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Technology-related dispute resolution and adjudication: Model clauses and guidance text

Note by the Secretariat

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I. Introduction

1. Upon considering the proposals for future work on technology-related dispute resolution and adjudication, the Commission, at its fifty-fifth session in 2022, entrusted the Working Group to consider the two topics jointly and to consider ways to further accelerate the resolution of disputes by incorporating elements of both proposals. It was generally felt that work should not be limited to the construction or technology industries but rather should address the need to resolve disputes effectively in all types of industries, for example, the financial sector.

2. The Commission agreed that model provisions, clauses, or other forms of legislative or non-legislative text could be prepared on matters such as shorter time frames, the appointment of experts and/or neutrals, confidentiality, and the legal nature of the outcome of the proceedings. It was stressed that such work should be guided by the needs of the users, taking into account innovative solutions, as well as the use of technology and should further extend the use of the UNCITRAL Expedited Arbitration Rules ("EARs").[1]

3. At its seventy-sixth session (Vienna, 10–14 October 2022), the Working Group considered the draft model clauses and guidance material on technology-related dispute resolution and adjudication on the basis of the Note by the Secretariat (A/CN.9/WG.II/WP.227), as well as the submission by the Government of Israel on case management conferences and evidence (A/CN.9/WG.II/WP.228).

4. At its seventy-seventh session (New York, 6–10 February 2023), the Working Group continued considering the draft model clauses and guidance material on technology-related dispute resolution and adjudication on the basis of the Note by the Secretariat (A/CN.9/WG.II/WP.231) and requested that the Secretariat revise the model clauses and guidance texts for further consideration by the Working Group, and illustrate in particular how they would interact with the EARs and the UNCITRAL Arbitration Rules ("UARs") (A/CN.9/1129).[2]

5. At its fifty-sixth session (Vienna, 3-21 July 2023), the Commission had before it the report of the seventy-sixth and seventy-seventh sessions of the Working Group (respectively A/CN.9/1123 and A/CN.9/1129) and expressed its satisfaction with the progress made by the Working Group and the support provided by the Secretariat. The Commission requested that the Working Group continue its work on technology-related dispute resolution and adjudication.[3]

6. Accordingly, this Note presents the revised draft model clauses and guidance material based on the deliberation of the Working Group.[4]

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[1] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 17* (A/77/17), paras. 224–225.

[2] As requested by the Working Group (A/CN.9/1129, para. 105), the Secretariat organized informal discussions with potential users and experts: (i) one round table in the frame of the Vienna Arbitration Days Conference 2023 "It takes two to waltz – is international arbitration out of steps with its users?" was dedicated to discussing the model clauses, (ii) questionnaires (with a number of accompanying discussions) were sent out (answered by 69 lawyers, 2 professors, 9 business executives/managers from 33 jurisdictions), and (iii) one informal webinar "Practice and experience in resolving tech-related disputes and in adjudication" for WG II delegates on 5 June 2023. Ideas, suggestions and comments therefrom are reflected in this Note. The questionnaire and answers will be published in the Austrian Arbitration Yearbook 2024.

[3] *Official Records of the General Assembly, Seventy-eighth Session, Supplement No.17* (A/78/17), chapter VII.

[4] The Working Group may also wish to consider the naming of the current project to reflect the general nature of the procedure which has been broadened to include other project-based, short life cycle, rapid development businesses. Name proposals included: Specialized Express Dispute Resolution (SpeEDR); Express Resolution for Technology and Businesses (EXPERTS); Dispute Resolution for Technology and Specialized Business (DARTS); Specialist Technology and Expedited Resolution (STER); and Advanced Expedited Dispute Resolution (AEDR).

II. Model clause on highly expedited arbitration

A. Introduction

7. A number of arbitration rules set specific time limits for key stages of the arbitration process. Arbitration rules, however, do not typically set a strict time limit for the duration of proceedings, as the time required may depend on a variety of factors.

8. In response to increasing demand from business users and the arbitration community for a quicker dispute resolution mechanism,[5] a number of arbitration institutions have developed expedited or fast-track proceedings, and their arbitration rules include either provisions to promote the expeditious resolution of disputes or a separate set of expedited arbitration rules. To achieve an accelerated time frame in expedited proceedings, the time frame for submission of pleadings is often condensed and the recommended time frame for rendering a final award ranges from one[6] to four months.[7] In some cases, financial incentives, for example an increased arbitration fee are provided to arbitrators for arbitral awards rendered within a certain period of time, e.g. within two or four months.[8]

9. Accordingly, the Working Group may wish to consider a model clause on highly expedited arbitration based on the EARs. Such a model clause would modify some of the articles of the EARs to provide for a highly expedited arbitration procedure, while the remaining articles of the EARs will apply to the proceedings.

[5] A questionnaire was sent out by the Secretariat, to experts and potential users, inquiring about the time needed or time preferred to resolve a dispute. The responses showed 31.5 per cent of the respondents of the questionnaires indicated 3–6 months, 20.6 per cent indicated 90 days, 13 per cent indicated 60 days, and 15.2 per cent indicated 30 days. See also the 2022 Energy Arbitration Survey by the School of International Arbitration (SIA), the Queen Mary University of London, in which arbitration scored as the most suitable forum for resolving energy disputes (including energy infrastructure disputes), with 66 per cent of respondents indicating a preference for expedited procedures (including faster constitution of tribunals and time limits of awards). Available at https://arbitration.qmul.ac.uk/research/2022-energy-arbitration-survey/.

