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Report of Working Group II (Dispute Settlement) on the work of its seventy-ninth session (New York, 12–16 February 2024)

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I. Introduction

1. The Commission, at its fifty-second session in 2019, considered a proposal by the Governments of Israel and Japan on possible future work in the field of dispute resolution in international high-tech-related transactions (A/CN.9/997).[1] At its fifty-fourth session in 2021, the Commission requested the Secretariat to continue to engage with experts with a view to preparing an outline of provisions to assist in the operation of such dispute resolution.[2] Accordingly, the Secretariat organized the Colloquium on Possible Future Work on Dispute Settlement during the seventy-fifth session of the Working Group.[3]

2. Among the documents considered by the Working Group were draft provisions for technology-related dispute resolution submitted by a group of experts (A/CN.9/WG.II/WP.224) and a note on adjudication, including a proposal for future work submitted by the Government of Switzerland (A/CN.9/WG.II/WP.225). A round-table discussion was held during the Colloquium with the aim to provide the Commission with input on possible future work on dispute settlement (A/CN.9/1091, paras. 69–79).

3. The Commission, at its fifty-fifth session in 2022, considered the proposals on technology-related dispute resolution and adjudication. There was general support to pursue legislative work building on the common elements, mainly that both aimed to provide a legal framework for a simplified mechanism to resolve disputes in a very short time frame involving a third party with the relevant expertise, not necessarily resulting in a final award but the outcome still being enforceable across borders. After discussion, the Commission entrusted the Working Group to consider the topics of technology-related dispute resolution and adjudication jointly and to consider ways to further accelerate the resolution of disputes by incorporating elements of both proposals. It was agreed that the work should build on the UNCITRAL Expedited Arbitration Rules (EARs) and that the model provisions or clauses, or other forms of legislative or non-legislative text could be prepared on matters such as shorter time frames, appointment of experts/neutrals, confidentiality, and the legal nature of the outcome of the proceedings, all of which would allow disputing parties to tailor the proceeding to their needs to further expedite the proceedings. It was stressed that such work should be guided by the needs of the users, take into account innovative solutions as well as the use of technology, and further extend the use of the EARs.[4]

4. During its seventy-seventh session in February 2023, the Working Group considered the topics of technology-related dispute resolution and adjudication on the basis of a note prepared by the Secretariat (A/CN.9/WG.II/WP.231) and requested the Secretariat to revise the model clauses and guidance texts based on the deliberations (A/CN.9/1129, para. 105).

5. At its fifty-sixth session (Vienna, 3–21 July 2023) the Commission had before it the report of the seventy-sixth and seventy-seventh sessions of the Working Group (respectively A/CN.9/1123 and A/CN.9/1129) and expressed its satisfaction with the progress made by the Working Group and the support provided by the Secretariat. The Commission requested the Working Group to continue its work on technology-related dispute resolution and adjudication.[5]

6. During its seventy-eighth session in September 2023, the Working Group considered the topics of technology-related dispute resolution and adjudication on the basis of a note prepared by the Secretariat (A/CN.9/WG.II/WP.234) and requested the

[1] *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 17* (A/74/17), paras. 212–215.
[2] Ibid., *Seventy-sixth Session, Supplement No. 17* (A/76/17), paras. 25(e), 214(b) and 229.
[3] Information about the Colloquium is available at https://uncitral.un.org/en/disputesettelementcolloquium2022.
[4] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 17* (A/77/17), paras. 223–225.
[5] Ibid., *Seventy-eighth Session, Supplement No.17* (A/78/17), paras. 143–145.

Secretariat to revise the model clauses and guidance texts, as well as to prepare the Guidance based on the deliberations for further consideration by the Working Group.

7. The Working Group further requested the Secretariat to organize a briefing on the project entitled "Dispute Resolution in the Digital Economy (DRDE)" and consider preliminarily its outcome at the margin of its seventy-ninth session (A/CN.9/1159, paras. 93–94).

8. At the current session, the Working Group is expected to continue considering the topics of technology-related dispute resolution and adjudication based on a note by the Secretariat (A/CN.9/WG.II/WP.236).

II. Organization of the session

9. The Working Group, which was composed of all States members of the Commission, held its seventy-ninth session, in person only, in New York, from 12 to 16 February 2024 at the United Nations Headquarters (New York).

10. The session was attended by the following States members of the Working Group: Algeria, Armenia, Australia, Belarus, Brazil, Bulgaria, Canada, Chile, China, Colombia, Côte d'Ivoire, Croatia, Czechia, Dominican Republic, Finland, France, Germany, Ghana, Hungary, India, Iran (Islamic Republic of), Iraq, Israel, Italy, Japan, Kenya, Kuwait, Malaysia, Mexico, Panama, Peru, Poland, Republic of Korea, Russian Federation, Saudi Arabia, Singapore, Spain, Switzerland, Turkmenistan, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America, Viet Nam and Zimbabwe.

11. The session was attended by observers from the following States: Bahrain, Congo, Egypt, El Salvador, Equatorial Guinea, Mozambique, Nepal, Netherlands (Kingdom of the), Norway, Oman, Paraguay and Philippines.

12. The session was further attended by observers from the following invited international organizations:

(a) *Organizations of the United Nations system*: the World Bank;

(b) *Non-governmental organizations*: American Arbitration Association-International Centre for Dispute Resolution (AAA/ICDR), American Bar Association (ABA), Association Internationale des Jeunes Avocats/International Association of Young Lawyers (AIJA), Beijing Arbitration Commission/Beijing International Arbitration Center (BAC/BIAC), Belgian Centre for Arbitration and Mediation (CEPANI), Center for International Legal Studies, Chartered Institute of Arbitrators (CIARB), Comité Français de l'Arbitrage (CFA), European Law Students' Association (ELSA), Forum for International Conciliation and Arbitration (FICA), Georgian International Arbitration Centre (GIAC), German Institution of Arbitration (DIS), Institute for Transnational Arbitration (ITA), International Institute for Conflict Prevention and Resolution (CPR), International Chamber of Commerce (ICC), International Insolvency Institute (III), International Women's Insolvency and Restructuring Confederation (IWIRC), Miami International Arbitration Society (MIAS), New York City Bar (NYCBAR), New York International Arbitration Center (NYIAC), New York State Bar Association (NYSBA), Singapore International Arbitration Centre (SIAC) and the Israeli Institute of Commercial Arbitration (IICA).

