Comments and Suggestions

on technology-related dispute resolution and adjudication: Model clauses and Guidance text

Georgian International Arbitration Centre

Georgian International Arbitration Center (GIAC), as an observer NGO of Working Group II, according to the instruction of Secretariat presents its below comments and suggestions regarding the topic of Technology-related dispute resolution and adjudication: Model clauses and Guidance text (the working document A/CN.9/WG.II/WP.236), which will be deliberated during the Seventy-ninth session of Working Group II held in UN Headquarters in New York from 12 to 16 February 2024.

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1. Regarding **the draft model clause on highly expedited arbitration**, we wish to emphasize that subparagraph (d) of the clause pertains to the modification of Article 16(1) of the UNCITRAL Expedited Arbitration Rules (EAR), which states: "(d) The period of time for making the award shall be [45] [60] [90] days." This subparagraph stipulates a shorter time frame for rendering the award. However, unlike Article 16(1) of EAR, it does not specify the starting point from which this time period should be calculated.

Therefore, the aforementioned subparagraph might be reformulated as follows: "(d) The period of time for making the award shall be [45] [60] [90] days from the date of the constitution of the Arbitral Tribunal."

2. Regarding the **draft model clause on adjudication**, we would like to highlight the following points:

a) The clause outlines the settlement of any dispute, controversy, or claim arising from or related to the contract, or breach, termination, or invalidity, through arbitration (under paragraph 1) and/or Adjudication. It is noteworthy that the clause mandates arbitration as the chosen dispute resolution mechanism, as indicated by the language "shall be settled" in paragraph 1. Conversely, adjudication is presented as optional, using the phrase "may be settled," despite both arbitration and adjudication sharing identical scope under paragraph 1 and 2. To enhance the clarity and efficacy of adjudication as a non-mandatory and expedited dispute resolution mechanism, it would be advisable to delineate its scope more precisely, perhaps focusing on matter such as payment disputes, technical matters etc.

Additionally, considering that many state legislations do not recognize the concept of adjudication or similar dispute resolution methods, enforcing such clauses could be challenging and subject to scrutiny by state courts, particularly in cases where the scopes of arbitration (under paragraph 1) and adjudication (under paragraph 2) overlap.

b) Another significant concern regarding the clause is related to paragraph 4, which permits the possibility of parallel proceedings and may give rise to complications regarding the *res judicata* effect. Namely, the clause allows for arbitration proceedings under paragraph 1 and adjudication, followed by arbitration concerning compliance with the adjudicator's determination (arbitration under paragraph 3), to occur simultaneously. This may lead to divergent outcomes and deviations with the *res judicata* implications. To avoid this complication, the possible option could be if the matter will be referred to arbitration pursuant to paragraph 1 only before the arbitral tribunal, constituted pursuant to paragraph 3, renders the award.

c) In well-established adjudication mechanisms, such as dispute boards, there are typically procedures, rules, or guidelines governing the reimbursement and conduct of the adjudicator. However, incorporating such rules or guidelines into the present clause may be restrictive and hinder the adjudication process for one or both parties. Therefore, careful consideration is needed to strike a balance between ensuring fairness and efficiency in the adjudication process while avoiding unnecessary impediments.