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Technology-related dispute resolution and adjudication

Submission by the Government of Israel

The annex to this Note contains a submission received by the Secretariat on 11 September 2022 from the Government of Israel in preparation for the seventy-sixth session of the Working Group. The annex is in the form in which the submission was received.

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Annex

We thank the Secretariat for preparing document A/CN.9/WG.II/WP.227 on technology-related dispute resolution and adjudication and greatly look forward to discussing the various proposals outlined therein. Chapter III of that document suggests that the case management conference and evidence frameworks could be achieved through guidance material as opposed to model clauses. While guidance materials are certainly useful, previous expert discussions have indicated that parties to a dispute, as well as the arbitrator, would benefit more meaningfully from a concrete provision to facilitate the establishment of a case management conference and providing its general parameters. Accordingly, it is proposed that the Working Group considers addressing these elements in model clauses.

Case Management Conferences

1. Article 9 of the UNCITRAL Expedited Arbitration Rules (the "Expedited Rules") puts emphasis on consultations with the parties and mentions a case management conference (CMC) as a possible method of conducting such consultations. Note 1 of the UNCITRAL Notes on Organizing Arbitral Proceedings (the "UNCITRAL Notes") also highlights the need for consultation and advises the arbitral tribunal to consider holding, at the outset of the proceedings, a meeting or a CMC at which it would determine the organization of the arbitral proceedings and a procedural timetable.[1] Note 1 also addresses the modification of decisions taken at a CMC, the recording of the outcome of a procedural meeting as well as the attendance of the parties. In general, CMCs may aid in avoiding unnecessary delay and expenses, and provide a fair and efficient resolution of the dispute. Including a detailed model clause on this issue in the final work product could be an important innovation and step forward for UNCITRAL from addressing this issue only in guidance notes up to now.

2. The Working Group may wish to consider the following model clause.

Model clause on case management conference

1. As soon as possible after the constitution of the arbitral tribunal, the arbitral tribunal shall hold an initial case management conference, in person or through virtual conferencing, to consult with the parties on the manner in which it will conduct the arbitration.
2. Preceding the initial case management conference, the tribunal shall circulate a proposed agenda detailing which of the subjects in paragraph 4 are to be addressed.
3. The parties' representatives should attend the case management conference, and, where appropriate, the parties' relevant experts may attend as well if already identified by the parties at this stage.
4. At the initial case management conference, the arbitral tribunal may discuss, inter alia, the particulars relevant to the subject matter of the dispute including:
   (a) Scheduling of the proceeding;
   (b) The identification of contested and uncontested facts;
   (c) The nature of the issues presented in the dispute, including the production and management of electronically stored information, and other case-specific matters;

[1] UNCITRAL Notes, para. 12.

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

(e) Confidentiality and disclosures;

(f) 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;

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

(h) Procedures to address any issues arising from the fact that the dispute relates to [Technology/Construction/…]; and

(i) Potential conditions for the early settlement of the dispute.

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

3. Paragraph 1 does not impose a fixed time limit for the initial CMC. However, it should be held 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.

4. In the spirit of efficiency, the CMCs can be conducted through virtual means in cases in which the circumstances require.

5. Paragraph 2 stipulates that the tribunal will circulate a proposed agenda for the CMC. This could facilitate preparation by the parties, their counsel and to the CMC.

6. Paragraph 3 contains an illustrative list of elements that arise which could be discussed at any CMC, alongside any standard issues common to any case. 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 take place or whether the proceedings would be based on documents only could also be discussed.

7. Paragraph 4 offers a non-exhaustive list of the issues which can be discussed at the CMC.

8. Paragraph 5 refers to potential additional ad hoc CMCs that may follow the initial CMC. Regular CMCs are recommended especially where tribunal-appointed experts have to be involved in the proceedings over an extended period.

Evidence

9. Article 15 of the Expedited Rules addresses issues relating to evidence, mainly that the arbitral tribunal may decide which documents, exhibits or other evidence the parties should produce. It further provides that statements by witnesses including expert witnesses, shall be in writing and that the arbitral tribunal may decide which witnesses shall testify in a hearing. Note 13 of the UNCITRAL Notes address issues relating to documentary evidence, which should be read in conjunction with Note 7 (Means of communication) and 10 (Practical details regarding the form and method of submission).

10. With the increased use of technology for producing and presenting evidence and the evidence being in forms other than documents, the Working Group may wish to consider providing the following model clause on evidence.

Model clause on evidence

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 [a] [experiment][demonstration][trial run][testing] 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 analysing or collating evidence. Upon such disclosure, any party may request that the use of such technology be limited, and the arbitral tribunal may refuse or allow it.]

11. Paragraph 1 is based on Article 15 of the Expedited Rules and Article 27 of the Arbitration Rules. In order to accommodate technology related disputes, it adds to the list "data" and "technical information". This is to clarify and ensure flexibility with regard to evidence in disputes relating to technology.

12. Paragraph 2 addresses the taking of evidence in the form of experiments and demonstration of a process or other forms to facilitate a better understanding of the issues under dispute by the tribunal.

Paragraph 3 of the model clause and the following two paragraphs are placed in square brackets to indicate that these issues warrant a focused discussion in the Working Group.

[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 in the operation of sensitive proceedings and facilitating the efficient and effective evaluation of evidence, while not overregulating the use of technological or digital means.

The arbitral tribunal should also take into account the possible use of artificial intelligence in taking evidence and guard against potentially adverse impacts. Specifically, if the artificial intelligence is used only to prepare and analyse the case, it should be considered appropriate; whereas, if the artificial intelligence is used in a manner directly affecting how evidence is analysed, the arbitral tribunal could a find a way to regulate this.]