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Report of Working Group II (Dispute Settlement) on the work of its seventy-eighth session (Vienna, 18–22 September 2023)

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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]

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[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.

II. Organization of the session

6. The Working Group, which was composed of all States members of the Commission, held its seventy-eighth session in Vienna, from 18 to 22 September 2023 at the Vienna International Centre.

7. The session was attended by the following States members of the Working Group: Algeria, Argentina, Armenia, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, China, Croatia, Czechia, Dominican Republic, Ecuador, Finland, France, Germany, Ghana, Hungary, India, Indonesia, Iran (Islamic Republic of), Iraq, Israel, Italy, Japan, Kenya, Kuwait, Malaysia, Mexico, Morocco, Panama, Peru, Poland, Republic of Korea, Russian Federation, Saudi Arabia, Singapore, Spain, Switzerland, Thailand, Turkmenistan, Türkiye, Uganda, Ukraine, United States of America, Viet Nam and Zimbabwe.

8. The session was attended by observers from the following States: Bahrain, Benin, Cambodia, Egypt, El Salvador, Guatemala, Jordan, Lebanon, Malta, Mozambique, Myanmar, Netherlands (Kingdom of the), Norway, Oman, Paraguay, Philippines, and Uzbekistan.

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

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

(b) *Intergovernmental organizations*: Andean Community (CAN), Association of Southeast Asian Nations (ASEAN), Eurasian Economic Commission (EEC), European Bank for Reconstruction and Development (EBRD), Gulf Cooperation Council (GCC), and Permanent Court of Arbitration (PCA);

(c) *Non-governmental organizations*: Alumni Association of the Willem C. Vis International Commercial Arbitration Moot (MAA), Asian International Arbitration Centre (AIAC), Beijing Arbitration Commission/Beijing International Arbitration Center (BAC/BIAC), Belgian Centre for Arbitration and Mediation (CEPANI), Centre for International Investment and Commercial Arbitration (CIICA)**,** Centro de Estudios de Derecho, Economía y Politica (CEDEP), Chartered Institute of Arbitrators (CIARB), China Council for the Promotion of International Trade (CCPIT), China International Economic and Trade Arbitration Commission (CIETAC), China Maritime Arbitration Commission (CMAC), Construction Industry and Development Council (CIAC), European Law Institute (ELI), European Law Students' Association (ELSA), Forum for International Conciliation and Arbitration (FICA), German Arbitration Institute (DIS), Institute for Transnational Arbitration (ITA), Inter-American Bar Association (IABA), International Bar Association (IBA), International Chamber of Commerce (ICC), International Insolvency Institute (III), International Institute for Conflict Prevention and Resolution (CPR), Israeli Institute of Commercial Arbitration (IICA), International Law Institute (ILI), Institute for Transnational Arbitration (ITA), International Women's Insolvency and Restructuring Confederation (IWIRC), Islamic Chamber of Commerce, Industry and Agriculture (ICCIA), Korean Commercial Arbitration Board (KCAB), Madrid Court of Arbitration (MCA), Miami International Arbitration Society (MIAS), New York State Bar Association (NYSBA), Regional Centre for International Commercial Arbitration Lagos (RCICAL), Silicon Valley Arbitration and Mediation Center (SVAMC), Tashkent International Arbitration Centre (TIAC), and Vienna International Arbitration Centre/International Arbitration Center of the Austrian Federal Economic Chamber (VIAC).

10. The Working Group elected the following officers:

Chair: Mr. Andrés JANA (Chile)

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

11. The Working Group had before it the following documents: (a) Annotated provisional agenda (A/CN.9/WG.II/WP.233); 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.234).

12. 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

13. The Working Group considered the topics on technology-related dispute resolution and adjudication based on document A/CN.9/WG.II/WP.234 ("Note").

14. At the outset, it was mentioned that the model clauses needed to be accompanied by a guidance text or commentary to enable parties to make an informed decision, become aware of potential risks and drawbacks of agreeing to the respective model clauses and understand the interaction with the UNCITRAL Arbitration Rules ("UARs") and EARs. Accordingly, the Working Group requested the Secretariat to draft such an explanatory text ("Guidance"). Furthermore, views were expressed that the work on the model clauses and Guidance should be finalized soon, preferably before the next Commission session.

