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Possible future work

Proposal by the Governments of Italy, Norway and Spain: future work for Working Group II

Note by the Secretariat

1. In preparation for the fifty-first session of the Commission, the Governments of Italy, Norway and Spain have submitted to the Secretariat a joint proposal in support of future work in the area of international commercial arbitration. The English version of that note was submitted to the Secretariat on 27 April 2018. The text received by the Secretariat is reproduced as an annex to this note in the form in which it was received.

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Annex

Expedited Arbitration, emergency arbitrator and adoption of other instruments for the efficiency and quality of arbitral proceedings

1. Since its sixty-third session, in September 2015, Working Group II has been working on instruments for the enforcement of international commercial settlement agreements resulting from mediation. During its sixty-eighth session, in February 2018, the Working Group completed its work on this topic. The result of the Working Group's endeavors will be submitted to the Commission at its fifty-first session. At the same session, the Commission will also consider topics for possible future work of Working Group II. During its sixty-eighth session, Working Group II considered possible input for the discussion on future work.

Mediation: modernization of the terminology

2. During the sixty-eighth session of Working Group II, the Secretariat informed delegations that possible future work could consist in modernizing and refining the existing UNCITRAL instruments on mediation, as well as in developing notes on organizing mediation proceedings. As indicated in document A/CN.9/934, at para. 163, delegations supported those suggestions including that such work should be performed by the Secretariat itself, and then submitted for review and approval to the Commission.

Topics for the Working Group's future work

3. As regards topics for future work of Working Group II, a few proposals were presented at the sixty-eighth session. Among others, a joint proposal was presented by the delegations of Switzerland and of the United States of America ("the Swiss-USA proposal"), suggesting that the Working Group could work on the topics of expedited arbitration and adjudication. Particularly, the part of the Swiss-USA proposal relating to expedited arbitration received support. This part is also covered by the proposal that was presented by a number of delegations (Italy, Norway and Spain) and very likely supported by other delegations representing States both from and outside the European Union, as explained in this document.

4. The present proposal is not meant to be in alternative to the Swiss-USA Proposal but it aims to enhance aspects of that proposal that have a great relevance in the arbitration practice and a large potential for constructive use of the Working Group resources and competence. Therefore, it seems not only possible but also advisable to join the two proposals under the title "*Expedited Arbitration, emergency arbitrator and adoption of other instruments for the efficiency and quality of arbitral proceedings*".

5. The proposal explained in this document is based on the assumption that Working Group II should devote its expertise and capacity to the development of instruments that may contribute to the enhancement of arbitration as a method for settlement of international commercial disputes. Arbitration is increasingly under pressure and threatened to lose its role as preferred means for dispute resolution for commercial disputes. Arbitration is under a double pressure: on the one hand, arbitral proceedings are getting increasingly complicated, and they expand both in terms of time frame and in terms of volume of documentation. This challenges one of the traditional advantages of arbitration as opposed to court litigation, namely efficiency.

6. On the other hand, measures taken by arbitral tribunals or arbitral institutions are increasingly faced with court control. Possibly for the sake of preserving efficiency in a scenario where disputes get more complicated, steps may be taken that do not necessarily meet the quality criteria that arbitration is expected to meet. In order to render a valid arbitral award, and in order to obtain enforcement of the award, arbitration needs to comply with a series of fundamental principles, such as the

principle of due process. The goal of ensuring efficient arbitration may lead to taking steps that compromise the quality of arbitration. This, in turn, may erode the trust in arbitration as a method for settlement of disputes, a trust that is the very foundation of the success of arbitration.

7. The aim of the present proposal is to supply Working Group II with a basis to develop instruments that are meant to ensure a balance between efficiency and quality: "*Expedited Arbitration, emergency arbitrator and adoption of other instruments for the efficiency and quality of arbitral proceedings*".

8. The balance between efficiency and quality would be the overarching principle that inspires more specific topics, within which this balance may manifest itself. The subtopics would address specific issues that today negatively affect the development of commercial arbitration.

Why commercial arbitration

9. The proposed topic implies that the Working Group devotes its attention to arbitration, leaving the topic of meditation to be handled by the Secretariat as indicated above.

