The UNCITRAL Draft Provisions for Technology Related Disputes

Draft provision 1
Definition

1. Technology dispute means a dispute arising out of or relating to the supply, procurement, research, development, implementation, licensing, commercialization, distribution, financing, as well as to the existence, scope, and validity of legal relationships of or related to the use of emerging and established technologies.

2. Technology disputes may be varied in nature and arise out of ownership (including intellectual property rights in a specific technology), licensing terms, payment or financial issues, non-competition (unfair competition or non-competition), confidentiality (data privacy, non-disclosures), or regulatory issues.

Draft provision 2

Number of arbitrators

Unless otherwise agreed by the parties, there shall be one arbitrator.

Draft provision 3
Case management conferences

1. As soon as possible after the constitution of the arbitral tribunal, and before any oral hearing, the arbitral tribunal shall hold an initial case management conference to consult with the parties on the manner in which it will conduct the arbitration to avoid unnecessary delay and expense and to provide a fair and efficient resolution of the dispute. To the extent possible, a case management conference should be attended by the representatives of the parties including, where appropriate, the parties' internal technology experts.

2. At the initial case management conference, the arbitral tribunal should discuss, in particular, the following:

(a) The nature of the technology-related issues presented in the dispute, including the production and management of electronically stored information, and other case-specific technology matters;

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

(c) Confidentiality and disclosures;

(d) The identification of contested and uncontested facts, including those relating to technology;

(e) The structuring and the appropriate phasing of the proceedings;

(f) The management of the technology issues in response to the needs of each phase, including the early exchange of relevant information and the exchange of information necessary to address the prospects of an early resolution or settlement of the dispute;

(g) The taking of expert evidence in the light of the technical issues in the dispute and in particular, the taking of expert evidence through party-appointed expert witnesses, tribunal-appointed experts and/or other forms of expert evidence;

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

(i) Any other issues in relation to the resolution of the dispute, including the prospects of an early resolution or settlement of the dispute.

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

4. In order to understand the dispute, the arbitral tribunal may ask any questions to the parties and the experts throughout the proceedings.

5. The arbitral tribunal may, after inviting the parties to express their views and taking into account the circumstances of the case, utilize any technological means as it considers appropriate to convene a case management conference pursuant to paragraphs 1 and 3.

Draft provision 4
Time frames

1. Any supplement to the notice of arbitration, including all supporting evidence, should be communicated within five days following the initial case management conference. In case, witness evidence is offered, the supplement must include the list of witnesses.

2. A reply to any supplement shall be communicated within five days after the receipt of the supplement. It shall include all supporting evidence, and if witness evidence is offered, the list of witnesses.

Draft provision 5
Appointment of experts and neutrals

1. Considering the needs and complexities of the dispute, it may be appropriate and necessary to appoint experts and neutrals to expeditiously assist the arbitral tribunal with matters such as the details and scope of the technology in dispute or the intricacies of damage calculations, and to provide an expert determination on specific issues. A party may request permission to appoint such an expert or neutral or the arbitral tribunal may determine that such assistance is required.

2. When so required, the arbitral tribunal will provide additional or alternative directions, including but not limited to directions for the service of written evidence from the appointed expert or neutral. When providing such directions, consideration shall be given to the following:

(a) Accessibility of the parties to counsel with the appropriate technological and related fields expertise;

Draft provision 5 (Cont.)

(b) The type of a suitable independent expert or neutral, the need for technical and/or damage-based expertise and other qualifications, and geographic locations;

(c)The experience and qualification of the arbitrator(s);

(d) Any time frame including those agreed between the parties;

(e) The structure of the expert determination and timetable of matters subject thereof (including discovery and the scope of discovery); and

(f) Any enhanced confidentiality or data-security requirements.

3. An expert or neutral appointed by the arbitral tribunal shall be independent of the parties and shall submit a signed declaration to that effect in its report.

4. The parties will provide the expert or neutral with all relevant information, documentation, coding, and products, including the organization of site visits if necessary. If a party fails to do so, the arbitral tribunal may order such access as appropriate to the circumstances.

5. Unless otherwise agreed by the parties and subject to any applicable law, the expert or neutral's report shall be admissible in any judicial or arbitral proceedings between the same parties.

6. The expert or neutral's findings are not binding on either party. However, the findings can be used by the parties as a basis for negotiations with a view to reaching a settlement of their dispute or narrowing their differences.

7. If asked by any party, or ordered by the arbitral tribunal, the expert or neutral shall attend any hearing/pre-hearing at which reasonable and relevant question may be put to them about their report.

8. The fees and expenses of any expert or neutral appointed by the arbitral tribunal shall form part of the cost of arbitration.

9. Subject to any applicable law, the parties may agree on, or the arbitral tribunal may direct the use of an early determination or neutral evaluation on one or more aspects of the dispute. In that case, the expert or neutral's findings shall constitute a contractually binding expert determination for the relevant aspects of the dispute. For the avoidance of doubt, such an expert or neutral is not an arbitrator, and their findings are not enforceable as an arbitral award.