A. Model clause on highly expedited arbitration

General comments

15. There was general support for the model clause on highly expedited arbitration. It was indicated that this clause could be very useful to resolve disputes in the high-tech but also other industries. It was mentioned that the model clause was comprehensive, and could be easily used by the arbitration community and parties alike. It was further said that the model clause contained a shortened time frame which catered to users' needs, particularly users from the high-tech sector. Reference was made to the questionnaire circulated to potential users mentioned in footnote 5 of the Note and the initial analysis of responses which generally supported the need for expedited arbitration and time limitations for awards.

16. However, principled concerns were expressed on the overregulation of the arbitration process and due process. It was suggested that instead of devising a model clause, speed could be achieved with good practices. One view suggested that there was a lack of clarity in the relationship among the model clause, the UARs and the EARs, and caution was expressed over the limited time frame for parties to sufficiently present their claims, defences, evidence, and arguments, and for arbitrators to comprehensively assess the case. Further, the issues of limited resources, language barriers, limited access to expertise and limited bargaining power in developing countries were highlighted.

17. It was also clarified that such a model clause would not be suitable for certain types of disputes, for instance for complex cases, including those with complex legal or technical issues requiring extensive evidence, and would not provide parties with sufficient time to present their case properly or discuss settlement options.

18. It was highlighted that it was for the parties to consent to and opt for highly expedited arbitration, depending on the specific circumstances of their dispute and

their needs. It was therefore widely felt that the Guidance would be able to address the concerns expressed about overregulation and due process, which the parties could weigh against their desire for a highly expedited and efficient process.

Chapeau

19. It was suggested that the language should reflect the language of the UARs and the Model Law on International Commercial Arbitration ("MAL") and consequently refer to "disputes" only. It was also suggested that the language of the chapeau should be aligned with the language of the model clauses accompanying the UARs and the EARs. It was questioned whether the model clause should be formulated in a generic manner as it was drafted to respond to the need of specific industries. Further, it was highlighted that parties may wish to use the clause also in a contractual arbitration clause, which might require adaptation in the wording.

20. After discussion, the Working Group agreed to align the language in the chapeau with the language in the model clauses accompanying the UARs and EARs and therefore replace the words "the contract" by "this contract".

Subparagraph (a) and subparagraph at end of model clause

21. With respect to subparagraph (a) and the additional subparagraph contained at the end of the model clause, diverging views were expressed. One view was that, as the model clauses attempted to provide innovative solutions to specific needs, the model clause should include the possibility of naming the arbitrator in the model clause while the Guidance alerted parties on any concerns or risks. Another view was that naming an arbitrator in the model clause risked jeopardizing the arbitral proceeding and that making available such a model clause should be avoided. It was said that various situations could arise after the contract was entered into, especially if the dispute arose many years after the contract was concluded, such as the named arbitrator's conflict of interest, lack of willingness to function as arbitrator, the arbitrator's unavailability, death or illness, or the risk that the clause would be pathological if the name of arbitrator or the appointing authority was considered an essential clause in the arbitration agreement. While not all of these concerns could be addressed by prior consultations with the arbitrator, the clause provided for appointment of a new arbitrator if the original arbitrator's appointment was not confirmed. It was pointed out that a similar issue would arise if the parties agreed to name a person as the appointing authority as suggested in subparagraph (a), which reflected the wording of the model clauses accompanying the UARs and the EARs. It was also noted that any practical difficulties in naming an arbitrator in advance should not pose an obstacle for the use of the model clause because parties can name institutions as appointing authority which would normally remain available to perform the task. It was further noted that the Guidance could elaborate on these concerns.

22. After discussion, it was suggested that the Guidance clarify that the parties were free to opt into the provisions in whole or in part and, specifically, that there were certain risks associated with naming an arbitrator.

23. Additionally, it was felt that the model clause should shorten the time frames for the choice of an appointing authority in article 6(1) EARs and the appointment of an arbitrator under article 8(2) to for instance 5 to 7 days.

Subparagraph (b)

24. There was general support for the 5 to 7 days consultation period in which the arbitral tribunal should consult the parties. A view was expressed to paraphrase paragraphs 60 to 65 of the Explanatory Notes to the EARs in the Guidance.

25. Regarding whether other case-management features should be included in the model clause, it was widely felt that subparagraph (b) should not be overly prescriptive. It was generally felt that additional features to ensure expeditious

and efficient arbitral proceedings should not be included in the model clause itself, but in the Guidance. A view highlighted the usefulness of in-person discussions and not limit the clause to recommending a documents-only proceeding or to limit the length of the written submissions was expressed. In response, it was stated that parties should have the autonomy to elect such features, if deemed desirable.