[6] See article 12 Digital Dispute Resolution Rule published by the United Kingdom of Great Britain and Northern Ireland Government-backed UK Jurisdiction Taskforce – a decision shall be rendered within 30 days from the appointment of a tribunal.

[7] See article 58 WIPO Expedited Arbitration Rules – four months from the constitution of the arbitral tribunal, after transmission of the file to the tribunal, or after the delivery of the statement of defence; article 29 IV Cepani Arbitration Rules – four months from the date of the establishment of the procedural timetable; article 7 Istanbul Arbitration Centre Fast Track Arbitration Rules – three months from the transmission of the file to the sole arbitrator. See also article 43 SCC Expedited Arbitration Rules – no later than three months from the date the case was referred to the Arbitrator; article 6.2.1 Ireland Capital Works Management Framework Arbitration Rules for Use with Public Works and Construction Services Contracts – 100 days from the formation of the tribunal and article 58 Beijing Arbitration Commission Arbitration Rules – 75 days from the constitution of the arbitral tribunal.

[8] Section 30 (1)(a) Rules of the Arbitration Court attached to the Czech Chamber of Commerce and the Agricultural Chamber of the Czech Republic.

B. Draft model clause

Any dispute, controversy, or claim arising out of or relating to the contract or the breach, termination, or invalidity thereof shall be settled by arbitration in accordance with the UNCITRAL Expedited Arbitration Rules, with the following modifications and additions:

(a) The appointing authority shall be [name of institution or person];

(b) Consultation in accordance with article 9 of the UNCITRAL Expedited Arbitration Rules shall take place within [5/7 days] of the constitution of the arbitral tribunal. The disputing parties may propose issues to be addressed in the consultations, which shall be duly considered during such consultations;

(c) The period of time for making the award shall be [a short period of time, for example, 60 or 90 days]. [Article 16 shall not apply.][9] or [The arbitral tribunal may in exceptional circumstances and after inviting the parties to express their views, extend the period of time to […]];

(d) If a party does not comply with the arbitral tribunal's order(s) or instruction(s), without showing sufficient cause for such failure, the arbitral tribunal may make the award based on the evidence before it;

(e) The place of the arbitration shall be…. [town and country];

(f) The language to be used in the arbitral proceedings shall be….

Note: Additionally, the parties may consider including before subparagraph (a), the following subparagraph:

The sole arbitrator shall be [name of a person]. The claimant shall communicate the notice of arbitration to the arbitrator, upon which he/she shall confirm the appointment as soon as possible and within […] days upon receipt. If for any reason the arbitrator does not confirm the appointment, and the parties cannot reach agreement on a new arbitrator, the appointing authority shall, at the request of a party, appoint the arbitrator within […] days in accordance with article 8(2) of the UNCITRAL Expedited Arbitration Rules.

1. Subparagraph (a)

10. Subparagraph (a) of the model clause sets forth that the parties agree on the appointing authority for the appointment process in accordance with article 8 of the EARs (A/CN.9/1129, para. 48).

11. Furthermore, parties may wish to name a specific arbitrator in a contract or an agreement, to shorten the time required for appointing an arbitrator. To do so, parties may include the subparagraph as contained at the end of the model clause. In such a case, the named arbitrator should confirm his/her appointment within a specified period upon receipt of the notice of arbitration as sent by the claimant. If the named arbitrator is not available, parties may agree on a new arbitrator. If they do not reach an agreement thereon, article 8(2) of the EARs will apply, with the appointing authority being specified in subparagraph (a).

2. Subparagraph (b)

12. The time period within which the arbitral tribunal should consult the parties in subparagraph (b) has been extended to 5 or 7 days to ensure that the period is sufficiently long to allow for meaningful and properly prepared consultations with possible input by the parties beforehand, such as parties' submission of issues and information to the arbitral tribunal in advance (A/CN.9/1129, para. 49).

[9] Parties may note that the non-application of article 16 of the EARs may entail potential consequences of difficulties to enforce an award if not rendered within the time frame set out in model clause A.

13. The Working Group may also wish to consider whether other case-management features should be included in the model clause, such as limiting the written submissions to one round, limiting the length of written submissions, setting the time frame for those submissions and allowing a documents-only hearing. However, considering that this may be overly prescriptive and unduly limit the flexibility of the proceedings, the Working Group may wish to consider leaving the matter for the arbitral tribunal to decide (see para. 17 below) and including such features into the guidance text in section VIII.

3. Subparagraph (c)

14. When deciding on the appropriate time frame, modifying article 16(1) EARs, for rendering the final award in the highly expedited context, the Working Group generally felt that reference to such a specific time frame should be made (A/CN.9/1129, para. 53) but also acknowledged the need to safeguard against adverse consequences. Such a time frame could be, for instance, 60 or 90 days with the parties being nevertheless free to agree on any other time frame to cater for their needs.

(a) Application of article 16

15. As the model clause is based on the EARs, article 16 of the EARs would apply, which means that the final award might take as long as nine months or that the proceedings might be conducted under the UARs.[10] Such application of article 16 might defeat the purpose of a highly expedited arbitration, and therefore, the Working Group may consider adding an opt-out regarding article 16, paragraphs (2) to (4), including the safeguards provided therein. However, the inclusion of an opt-out of article 16 may compel parties with less bargaining power to agree to waive the safeguards in advance. Moreover, a rigid time frame may lead to the potential risk of an unenforceable award under article V(1)(d) of the New York Convention when the award is not rendered within the parties' agreed time frame. As such, the model clause could be supplemented by an explanatory comment to raise awareness on potential consequences if the parties agreed not to apply article 16, paragraphs (2) to (4).

