United Nations A/CN.9/1129

General Assembly

Distr.: General
23 February 2023

Original: English

United Nations Commission on International Trade Law
Fifty-sixth session
Vienna, 3–21 July 2023

Report of Working Group II (Dispute Settlement) on the work of its seventy-seventh session (New York, 6–10 February 2023)

Contents

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I. Introduction

1. At its fifty-fifth session in 2022, the Commission entrusted the Working Group to develop a guidance text on early dismissal and preliminary determination as provided in the note by the Secretariat (A/CN.9/1114) and to present it to the Commission for its consideration at its fifty-sixth session in 2023.[1] Accordingly, the Working Group, during its seventy-sixth session in October 2022, considered the topic of early dismissal and preliminary determination and requested the Secretariat to prepare a revised version of the guidance text as an additional note in the Notes on Organizing Arbitral Proceedings ("Notes") to be considered briefly by the Working Group at its seventy-seventh session before presenting it to the Commission (A/CN.9/1123, para. 40).

2. The Commission further entrusted the Working Group to consider the topics of technology-related dispute resolution and adjudication jointly.[2] The Working Group was requested to explore the commonalities that existed in the proposals regarding work on technology-related dispute resolution and adjudication and, in that context, prepare model provisions, clauses, or other forms of legislative or non-legislative text, where appropriate.[3] The Working Group was requested to consider ways to further accelerate the resolution of disputes by incorporating elements of both proposals. The Commission further agreed that the work should build on the UNCITRAL Expedited Arbitration Rules ("Expedited Rules") and that 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 Expedited Rules.[4] During its seventy-sixth session in October 2022, 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.227) and requested the Secretariat to revise the model clauses and guidance texts based on the deliberations (A/CN.9/1123, paras. 93–94).

II. Organization of the session

3. The Working Group, which was composed of all States members of the Commission, held its seventy-seventh session in New York, from 6 to 10 February 2023 at the United Nations Headquarters (New York).

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

5. The session was attended by observers from the following States: Azerbaijan, Bahrain, Cambodia, El Salvador, Equatorial Guinea, Georgia, Guatemala, Lebanon, Madagascar, Netherlands, Norway, Pakistan, Paraguay, Philippines and Uruguay.

[1] *Official Records of the General Assembly*, *Seventy-seventh Session, Supplement No. 17* (A/77/17), paras. 22(c), 194(b), and 226–229.
[2] Ibid., para. 22(c).
[3] Ibid., para. 194(b).
[4] Ibid., paras. 223–225.

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

(a) *Intergovernmental organizations*: European Bank for Reconstruction and Development (EBRD), Gulf Cooperation Council (GCC), Interparliamentary Assembly of Member Nations of the Commonwealth of Independent States (IPA CIS), Permanent Court of Arbitration (PCA) and South African Development Community (SADC);

(b) *Non-governmental organizations*: American Arbitration Association/ International Centre for Dispute Resolution (AAA/ICDR), American Bar Association (ABA), American Society of International Law (ASIL), Asia Pacific Centre for Arbitration & Mediation (APCAM), Beijing Arbitration Commission/Beijing International Arbitration Center (BAC/BIAC), Belgian Centre for Arbitration and Mediation (CEPANI), Center for International Investment and Commercial Arbitration (CIICA), Center for International Legal Studies (CILS), Chartered Institute of Arbitrators (CIARB), China Council for the Promotion of International Trade (CCPIT), China International Economic and Trade Arbitration Commission (CIETAC), Comité Français de l'Arbitrage (CFA), Construction Industry and Development Council (CIAC), European Law Institute (ELI), European Law Students' Association (ELSA), Forum for International Conciliation and Arbitration (FICA), Georgian International Arbitration Centre (GIAC), German Arbitration Institute (DIS), Hong Kong International Arbitration Centre (HKIAC), Hong Kong Mediation Centre (HKMC), Inter-American Arbitration Commission (CIAC-IACAC), Inter-American Bar Association (IABA), International Association of Young Lawyers (AIJA), International Bar Association (IBA), International Dispute Resolution Institute (IDRI), International Insolvency Institute (III), International Law Institute (ILI), International Women's Insolvency and Restructuring Confederation (IWIRC), Israeli Institute of Commercial Arbitration (IICA), Korean Commercial Arbitration Board (KCAB), Madrid Court of Arbitration (MCA), Miami International Arbitration Society (MIAS), Milan Chamber of Arbitration, Moot Alumni Association (MAA), Netherlands Arbitration Institute (NAI), New York City Bar Association (NYCBAR), New York International Arbitration Center (NYIAC), New York State Bar Association (NYSBA), Panel of Recognised International Market Experts in Finance (P.R.I.M.E Finance), Russian Arbitration Center at the Russian Institute of Modern Arbitration (RAC at RIMA), Singapore International Arbitration Centre (SIAC), Tashkent International Arbitration Centre (TIAC), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Venezuelan Arbitration Association (AVA), and Vienna International Arbitration Centre (VIAC).

7. The Working Group elected the following officers:

Chair: Mr. Andrés JANA (Chile)

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

8. The Working Group had before it the following documents: (a) Annotated provisional agenda (A/CN.9/WG.II/WP.229); (b) Note prepared by the Secretariat on early dismissal and preliminary determination (A/CN.9/WG.II/WP.230); (c) Note prepared by the Secretariat on technology-related dispute resolution and adjudication (A/CN.9/WG.II/WP.231); and (d) Submission by the Government of Switzerland (A/CN.9/WG.II/WP.232).