Draft provision 6
Confidentiality

- 1. Unless expressly agreed otherwise, the parties undertake to keep confidential all awards and orders in the arbitration, together with the existence of the arbitration, all materials produced in and/or generated during the proceedings which are not otherwise in public domain, including materials created for the purpose of the arbitration and all other documents or evidence given by a party, witness, or expert, except and to the extent that a disclosure may be required:
- (a) To enforce or challenge an award in legal proceedings before a judicial authority or to pursue a legal right;
- (b) To comply with the provisions of the laws of any State, which are binding on the party making the disclosure;
- (c) To any government body, regulatory body, court or tribunal where the party is obliged by the law to disclose the above-mentioned information; or
- (d) To a professional or any other adviser of any of the parties, including any potential witness or expert.
- 2. The undertaking in paragraph 1 also applies to the arbitrators, and any person appointed by the arbitral tribunal, including any expert, and any administrative secretary to the arbitral tribunal. The parties shall seek the same undertaking of confidentiality from all those that it involves in the arbitration, including but not limited to any authorized representative, witness of fact, expert, or service provider.

Draft Provision 6 (Cont.)

3. The deliberations of the arbitral tribunal shall be confidential. The parties shall acknowledge this confidentiality and undertake to protect it.

4. The arbitral tribunal may take appropriate measures and sanction a party through an order or an award if a party breaches the duties in this draft provision.

5. A party intending to make disclosure in accordance with paragraph 1 must within a reasonable time prior to the intended disclosure notify the arbitral tribunal and the other parties (if during the proceeding) or the other parties (if the disclosure is after the conclusion of the proceeding) and furnish details of the disclosure including the reasons for the disclosure.

6. The duties in this draft provision shall survive the termination of the proceedings.

7. The arbitral tribunal may, in consultation with the parties, adopt any measure:

(a) To protect any physical and electronic information shared in the arbitration; and

(b) To ensure any personal data produced or exchanged in the arbitration is processed and/or stored in light of any applicable law.

Draft provision 7
Confidential Information

1. For the purposes of this draft provision, confidential information means any information, regardless of the medium in which it is expressed, which is:

(a) In the possession of a party;

(b) Not accessible to the public;

(c) Of commercial and/or scientific and/or technical sensitivity; and

(d) Treated as confidential by the party possessing it.

2. A party invoking the confidentiality of any information it wishes or is required to submit during the proceeding, including to an expert appointed by the tribunal, shall request the arbitral tribunal to have the information classified as confidential with a copy to the other parties. Without disclosing the substance of the information, the party shall give the reasons for which it considers the information confidential. The other parties shall be given a reasonable opportunity to state its views. Upon receipt of any such request, the arbitral tribunal may invite the relevant parties to consult with each other with regard to the request.

3. If the other parties do not agree with the request, the arbitral tribunal shall determine whether the information is to be classified as confidential and of such a nature that absent special protection measures it would likely cause serious harm to the party making the request. If the arbitral tribunal so determines, it shall decide under which conditions and to whom the confidential information may in part or in whole be disclosed and shall require any person to whom the confidential information is to be disclosed to sign a confidentiality undertaking.

4. In exceptional circumstances, the arbitral tribunal may, at the request of a party or on its own motion and after consultation with the parties, designate an advisor to make the determination in accordance with paragraph 3.

5. The arbitral tribunal may also, at the request of a party or on its own motion and after consultation with the parties, appoint a person as an 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.

Draft Provision 8
Evidence

1. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits, data, technical information, or other evidence within such a period of time as the arbitral tribunal shall determine.

2. At any time during the arbitral proceedings the arbitral tribunal may order that evidence be taken or that an experiment be performed or repeated in the presence of or by the arbitral tribunal, the parties or an expert appointed by the arbitral tribunal.

3. Each party shall disclose to all parties and the arbitral tribunal the use of technology including artificial intelligence for the purpose of collecting or presenting evidence or complying with an order of the arbitral tribunal. Upon such disclosure, any party may request that the use of such technology be limited, and the arbitral tribunal may refuse or allow it in view of the circumstances of the case.

Draft Provision 9
Period for Making Award

1. If the arbitral tribunal determines that an award could be rendered based on written statement only without hearing the witnesses or hearing a limited number of witnesses, the award may be rendered within 20 days of the constitution of the arbitral tribunal.

2. Except as provided in paragraph 1 and unless otherwise agreed by the parties, the award shall be made within 40 days from the date of the constitution of the arbitral tribunal.

3. The arbitral tribunal may, in exceptional circumstances and after inviting the parties to express their views, extend the period of time established in accordance with paragraph 2. The extended period of time shall not exceed a total of 60 days from the date of the constitution of the arbitral tribunal.

4. If the award is not rendered within the established period of time, the fee of the arbitrator will be reduced as follows, unless otherwise agreed by the parties and the arbitral tribunal:

(a) Delay of up to 14 days: 20 per cent

(b) Delay between 15 and 30 days: 50 per cent

(c) Delay between 31 and 60 days: 70 per cent

(d) Delay of more than 60 days: 90 per cent

PRESENTING WITNESS TESTIMONY IN U.S. *DOMESTIC* ARBITRATION: SHOULD WRITTEN WITNESS STATEMENTS BECOME THE NORM?

*Raymond G. Bender**

I. INTRODUCTION

The direct testimony of fact witnesses in international arbitration is routinely presented in written rather than oral form. Written statements are intended to reflect the detailed testimony that a witness would offer if questioned orally at an arbitration hearing. The statements are typically signed by the witnesses, often under affidavit, and are exchanged with the other parties prior to the hearing. Each witness providing written direct testimony then will appear at the hearing for examination by the other side's counsel and the arbitrators.

