II (Dispute Settlement)

by

Yasaschandra Devarakonda

Hyderabad, Telangana, India

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On 22 to 26 March 2021, the UNCITRAL Working Group II held its 73rd Session in New York (virtually)

Executive Summary

In its 73rd Session, the Working Group II (Dispute Settlement) (the “**Working Group II**”) deliberated extensively upon and delivered its final approval on the Draft Expedited Arbitration Provisions (the “**EAPs**”) to be appended to the UNCITRAL Arbitration Rules (the “**UARs**”). The final Draft EAPs prepared by the Secretariat were the fruit of deliberations during numerous previous sessions of the Working Group. The Working Group approved the draft EAPs in their final form, including the amendments proposed on provisions related to: (a) amendments and supplements to the statements of claim and defence; (b) evidence; and (c) the award. The draft texts on international mediation consisted a part of the Working Group’s agenda as well.

Report

The final set of deliberations on EAPs and its approval, to be presented before the Commission, was a concerted effort aiming to introduce a uniform system of Expedited Arbitrations under the aegis of UNCITRAL. It was decided that the EAPs would be appended to the UARs, so as to achieve the seamless interaction between the potentially contradictory realms of ordinary and expedited arbitration processes. It was also decided that should the parties, at any stage during an expedited arbitration, decide to withdraw from it, the tribunal shall be empowered to determine the non-applicability of EAPs for reasons recorded in writing, albeit some concerns were expressed regarding potential delays if such determination was made.

Amendments and supplements to the claim and defence

The Working Group discussed extensively the need to allow for amendments and supplements to the claim and defence within a time-frame of thirty (30) days, pursuant to Draft Provision 13. In this respect, many delegates raised concerns on the ensuing potential uncertainty arising out of amendments, which may be sought before the commencement of the aforementioned time-frame as well as after its lapse. They also opined that this would lead to inconsistent treatment of the two parties, as the proposed time-frame commences upon receipt of the statement of defence, allowing the Respondent more time to file supplement documents or amendments. Moreover, while it would have been fitting to allow the Claimant to file an additional statement by way of counterclaims upon the receipt of the statement of defence, this would render an expedited arbitration futile. Hence, it was found that the submission of such amendments or supplements is barred in an expedited arbitration proceeding, unless the tribunal were to allow them in exceptional circumstances. Insofar as congruousness with existing Article 22 of UARs

is concerned, the Working Group determined that Draft Provision 13 would replace the rule in Article 22 of UARs.

Evidence

Amendments were also proposed with respect to Draft Provision 15, which enables a party to request the other party for document production. The Working Group recognized the need for the highest possible threshold in this regard, in order to avoid party-induced delays. The tribunal was thus given discretionary powers to allow them in exceptional circumstances, including when the parties mutually agree to request for document production.

Award

Draft Provision 16, concerning 'Awards', was the most debated upon provision throughout the Session. Clashing interests in the choice between providing an extended time-frame against a fixed overall time frame for rendering the award saw the Working Group in a state of quagmire. After intense deliberations during both the Secretariat and Informal Consultation Sessions, it was agreed that a fixed overall extended period not exceeding nine months from the date of constitution of the tribunal must be provided in Draft Provision 16, with adequate safeguards against consequences of lapse of the extended time and party abuse to delay and derail the proceedings. Certain amendments to the Model Arbitration Clause by way of an express prohibition against the imposition of the maximum frame and directions in the explanatory note to the EAPs were recommended as well.

Conclusion

Currently, the EAPs stand to benefit only commercial arbitration. It was proposed that analogous expedited transparency rules to deal with investment arbitrations should be recommended to the Commission, a work which might be taken up by subsequent working groups. The Working Group also deliberated upon the International Mediation Rules, while some delegates suggested amendments to the draft. The Working Group would deal with these issues in greater detail at a later stage.

The deliberations upon the draft EAPs and the thoughts expressed in its context stand as an epitome of how modern forms of arbitration may take shape in the years to come. Traditionally, legislations were considered politically motivated with compromised and half-hearted attempts, only to be remedied by numerous subsequent amendments to the legislation or by judicial pronouncements. The Working Group's initiative to involve many stakeholders from different organizations and legal backgrounds and to reach a consensus on the draft provisions is akin to providing for a unified procedural law on expedited arbitrations, which hints towards a satisfactory landscape for expedited arbitrations in the future.

As a delegate and an observer of MAA at the Session, it was an enriching learning experience to witness the deliberations on the provisions. The foresight with which the deliberations ensued is unfathomable, reinforcing trust in upcoming legislative instruments to serve the contemporaneous needs of the industry. Discussions in the informal consultations that often led to a compromise amongst delegates with conflicting views on draft EAPs were the most exciting part of the entire Session.