10. There are various reasons why we consider it advisable that the Working Group returns to the field of commercial arbitration.

11. Firstly, Working Group II has been mandated with a "double mission", focused on mediation and arbitration: a new round of sessions devoted to mediation will keep the Working Group away from one of its two missions for too long (realistically, 7 or 8 years).

12. Secondly, if Working Group II does not deal with commercial arbitration, there is a risk that arbitration be absorbed in Working Group III, that deals with investment arbitration. Working Group III has been constituted with a political and broader mandate, focused not only on arbitration itself (specifically, on investment arbitration), on its need to be improved and on the "corrections" to be adopted, but also on ISDS. It should be then kept in mind that the identified issues regarding investment arbitration are not common with commercial arbitration, being directly related to its features and its political implications. Commercial arbitration is a very private system, limited to the parties of the case — most of the time, private companies — and with no general or public interests involved. Therefore, there is no competition between the two Working Groups.

13. Furthermore, the merge of the two systems is very risky for commercial arbitration and its proximity with investment arbitration may pollute the many advantages of commercial arbitration.

14. Last but not least, it seems wiser — before dealing with mediation issues again — to wait for the impact of the new "mediation instruments" that will be submitted to the Commission (Convention and Model Law on enforcement of international commercial settlement agreements resulting from mediation) and see how their implementation may progress. Therefore, it is advisable to keep mediation on hold, focusing on arbitration for the next "round" of work of Working Group II.

Why efficiency and quality of arbitration

15. Today, commercial arbitration is increasingly criticized by users and practitioners, for different reasons (some of them grounded, others probably not).

16. One of the major criticisms is related to the excess of regulation and to the tendency of the arbitral process to look like a State court proceedings. This phenomenon leads to a lack of efficiency.

17. Furthermore, also the quality of arbitration (and of the arbitrators) seems to undermine the legitimacy of the system and the enforceability of the outcome.

18. As it has been properly highlighted in the Swiss-US proposal, there is a wide concern among practitioners "about rising costs and lengthier timelines making arbitration more burdensome and too similar to litigation".

19. For these reasons, an intervention by UNCITRAL, aimed at increasing the efficiency and the quality of arbitration, rendering the proceedings more expedite (quoting the Swiss-US proposal), is of fundamental importance for the future of commercial arbitration.

20. Trying to develop, under the umbrella of an organization such as UNCITRAL, instruments able to improve the efficiency and the quality of arbitration, seems the proper action to be taken today in order to increase the reliability of the system as a whole.

21. Working Group II looks particularly suited to meet the expectations in terms of competence and membership (representing all regions and including relevant organizations), inducing harmonization through persuasive authority.

22. Furthermore, Working Group II has the capacity not only to propose soft law interventions but also instruments of legislative character, where needed, balancing the need for efficient and quality arbitration proceedings, due process and party autonomy.

23. The topic proposed — starting from the one of the Swiss-US proposal — is a fertile basis for work aimed at improvement of the mechanism of arbitration as a tool for dispute resolution in commercial disputes. It will give UNCITRAL the possibility to meet the growing criticism that is facing arbitration and answer to the different demands that are present in practice and contributing to streamlining dispute resolution mechanisms. This fits perfectly with the Commission's functions and mission.

Focus on some topics of growing importance in the arbitration practice

24. Under the wide topic of "*Expedited Arbitration, emergency arbitrator and adoption of other instruments for the efficiency and quality of arbitral proceedings*", Working Group II may work on various specific topics with practical relevance, such as:

- Expedited arbitration (Swiss-US proposal)
- Basic uniform principles for arbitral institutions' rules
- Emergency arbitrator

25. Working Group II may develop instruments for each of these topics that will represent concrete tools able to reduce cost and time of the arbitral process, increasing its efficiency without compromising the quality.

26. Each of these topics may be dealt with independently, and in the next future new topics may be also added to the list (such as, for example, "Arbitration clauses and non-signatory parties", "Legal privileges and international arbitration"). The proposal is to use the overarching principles of efficiency and quality as a red thread for future work. Which specific topic the Working Group may work on, may be discussed from time to time. The discussion at the sixty-eighth session seemed to indicate that the topic of expedited arbitration is considered to be an appropriate topic by a vast number of delegations. This could be the first topic on which the Working Group could concentrate.

