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Technology-related dispute resolution and adjudication

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.[1] It was generally felt that the work should not be limited to the construction or technology industries but should rather address the need to resolve disputes effectively in all types of industry, including for example, the financial sector (A/77/17, para. 224).

2. The Commission agreed that model provisions, clauses, or other forms of legislative or non-legislative text could be prepared with shorter time frames, providing for appointment of experts and/or neutrals, confidentiality, and addressing the legal nature of the outcome of the proceeding. It was stressed that these texts shall be prepared with a view of the needs of prospective users, taking stock of currently available innovative solutions, and further extend the scope of the UNCITRAL Expedited Arbitration Rules (the "Expedited Rules") (A/77/17, para. 225).

3. At its seventy-sixth session (Vienna, 10–14 October 2022), the Working Group considered the draft model clauses on technology-related dispute resolution and adjudication and guidance material as prepared 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). Considering that the above-mentioned texts did not necessarily address technology-related dispute resolution or adjudication, it was stated that the texts could be presented more generally as those aimed to further accelerate and ensure effective dispute resolution. In that context, the Secretariat was requested to (i) illustrate how the model clauses and the guidance material would interact with existing UNCITRAL texts (for example, how the model clauses would modify the articles of the Expedited Rules and the timeline); (ii) ensure that the model clauses were prepared in a coherent manner; and (iii) suggest ways to present the guidance material (A/CN.9/1123, para. 94).

4. Accordingly, this Note presents revised draft model clauses and guidance material.

II. Draft model clauses

A. Need of business users for specialized and express dispute resolution

5. It was understood that parties could benefit from a specialized and express dispute resolution mechanism, involving a third party with relevant expertise, not necessarily resulting in a final award but the outcome still being enforceable across borders. This would allow disputing parties to tailor the proceedings to their needs to further expedite the proceedings. The said mechanism would take into account innovative solutions, as well as the use of technology, and further extend the use of the Expedited Rules (A/77/17, paras. 223–225).

6. Express dispute resolution is particularly needed for businesses that function on a project-by-project basis or are characterized by dynamic development with short life cycles such as start-ups. Such businesses require specialized and express dispute resolution because a long and costly arbitral proceeding runs the risk of stalling the project or prevents the businesses from continuing its operations due to uncertainties. Such businesses may also lack the time and the financial resources to go through the entire arbitral process. Furthermore, specialized industries, such as information

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

technology (“IT”) and construction, require decision makers in dispute resolution procedures to possess technical knowledge and insights about the workings of the industry. In the absence of such specialized knowledge, they may be unable to resolve disputes in an accelerated and correct manner.

7. To ensure that the model clauses are responsive to the needs of users, they should be easily accessible and integrable in dispute resolution clauses of a contract.

Express dispute resolution services available to users

8. Presently, there is a limited number of international dispute resolution services responding to the need for a specialized and express dispute resolution. Some of the dispute resolution services available to users include those provided by arbitral institutions.

9. The German Arbitration Institute (“DIS”) offers rules for expert determination[2] providing parties with an opportunity to obtain a preliminary binding decision on disputed issues. The expert decision becomes binding if no declaration of non-recognition is received by DIS within one month following receipt of such decision. The binding effect of the expert decision ceases if and insofar as it is set aside or altered by a subsequent arbitral tribunal or court proceedings. Not observing the binding effect of the determination is an intentional and severe contractual breach and the entitled party may seek performance or other remedies in an expedited arbitration proceeding if the parties have agreed to apply the DIS Arbitration Rules. Accordingly, the DIS expert determination results in a contractual obligation, that might be enforced, either in an expedited arbitration (if so agreed by the parties) or, alternatively, parties may have to rely on domestic courts to enforce the contractual undertaking to comply with the expert determination. Consequently, to make the decision enforceable across borders, an additional procedure is required.

