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Draft Provisions for Technology-related Dispute Resolution

At the fifty-fourth session, the Commission requested its secretariat to organize a colloquium during the seventy-fifth session of Working Group II to further explore the legal issues with regard to dispute resolution in the digital economy and to identify the scope and nature of possible legislative work. It was agreed that the agenda for the colloquium should include, among others, model provisions that could be utilized in the context of technology-related disputes or provisions to be incorporated by reference in dispute resolution clauses.

In 2019, the Commission had 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). And 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 (A/76/17, para. 229).

The text in the annex is a first draft prepared by experts to facilitate further exploration of the relevant issues with regard to technology-related dispute resolution.

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Annex

Draft provisions for technology-related dispute resolution

The following provides draft provisions that could be utilized in the context of technology-related disputes, either as part of a set of rules to be agreed upon by the parties or as clauses to be incorporated by reference. They have been prepared to stimulate discussion during the colloquium and therefore do not include mechanisms for parties to opt in to the provisions nor define the role of the appointing authority in determining whether such provisions are appropriate for the dispute at hand.

A. Definition

Draft provision 1

1. Technology dispute means a dispute arising out of or relating to the supply, procurement, research, development, implementation, licensing, commercialization, distribution, financing, as well as to the existence, scope, and validity of legal relationships of or related to the use of emerging and established technologies.

2. Technology disputes may be varied in nature and arise out of ownership (including intellectual property rights in a specific technology), licensing terms, payment or financial issues, non-competition (unfair competition or non-competition), confidentiality (data privacy, non-disclosures), or regulatory issues.

1. Since the draft provisions are aimed at creating a specific mechanism for resolving technology-related disputes, it is imperative to first define the term “technology dispute”. This would also guide the possible scope of work to be undertaken by the Working Group. The definition in draft provision 1 aims to include the standard types of disputes arising in the digital economy, which can generally be described as having two important and sometimes contradictory features: the need for significant technical expertise and the need for a very efficient and speedy resolution. While common, these two features may not exist to their fullest extent in every dispute and may vary in their nature and intensity depending on the case.

2. Concerns have been expressed about the high costs, the lengthy proceedings, and the lack of expertise by decision makers in resolving technology-related disputes. They result from the fact that such disputes are quite complex, and their resolution may require expertise in more than one field. Furthermore, while tech companies need to be agile and innovative in order to remain competitive, such disputes could prevent them (particularly start-ups) from obtaining funding from investors. In summary, technology-related disputes can be described as those that require a speedy and cost-efficient resolution by a person(s) with the appropriate expertise and that require a flexible resolution process to adapt to the evolution of the dispute as well as relevant technology.

3. The two most representative types of technology dispute are as follows. One is a dispute arising out of IT systems development and/or implementation contracts, which typically require a high level of technical understanding. The other is a dispute relating to the ownership of technology in early-stage start-ups, which requires a very speedy and efficient resolution to allow parties to continue their business operations, including software development. True to the old proverb of “justice delayed is justice denied”, full-length proceedings would deny the parties their due process rights and could have a negative impact on their business prospects.

4. Draft provision 1 was prepared with the understanding that parties’ consent would be required for the application of the draft provisions, which would avoid questions on whether the draft provisions shall apply to a certain dispute and if so,

which authority would make that determination. Accordingly, draft provision 1 provides a very wide and open-ended definition for the parties' consideration. In preparing the definition, reference was made to existing work by the OECD, United Nations Statistics Division, the European Council, the UK Jurisdiction and the Society of Computers and Law.

5. The definition focuses on the nature of the underlying transaction and the dispute but not on the identity of the parties, the sector they are operating in, or the type of relevant product or service. While disputes that arise in the high-technology industry (aerospace, pharmaceuticals, computers and office equipment, electronics, communications, and precision instruments) are often technology-related, it can be said that companies in almost every industry face similar disputes, as they also rely heavily on technology in their operations. The definition is also geared towards business-to-business disputes.