13. The Working Group elected the following officers:

Chair: Mr. Andrés Jana (Chile)

Rapporteur: Ms. Thi Van Anh LAI (Viet Nam)

14. The Working Group had before it the following documents: (a) Annotated provisional agenda (A/CN.9/WG.II/WP.235) and (b) Note prepared by the Secretariat on Technology-related dispute resolution and adjudication: Model clauses and guidance text (A/CN.9/WG.II/WP.236).

15. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of technology-related dispute resolution and adjudication.
5. Adoption of the report.

III. Consideration of technology-related dispute resolution and adjudication

16. The Working Group considered the model clauses and guidance texts on technology-related dispute resolution and adjudication on the basis of the Note by the Secretariat (A/CN.9/WG.II/WP.236).

A. Model clause on highly expedited arbitration

1. Model clause

17. Generally, it was stated that the clause should either explicitly mention those articles of the EARs that were modified or redraft the entire clause with the implemented modifications as a more user-friendly approach.

18. Regarding the chapeau, there was a suggestion to replace the word “or” with “including” in the first sentence, but that suggestion did not gain support.

19. Regarding subparagraph (a), doubts were expressed about the phrase “as promptly as possible” since it created uncertainty in the time frame for the appointment of the arbitrator by the appointing authority. It was noted that such a phrase was found in article 8 (2) of the UNCITRAL Arbitration Rules (UARs), and that its inclusion would be redundant. However, it was widely felt that the phrase added flexibility, and that a prescriptive time period could run the risk of an arbitration clause rendered inoperative should the appointing authority fail to comply with the time limit. It would also serve as a reminder for the appointing authority to be swift in their appointment procedure.

20. It was suggested to consider subparagraphs (d)–(f) together. With respect to subparagraph (d), the Working Group discussed the period of time, more specifically the number of days, for making the award. In this regard, it was mentioned that subparagraph (d) should be discussed in conjunction with subparagraph (e) and that, for instance, 45 days would correspond to 90 days in option 1 of subparagraph (e). It was generally felt that the periods of time suggested in subparagraphs (d) and (e) could all be retained. There was a view that the extended time frame should not exceed more than half of the initial time frame.

21. Regarding subparagraph (e), there was a view that option 2 of the same subparagraph should be deleted considering the risk of having a hard stop that did not allow the extension of the period of time for making the award, with a risk for the enforcement of the award. In response, it was mentioned that the proposal was to have one option with the possibility of extension pursuant to article 16(3) and 16(4) EARs and another that did not allow for a further extension, with a mention of the risk in the explanatory notes. Another view emphasized the advantages of a hard stop for parties interested in certainty for the period for the issuance of the award.

22. As for subparagraph (f), it was suggested that the subparagraph be elevated to an earlier subparagraph in the model clause as it was based on article 2(2) of the EARs to avoid the misperception that this subparagraph was a safeguard on the time frame for making the award. It was reiterated that this subparagraph served a separate purpose, as was the case for article 2(2) EARs.

23. After the drafting suggestions had been made, it was widely felt that the Working Group should seek clarity as to what the model clause aimed to achieve. It was said that the primary objective of the model clause was to ensure that the expeditious resolution of disputes was achieved through a fixed and non-negotiable time frame for arbitral proceedings. It was further mentioned that the model clause setting forth a fixed time frame would help prevent unnecessary delays and reduce costs and provide parties with predictability in the arbitration. On the other hand, it was said that, while the goal was efficiency, it was essential to strike a balance that allowed for a fair and just resolution and minimize the risks that an arbitral tribunal could not render an enforceable award because a fixed deadline was too short.

24. It was said that the requirement in article 16(3) EARs for the parties to agree to the proposed extension could create a situation where parties felt compelled to consent as they might fear that rejecting an extension could be detrimental to their case or may be perceived negatively by the arbitral tribunal and that the model clause should therefore allow for the non-application of article 16(3) EARs. It was also highlighted that the flexibility provided in article 2 EARs allowed, at the request of a party, the arbitral tribunal to reconsider and potentially revert to ordinary arbitration if it found that the highly expedited procedure was not appropriate for the case. This safeguard was said to acknowledge that circumstances could change or that the nature of the dispute would be more complex than initially anticipated. It was suggested that, if the model clause provided the possibility for the arbitral tribunal to move away from highly expedited arbitration to expedited arbitration or regular arbitration due to the unsuitability, the parties and the arbitral tribunal, when organizing the procedure under the EARs or UARs, should keep in mind the parties' initial desire for urgency.

25. After discussion, the following proposal was made:

> 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 EARs, with the following modifications:
>
> (a) The arbitral tribunal's power pursuant to article 2(2) of the EARs to determine that the EARs shall no longer apply to the arbitration also extends to the power to determine that the modifications to the EARs contained herein shall no longer apply;
>
> (b) The period of time for the parties to reach agreement on the appointment of a sole arbitrator pursuant to article 8(2) of the EARs and after which the sole arbitrator shall, at the request of a party, be appointed by the appointing authority in accordance with article 8(2) of the UARs shall be [reduced from 15 to] 7days after a proposal has been received by all other parties;
>
> (c) The appointing authority shall be [name of institution or person];
>
> (d) The period of time within which the arbitral tribunal shall consult the parties pursuant to article 9 of the EARs shall be [reduced from 15 to] 7 days;
>
> (e) The period of time within which the award shall be made pursuant to Article 16(1) of the EARs shall be [reduced from six months to] [45][60][90] days;
>
> (f) Option 1: The extended period of time referred to in article 16(2) of the EARs shall not exceed a total of [90][120][180] days from the date of the constitution of the arbitral tribunal.
>
> Option 2: The extended period of time referred to in article 16(2) of the EARs shall not exceed a total of [90][120][180] days from the date of the constitution of the arbitral tribunal. The period of time within which the award is made may not be further extended. Articles 16(3)–16(4) of the EARs shall not apply.