Subparagraph (c)

26. Various views were expressed in terms of the recommended time frame in subparagraph (c), such as (i) not including any suggested time frame, (ii) referring to either 60 or 90 days, or (iii) retaining the text as is to incentivize parties to choose whatever was considered appropriate.

27. On the extension of the time frame, it was mentioned that, as the model clause aimed at providing options to the users, it would be advisable to provide as part of the model clause the option to agree on an arbitral proceeding which would be completed within a short and predictable time. In this regard, it was widely felt that the model clause should modify article 16(2) EARs to enable the arbitral tribunal to extend the time frame from 30 to 90 days. There was also general support for the model clause to facilitate a limited extension to this period to address possible due process concern and unexpected delays.

28. Regarding the safeguard provided for in article 16(3) and (4) EARs, divergent views were expressed. It was suggested to incorporate an opt-out provision to exclude a further extension of the time frame and to avoid that the proceedings be conducted under the UARs, which contained no time limitation for the issuance of the awards which would defeat the purpose of a highly expedited arbitration. It was said that, in light of the principle of party autonomy, parties should be allowed to choose the best possible option for their needs which might include a quick decision, albeit associated with certain risks, including the unenforceability if the award was not rendered within the parties' agreed time frame. Parties needed only to be properly informed to be able to assess the potential risks, which would be for the Guidance to outline.

29. In response, it was mentioned that, as the nature and complexity of disputes were not easy to anticipate, setting a rigid time frame with limited possibility of extension and without the safeguards of article 16 (3) and (4) EARs risked due process being undermined or the period of time for rendering the award being missed, both of which posed a risk of awards being unenforceable. As such, it was said that, while the extended period of time in article 16(2) EARs could be modified to be shorter, the safeguard provided in article 16(3) and (4) should remain unaltered.

30. In this connection, the issue as to how article 2(2) EARs should apply to highly expedited arbitration was also discussed. While it was generally felt that article 2(2) EARs should basically apply to arbitration under the model clause, it was suggested that the same article which, in exceptional circumstances, referred the dispute to an arbitration under the UARs should be amended by the model clause, to allow proceedings to be conducted under the EARs if the highly expedited arbitration was no longer appropriate and then only exceptionally under the UARs. The former would be closer to the parties' expectation of a quick resolution of the dispute when agreeing to highly expedited arbitration. In this context, it was mentioned that article 2(2) EARs provided sufficient safeguard and that providing parties with an explicit option in the model clause to exclude the application of 16(3) and (4) EARs would be justified reflecting a balanced approach between the diverging views expressed in the Working Group. It was noted, however, that the two articles addressed different concerns. Article 2(2) EARs provided a sufficient safeguard when requested by a party needing more time for presentation for its case, whereas article 16(3) and (4) provided an option for an arbitral tribunal that needed more time to adjudicate the case.

31. Relatedly, it was proposed to clarify that, to save time and costs while ensuring a fair and thorough resolution of the dispute, the arbitral tribunal was allowed to determine that certain issues could not appropriately be decided in highly expedited arbitration and should be addressed in an arbitration under the EARs or the UARs.

32. With regard to further specifying time frames in the model clause that would shorten the time frames provided for in the EARs, it was widely felt that article 10 EARs provided arbitral tribunals with sufficient discretion.

Subparagraph (d)

33. Diverging views were expressed on the need to include subparagraph (d). It was said that the clause was worded ambiguously and was additionally superfluous, as such similar powers were included in article 30 UARs. Further, it was queried whether subparagraph (d) sought to modify or complement article 30 UARs, which may run the risk of effecting default judgments in arbitrations. It was suggested that article 3 EARs, and the tribunal's general discretionary power enshrined in article 17 UARs should suffice to cover circumstances in highly expedited proceedings.

34. Conversely, it was mentioned that, given the tight time frame of highly expedited arbitration, a clause restating the powers of the arbitral tribunal was useful as it would alert parties on the necessities of such an arbitration and thereby promote efficiency and enhance cooperation of parties. There were suggestions to emphasize that the highly expedited nature of the arbitration required a high level of discipline by both the parties and the tribunal, which needed to be clearly expressed by the tribunal to put the parties on notice. Alternatively, it was proposed that subparagraph (d) should be included in the Guidance rather than the model clause.