6. Paragraph 1 provides an open-ended definition, which can potentially encompass all forms and sizes of technology-related disputes. Paragraph 2 lists in a non-exhaustive manner, the common types of disputes that would fall under the definition in paragraph 1, while leaving a margin of appreciation for the parties, arbitral tribunals and administering institutions to further broaden the scope of disputes. It may be the case that disputes that do not necessarily fall within the definition (such as construction, commodities, and maritime disputes) may also benefit from the application of the draft provisions. Whether certain types of disputes should be excluded depending on the technology utilized (for example, mature technologies that have been operational for over fifty years or design patents) or on the industry (for example, the art or culinary industry) would need further consideration.

7. By way of illustration only, disputes arising in the following industry or sector would likely fall under the definition: aerospace, audio technology, automotive or mobility (including electric, smart, and autonomous vehicles), artificial intelligence, automation, biotechnology, computer engineering, electronic engineering, information technology, legal technology, medical devices, military/defence, nanotechnology, nuclear physics, photonics, robotics, semiconductors, telecommunications and media communications, pharmaceutical and financial technology (FinTech). Similarly, the draft provisions may apply to disputes relating to industrial technology, disruptive/innovation technology, architectural/building technology, creative technology (intersection between technology, arts, and fashion) and open-source technology. Furthermore, the draft provision could apply to disputes arising from or related to e-commerce, data privacy and security, technology insurance, M&A transactions involving tech companies or where technology is a prominent deal feature, technology distribution or resale, digital currency and cryptocurrency, non-fungible tokens (NFTs), blockchain based smart contracts and cloud computing.

B. Number of arbitrators

Draft provision 2
Unless otherwise agreed by the parties, there shall be one arbitrator.

8. If the parties have not agreed on the number of arbitrators, the default should be a sole arbitrator as proceedings involving an arbitral tribunal composed of more than one arbitrator may be less expeditious. This would be in line with article 7 of the UNCITRAL Expedited Arbitration Rules (the "Expedited Rules"). For the appointment of the sole arbitrator, the mechanism provided in article 8 of the Expedited Rules could apply.

C. Case management conferences

Draft provision 3

1. As soon as possible after the constitution of the arbitral tribunal, and before any oral hearing, the arbitral tribunal shall hold an initial case management conference to consult with the parties on the manner in which it will conduct the arbitration to avoid unnecessary delay and expense and to provide a fair and efficient resolution of the dispute. To the extent possible, a case management conference should be attended by the representatives of the parties including, where appropriate, the parties' internal technology experts.

2. At the initial case management conference, the arbitral tribunal should discuss, in particular, the following:

(a) The nature of the technology-related issues presented in the dispute, including the production and management of electronically stored information, and other case-specific technology matters;

(b) The protection of data integrity and data security;

(c) Confidentiality and disclosures;

(d) The identification of contested and uncontested facts, including those relating to technology;

(e) The structuring and the appropriate phasing of the proceedings;

(f) The management of the technology issues in response to the needs of each phase, including the early exchange of relevant information and the exchange of information necessary to address the prospects of an early resolution or settlement of the dispute;

(g) The taking of expert evidence in the light of the technical issues in the dispute and in particular, the taking of expert evidence through party-appointed expert witnesses, tribunal-appointed experts and/or other forms of expert evidence;

(h) The appointment of a secretary of the tribunal with special technical expertise;

(i) Any other issues in relation to the resolution of the dispute, including the prospects of an early resolution or settlement of the dispute.

3. The arbitral tribunal may hold additional case management conferences at regular intervals and at any appropriate time to discuss issues set forth in paragraph 2.

4. In order to understand the dispute, the arbitral tribunal may ask any questions to the parties and the experts throughout the proceedings.

5. The arbitral tribunal may, after inviting the parties to express their views and taking into account the circumstances of the case, utilize any technological means as it considers appropriate to convene a case management conference pursuant to paragraphs 1 and 3.