Expedited arbitration

27. The very first topic on which Working Group II should focus its work is the development of model rules — starting from the UNCITRAL Arbitration Rules — or contractual clauses (or similar tools) facilitating the use of expedited arbitration procedures and, doing so, reducing time and cost of an arbitration.

28. Expedited arbitration is a form of arbitration that is carried out in a shortened time frame and at a reduced cost. As it has been highlighted in the Swiss-US proposal, UNCITRAL may well assist users either modifying the UNCITRAL Arbitration Rules or incorporating them into contracts via arbitration clauses that provide for expedited procedures (for example, limiting the number of submissions that the parties can file, imposing shorter deadlines, referring the case to a sole arbitrator etc.). The work could also consist in guidance to arbitral institutions adopting such procedures in order to provide for the right balance between speedy resolution of the process and respect of due process, as indicated below.

Basic uniform principles for Arbitral Institutions' Rules

29. This topic is strictly related to the previous subject (expedited arbitration).

30. Today, around the world, there are an indefinite number of arbitral institutions, of different nature, dimension, range of action, competence.

31. Many of them have proved to work well, others seem to be not very active and their existence is purely formalistic, few have a very poor level of efficiency and competence. Of course, this last group is very dangerous, and it risks to undermine the efforts put by all the other institutions for the promotion of a quality and reliable arbitration system.

32. We should keep in mind that arbitration is a means for resolution of disputes based on contractual will of the parties who have to be fully convinced of the competence, reputation and reliability of the institutions.

33. Working Group II may well develop an exchange of best practices among arbitral institutions and elaborate common principles and standards in administering arbitral procedures, not only related to the expedite proceedings as described above.

34. This process will give to the entrepreneurs the benefit of seeing applied homogenized criteria and guarantees whatever arbitral institution they choose on the basis of the characteristics of their case, finally increasing the trust of the parties in the system and in arbitration as a whole.

35. The aim of this work should not be the homogenization of arbitral institutions rules (that each centre should be free to adopt) but the development of common principles and the application of the highest international standards in the administration of arbitral proceedings by the Centres "*UNCITRAL's principles compliant*".

36. Working Group II may focus, among others, not only on speedy resolution of the dispute and due process (two major points of the above mentioned subtopic of expedited arbitration) but also on other principles, which are considered to be decisive for the "good" administration of arbitral proceedings, such as independence/impartiality and multi-party arbitration.

Emergency arbitrators

37. A relatively recent trend in international arbitration is the appointment of emergency arbitrators. The underlying idea is that, in cases of particular urgency, a party may need to seek preliminary measures even before the arbitral tribunal has been appointed. To meet this need for urgency, some institutions offer the services of an emergency arbitrator, who may render an interim order, without having to wait for the arbitral tribunal to be appointed.

38. The use of emergency arbitrators may give rise to a series of questions, of which the most important is the enforceability of the measures ordered by the emergency arbitrator.

39. There does not seem to be a uniform approach in this area. If the relief ordered by an emergency arbitrator is not enforceable, there is the risk that the party seeking relief has to apply an ordinary court for the same relief. This means a multiplication of the time and costs connected with the preliminary measure.

40. In order to ensure the effectiveness of emergency arbitrators, it would be necessary to regulate their enforceability in an international instrument. UNCITRAL is ideally positioned to propose such an instrument.

The instrument(s) to be adopted

41. Depending on the issues discussed, the Working Group may well work on different tools, addressing soft law principles, best practices, notes, recommendations or legislative provisions. We believe that these sub-topics would give the possibility to issue uniform principles of soft law, either restating existing principles and best practices, or proposing normative interventions, as opposed to Notes (therefore, descriptive, alternatives and not as “best rules”).

42. For all these reasons, we suggest that the Working Group be given by the Commission the mandate to start working on “*Expedited Arbitration, emergency arbitrator and adoption of other instruments for the efficiency and quality of arbitral proceedings*”, starting with the topic on expedited proceedings as under the Swiss-US Proposal.