35. Views were expressed to move subparagraph (d) before (c), whereby (c) would relate to a procedural sanction, and (d) would touch on the final stages of the proceedings. It was also suggested that subparagraph (d) could be linked to (c) and (b).

36. After discussion, the Working Group requested the Secretariat to revise the model clause based on the deliberations, including how to address the concerns about the relationship with article 30 UARs for the Working Group's consideration at the next session. Alternatively, the revised model clause or wordings to such effect could be included in the Guidance to reinforce the message enshrined in article 30 UARs.

Subparagraphs (e) and (f)

37. 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 subparagraphs (e) and (f) should be kept.

Non-reasoned award

38. Upon a suggestion to include as an option in the model clause for parties to agree on a non-reasoned award, divergent views were expressed. With reference to the MAL, which contained in article 31(2) the possibility for parties to agree that no reasons be given, as well as the UARs, which contained an identical provision in article 34(3), it was stated that many jurisdictions allowed for such practice and, in light of the fundamental principle of party autonomy and the possibility to expedite the generally time-consuming stage of drafting an award, the inclusion of the option of a non-reasoned award into the model clause was warranted.

39. It was recalled why the Working Group did not include the possibility of a non-reasoned award in the EARs. A number of factors were mentioned, namely that (i) reasoned awards provided for some level of transparency, helping parties to understand and accept the decision, to verify that the arbitrators carefully considered the case and thereby contributing to the legitimacy of arbitration;

(ii) reasoned awards facilitated the legal review of potential challenges to the award; (iii) courts needed to assess awards for instance in set-aside or insolvency proceedings and, without reasons, such assessment could require a time-consuming reopening of a number of issues; (iv) providing reasons enabled arbitrators to be accountable and ensured that they have thought about their decisions and such well-thought-out and well-justified awards contributed to the overall quality of decisions and arbitration as a dispute resolution mechanism; and finally that (v) in a number of jurisdictions, arbitral awards without a certain standard of reasoning would raise public policy concerns and not be enforceable.

40. In light of such risks, it was said that an agreement of parties to a non-reasoned award should be given expressly, and preferably after the arbitration commenced so that parties would understand the implications of their decision for the completeness and enforceability of the award. However, it was also stated that an advance agreement to include reasons could be discussed with the arbitral tribunal when organising the proceedings and could be revisited by the parties at any time.

41. The possibility of an award with summary reasons was mentioned, however caution was expressed as it would be a new concept to the UNCITRAL arbitration framework and furthermore it was not clear what a brief reasoned award compared to a reasoned award would look like. The possibility of issuing a decision upfront and provide for the reasoning at a later stage was also mentioned. It was said that some arbitrations were particularly suitable for a non-reasoned award, such as a "final offer arbitration" where the arbitrator could only choose between two offers submitted by the parties.

42. After discussion, the Secretariat was requested to explore further the possibility of including options for the Working Group to consider regarding allowing the parties to choose that the tribunal would not need to state any reasons in its award and highlighting any related risks in the Guidance, including by considering the manner in which parties were required to express consent before courts under the Convention on the Recognition and Enforcement of Foreign Judgements in Civil or Commercial Matters (concluded 2 July 2019).

B. Model clause on expert determination procedure

General comments

43. Reflecting on the draft model clause on expert determination, different perspectives were shared. At the outset, it was mentioned that the model clause was intended to partly resolve disputes outside of the arbitration regime and that, for this reason, it should be made clear that the requirements in arbitration such as due process were preserved at a later stage of the dispute. It was suggested to include preambular language at the beginning of the model clause to state the intention of the parties to agree on a simplified mechanism to resolve disputes in a very short time frame involving a third-party expert, and provide a mechanism for such outcome to be enforceable across borders.

44. In this regard, it was mentioned that there was a need to have an appropriate name for the model clause that would capture its essence and not be associated with different existing mechanisms. As for the name of the first step of the model clause, it was generally felt that the term "determination" was basically acceptable and that it could be complemented by terms such as "technical" and "neutral", rather than by the term "expert"; "adjudication" was also considered suitable.

45. In contrast, acknowledging that the model clause was aimed at providing a mechanism through which such a determination would be made enforceable under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), it was recalled that there were certain preconditions that needed to be met to make awards enforceable, such as due process, fairness of the

proceedings and impartiality and independence of the determining third party. Caution was raised against circumventing those preconditions. Additionally, it was questioned what the impact of a request for a determination on the limitation period would be.