This prevailing practice in international arbitration has not been embraced widely by advocates in U.S. domestic arbitration. There may be sound reasons for not wanting to use written witness statements in the context of any given dispute. But many arbitration advocates trained in U.S. court litigation appear to be unfamiliar with the use of written testimony, or they are unwilling to relinquish the common practice of presenting witness testimony live via the question-and-answer format. [1]

This article focuses on written witness statements in arbitration and highlights notable advantages that can be gained by their use. Among other things, presenting the direct testimony of fact witnesses in writing can streamline an arbitration hearing and afford significant

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[1] When used in arbitration (or other proceedings), written witness statements generally present the testimony of witnesses under the control of the sponsoring party, but not of witnesses who are hostile or require the issuance of a subpoena.

efficiencies and cost savings. Countervailing factors may, of course, weigh against using written statements in some instances, but a new and searching look by U.S. counsel and arbitrators could instill a greater appreciation for written witness statements and a wider acceptance of their use in U.S. domestic arbitration.[2]

II. WRITTEN WITNESS STATEMENTS IN INTERNATIONAL ARBITRATION

It is now common in international arbitration to exchange the written direct testimony of fact witnesses with opposing counsel and arbitrators in advance of the hearing. The use of witness statements is normally conditioned on the witness' appearance at hearing to be cross-examined by opposing counsel and questioned by the arbitrators. To some extent, this procedure reflects a convergence in international arbitration of different common law and civil law practices concerning the presentation of evidence generally.

In a common law system, such as in the United States, it is customary for advocates to present their witnesses live for questioning on direct examination, and then to offer those witnesses for cross-examination by opposing counsel. Civil law systems, in contrast, place greater emphasis on documentary evidence. Written witness statements might be used, and oral testimony may be permitted, but the questioning of witnesses in civil law jurisdictions ordinarily is pursued solely by the judge, although lawyers may suggest specific questions for a judge to pose. Cross-examination of witnesses by opposing counsel generally is not favored in civil law proceedings. [3]

Efforts to harmonize these practices in the context of international arbitration—which often includes parties, counsel and arbitrators

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[2] The usual practice regarding *expert witnesses* (as opposed to *fact witnesses*) in both domestic and international arbitration is for parties to exchange written expert witness reports in advance of an arbitration hearing, with the experts then appearing at the hearing for examination by the other side. A wider use of the same format for fact witnesses in U.S. domestic arbitration may serve the process and parties in meaningful ways.

[3] For discussions of the differences between common law and civil law legal systems regarding the presentation of evidence, *see* Siegfried H. Elsing and John M. Townsend, *Bridging the Common Law Civil Law Divide in Arbitration*, Arbitration International, Vol. 18, No. 1, LCIA (2002); and John Anthony Wolf and Kelly M. Preteroti, *Written Witness Statements—A Practical Bridge of the Cultural Divide*, Dispute Resolution Journal (May-July 2007).

from different legal cultures—led to an increasing use of written witness statements for direct testimony, followed by cross-examination of the witnesses by counsel for the other parties. A recent study on the views of in-house counsel, private practitioners and arbitrators involved in international arbitration reported that, over the prior five years, fact witness evidence was offered by exchange of written witness statements in a significant majority of arbitrations (87%), together with either direct examination at the hearing (48%) or limited or no direct examination at the hearing (39%).[4] In contrast, fact witness evidence was offered solely by oral testimony in only 13% of arbitrations.[5] Moreover, 59% of survey respondents believe that the use of written witness statements as a substitute for oral direct examination at the hearing is generally effective.[6]

Witness statements can be defined as "detailed presentations in writing of the testimony, including references to documents that are also presented, that a witness would give if questioned before the tribunal."[7] More specifically, the IBA Rules on the Taking of Evidence in International Arbitration delineate the items that should be included in each witness statement:

> (a) the full name and address of the witness, a statement regarding his or her present and past relationship (if any) with any of the Parties, and a description of his or her background, qualifications, training and experience, if such a description may be relevant to the dispute or to the contents of the statement;
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> (b) a full and detailed description of the facts, and the source of the witness's information as to those facts, sufficient to serve as that witness's evidence in the matter in dispute. Documents on which the witness relies that have not already been submitted shall be provided;

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[4] *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process*, White & Case LLP and the School of International Arbitration, Queen Mary University of London, at 24 (2012).

[5] *Id.*

[6] *Id.* at 25.

[7] CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration (2009), at 12.

(c) a statement as to the language in which the Witness Statement was originally prepared and the language in which the witness anticipates giving testimony at the Evidentiary Hearing;

(d) an affirmation of the truth of the Witness Statement; and

(e) the signature of the witness and its date and place.[8]

Today, most international arbitration rules envision the use of written statements to present direct testimony of fact witnesses, coupled with the witness's appearance at hearing for cross-examination and arbitrator questions. The rules of the AAA's International Center for Dispute Resolution (ICDR) provide, for example, that:

> Unless otherwise agreed by the parties or directed by the tribunal, evidence of witnesses may be presented in the form of written statements signed by them. In accordance with a schedule set by the tribunal, each party shall notify the tribunal and the other parties of the names of any witnesses who have presented a witness statement whom it requests to examine. The tribunal may require any witness to appear at a hearing. If a witness whose appearance has been requested fails to appear without valid excuse as determined by the tribunal, the tribunal may disregard any written statement by that witness.[9]

The London Court of International Arbitration (LCIA) rules provide that "[s]ubject to any order otherwise by the Arbitral Tribunal, the testimony of a witness may be presented by a party in written form, either as a signed statement or like document," and "[t]he Arbitral Tribunal and any party may request that a witness, on whose written testimony another party relies, should attend for oral questioning at a hearing before the Arbitral Tribunal." [10]

The International Chamber of Commerce (ICC) rules include references to written witness statements, and the ICC Commission Report on Controlling Time and Costs in Arbitration provides that

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[8] Article 4.5 of the IBA Rules on the Taking of Evidence in International Arbitration (2010) (IBA Rules).