10. Recently, the Arbitration Institute of the Stockholm Chamber of Commerce (“SCC”) started offering a service called SCC Express Dispute Assessment (SCC

[2] Under the DIS Rules on Expert Determination, the proceeding is initiated by a request sent to the DIS Secretariat and is generally to be completed within six months. Under this procedure a so-called “arbitration expert” is to be agreed upon jointly by the parties (section 6.1(1)). The parties may also request the DIS Secretariat to appoint the arbitration expert should they be unable to agree on one jointly (section 6.1(2)). This arbitration-expert shall be a lawyer, or in case the parties agree on a three arbitration experts’ panel, the chairperson shall be a lawyer (section 5.2). The arbitration expert shall be impartial and independent (section 6.5) and give “full opportunity” to the parties to present their case (section 16). The arbitration expert may issue a preliminary ruling, which loses its effect upon the rendering of the final decision by the arbitration experts (section 20.9). The non-observance of any ruling (preliminary (section 20.6) or final (section 22.2.)) is an “intentional and severe breach of contract”. If no party notifies DIS within a month following receipt of the decision by the arbitration expert, the decision becomes final and binding (and no longer subject to an “appeal” (..) “not even with the assertion of an obvious inequity or obvious incorrectness or a breach of the right to be heard or other procedural breach”, section 23.1 and 2). In case a declaration of non-recognition of the arbitration expert’s decision is made, both parties are entitled to file an arbitration (section 23.4). The DIS recommends combining the expert determination with an agreement on the application of the DIS Arbitration Rules so that if the binding decision by the arbitration-expert is not complied with, subsequent expedited arbitration proceedings shall be carried out (according to section 23.5). Additionally, the entitled party may seek the performance established by the arbitration-expert in a court proceeding (section 23.5). The DIS also offers the DIS Rules on Expertise, which enable parties to obtain a non-binding expert opinion within six months to clarify a specific issue in a dispute in the context of settlement negotiations or independently thereof. The principal difference between the proceedings under the DIS Rules on Expert Determination and the proceedings under the DIS Rules on Expertise is that in expertise proceedings the expert decision is not binding, it is thus a mere opinion with no legal effect. The parties, when they do not follow such an opinion, do not breach any contractual obligations. In practice, however, such opinions may play a significant role in fostering the dispute resolution process. See for further information: www.disarb.org/en/arbitration-and-alternative-dispute-resolution/expert-determination.

Express).[3] It has been specifically designed for quick dispute resolution between parties with an ongoing contract (and a good business relationship) wanting to solve their dispute to be "able to work quickly on a joint project", and who are "likely to accept the assessment without an enforceable judgement". The decision is rendered by a neutral legal expert within three weeks. Parties may agree to use this procedure for the settlement of disputes either at the conclusion of the contract or at a later stage. This assessment is neither enforceable nor binding on the parties, unless the parties explicitly consent to make it binding. Indeed, the idea is that the assessment would provide clarity to the parties and thereby allow them to move forward "in their contractual relationship". In brief, the SCC Express is intended to fill a gap in the dispute resolution spectrum by providing parties solely with an informative assessment within three weeks at low costs, and is not designed to result in an enforceable award.

11. Another possibility mentioned at the Working Group session (A/CN.9/1123, para. 66) was the combination of arbitration and expert determination[4] as a tiered dispute resolution procedure under which parties may first refer their dispute to arbitration, stay the arbitration proceeding and refer the issue to expert determination.[5] The result of such expert determination could be referred back to arbitration, where in case of an agreement by the parties, the expert determination could be transformed into a consent award, enforceable under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention").[6] Likewise, the parties could start with a mediation, refer to an expert determination, and agree on a mediated settlement resulting from mediation, enforceable under the United Nations Convention on International Settlement Agreements Resulting from Mediation. However, in case parties are willing to agree

[3] Under the SCC Rules for Express Dispute Assessment, the procedure is initiated by a request to SCC (article 4), which describes the dispute and the issues, upon which SCC is contacting the other party to give them an opportunity to respond (article 5). After having received the remaining fee, SCC appoints a neutral expert within 48 hours and refers the case to them (articles 6 and 7). The conduct of the assessment will be done in a way the neutral expert considers appropriate but giving each party an equal and reasonable opportunity to presents it case (article 7). The neutral expert can raise the question at this stage of whether the outcome should be binding on the parties. After three weeks, the neutral expert gives the written assessment to the parties (article 9). See for further information: https://sccarbitrationinstitute.se/en/our-services/scc-express. See also the "Guidelines to the SCC Rules for Express Dispute Assessment", available under: https://sccarbitrationinstitute.se/sites/default/files/2022-11/scc-express-guidelines_2021.pdf.

