

# Legal Update

## UNCITRAL's Expedited Arbitration Rules: 15 Q&A's to get you up to speed

Welcome streamlined, simplified and quicker *ad hoc* arbitral proceedings! On 9 July 2021, UNCITRAL finalised and adopted its 2021 Expedited Arbitration Rules (the "**EAR**"), a set of rules which parties may agree to adopt for expedited arbitration<sup>1</sup>. This refers to "a streamlined and simplified procedure with a shortened time frame<sup>2</sup>" and enables parties to resolve their disputes in a cost and time-effective manner.

The EAR form an appendix to the UNCITRAL Arbitration Rules which will also be slightly amended (new Article 1(5)) to take account of this change (the "**Revised UNCITRAL Rules**"). The Revised UNCITRAL Rules and the EAR are due to come into effect on 19 September 2021 when they will be officially published in the six official languages of the United Nations.

The FAQs set out below highlight the most important aspects of the EAR. Please note that this legal update is based on the draft EAR and draft Explanatory Note, currently available [here](#) (final versions having not yet been published).

### 1. When do the EAR apply?

- "*The Expedited Arbitration Rules in the appendix shall apply to the arbitration **where the parties so agree***" according to new Article 1(5) of the Revised UNCITRAL Rules. Accordingly, the parties must provide their express consent for the EAR to apply. This contrasts with other institutions' expedited rules, since there is no automatic application based on specific criteria such as the amount in dispute.
- In practice, this means that either the arbitration clause will need to state that the "*UNCITRAL Expedited Arbitration Rules apply*" or the parties will need to agree on the application of the EAR after their dispute has arisen.
- For clarity, this means that:
  - » an agreement to the 2021 version of the UNCITRAL Rules does not automatically encompass the application of the EAR (unless such consent is expressly stated); and
  - » parties to an arbitration agreement concluded before the entry into force of the EAR will not be presumed to have referred their dispute to the EAR even though the EAR form an appendix to the Revised UNCITRAL Rules.

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<sup>1</sup> We understand this to be the case according to UNCITRAL's Draft Report of the 54th Session dated 9 July 2021 entitled A/CN.9/LIV/CRP.1/Add.12.

<sup>2</sup> The meaning given to expedited arbitration in UNCITRAL's draft Explanatory Note.

## 2. As the EAR are integrated into the Revised UNCITRAL Rules, rather than a separate set of rules, how do the two sets of rules interact?

- The Revised UNCITRAL Rules will be officially called the “*UNCITRAL Arbitration Rules (with new article 1, paragraph 5, as adopted in 2021)*”.
- Since the EAR are contained in an appendix to the Revised UNCITRAL Rules, both sets of rules must be read in conjunction with each other. The Revised UNCITRAL Rules are either supplemented by or replaced by the EAR.
- To help users navigate the interaction between the two, Article 1 incorporates a footnote listing those provisions of the Revised UNCITRAL Rules that do not apply in expedited arbitration. These are: Article 3(4)(a) and (b), Article 6(2), Article 7, Article 8(1), first sentence of Article 20(1), first sentence of Article 21(1), Article 21(3), Article 22 and the second sentence of Article 27(2).
- Where the parties have agreed to expedited arbitration, Article 1 of the EAR makes it clear that the “*UNCITRAL Arbitration Rules as modified by these Expedited Rules*” will apply “**subject to such modification as the parties may agree**”. This shows that parties still have ample flexibility to ensure they have tailored rules suitable for their proceedings.

## 3. What are the key considerations for parties when deciding whether or not to opt for the EAR?

- According to UNCITRAL’s draft Explanatory Note, the parties should take into account (amongst others) the following elements when deciding whether expedited arbitration is suitable for their dispute:
  - » 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;
  - » The financial resources available to the party in proportion to the expected cost of the arbitration;
  - » The possibility of joinder or consolidation; and
  - » The likelihood of an award being rendered within the time frames provided in Article 16 of the EAR (namely six months, with a nine month long stop date).
- There are two key features of the EAR which will be attractive to parties. First, they strike a careful balance between the efficiency of the arbitral process and the parties’ rights to due process and fair treatment. Second, parties will be able to resolve their disputes expeditiously and cost-effectively whilst simultaneously having the UNCITRAL quality hallmark.