9. A case management conference (CMC) can help to avoid unnecessary delay and expenses and is the best means to provide a fair and efficient process. Draft provision 3 distinguishes between the initial CMC, which is mandatory, and subsequent CMCs, which can be scheduled at the discretion of the arbitral tribunal.

10. Paragraph 1 does not impose a fixed time limit for the initial CMC. However, it should be as early as possible and, in any case, before any oral hearing. The most appropriate time for the initial CMC will be promptly after the constitution of the arbitral tribunal, and prior to the exchange of further written submissions.

11. Paragraph 2 contains an illustrative list of elements, which might be discussed at any CMC. Where appropriate, the arbitral tribunal should invite the parties to make additional proposals, or to comment on the list of elements ahead of the CMC. For example, whether a hearing will be held or whether the proceedings would be based on documents only could also be discussed.

12. The phrase "other forms of expert evidence" in subparagraph (g) refers to a pre-hearing where the party-appointed experts may be requested to identify technological issues where agreement can be reached upon and those where the views are split, or "experts teaming" procedures where experts selected among those proposed by the parties work under the instruction of the arbitral tribunal in order to produce a joint report. The provision is intended to be open to novel forms of expert evidence that may arise in the future.

13. Paragraph 3 refers to regular and ad hoc CMCs that may follow the initial CMC. Regular CMCs are recommended especially where tribunal-appointed experts have to perform operations over an extended period of time.

14. Paragraph 4 encourages the arbitral tribunal to ask questions to the parties and experts at any time during the proceedings. If the arbitral tribunal puts a question to a party or an expert, this should not, in and of itself, be considered as a lack of independence and impartiality. Where a question is put only to one of the parties, the arbitral tribunal will have to assess if and when the other party or parties should be given an opportunity to comment on the answer.

15. Paragraph 5 refers to the technological means used for the CMCs. While the provision is open to any appropriate means, including a meeting in person, the most cost-effective means will usually be to conduct the CMCs by telephone or videoconference.

D. Time frames

Draft provision 4

1. Any supplement to the notice of arbitration, including all supporting evidence, should be communicated within five days following the initial case management conference. In case, witness evidence is offered, the supplement must include the list of witnesses.

2. A reply to any supplement shall be communicated within five days after the receipt of the supplement. It shall include all supporting evidence, and if witness evidence is offered, the list of witnesses.

E. Appointment of experts and neutrals

Draft provision 5

1. Considering the needs and complexities of the dispute, it may be appropriate and necessary to appoint experts and neutrals to expeditiously assist the arbitral tribunal with matters such as the details and scope of the technology in dispute or the intricacies of damage calculations, and to provide an expert determination on specific issues. A party may request permission to appoint such an expert or neutral or the arbitral tribunal may determine that such assistance is required.

2. When so required, the arbitral tribunal will provide additional or alternative directions, including but not limited to directions for the service of written evidence from the appointed expert or neutral. When providing such directions, consideration shall be given to the following:

(a) Accessibility of the parties to counsel with the appropriate technological and related fields expertise;

(b) The type of a suitable independent expert or neutral, the need for technical and/or damage-based expertise and other qualifications, and geographic locations;

(c) The experience and qualification of the arbitrator(s);

(d) Any time frame including those agreed between the parties;

(e) The structure of the expert determination and timetable of matters subject thereof (including discovery and the scope of discovery); and

(f) Any enhanced confidentiality or data-security requirements.

3. An expert or neutral appointed by the arbitral tribunal shall be independent of the parties and shall submit a signed declaration to that effect in its report.

4. The parties will provide the expert or neutral with all relevant information, documentation, coding, and products, including the organization of site visits if necessary. If a party fails to do so, the arbitral tribunal may order such access as appropriate to the circumstances.

5. Unless otherwise agreed by the parties and subject to any applicable law, the expert or neutral's report shall be admissible in any judicial or arbitral proceedings between the same parties.