[9] Rule 23.4 of the ICDR International Arbitration Rules (2014).

[10] Articles 20.2 and 20.4 of the LCIA Arbitration Rules (effective October 1, 2014).

"[w]hen appropriate, witness statements can substitute for direct examination at a hearing."[11]

The Stockholm Chamber of Commerce arbitration rules state that "[t]he testimony of witnesses…may be submitted in the form of signed statements," and that "[a]ny witness …on whose testimony a party seeks to rely, shall attend the hearing for examination, unless otherwise agreed by the parties."[12]

The Singapore International Arbitration Center (SIAC) rules provide that "[t]he Tribunal may direct the testimony of witnesses to be presented in written form, either as signed statements or sworn affidavits or any other form of recording" and that, subject to the tribunal's discretion, "any party may request that such a witness should attend for oral examination."[13]

As reflected in these and other international rules, witnesses who submit written direct testimony generally are expected to appear at a hearing for cross-examination and tribunal inquiries. Indeed, knowledgeable commentators have observed that cross-examination is now the norm in international arbitration.[14] Parties can agree, of course, to waive cross-examination, which might occur in the case of secondary witnesses whose testimony is straightforward and non-controversial.

Some international arbitration rules authorize the tribunal to condition the use of written statements on the witness' appearance at hearing for cross-examination. For example, the rules of the World Intellectual Property Organization (WIPO) provide that the testimony of witnesses may be submitted in written form, "in which case the Tribunal may make the admissibility of the testimony conditional upon the witnesses being made available for oral testimony."[15] Similarly, JAMS international Rule 24.4 states that, in the discretion of the tribunal, "the presentation of witness testimony in the form of written

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[11] *See e.g.,* ICC Rules of Arbitration Article 24(1) and Appendix IV(e) (2012), and ICC Commission Report on Controlling Time and Costs in Arbitration at 14 (2012).

[12] Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (Stockholm Chamber), Article 28(2) and (3) (2010).

[13] Rule 22.4 of the SIAC Arbitration Rules (2013).

[14] *See e.g.*, William W. Park, *Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion*, Mealey's Intl. Arb. Rep. (Vol. 19, Issue #5) 30 (2004), at 37.

[15] Article 56(d) of the WIPO Arbitration Rules (2014).

statements may be made conditional upon the witnesses' appearance for the purpose of cross-examination."[16] The Stockholm Chamber rules state unequivocally that any witness on whose testimony a party seeks to rely "*shall attend a hearing for examination*, unless otherwise agreed by the parties."[17]

Other international rules permit the tribunal to consider written witness statements even in circumstances where a witness fails to appear for cross-examination, provided there is a valid reason or other exceptional circumstance. The ICDR Rules provide, for example, that "[i]f a witness whose appearance has been requested fails to appear *without a valid excuse* as determined by the tribunal, the tribunal may disregard any witness statement by that witness," inferring that the tribunal may still consider a written statement if the witness offers a legitimate reason for not appearing.[18] Similarly, the IBA Rules provide:

> If a witness whose appearance has been requested pursuant to Article 8.1 fails *without a valid reason* to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Witness Statement related to that Evidentiary Hearing by that witness unless, *in exceptional circumstances,* the Arbitral Tribunal decides otherwise.[19]

Other rules state that if a witness fails to attend a hearing, the tribunal may disregard or exclude his or her written testimony altogether, or may discount the weight it places on such testimony.[20]

Civil law arbitrators possibly may be more inclined than common law arbitrators to admit a written witness statement into evidence if the witness, for a valid reason, were unable to appear at a hearing for cross-

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[16] Article 24.4 of the JAMS International Arbitration Rules (2011).

[17] Article 28(3) of the Arbitration Rules of the Stockholm Chamber (2010) (emphasis added).

[18] Article 23.4 of the ICDR Rules (emphasis added).

[19] Article 4.7 of the IBA Rules (emphasis added).

[20] *See* Article 20.4 of the LCIA Rules ("If the Arbitral Tribunal orders that other party to secure the attendance of that witness and the witness refuses or fails to attend the oral hearing without good cause, the Arbitral Tribunal may place such weigh on the written testimony or exclude all or any part thereof altogether as it considers appropriate in the circumstances."); and Rule 22.4 of the SIAC Arbitration Rules ("If the witness fails to attend, the Tribunal may place such weight on the written testimony as it thinks fit, disregard it or exclude it altogether.").

examination. This approach is consistent with the higher value civil law systems place on documentary evidence (over witness testimony), and on the relative dislike of cross-examination by civil law attorneys. In common law systems, on the other hand, especially in the United States, cross-examination of witnesses has become so engrained as a fundamental due process right that many common law arbitrators would be reluctant to accept a written witness statement if the witness fails to appear at hearing.[21] In any event, most international arbitration rules afford arbitrators broad discretion to reject a witness statement entirely, or discount its weight, if a witness does not submit to an opposing party's cross-examination.