9. The Working Group adopted the following agenda:

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

III. Consideration of early dismissal and preliminary determination (A/CN.9/1114)

10. It was recalled that the Commission, at its fifty-fifth session in 2022, had considered the topic of early dismissal and preliminary determination (hereinafter, "early dismissal") and entrusted the Working Group to develop a guidance text on the basis of document A/CN.9/1114. At its seventy-sixth session, the Working Group reviewed that text, and requested the Secretariat to prepare a revised version.

11. Accordingly, the Working Group considered the so revised guidance text on the basis of document A/CN.9/WG.II/WP.230.

12. It was observed that the guidance note was drafted to assist arbitration practitioners and users to illustrate the discretionary power of the arbitral tribunal under the UNCITRAL Arbitration Rules and other arbitration rules and that the guidance text was not to modify any applicable arbitration rules limiting such discretion.

Revised guidance text

Paragraph 1

13. It was suggested that the text should clearly read that the standard for dismissal was the "manifestly without merit" standard.

14. A suggestion was made to limit an early dismissal to claims only. It was reiterated that such approach would unduly limit the scope of the arbitral tribunal's discretion and did not receive support.

15. After discussion, the Working Group agreed on the following text:

> *Many arbitration rules provide discretion to the arbitral tribunal to conduct the arbitration in a manner it considers appropriate provided that the parties are treated with equality and that each party is given a reasonable opportunity to present its case. In exercising the discretion, the arbitral tribunal should conduct the proceedings in a manner that avoids unnecessary delay and expense and provide a fair and efficient process for resolving the parties' dispute. One such discretionary power is the ability of the arbitral tribunal to dismiss a claim or defence on the ground that it is manifestly without merit or that it manifestly lacks jurisdiction, or to make a preliminary determination to that effect (referred to below as "early dismissal"). This includes the early dismissal of a counterclaim and a claim for the purposes of set-off.*

Paragraph 2

16. It was emphasized that early dismissal was an option that could be considered by the arbitral tribunal among other alternatives in exercising its discretionary power. It was agreed to modify the paragraph accordingly.

17. Regarding the initiation of the early dismissal process, it was said that the process should not be instituted by the arbitral tribunal if both parties objected to its initiation. The suggestion to include clarifying language in that regard did not receive support.

18. Concerns were expressed that the time frame for a request for early dismissal was vague, and that a specific time frame needed to be clearly specified, e.g., before the first case management hearing or "not later than" a certain stage of the proceedings. It was observed that such request could be made as early as the arbitral tribunal was constituted and therefore a determination of a specific time frame would not accommodate the different circumstances. Hence, it was agreed to keep the phrase "as promptly as possible" without further reference to a specific time frame.

19. After discussion, the Working Group agreed on the following text:

The exercise of such discretionary power for early dismissal depends on the circumstances and the applicable arbitration rules. One possible approach is to implement an early dismissal process. Under an early dismissal process, if early dismissal of any claim or defence is sought by a party, it should be raised as promptly as possible. In considering such a request or in initiating the process on its own initiative, the arbitral tribunal shall invite the parties to express their views.

Paragraph 3

20. It was suggested to not mention the possibility that the arbitral tribunal could initiate the early dismissal *sua sponte*. In view of previous discussions in the Working Group, this suggestion did not receive support.

21. It was suggested to rephrase the first sentence of paragraph 3 as "[F]actors that may persuade an arbitral tribunal not to consider the merits of the early dismissal include the stage of the proceedings, the time when the parties submitted their request for early dismissal, the need to avoid unnecessary delay and expense, and the need to provide a fair and efficient process", and to delete the last sentence of paragraph 3 which appeared repetitive. In view of such proposals, it was agreed to include language that clarified that an arbitral tribunal did not necessarily need to proceed to consider a request for early dismissal sought by a party.

22. It was clarified that the word "usually" in the second sentence was used to describe what tribunals would normally do.

23. After discussion, the Working Group agreed on the following text:

When determining whether to proceed with the early dismissal process, the arbitral tribunal should take into account a number of factors including the stage of the proceedings. For example, if the early dismissal process may lead to unnecessary delay and expense or may undermine a fair and efficient process, the arbitral tribunal may decide not to proceed with early dismissal. The arbitral tribunal would usually require the party making the request to provide justifying grounds and may require that party to demonstrate that the early dismissal process will expedite the overall proceeding. This could prevent a request for early dismissal from being misused by the parties to delay the proceedings.

Paragraph 4

24. It was discussed whether the issue of jurisdiction should be subject to early dismissal, and which standard should apply. It was said that some arbitration rules governing an arbitration normally required that jurisdictional objections had to be raised by a certain time, and that such a provision may preclude a party from separately objecting to jurisdiction by way of an early dismissal. Furthermore, if the tribunal denied the objection to jurisdiction as a matter of early dismissal because it was not manifestly without merit, a party could then raise the same jurisdictional objection later, creating the possibility of a second consideration of the same jurisdictional issue. In response it was mentioned that an objection to jurisdiction as early dismissal would be subject to the standard of manifest lack of merit, which was a heightened standard as compared to an objection to jurisdiction under the arbitration rules. It was emphasized that the possible effect of early dismissal and a jurisdictional objection under arbitration rules needed to be further addressed.