[4] See for instance the SIAC-SIMC Arb-Med-Arb Protocol by the Singapore International Arbitration Centre ("SIAC") and the Singapore International Mediation Centre ("SIMC"), which provides for the above-described three-stage process. The first stage is the initiation of arbitration proceedings before SIAC. After the exchange of the notice of arbitration and response to the notice of Arbitration, the arbitral tribunal then stays the proceedings and the case is submitted to mediation at SIMC. Mediation then takes place and must be completed within 8 weeks. In the third and final stage, if the case is resolved through mediation resulting in a mediated settlement agreement between the parties, the matter is referred back to arbitration in SIAC and the parties can then request the arbitral tribunal to record the settlement in the form of an enforceable consent award. If the case does not result in a mediated settlement, the arbitration proceedings resume. This protocol was an innovation introduced before the Singapore Convention was negotiated, with a view to providing for a mechanism that offers parties the advantages of mediation, while at the same time, leveraging the enforceability accorded by arbitration, namely to end the proceedings with a consent award. See for further information: https://simc.com.sg/dispute-resolution/arb-med-arb/ and https://siac.org.sg/the-singapore-arb-med-arb-clause.

[5] There is broad agreement that decisions issued from an expert determination, are not "awards made by arbitrators" and therefore cannot be recognized as an award under the New York Convention, see UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), art. 1, p. 13, para. 22.

[6] The New York Convention is silent on the question of its applicability to consent awards. During the Conference, the issue of the application of the Convention to such decisions was raised, but not decided upon and reported case law does not address this issue, see UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), art. 1, pp. 16–17, para. 36.

with the result of the expert determination, enforcement is probably not needed. Furthermore, the expeditiousness of an expert determination is not granted per se.

12. In view of the above, this Note provides two alternative options of model clauses for the consideration of the Working Group. Model clause A on highly expedited arbitration is built upon the framework of the Expedited Rules, with shorter time frames. The alternative model clause B provides for a multi-tier dispute resolution procedure, involving a quick determination by a neutral specialist, a possibility for parties to request enforcement of that specialist determination through arbitration, and the possibility of referring the dispute subsequently to arbitral review. Users could opt to incorporate either of these model clauses into their contracts. The two model clauses are discussed in further detail below.

B. Model clause on highly expedited arbitration (model clause A)

13. The Working Group may wish to consider the model clause on highly expedited arbitration, which is based on the Expedited Rules.[7] Model clause A modifies the articles of the Expedited Rules with shorter time frames, thus providing a highly expedited arbitration procedure. Shorter time frames will ensure expeditious resolution of any commercial disputes, controversies or claims arising out of contractual relationships, for example in the IT and construction industries. Furthermore, by using model clause A, parties can agree on the sole arbitrator or the appointing authority, and to also agree on experts jointly, or on an institution determining the experts. Subparagraphs (a), (b) and (d) of the model clause reflect the parties' agreement to modify the Expedited Rules, as permitted under article 1(1) of the UNCITRAL Arbitration Rules ("the UARs") and article 1 of the Expedited Rules.