46. A suggestion was made that the binding nature of the determination should be kept solely contractual. Furthermore, it was said that the multi-tiered mechanism was overly complex, making it difficult to understand how it would function. Furthermore, it was noted that marrying two different mechanisms that were not necessarily compatible should be avoided. If a model clause with such a structure were to be developed, it was mentioned that a detailed explanation in the Guidance as to the operation would be indispensable.

47. In response, it was mentioned that there was nothing that should hinder the parties to agree on making the expert determination contractually binding and, furthermore, to enforce this contractual commitment to comply with the determination like any other commitment through arbitration. In this regard, it was said that parties were free to limit an arbitration to a specific contractual obligation and to the questions of validity of the obligation and a party's compliance with it.

Scope

48. In terms of the scope of disputes to be resolved through the model clause, it was pointed out that disputes over termination or invalidity of the contract should not be included. It was also pointed out that the scope should be determined by reference not to the type of the dispute but by reference to the remedy.

49. It was generally observed that the scope of the expert determination clause should not be too restrictive, since this would limit its applicability in future disputes suitable for adjudication. It was thus mentioned that it would be desirable to leave it to the parties to decide on the scope of the issues that would arise and would be suitable for determination in the circumstances.

50. Another view was that the expert determination clause should ensure certainty, and specifically exclude irreversible decisions, while another view questioned the usefulness of the not legally clearly defined term "irreversible". One view was that the expert determination clause should apply to monetary disputes alone, and not to those for specific performance, as only monetary awards could be reversed if necessary, and monetary awards tended to be recognized and enforced in different jurisdictions.

51. It was also proposed that the ambit of the expert determination clause could be contained in square brackets in the clause itself, for parties to choose with the usefulness and the potential risks of the options expounded in the Guidance. In response, caution was expressed on the uncertainty and complexities that it would create and the concerns of enforceability of the arbitral award when the scope was not clearly defined.

52. There were illustrations of the practical applicability of adjudication in different jurisdictions, for instance in areas of payment obligations, valuation, specific enforcement regarding delivery of the goods, specific enforcement in construction obligation.

Parallel proceedings

53. Regarding the possibility of an arbitration being initiated in parallel with expert determination proceedings, questions were raised as to whether specific conditions should be set forth at all and, if so, their content. It was mentioned that the conditions for initiating an arbitration should not be ambiguous and should not limit parties' access to justice. For instance, if the condition for initiating an arbitration was "completion of the project" and such completion never materialized, parties would not be able to start an arbitration. In addition, it was mentioned that default conditions should be set forth so as to provide users with clauses which they

could directly incorporate in their contract. It was pointed out that statutory adjudication in some jurisdictions did not have restrictions on parallel proceedings and that, in some institutional rules on adjudication, resort to arbitration or litigation was not conditioned by the completion of the project, in that parties could potentially engage in them simultaneously if different aspects of a dispute required different resolution methods, for instance reference of a technical issue to adjudication while an arbitration took place.

Paragraph 1

54. It was suggested to swap the order of subparagraphs (c) and (d), in accordance with the usual practice where the respondent should communicate a response to the claimant first, prior to the expert's consultation with the parties. In response, it was said that given the tight time frame in the expert determination process, it would be more practical for the expert to hold a consultation with the parties immediately after its appointment, thus the present arrangements in subparagraphs (c) and (d) were reasonable for the purpose of this determination procedure.

55. Regarding subparagraph (d), it was observed that the 3-day time period for the respondent to respond to the claimant's request was too short. The claimant would have an unfair head start, especially in cases when the claimant acted with bad intent, the respondent would not have sufficient time to prepare its case. A suggestion was made that a longer period of time could be contemplated to ensure that due process could be safeguarded.

56. Regarding the time frame to make the determination in subparagraph (e), it was generally felt that 21 days from the date of appointment was tight, and the 3-month extension period was disproportionately long. A view was that the date of calculation should run from the last actions of the parties and not from the date of appointment, as time would be taken up by parties' consultations, and the expert would in turn have only 15 days to reach a determination.

57. After discussion, it was widely felt that 21 to 30 days would be reasonable for the expert to make a determination, accompanied with a proportionate extension when deemed necessary.

58. It was mentioned that the counting of time should be made only in days. It was felt that the starting points should be harmonized to the date of the appointment of the expert when the active engagement started.

