



General Assembly

Distr.: General
27 January 2022

Original: English

**United Nations Commission on
International Trade Law**
Seventy-fifth session
New York, 14–18 February 2022

Settlement of Commercial Disputes

Adjudication

Note by the Secretariat

Contents

	<i>Page</i>
I. Introduction	2
II. Possible questions for consideration	2
Annex	
Proposal by Switzerland	5



I. Introduction

1. At its sixty-eighth session, in 2018, the Working Group discussed adjudication and expedited arbitration as possible topics for future work. Regarding adjudication, it was pointed out that it could be useful in the context of long-term projects where work must continue despite disagreements regarding quality or payment. It was noted that adjudication clauses were used, and a number of jurisdictions had enacted legislation on adjudication. It was suggested that model legislative provisions and contractual clauses could be developed to facilitate the broader use of adjudication ([A/CN.9/934](#), para. 154).

2. However, there was some hesitation about undertaking work on adjudication as it would mainly concern a specific industry and as it required a more detailed assessment of the legislative framework surrounding adjudication as well as the practice that governed adjudication clauses ([A/CN.9/934](#), para. 155). It was thus suggested that a gradual approach could be taken by first taking stock of relevant practice and assessing feasibility of any work in that area. In so doing, it was suggested that the focus could be on (i) adjudication as an efficient means to solve disputes in long-term contracts generally and (ii) the means to ensure provisional enforcement of decisions ([A/CN.9/934](#), para. 161).

3. After discussion, the Working Group decided to recommend to the Commission that work on expedited arbitration procedure should be given priority for future work and that the topic of adjudication should be brought to the attention of the Commission, taking into account that more information would need to be provided ([A/CN.9/934](#), para. 164).

4. At its fifty-fourth session, the Commission adopted the Expedited Arbitration Rules. At the session, a proposal to prepare rules on international adjudication was reiterated as they could usefully complement the work on expedited arbitration. Consequently, the Commission decided that the desirability and feasibility of work on adjudication should be discussed at this session ([A/76/17](#), para. 243).

5. Accordingly, this note highlights some possible questions to be discussed at the colloquium. The annex reproduces a submission received from the Government of Switzerland in preparation for the fifty-fourth session of the Commission, which was further updated in preparation of the Colloquium on adjudication. The submission is reproduced in the form in which it was received.

II. Possible questions for consideration

6. Adjudication generally refers to a mechanism whereby parties can refer a dispute to an independent and impartial third-party who is then required to make a decision in a strictly limited time frame, after having heard both sides. This decision is immediately enforceable but subject to a challenge either through arbitration or litigation. In other words, the decision of the adjudicator is binding initially, but not final and attains its finality only if not subsequently challenged, the timeline for challenge elapses, or the challenge is unsuccessful.

7. Adjudication is thus characterized as a form of interim dispute resolution, and described as a solution which secures prompt payment and can be argued later. As it provides for a quick process to resolve contractual disputes, this dispute resolution tool has shown its utility in efficiently solving disputes in the field of construction ([A/CN.9/934](#), para. 155). Indeed, practice seems to show that parties often satisfy themselves with the interim decision and do not see the need for taking it further to full-fledged arbitration or litigation.

8. Certain States have developed legislation on adjudication¹ and a number of arbitral and other institutions have prepared rules on adjudication.²

9. In jurisdictions without statutory adjudication, adjudication remains available on a contractual basis. In these jurisdictions, the main issue is the lack of a framework regarding the enforceability of decisions by adjudicators.