16. Another option would be to allow for one extension in exceptional circumstances (see A/CN.9/1129, para. 53), for example one of four weeks. This may involve cases where the claimant may attempt to start proceedings at a strategic time, e.g. before traditional holiday seasons, where a respondent may have insufficient time to respond.

(b) Shortening of other time frames

17. Given the shortened time frame in rendering the award, the Working Group may wish to confirm that no additional time frames are necessary to be included into the model clause. Reducing the time frames in a proportionate manner or specifying a shortened period of time mirroring the time frames set out in the UARs and EARs would be overly complicated and prescriptive. This is particularly so because article 10 of the EARs gives the arbitral tribunal discretionary power to abridge or extend any period of time prescribed under the UARs or EARs. Practically, in light of the shortened overall time frame, a provisional timetable abridging the periods of time in the EARs would likely need to be established by the arbitral tribunal in accordance with article 17(2) of the UARs. The burden of highly expedited proceedings lies not only on the arbitral tribunal to render an award within the specified period, but also on the parties. Their cooperation to prevent dilatory conducts in achieving highly expedited proceedings is crucial. Consequently, the insertion of a default provision in subparagraph (d) (see para. 18 below), should incentivize parties to cooperate and ensure smooth proceedings.

[10] Part N of the Explanatory Note to the EARs.

4. Subparagraph (d)

18. In a highly expedited arbitration, the cooperation of parties is particularly crucial, which is why the Working Group may wish to consider adding subparagraph (d), which allows the arbitral tribunal to proceed with the arbitral proceedings upon default by a party and make an award based on the evidence before it. While article 30(2) and (3) of the UARs provides "default" provisions, allowing the arbitral tribunal to proceed with the proceedings when a party fails to appear at a hearing without showing sufficient cause or to decide on the basis of evidence before it when a party fails to produce documents, exhibits, or other evidence without sufficient cause, subparagraph (d) covers circumstances beyond these by allowing the tribunal to proceed and make a decision based on evidence if a party does not comply with the arbitral tribunal's order(s) or instruction(s).[11]

III. Model clause on expert determination procedure

A. Introduction

19. The model clause on expert determination procedure below allows disputing parties as a first step to agree to a simplified mechanism to resolve disputes within a very short time frame by involving a third party (the "expert"). The rapid determination by the expert becomes contractually binding and immediate compliance by the parties is required.

20. In the case of non-compliance, through arbitration under the EARs, the contractually binding determination may be made enforceable with an arbitral award. A party will be required to comply with the determination even when not satisfied with the outcome, but the party may ultimately pursue arbitration to resolve all outstanding issues, including to challenge the determination, when any condition that is to be specified by the parties arises, for instance the completion of a project, or after a certain period of time to be specified by the parties, whichever comes first is met.

21. In view of the lack of an adequate legal framework supporting the enforcement of expert determination, the Working Group might wish to consider whether a purely contractual commitment or a non-binding solution may suffice (see also A/CN.9/1129, para. 56).

B. Draft model clause

Any dispute, controversy, or claim arising out of or relating to the contract or the breach, termination, or invalidity thereof shall be settled by the procedures in the following paragraphs.

1. [Until any of the conditions to be specified by the parties, for instance completion of a project, or after a certain period of time to be specified by the parties, whichever comes first is met,] any dispute, controversy, or claim arising out of or relating to the contract or the breach, termination, or invalidity thereof shall be settled by a determination by an expert pursuant to the following subparagraphs;

(a) The expert shall be appointed jointly by the parties, and if parties have not reached any agreement thereon within […] days, any party may request that the expert shall be appointed by [name of the institution or person];

(b) A party shall communicate the request for a determination by an expert to the other party, or parties as well as to [any person and/or institution named under subparagraph (a)], which shall contain a detailed description of the factual basis of the dispute;

[11] See article 10 Rules on the Efficient Conduct of Proceedings in International Arbitration ("Prague Rules"), article 58(d) WIPO Arbitration Rules, and article 30 UARs.

(c) The expert shall consult with the parties promptly and within 3 days of its appointment;

(d) Within [3 days] after the consultation, the other party or parties shall communicate a response to the request;

(e) The expert shall make a determination within [21 days] from the date of appointment. [The expert may extend such time, not exceeding a total of [3] months from the date the receipt of the request, in exceptional circumstances and after inviting the parties to express their views];

(f) The parties shall not commence arbitration proceedings relating to that dispute, controversy, or claim except as provided in the following paragraphs;

(g) The determination by the expert is binding on the parties and the parties shall comply with the determination.

Note: Additionally, the parties may consider including before paragraph 1 (a), the following subparagraph:

The expert shall be [name of a person]. The claimant shall communicate the request for a determination to the expert, upon which he/she shall confirm the appointment as soon as possible and within […] days upon receipt. If for any reason the expert does not confirm the appointment, and the parties cannot reach agreement on a new expert, the appointing authority shall, at the request of a party, appoint an expert within […] days.