59. It was suggested to include minimal procedural standards for the determination, such as requiring the expert to be impartial and independent, to hear both parties, treat them with fairness and equality, to respect confidentiality, and give the expert discretion to conduct the proceedings. It was also suggested that the model clause or the Guidance should provide options to parties in case the expert did not issue the determination in time.

60. A concern was raised regarding the order of subparagraphs (f) and (g). It was said that subparagraph (g), when placed after subparagraph (f), risked being construed as meaning that, if a party were alleged not to have complied with the expert determination, it could be barred from initiating any kind of arbitration proceedings pursuant to subparagraph (f). To address such unintended consequence, it was suggested to invert the order of these two subparagraphs. In support, it was also said that this would better reflect the chronology of the determination.

Paragraph 2

61. The scope on the competence of the arbitral tribunal in the first arbitration was discussed. It was mentioned that the arbitral tribunal should have not only the competence to address the specific issue as to whether the determination under paragraph 1 had been complied with or not but also the power to address the issue as to whether the obligation to comply with the determination existed or was valid. While noting that specific criteria to assess the existence or validity of the

obligation to comply with the determination could vary as it would be subject to the governing law of the contract, it was suggested that generic and simple criteria could be extracted and incorporated in the paragraph. In response, it was mentioned that delineating further in detail the scope would add an extra layer of complexity, which might deter users from adopting the mechanism, and that the paragraph should simply clarify the intended purpose, i.e. that the arbitral tribunal should address the failure to comply with the determination under paragraph 1, making that binding obligation enforceable.

62. It was stressed that adopting such a simple procedure would not be viewed as precluding the respondent from raising issues concerning the existence and validity of the contractual obligation to comply with the determination, as compliance with the determination presupposes that the contractual obligation existed and was valid. It was recalled that the need to circumscribe the scope of the power of the arbitral tribunal was to avoid issues being raised that were unrelated to the obligation to comply with the determination in accordance with paragraph 1.

63. Regarding subparagraph (c), it was said that the wording was repetitive and complicated and that it should rather mirror the wording of subparagraph (c) of the model clause on highly expedited arbitration as appropriate. Furthermore, it was generally observed that 10 days for the arbitral tribunal to make a decision would be too short and unrealistic, taking into consideration the complexity of the case and due process concerns. Suggestions of 14 to 21 days for the arbitral tribunal to make a decision were made. It was mentioned that the time frame should align with the one set out in paragraph 1 of the same model clause, and its reasonableness would ultimately depend on the merits of the proceedings.

64. It was questioned whether the decision made by the arbitral tribunal under paragraph 2 would qualify as an award under the New York Convention. With reference to the "UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards", it was emphasized that a defining element was its finality. It was said that an award made by the arbitral tribunal under paragraph 2 might not be considered final, since a decision to the contrary could be taken by the arbitral tribunal under paragraph 3. In response, it was mentioned that the decision of enforcing the obligation to comply with the expert determination was final, that the subject matter of the dispute to be dealt with by the arbitral tribunal under paragraph 3 was different and that it would not be revisiting the issue of compliance by the parties with the determination, even if it would reach a different outcome.

Paragraph 3

65. It was queried whether reference should only be made to the UARs, in particular as the arbitration tribunal had to consider the decision *de novo*. In response, it was mentioned that it was for the parties to decide.

66. Concerns were raised that parties would only agree on paragraphs 1 and 2 of the model clause and would therefore not benefit from a *de novo* review in paragraph 3 which provided the necessary safeguard of the model clause. In response, it was stated that the Working Group could not hinder parties from using a proposed model clause in an inappropriate manner.

Alternative approaches

67. The usefulness of dispute avoidance aiming to avoid a conflict from escalating to the point where formal adjudication or legal proceedings became necessary was emphasized. Reference was made to the construction industry where parties could request a board of experts to either determine a technical issue, recommend a solution or mediate settlements. Suggestions were made on the use of experts accompanying projects to resolve differences, despite of potential costs implications.

68. The proposal of adding mediation to the expert determination procedure in paragraph 1 was discussed. A view expressed that it was unnecessary to try to convert the expert determination into a settlement agreement. It was also noted that mediation would be more productive before the expert made its determination. A view that mediation could be held in parallel with the procedures in paragraph 1 was also raised, where the expert could take up two roles, both as the determinator and the mediator. Concerns were expressed that overloading the model clause with layers of alternative dispute resolution mechanisms, rather than including those suggestions in the Guidance, would be cumbersome, counter-productive and overly prolong a process intended to speedily resolve technical disputes.