¹ For example, Canada (Federal Government), Federal Prompt Payment for Construction Work Act 2019, available at <https://laws.justice.gc.ca/eng/acts/F-7.7/FullText.html>; Ireland, Construction Contracts Act 2013, available at www.irishstatutebook.ie/eli/2013/act/34/enacted/en/html; Malaysia, Construction Industry Payment and Adjudication Act 2012, available at www.adjudication.org/sites/default/files/CIPAA%20Act%20746%20ENGLISH.pdf; New Zealand, Construction Contracts Act 2002; available at www.legislation.govt.nz/act/public/2002/0046/latest/DLM163059.html; Singapore: Building and Construction Industry Security of Payment Act (Cap 30B, 2006), available at <https://www1.bca.gov.sg/regulatory-info/security-of-payment/building-and-construction-industry-security-of-payment-act>; UK: Housing Grants, Construction and Regeneration Act 1996 (c. 53), s.108, available at www.legislation.gov.uk/ukpga/1996/53/section/108/data.pdf; States in Australia: Australian Capital Territory, Building and Construction Industry (Security of Payment) Act 2009 available at http://www9.austlii.edu.au/cgi-bin/viewdb/au/legis/act/consol_act/baciopa2009606/; New South Wales, Building and Construction Industry Security of Payment Act 1999 No 46, <https://legislation.nsw.gov.au/view/html/inforce/current/act-1999-046>; South Australia, Building and Construction Industry Security of Payment Act 2009, available at www.legislation.sa.gov.au/lz/path=%2FC%2FA%2FBUILDING%20AND%20CONSTRUCTION%20INDUSTRY%20SECURITY%20OF%20PAYMENT%20ACT%202009; Tasmania, Building and Construction Industry Security of Payment Act 2009, available at www.legislation.tas.gov.au/view/html/inforce/current/act-2009-086; Queensland, Building Industry Fairness (Security of Payment) Act 2017, available at www.legislation.qld.gov.au/view/html/inforce/current/act-2017-043#ch.3-pt.4; Victoria, Building and Construction Industry Security of Payment Act 2002, available at www.legislation.vic.gov.au/in-force/acts/building-and-construction-industry-security-payment-act-2002/012; Western Australia, Construction Contracts Act 2004 available at [www.legislation.wa.gov.au/legislation/former/swans.nsf/\(DownloadFiles\)/Construction+Contracts+Act+2004.pdf/\\$file/Construction+Contracts+Act+2004.pdf](http://www.legislation.wa.gov.au/legislation/former/swans.nsf/(DownloadFiles)/Construction+Contracts+Act+2004.pdf/$file/Construction+Contracts+Act+2004.pdf); and States in Canada: Alberta, Bill 37 Builders' Lien (Prompt Payment) Amendment Act 2020, available at https://docs.assembly.ab.ca/LADDAR_files/docs/bills/bill/legislature_30/session_2/20200225_bill-037.pdf; British Columbia, ByLaw Notice Enforcement Regulation B.C. Reg. 175/2004, available at www.bclaws.gov.bc.ca/civix/document/id/crbc/crbc/175_2004; Nova Scotia, Bill 119 Builders' Lien Act (amended) 2019, available at https://nslegislature.ca/legc/bills/63rd_2nd/3rd_read/b119.htm; Ontario, Construction Act 1990, available at www.ontario.ca/laws/statute/90c30; Saskatchewan, The Builders' Lien Amendment Regulations 2020, available at <https://publications.saskatchewan.ca>; Quebec is currently conducting pilot projects for parties to certain, defined public construction contracts and related public subcontracts, according to the Act respecting the acceleration of certain infrastructure projects (CQLR c A-2.001), available at www.legisquebec.gouv.qc.ca/en/document/cs/A-2.001.

² For example, Asian International Arbitration Centre, AIAC Adjudication Rules and Procedures 2012, available at https://admin.aiac.world/uploads/ckupload/ckupload_20190930053228_47.pdf; Chartered Institute of Arbitrators, Dispute Board Rules 2014 available at www.ciarb.org/media/3934/ciarb-dispute-board-rules-practice-standards-committee-august-2014.pdf; China International Economic and Trade Arbitration Commission, Construction Project Dispute Review Rules 2015, available at www.cietac.org/index.php?m=Article&a=show&id=2776&l=en; Chinese Arbitration Association International Arbitration Centre, CAA Construction DAB Rules 2016, available at http://en.arbitration.org.tw/DAB_Class.aspx?BigClassID=0d92a49c-ab6a-41e6-90fb-737fdd518653; German Arbitration Institute (DIS), DIS-Adjudication Rules 2010, available at www.disarb.org/fileadmin//user_upload/Werkzeuge_und_Tools/DIS_Adjudication_Rules_V-2.pdf; Hong Kong International Arbitration Centre, Hong Kong International Arbitration Centre Adjudication Rules 2009 available at www.hkiac.org/sites/default/files/ck_filebrowser/PDF/Adjudication/HKIAC_Adjudication_Rules_2009.pdf; Lagos Chamber of Commerce International Arbitration Centre, Lagos Chamber of Commerce International Arbitration Centre Adjudication Rules 2020, available at www.laciac.org/wp-content/uploads/2021/03/LACIAC-Adjudication-Rules-2020.pdf; Ontario Dispute Adjudication for Construction Contracts ODACC, with the rules available at <https://odacc.ca/en/>; and Singapore Mediation Centre, SMC Adjudication Rules 2020, available at www.mediation.com.sg/wp-content/uploads/2020/12/SMC-Adjudication-Rules-15Dec20.pdf.