6. The expert or neutral's findings are not binding on either party. However, the findings can be used by the parties as a basis for negotiations with a view to reaching a settlement of their dispute or narrowing their differences.

7. If asked by any party, or ordered by the arbitral tribunal, the expert or neutral shall attend any hearing/pre-hearing at which reasonable and relevant question may be put to them about their report.

8. The fees and expenses of any expert or neutral appointed by the arbitral tribunal shall form part of the cost of arbitration.

9. Subject to any applicable law, the parties may agree on, or the arbitral tribunal may direct the use of an early determination or neutral evaluation on one or more aspects of the dispute. In that case, the expert or neutral's findings shall constitute a contractually binding expert determination for the relevant aspects of the dispute. For the avoidance of doubt, such an expert or neutral is not an arbitrator, and their findings are not enforceable as an arbitral award.

F. Confidentiality and protection of confidential information

16. Technology-related disputes often concern technical and scientific information, trade secrets and rights with a high profile in the market that are sensitive to confidentiality and from which tech companies derive significant economic value.

17. However, the UNCITRAL Arbitration Rules do not contain a provision on confidentiality and the 2016 UNCITRAL Notes on Organizing Arbitral Proceedings leave the desired confidentiality regime up to the agreement of the parties, should confidentiality be a concern or priority (Note 6, paras. 50–54). While an agreement between the parties would provide certainty, it may be desirable to provide default rules in the absence of such an agreement. Draft provisions 6 and 7 provide a specific and supplementary set of rules applicable to technology-related disputes, at the heart of which lie technical and commercially sensitive information and where preserving confidentiality is critical. They attempt to obtain a balance between preserving confidentiality and ensuring sufficient disclosure to facilitate the proceedings.

18. The duty to maintain confidentiality has two facets with a potentially different scope of protected information. One relates to "outbound confidentiality" in the sense of non-disclosure to third parties not involved in the arbitration proceedings of information relating to the arbitration (which is to some extent regulated in arbitration rules such as LCIA Arbitration Rules and the Swiss Arbitration Rules). Another

relates to “inbound confidentiality” regarding protection of information before it is produced or disclosed within the proceedings (for example, trade secrets). The latter, which is rarely regulated, relates to situations where certain information is deemed to be confidential to one of the parties.

Draft provision 6

1. Unless expressly agreed otherwise, the parties undertake to keep confidential all awards and orders in the arbitration, together with the existence of the arbitration, all materials produced in and/or generated during the proceedings which are not otherwise in public domain, including materials created for the purpose of the arbitration and all other documents or evidence given by a party, witness, or expert, except and to the extent that a disclosure may be required:

(a) To enforce or challenge an award in legal proceedings before a judicial authority or to pursue a legal right;

(b) To comply with the provisions of the laws of any State, which are binding on the party making the disclosure;

(c) To any government body, regulatory body, court or tribunal where the party is obliged by the law to disclose the above-mentioned information; or

(d) To a professional or any other adviser of any of the parties, including any potential witness or expert.

2. The undertaking in paragraph 1 also applies to the arbitrators, and any person appointed by the arbitral tribunal, including any expert, and any administrative secretary to the arbitral tribunal. The parties shall seek the same undertaking of confidentiality from all those that it involves in the arbitration, including but not limited to any authorized representative, witness of fact, expert, or service provider.

3. The deliberations of the arbitral tribunal shall be confidential. The parties shall acknowledge this confidentiality and undertake to protect it.

4. The arbitral tribunal may take appropriate measures and sanction a party through an order or an award if a party breaches the duties in this draft provision.

5. A party intending to make disclosure in accordance with paragraph 1 must within a reasonable time prior to the intended disclosure notify the arbitral tribunal and the other parties (if during the proceeding) or the other parties (if the disclosure is after the conclusion of the proceeding) and furnish details of the disclosure including the reasons for the disclosure.

6. The duties in this draft provision shall survive the termination of the proceedings.

7. The arbitral tribunal may, in consultation with the parties, adopt any measure:

(a) To protect any physical and electronic information shared in the arbitration; and

(b) To ensure any personal data produced or exchanged in the arbitration is processed and/or stored in light of any applicable law.