Although written witness statements are a mainstay of international arbitration, they still are not utilized widely in U.S. domestic arbitration.

III. PRESENTING DIRECT TESTIMONY IN WRITING IS COMMON IN OTHER U.S. CONTEXTS

The use of written witness statements has long been used effectively in various federal and state administrative proceedings. For example, in the 1970's and 1980's, this author represented numerous parties in contested licensing proceedings before Administrative Law Judges of the Federal Communications Commission (FCC). It was standard practice in those cases to exchange the direct testimony of witnesses in writing in advance of the hearing, subject to cross-examination by opposing counsel at the hearing. This procedure was viewed generally by FCC litigators to be beneficial and effective in the context of contested, often high-stakes cases for the award of valuable broadcast and other communications-related licenses.

The adoption of written direct testimony as a civil trial convention also is gaining ground in U.S. courts.[22] For example, it was reported

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[21] *See* The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration, at 438 (James M. Gaitis *et. al*. eds., 3rd ed. 2014) ("CCA Best Practices") which states: "If a witness fails to appear, arbitrators should invite counsel to give their views on the appropriate action to be taken. In the absence of a waiver of the right of cross-examination, a witness statement that has not been subjected to cross-examination should bear no weight," but which also provides that "[w]hen specific guidelines such as the IBA Rules have been adopted, those guidelines may determine how the tribunal should or must proceed."

[22] *See* Marc C. Goldstein, *Written Direct Testimony Gains Favor in US Courts: A Precursor for Domestic Arbitration Hearing Practice* (2011), available at http://arbblog.lexmarc.us/2011/05/written-direct-testimony-gains-favor-in-us-courts.

that at least eight of the sixteen U.S. District Court Judges for the Southern District of New York provide in their individual rules of practice that in civil non-jury trials the direct testimony of witnesses under the control of a party "shall be" by written witness statement, subject to cross examination by the adverse party.[23] For example, the Rules of District Judge Ronnie Abrams provide that in non-jury cases the parties shall "submit to the Court and serve on opposing counsel…copies of affidavits constituting the direct testimony of each trial witness, except for the direct testimony of an adverse party, a person whose attendance is compelled by subpoena, or a person whom the Court has agreed to hear direct testimony live at the trial."[24] Within three business days after submission of such affidavits, "counsel for each party shall submit a list of affiants whom he or she intends to cross-examine at the trial" and "[o]nly those witnesses who will be cross-examined need to appear at trial."[25]

The rules or protocols of various U.S. domestic arbitration institutions permit the use of written witness statements in lieu of oral direct testimony. The AAA Commercial Rules provide, for example, that an arbitrator may "allow for the presentation of evidence by alternative means including…means other than an in-person presentation," and that such alternative means "must afford a full opportunity for all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute and, when involving witnesses, provides an opportunity for cross-examination."[26] The AAA Commercial rules also provide as follows:

> R-35. Evidence by Written Statements and Post-Hearing Filing of Documents or Other Evidence
>
> (a) At the date agreed upon by the parties or ordered by the arbitrator, the parties shall give written notice for any

[23] *See Id.* at 1, noting that such rules can be viewed on the court's website at www.nysd.uscourts.gov/judges.

[24] Individual Rules & Practices in Civil Cases, Hon. Ronnie Abrams, United States District Judge, § 6.C.iv (Dec. 11, 2013), available at www.nysd.uscourts.gov/judge/Abrams. As a practical matter, written witness statements are utilized in arbitration or other proceedings to present the testimony of witnesses under the control of the sponsoring party, and not for witnesses who are hostile or who may require the issuance of a subpoena.

[25] *Id. See also* Individual Rules of Practice of Hon. Colleen McMahon. U.S. District Judge, at 12-13 (Nov. 26, 2013), available at www.nysd.uscourts.gov/judge/McMahon.

[26] Rule R-32(c) of the AAA Commercial Arbitration Rules (2013).

> witness or expert witness who has provided a written witness statement to appear in person at the arbitration hearing for examination. If such notice is given, and the witness fails to appear, the arbitrator may disregard the written witness statement and/or expert report of the witness or make such other order as the arbitrator may consider to be just and reasonable.[27]

The CPR Arbitration Rules (both administered and non-administered) state that the testimony of witnesses "may be presented in written and/or oral form as the Tribunal may determine is appropriate."[28] A related CPR protocol on the presentation of witnesses provides that each witness who has provided a written witness statement "*must* appear for examination at the evidentiary hearing by the opposing parties and the tribunal unless the parties and the tribunal agree otherwise," and that "[t]he tribunal may disregard the statement of any witness who fails to appear in support of it."[29]

The JAMS Comprehensive Arbitration Rules also appear to permit the use of written direct testimony under Rule 22 (e), which provides that an arbitrator may in his or her discretion "consider witness affidavits or other recorded testimony even if the other Parties have not had the opportunity to cross-examine, but will give that evidence only such weight as he or she deems appropriate."[30]

Despite this authority in U.S. arbitration rules, there appears to be a continuing reluctance to use written witness statements regularly in U.S. domestic arbitration. Perhaps this is understandable in the case of U.S. litigators who do not practice routinely in international arbitration

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[27] Rule R-35(a) of the AAA Commercial Arbitration Rules (2013).