69. It was suggested to further explore how to utilize such dispute avoidance mechanisms.

C. Model clause on experts accompanying the tribunal

70. At the outset, it was recalled that, in addition to expeditiousness, the highly technical nature was a common characteristic of disputes suitable for settlement through highly expedited arbitration and adjudication but not limited to them. This model clause was therefore being developed to be used in arbitration broadly. It was generally felt that the feature of experts being on standby to advise the arbitral tribunal, instead of presenting reports on specific issues, was useful and that established practice was seen in court proceedings in some jurisdictions and used in some arbitrations without any significant concerns. It was pointed out nonetheless that allowing for experts to accompany the arbitral tribunal and explain orally could give rise to transparency concerns and that the mechanics of the model clause should be designed carefully so as to preserve the parties' due process rights to comment on the expert's observations to the tribunal. In this regard, the importance of setting forth clearly the mandate of experts, which is not to provide opinions but to assist the arbitral tribunal's understanding of the evidence submitted by the parties was underscored. It was suggested to call the expert a technical advisor or assessor.

71. It was further said that appointing such experts risked the arbitral tribunal delegating the decision-making authority to experts and that, as experts would be accompanying the arbitral tribunal, the cost to retain them could be high. Alternatively, appointing a co-arbitrator with the relevant technical expertise was suggested as a possible approach. It was however mentioned that the issue of lack of transparency would be greater if experts were appointed as co-arbitrators, since the non-expert member of the arbitral tribunal who tended to be one from the legal profession would find difficulty in assessing the credibility of the views of the co-arbitrator with expert knowledge and the parties would not be able to intervene in the internal deliberation process of the arbitral tribunal. It was said that the advisory role of experts could serve to remove the risk of the arbitrators delegating their decision-making authority. In addition, the cost aspect in retaining experts could also be modest. It was also noted that there could be significant difficulties with locating appropriate experts with arbitration skills.

72. Regarding paragraph 3, as the availability of institutions with up-to-date lists of experts was limited and the fact that the specific area of expertise required would only become apparent once the dispute arose, it was widely felt that the paragraph simply stated that the arbitral tribunal should appoint experts in consultation with the parties.

73. With respect to paragraph 4, a suggestion was made that article 29(2) UARs should directly apply and the words *mutatis mutandis* be deleted. In this connection, one view suggested a time frame, for instance that of 7 to 14 days, for the process provided in the same provision, while another view was that the process of the decision to nominate the expert should be managed by the arbitral tribunal's discretionary case management power and that no time frame should be prescribed.

74. Having briefly heard experiences in several jurisdictions, delegates were invited to further share with the Secretariat relevant information available in their respective jurisdictions or area of practice so as to enable the Secretariat to further refine the model clause.

D. Model clause on confidentiality

75. The Working Group reiterated the importance of a model clause on confidentiality, in high-tech related disputes and beyond. Indeed, although approaches varied significantly, confidentiality was considered a fundamental aspect in arbitration, highly valued by parties.

76. It was said that the text of the model clause captured the main elements related to confidentiality, including the reference to the existence of an arbitration, and necessary exceptions. It was suggested that the clause should include an enforcement mechanism such as sanctions or remedies, so that the arbitral tribunal was able to ensure compliance with the confidentiality duties and to address breaches of confidentiality by the parties, for instance by allocating costs to the party in breach.

77. Regarding the exception related to legal proceedings before a court, it was questioned whether it would constitute a breach, if a party requested the set-aside of an award as the initiation of such procedures would result in confidentiality not being observed.

78. Furthermore, it was questioned, what the duty to maintain confidentiality of the existence of an arbitration would entail and what would be the practical implications, especially, if witnesses, related third parties or third-party-funders needed to be informed. In response, it was said that it was possible to contact the persons in question while still maintaining a degree of confidentiality, for instance by seeking an undertaking of confidentiality in writing according to paragraph 2 of the model clause.

79. Regarding the question whether information should be characterized as being “lawfully” or “not lawfully” in the public domain for purposes of applying a confidentiality duty, it was felt that the arbitral tribunal should not be required to investigate the source of public information, and information in the public domain that became widely and publicly known was no longer confidential. Another view was that the information should not lose its confidentiality status, to not incentivize unlawful dissemination. Accordingly, there were suggestions to delete the word “lawfully”, to retain it, or to leave it in brackets for parties to choose, with the pros and cons stipulated in the Guidance. It was suggested that the Secretariat collect information on modalities for confidentiality clauses in respect of dispute resolution mechanisms.