19. Draft provision 6 provides for outbound confidentiality. Paragraph 1 defines the scope of the confidentiality obligation. Paragraph 1 prohibits disclosure of all information revealing the existence of the arbitration, and all materials in the arbitration proceedings, which are not publicly available. It covers all information and documents created for the purposes of the proceedings as well as information and documents provided by the other party.[1]

[1] See article 3.13 of the IBA Rules on Taking of Evidence (2020) (“IBA Rules”).

20. With regard to awards, draft provision 6 supplements article 34(5) of the UNCITRAL Arbitration Rules, which provides that an award may be made public with the consent of all parties and where and to the extent disclosure is required.[2]

21. Paragraph 1 further outlines circumstances in which disclosure of confidential information is permissible. Subparagraph (d) creates an obligation to endeavour to preserve confidentiality when non-disputing parties become involved in the proceedings. Paragraph 4 makes clear that the confidentiality provision may yield rights and duties, which may be enforced by the arbitral tribunal. Paragraph 5 imposes a duty to inform prior to any disclosure.

Draft provision 7

1. For the purposes of this draft provision, confidential information means any information, regardless of the medium in which it is expressed, which is:

(a) In the possession of a party;

(b) Not accessible to the public;

(c) Of commercial and/or scientific and/or technical sensitivity; and

(d) Treated as confidential by the party possessing it.

2. A party invoking the confidentiality of any information it wishes or is required to submit during the proceeding, including to an expert appointed by the tribunal, shall request the arbitral tribunal to have the information classified as confidential with a copy to the other parties. Without disclosing the substance of the information, the party shall give the reasons for which it considers the information confidential. The other parties shall be given a reasonable opportunity to state its views. Upon receipt of any such request, the arbitral tribunal may invite the relevant parties to consult with each other with regard to the request.

3. If the other parties do not agree with the request, the arbitral tribunal shall determine whether the information is to be classified as confidential and of such a nature that absent special protection measures it would likely cause serious harm to the party making the request. If the arbitral tribunal so determines, it shall decide under which conditions and to whom the confidential information may in part or in whole be disclosed and shall require any person to whom the confidential information is to be disclosed to sign a confidentiality undertaking.

4. In exceptional circumstances, the arbitral tribunal may, at the request of a party or on its own motion and after consultation with the parties, designate an advisor to make the determination in accordance with paragraph 3.

5. The arbitral tribunal may also, at the request of a party or on its own motion and after consultation with the parties, appoint a person as an expert in accordance with article 29 of the UNCITRAL Arbitration Rules to report to it on the basis of the confidential information on specific issues designated by the arbitral tribunal without disclosing the confidential information either to the party from whom the confidential information does not originate or to the arbitral tribunal.

22. Draft provision 7 provides for inbound confidentiality of information of intrinsic value (such as trade secrets, know-how, algorithms, etc.) regardless of the medium in which it is expressed.

23. Most arbitration laws and arbitration rules lack rules on protection of confidential information. Such protection could be viewed as falling within the broad discretionary powers of the arbitral tribunal, while some arbitration rules have

[2] In contrast, another approach would be to allow the publication of anonymized awards, provided that the parties do not object. This could allow others involved in technology-disputes to be informed of the development of relevant law and principles. See Digital Dispute Resolution Rules (2021) of the UK Jurisdiction Task force.

included specific provisions (see article 22(3) of the 2021 ICC Arbitration Rules[3]). The WIPO Arbitration Rules, while geared towards IP disputes, contain a very detailed set of rules on protection of trade secrets and other information of commercial or industrial significance. While article 7(2) of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration provides a definition of confidential or protected information, this is in the context of investment arbitration and relates more to whether the information should be made publicly available.