[28] Rule 12.2 of the CPR Administered Arbitration Rules (2013) and Rule 12.2 of the CPR Non-Administered Arbitration Rules (2007).

[29] CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration, Section 2(a)2 (2009) (emphasis added).

[30] Rule 22(e) of the JAMS Comprehensive Arbitration Rules (2014). Whether this JAMS rule encompasses written direct case witness statements is somewhat unclear, especially given the clarity of the JAMS *International* Arbitration Rules on the use of written witness statements (Article 24.4), as follows: "In the discretion of the Tribunal, evidence of witnesses may also be presented in the form of written statements signed by them. In the discretion of the Tribunal, the presentation of witness testimony in the form of written statements may be made conditional upon the witnesses' appearance for the purpose of cross-examination." Whatever may be the intent of JAMS Rule 22 (e), the JAMS domestic rules do not prohibit written witness statements to the extent the parties and the tribunal agree to use them.

and who therefore are more comfortable with the U.S. custom of presenting witnesses live.[31] As for arbitrators, those who serve in both international and U.S. domestic arbitration will have had greater exposure to the use of witness statements in their international practice, and they may be more willing to broach the use of written direct testimony than arbitrators who serve solely in U.S. domestic disputes.[32] In any event, there are good reasons why all of the participants in U.S. domestic arbitration—parties, counsel and arbitrators alike—should be more open to the use of written witness statements.

IV. BENEFITS OF WRITTEN WITNESS STATEMENTS

The advantages associated with written witness statements should persuade parties, counsel and arbitrators to consider using them more routinely in U.S. domestic arbitration.

First, presenting the direct testimony of witnesses in writing can save considerable hearing time and thereby achieve efficiencies and cost-savings, which are hallmarks of any arbitration. Depending on the complexity of the dispute, days or even weeks of oral hearings can be avoided by presenting direct witness testimony in writing in advance of the hearing.[33] Some costs are associated with the preparation of witness statements, but the time involved ordinarily is not much different than needed to prepare witnesses to testify orally.[34]

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[31] *See* David W. Rivkin, *21st Century Arbitration Worthy of Its Name*, Law of International Business and Dispute Settlement in the 21st Century, at 4 (2001) (asserting that counsel representing parties "frequently have less experience with international arbitration than the arbitrators, so they seek to rely upon the procedures to which they are accustomed in their domestic litigation.")

[32] *See* Goldstein, *supra* note 22, at 2 ("Many U.S. arbitrators who sit in domestic as well as international cases prefer to have witness statements, but often encounter resistance from counsel unfamiliar with the practice.")

[33] *See* Thomas J. Tallerico and J. Adam Behrendt, *The Use of Bifurcation and Direct Testimony Witness Statements in International Commercial Arbitration*, 20 Journal of International Arbitration, Issue 3, p 295-305 (2003) ("Direct testimony written witness statements in commercial arbitration offer both speed and efficiency to the arbitral process, limiting the need for lengthy evidentiary hearings."); and Lawrence W. Newman and David Zaslowski, *International Arbitration: Witness Statements*, LAW.COM, available at http://www.law.com/jsp/article.jsp?id=1202421714165&slreturn=20140106173912 ("hearing time is dramatically reduced by compressing into written pages what would otherwise be hours of oral presentation.")

[34] *See* Rivkin, supra note 31, at 11. *See also* Daniel L. Small, *Preparing a Witness for Arbitration,* AAA Handbook on Commercial Arbitration, at 329 (2d ed. 2010), (noting that "communicating effectively in a question-and-answer format is an extraordinarily unnatural and difficult process, one that requires considerable preparation.").

Thus, limiting oral direct testimony where possible can reduce the duration and cost of a hearing to a significant extent.

The use of written witness statements is one of many techniques suggested by the College of Commercial Arbitrators (CCA) to achieve a fair and efficient arbitration hearing. [35] Specifically, the CCA notes that every day of hearing, which can require the attendance of lawyers, paralegals, client representatives and witnesses, typically can cost a party many thousands of dollars.[36] For this reason, the CCA urges arbitrators to discuss with counsel various steps geared toward achieving efficiency and cost-savings, including the use of written direct testimony for some or all witnesses appearing in the arbitration.

Second, the use of written statements permits everyone involved in an arbitration to be better prepared for the hearing, which also creates efficiencies. Each witness will have collected his or her thoughts to present testimony in a clear and cogent written narrative. Not everyone is an articulate speaker, and even with advance preparation, witnesses still can be confused and disorganized when testifying live. Indeed, testifying can be intimidating, even in the relatively informal setting of arbitration, and a poor performance by a witness can cause disruption and delay as counsel continues probing to clear up the record. As one attorney favoring witness statements observes: "arbitration should de-emphasize rhetorical skills and focus on the facts and law."[37]

Written witness statements also facilitate cross-examination by opposing counsel. Knowing what a witness' testimony will be in advance of the hearing obviously provides an opportunity to prepare effectively for cross-examination.[38] Witness statements avoid surprise at the hearing and eliminate requests for more time to prepare for cross-examination, or to review the transcript for that purpose, again creating efficiencies at the hearing.

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[35] *See* The College of Commercial Arbitrators Protocols for Expeditious, Cost-Effective Commercial Arbitration, at 75 (2010), available at www.thecca.net.