25. It was proposed that the possibility to request an early dismissal on jurisdictional grounds should be mentioned in paragraph 1, and that paragraph 4 was thus unnecessary because a request for early dismissal on grounds that the arbitral tribunal manifestly lacked jurisdiction and an objection to its jurisdiction under the applicable arbitration rules were subject to different standards. It was mentioned that the guidance text on the discretionary power of the arbitral tribunal did not affect either the legal standard or the timing under the arbitration rules. It was debated whether the

guidance text should refer to such "legal standards and timing" or whether a broader term such as "operation" would be more appropriate. It was further discussed whether reference should be made to arbitration rules only, or also to arbitration laws.

26. After discussion, the Working Group agreed to the following text:

Provisions of the applicable arbitration laws or arbitration rules usually recognize the arbitral tribunal's authority to rule on its own jurisdiction and allow parties, during a proceeding, to raise any objection on jurisdiction. The standard and timing for considering the objection under those provisions are not affected by the arbitral tribunal's ability to decide that it manifestly lacks jurisdiction as a matter of early dismissal.

Paragraph 5

27. It was suggested to condense and simplify paragraph 5, combine it with paragraph 6 and adopt less prescriptive wording. However, it was stressed that the guidance text had educational value and that the text should therefore be kept. Nevertheless, it was agreed to delete the end of the second sentence after the word "short" as it was self-evident that the arbitral tribunal would give itself sufficient time to issue a decision. It was further agreed that the last sentence be deleted as it was considered to be redundant.

28. After discussion, the Working Group agreed on the following text:

Upon determining that the early dismissal process would proceed, the arbitral tribunal should invite the parties to express their views and indicate the procedure it will follow (which should ensure that parties have a reasonable opportunity to prepare and present their case), possibly indicating a period of time within which it will make a ruling. Such a period should be reasonably short.

Paragraph 6

29. The Working Group kept the text, unchanged:

The arbitral tribunal should make a ruling as soon as practicable and within the indicated period of time. Depending on the nature of the ruling and its impact on the proceeding, the arbitral tribunal may not need to continue the proceedings or examine all other issues of the case.

Paragraph 7

30. A view was expressed that issuing a partial award might trigger set-aside proceedings in parallel with the remaining arbitral proceeding, which could lead to inefficiencies. In response, it was stated that the form of the decision would depend on the applicable law and rules.

31. It was suggested that, in the first sentence, the "rules applicable to the specific case" should also be mentioned, but in response it was stated that the circumstances encompassed the rules and that such an addition was not necessary.

32. After discussion, the Working Group agreed on the following text:

A ruling on early dismissal may take the form of an order or an award depending on the circumstances. For example, if the arbitral tribunal decides to deny the request, it may issue an order to that effect. If the arbitral tribunal decides that a claim or a defence is manifestly without merit and there are other claims or defences remaining, the arbitral tribunal may issue a partial award. The arbitral tribunal would then continue with the proceedings to consider the remaining claims. If the arbitral tribunal decides that all the claims are manifestly without merit, the arbitral tribunal may issue a final award to that effect or may order the termination of the proceeding.

Paragraph 8

33. It was mentioned that the extent to which the arbitral tribunal should provide reasons when making a ruling on an early dismissal request depended on the type of decision when making such ruling. A suggestion was made that the parties should agree "expressly", which did not receive support as it was considered implicit and therefore not necessary.

34. The Working Group approved the following text:

> *The arbitral tribunal should provide reasons when making a ruling. If such reasoning is not required under the applicable arbitration law, parties may agree that no reasons are to be given.*

Paragraph 9

35. It was pointed out that, even when the arbitral tribunal rejected a request for early dismissal and did not dismiss a claim or defence, there were instances where it would be inappropriate to allow the party that made that request to raise the same argument at a later stage of the proceeding and that the tribunal should be able to decide whether to allow the parties to do so. It was said that such a situation could arise, for instance, when a party requested early dismissal on the ground that the claim was time barred and the arbitral tribunal denied that ground. In response, it was mentioned that the general understanding was that it was not for the arbitral tribunal to make such a decision and that it might create difficulties on its application.

36. After discussion, the Working Group agreed to delete the text of paragraph 9, as it was widely felt that it was unnecessary.

Placement and name of the Notes

37. The Working Group agreed to place the note on early dismissal (reproduced in the annex to this document) at the end of the Notes as Note 21, with the agreed name of the Notes being: "The UNCITRAL Notes on Organizing Arbitral Proceedings adopted in 2016 (with an additional note on early dismissal and preliminary determination adopted in 2023)".

IV. Consideration of technology-related dispute resolution and adjudication

38. The Working Group considered the topics of technology-related dispute resolution and adjudication based on documents A/CN.9/WG.II/WP.231 and A/CN.9/WG.II/WP.232.

39. At the outset, the Working Group discussed the overarching naming of the instrument. Some support was expressed for "Specialized Express Dispute Resolution" (with the acronym "SpeEDR") capturing the two main elements addressed by the instrument: speed and expertise. A suggestion was made to include a reference to "technology", and it was also suggested that given the different facets of the discussions in the current instrument to proceed to the naming of the instrument only at the end of the discussions.

40. The following names for the project were also proposed for future consideration: (i) Express Resolution for Technology and Businesses (EXPERTS); (ii) Dispute Resolution for Technology and Specialized Business (DARTS); (iii) Specialist Technology and Expedited Resolution (STER); and (iv) Advanced Expedited Dispute Resolution (AEDR).

41. In addition, it was expressed that the name should not refer to technology, in order not to discourage the use in other types of disputes. It was also said that the proposed English name and its acronym, upon translation, should be compatible in different languages.

