

## A significant step forward towards time and cost-effective arbitration: UNCITRAL adopted its 2021 Expedited Arbitration Rules

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The United Nations Commission on International Trade Law ("**UNCITRAL**") plays a significant role in harmonizing and modernizing the rules on international trade through the texts it publishes. As part of this mission, the UNCITRAL Arbitration Rules ("**Arbitration Rules**"), which aim to provide the parties with a complete set of rules in institutional and *ad hoc* arbitrations, were first published in 1976 and revised in 2010 and 2013.

The latest version of the Arbitration Rules adopted on 9 July 2021 and offering the opportunity of expedited proceedings, is set to enter into force on 19 September 2021 after its translation is completed in the six official languages of the United Nations. Within the new version, the UNCITRAL Expedited Arbitration Rules ("**EAR**"), aiming at a faster and more economical arbitration, were accepted as an appendix to the Arbitration Rules and amendments were made to the Arbitration Rules in this direction. Further, the EAR Explanatory Note ("**Explanatory Note**"), published together with the EAR, is of quality that will largely eliminate the hesitations that may arise in practice.

The EAR constitute an important step that will provide efficiency to the parties in time and cost management. In this context, the outlines of the expedited and simplified procedure brought with the EAR are examined below.

### Scope of Application of UNCITRAL Expedited Arbitration Rules UNCITRAL

The EAR form an integral appendix to the 2021 Arbitration Rules. Pursuant to article 1(5) of the 2021 Arbitration Rules, which regulates the scope of application of the EAR, "*The Expedited Arbitration Rules in the appendix shall apply to the arbitration where the parties so agree [...]*". Therefore, it is not sufficient for the parties to simply agree that the UNCITRAL Arbitration Rules will be applied to the arbitration in order to implement the procedure envisaged by the EAR. The implementation of the EAR is only possible if there is an explicit consent of the parties to the implementation of the EAR. This agreement of the parties to apply the EAR can be reached before or after the conflict arose. In this respect, the EAR differ from the expedited arbitration rules of other institutions such as those of the ICC, which automatically applies the expedited arbitration procedure according to the amount of dispute, unless otherwise agreed by the parties. Compared to the other institutions' rules, this feature may limit the EAR's scope of application. The fact that parties will hardly estimate the amount and complexity of possible disputes and whether they will be in the position of claimant or defendant, they may be reluctant to agree on application of the EAR.

Further, the EAR also offer the parties the opportunity to refrain from applying the expedited arbitration procedure during the arbitration proceedings. Pursuant to article 2 of the EAR, "*At any time during the proceedings, the parties may agree that the Expedited Rules shall no longer apply to the arbitration.*" Moreover, in exceptional cases, one of the parties may request that the application of the expedited proceedings be discontinued. However, in this case, the final decision rests with the arbitral tribunal.

As the application of the EAR is left to the parties' discretion, the Explanatory Note provides a set of criteria to guide the parties in deciding whether the EAR are appropriate in resolving their disputes. In this context, the parties should consider the following issues when deciding on the implementation of the EAR:

- 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,
- Financial resources available to the party in proportion to the expected cost,
- The possibility of joinder or consolidation;
- The likelihood of an award being rendered within the 6 and 9-month timeframes provided in article 16 of the EAR.

Considering these criteria, the parties who consider that application of the EAR is appropriate for settlement of their possible disputes can add the following sample arbitration clause in the annex of the EAR to their agreements:

*"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.*

*[The parties may also add the following matters to the arbitration clause:]*

- a. The appointing authority shall be ... [name of institution or person];*
- b. The place of arbitration shall be ... [town and country];*
- c. The language to be used in the arbitral proceedings shall be;*
- d. Article 16(3) of the Expedited Rules shall not apply to the arbitration."*

Although it is possible for the parties to elaborate the arbitration clause in more detail regarding the possible nature of the dispute and their expectations from the trial, it should not be ignored that in practice, the complex arbitration clauses do not provide the parties with the necessary flexibility in the future and the arguments that "the procedure stipulated in the arbitration clause has not been duly applied" can be put forward as a reason for refusal of enforcement and setting aside of the award.