## 4. Can parties withdraw from expedited arbitration?

- Yes this is covered by Article 2 of the EAR which envisages two scenarios for withdrawal. One option is that *all* the parties can agree that the EAR no longer apply. Alternatively, when the circumstances have evolved in a manner that would make expedited arbitration no longer suitable, a party may make a (unilateral) withdrawal request directly to the tribunal. The tribunal must invite the parties' views and in exceptional circumstances it may determine that the EAR no longer apply (with reasons). According to the draft Explanatory Note (discussed further at question five below), "[t]he phrase *“in exceptional circumstances”* means that the party requesting withdrawal should provide convincing and justified reasons for the request and that the tribunal should uphold the request only in limited circumstances. It introduces a high threshold for allowing a unilateral withdrawal from expedited arbitration."
- Upon withdrawal, the arbitration will continue to be conducted under the Revised UNCITRAL Rules (without the application of the EAR) and the same tribunal will remain in place. Decisions made during the expedited proceedings should remain applicable to the non-expedited proceedings, unless the tribunal decides to depart from them.

## 5. Can you quickly tell me more about the Explanatory Note that you keep mentioning?

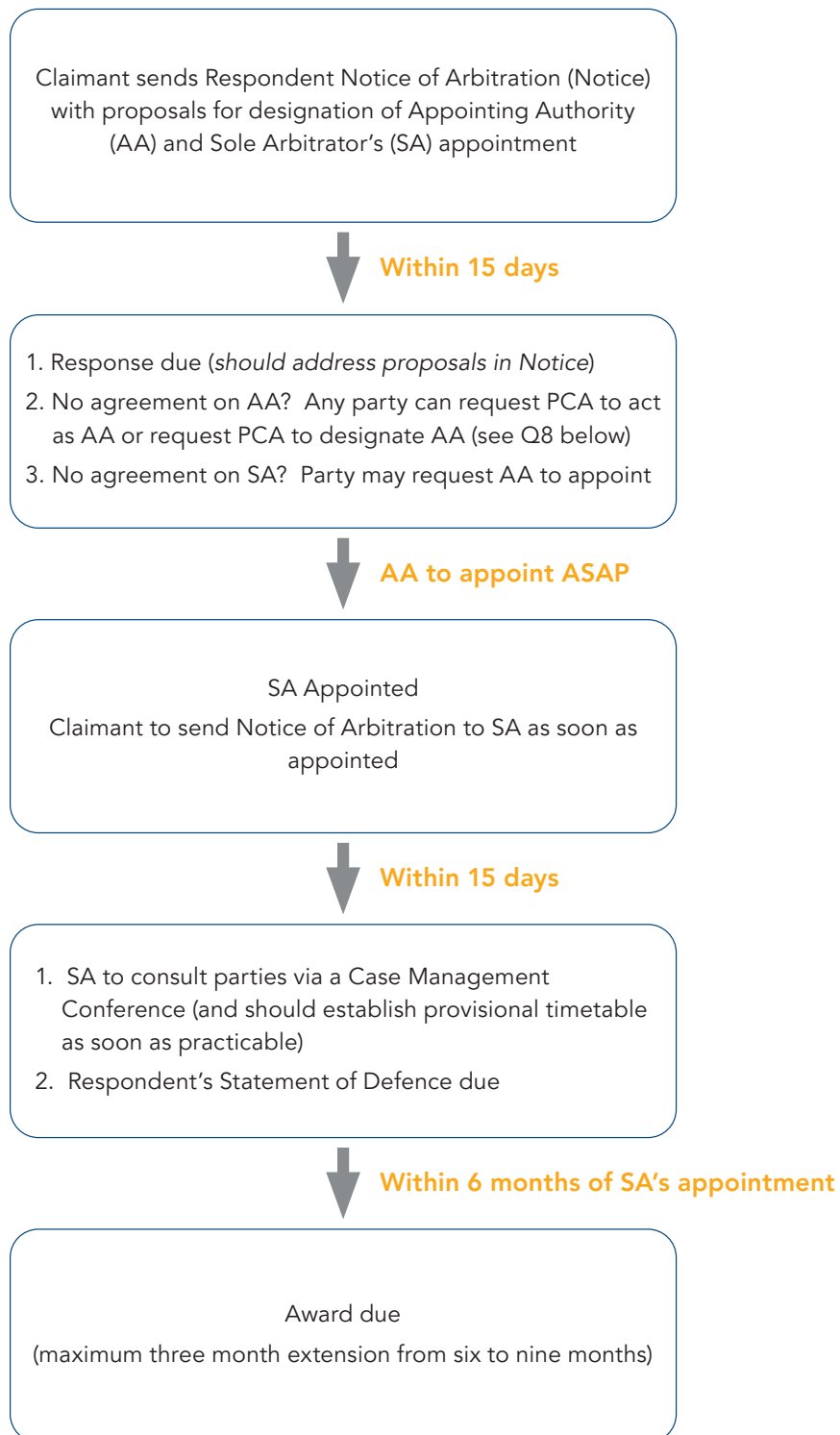
- UNCITRAL has produced a draft Explanatory Note to the EAR (cited throughout this update), the current version of which is available here: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/acn9-1082-add1-e.pdf>.
- In July 2021, UNCITRAL approved the Explanatory Note in principle and authorised its Working Group II (Dispute Settlement) to finalise the text during its next session, currently scheduled to take place in September 2021.
- Parties embarking on an UNCITRAL arbitration under the EAR will benefit from reviewing the Explanatory Note as it provides useful commentary on each of the provisions. Taking an example: it sets out a list of circumstances that a tribunal may wish to take into account when determining a unilateral request for withdrawing from the expedited procedure. The Explanatory Note will provide helpful guidance to arbitrators arbitrating under the EAR but will be equally useful for parties and their lawyers when making strategic decisions.