26. It was suggested that a phrase along the lines of "in whole or in part" at the end of subparagraph (a) should be added, which did not receive support. It was further

suggested that the brackets in subparagraphs (b), (d) and the brackets of the texts "reduced from six month to" in subparagraph (e) be retained to highlight to parties the specific changes. Another view was that the subparagraphs conveyed the amendments without repeating the time frame of the respective articles 8(2), 9, 16(1) EARs. This proposal received support. It was further suggested to merge the two options in subparagraph (f), for instance by including the last sentence of the second option in brackets so that parties could choose whether to apply article 16(3)–16(4) EARs into the first option, with an appropriate explanation in the annotations. It was further questioned whether all of the specified numerical options for the duration of the award should be kept as parties needed to take care to make proper choices. This proposal did not receive support.

27. It was suggested that only one number be proposed, namely 45 days for subparagraph (e) and 90 days for subparagraph (f), and that the numbers should remain bracketed to indicate that they were only illustrative.

28. It was also suggested to exchange in subparagraph (f) the word "may" by "shall". Both proposals received support.

29. The Working Group approved the model clause in paragraph 25 in substance, subject to the agreed changes (see paras. 26–28 above).

2. Explanatory notes

30. At the outset, the Working Group decided to refer to the annotations that accompany the model clauses as "explanatory notes", because they served the purpose of explaining to the parties how the model clauses could be utilized and given the different connotations the word "annotations" may have.

31. Paragraph 1 was approved, unchanged.

32. For paragraph 2, it was suggested to balance the positive and negative aspects of the clause to not deter parties from using the clause. In response, it was stated that the caveats mentioned in the paragraph were important as they were based on the deliberations of the Working Group about the risks of the parties in using the model clause. There were views that the present topic of technology-related dispute resolution should be underscored in the paragraph. Also, the element of speed was an essential feature that should be highlighted in this paragraph. A view was expressed to change the word "sufficient time" in the second sentence to "more time".

33. Paragraphs 3 and 4 were supported by the Working Group. An editorial change was raised that in paragraph 4, first sentence, where "and" should be replaced with "or". It was also suggested that the importance of having an arbitrator who was committed to acting expeditiously in a highly expedited arbitration should be highlighted, in addition to the model statement in the annex to the EARs.

34. There were views to redraft paragraph 5 in a more positive light. It was suggested to delete "many years" in the second sentence as the circumstances that led to an arbitrator's inability to act might arise anytime.

35. Paragraph 6 was accepted by the Working Group, save it was suggested to make reference to the Secretary-General of the Permanent Court of Arbitration as the default appointing authority for the sake of clarity.

36. For paragraph 7, it was suggested to delete the last sentence as the reference to article 9 of the EARs was in the model clause itself. Further, a proposal was made to include in paragraph 7 a list of issues to be discussed by the parties and the arbitral tribunal during the consultation.

37. Regarding paragraphs 9–10, it was widely felt that they needed to be reconsidered to reflect the discussions of the Working Group on the model clause.

38. It was suggested that paragraphs 11–13 be deleted as UNCITRAL should refrain from endorsing the practice of non-reasoned awards and that providing reasons did not necessarily justify the need for more time in the issuance of awards. It was

reiterated that unreasoned awards could impact the enforceability, that courts would face challenges in assessing unreasoned awards, as the lack of reasoning would make it difficult to understand the basis of the decision and hinder an effective judicial review, and that the need for caution was emphasized as the users of the model clauses might be unfamiliar with arbitration. Furthermore, it was highlighted that writing reasons helped arbitrators in developing their thinking when making their award. It was said that, if not deleted, these paragraphs should address clearly the risk of unenforceability of non-reasoned awards in certain jurisdictions.

39. On the other hand, it was stated that both Article 31(2) of the UNCITRAL Model Law on International Commercial Arbitration and 34(3) of the UARs allowed for unreasoned awards, that some jurisdictions did not allow for such awards, that in most jurisdictions, the lack of reasons was not a ground for setting an award aside, that the key principle of arbitration was party autonomy and that there could be situations where providing reasons was unnecessary, and that the option of a unreasoned award should be included into the model clause. In this connection, it was suggested that reference be made to specific examples of circumstances in which reasons were not needed, for instance, where the arbitrator simply chose between two competing final offers. It was said that in such cases the parties would understand the basis of the decision without the reasons being developed in the award.

40. After discussion, it was felt that a non-reasoned award could be useful in highly expedited arbitration and it was agreed to illustrate the option of a non-reasoned award in the explanatory note, in a balanced way, rather than inserting such an option in the model clause itself.

B. Model clause on adjudication

1. Model Clause

41. The Working Group considered the model clause on adjudication and its appropriate terminology. It was pointed out that the term “adjudication” was used in different context, including to describe a procedure developed in the context of construction disputes. It was this procedure that inspired the broader use of the procedure which the Working Group was considering. There was therefore broad support for the use of the term “adjudication”. However, it was also said it needed to be translatable into the other official languages of the United Nations. The latter was considered to be problematic as the procedure was not known in many jurisdictions and there were no direct equivalents. One suggestion was to depart from a term translated from another language and then translate it back into English for clarity and universality. The assistance from delegations was sought to determine the proper terminology in the various United Nations languages, if the most suitable term in English “adjudication” was kept.

42. After discussion, the Working Group confirmed that “determination” was the appropriate term to refer to the adjudicator’s decision.

Preamble to the model clause and introduction to the draft explanatory notes

43. The Working Group considered the preamble at the beginning of the model clause and whether such a preamble would be needed. It was highlighted that it would help parties understand the provisions set forth in the subsequent paragraphs, particularly as the first step was not an arbitral proceeding but an adjudication. It was emphasized that explicitly stating the essence of the procedure would make parties aware of the potential ramifications of the procedure and would document this awareness to enforcement authorities.