[36] *Id.*

[37] Gerry DeNotto, *International and U.S. Arbitration from a Business Perspective: The Importance of the Arbitration Clause*, at 2, Mediate.com (2013), available at http://www.mediate.com/articles/DeNottoG1.cfm.

[38] Tallerica & Behrendt, *supra* note 33, ("cross-examination can be more effectively prepared (especially in complex, technical disputes) with a consequent reduction in hearing time," quoting Robert Gorske, *An Arbitrator Looks at Expediting the Large Complex Case*, 5 Ohio St. J. Disp. Resol. 381 395 (1990)).

Arbitrators also are more knowledgeable and prepared concerning the issues and evidence in a case when written witness statements are provided in advance. Parties should expect arbitrators to review the written testimony prior to hearing, which permits the tribunal to focus on the key issues in the case, formulate relevant questions for the witness, and conduct the hearing more effectively and efficiently.

Even counsel who sponsor witnesses will be better prepared on the various claims and defenses involved in the arbitration. Written statements ordinarily are exchanged several weeks before the hearing, permitting counsel to focus well in advance on the elements of each claim and the proof needed to make their case.

Third, a written witness statement can be an important fact-finding tool which, to some extent, can serve as a substitute for a deposition if exchanged early enough in the proceedings.[39] Unlike the prevailing practice in international arbitration, where depositions generally are not permitted, U.S. arbitrators often allow some depositions based on need or good cause shown. Ordinarily, however, rather than sanction countless or unending depositions, U.S. arbitrators normally permit a reasonable number of depositions of limited duration. As a practical matter, this may mean that depositions in some cases will be limited to key witnesses. Having the testimony of secondary witnesses who may not be deposed in advance of the hearing can serve a fact-finding purpose which, while not equivalent to a deposition, should assist counsel to prepare effectively for cross-examination.

V. THERE CAN BE DRAWBACKS ASSOCIATED WITH WRITTEN WITNESS STATEMENTS

Not everyone favors the use of written witness statements and commenters have identified a number of concerns regarding this technique.

One criticism is that witness statements are drafted by lawyers and therefore the testimony is not as spontaneous and/or reflective of how a witness actually would present the facts if he or she were testifying

[39] *See e.g.*, New York State Bar Association Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of Domestic Commercial Arbitrations ("N.Y. State Bar Assn Guidelines") at 17 ("From a discovery perspective, [written witness statements] can avoid or lessen the need for depositions since the cross-examining party has detailed advanced notice of the witness' direct testimony.").

live.[40] Relatedly, witness statements can deprive arbitrators of the ability to assess the witness' credibility on direct examination. It also has been suggested that because lawyers draft witness statements, a witness can place too much trust in the lawyer and might review the witness statement only cursorily.[41]

From the perspective of the party presenting the witness, one concern is that written statements lack the impact of live testimony and, accordingly, witness statements may not be the best means of persuading the tribunal concerning one's view of the case.[42] Also, when a witness does not present direct testimony live, the witness' first appearance is on cross-examination by opposing counsel. Lawyers decidedly do not want a tribunal's first impression of a witness to reflect his or her defensive reaction to hostile questioning on cross-examination.[43]

There are suitable responses to most, if not all of these concerns.

First, lawyers often do draft written testimony for their witnesses, but generally only after an interview of the witness concerning relevant facts and a discussion of specific details to include in the testimony. The process is not unlike preparing a witness for oral testimony, which itself can involve repetition or practice as to how the witness is going to testify at the hearing. In this author's experience, as both advocate and arbitrator, lawyers normally approach the preparation of written witness statements professionally and responsibly, and they understand that such statements need to be truthful and accurate. Witnesses also recognize the import of their written testimony, which they will need to sign or possibly submit under affidavit. As for a witness' undue reliance on a lawyer, or reviewing witness statements only cursorily, lawyers can and should admonish witnesses that they will need to defend their testimony under rigorous cross-examination (and arbitrator questioning), and that a witness can risk loss of credibility entirely if written testimony is approached in a careless or cavalier manner. Thus, the overall

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[40] *See Id.*; and Rivkin, *supra* note 31, at 11.

[41] *See* N.Y. State Bar Assn Guidelines, *supra* note 39, at 17.

[42] Mark W. Danis, *Strategic Options with Foreign Witnesses in International Arbitration*, Association of Corporate Counsel Legal Resources, at 2 (2012), available at http://www.acc.com/legalresources/quickcounsel/sowfwiia.cfm.

[43] *See* John Wilkinson, *Streamlining Arbitration of the Complex Case,* 55 Dispute Resolution Journal 3, at 4 (Aug.-Oct. 2000).

process, and particularly the role of the lawyers on both sides, is designed to ensure that written witness statements serve as a useful means for adducing evidence in arbitration.

Second, with respect to assessing witness credibility, arbitrators normally can gain sufficient insight as to credibility during cross-examination, as well as on re-direct, and also during questioning by the tribunal itself after counsel have completed their examinations.[44] Moreover, as noted below, most U.S. arbitrators can be expected to permit some limited live questioning by counsel on direct examination so that the witness can become comfortable before being turned over to opposing counsel for cross-examination. This approach affords an arbitrator an additional opportunity to assess witness credibility during a shortened form of direct examination.