## 6. Is a sole arbitrator the default rule under the EAR?

- Yes, Article 7 provides that, unless otherwise agreed, there shall be one arbitrator. To facilitate the speedy constitution of the tribunal, in its Notice of Arbitration, the claimant must include its proposals regarding an appointing authority (if one has not already been agreed upon) and in relation to the appointment of the sole arbitrator.
- The latter does not mean that a party needs to put forward the name of the arbitrator. It would be sufficient to suggest a list of suitable candidates or qualifications or a mechanism to be used by the parties for agreeing the sole arbitrator (or tribunal).

## 7. What are the key procedural stages and timeframes under the EAR?

- The key procedural stages and timeframes are as follows:



## 8. What is different under the EAR in terms of agreeing and/or designating an appointing authority?

- The appointing authority has a significant role in expediting the proceedings, especially when it comes to appointing the sole arbitrator (or tribunal, if the parties agree there should be more than one arbitrator). Often the parties will agree the relevant appointing authority (“AA”). But, sometimes such agreement will prove impossible.
- In this regard, Article 6(1) provides a simpler and more flexible process than under Article 6(2) of the Revised UNCITRAL Rules. If 15 days after all the parties have received the proposal for the designation of an AA, they have not all agreed on the choice of an AA, then any party can request that the Secretary-General of the PCA serves as the AA (or ask it to designate the AA).
- Article 6(3) states that, if the PCA Secretary-General is requested to serve as AA, it will do so “*unless it determines that in view of the circumstances of the case, it is more appropriate to designate an appointing authority*” (hence a level of discretion remains for the Secretary-General of the PCA).

## 9. What do the EAR say about tribunal discretion?

- Article 10 provides broad discretion to the tribunal to extend or abridge any period of time set out in the EAPs, with the exception of the timeframe for the issuance of the award (see question 12 below). Enabling the tribunal to adapt the proceedings to the circumstances of the case is aimed at limiting the risk of challenges at the enforcement stage.
- Article 14 reinforces the tribunal’s discretionary power under Article 24 of the Revised UNCITRAL Rules to limit further written statements.
- In terms of evidence, Article 15 also clarifies the tribunal’s discretionary power with regard to the taking of evidence. For example, it reiterates its power to reject a document production phase.
- Where the parties fail to comply with timeframes fixed by the EAR or the tribunal, Article 30 of the Revised UNCITRAL Rules will continue to apply. This sets out the tribunal’s discretionary powers in specific circumstances. For example, under Article 30(3) if a party fails to produce documents or evidence within the relevant time frame, without showing sufficient cause for such failure, the tribunal may make the award on the evidence before it.

## 10. Do the EAR say anything about hearings?

- Article 11 empowers the tribunal to decide that no hearings shall be held, after having consulted the parties and in the absence of a request for a hearing from a party. In such case, the arbitration is conducted on the basis of documents and other materials.
- This is an example of a rule which needs to be read alongside another rule in the Revised UNCITRAL Rules namely, Article 17(3). This provides that: (i) the tribunal shall hold hearings if any party so requests at an appropriate stage of the proceedings; and (ii) in the absence of such a request, the tribunal shall decide whether to hold hearings.
- The draft Explanatory Note confirms that if a party requests a hearing after the tribunal decides not hold one, the request can be denied as it would no longer be considered as being made at “*an appropriate stage of the proceedings*”.
- As one would expect in our digital era, the tribunal may use any technological means to hold hearings without the physical presence of the parties or witnesses, including remotely (Article 3(3) of the EAR and Article 28(4) of the Revised UNCITRAL Rules).

