

UNCITRAL Expedited Arbitration Rules enter into force

by Thomas Young

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1. On 19 September 2021, the UNCITRAL Expedited Arbitration Rules entered into force. The introduction of these expedited rules reflects the increased use of expedited arbitration procedures, the value of simplified procedures for resolving disputes in shortened timeframes, and the need to balance efficiency against parties' rights to due process.
2. The expedited rules are set out over 16 Articles and form an appendix to the UNCITRAL Arbitration Rules. The full text of the UNCITRAL Expedited Arbitration Rules is set out at Annex IV to the Report of the United Nations Commission on Internal Trade Law for the fifty-fourth session¹ and the key features of the expedited rules are set out below.

When do the expedited rules apply?

3. As noted in Article 1, an important feature of the expedited rules is that they are only applicable where the parties have agreed that this is the case. The application of the rules are, therefore, not tied to any particular financial threshold or other criteria.

Are there circumstances in which the expedited rules may cease to apply?

4. There are circumstances in which the expedited rules may cease to apply.
5. Article 2 recognises that the expedited rules will no longer apply if the parties agree that they should not.
6. However, a less straightforward situation arises if only one of the parties considers that the expedited rules should no longer apply. In this situation, Article 2(2) empowers the arbitral tribunal "in exceptional circumstances and after inviting the parties to express their views" to determine that the expedited rules shall no longer apply. The reference to "exceptional circumstances" indicates that, once there has been an initial agreement to apply the expedited rules, it may be quite difficult for a party to convince an arbitral tribunal to move away from this.
7. Further, as discussed further below, the expedited rules may also cease to apply if the arbitral tribunal is unable to make its award within the prescribed time limits.
8. In any circumstance where the expedited rules shall no longer apply, the arbitration shall proceed thereafter by reference to the UNCITRAL Arbitration Rules, and the existing arbitral tribunal shall remain in place.

1. See page 107 of the Report of the United Nations Commission on Internal Trade Law for the fifty-fourth session (28 June-16 July 2021).

Focus on expeditious conduct and use of technology

9. Article 3 enshrines an obligation on the parties to act expeditiously throughout the proceedings, and also an obligation on the arbitral tribunal to conduct the proceedings expeditiously.
10. The expedited rules are not prescriptive about how to achieve this, but Article 3(3) does provide that the arbitral tribunal may, after inviting views of the parties, make use of “any technological means” to conduct the proceedings. This recognises that, in appropriate circumstances, significant efficiencies can be achieved by holding consultations and hearings remotely.

Notice of arbitration and statement of claim

11. In keeping with the focus on expeditious conduct, Article 4 provides that when the claimant communicates its notice of arbitration to the respondent, it is also required to communicate its statement of claim.
12. As part of its notice of arbitration, the claimant needs to make a proposal of an appointing authority (unless this has already been agreed by the parties) and make a proposal for the appointment of an arbitrator.
13. As soon as the arbitral tribunal is constituted, the claimant is required to communicate both its notice of arbitration and statement of claim to the arbitral tribunal.

Response to the notice of arbitration and statement of defence

14. The respondent is obliged to submit its response to the notice of arbitration within 15 days of receipt and provide responses to the proposals of an appointing authority (if applicable) and arbitrator.
15. The time period for the respondent to communicate its statement of defence only begins to run once the arbitral tribunal has been constituted. However, once the arbitral tribunal is constituted, the respondent must communicate its statement of defence within 15 days.

Can counterclaims and claims for set off be made?

16. Provided that the arbitral tribunal has jurisdiction over it, Article 12 provides that a counterclaim or claim for a set off shall be made by no later than in the statement of defence.
17. A party is not permitted to make a counterclaim or claim for a set off at a later stage in the proceedings, unless the arbitral tribunal considers it appropriate to allow such a claim. In considering whether it is appropriate to allow such a claim, the arbitral tribunal is to have regard to the delay in the party making such a claim and the prejudice to other parties or any other circumstances. As such, the only way for a party to be confident that it will be permitted to advance a counterclaim or set off is to make it no later than in the statement of defence.