44. However, concerns were raised that preambles were typically associated with legal documents like treaties, not standard contracts and that a preamble would deviate from traditional contract drafting styles and could therefore cause confusion. In particular, it was said that preambles were often used for interpretation of the entire

document, reflecting the parties' shared intentions. As the preamble contained the obligation to comply with the determination by the adjudicator, it was said that it would be unclear whether those were legally binding or merely explanatory.

45. While it was widely acknowledged that a preamble could be a valuable educational tool, it was suggested that the same could be achieved by adding a footnote to or a note before the model clause, without altering the main text and making sure that parties would read it.

Paragraph 1 – arbitration clause

46. It was said that the order of the paragraphs in the model clause should be reconsidered as the dispute resolution process was not clear. It was suggested to have the paragraph on adjudication first, as it provided the initial step in the process.

Paragraph 2 – adjudication

47. The Working Group discussed whether the scope of disputes that might be determined through adjudication should be limited. In support of limiting the scope, it was said that, if the scope was not limited, adjudication would cover broadly all issues that arbitration could cover and might lead to unexpected consequences for parties agreeing to this model clause, such as when the adjudicator misjudged whether the dispute was suitable in light of his/her expertise and where the decision provided an irreversible remedy. Due to such a risk, it was mentioned that it would deter parties from opting into such a model clause. It was suggested that the termination or invalidity of the contract and non-monetary claims were not suitable for adjudication and, hence, that parties should be provided with an option to limit the scope in the model clause accordingly.

48. Conversely, it was reiterated that the scope should not be limited and that it should be left to the adjudicator to determine whether a dispute was suitable for adjudication. It was mentioned that drawing a line between those disputes that were suitable for adjudication and those that were not, was difficult and that experience in current practice demonstrated that, by limiting the scope, the issue as to whether a dispute submitted to adjudication was within the limited scope adopted by the parties could itself become heavily disputed.

49. It was mentioned that disputes often consisted in a combination of legal and factual issues, and it would often not be easy to separate them. Moreover, it was pointed out that non-monetary issues, such as continued delivery of goods or delivery of documentation were suitable subjects for adjudication. Warnings were expressed about the complications caused in practise in cases where some issues were removed from the adjudicators' power and reserved for arbitration.

50. After discussion, it was proposed that two options to accommodate the different perspectives be prepared so that parties had a choice. One option would provide for a broad scope of adjudication, covering any disputes arising out of a contract or its breach, termination or invalidity, which may be determined/decided by adjudication, and one option would provide for a narrower scope, which the parties could choose by excluding issues such as termination or invalidity of the contract, limiting the scope of adjudication to certain obligations of the contract, certain types of disputes, such as monetary claims.

51. It was said to move option 2 to the end of the clause and regulate there not only the allocation of powers between the adjudicator and the arbitral tribunal, but also other issues that could arise in case of such split of powers in particular the question of who would decide such disputes over such allocations. In response, it was noted that such a proposed structure could diminish the possibility of parties to agree on the second option. In addition, it was noted that even without explicitly addressing the mater in the model clause the arbitral tribunal could decide questions concerning the adjudicator's decision in respect of the scope of adjudication in case the parties agreed on the second option.

52. Regarding subparagraph (a), it was agreed that the request should contain "a description of the dispute, including its basis and…".

53. It was suggested to redraft subparagraph (b) along the following lines: "If the parties have not reached an agreement on the appointment of an impartial and independent adjudicator [7] days after a proposal made by a party has been received by all other parties, such an adjudicator shall, at the request of any party, be appointed by the appointing authority as promptly as possible" in order to emphasize the necessity for the adjudicator to be independent and impartial as an ongoing requirement throughout the proceedings. This suggestion received support.

54. Furthermore, it was suggested that rules on challenges of adjudicators be included. In response, it was recalled that there was an absence of widely acknowledged procedural rules for adjudication proceedings, and that the model clause would become overly complex if an attempt were made to regulate all issues that could arise in the course of the process.

55. Regarding subparagraph (c), in order to clarify that a different appointing authority could be chosen for the adjudicator, it was suggested to refer to "the appointing authority for an adjudicator". This suggestion received support.

56. As for subparagraph (d), it was mentioned that the adjudicator could be agreed between parties before the 3-day time frame and that the start time of that time frame needed to be clarified. It was widely felt that the "acceptance of appointment for the particular dispute" should constitute such a start time and that this should also be the start time in subparagraph (h). It was suggested to include the following language after the word "consult": "on the dispute and the organization of the procedure" to clarify the scope of the consultations.

57. With respect to subparagraph (e), it was discussed whether a time frame for communicating the response should be provided. One view pointed out that the response would have to be produced after the consultation and that therefore the time for the response could be left to the decision by the adjudicator in the context of the consultation. In response, it was mentioned that, while the time frame itself could be left in brackets, having a clause that envisaged a timeline would be important for the sake of clarity of the process. As to the start time, it was suggested to count the time for the response from the receipt of the application by the respondent and that adjustment in the context of the consultation should be allowed.

58. Regarding subparagraph (f), it was suggested that "due process" be added to the list of procedural requirements to be respected by the adjudicator. In response, it was highlighted that the language came from article 17(1) of the UARs and did not need to be supplemented. It was also suggested to add the power of the adjudicator to abridge or extend any period of time. This suggestion received support.

59. It was questioned what the consequence in subparagraph (g) would be if the adjudicator determined that the matter was not suitable for adjudication. It was explained that paragraph 4(a) preserved the possibility of recourse to arbitration; issues that the adjudicator found unsuitable for adjudication in any event could be submitted to arbitration, just like issues that were determined by the adjudicator. It was suggested that a timeline be included for the adjudicator to determine the suitability of adjudication to help prevent unnecessary delays in the determination and contribute to the efficiency of the adjudication process. In response, it was stated that imposing strict timelines might not allow for a nuanced evaluation, especially if the unsuitability related to complex or evolving circumstances.