## 11. Is early dismissal/preliminary determination available under the EAR?

- “Early dismissal” enables tribunals to dismiss claims and defences that lack merit and “preliminary determination” allows a party to request the tribunal to decide on one or more issues or points of law or fact without undergoing every procedural step.
- According to the draft Explanatory Note: *“the use of such tools would be within the inherent power of the arbitral tribunals under article 17(1) of [the Revised UNCITRAL Rules].”* Article 17(1) also applies to expedited proceedings. The Explanatory Note adds that *“[a]s long as such tools are utilized with caution to avoid adding another stage in the proceedings, they could usefully expedite the proceedings.”*

## 12. Do the EAR specify a set time frame for rendering the award?

- Yes, Article 16(1) provides that the award is to be made within six months from the date of the constitution of the tribunal.
- The tribunal may extend the six month deadline to nine months (following the tribunal’s constitution) but can only do so *in exceptional circumstances* and after inviting the parties to express their views (Articles 16(2) and (3)). While the tribunal may indicate the reasons for extending this period, this is not a mandatory requirement.
- Further, while parties in expedited proceedings will usually expect the award to arrive within six months, the parties remain free to agree a different time frame for the delivery of the award (since Article 16(1) is subject to the parties’ agreeing otherwise).

## 13. Is there a Model Arbitration Clause for the adoption of the EAR?

- Yes, a model arbitration clause for parties’ contracts is included in an annex to the EAR. It reads as follows:

*“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.*

*Note. Parties should consider adding:*

*(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.”*

- The parties should discuss with their lawyers the suitability of including provisions (a) to (d) in their particular contract. For example, the proposed exclusion of Article 16(3) of the EAR may be useful where the parties do not want a hard nine month “long stop” date for rendering the award and prefer to retain flexibility from the outset.

## 14. Will arbitrators need to confirm, prior to their appointment, that they can meet the time limits in the EAR?

- According to the draft Explanatory Note, parties should consider expanding the statement of independence required under Article 11 of the Revised UNCITRAL Rules to include reference to their commitment under the EAR.
- Specifically, the annex to the EAR provides the following “Model Statement” which the parties could ask arbitrators to add to their statement of independence: “I confirm, on the basis of the information presently available to me, that I can devote the time necessary to conduct this arbitration diligently, efficiently, expeditiously and in accordance with the time limits in the UNCITRAL Arbitration Rules and the Expedited Rules.” This is therefore optional.
- If adopted, this additional statement should remind arbitrators of the truncated time frames under the EAR and if an arbitrator does not have sufficient availability to adhere to the expedited process, it is hoped that he/she would decline from accepting appointment at the case outset.

## 15. Do the Transparency Rules apply in the context of expedited arbitrations?

- Assuming the disputing parties agree to the application of the EAR, will the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the “**Transparency Rules**”) apply given that they form part of the Revised UNCITRAL Rules?
- The draft Explanatory Note provides detailed commentary on this issue. The short answer is that if the investor-State arbitration is initiated pursuant to an investment treaty concluded on or after 1 April 2014, the Transparency Rules would apply to the expedited proceedings unless the States Parties to the treaty have agreed otherwise.
- By contrast, if the investor-State arbitration is initiated pursuant to an investment treaty concluded before 1 April 2014, the Transparency Rules would not apply to the expedited proceedings unless (i) the disputing parties have agreed to their application or (ii) the States Parties to the treaty have agreed to their application after 1 April 2014.

## Concluding remark

Overall, the EAR are a carefully considered set of rules which are the result of the wisdom and expert input from a wide range of stakeholders (including UNCITRAL Member States, other States, international organisations and arbitration institutions). They offer parties a simple and streamlined procedure to resolve their disputes expeditiously on an ad hoc basis. Parties should be incentivised to expressly opt-in to the EAR where it suits their commercial needs. The EAR should help increase the use of expedited procedures in international arbitration, reinforcing arbitration as a cost-and time-effective dispute resolution mechanism.

If you have any questions about the issues raised in this legal update, please get in touch with your usual Mayer Brown contact or:

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