Model clause A: Highly expedited arbitration

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:

(a) The sole arbitrator to be appointed in accordance with article 8 shall be (i) [name of a person or persons]; or (ii) appointed by [name of institution or person];

(b) Consultation in accordance with article 9 shall take place within [three days] of the constitution of the arbitral tribunal and shall address issues proposed by the parties prior to the consultation;

(c) Expert witnesses shall be presented jointly by the parties [including, name of a person or persons] or presented by [name of institution or person];

(d) The period of time for making the award in accordance with article 16, paragraph 1, shall be [a short period of time to be specified by the parties, for example, 60 or 90 days];

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

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

14. The model clause provides for various time saving measures. A significant source of potential delay in an arbitral proceeding is the constitution of the arbitral tribunal: subparagraph (a) therefore foresees that the parties agree on the name of the arbitrator, or at least on the appointing authority, preferably when concluding the contract. The parties may wish to appoint an arbitrator with technical expertise in the matter of the dispute. This may be beneficial as it may eliminate the need for additional experts and save time and costs for both parties. The generally time-consuming taking of evidence could be reduced if parties, as suggested in model

[7] The Expedited Rules include in its annex a model arbitration clause, which would be replaced by model clause A in the context of highly expedited arbitration.

clause A, subparagraph (c), would agree to present the expert jointly or at least agree on an institution who would present the expert.

15. Furthermore, model clause A, subparagraph (b), would reduce the time period within which the arbitral tribunal should consult the parties from 15 days in article 9 of the Expedited Rules to, for example, 3 days. This may encourage the arbitral tribunal and the parties to identify the key issues at a very early stage. Finally, model clause A, subparagraph (d), would reduce the overall deadline for the arbitration to be completed in, for example, 60 to 90 days.

16. The Working Group may wish to consider whether other time frames would need to be adjusted, such as the deadline for the submission of the response to the notice and statement of defence according to article 5 of the Expedited Rules. Such an approach might provide more clarity regarding the conduct of the arbitration but might unduly limit the flexibility to adjust the proceedings to the time constraints as provided for in model clause A, subparagraph (d).

17. Subparagraphs (e) and (f) have been added, as already foreseen in the model arbitration clause for contracts provided for in the annex to the Expedited Rules.

C. Model clause on multi-tier dispute resolution (model clause B)

18. Model clause B provides for a multi-tier dispute resolution mechanism, with the initial stage securing prompt payment or prompt performance of obligations, and making arbitration available at a later stage.

Model clause B: Multi-tier dispute resolution

Specialist determination

1. 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 a neutral specialist (specialist determination):

(a) The neutral specialist shall be (i) [name of a person or persons]; or (ii) appointed by [name of institution or person];

(b) The request for a determination by a neutral specialist shall contain a detailed description of the factual basis of the dispute and shall be communicated to the other party or parties as well as [any person or institution named under subparagraph (a)];

(c) The neutral specialist shall consult with the parties promptly and within [three days] of receipt of the request;

(d) Within [three days] of the consultation, the other party or parties shall communicate a response to the request containing its views;

(e) The neutral specialist shall render a determination within [21 days] from the response of the responding party;

(f) The determination by the neutral specialist will be binding on the parties and the parties shall comply with the determination.

Enforcement of the specialist determination

2. Any dispute, controversy, or claim arising out of or relating to the compliance of a party with a specialist determination shall be settled by arbitration in accordance with the UNCITRAL Expedited Arbitration Rules:

(a) The sole arbitrator to be appointed in accordance with article 8 shall be (i) [name of a person or persons]; or (ii) appointed by [name of institution or person];

(b) If the arbitral tribunal finds that a specialist determination has not been complied with, it shall render an award giving effect to the specialist determination,

within [a short period of time to be specified by the parties, for example, 10 days] after the constitution of the arbitral tribunal;

(c) Parties may only use the procedure under paragraph 2 until they have recourse to the procedure under paragraph 3 whether due to [any condition 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].

Arbitral review of the specialist determination

3. 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 specialist 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], after [any condition 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].

Specialist determination

19. Model clause B outlines in paragraph 1 the procedure for a specialist determination, a procedure distinct from arbitration. The parties agree to submit any dispute relating to their contract that may arise between them to a neutral specialist. The procedure is initiated by sending a request containing a description of the issues to the other party. This enables the other party to obtain an overview of the matters at issue, understand and assess the dispute.