2. Any failure to comply with the expert's determination in paragraph 1 shall be settled by arbitration in accordance with the UNCITRAL Expedited Arbitration Rules, with the following modifications and additions:

(a) The appointing authority shall be [name of institution or person];

(b) Consultation shall take place within [5/7 days] of the constitution of the arbitral tribunal. Issues proposed by the parties prior to the consultation shall be addressed during such consultation;

(c) If the arbitral tribunal finds that the expert determination has not been complied with, it shall make an award giving effect to the expert determination, within [a short period of time to be specified by the parties, for example, 10 days] of the constitution of the arbitral tribunal;

(d) If a party does not comply with the arbitral tribunal's order(s) or instruction(s), without showing sufficient cause for such failure, the arbitral tribunal may make the award based on the evidence before it;

(e) The place of the arbitration shall be [town and country];

(f) The language to be used in the arbitral proceedings shall be….

Note: Additionally, the parties may consider including before subparagraph (a), the following subparagraph:

The sole arbitrator shall be [name of a person]. The claimant shall communicate the notice of arbitration to the arbitrator, upon which he/she shall confirm the appointment as soon as possible and within […] days upon receipt. If for any reason the arbitrator does not confirm the appointment, and the parties cannot reach agreement on a new arbitrator, the appointing authority shall, at the request of a party, appoint the arbitrator within […] days in accordance with article 8(2) of the UNCITRAL Expedited Arbitration Rules.

3. [Once any of the conditions to be specified by the parties, for instance completion of a project, or after a certain period of time to be specified by the parties, whichever comes first is met,] any dispute, controversy, or claim arising out of or relating to the contract or the breach, termination, or invalidity thereof, including to the merits of the expert determination on both the facts and the law shall be settled by arbitration in accordance with the [UNCITRAL Expedited Arbitration Rules or the UNCITRAL Arbitration Rules, as chosen by the parties].

1. Paragraph 1 – expert determination

(a) Nature of claims

22. The Working Group may wish to decide whether the scope of this expert determination clause should be limited to certain types of disputes or decisions, such as payment obligations (A/CN.9/1129, para. 69), or whether remedies that are irreversible, such as specific performance (A/CN.9/1129, para. 78), should fall within the ambit of expert determination as well.[12]

(b) No parallel proceedings

23. The chapeau of paragraph 1 specifies that until certain conditions have been met, for instance completion of a project, or after a certain period of time to be specified by the parties (whichever comes first), parties shall refer their dispute to expert determination and, until then, subparagraph (f) confirms that the parties shall not be entitled to commence arbitration proceedings relating to that dispute, controversy, or claim. This is to avoid parallel arbitral proceedings while the expert determination or the compliance procedures under paragraph 2 are under way.

24. The conditions set by the parties must be reasonable to not prevent parties' access to justice, e.g. when parties set a condition that never materializes. Ultimately, this would depend on the facts of the case, but parties may wish to consider two conditions, for example, completion of a project or the elapse of a certain period of time, whichever comes first.

(c) Option to extend time

25. Regarding paragraph 1(e), the Working Group may consider whether it is necessary to include safeguards, allowing the expert flexibility to adjust the tight time frames and ensure that parties' may sufficiently make their case. Should the expert fail to issue any determination within the determined time frame, an option to extend time in exceptional circumstances provides leeway to the expert, as 21 days may be insufficient to deal with complex disputes.

2. Paragraphs 2 to 3 – arbitral proceedings

26. Paragraph 2 determines that any failure to comply with the expert's determination shall be settled by arbitration in accordance with the EARs.

27. Moreover, paragraphs 2(a), (b), (d), (e), and (f) mirror the provisions of the highly expedited clause.

28. Paragraph 3 specifies that once any of the parties' specified conditions has been met, parties shall be entitled to commence arbitration proceedings relating to that dispute, including the merits of the expert determination on both the facts and the law, pursuant to EARs or the UARs.

3. Alternative approaches

29. In lieu of the model clause above, the Working Group may wish to explore other options, such as expert determination, followed by mediation (A/CN.9/1129, para. 65) or expert determination, followed by mediation, and then by arbitration.

30. Upon the expert's determination, subject to the parties agreement, parties could opt to turn the expert's determination into a settlement agreement, so that such an agreement could be enforced in cross-border disputes under the United Nations Convention on International Settlement Agreements Resulting from Mediation (the

[12] In some jurisdictions, any construction dispute can be referred to statutory adjudication, see United Kingdom, Housing Grant, Construction and Regeneration Act 1996, in others only payment claims, see Australia, Building and Construction Industry (Security of Payment) Act 2021.

Singapore Convention).[13] It should however be noted that enforcement by mediation would require parties to unanimously agree with the decision of the expert determination and to proceed with enforcement procedures, contrary to arbitration proceedings, where the arbitrator would impose a resolution on the parties.[14]

31. Alternatively, should parties fail to reach a settlement after mediation,[15] parties may initiate arbitral proceedings, that is by either reverting to paragraphs 2 and 3 of the expert determination clause or by foreseeing an unconditional arbitration agreement.

IV. Model clause on experts accompanying the tribunal

A. Introduction

32. The Working Group may wish to consider the revised model clause on experts accompanying the tribunal to explain technical matters. This model clause may be useful not only to highly expedited arbitration but also to arbitration under the UARs and EARs.