42. It was highlighted that while model clauses A and B accounted for different needs, parties should have the flexibility to pick and choose elements from the different model clauses A–D, or agree on a combination thereof. It was widely felt that the Working Group should aim to provide parties with further options and models to allow them to tailor their dispute resolution clauses to their specific needs. However, a view was also expressed that the existing UNCITRAL arbitration framework would be sufficient and no further model clauses or guidance documents would be needed.

A. Draft model clauses

1. Model clause A: highly expedited arbitration

General comments on model clause A

43. Model clause A was conceptualised as an arbitration clause based on the UNCITRAL Expedited Arbitration Rules (EARs) providing for highly expedited arbitration of 60 or 90 days.

44. The Working Group expressed general support for such a model clause, as many users required highly expedited arbitration clauses, for example high-tech and start-up companies. However, one view was that such short timelines were not acceptable in view of due process concerns. In response, it was stated that party autonomy allowed parties to agree on short timelines, and it was said that 60 days was not uncommon for an expedited arbitration to take place. It was also stated that there could be cases where users might prefer a faster resolution of their dispute even at the cost of some procedural safeguards.

Chapeau

45. Caution was expressed that parties might be attracted by highly expedited arbitration not being fully aware of the consequences of agreeing to it. A suggestion was to incorporate such guidance in the chapeau without necessarily limiting its scope of possible application, while others suggested to basically maintain the generic language in the chapeau but to provide guidance in an explanatory note outlining the relevant information to parties. For instance, it was said that such guidance could clarify that certain type of disputes might not be suitable for highly expedited arbitration, or might only be suitable for disputes involving a certain financial amount, although it was said that, in view of the different economic realities, the determination of such an amount could be usefully done only by the parties themselves.

Subparagraph (a)

46. Diverging views were expressed regarding the desirability of maintaining the possibility for the parties to agree on a specific arbitrator or to specify its qualifications upon appointment at the time the contract was concluded.

47. One view was that there would be merit in including a name of an arbitrator in a contract as it would help shorten the appointment phase which could take a considerable amount of time. If multiple persons were to be named, it was said that the list should prioritize the order in which the persons would be appointed. It was nonetheless mentioned that, if the model clause were to include reference to naming a person(s) to act as arbitrator, it should also address circumstances in which that person was unable to act, such as when he/she was incapacitated or had a subsequent conflict of interest. It was said that reference could be made to an appointing authority for the appointment of an arbitrator when its replacement was needed, which would require adjustments to the appointing mechanism in article 8 of the EARs, including providing for an appointment in cases where the named arbitrator or appointing authority failed to act and adjusting the timeframe. It was further mentioned that the arbitrator should be quickly informed of his/her designation as arbitrator and

comment without delay whether he/she accepted the appointment. The tribunal would be constituted only once the arbitrator accepted the designation.

48. Another view was that it would be counterproductive to name a person(s) to act as arbitrator in a contract and that the appointment mechanism should remain as it was in article 8 of the EARs. It was mentioned that there were various circumstances where a named person(s) might become unable or unwilling to act as arbitrator. It was also mentioned that, as it was difficult to envisage in a contract the nature of a future dispute, the arbitrator named in the contract could turn out not to have the relevant expertise and to need replacement. In the same vein, it was mentioned that stipulating criteria for a future dispute might create obstacles rather than facilitating the appointment of a relevant arbitrator. Instead of specifying an arbitrator, a suggestion was made to enable a swift intervention of an appointing authority to expedite the appointment of arbitrator.

Subparagraph (b)

49. There was general support to the reduction of the time period of article 9 of the EARs within which the arbitral tribunal should consult the parties. However, it was said that the bracketed period of three days was too short, but that it should be a period shorter than the 15 days as provided for in article 9 of the EARs and longer than the three days currently provided for in the model clause, for example 5 or 7 days. It was highlighted that the time period should be sufficiently long to allow for meaningful and properly prepared consultations with possible input by the parties beforehand. It was also observed that whether the time period was reasonable depended on how the arbitral tribunal was constituted.

50. It was highlighted that the interaction of subparagraph (b) with the EARs needed to be further considered, for example whether parties had the obligation to submit issues to the arbitral tribunal in advance, or whether it was the tribunal that needed to request the information and more generally how the timeline in subparagraph (b) would reconcile with the timelines under the EARs.

Subparagraph (c)

51. The subparagraph suggested that the joint appointment of experts would speed up the process and be an important feature. However, it was questioned how this clause interacted with articles 27 and 29 of the UNCITRAL Arbitral Rules (UARs) respectively.

52. Additionally, it was mentioned that in practice parties usually appointed their own experts, and that a compulsory joint appointment would jeopardize the process. Thus, the removal of subparagraph (c) was recommended or at least that the option that parties appointed their own expert should be kept. Furthermore, how subparagraph (c) and model clause C on experts might be considered together was left for further discussion.

Subparagraph (d)

53. There was general support for subparagraph (d) to specify a recommended time frame for making the award, e.g. 90 days or a shorter time frame. There was a suggestion that an extension beyond the 60 or 90 day time-limit should be made possible, limiting to a one-time extension. Caution was expressed to avoid the possible consequence of allowing the making of the award to be unduly prolonged should articles 16(2), (3) or (4) of the EARs come into play, which would defeat the purpose of subparagraph (d). On the other hand, there were strong reservations expressed against such modification as they provided for necessary safeguards. Suggestions were made for an opt-out provision, which allowed parties to override these articles and that such a provision should be accompanied by explanatory text.