10. It should be noted that adjudication is referred to in the UNCITRAL Legislative Guide on Public-Private Partnerships (“PPP”), as a possible contractual dispute resolution tool for large PPP – infrastructure projects.³

11. In order to enable the Commission to take an informed discussion on the desirability and feasibility of possible future work on adjudication, the following questions would need to be considered:

- How is adjudication used to resolve disputes and what are the legal standards that apply (including contractual arrangements)?
- Should such a framework address the use of adjudication in the construction industry or be broader to apply to other types of commercial disputes?
- Is there a need for a harmonized legal framework to facilitate the international use of adjudication and for the international enforcement of such decisions?
- Is it feasible to prepare such a harmonized legal framework?
- How does adjudication interact with arbitration, and particularly with expedited arbitration?
- How can a decision by the adjudicator (interim decision) be enforceable while still being potentially challenged?
- Can such a decision be enforced cross-border? What are necessary safeguards?

³ See chapter VI, paras. 25–37.

Annex

Proposal by Switzerland

The Government of Switzerland proposes now that the Rules and Notes on Expedited Arbitration are adopted, that the Adjudication Procedure be examined with the objective of adopting rules for international adjudication. Such rules exist already in various forms in legislation of a number of countries and have been proposed by various bodies, adopting different approaches. As one possible approach to international adjudication, the Swiss proposal seeks to ensure international compliance with the adjudicator's decision in summary proceedings with the possibility of review of the decision once it has been complied with.

Justification and purpose of the proposed rules

1. International commercial arbitration, as it is conducted today, ensures full protection of the parties' procedural rights at the price of often lengthy and costly proceedings. The Expedited Arbitration Rules, as they have been adopted by UNCITRAL, can be expected to provide some relief to the time and cost problem in international commercial arbitration. The present proposal seeks not just to reduce further the time by which an enforceable decision is issued, but also to ensure its enforcement. As the adjudicator's decision is issued in summary proceedings, it offers the party dissatisfied with the outcome the possibility of an ordinary arbitration, provided it complies with the adjudicator's decision (that may have to be called a "preliminary award") before commencing the arbitration. In other words, the adjudicator's decision is either accepted by the parties voluntarily or, if it is not, it reverses the cash flow situation, depriving the original debtor of the comfortable position in which it can withhold payment until the arbitration is completed.
2. At present various rules and mechanisms exist to provide rapid decisions; examples include the rules for emergency arbitrators, dispute boards or adjudication under the rules of an institution. These mechanisms are useful and are applied successfully in various circumstances. Their principal shortcoming, however, is that they are not enforceable.
3. A legislative enactment, as applied successfully in the United Kingdom of Great Britain and Northern Ireland and some other jurisdictions, may provide a solution on the domestic level. UNCITRAL may examine such a solution, for instance by an addition to the Model Law. As broad international application of this approach requires enactment in many different countries, the present proposal instead seeks to resolve the issue through a set of rules that can be adopted by the parties to an international contract or offered by arbitral institutions as part of its arbitration services.
4. The problem which the present proposal seeks to resolve is the following: fast decisions, as issued in adjudication or similar proceedings, normally apply a form of summary proceedings, in which the case is examined with less thoroughness as it may require. The parties may nevertheless feel that they can live with the result. A safeguard must, however, be provided for those cases in which summary proceedings led to a result that at least one of the parties finds unacceptable. Preserving the right of recourse to ordinary arbitration or litigation therefore would seem to be a necessity. Contractual arrangements for adjudication and similar procedures reserve such recourse; but it will be only the ultimate arbitral award that will be enforceable under the mechanism provided by the New York Convention. In the meantime, the beneficiary of the adjudicator's decision will have to wait or hope for voluntary compliance.
5. The present proposal seeks to address these difficulties through a set of rules aimed at providing immediate enforcement through the international framework of the New York Convention, and nevertheless provide the possibility of a review of the adjudicator's decision in ordinary arbitration or court proceedings. The mechanism

consists in turning the adjudicator's decision into a binding award, enforceable under the New York Convention, unless it is challenged, and the dispute is brought in an ordinary arbitration. Such challenge, however, is available only if the debtor of the adjudicator's decision complies with the decision within the specified period and before commencing the arbitration.