80. Regarding paragraph 2, the Working Group expressed its satisfaction.

E. Guidance text on confidentiality within the proceedings

81. Regarding the confidentiality guidance text, a view was expressed to shorten paragraphs 1 to 4, and to expand paragraph 5. It was also suggested to highlight the applicability of the text in the highly expedited arbitration context. The addition of other elements in paragraph 2 of the text was further mentioned, such as the procedures for challenging the confidentiality classification, disclosure of information to the opposing party, handling confidentiality information during and after proceedings, and the confidentiality period.

82. After discussion, the Working Group expressed its general acceptance of the text, and delegates were invited to provide suggestions on how to further expand paragraph 5. It was also agreed that the Guidance should not address the situation referred to in paragraph 64 of A/CN.9/WG.II/WP.234.

F. Guidance on evidence

83. It was generally felt that the guidance on evidence was useful to include, highlighting the tech-related aspects in light of the development of new technologies. While some views were expressed that such text should be considered more broadly in the context of dispute resolution in the digital economy project, there was broad support for finalizing the text, which was already building on the findings of the project.

84. Support was expressed for the inclusion of the sentence referring to specific technologies as proposed in A/CN.9/WG.II/WP.234, para. 67. There was also a suggestion that the issue regarding the admissibility of illegally obtained information, the preservation of evidence and remedies for breaches should be reflected in the text. In response, it was said that the focus of the text should generally be to address the arbitral tribunal's handling of evidence involving the use of technologies.

85. Regarding paragraph 1, it was said that the purpose and wording was unclear, for instance what was meant by "significant" technologies. It was also suggested that the paragraph should reflect the notion that it was primarily for the parties to enable the arbitral tribunal and the other party to understand the content of the evidence, while bearing in mind the importance for the arbitral tribunal to familiarize itself with the technologies for the appropriate conduct of the proceeding.

86. As for paragraph 3, it was pointed out that the arbitral tribunal should not interfere with the parties' use of technology as it would be for the parties to decide. It was mentioned that the concept of authenticity may not cover all the issues raised by the use of recent technologies such as artificial intelligence ("AI"). It was said that today's use of AI did not include evidence matters but rather the drafting of submissions. In response, it was said that the use of certain technologies could impact the context of the evidence presented. Further, it was proposed to add the words "the manner and" before "the technology" in the first sentence.

87. In paragraph 4, a proposal was made to delete the word "highly" in the first sentence and add a reference to the security and integrity of the technological systems being used. It was also widely felt that the second sentence in this paragraph should be deleted for its redundancy.

88. Regarding paragraphs 5 and 6, several proposals were made: (i) to align the text with paras. 80 and 81 of the UNCITRAL Notes on Organizing Arbitral Proceedings, including on the notion that, when there are doubts as to the authenticity of evidence, it was for the parties to verify; (ii) to make reference to the need to provide parties with the opportunity to express their views in this regard; (iii) to simplify the language, e.g. replace "specificities in terms of the risk" with "risks" or even merge paragraphs 5 and 6; and (iv) to remove the reference to circumstances where evidence had not yet been submitted.

89. On the issue of taking evidence in the form of a demonstration of a process, it was suggested to reintroduce it as part of the text, as it could be useful for disputes in the high-tech and other industries.

G. Guidance to ensure an expeditious arbitration

90. Regarding this guidance text, it was widely felt that such text would be redundant, especially as the Guidance for the model clauses would reflect the relevant substance. It was said that the substance of some of the bullet points was not appropriate.

91. Whether arbitrators should provide preliminary views to parties was discussed, as such preliminary views might give rise to due process concerns regarding

impartiality or independence of arbitrators. However, it was reported that if requested by the parties, preliminary views from arbitrators could promote parties' settlement, and an agreed waiver could avoid potential challenges.

H. Form of Presentation

92. The Working Group considered the form in which the model clause, the Guidance and the guidance texts were to be presented in order to ensure user-friendliness and easy access. It was felt that the work should be presented as one package, with an introductory text that would highlight the genesis of the work, the commonalities of technology-related disputes and adjudication, the possibilities of combining the different model clauses and the potential use of the model clauses on confidentiality and on experts accompanying the tribunal for arbitration generally. Additionally, it was suggested that the different model clauses and texts should also be presented separately, as appropriate.

IV. Way Forward

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

94. 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 margins of its seventy-ninth session.