54. It was suggested that in order to comply with the shortened timeline to render the award, the other timelines in the EARs, such as for a response to arbitration, and

in the UARs, such as for the challenge of an arbitrator, needed to be adapted accordingly.

Subparagraphs (e) and (f)

55. Considering that subparagraphs (e) and (f) had the same wording as the model clause provided for in the annex to the EARs, it was widely felt that the subparagraphs (e) and (f) should be kept.

2. Model clause B: multi-tier dispute resolution

56. It was stated that some users required a quick decision for which existing arbitration procedures, which could be time consuming and costly, were not appropriate. It was also suggested by some delegations that for such users, the need for expedience provided by a specialist determination could sometimes outweigh considerations of due process or enforceability. Adjudication type summary procedures provided such a solution without requiring a full-fledged arbitration. Such procedure had been developed in the construction industry but was applicable to other types of contracts. It was said that adjudication had substantially reduced and largely eliminated ordinary construction arbitration or litigation. While a number of jurisdictions provided for domestic legislation which ensured the enforceability of decisions, cross-border enforcement without an adequate legal framework posed a number of issues. The proposal aimed to ensure cross-border enforcement of the outcome of adjudication by giving effect to the parties' contractual commitment to comply with this result and enforce it in a procedure which was limited to determining compliance and enforcing it through the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

57. It was said that the model clause as currently drafted did not achieve the benefits outlined above. Scepticism was expressed that such a procedure was overly complicated and therefore not sufficiently user friendly, that it created legal uncertainties, that a multi-tiered process would lead to additional costs, and that the status of the decision-maker of the specialist determination was unclear. Further it was highlighted that a decision on performance that once complied with would not be reversible posed an issue.

58. It was stated that the issue of enforceability under the New York Convention needed to be analysed further. It was pointed out that the New York Convention did not limit enforcement of awards to those awards deemed "final", but rather provided pursuant to article V(1)(e), that a court might decline to enforce an award that had not become binding on the parties. On this basis, it was mentioned that the arbitral award contemplated under paragraph 2 could become binding on the parties and thus should be enforceable under the New York Convention.

59. It was also said that it would be useful to analyse whether the specialist determination could be considered a settlement agreement as the specialist had no authority to impose a decision on the parties, and thereby be potentially enforceable under the United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention).

60. It was discussed whether other mechanisms could provide parties with a quick resolution of a dispute.

61. Reference was made to the two types of "adjudication" models of the German Arbitration Institute (DIS). The DIS Adjudication Rules were applicable when the parties agreed upon a project-accompanying adjudication for the purpose of settling differences and disputes as they arise, and the DIS Rules on Expert Determination enabled parties to seek an expert determination for a dispute that had already arisen ("ex post perspective"). The decisions of the adjudicator and the expert were binding on the parties until such decision was set aside or altered by an arbitral tribunal or a State court, and the non-observance of a decision by a party constituted an intentional and severe breach of contract. In case of non-compliance with the decision under both

set of rules enforcement of a binding determination would be sought through expedited arbitration if court proceedings were not chosen. Parties reserved the right to declare non-recognition of the decision and, when a party did so, the dispute would be resolved through arbitration or litigation. Until the decision would be reviewed in a full proceeding, it would still be binding on the parties.

62. Furthermore, the SCC Rules for Express Dispute Assessment (SCC Express) were introduced, which were developed on the demand of industries as they required a quick and focused dispute settlement tool which allowed parties to continue their business relations. Within a short period of time, parties could get an assessment of their dispute by a neutral, choose whether they wanted such assessment to be binding and, additionally, decide to transform the decision into an enforceable consent award.

63. After these presentations, it was questioned whether, considering difficulties raised by some delegations, it would be useful to continue exploring an approach that started with a procedure different from arbitration and then, through multi-tier provision along the lines of model clause B, would be given effect and rendered enforceable.

64. It was said that a procedure akin to SCC Express or the DIS Adjudication Rules (see paras. 61–62) without an enforcement mechanism, if embodied in an UNCITRAL model clause could have value and provide parties with a quick dispute resolution tool and that such options needed to be explored further. For example, a model clause consisting of the first and third step of model clause B would be useful for parties. In response, it was said that this would simply be a replication of existing means, while the second step added a novel feature to these procedures.

65. Additionally, it was said that enforcement was a key feature, and if compliance rates in domestic adjudication were high, this was largely due to the existence of an enforcement mechanism. It was noted that contractual model clauses might not be adequate to ensure international cross-border enforcement, and that a model law or a convention would be more appropriate. Reference was made to the Singapore Convention, which was considered necessary to allow for mediation to yield its full benefits.

66. It was said that in working on an enforcement mechanism, the diverging degrees of development of specialist determination and its practice across various jurisdiction should be considered; and that the challenge of creating the mechanism needed to be justified by the actual needs of the users.

67. The mechanics in terms of how a determination by a neutral specialist could be enforced was further discussed and whether such procedure raised due process concerns. It was mentioned that the parties to a contract based on the model clause would contractually undertake to comply with the specialist's determination. Via model clause B, paragraph 2, the parties agreed to an enforcement mechanism, which considered whether the specialist determination had guaranteed some minimal procedural protection (such as neutrality of the specialist, the consultations of the parties), but not for the full scope of procedural protections as provided for in an arbitration. It was said that when assessing whether due process criteria were met, the multi-tier process needed to be considered in its entirety, as it provided complete due process protection by the possibility of initiating a full-fledged arbitration for the dispute.

