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Technology-related dispute resolution and adjudication & Early dismissal and preliminary determination

Submission by the Government of Switzerland

Note by the Secretariat

This Note reproduces a submission from the Government of Switzerland in preparation for the seventy-seventh session of the Working Group. The submission was received by the Secretariat on 17 January 2023, and is reproduced as an annex to this Note in the form in which it was received.

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Annex

In preparation to the discussion at the forthcoming 77th Session of UNCITRAL Working Group II, the Government of Switzerland submits the following comments and proposals:

I. URGENT SPECIALIST DETERMINATION – MODEL CLAUSE B

1. Having considered Model Clause B and the explanatory notes relating to it in Document A/CN.9/WG.II/WP.231 (the Note), the following comments and proposals are made:

A. PARAGRAPH 1 – SPECIALIST DETERMINATION

2. The decision of the neutral specialist is described in Model Clause B as a "determination" and the entire process as a "specialist determination". While these are likely the most suitable terms, it is nevertheless suggested to give some further thought to the terminology, considering also potential alternatives such as "order" or "decision" for the "determination" (in paragraph 1 (e)) and, for the process itself, other expressions such as "urgent determination", "summary determination", or "prima vista determination".

3. It appears important to add the following provision:

> *The neutral specialist may find that some or all issues are not suitable for specialist determination.*

4. Moreover, it is suggested to add in sub-paragraph (f), after the first sentence, the following passage:

> *Subject to such compliance, one or more parties may reserve the right to submit the dispute or claim subject to specialist determination to [de novo] arbitration according to paragraph 3.*

B. PARAGRAPH 2 – ENFORCEMENT OF SPECIALIST DETERMINATION

Comments to the text of paragraph 2

5. The purpose of this paragraph is to render enforceable internationally the specialist determination. Given the limited number and scope of existing instruments for international enforcement, the most realistic (if not the only realistic) option is the one currently proposed, namely for the parties to have the ability to obtain an award ordering compliance with the determination.

6. To give effect to this procedure as it is also described in paragraphs 27-28 of the Note, the issues presented to the sole arbitrator pursuant to paragraph 2 of Model Clause B should be limited to whether (i) there is a specialist determination that needs to be complied with, and (ii) if so, whether it was complied with.

7. Accordingly, the introductory language of paragraph 2 of Model Clause B should be narrowed and the mandate of the sole arbitrator clarified as follows:

2. Any party may initiate arbitration in accordance with the UNCITRAL Expedited Arbitration Rules to ensure compliance with the decision of the specialist determination.

8. In addition, the following provision should be added (preferably after current subparagraph (a)):

The examination of the Sole Arbitrator shall be limited to determining whether:

(i) the agreement to submit to specialist determination the issues for which enforcement is sought is valid;

(ii) the procedure in paragraph 1 was complied with;

(iii) the specialist determination was complied with.

9. The draft of subparagraph 2(c) seems to provide that, once arbitration according to paragraph 3 has been commenced, the enforcement procedure available under paragraph 2 is no longer available. This appears to be the appropriate solution to avoid parallel proceedings.

10. However, the right to obtain a specialist determination and/or have such a determination enforced should not be lost entirely simply because an arbitration was commenced. It may thus be helpful to clarify further the parties' rights to obtain such determinations and their enforcement, for instance by providing that once arbitration proceedings pursuant to paragraph 3 are commenced (i) an enforcement award ordering compliance with a specialist determination as would have been available under paragraph 2 may be requested from the arbitral tribunal; and/or (ii) provide that determinations such as those under paragraph 1 remain available. In the latter case, it will have to be examined whether such determinations should still be made by a neutral specialist pursuant to paragraph 1 or may be made by the arbitral tribunal in the form of interim relief of a partial award.

Comments to the explanatory text to paragraph 1 in the Note

11. The Note usefully describes some other procedures for "specialised and express dispute resolution" (paragraph 8 et seq.). Others may be added, in particular dispute boards and related mechanisms. The solution in paragraph 2 of Model Clause B may provide a useful enforcement mechanism also for such other procedures. It is suggested that the possibility of such wider use be signalled to the users of the Model Clause.

12. At paragraph 19, the Note explains that the request by which the process is started "enables the other party to obtain an overview of the matters at issue, understand and assess the dispute". Paragraph 1 (b) requires that the request "shall contain a detailed description of the factual basis of the dispute". This is more than an "overview of the matters at issue". It is suggested to either leave out the sentence or reflect more clearly the required content of the request.