33. Whereas experts under article 29 of the UARs are appointed to report in writing to the arbitral tribunal on specific issues, this model clause sets forth a separate mechanism allowing for the appointment of an expert on standby to accompany the arbitral tribunal while it conducts the proceedings.[16]

34. In disputes involving technical matters, it may be useful for the arbitral tribunal to be accompanied by an expert on standby so as to be able to casually, i.e. not limited to "in writing" but also orally and as the need arises in the proceedings, seek and receive explanations from subject matter experts on the technical aspects of the dispute. Explanations by the expert will help the arbitral tribunal understand technical matters, including highly specialized concepts specific to certain fields, contained in the parties' submissions and evidence and capture the real issues at stake. In principle, this should be done without providing an opinion on those issues. With the support of the expert appointed pursuant to this model clause, the arbitral tribunal may avoid unnecessary delays.

35. The functions of experts appointed in accordance with article 29 of the UARs and this model clause are clearly distinct. While article 29 of the UARs is not applicable to experts under this model clause, the safeguards should apply (A/CN.9/1129, para. 80). In the model clause below, the function of the expert and their appointment process is set forth. To expedite the appointment process, it may also be useful to stipulate the issues to be addressed by the arbitral tribunal when it consults with the parties.

[13] See article 14(b)(i) WIPO Mediation Rules. The WIPO Expert Determination Rules have generally not been used much.

[14] Also, the enforceability of mediation settlements would arguably depend on how widespread the Singapore Convention is.

[15] See article 14(b)(ii) WIPO Mediation Rules, where the mediator may propose dispute resolution by arbitration in light of the circumstances.

[16] See UNCITRAL Notes on Organizing Arbitral Proceedings, para. 101, explains that the function of experts could be assisting the tribunal in understanding certain technical issues in matters requiring specialized knowledge or skills.

B. Draft model clause

1. Without prejudice to article 29 of the UNCITRAL Arbitration Rules, the arbitral tribunal may appoint one or more experts to accompany it in the proceedings and explain, orally or in writing and as the need arises, relevant technical matters in accordance with the terms of reference established pursuant to paragraph 3.

2. In appointing the expert, the arbitral tribunal shall consult the parties on:

(a) The area of technical expertise required;

(b) The terms of reference of the expert;

(c) The working methods of the expert; and

(d) Any other issue.

3. [The arbitral tribunal shall appoint the expert jointly identified by the parties]/[The expert to be appointed by the arbitral tribunal shall be designated by… [name of institution]]/[[The expert to be appointed by the arbitral tribunal shall be… [name of person]]. Upon appointment, the arbitral tribunal shall establish the terms of reference, which shall be communicated to the parties.

4. Article 29(2) of the UNCITRAL Arbitration Rules shall apply mutatis mutandis.

1. Paragraph 1

36. In accordance with this paragraph, the arbitral tribunal is vested with the power to appoint experts to accompany the tribunal in the proceedings. The specific function of the expert is to "explain" "orally or in writing" relevant technical matters "as the need arises." This is different from the function of tribunal appointed experts as provided for in article 29(1) of the UARs, where they report in writing, on specific issues to be determined by the arbitral tribunal, including on opinions. The establishment of the terms of reference is essential to safeguard the rights of the parties to be heard by making comments, objecting and questioning the expert accompanying the tribunal, in a transparent manner (A/CN.9/1129, para. 82).

2. Paragraph 2

37. Certain issues in relation to the appointment of the expert need to be addressed by the arbitral tribunal and this should be done in consultation with the parties. This paragraph lists two key issues, namely the area of technical expertise required and the terms of reference of the expert. The working methods of the expert will also likely need to be discussed in view of their inclusion in the terms of reference.

38. The parties, especially when they are specialists in the field, may be better placed to identify a relevant individual to be appointed for the case (A/CN.9/1129, para. 85).[17] The arbitral tribunal may seek the parties' views on the expert to be appointed by requesting a list of candidates from a party to be considered by the other party and the arbitral tribunal.

39. Ensuring transparency is essential to build confidence in the functioning of the expert. This could be achieved by stipulating in the terms of reference that private communication between the arbitral tribunal and the expert should be avoided. The terms of reference may specifically provide that the communication should take place keeping the parties equally informed. These terms may also provide that an oral explanation by the expert should be done in the presence of the parties or recorded for subsequent reference.

40. The Working Group may wish to consider whether it would be useful for the parties and the tribunal to have a checklist on the terms of reference.

[17] See article 28(1), P.R.I.M.E. Finance Arbitration Rules.

3. Paragraph 3

41. Three possible ways to identify the person to be appointed as the expert are set forth. The identification of the expert in a contract clause and the joint appointment by the parties would contribute to the speedy appointment of the expert. The designation by an institution would likely also contribute in the same manner. However, there were concerns that naming the expert in a contract clause before any dispute has arisen could be counterproductive, as it could be difficult to identify the nature of potential disputes and the expertise required in advance (A/CN.9/1129, para. 84).

42. Upon appointment of the expert pursuant to paragraph 1, the arbitral tribunal should establish the terms of reference. In line with article 29(1) of the UARs, the terms of reference should be communicated to the parties.

4. Paragraph 4

43. There is a need to ensure that the parties have the opportunity to exercise their procedural right to raise an objection regarding the expert's qualification, impartiality and independence. Hence, the same process as provided for in article 29(2) of the UARs may be followed.

5. Other approaches

44. The appointment and performance of the expert pursuant to this model clause may require additional costs and time and may run counter to the objective of achieving speedy settlement of disputes. Furthermore, appointing an expert that advises the arbitral tribunal might raise due process concerns if the arbitral tribunal is seen as delegating its decision-making function to the expert.