20. Paragraph 1(a) provides for the appointment of a neutral specialist. Parties that have a long-standing relationship, such as long-term business partners, can specify a neutral specialist at the conclusion of the contract. However, the specification of the neutral specialist can also occur at a later stage, and should the parties be unable to appoint a neutral specialist jointly, they may refer to the institution designated in paragraph 1(a) to appoint one.

21. Paragraph 1(c) foresees a case management conference ("CMC"), within [three days] after the request was made, where the parties will have the opportunity to discuss the issues that need determination by the neutral specialist and take steps to ensure that the process moves swiftly.

22. Upon receiving the request for specialist determination, the other party has very little time to respond. The consultation envisaged in paragraph 1(c) provides for that party to be briefed, respond exactly to the issues at stake and provide a concise statement, so that the neutral specialist can make a determination. The other party has [three days] after the CMC to submit their written views on the request to the neutral specialist.

23. According to paragraph 1(e), the neutral specialist would have limited time, for example 21 days from the response within which they must render a determination.

24. Paragraph 1(f) places an obligation on the parties to comply with the determination of the neutral specialist (A/CN.9/1123, para. 60).

25. Unlike in arbitration, there is no underlying set of rules to govern the specialist determination procedure in paragraph 1. Such set of rules could guarantee procedural fairness and effectiveness by providing default rules for various contingencies that may arise during the procedure. Consequently, the Working Group may wish to consider whether and how these procedural safeguards could be incorporated in the present model clause. The Working Group may wish to expand the model clause above and include for instance provisions pertaining to the independence of neutral specialists, default clauses dealing with the inability of neutral specialists to perform their functions, relating to communication between the parties, or the conduct of the determination, such as the right to be heard and fairness of the procedure. This may,

however, result in the preparation of a new set of rules to govern the specialist determination procedure.

26. Alternatively, the Working Group may wish to ground such procedure in the UARs or the Expedited Rules, by including a clause stating that either of these sets of rules apply mutatis mutandis to the specialist determination procedure. Another option would be to keep the procedure simple as provided for in the model clause, as compliance with the specialist determination is voluntary in nature unlike an award rendered through arbitration. However, the latter approach might not guarantee procedural fairness considering the lack of procedural rules.

Enforcement of the specialist determination

27. Paragraph 2 provides a mechanism to guarantee compliance with the determination of the neutral specialist referred to in paragraph 1. As mentioned, the obligation to comply with a determination by a neutral specialist arises from paragraph 1(f) and therefore is a voluntary contractual undertaking. However, if one of the parties does not comply, the other party may refer the dispute about compliance to arbitration in order to give effect to the neutral specialist determination and render an enforceable award.

28. Paragraph 2 limits the jurisdiction of the arbitral tribunal formed under this paragraph to matters pertaining to compliance of the determination of the neutral specialist. Consequently, the arbitrator shall assess whether the parties had a contractual relationship, and whether, the parties had agreed to submit their dispute to the neutral specialist, including an agreement to comply with the determination of the neutral specialist. It may further be noted that compliance might be difficult to assess, especially if performance of an action, not related to a payment, is required.

29. Paragraph 2 provides for an arbitral proceeding based on the Expedited Rules and the consequent award possibly being enforceable under the New York Convention. Any discussion on the merits of the specialist determination shall be beyond the scope of the proceedings and may only be discussed during an arbitration under the procedure in paragraph 3.

30. According to subparagraph 2(c), the procedure under paragraph 2 is only available to the parties if they are unable to access the procedure under paragraph 3. This is to make sure that parties would not start a procedure under paragraph 2 if the conditions under paragraph 3 are already met, therefore preventing parallel proceedings.

31. According to article 8 of the Expedited Rules these proceedings shall be conducted before a sole arbitrator, which shall be appointed jointly by the parties or determined by an appointing authority as agreed by the parties. Parties may appoint this arbitrator (or determine the appointing authority) at the time of the conclusion of the contract or at a later stage.