Default number of arbitrators and constitution of the arbitral tribunal

18. Article 7 provides that absent any agreement by the parties otherwise, the default number of arbitrators under the expedited rules is one.
19. The sole arbitrator shall be appointed jointly by the parties. However, as noted in Article 8, if the parties are unable to agree on an appointment within 15 days after a proposal has been received by all other parties, then, at the request of a party, the appointing authority shall appoint the sole arbitrator.
20. As to who the appointing authority is, that is a matter which may be agreed by the parties. However, if the parties are unable to agree, then Article 6(1) provides for a party to request that the Secretary-General of the Permanent Court of Arbitration either designate the appointing authority or serve as the appointing authority itself.

Procedure following constitution of the arbitral tribunal

21. After constitution, the arbitral tribunal has an obligation to consult the parties on the manner in which it will conduct the arbitration within 15 days.
22. The arbitral tribunal has the discretion, after inviting parties to express their views, to decide whether any further written statements are required or may be presented. In relation to evidence, the arbitral tribunal may decide which documents, exhibits or other evidence the parties should produce. It is notable that the arbitral tribunal is able to reject any request that a procedure be established for document production, unless that request is made by both parties. Finally, if neither party requests that a hearing be held, after inviting the parties to express their views, the arbitral tribunal may decide that a hearing shall not be held. All these provisions within the rules are aimed at providing the arbitral tribunal with the necessary tools to shape the arbitration procedure so that the arbitration can be conducted expeditiously.

Can a party amend or supplement its claims or defences during the arbitration?

23. The default position is that a party may not amend or supplement its claim or defence during the course of the arbitral proceedings.
24. However, there is the facility to allow amendments if the arbitral tribunal considers that it is appropriate to do so having regard to when the amendment is requested or the prejudice to the other parties. Because such changes have the ability to impact how expeditiously the case can proceed, a party is likely going to need to show a good reason to introduce an amendment at a late stage.

How quickly will an arbitration award be made?

25. The default position is that an award shall be made within six months from the constitution of the arbitral tribunal.
26. However, there are circumstances in which an award may be issued later. In this regard, it may be that the parties agree otherwise. Separate to this, the arbitral tribunal may “in exceptional circumstances”, after inviting the parties to express their view, extend the 6 month period, by up to a further 3 months, such that the total time period is no more than 9 months.
27. In circumstances where the arbitral tribunal still remains concerned it will not be able to make its award within 9 months, the arbitral tribunal may propose a final extended period in which it is to make its award, but that further extended period can only be adopted if all parties agree to it.
28. If the parties do not agree to the further extension beyond 9 months, any party may request that the expedited rules no longer apply and that the arbitration continue by reference to the UNCITRAL Arbitration Rules.
29. Subject to the obligations on the arbitral tribunal to make its award within 6 months or an extended period as outlined above, the arbitral tribunal has the discretion, after inviting the parties to express views, to extend or abridge other periods of time set out in the UNCITRAL Arbitration Rules or expedited rules or agreed by the parties.

Model arbitration clause for contracts

30. Should parties wish to provide for arbitration under the expedited rules in their contracts UNCITRAL has proposed the following model clause:

“Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Expedited Arbitration Rules.”

31. UNCITRAL also notes that parties may wish to supplement this clause in order that the appointing authority, place of arbitration and language to be used in the arbitral proceedings is agreed, and proposes the following potential additions:

*“(a) The appointing authority shall be... [name of institution or person];
(b) The place of the arbitration shall be... [town and country];
(c) The language to be used in the arbitral proceedings shall be...;”*

Conclusion

32. The addition of the Expedited Arbitration Rules to the existing UNCITRAL Arbitration Rules are a welcome response to arbitration users' growing appetite to have their disputes resolved effectively in a short time period. In this regard, UNCITRAL has now taken a step to close the gap between its rules and the other major sets of institutional rules which had already embraced the need for expedited procedures. While arbitration under the UNCITRAL Arbitration Rules has been and remains a flexible process, the expedited rules now provide a more certain framework against which expedited proceedings can be achieved.

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22 October 2021