6. In other words, the proposed mechanism reverses the cash-flow situation: the debtor of, for example, a monthly progress payment, of the payment for the delivery under a long-term supply contract, or of a periodic licence fee, no longer enjoys the comfortable position of retaining the payment until the arbitration is completed. Instead, having paid the amount after being ordered to do so by the adjudicator, the debtor would resort to arbitration to recover the amount it paid on account of the adjudication decision. The adjudicator thus may invert the creditor/debtor position, depending on the conclusion reached in the summary proceedings of an adjudication. As the practice in domestic adjudication has shown, the preliminary decision of the adjudicator may be satisfactory enough for the parties that neither of them wishes to engage the cost and time for a full-fledged arbitration or litigation.

7. In addition to the possibility of resorting to ordinary arbitration in case of a result in the adjudication that is unacceptable to one of the parties, two further protections are built into the proposal: (i) the adjudicator may determine that a matter, or some part or claim in it, is not ready or suitable for a decision in adjudication proceedings; and (ii) the adjudicator may make his/her decision subject to guarantees.

8. The proposed mechanism has not been tested and the rules proposed below are a first draft. It is suggested, however, that they provide a solution to a major problem in international arbitration by combining a very quick decision without abandoning altogether the protection of a thorough examination of the dispute, as it is ensured for instance by the UNCTIRAL Arbitration Rules. The process of adjudication may be applied in all cases where rapid decisions are particularly important. That is the case in construction projects, but it may be equally useful in disputes under other long-term contracts providing for recurring payments such as license agreements, long-term delivery contracts and the like. It might also be applied more generally to cases in which the parties wish to avoid the long-term procedures that have become standard in international arbitration.

Proposed draft provisions

9. If agreed by the Parties, any dispute may be decided by an adjudicator, according to the UNCITRAL Arbitration Rules [Rules on Expedited Arbitration], modified as follows:

(1) Adjudication may be started by the claimant communicating to the respondent a Notice of Adjudication, stating the Claimant's case in full and identifying the legal basis and the evidence on which the Claimant relies in support of its allegations. The Notice shall be accompanied by a copy of the contract to which the dispute relates and the evidence for the Adjudication agreement. Other documents critical for the understanding of the request made may also be attached. Where the Claimant relies on witness evidence or expert opinions, it shall identify the witnesses and the experts and the subject matters on which they may be heard.

(2) Within two weeks following the receipt of the Notice of Adjudication, the respondent shall submit its Answer, setting out its full defence, specifying contested legal and factual allegations and containing any counterclaim the Respondent intends to pursue. The provision on the factual evidence and expert opinions concerning the Notice of Adjudication shall apply also to the Answer.

(3) The dispute shall be submitted to a sole adjudicator, named in the adjudication agreement. If the parties have not agreed on an adjudicator by the time the Notice of Adjudication is communicated to the respondent, the 3 adjudicators shall be appointed, at the request of either party, by the appointing

authority and, if no appointing authority has been agreed by the time of the Notice of adjudication, by the Secretary General of the Permanent Court of Arbitration (PCA). Duties and procedures concerning the arbitrator's independence and impartiality also apply to adjudicators.

(4) Within one week after the expiration of the time for the Answer, the adjudicator shall hold a case management conference. At that occasion, the adjudicator shall, after having heard the Parties, identify the issues on which further evidence and argument is to be heard and determine whether any of the witnesses and experts named by the parties shall be heard. The adjudicator shall determine the further procedure and relevant time limits, including the time for the claimant's response to any counterclaim. At the request of the Parties or on his/her own motion, the adjudicator may determine that the case or some issues may be decided on documents alone and without a hearing.

(5) At any time after the case management conference the adjudicator may, upon request of a Party or on his/her own motion, decide any issues that, on the basis of the evidence and argument produced or announced, he/she determines to be ready for decision.

(6) Within six weeks following the case management conference or any longer period agreed by the parties [or: by the claimant or the counterclaimant] the adjudicator shall issue a preliminary award, deciding all issues that, in the adjudicator's opinion, are ready to be decided. All matters not so decided may be pursued subsequently by the claimant according to the UNCITRAL Arbitration Rules, before the adjudicator or, if the Parties so decide, by an arbitral tribunal constituted according to the Arbitration Rules.

(7) Thirty days following the notification of any preliminary award or at the expiration of any longer [or: other] period that the adjudicator may determine, the preliminary award shall become final and binding and may be enforced as an award, unless a Party (i) objects to it and requires that the issues decided in the preliminary award be submitted to arbitration under the UNCITRAL Arbitration Rules and (ii) the Party objecting to the preliminary award complies, within the specified period, with any orders contained in the preliminary award. In exceptional circumstances, the adjudicator may permit that such compliance be subject to appropriate guarantees by the beneficiary of the award.