Arbitral review of the specialist determination

32. Paragraph 3 provides a model clause for parties to refer to an arbitration with a broader scope than under paragraph 2, including with regard to the merits of the specialist determination on both the facts and the law. Any party shall have the right to request a review of the determination of the neutral specialist and submit the dispute to an arbitral tribunal. However, arbitration under paragraph 3 may only be initiated under the conditions as agreed by the parties, e.g. after the completion of the project which has given rise to the dispute or after the lapse of specified period, whichever comes first. This requirement is to ensure that the project is not delayed or halted by the arbitration.

33. It may be noted that the conditionality to initiate a proceeding under paragraph 3 might raise access to justice concerns, especially if parties refer only to the completion of the project. To cater for the possibility of the project of never being completed, paragraph 3 suggests specifying in any case a time period, beyond which

parties shall be able to access the procedure under paragraph 3 regardless of any additional conditionality specified by the parties.

34. One possible way to ensure compliance with the determination by a neutral specialist would be to require compliance as a condition for access to arbitration under paragraph 3 (A/CN.9/1123, para. 63). However, inserting such a requirement as a condition to access arbitration might raise due process concerns, stemming from undue limitation. This concern increases if the procedure under paragraph 1 does not provide the necessary procedural safeguard.

35. The absence of a compliance requirement to refer to arbitration under paragraph 3, however, raises the risk of parallel proceedings, as the non-complying party might initiate arbitration proceedings under paragraph 3, while the other party might initiate a proceeding under paragraph 2. The conditionality of the specified time period lapsing or any other condition, such as completion of the project, still raises the possibility of parallel proceedings, as one of the parties might not have complied with the specialist determination by the time the conditions of paragraph 3 are satisfied. Consequently, paragraph 2(c) addresses this concern by not allowing the initiation of an arbitration under paragraph 2 in such a case, but only allowing access to an arbitration under paragraph 3. The Working Group may consider whether if the conditions for a procedure under paragraph 3 are met, and a party is yet to comply, the non-compliance should be factored into the decision on costs during the full-fledged arbitration, especially in the absence of a commitment to comply.

36. The Working Group might wish to consider whether an additional paragraph should be included that the parties agree not to initiate any other dispute resolution proceedings, including judicial proceedings during the specified period or until the project is completed. Again, such limitation to initiate court proceedings might raise constitutional issues in view of access to justice, especially if the time period specified is lengthy or the project by the parties immense.

37. According to paragraph 3, it is up to the parties to decide whether the Expedited Rules or the UARs would apply to the process.

D. Model clause on experts (model clause C)

38. The Working Group may wish to consider the model clause on experts so that parties may resort to the use of experts to facilitate the determinations of the arbitral tribunal on technical matters.

39. This model clause would reflect the agreement of the parties on the procedure for the appointment of experts to assist the tribunals.

40. This model clause may be used in conjunction with the model clauses A and B, but also to supplement other arbitration procedures under the UARs or the Expedited Rules.

Model clause C: Experts

1. The expert to be appointed by the arbitral tribunal in accordance with article 29 of the UNCITRAL Arbitration Rules shall be (i) [name of person]; or (ii) appointed by [name of institution or person].

2. If the parties are unable to identify an expert jointly:

(a) The arbitral tribunal shall provide the parties with a list of prospective experts, out of which parties can refuse a certain number of candidates, rank the remaining ones and the experts with the highest ranking will be appointed by the arbitral tribunal; or

(b) The parties shall request [name of a person or institution to be specified by the parties jointly] to appoint an expert.

3. Expert witnesses and their statements, as referred to in article 27 of the UNCITRAL Arbitration Rules, shall be presented jointly by the parties. The arbitral tribunal shall take due account of such statements.

