

Report on the 73rd session of the UNCITRAL Working Group II (Arbitration and Conciliation / Dispute Settlement)

by

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On 22 to 26 March 2021, UNCITRAL Working Group II held its 73rd Session in Vienna

Executive Summary

On 22 to 26 March 2021, the United Nations Commission on International Trade Law (the “**UNCITRAL**” or the “**Commission**”) Working Group II on Arbitration and Conciliation / Dispute Settlement (the “**Working Group**”) held its 73rd Session virtually. The Working Group spent four days discussing the Expedited Arbitration Rules which were finalized for approval by the UNCITRAL Commission. The fifth day was devoted to the discussion of International Mediation draft texts. I was one of the more than 400 delegates who joined the session remotely online, while a few delegates and members of the UNCITRAL Secretariat attended the session in person, in Vienna. Delegates represented member states, intergovernmental organizations and non-government organizations. Each day was broken up into one two-hour formal session and another hour of informal consultation afterwards.

Report

Expedited Arbitration Rules

Two issues were of particular note in the discussion of the Expedited Arbitration Rules. First, there was extensive discussion concerning draft provision 13 and its interaction with Article 22 of the UNCITRAL Arbitration Rules. Both provisions deal with the issue of amending or supplementing a claim or defence, including a counterclaim or a claim for the purpose of a set-off. In the context of expedited arbitration, it was considered that there should be a higher threshold for making amendments and supplements in expedited arbitrations so as to allow for the timely progression of the arbitration. It was decided that draft provision 13 would entirely replace Article 22 of the UNCITRAL Arbitration Rules. Instead of allowing parties to amend or supplement their claim or defence within 30 days, parties would not be able to amend or supplement their claim or defence unless the tribunal considered it appropriate. This essentially reversed the rule in Article 22 of the UNCITRAL Arbitration Rules.

Second, delegates expressed two schools of thought regarding draft provision 16, which concerned the making of the award. Some delegates believed it was important to impose a firm deadline for the making of the award as this would ensure that the award is rendered expeditiously and would satisfy a key feature of having an expedited arbitration. Other delegates were concerned that there could be problems with enforcement, depending on the jurisdiction, if a fixed deadline was missed. Furthermore, parties acting in bad faith could use a more flexibly worded provision to extend the proceedings in an abuse of process.

Eventually, the two positions were brought closer together through negotiation and compromise. The agreed position was that: (a) unless otherwise agreed by the parties, the award shall be made within six months from the date of the constitution of the tribunal; (b) the period of time for making the award may be extended by the tribunal in exceptional circumstances after inviting the parties to express their views; and (c) 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.

At the end of the fourth day, the final reading of the Rules was completed. The Rules are expected to be adopted by the UNCITRAL Commission in the third quarter of 2021 as an appendix to the UNCITRAL Arbitration Rules. Further work will take place to finalize the Explanatory Note.

International Mediation Draft Texts

As for international mediation, the Working Group reviewed 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. These documents are intended to compliment and complete the framework on international mediation and go together with the Singapore Mediation Convention and the Model Law. Formally adopting these documents would create a framework as complete as the existing framework on arbitration.

The discussion of these documents progressed quite smoothly. One interesting discussion concerned Article 3(5) of the draft Mediation Rules. This article addresses how a selecting authority should take into account gender and geographical diversity in the selection of a mediator. Although some delegates felt that the selecting authority should merely avoid discriminating based on gender or geographical origin, there was greater support for the view that the selecting authority should have a positive obligation to take into account gender and geographical diversity.

A revised version of the three instruments on mediation will be prepared by the UNCITRAL Secretariat based on the comments received. The revised texts will be presented to the UNCITRAL Commission at its upcoming session.

Conclusion

The impact of COVID-19 pandemic was also apparent during this Working Group session, as the discussions on both expedited arbitration and international mediation took account of the fact that arbitration hearings and mediations should be able to take place remotely, utilizing technological means. The transition to virtual hearings, which we all experienced during the pandemic, may therefore become more permanent.

One of the most important takeaways from this session was my realisation of the power of informal negotiation sessions and effective chairing in driving the agenda.