45. The Working Group may therefore wish to consider other efficient approaches to enable the arbitral tribunal to duly address technical questions, which may include (i) appointing decision makers with the respective technical skills as arbitrators so that no additional experts would be required [18] (A/CN.9/1129, para. 87); (ii) considering guidelines for encouraging active participation of the arbitral tribunal such as by inviting party-appointed experts to a joint conference and having exchanges on key technical issues;[19] (iii) inviting all experts (party and tribunal appointed experts) to issue joint expert reports;[20] or (iv) inviting experts to provide a list of issues of agreements and disagreements with an indication of the reason.[21]

V. Model clause on confidentiality

A. Introduction

46. The ability to keep an arbitral award and the proceedings confidential is a key reason for parties to choose arbitration as a means to resolve cross-border commercial disputes. However, international law neither precisely guarantees nor defines a principle of confidentiality in arbitration proceedings. As the UNCITRAL Notes highlight, while it is a widely held view that there is an "inherent" requirement of confidentiality in international commercial arbitration, there is in fact no uniform approach or body of rules that governs matters of confidentiality. Questions regarding the nature and extent to which the parties in an arbitration are under duties of confidentiality remain open due to the absence of any widely accepted standards. The

[18] See article 8.3, PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment; article 8, P.R.I.M.E. Finance Arbitration Rules; article 19 (b), WIPO Arbitration Rules; and article 14 (b), WIPO Expedited Arbitration Rules.

[19] See article 8.4 (f), IBA Rules on the Taking of Evidence in International Arbitration (2020).

[20] See para. 98, UNCITRAL Notes No. 15.

[21] See article 6.7, Prague Rules.

Working Group therefore requested that the Secretariat explore which solutions were found in arbitration practice (A/CN.9/1129, para. 97).

47. Applicable laws may have provisions on confidentiality (either by imposing such obligations or by recognizing the confidentiality of the arbitral proceedings), may be silent on the issue,[22] or may foresee some disclosure obligations. Additionally, laws regulating certain professions, such as the legal profession, might contain various confidentiality obligations. However, in view of the difficulties in determining the applicable law, some arbitral rules regulate certain issues of confidentiality, as outlined below. Additionally, practice shows that parties that consider confidentiality an important tool have addressed confidentiality in their arbitration agreements or have concluded additional confidentiality agreements.

B. Arbitration rules

48. Many arbitral rules address confidentiality to provide for more clarity, while highlighting party autonomy when it comes to confidentiality obligations, i.e. that parties can "agree otherwise" than what is stipulated in the arbitral rules.

49. One approach followed by a number of arbitral rules is a general all-encompassing provision on confidentiality for proceedings,[23] with some rules providing for confidentiality obligations of the administering institution.[24]

50. However, some rules regulate only certain aspects, e.g. the confidential status of the awards,[25] deliberations of the arbitral tribunal,[26] hearings,[27] documents, and specify the persons that are bound by confidentiality obligations.

51. Furthermore, some rules provide that an arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings.[28] As persons not part of the arbitration agreement may not be bound by confidentiality obligations, some rules provide a procedure for the creation of confidentiality agreements.[29] On the question of who should seek the undertaking of confidentiality, whether that be the arbitral tribunal and/or the parties, the approach diverges: some rules put the responsibility on the parties to seek such confidentiality agreements from persons brought into the arbitral proceedings,[30] some on the arbitral tribunal.[31]

C. Other sources of confidentiality obligations

52. In addition to arbitration rules, confidentiality obligations may have other sources, such as (i) confidentiality agreements between the parties, (ii) protective orders from arbitral tribunals, and (iii) confidentiality undertakings signed by individuals participating in the proceedings.

53. Confidentiality agreements facilitate the creation of purpose-built solutions for the parties and allow them to address the terms and conditions under which the parties agree to share confidential information while preventing disclosure to third parties.

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[22] See UNCITRAL Model Law on International Commercial Arbitration.

[23] For example: article 30, LCIA; article 35, SIAC Rules; article 44(1), DIS Rules; and article 3, SCC Rules. See also the more detailed confidentiality regime articles 54, 55, 75–78, WIPO Arbitration Rules (2021).

[24] See article 8, Appendix I – Statutes of the International Court of Arbitration of the ICC Rules; article 9 of Appendix I Organisation of the SCC Rules.

[25] See article 34(5), UAR; article 44(1), DIS Rules; article 3, SCC Rules; article 39(9), P.R.I.M.E. Finance Arbitration Rules (2022); and articles 77 and 78, WIPO Arbitration Rules (2021).

[26] See article 38(4), P.R.I.M.E. Rules.

[27] See article 28(3), UAR; article 55(c), WIPO Arbitration Rules; and article 27 (4), P.R.I.M.E. Finance Arbitration Rules, which states that hearings are private.

[28] See article 22(3), ICC Rules.

[29] See for example article 30(1), LCIA Rules; articles 54(c)(d) and 57, WIPO Rules.

[30] See article 30(1), LCIA Rules.

[31] See articles 54(c)(d) and 57, WIPO Rules.

Such agreements may include, as suggested in paragraph 52 of the UNCITRAL Notes: (i) material that is to be deemed confidential such as the existence of the arbitration, identity of the parties or arbitrators, evidence, submissions, and content of the award; (ii) measures to maintain the confidentiality of such material and the duration or scope of confidentiality duties; and (iii) circumstances in which confidential information may be disclosed in whole or in part to the extent necessary to protect a legal right or other circumstance.