60. Regarding subparagraph (h), the Working Group agreed that the brackets in the last sentence be removed.

61. Subparagraph (i) received support.

Paragraph 3

62. The Working Group considered the narrow scope of the arbitration under paragraph 3, the arbitration for non-compliance with the adjudicator's decision. Concerns were raised whether the scope would not be too narrow, as the parameters of compliance were not clearly defined and as it was unclear whether the basic principles of due process, such as independence, impartiality, and the right to be heard, could be challenged in the arbitration under paragraph 3. It was stated that if the basic due process principles were not captured by the arbitration under paragraph 3, the awards resulting from such an arbitration might be unenforceable. Equally, it was stated that the arbitrator should be able to consider any allegation of public policy violations in the adjudication.

63. In response, reference was made to jurisprudence in the United Kingdom of Great Britain and Northern Ireland in such cases where material breaches in the principles of natural justice by an adjudicator could be considered by any court asked to enforce an adjudicator's determination. Such principles would include basic elements of due process, such as the right to be heard, the independence and impartiality of the adjudicator and allegations of their breach could be considered in arbitration under paragraph 3.

64. After discussion, it was agreed to include a new subparagraph at the end of paragraph 3 along the following lines:

> The arbitral tribunal shall limit the procedure to determining whether a party has breached its undertaking under subparagraph 2(i) and, if so, to ordering compliance with the adjudicator's determination, unless it finds that the adjudicator failed to comply with paragraph 2(f). The arbitral tribunal shall not review the substance of the adjudicator's determination.

65. It was explained that the new text underscored the limited scope of an arbitration under paragraph 3 but ensured a robust process guaranteeing equal treatment of parties and fairness in proceedings.

66. It was suggested to additionally add a reference to "independence and impartiality of the adjudicator" as important elements of due process. In response, it was said that the phrase "fair and equal treatment of the parties" was understood to inherently encompass the principles of independence and impartiality and that an additional reference was therefore superfluous, but that inclusion of these principles could be confirmed in the explanatory notes. It was also suggested that the word "substance" be replaced by the word "merits". This proposal received support.

67. The Working Group approved the newly proposed subparagraph, subject to the change in paragraph 4.

68. It was proposed to better define the chapeau of paragraph 3, for instance along the following lines, "A dispute as to whether any party has not complied…". It was however said that such language would not capture situations where a party had not complied but there was no dispute about their non-compliance.

69. After discussion, it was agreed that the chapeau should read along the following lines:

> If there is any dispute as to the compliance by any of the parties with the determination of the adjudicator under subparagraph 2 (i), then any of the parties may refer such dispute to arbitration in accordance with the UNCITRAL Expedited Arbitration Rules, with the following modifications (the "Compliance Arbitration"):

70. It was pointed out that, if the order of the paragraphs were to be reconsidered, the reference to the subparagraphs in paragraph 1 would need to take those changes into account.

71. Regarding subparagraphs (a)–(e), it was mentioned that those subparagraphs needed to be changed to reflect the changes in the model clause on highly expedited

arbitration. As for subparagraph (e), it was questioned whether such a subparagraph was necessary for a dispute over compliance of the determination of the adjudicator, as the scope of arbitration under paragraph 3 was limited and exceptional circumstances were unlikely to arise. In response, it was mentioned that there was advantage in keeping the same subparagraph because the possibility that exceptional circumstances might arise could not be entirely ruled out. It was nonetheless suggested that subparagraph (e) provide that the arbitral tribunal could determine to move to proceedings in accordance with the EARs but not to those under the UARs.

72. Regarding subparagraphs (c) and (d), a view was expressed that whether an extension of time was necessary should depend on the applicant. In response, it was said that the question of possible extension of the period should not be in the hands of only one of the parties.

73. It was further suggested that the extension should not exceed a total of 60 days.

Paragraph 4

74. It was stated that if the Working Group decided to delete paragraph 1, consequently, paragraph 4 would have to be reconsidered (see para. 80).

75. Regarding paragraph 4, views were expressed that allowing parallel proceedings was not advisable. It was said that once an issue was submitted to adjudication and the subsequent arbitration under paragraph 3 and while those proceedings were ongoing, arbitration under paragraph 1 should not be commenced and, when arbitration under paragraph 1 was ongoing, a dispute should not be submitted to adjudication pursuant to paragraph 2. It was mentioned that the possibility of parallel proceedings could lead to conflicting outcomes through the two separate mechanisms, which could result in inefficiencies and potentially inconsistent and irreconcilable decisions. Enabling proceedings of the two mechanisms to be conducted independently could be retained as an option, it was suggested. However, it was explained that that option would likely deter parties from using the model clause due to the risk of conflicting decisions. Thus, it was suggested that the model clause should at least indicate that parties were able to exclude the possibility of parallel proceedings. It was also suggested to add to the chapeau of paragraph 2 the following phrase “and not already resolved by arbitration in paragraph 1”.

76. In response, it was mentioned that the Working Group considered the issue at the previous session and found that it was difficult to come up with an exclusion that barred parallel proceedings and that paragraph 4 in the model clause and paragraph 18 of the explanatory note reflected those discussions. It was noted that the subject matter of the adjudication and arbitration under paragraph 1 was different under all circumstances and that what might potentially be common were the underlying issues of the dispute referred to either adjudication or arbitration under paragraph 1. It was recalled that, in certain jurisdictions where statutory adjudication existed, parallel proceedings rarely occurred. It was noted that, if they did occur, any parallel conduct of adjudication and arbitration under paragraphs 2 and 3 and arbitration under paragraph 1 would be limited to a short period of time as the time frame for adjudication was short. It was mentioned that providing for criteria in which parallel proceedings should be avoided seemed impracticable and if it were to be defined, for instance, as when the disputed issue was the same, it was likely that whether the disputed issue was the same would be heavily disputed. It was also stated that the possibility of different outcome of adjudication and arbitration was inherent in the system and was not a problem.