68. After discussions, it was widely felt, that providing parties with additional options would be useful and that therefore exploratory work on model clause B should be continued, considering different alternatives on how concerns expressed could be addressed.

Specialist determination

69. The Working Group considered the scope of model clause B, paragraph 1, whether it should be narrowed, and if necessary, the extent to which it should be narrowed, for instance to certain matters or specific claims such as payment

obligations only. It was said that such narrow scope would reduce the risk of irreversible decisions and thereby help mitigate unintended consequences. In response, it was said that such limitations would give rise to disputes about the question whether, in a specific case, a request was within the scope and that subparagraph (f) as proposed in A/CN.9/WG.II/WP.232 as well as the de novo arbitral review would provide for sufficient safeguards.

70. Regarding the appointment of specialists, reference was made to the discussion on arbitrators and experts under model clause A and the difficulties regarding their designation at a time when it was not clear yet what type of dispute would arise (see paras. 46–48). It was also said that the appointment and qualification of the neutral specialist should be left to the parties to decide. Views on appointment procedures in statutory and institutional adjudications were shared, for example those by the German Arbitration Institute (DIS), the International Federation of Consulting Engineers (FIDIC) and the International Chamber of Commerce (ICC).

71. It was generally felt that the model clauses for specialist determination should be kept simple as provided for in the model clause, and that the conduct of the determination should be left to the specialist, in consultation with the parties. However, one view was that further elements should be included, for instance if the specialist decided to not issue any determination or not within the determined timeframe. Another view was that the EARs should apply mutatis mutandis to the determination to provide for some procedural safeguards. In response, it was stated that the benefits of a simple procedural determination would outweigh its possible disadvantages.

Enforcement of the specialist determination

72. Divergent views on the inclusion of paragraph 2 with the modifications as suggested in A/CN.9/WG.II/WP.232 were expressed. One view was that it would be essential to include paragraph 2 to ensure compliance with the specialist determination backed up by enforceability. It was added that this was indeed a need expressed by users of international adjudication. It was mentioned that arbitration pursuant to paragraph 2 was not different from arbitration under the EARs, except that the narrow focus on the commitment to comply with the specialist determination allowed for some simplification in the procedure. This should also allow the completion of the procedure in a relatively short period of time, for instance 10 days. The need to further consider to what extent the provisions of the EARs applied to such short proceedings was also mentioned.

73. Another view was that paragraph 2 should be deleted, as the enforcement of the contractual undertaking could be left to arbitration under the EARs without limiting the competence of the arbitral tribunal. It was mentioned that the arbitral tribunal tasked to conduct arbitration pursuant to paragraph 2 might face difficulty in performing its role with a narrowly defined jurisdiction in a short time frame. It was said that after compliance of a party with the specialist determination, the determination could be reviewed de novo through arbitration pursuant to paragraph 3 and could be reversed. The risk that such a situation could arise was pointed out to be problematic, and the lack of a mechanism to compensate for the damage inflicted on the party that complied with the specialist determination was also pointed out.

74. The interplay between paragraph 2 and 3 was also discussed and diverging views were expressed. It was said that the use of the word “until” in paragraph 2(c) was confusing, and a suggestion was made that paragraph 2(c) should be replaced with “Parties may use the procedure in paragraph 2 if recourse to procedure under paragraph 3 is unavailable” to avoid parallel proceedings. While it was generally felt that parallel proceedings should indeed be avoided, it was mentioned that the idea was not to render arbitration pursuant to paragraph 2 inoperable solely because arbitration under paragraph 3 was instituted. To coordinate the two proceedings, it was said that one possible solution could be that the arbitral tribunal conducting the arbitration pursuant to paragraph 3 would assume the power of the arbitral tribunal

conducting the arbitration pursuant to paragraph 2. Alternatively, it was noted that removing paragraph 2 would avoid the risk of parallel proceedings. However, by retaining paragraph 2, assisting in the enforceability of the specialist determination, parties could be incentivized to abide by the specialist determination if parties were aware of the "enforceability" mechanism under paragraph 2.

75. In this connection, it was said that the risk of parallel proceeding would be negligible as the enforcement of the decision would be an expedited arbitration with a limited jurisdiction, whereas the full-fledged arbitration would only be available after the completion of the project or a certain period of time and paragraph 2 should therefore be retained.

76. It was however questioned whether the access to arbitration should be conditioned and if so, how. Doubts were expressed as to whether compliance with the specialist determination could be set forth as a precondition in resorting to arbitration under paragraph 3, as it might amount to a lack of access to justice.

77. Additionally, it was mentioned that domestic adjudication based on an adequate domestic framework would not be comparable to contractual cross-border enforcement. In the former setting there was little risk of parallel adjudication and court proceedings as the adjudication would have been swiftly enforced by the time a complaint was filed to court.

78. Concerns of the risk of conflicting decisions under paragraphs 2 and 3 was also raised. In response, it was said that conflict occurred when a paragraph 2 decision had not been complied with. Once a paragraph 3 decision was made, then a paragraph 2 decision would be inapplicable. Hence, it was highlighted that a neutral specialist should not make decisions that would be irreversible, such as specific performance.

79. After discussion, it was generally felt that there was a need to further refine and explore the various possibilities, and to make a thorough assessment on the issues, including on the need of paragraph 2 and the interplay between paragraphs 2 and 3.