54. Subject to the parties' agreement on confidentiality, the arbitral tribunal may issue protective orders to facilitate the strengthening or implementation of the confidentiality agreement. In addition, where no such agreement has been signed, protective orders may also create duties of confidentiality through rules of arbitral procedure as agreed between the parties.

55. The third element of confidentiality in practice is the creation of confidentiality undertakings. While the confidentiality agreement is signed between the parties, unilateral undertakings to respect confidentiality may be entered into by various individuals brought into the proceedings.

D. Draft model clause

56. The Working Group may wish to consider the following revised model clause on confidentiality.

Confidentiality

1. [All aspects of the proceedings [alongside all information disclosed by a party in the proceedings] [and all awards] that are not [lawfully] in the public domain [including the existence of the arbitration itself] [and] [all information disclosed by a party in the proceedings] shall be kept confidential except and to the extent that disclosure of the relevant information is required by legal duty, to protect or pursue a legal right, or in relation to legal proceedings before a court or other competent authority.

2. The [the arbitral tribunal or the expert in model clause B] and the parties shall seek the same undertaking of confidentiality in writing from all those that they involve in the proceedings.

1. Footnote after the title of the model clause

57. In some jurisdictions a valid confidentiality agreement can only be concluded once a dispute has arisen (A/CN.9/1129, para. 92). The Working Group may wish to add a footnote to the model clause along the following lines: "In some jurisdictions a valid confidentiality agreement can only be concluded once a dispute has arisen. In such cases, parties may add a first paragraph to the model clause: Upon commencement of a dispute, parties may consider agreeing on the following: (and then have the model clause as it currently stands)".

2. Paragraph 1

58. The Working Group may wish to consider the revision of paragraph 1 aiming to clarify that (i) all information not in the public domain should be subject to confidentiality obligations, (ii) information that was in the public domain due to a confidentiality breach should be covered by the model clause, and (iii) the confidentiality duty should also extend to information on the existence of the case (A/CN.9/1129, para. 90).

59. Furthermore, the Working Group may wish to clarify the scope and include a specific reference to awards. While arbitral awards may be interpreted to fall under "all aspects of the proceedings", it might also be interpreted differently.

3. Paragraph 2

60. The paragraph foresees that the undertaking of confidentiality lies both on the arbitral tribunal and the parties (A/CN.9/1129, para. 91). The inclusion of "the arbitral tribunal or the expert in model clause B" alongside "the parties" notes that the parties and the tribunal itself have a duty to enter into written confidentiality agreements with witnesses, experts and other persons brought into the proceedings. In some circumstances, it may be more appropriate for the parties themselves to enter into a confidentiality agreement with persons the parties have invited to participate in the proceedings. In other circumstances, for example where the tribunal invites experts to become involved in the proceedings, it may be more appropriate to have the duty rest with the arbitral tribunal.

VI. Guidance text on confidentiality within the proceedings

61. This section addresses the issues on inbound confidentiality (A/CN.9/1123, para. 77).

62. The Working Group may wish to consider the following guidance text on confidentiality within the proceedings.

> 1. Confidentiality concerns may arise in respect of pieces of information of intrinsic value (such as trade secrets, know-how, algorithms, or any other proprietary information) on which a party wishes to rely when presenting its case but does not want to disclose them to the opposing party (including their legal representatives) due to their sensitivity. If such concerns arise, the way in which to treat such information may be discussed during a case management conference and certain measures may be taken. One way would be to classify such information as "confidential" within the proceedings and adopt measures to address them.
>
> 2. Information that is (i) in the possession of a party and treated as confidential by that party, (ii) inaccessible to the public or to the opposing parties, and (iii) of a commercial, scientific or technical sensitivity, can be classified as confidential information.
>
> 3. A party invoking confidentiality may submit a request to the arbitral tribunal to have the information classified as confidential. The party making such a request would need to provide justifiable reasons for making the request.
>
> 4. Upon receipt of such a request and after inviting the opposing party to express its views, the arbitral tribunal may determine whether the information is to be classified as confidential. In making the determination, the arbitral tribunal would consider whether the absence of a measure to protect the confidential nature of the information would likely cause serious harm to the party making the request.
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> 5. Where the arbitral tribunal concludes that the information is to be classified as confidential, the arbitral tribunal may adopt measures to protect the confidential nature of the information, for example, by limiting access to specified information to certain individuals; controlling the distribution of the specified information; or permitting the submission of specified information in redacted form only as documentary evidence.

63. Paragraph 5 describes how an arbitral tribunal should protect confidential information (A/CN.9/1129, paras. 94–95),[32] providing further guidance as to how the arbitral tribunal may treat confidential information after having made its determination on the need to issue such protective measures.

64. Reference to a situation in which a party wishes to keep confidential certain information from the arbitral tribunal and the other party has been omitted as the Working Group considered such situations to occur rarely (A/CN.9/1129, para. 96).

[32] See Commentary on WIPO Arbitration Rules, paras. 54.1–10, available at www.wipo.int/export/sites/www/amc/en/docs/2017commentrulesarb.pdf.

The WIPO Arbitration Rules foresee in such a situation the appointment of a confidentiality advisor (article 54, d), an approach that has now also been reflected in the article 3(8) of the IBA Rules on Evidence. However, in the WIPO context, such appointment appears to have never occurred.