## Simplified Procedural Stages under UNCITRAL Expedited Arbitration Rules

In general, the EAR impose an obligation on the parties and the arbitral tribunal to act expeditiously throughout the proceedings. In this respect, it is also possible for the arbitral tribunal to utilize any technological means it considers appropriate to conduct the proceedings. (The EAR, article 3). In this challenging period where both parties and arbitrators struggle with unprecedented issues due to COVID-19, this flexibility granted to the arbitrators for use of technology is of utmost importance and it may lead the arbitrators to produce creative solutions.

The procedure envisaged in the EAR basically consists of the following stages:

- i. Communication of notice of arbitration including the claimant's proposal for the designation of an appointing authority or for appointment of an arbitrator, along with the statement of claim to the respondent (The EAR, article 4),
- ii. Communication of the respondent's response to the notice of arbitration to the claimant, including comments on the designation of the appointing authority or an arbitrator, within 15 days as of the receipt of the notice of arbitration (The EAR, article 5),
- iii. Appointment of the sole arbitrator/tribunal by the parties or by the appointing authority (The EAR, article 6-8),
- iv. Immediate communication of notice of arbitration and the statement of claim to the sole arbitrator/tribunal by the claimant (The EAR, article 4)

- v. Sending of the respondent's statement of defence to the sole arbitrator/tribunal within 15 days after the appointment of the sole arbitrator/tribunal (The EAR, article 5)
- vi. Conducting the case management conference within 15 days after the constitution of the tribunal (The EAR, article 9)
- vii. Making the award within 6 months from the date of the constitution of the arbitral tribunal or, in exceptional cases, within a maximum of 9 months (The EAR, article 16)

In arbitrations where the EAR apply, unless the parties agree otherwise, there shall be one arbitrator (The EAR, article 7). If the parties cannot agree on who the sole arbitrator will be within 15 days from the receipt of appointment proposal by all other parties, each party may request the appointment of a sole arbitrator from the appointing authority.

On the other hand, if the parties fail to reach an agreement on the appointing authority within 15 days from the receipt of proposal by all other parties for the appointing authority, each party may request the Secretary-General of the Permanent Arbitration Court ("**PCA**") to designate the appointing authority or to serve as appointing authority (The EAR, article 6)

In arbitration proceedings subject to the EAR, the arbitral tribunal has the authority to decide to hold the proceedings without a hearing, unless there is a request from the parties to the contrary and after receiving the opinions of the parties. Thus, the parties hoping for a quick and economical solution are relieved of the serious time and expense required for the organization of the hearing (The EAR, article 11).

Pursuant to the EAR, an award shall be made within six months from of the constitution of the arbitral tribunal, unless otherwise agreed by the parties. On the other hand, the parties and the arbitral tribunal have discretion as to the timeframes in the expedited proceedings. In this context, the EAR state in its article 16(2), "*The arbitral tribunal may, in exceptional circumstances and after inviting the parties to express their views, extend the period of time in paragraph 1.*" contains the provision. With this extension, unless the parties agree otherwise, an award shall be made within a maximum of nine months from of the constitution of the arbitral tribunal. (The EAR, article 16(3)) However, the parties can adopt a more flexible approach to the time limit by excluding application of article 16(3) of the EAR. Keeping the flexibility in terms of duration may prevent losing party's arguments based on non-compliance with the agreed time-limits in potential enforcement and/or setting aside proceedings.

The EAR outlined above will present a highly attractive option for parties seeking a fast and affordable proceeding that also offers principle procedural safeguards along with flexibility. Adopted on 9 July 2021, the text is set to enter into force upon completion of its translation in the six official languages ??of the United Nations on 19 September 2021. You can access [the UNCITRAL Arbitration Rules](#), [the UNCITRAL Expedited Arbitration Rules](#), which are still in a draft form, and [the Explanatory Note](#) from the links.

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