3. Model clause C: experts

80. There were concerns about what model clause C sought to achieve, and doubts on whether model clause C could indeed facilitate or speed up the process of expert appointment was expressed. Additionally, there appeared to be an overlap between model clause A(c) and model clause C. Further, it was widely felt that the relationship between model clause C and articles 27, 29 of the UARs was unclear. It was said that model clause C unduly limited the power of the arbitral tribunal under article 29 of the UARs, without providing a useful alternative as to the time-consuming procedure to appoint experts under article 29 of the UARs.

81. In response to those concerns, it was stated that model clause C should complement and not replace article 29 of the UARs. It was opined that the procedural steps in article 29 of the UARs were necessary to safeguard the rights of the parties. While such steps seemed complex, it was pointed out that they could be handled in a flexible manner, in consultation with the parties.

82. Reference was made to A/CN.9/WG.II/WP.224 and it was stated that in technical disputes it could be useful for arbitral tribunals to be assisted in understanding and using the technical information and material presented by the parties. It was further stated that the assistance of experts should be based on the information submitted by the parties and should not provide new information or opinion. Though not provided for under the UARs, it was mentioned that such assisting experts were used successfully in arbitration practice and should be provided for in the model clause. As appointing such an assisting expert would require a certain degree of confidence on the part of the arbitral tribunal, it was pointed out that the assisting expert and the arbitral tribunal should operate in a transparent manner, so that the parties could comment on any opinion prepared by the assisting expert.

83. It was suggested that the appointment of such an assisting expert by arbitral tribunal should be discussed early in the procedure, before the parties mandated their own experts. One view was that the default should be that parties jointly appoint the expert, while another view was that the arbitral tribunal should retain the authority to appoint the expert.

84. Regarding paragraph 1, it was mentioned that naming a person as an expert in a contract could turn out to be counterproductive as it was difficult to identify the nature of the future dispute in advance and the expertise required.

85. For paragraph 2(a), it was observed that the request for the arbitral tribunal to provide a list of prospective experts to parties was demanding, as parties tend to be in a better position than the arbitral tribunal to determine the experts needed to advance their case. Also, suggestions were made to limit the number of experts in the list to be provided by the arbitral tribunal and provide a short timeline for such appointment. It was also suggested to provide for short timelines for appointing the experts under paragraph 2(b). Furthermore, the clause was said to not reflect the practice where typically the parties had their own experts and were not able to agree on an expert jointly.

86. As for paragraph 2(b), its deletion was suggested. For paragraph 3, there were concerns about the undue weight to be given to expert witnesses and their statement jointly presented by the parties.

87. While some suggested the deletion of model clause C, others saw merit in having a provision on experts, as the swift introduction of expert knowledge was considered to be a key feature of highly technical disputes. It was emphasized that the most efficient approach would be to appoint decision makers with the respective technical skills so that no experts would be required.

4. Model clause D: confidentiality and guidance on inbound confidentiality

88. The Working Group considered model clause D on confidentiality and the guidance on inbound confidentiality together.

89. With respect to model clause D, considering that neither the UARs nor the EARs contained a general provision on confidentiality, some delegations expressed that the inclusion of such a model clause was useful, while one view was that the Notes and article 34(5) of the UARs provided enough guidance on confidentiality.

90. Regarding paragraph 1, a number of drafting suggestions were made. One was that it should be made clear that all information not in the public domain should be subject to confidentiality obligations. Views were however expressed that information that was in the public domain due to a violation of a confidentiality duty or an illegal data leak should be covered. It was further suggested that the undertaking of confidentiality should be provided for in writing and that the confidentiality duty should also extend to information on the existence of the case.

91. Regarding paragraph 2, it was mentioned that it was unclear as to who should seek the undertaking of confidentiality, the arbitral tribunal and/or the parties.

92. It was pointed out that, in some jurisdictions, a valid confidentiality agreement could only be entered into after the dispute had arisen and that there was a need to caution that the model clause might not always have effect.

93. On the guidance text on inbound confidentiality, various suggestions were made. It was proposed that the text concerning the situations described in the second sentence of para. 94 below should take the form of a model clause to provide parties with a ready-made solution to be included in their contract. It was however pointed out that such situations were too diverse for a model clause and guidance text would be preferrable.

94. It was mentioned that, as especially technology-related disputes could involve highly sensitive information, it would be essential to provide not only for the

possibility of declaring specific information as confidential but also find solutions as to how such information should then be handled in the arbitration. One possibility that was mentioned was that a party would submit the relevant evidence only for the arbitral tribunal's consideration but not the other party or only to that party's counsel in the arbitration.

95. It was also pointed out that the guidance text did not sufficiently describe how the arbitral tribunal should treat confidential information.

96. Regarding paragraph 5, it was said that it would not be necessary to account in a model clause or guidance text for the rare situation that a party wished to keep certain information confidential from the other party and the arbitral tribunal.

97. It was suggested that the Secretariat should explore what solutions were found in arbitration practice.

5. Guidance on evidence

98. Divergent views were expressed with regards to the guidance on evidence. One view was that it would be useful to have a guidance text. Another view was that, as technology was evolving rapidly, contemporaneous reference to specific technology could be outdated in the near future and, thus, that the guidance text on evidence should be removed. It was cautioned that UNCITRAL texts on technology should be drafted in a neutral and generic nature so as to ensure its future-proof nature.

99. A proposal was made to refer to "artificial intelligence". In response, it was said that that term was not clearly defined, was still developing and that, if mentioned, should only be referred to as an example. Regarding paragraph 2, it was widely felt that meta data fell under the term "data" and that specific reference was not necessary.