VII. Guidance on evidence

65. The Working Group may wish to consider the following guidance text on evidence.

1. Evidence submitted and produced in arbitral proceedings may involve significant technologies in itself or may require the use of technology to make the content perceivable and comprehensible to humans. As such, the arbitral tribunal may need to familiarize itself with the technologies used by the parties in the process of gathering, presenting, and evaluating evidence, bearing in mind the need to ensure due process, and efficiency.

2. Such evidence would likely exist in electronic/digital form, i.e. in the form of data messages.[33] Data messages are pieces of information generated, sent, received or shared by electronic, magnetic, optical or similar means.[34] Article 15 of the UNCITRAL Expedited Arbitration Rules as well as article 27(3) of the UNCITRAL Arbitration Rules refers to the subject of production as "documents, exhibits or other evidence", which encompass data messages.[35]

3. The arbitral tribunal may require the parties to disclose information about the technology they used in collecting, processing, and presenting evidence, or in complying with an order of the arbitral tribunal. Upon disclosure, the arbitral tribunal may seek the views of the other party and determine whether such use would be admissible, relevant, and material as well as consider the weight of the evidence.

4. To mitigate the challenge that may be posed by the highly technological nature and the large quantity of evidence in electronic form (electronic evidence), the arbitral tribunal may consider solutions such as using third-party experts or technological solutions to manage and review the electronic evidence. The arbitral tribunal should keep abreast of the latest technological developments that could potentially provide assistance in the management of the case.

5. Arbitral tribunals should recognize that there are specificities in terms of the risk that electronic evidence might be subject to falsification, as it is becoming increasingly easy with technology to extract and alter information contained in data messages.

6. If the arbitral tribunal has reasonable doubts that a party may submit or has submitted falsified or manipulated such electronic evidence, it may request that party provide proof confirming the authenticity of the submitted evidence and take other necessary steps, including but not limited to, requesting beforehand that electronic evidence is properly safeguarded, ordering an inspection of the submitted evidence or disregarding the falsified evidence.

66. The guidance note has been revised to refer to UNCITRAL texts on electronic commerce (A/CN.9/1129, para. 101), and to highlight in paragraph 4 the additional challenge of a large quantity of data (A/CN.9/1154, para. 18).

[33] This guidance builds upon the proposition that data messages should be treated with due evidential weight, as stated in article 9 UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996.

[34] Article 4(c) United Nations Convention on the Use of Electronic Communication in International Contracts.

[35] In UNCITRAL texts, the term "documents" is generally qualified with the term "paper-based" or "paper" when they specifically refer to paper-based documents. For example, article 17 UNCITRAL Model Law on Electronic Commerce.

67. The Working Group may wish to add a clarifying sentence in the first paragraph to show the range of technological developments and provide the opportunity to name several of them, for instance, “Such technologies involve traditional ones as well as new and emerging ones including, but not limited to, digital documents, information search functions, artificial intelligence/machine learning, online platforms and distributed ledger technology systems.”

68. The paragraph on taking evidence in the form of an experiment and a demonstration of a process has been taken out (A/CN.9/1129, para. 100) as it is not specific to electronic evidence, and the taking of evidence through experiments does not seem to be a common process.

VIII. Guidance to ensure an expeditious arbitration

69. The Working Group may wish to consider whether (expedited) arbitration proceedings, in particular highly expedited arbitration, would benefit from the following accompanying guidance in order to provide a framework and guidance for parties and the arbitral tribunal to accelerate the arbitral proceedings and increase efficiency of the highly expedited proceedings, while ensuring fairness and due process during the process.

In order to ensure expeditious arbitration proceedings, the parties and/or arbitrators might implement the following measures.

The parties:

- Identify and agree on arbitrators with the necessary expertise as early as possible, e.g. when agreeing to arbitration (naming an arbitrator in the contractual clause, see model clause on highly expedited arbitration) or when a dispute arises, as the selection of arbitrators is crucial and can cause significant delays;
- Choose arbitrators that (i) are available, (ii) have a track record of making awards in a timely manner, and (iii) have expertise in the subject matter of the dispute;
- Identify and clarify the key issues in dispute early in the process to focus on the core matters at hand.

The parties and the arbitral tribunal:

- Make use of technology to share and manage documents and handle virtual hearings (including to hear remote witnesses) and ensure a swift communication between all stakeholders;
- Actively participate in such case management conferences to solve any issue efficiently;
- Make good attempt to cooperate with one another to arrive at a mutually amicable and satisfactory settlement.

The arbitral tribunal:

- Engages in case management from the outset and throughout the proceedings, including early and regular case management conferences to ensure smooth and effective communication, establish a realistic timetable, and address outstanding issues;
- Develops clear time frames with parties for procedural meetings regarding the progress of the case so as to allow parties to be efficient in their submissions;
- And encourages the parties to cooperate, potentially in view of settling the dispute or parts thereof.

70. The Working Group may wish to add bullet points suggesting that the parties can request preliminary views from the arbitral tribunal, as such views might provide

the grounds to settle the dispute or alternatively allow the parties to submit focused submissions. However, such preliminary views may give rise to concerns regarding the impartiality or independence of the arbitral tribunal if they favour one party over another. If tribunals choose to give their preliminary views, they should make very clear that such views are indeed preliminary and be cautious in the wording of their views.