C. PARAGRAPH 3 – DE NOVO ARBITRATION

13. The examination of a dispute (or of claims) in the extremely rapid specialist determination procedure may be suitable for a rapid decision. In cases where the parties, or one of them, cannot accept this decision, the possibility of a full examination must be reserved. The arbitration in which such full determination takes place must allow the parties to argue the case

fully, bring new and possibly different arguments and evidence, or even assert new claims or issues that were not submitted to specialist determination.

14. The present draft seems to be based on this assumption, although the reference to the "merits of the specialist determination" could be understood to suggest otherwise. It should be clarified that the paragraph 3 arbitration is not an appeal against the specialist determination but a de novo arbitration in which the arbitral tribunal may – but need not – consider or review the merits of the specialist determination. It is therefore suggested to add the following passage to paragraph 3:

> *The arbitral tribunal may consider any specialist determinations that have been made on claims or issues before it, but is not bound by them and, if asked to review them, will subject them to de novo review on both the facts and the law.*

15. The following alternatives to the present wording of paragraph 3 in A/CN.9/WG.II/WP 231 may also be considered:

> *A party that has complied with the specialist determination (directly or in the form of an award under paragraph 2) may bring arbitration under the UNCITRAL Rules [possibly Expedited Rules] about claims determined by the neutral specialist. In such proceedings, neither party is limited to argument and evidence brought in the proceedings of specialist determination.*

16. Alternative wording:

> *Determination of a request by a neutral specialist does not prevent a party from submitting the dispute about the issue underlying the determination to arbitration under the UNCITRAL Rules [possibly Expedited Rules], provided that party has complied with the determination. In such proceedings, neither party is limited to argument and evidence brought in the specialist determination proceedings.*

17. Another alternative, could be:

> *Any party having reserved its right to do so in accordance with Article 1 [(f) additional wording] shall have the right to object to the determination of the expert specialist and submit the dispute to an arbitral tribunal for de novo determination on both the facts and the law. In that arbitration the parties shall not be limited to the argument and evidence before the specialist.*

D. ADDITIONAL COMMENTS – INTRODUCTORY TEXT

18. Due to the novel nature of the procedures being introduced with Model Clause B and to avoid any concerns or issues in particular at the enforcement stage, it may be helpful to add an introductory paragraph to the entire clause (or to paragraph 1 of the clause) in which the parties clarify their intention in adopting Model Clause B, for instance as follows:

> *The Parties agree that, in case of a dispute, a rapid determination by an expert specialist, that will be binding on their further conduct under the contract is essential for their relationship. They commit therefore to comply with this determination and reserve a more detailed and possibly more thorough examination of the dispute for a full-fledged arbitration, if they find specialist determination inacceptable.*

II. EARLY DISMISSAL

19. A/CN.9/WG.II/WP.230 describes in detail what in the latest version is termed the "early dismissal process", initiated by a "plea for early dismissal". The effect of this terminology is to increase the impression that the Notes introduce, in a descriptive manner, the detailed rules which the Commission wished to avoid. The great concern expressed by those who opposed the introduction of rules specific to early dismissal was the incentive that such rules would create for "motion practice" and for using the "early dismissal process" as a tool for adding complications to an arbitration.

20. In international arbitration proceedings it is not infrequent that parties describe all or part of their opponent's case as "manifestly without merit" or in similar terms. Under the UNCITRAL Arbitration Rules and most other rules, such descriptions are dealt with in a variety of manners, from treating them as cases of hyperbolic argument to addressing them in a case management conference or to allowing further argument. In none of these cases do such claims or arguments need to be dealt with by means of an "early dismissal process". The concern expressed by delegations that objected to the introduction of such a process in the rules was that, once the process is presented as an option by UNCITRAL, in the Rules or in the Notes, it will be used even in cases where simpler approaches could have been applied.

21. A short reference to the possibilities available to an international arbitral tribunal may well be sufficient to achieve the objective, without the need for circumscribing by a text the rules to be applied. It is therefore suggested to remove paragraphs 2 to 9 from the guidance text and replace it by a text along the following passage:

> *The discretionary power of the arbitral tribunal to make such dismissal or preliminary determination requires that the parties be heard on the dismissal or determination in a form that complies with the applicable arbitration law and rules and any relevant agreements of the parties. While such dismissal or determination may simplify the procedure and contribute to saving time and costs, it is important to avoid that dealing with them causes disruption or procedural complications*.

22. If the text in paragraphs 2 to 9 is preserved, it is suggested that they be introduced by text along the following lines:

> *The procedure for such dismissal or preliminary determination depends on the circumstances and rules applicable to the specific case. One possible approach is to adopt an early dismissal process. Such a process would typically be initiated ... [continue with the rest of what is now paragraph 2]*.