77. After discussion, the Working Group agreed to include the following option for the case that the parties wish to avoid parallel proceedings in the following terms:

> [Once adjudication has been initiated, arbitration on issues before the adjudicator may be commenced only once the adjudicator has made his or her determination.]

[If adjudication is initiated while arbitration is pending, at the request of a party, the arbitration on issues before the adjudicator shall be suspended until the adjudicator has made his/her determination.]

78. On subparagraphs (a)–(c), it was suggested that the language needed to be refined overall. Regarding subparagraph (a), it was mentioned that the matter referred to adjudication (and arbitration under paragraph 3) and the matter that was referred to arbitration under paragraph 1 would not be the same and that, hence, the provision needed to clarify what it intended to mean. With regard to subparagraph (b), it was suggested that it be amended as "If a matter is referred to arbitration pursuant to paragraph 1, the parties are free to develop their case and are not restricted to their argument and evidence before the adjudicator." As for subparagraph (c), it was suggested to amend "the proceedings of adjudication" to "the proceedings and outcomes (or their respective outcome) of adjudication". It was further suggested that subparagraphs (b) and (c) be merged.

79. After discussion, a proposal was made to streamline the language in paragraph 4 along the following lines:

In any arbitration initiated by the parties [under paragraph 1]:

(a) A party may submit matters considered in the adjudication under paragraph 2 without being limited by any of its claims, statements or evidence in those proceedings;

(b) The arbitral tribunal shall not be bound by any determination by the adjudicator.

Paragraphs 1–4 consolidated

80. After further discussions, the following proposal on the clause was made:

[*Note: Parties entering into a contractual relationship may wish to adopt the following procedure whereby disputes, as and when they arise, can be resolved in an expedited and binding manner by an adjudicator, subject to any party's right to have the same* dispute *finally resolved in an arbitration.*]

Arbitration

1. Any dispute, controversy or claim arising out of or relating to this contract, or breach, termination or invalidity thereof ("Dispute"), shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules with the following additions:

(a) The appointing authority shall be… [name of institution or person].

(b) The number of arbitrators shall be… [one or three].

(c) The place of the arbitration shall be… [town and country].

(d) The language to be used in the arbitral proceedings shall be….

Adjudication

2. Option 1: Any Dispute may be determined by adjudication in accordance with the following subparagraphs:

Option 2: Any Dispute relating to [clauses xx (to specify clauses)][performance obligations under clauses xx][monetary claims][technical issues] under this contract [excluding its termination and invalidity] may be determined by adjudication in accordance with the following subparagraphs:

(a) A party shall communicate a request for adjudication containing a description of the dispute, including its basis and an indication of the determination being requested to all other parties and, once there is an agreement on his/her appointment, the adjudicator;

(b) If the parties have not reached an agreement on an impartial and independent adjudicator [7] days after a proposal made by a party has been received by all other parties, such an adjudicator shall, at the request of any party, be appointed by the appointing authority as promptly as possible;

(c) The appointing authority for adjudicators shall be … [name of institution or person];

(d) The adjudicator shall consult on the dispute and the organization of the procedure with the parties promptly and within 3 days from his/her acceptance of appointment for the particular dispute. The adjudicator may hold additional consultations with the parties or request additional information he/she deems necessary;

(e) Within [14] days from the adjudicator's acceptance of appointment for the particular dispute, the other party or parties shall communicate a response to the request;

(f) Subject to subparagraph (h), the adjudicator may conduct the proceedings as he/she considers appropriate, including abridging or extending any period of time, provided that the parties are treated with equality and that each party is given a reasonable opportunity to present its case;

(g) The adjudicator may determine that the dispute submitted to him/her is, in whole or in part, not suitable for adjudication;

(h) The adjudicator shall make a determination within [30 days] from the date of his/her acceptance of appointment for the particular dispute stating the reasons. In exceptional circumstances and after having consulted the parties, the adjudicator may extend the period of time for making the determination, which shall not exceed a total of [60] days;

(i) The determination of the adjudicator shall be binding on the parties and the parties shall comply with the determination without delay.

Compliance Arbitration

3. Any dispute as to the compliance by any of the parties with the determination of the adjudicator under subparagraph 2(i) may be referred to arbitration by either party in accordance with the UNCITRAL Expedited Arbitration Rules ("EARs"), with the following modifications:

(a) If the parties have not reached an agreement on the appointment of a sole arbitrator [7] days after a proposal has been received by all other parties, the arbitrator shall, at the request of a party, be appointed by the appointing authority in accordance with article 8(2) of the UNCITRAL Arbitration Rules as promptly as possible;

(b) Promptly after and within [7] days of the constitution of the arbitral tribunal, the arbitral tribunal shall consult the parties pursuant to article 9 of the EARs;

(c) The period of time within which the award shall be made pursuant to article 16(1) of the EARs shall be [30] days;

(d) The extended period of time referred to in article 16(2) of the EARs shall not exceed a total of [60] days. The period of time within which the award is made shall not be further extended. Article 16(3) and (4) of the EARs shall not apply;

(e) The arbitral tribunal shall limit the procedure to determining whether a party has breached its undertaking in paragraph 2(i) and, if so, to ordering compliance with the adjudicator's determination, unless it finds that the adjudicator failed to comply with paragraph 2(f). The arbitral tribunal shall not review the merits of the adjudicator's determination.

Arbitration under paragraph 1 in relation to adjudication

4. In any arbitration initiated by the parties under paragraph 1:

(a) A party may submit disputes considered in the adjudication under paragraph 2 without being limited by any of its claims, arguments, evidence or other submissions in those proceedings; and

(b) The arbitral tribunal shall not be bound by any determination by the adjudicator.

5. The initiation of adjudication and arbitration under paragraphs 2 and 3 shall not preclude the initiation or continuation of arbitration under paragraph 1 with respect to any dispute. Similarly, the initiation of arbitration under paragraph 1 shall not preclude the initiation or continuation of adjudication and arbitration under paragraphs 2 and 3 of any dispute.