24. The existence and scope of confidential information is normally determined by the applicable law, which requires a choice of law analysis. This exercise could prove difficult if there are several competing applicable laws. To avoid this, paragraph 1, largely based on the WIPO Arbitration Rules, provides a precise description of what would constitute confidential information and limits requests for confidentiality on the ground of commercial, scientific and/or technical sensitivity.

25. While there may be different approaches to deal with requests for confidentiality, one approach may be to provide a default rule that all information exchanged between the parties and the arbitral tribunal shall be deemed confidential, unless determined otherwise by the tribunal upon request by a party. If necessary, the arbitral tribunal should make arrangements to preserve the confidentiality of the information in question.

26. Another approach could be based on the premise that confidentiality is not assumed but must be invoked by a party. According to draft provision 7, upon the request by a party, the tribunal will determine whether the information is to be classified as confidential and whether the absence of special measures of protection in the proceedings would be likely to cause serious harm to the party invoking confidentiality. The requirement of "serious harm" must be considered on a case-by-case basis and will include a balancing by the tribunal of competing interests. The discretion provided to the arbitral tribunal under article 27(3) of the UNCITRAL Arbitration Rules and article 9.2 of the IBA Rules would continue subject to any protective measure under draft provision 7.

27. Paragraph 2 provides that the plea of confidentiality can be invoked both by a party resisting the introduction of the information into the proceedings and by a party seeking to rely on the allegedly confidential information. In other words, the draft provision deals with protection of a party that is requested to produce information as well as with protection of a party that needs to rely on information in its possession. Paragraphs 3, 4 and 5 deal with the procedure of determining whether the information is confidential. If information is deemed confidential, the tribunal will determine under which conditions and to whom information may be disclosed. The second sentence of paragraph 3 envisages the possibility of limiting the disclosure to specific individuals (such as opposing parties' lawyers).

28. Paragraph 4 allows the appointment of a third-party advisor, which is widely recognized in the context of document production. Such an advisor can be better equipped with relevant expertise to determine whether the confidentiality concern is genuine, supervise the redaction process, and monitor the disclosure or inspection of documents. A similar approach can be found in article 3.8 of the IBA Rules.[4]

29. Paragraph 5 envisages the appointment of a neutral expert where such person would collect evidence which may only be drawn from the confidential information and prepare a report answering specific questions put by the parties and the tribunal.

[3] Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.

[4] In exceptional circumstances, if the propriety of an objection can be determined only by review of the Document, the Arbitral Tribunal may determine that it should not review the Document. In that event, the Arbitral Tribunal may, after consultation with the Parties, appoint an independent and impartial expert, bound to confidentiality, to review any such Document and to report on the objection. To the extent that the objection is upheld by the Arbitral Tribunal, the expert shall not disclose to the Arbitral Tribunal and to the other Parties the contents of the Document reviewed.

Whether the advisor in paragraph 4 or the expert in paragraph 5 can report on specific issues arising from confidential information communicated to that person but not disclosed to the tribunal or other parties would need to be further considered.

30. Examples of suitable confidentiality protection arrangements that the tribunal can adopt in order to permit evidence containing highly competitive or sensitive information to be presented or considered subject to such arrangements (e.g. disclosure of information only to counsel or to the experts or to arbitrators; redaction of documents and use of different sets of written submission) can be elaborated in a separate confidentiality protocol/guide rather than in the rules.

G. Evidence

Draft provision 8

1. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits, data, technical information, or other evidence within such a period of time as the arbitral tribunal shall determine.

2. At any time during the arbitral proceedings the arbitral tribunal may order that evidence be taken or that an experiment be performed or repeated in the presence of or by the arbitral tribunal, the parties or an expert appointed by the arbitral tribunal.

3. Each party shall disclose to all parties and the arbitral tribunal the use of technology including artificial intelligence for the purpose of collecting or presenting evidence or complying with an order of the arbitral tribunal. Upon such disclosure, any party may request that the use of such technology be limited, and the arbitral tribunal may refuse or allow it in view of the circumstances of the case.