100. A view was expressed that paragraphs 1–4 provided for useful guidance, while a suggestion was made to delete paragraphs 1 and 3. Regarding paragraphs 5 and 6, the usefulness was questioned. It was also pointed out that they concerned arbitration in general and could be included into the Notes.

101. It was widely felt that the work on guidance on evidence should be drafted taking into account the UNCITRAL texts on electronic commerce for the sake of coherence and consistency of UNCITRAL instruments generally. Furthermore, as the current work derived from a proposal on technology-related dispute resolution, it was mentioned that the Working Group could consider the issues that are specific to such type of dispute resolution. Reference was made to the project on the stocktaking of developments in dispute resolution in the digital economy implemented by the Secretariat.

6. Presentation of the model clause and guidance texts

102. Various options on how the guidance material should be presented were discussed, as outlined in paragraphs 51–54 of document A/CN.9/WG.II/WP.231. It was suggested that the presentation of the model clause should allow drafters to easily incorporate into their contracts possibly through web-based tools similar to the presentation on the UNCITRAL Notes on Main Issues of Cloud Computing Contracts.

103. While it was stated that such discussion was premature, it was also felt that the elements to be taken into account were (i) high visibility, (ii) easy accessibility, and (iii) consistency with other UNCITRAL texts, and (iv) the need to explain that the model clauses were not suitable for all disputes but to certain specialized disputes. Relatedly, concerns were expressed that frequent amendments to the UNCITRAL instruments might be disruptive to users of the materials, and had to be done in a coordinated manner.

V. Way Forward

104. Regarding the guidance text on early dismissal, the Secretariat was requested to present the revised guidance text on early dismissal as an additional Note to the Notes to the Commission for its consideration and possible adoption at its fifth-sixth session in 2023.

105. Regarding the model clauses and guidance texts in technology-related dispute resolution and adjudication, the Working Group requested the Secretariat to revise the model clauses and guidance texts for further consideration by the Working Group, illustrate in particular how they would interact with the EARs and the UARs, and organize informal discussions with potential users and experts to further advance the work.

106. The Working Group further suggested that the general question of how UNCITRAL instruments were presented should be discussed by the Commission to ensure a user-friendly, easily accessible presentation consistent with UNCITRAL's practice and future needs.

Annex

UNCITRAL Notes on Organizing Arbitral Proceedings

Note 21. Early dismissal and preliminary determination

1. Many arbitration rules provide discretion to the arbitral tribunal to conduct the arbitration in a manner it considers appropriate provided that the parties are treated with equality and that each party is given a reasonable opportunity to present its case. In exercising the discretion, the arbitral tribunal should conduct the proceedings in a manner that avoids unnecessary delay and expense and provide a fair and efficient process for resolving the parties' dispute. One such discretionary power is the ability of the arbitral tribunal to dismiss a claim or defence on the ground that it is manifestly without merit or that it manifestly lacks jurisdiction, or to make a preliminary determination to that effect (referred to below as "early dismissal"). This includes the early dismissal of a counterclaim and a claim for the purposes of set-off.

2. The exercise of such discretionary power for early dismissal depends on the circumstances and the applicable arbitration rules. One possible approach is to implement an early dismissal process. Under an early dismissal process, if early dismissal of any claim or defence is sought by a party, it should be raised as promptly as possible. In considering such a request or in initiating the process on its own initiative, the arbitral tribunal shall invite the parties to express their views.

3. When determining whether to proceed with the early dismissal process, the arbitral tribunal should take into account a number of factors including the stage of the proceedings. For example, if the early dismissal process may lead to unnecessary delay and expense or may undermine a fair and efficient process, the arbitral tribunal may decide not to proceed with early dismissal. The arbitral tribunal would usually require the party making the request to provide justifying grounds and may require that party to demonstrate that the early dismissal process will expedite the overall proceeding. This could prevent a request for early dismissal from being misused by the parties to delay the proceedings.

4. Provisions of the applicable arbitration laws or arbitration rules usually recognize the arbitral tribunal's authority to rule on its own jurisdiction and allow parties, during a proceeding, to raise any objection on jurisdiction. The standard and timing for considering the objection under those provisions are not affected by the arbitral tribunal's ability to decide that it manifestly lacks jurisdiction as a matter of early dismissal.

5. Upon determining that the early dismissal process would proceed, the arbitral tribunal should invite the parties to express their views and indicate the procedure it will follow (which should ensure that parties have a reasonable opportunity to prepare and present their case), possibly indicating a period of time within which it will make a ruling. Such a period should be reasonably short.

6. The arbitral tribunal should make a ruling as soon as practicable and within the indicated period of time. Depending on the nature of the ruling and its impact on the proceeding, the arbitral tribunal may not need to continue the proceedings or examine all other issues of the case.

7. A ruling on early dismissal may take the form of an order or an award depending on the circumstances. For example, if the arbitral tribunal decides to deny the request, it may issue an order to that effect. If the arbitral tribunal decides that a claim or a defence is manifestly without merit and there are other claims or defences remaining, the arbitral tribunal may issue a partial award. The arbitral tribunal would then continue with the proceedings to consider the remaining claims. If the arbitral tribunal decides that all the claims are manifestly without merit, the arbitral tribunal may issue a final award to that effect or may order the termination of the proceeding.

8. The arbitral *tribunal should provide reasons when making a ruling. If such reasoning is not required under the applicable arbitration law, parties may agree that no reasons are to be given.*