Note: To address concerns regarding concurrent initiation and conduct of adjudication or arbitration under paragraphs 2 and 3 and arbitration under paragraph 1, parties may consider adding the following text to paragraph 5.

Once adjudication has been initiated and is continuing, arbitration on issues before the adjudicator may be commenced only once the adjudicator has made his/her determination. If adjudication is initiated while an arbitral proceeding is continuing, the arbitral proceeding on issues before the adjudicator, at the request of a party, shall be suspended until the adjudicator has made his/her determination.

81. It was widely felt that the structure of paragraph 5, presenting the general rule first and then addressing the concerns as an additional subparagraph was useful. It was however questioned whether the Note was necessary, as it was an uncommon drafting approach and would deter parties from using that clause. It was suggested that it would be sufficient to bracket the second subparagraph to identify it as an option. In response, it was stated that the Note made clear that the two subparagraphs were not meant to be alternatives, but that the second subparagraph was an add-on.

82. After discussion, the Working Group approved the text, subject to the changes.

2. Explanatory notes

83. At the outset, it was stated that the explanatory notes needed to reflect the deliberations of the Working Group with regard to the model clauses.

84. Regarding paragraph 1, it was proposed to expand on the introductory text by highlighting that adjudication was a well-established procedure in some jurisdictions and also being applied in international contracts, especially in the construction industry, that the model clause aimed to expand its use to other industries and to provide for a mechanism for cross-border enforcement of the determination by the adjudicator. It was also proposed to underscore the fact that the proceedings for adjudication was built into arbitration and the expedited nature of those proceedings. It was further highlighted that the definition of adjudication was not necessarily clear and needed to be expanded.

85. For paragraph 5, it was suggested to delete the last sentence “adjudication might not be suitable for purely legal matters”, given that contract interpretation could be considered a legal matter but could be suitable for the adjudicator to determine.

86. Regarding paragraph 6, it was pointed out that the impartiality and independence of adjudicators were essential obligations owed to the parties, which should be distinguished from the concept of the qualification of adjudicators.

87. On paragraph 7, it was mentioned that parties could add in their contractual framework the procedures to address situations where adjudicators were unable to act.

88. Regarding paragraph 8, it was reiterated that the appointing authority for arbitrators and that for adjudicators could be different and suggested that this be referred to in this paragraph.

89. As for paragraph 10, it was mentioned that the issue as to whether the matter was suitable for the adjudicator to determine might not always be evident at an early stage and that, in terms of the timing for the adjudicator to make that determination, it would be advisable to not connect it to the consultation stage.

90. Regarding paragraph 11 on non-reasoned determinations, it was stated that this should be aligned with the discussions and conclusions on non-reasoned awards under highly expedited arbitration.

91. It was stated that paragraph 13 should be carefully drafted considering that the request of security could defeat the purpose of adjudication when additional monetary payment was required.

92. The deletion of paragraphs 14 and 15 was suggested as they seemed to encourage parallel proceedings.

93. Paragraph 16 was suggested to be deleted given the complexity involved as the impact of a request for adjudication on the limitation period can vary across jurisdiction.

94. Regarding paragraph 17, it was suggested to add more explanation on the purpose of the compliance arbitration, in particular that the arbitrator still had the authority to address issues related to the adjudicator's independence, impartiality, and principles outlined in paragraph 2(f).

C. Model clause on technical advisors

1. Model Clause

95. The Working Group considered the model clause on technical advisors and acknowledged inputs received from different jurisdictions on the use of court's assessors. The usefulness of a technical advisor providing guidance, explanations and support to the arbitral tribunal in understanding complex technical issues and explaining technical concepts was reiterated.

96. With regard to paragraph 1, it was suggested to delete the article before the phrase "terms of reference" and that reference to those terms should be made to all paragraphs which related to their establishment. Those suggestions received support.

97. It was widely felt that paragraphs 2 and 3 should be merged and reordered, as the consultations in paragraph 3 needed to take place before the appointment pursuant to article 29(2) of the UARs. It was also questioned what "methods of work" meant and it was suggested to delete a reference thereto.

98. The following proposal for a combined paragraph was made:

> In the process of selecting and appointing a technical advisor, the arbitral tribunal shall consult the parties on: (a) the specific area of technical expertise necessary; (b) the terms of reference, including on the means and manner in which the technical advisor performs its role; and (c) any additional matters that the arbitral tribunal deems pertinent to the appointment of a technical advisor. Article 29(2) of the UNCITRAL Arbitration Rules shall apply to technical advisors.

99. It was widely felt that the first sentence of paragraph 4 was repetitive and not needed. While the second sentence was considered to be appropriate, it was suggested to also clarify the level of interaction between the parties and the technical advisor by explicitly stating their rights to comment and ask questions. Another view was that in particular in the context of highly expedited arbitration, where time is a critical factor, it should be left to the arbitral tribunal to decide on the most efficient way to

incorporate parties' input without being bound by a specific mechanism. Including a provision that explicitly granted the parties the opportunity to provide comments and submit questions would introduce additional steps and time-consuming processes. Furthermore, it was suggested that parties should be allowed to waive their rights under paragraph 4.

100. A suggestion was made that the manner in which the parties were informed about the advice and assistance to be provided by the advisor be indicated as one of the subjects for the terms of reference. In response it was explained that this was covered by the description in paragraph 2(b); and that paragraph 4 left some discretion about the information which, in a specific case, the arbitral tribunal provided to the parties.

101. After discussion, the Working Group agreed in substance to the following streamlined text:

> 1. The arbitral tribunal may appoint one or more independent technical advisors to accompany it in the proceedings and, as the need arises, to assist it in the technical understanding of the dispute.
>
> 2. In the process of selecting and appointing a technical advisor, the arbitral tribunal shall consult the parties on:
>
> (a) The specific area of technical expertise necessary;
>
> (b) The terms of reference, including the type of assistance to be provided by the technical advisor and the means and manner in which the technical advisor performs his/her role; and
>
> (c) Any additional matters that the arbitral tribunal deems pertinent to the appointment of a technical advisor.
>
> 3. Article 29(2) of the UNCITRAL Arbitration Rules shall apply to technical advisors.
>
> 4. The arbitral tribunal shall ensure that the parties are given a reasonable opportunity to comment on the explanations provided by the technical advisor.