41. Paragraph 1 foresees that the arbitral tribunal appoints experts that have been jointly agreed by the parties.

42. Ideally, the parties would specify the expert jointly, or at least have nominated an institution to do so before the dispute arises. However, should the parties be unable to jointly specify an expert, then paragraph 2 provides two possible alternatives. According to paragraph 2(a) the tribunal may provide the parties with a list of possible experts. The parties may then refuse some candidates and rank the remaining ones. The tribunal may then appoint the expert with the highest ranking. Alternatively, under paragraph 2(b), the parties could also leave this choice to an individual or to an institution. The individual could be either named or identified on the basis of their position, such as the secretary-general or similar person of authority in an arbitral institution.

43. Paragraph 3 stipulates that expert witnesses and their statements in accordance with article 27(2) of the UARs shall be submitted jointly by the parties for the consideration of the arbitral tribunal.

E. Model clause on confidentiality (model clause D)

44. A number of disputes require discretion by all parties involved, especially technology-related disputes. Consequently, this model clause addresses confidentiality.

45. This model clause may be used in conjunction with the model clauses A and B, but also to supplement other arbitration procedures under the UARs or the Expedited Rules.

Model clause D: Confidentiality

1. All aspects of the proceedings that are not in the public domain 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 [neutral specialist or arbitral tribunal – as specified by the parties based on the proceedings] and the parties shall seek the same undertaking of confidentiality in writing from all those that they involve in the proceeding.

46. Paragraph 1 places an obligation on the parties and the decision maker in the proceedings (i.e. the neutral specialist or the arbitral tribunal) to keep confidential all aspects of the proceedings. However, the paragraph also provides for exceptions to the obligation of confidentiality, including a legal duty, to protect a legal right, or in relation to legal proceedings before a court or other competent authority (see A/CN.9/1123, para. 73).

47. Paragraph 2 recognizes that there may be others involved throughout the course of the proceedings, and ensures that all those involved will be under an obligation to maintain confidentiality. The legal representatives, witness of fact, experts, or service provider will be requested to sign an undertaking of confidentiality (A/CN.9/1123, para. 74).

III. Draft guidance on inbound confidentiality and evidence

48. This section provides guidance text on inbound confidentiality (A/CN.9/1123, para. 77) and on evidence (A/CN.9/1123, para. 92).

A. Guidance on inbound confidentiality

49. The Working Group may wish to consider the following guidance text on inbound confidentiality.

1. Confidentiality concerns may arise in respect of information of intrinsic value (such as trade secrets, know-how, algorithms, or any other proprietary information) regardless of the medium in which it is expressed and which the party would not want to disclose neither to the tribunal nor to the opposing parties (including their legal representatives) or both. During a case management conference, the parties and the tribunal may decide how to treat such information. One way would be to classify such information as "confidential" within the proceedings.

2. Information that is (i) in the possession of a party; (ii) inaccessible to the public or to the opposing parties; and (iii) of a commercial, scientific or technical sensitivity, or treated as confidential by the party in possession of the information, can be considered as confidential information.

3. A party invoking the confidentiality should submit a request to the arbitral tribunal to have the information classified as confidential. The party making such a request shall provide justifiable reasons for making the request but would, of course, not be required to disclose the substance of the information.

4. Upon receipt of such a request and after inviting the other party to express their views, the arbitral tribunal may determine whether the information is to be classified as confidential. In making the determination, the arbitral tribunal shall consider whether in the absence of a measure to protect the confidential nature of the information, it would likely cause serious harm to the party making the request. The arbitral tribunal shall also consider whether disclosure is necessary to maintain the fairness of the procedure or if classifying certain information as confidential would unduly undermine the ability of a party to comment on the evidence submitted. After balancing these considerations, the tribunal may relieve a party, or not, of its obligation to disclose the substance of information and/or may decide whether the fact for which the confidential information could serve as evidence shall be taken as proven.

5. Should the party wish to keep confidential certain information from the arbitral tribunal and/or the other party, the arbitral tribunal may designate a confidentiality expert to make the determination. The tribunal may appoint a confidentiality expert in accordance with article 29 of the UNCITRAL Arbitration Rules, to report to it on the basis of the confidential information on specific issues designated by the arbitral tribunal without disclosing the confidential information either to the party from whom the confidential information does not originate or to the arbitral tribunal.