31. Draft provision 8 supplements article 27 of the UNCITRAL Arbitration Rules (Evidence) to provide tools for technology-related disputes, where evidence may involve significant technology and/or digital processes. In line with article 27, draft provision 8 reaffirms the ability of the arbitral tribunal and the parties to adapt the gathering, presentation, and evaluation of evidence to the circumstances of the case, while protecting due process and ensuring efficiency and effectiveness.

32. Paragraph 1 intends to clarify that “data” and “technical information” fall under the phrase “other evidence” in article 27(3) of the UNCITRAL Arbitration Rules and that the arbitral tribunal may require their production. The inclusion of the two terms would clarify and ensure that flexibility is provided with regard to evidence in technology-related disputes. The term “technical information” includes primers, namely technical background information necessary to understand the issues or expert evidence on technical points. The addition of the two terms should, however, not be understood as limiting the types of evidence to be produced which may change with new developments in technology.

33. Paragraph 2 addresses the taking of evidence in the form of experiments and demonstration of a process.

34. Paragraph 3 requires the parties to disclose the use of technology, including artificial intelligence, in collecting, processing, and presenting evidence, or complying with an order of the tribunal. A party may object to the use of such technology, upon which the arbitral tribunal should make a determination on whether it should be allowed. Paragraph 3 seeks to balance between ensuring transparency and facilitating the evaluation of evidence, while not overregulating the use of technological or digital evidence.

35. With regard to the use of artificial intelligence (AI), it may be necessary to distinguish between two situations. If used by parties to help prepare and analyse their case with no direct impact as to the evidence, documents or information presented to tribunals or the other parties, it should be considered legitimate. As there is a human involved, who understands and takes responsibility for the work done by AI, parties

should remain free to use such technology. However, if AI is used to collate documents or information submitted or disclosed during the proceedings, some regulations may be necessary. In that sense, the discretion provided in article 17(1) should allow arbitral tribunals to regulate the use of AI and similar technology. More generally, it will be necessary to monitor how AI and other technology may be used in arbitral proceedings and to guard against potentially adverse impacts on evidence.

H. Period for making an award

Draft provision 9

1. If the arbitral tribunal determines that an award could be rendered based on written statement only without hearing the witnesses or hearing a limited number of witnesses, the award may be rendered within 20 days of the constitution of the arbitral tribunal.

2. Except as provided in paragraph 1 and unless otherwise agreed by the parties, the award shall be made within 40 days from the date of the constitution of the arbitral tribunal.

3. The arbitral tribunal may, in exceptional circumstances and after inviting the parties to express their views, extend the period of time established in accordance with paragraph 2. The extended period of time shall not exceed a total of 60 days from the date of the constitution of the arbitral tribunal.

4. If the award is not rendered within the established period of time, the fee of the arbitrator will be reduced as follows, unless otherwise agreed by the parties and the arbitral tribunal:

(a) Delay of up to 14 days: 20 per cent

(b) Delay between 15 and 30 days: 50 per cent

(c) Delay between 31 and 60 days: 70 per cent

(d) Delay of more than 60 days: 90 per cent

36. Paragraph 1 proposes a fast-track process whereby the award can be rendered within 20 days of the constitution of the arbitral tribunal, when it is possible for the arbitral tribunal to do so based on written statements only and hearing a limited number of witnesses, if any.

37. Unlike the Expedited Rules where the award shall generally be made within six months from the date of the constitution of the arbitral tribunal, paragraph 2 provides a fast-track process whereby the award shall be made in 40 days. This period can be extended by the arbitral tribunal, after hearing the views of the parties, for up to 60 days (in comparison with nine months as provided in the Expedited Rules). An alternative approach would be to subject the extension to the agreement of the parties.

38. By providing sanctions on arbitrator’s fees, paragraph 4 encourages the arbitral tribunal to manage the proceeding efficiently and in accordance with the established timetable. Even when the fees are reduced, the right of the parties to request damages under the applicable law should remain unaffected.