2. Explanatory notes

102. It was stated that the explanatory notes needed an introduction, which should include an explanation on the difference between the technical advisor and the arbitral tribunal appointed expert under article 29 of the UARs (along the lines of para. 9 of the annotations) and indicate that the clause could be used in various types of disputes.

103. Regarding paragraph 1, it was suggested to delete the words "or scientific" in the first sentence and the phrase "thereby leading to ensure the quality and efficiency of the proceedings" in the second sentence. Both proposals received support.

104. Regarding the second sentence of paragraph 6, it was suggested to also highlight the "right to be heard" as a key principle. It was also suggested that the terms of reference should address the issues of costs.

105. A suggestion to delete the last sentence in paragraph 7 was not supported.

D. Model clause on confidentiality

1. Model Clause

106. Regarding paragraph 1, it was said that the situation where decisions or awards that have been "proven to have become public illegally" should be covered by the confidentiality duty to avoid a wider spread of the illegally disclosed information.

107. It was said that the bracketed text in paragraph 1 on disclosure to certain third parties was not necessary, as the standard exceptions were broad enough and would cover various situations adequately. In that context, a view was expressed that the phrase "to protect or pursue a legal right or interest" would cover the disclosure of

information for the purpose of obtaining third-party funding. Conversely, it was said that the bracketed text would provide additional clarity and assurance to the parties involved. After discussion, it was agreed to address the issue of the third-party funder in the explanatory notes, and not in the clause itself and the second set of brackets be deleted.

108. The Working Group confirmed that the text in paragraph 14 of A/CN.9/WG.II/WP.236, should be included into a footnote to the model clause to provide for sufficient visibility.

109. Regarding paragraphs 2 and 3, it was said that there was no need to refer to the adjudicator and it was suggested that paragraph 4 be deleted as it was redundant.

110. After discussion, the Working Group approved the following text in substance:

> 1. Each party shall maintain confidentiality of all aspects of the proceedings, including the existence of the proceedings, all non-public information disclosed by another party in the proceedings, all non-public decisions or awards, [and any decisions or awards that have been proven to have become public unlawfully] with the following exceptions: to the extent that such disclosure is required by legal duty, to protect or pursue a legal right or interest, or in relation to enforcing or challenging awards in legal proceedings before a court or other competent authority, or for the purposes of having, or seeking, legal, accounting or other professional services.
>
> 2. The arbitral tribunal and the parties shall seek the same undertaking of confidentiality in writing from all those that they involve in the proceeding.
>
> 3. The arbitral tribunal may, upon the request of a party make orders concerning the confidentiality of the arbitral proceedings and take measures for protecting confidential information.

2. Explanatory notes

111. It was said that the explanatory notes needed to be updated to reflect the changes in the model clause. Additionally, it was stated that paragraph 1 should be rephrased to acknowledge that many institutional rules and national laws had a provision on confidentiality, but that the need for a clause would typically arise in the UNCITRAL context as the UARs did not contain such a rule.

112. Regarding paragraphs 9 and 10, it was stated that the duty of confidentiality needed to be expressed in a more compelling manner to properly mirror the wording of paragraph 2 of the model clause.

113. Notwithstanding the decision to delete paragraph 4, there was also an agreement to include some general reference to remedies in the explanatory note. However, the specific proposal to include remedies like the allocation of costs in the event of a breach of confidentiality did not receive support.

114. It is stated that the guidance text on confidentiality within the proceedings identified the relevant challenges but did not offer specific solutions. As a result, it was determined that it did not merit to be a stand-alone text. Following discussions, the Working Group reached the conclusion that the guidance text should be condensed and integrated into the explanatory notes to the model clause on confidentiality.

E. Guidance text on evidence

115. The question as to whether the guidance text on evidence should be included was discussed. There was a view that supported its inclusion. It was recalled that the issue of evidence originated from an expert group meeting which led to the current project and that the issue received prominence. In response, it was said that the guidance text as currently drafted did not contain controversial content, but its value was limited as it did not provide solutions. It was mentioned that, to provide

meaningful guidance to the arbitration community on this important matter, which was expected to continue to evolve over time, further work including research was needed and that it would be suitable for the project on the stocktaking of developments in dispute resolution in the digital economy (DRDE) to take on further exploratory work. It was mentioned, nonetheless, that the DRDE project had its own priorities.

F. Introductory text to UNCITRAL model clauses

116. There was a suggestion that the name of the instrument should encompass the various facets of its content, including the technical advisor and confidentiality. However, it was stated that it was impractical to incorporate all aspects into the name. It was therefore agreed to provisionally name the instrument “Specialised Express Dispute Resolution (SpeEDR)”, subject to the provision of a more suitable and harmonized name in the six United Nations languages.

117. An additional suggestion was made to promote the model clauses both collectively as a package and individually.

118. Regarding the structure of the introduction, it was suggested to move paragraph 11 upfront, and further highlight the mandate, the goal, and the usefulness of the instrument at the beginning paragraphs of the introductory text. Suggestions to streamline and update the text according to the deliberations of the Working Group were made, including putting in brackets paragraph 9.

IV. Way forward

119. The Working Group requested the Secretariat to revise the explanatory notes accompanying the model clauses based on the decisions and deliberations of the Working Group and to present the model clauses with their accompanying explanatory notes for finalization and adoption by the Commission at its fifty-seventh session in 2024, where sufficient time should be devoted to the discussions.

V. Other Business

120. Concerns were expressed about the discontinuation of providing remote access as such access was considered crucial for accommodating participants facing financial constraints or aiming to advance climate change goals to effectively engage in the deliberations of the Working Group, fostering inclusivity, and ensuring a proper outreach of the work of the Working Group