B. Guidance on evidence

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

1. Evidence produced in an arbitral proceeding may involve significant technology and/or digital processes. As such, the arbitral tribunal and the parties may need to adapt the gathering, presentation, and evaluation of evidence to the circumstances of the case, while protecting due process and ensuring efficiency.

2. Article 15 of the UNCITRAL Expedited Arbitration Rules as well as article 27(3) of the UNCITRAL Arbitration Rules should be understood so that the phrase "documents, exhibits or other evidence" includes "data" and "technical information". This is to clarify and ensure that flexibility is provided to the parties and the arbitral tribunal with regard to evidence in disputes relating to technology.

Note to the Working Group: The Working Group may wish to consider whether "metadata" needs to be included alongside "data" and "technical information", or whether metadata is to be considered data.

3. The arbitral tribunal may wish to consider taking of evidence in the form of an experiment and a demonstration of a process. An experiment or a demonstration could be performed or repeated in the presence of the arbitral tribunal, the parties and or tribunal-appointed expert as part of the proceedings.

4. The arbitral tribunal may consider requiring the parties to disclose the use of technology in collecting, processing, and presenting evidence, or complying with an order of the tribunal. Upon disclosure, the arbitral tribunal may seek the views of other parties and determine whether such use would be acceptable. The arbitral tribunal should also take into account the possible use of emerging technologies in taking evidence and guard against potentially adverse impacts.

5. If the arbitral tribunal has reasonable doubts that a party has submitted falsified or manipulated evidence, it may request that party to provide proof to confirm the legitimacy of the submitted evidence.

6. The arbitral tribunal may take the necessary steps in case of reasonable doubts that evidence is falsified or manipulated, including but not limited to, ordering an inspection of the submitted evidence or disregarding the falsified evidence.

C. Presentation of the guidance material

51. The Working Group had requested the Secretariat to suggest ways to present the guidance material (A/CN.9/1123, para. 94) outlined in sections A and B. Accordingly, this section suggests four possible ways for the consideration of the Working Group. The guidance material may be presented as:

(a) A stand-alone instrument;

(b) A stand-alone instrument consisting of the model clauses in chapter II and the guidance material;

(c) An addition to the Explanatory Note to the Expedited Rules; or

(d) an additional note or an addition to the existing notes of the UNCITRAL Notes on Organizing Arbitral Proceedings.

52. Should the Working Group wish to present the guidance material as a stand-alone instrument, it shall have the advantage of added visibility, given the ease of accessibility. However, it might be difficult for users to assess the context of the project. If the guidance material is published in conjunction with the model clauses, users would be able to access the material on specialized express dispute resolution altogether.

53. Alternatively, if the Working Group wishes to include the guidance material in the Explanatory Note to the Expedited Rules, then users of the Expedited Rules may be able to quickly access them. However, the guidance texts are not drafted to apply only in the context of an arbitration under the Expedited Rules and an inclusion in the Explanatory Note might therefore be confusing.

54. The Working Group may as well consider presenting the guidance material in the Notes on Organizing Arbitral Proceedings. The guidance on confidentiality may be added as a new subparagraph to section 6 entitled, "Possible agreement on

confidentiality; transparency in treaty-based investor-State arbitration" and the guidance on evidence may be inserted after section 15 as section 15(a) "Types of experts and selection". Alternatively, the guidance material may also be inserted together as a new note at the end of the text.

IV. Way forward

55. The Working Group may wish to consider naming 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.

56. In light of the above, a possible name for this procedure could be express expert dispute resolution. Alternatively, to emphasize that the model clauses could be utilized by specialized businesses, where technical knowledge is required, the name could be: Specialized Express Dispute Resolution (with the acronym "SpEDR"). Both names would cover the essence of the prospective dispute resolution procedure and its salient features.