Third, the concern that a witness not be turned over for cross-examination before being at ease in the arbitral setting is a legitimate one, and it is therefore reasonable for counsel to request U.S. arbitrators to permit some brief direct examination (*e.g.*, 15 to 30 minutes) by counsel offering the witness. This approach "allows the witness to 'warm to the seat' and permits the tribunal to hear the witness testify in his/her own words."[45] Such questioning on direct might include brief background information about the witness, such as residence, age, education, professional and similar data. Counsel also may ask the witness to verify the truth or correctness of the written testimony and to make any appropriate corrections or updates. It also can be helpful for the witness to present a high-level summary of the key points of the testimony—which, as noted above, provides another window for the tribunal to assess credibility—although such live direct testimony should be abbreviated so as not to defeat a primary purpose of using written witness statements (*i.e.,* time savings and efficiency).[46]

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[44] *See* Rivkin, *supra* note 31, at 11 ("It is important for arbitrators to hear directly from witnesses and to be able to judge their credibility and the weight to be given to their evidence. This may be achieved, however, by requiring that any witness submitting direct testimony be available for cross-examination at the hearing.")

[45] CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration, at 13 (2009).

[46] A witness should not be permitted to testify orally to matters not included in his or her written witness statement.

Written witness statements may not be suitable in every case. For example, there may be arbitrations where the credibility of a key witness can be decisive in the outcome of the case. Arbitrators and counsel may wish to dispense with written testimony in that situation to permit a key witness or witnesses to testify live and thereby enable the tribunal to take the full measure of the witness.[47] Indeed, some commenters observe that arbitrators may benefit by being able to assess the credibility of primary witnesses during direct testimony.[48] Another experienced practitioner notes that it might be important for a witness to speak directly to the tribunal where there are complicated facts or significant details that need to be communicated.[49] These and other circumstances might lead counsel and arbitrators in specific cases to conclude that, on balance, live direct examination of a key witness might be preferable to written testimony.

The foregoing suggests that attorneys and arbitrators in U.S. domestic arbitration should weigh the advantages and disadvantages of witness statements on a case-by-case basis. If such an analysis is objectively performed, this author believes that in most cases, and for most witnesses, the use of written witness statements could well become the norm in U.S. domestic arbitration (as it is in international arbitration). This conclusion assumes that certain practical measures are taken by arbitrators and counsel to realize the benefits of written witness statements and to ameliorate any potential drawbacks associated with their use.

VI. PRACTICAL STEPS RELATING TO THE USE OF WRITTEN WITNESS STATEMENTS

Arbitration is a flexible process that permits participants to adopt procedures best suited to the needs of each particular dispute. In light

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[47] *See* John Fellas, *A Fair and Efficient International Arbitration Process,* PLI Course Handbook on International Arbitration, at 13 (2007), available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Fwww.pli.edu%2Femktg%2Fall_star%2Fintl_arb13.doc&ei=GZD3U6mAIMP9yQSd5oLoAw&usg=AFQjCNGmJbFnc2jvqdyMsg7-MEL5OwB98Q.

[48] *See e.g.*, Wilkinson, *supra* note 43, at 4 ("The arbitrators…can often benefit from hearing direct testimony from those primary witnesses, which they can use to assess credibility in a very different context from that of cross-examination."). *See also* New York Bar Association, at 17 ("oral direct testimony can be a good time for an arbitrator to assess credibility from a perspective other than cross-examination.").

[49] *See* Rivkin, *supra* note 31, at 12.

of this flexibility, the participants in any U.S. domestic arbitration should consider the use of written witness statements as a routine matter when formulating procedures to govern the conduct of the proceedings. Indeed, arbitrators and counsel should, at a minimum, observe the following steps:

First, arbitrators should include the subject of witness statements as an item for discussion on the preliminary hearing conference agenda. Once an arbitrator or tribunal is appointed, the arbitration's first key event is the preliminary conference, at which the arbitrators and counsel make important decisions that shape the course of the proceedings to come. Proactive arbitrators typically circulate an agenda in advance of the preliminary conference and direct counsel to meet and confer—and to endeavor to reach agreement---on various procedures that will apply in the arbitration, including with respect to any motions, the nature and extent of discovery, the location and dates for the hearing, witness testimony, the presentation of documentary evidence, and a myriad of other preliminary issues.[50]

Most or all of these items are resolved by agreement of the parties or, if necessary, by ruling of the tribunal at or immediately after the preliminary conference. It is therefore essential that the topic of written witness statements appear as an item on the preliminary conference agenda to facilitate a candid discussion among counsel and arbitrators concerning their use.

Second, arbitrators should highlight the advantages of written witness statements, especially where there is resistance from counsel or where U.S. litigators are unfamiliar with the practice of presenting direct testimony in writing. Arbitrators surely have a duty in today's arbitration environment to identify efficiencies and cost-saving techniques which can inure to the benefit of the parties. Where there are countervailing factors that weigh against using witness statements, such as where witness credibility might be a decisive factor or, more precisely, where exposure to a witness' credibility solely or primarily on cross-examination may not be sufficient, then arbitrators should afford an opportunity at the preliminary conference for open and frank discussion of the subject. In other words, arbitrators in every

[50] *See generally*, Raymond G. Bender, *Critical First Steps in Complex Commercial Arbitration—Appointing Qualified Arbitrators and Staging the Preliminary Conference,* Dispute Resolution Journal (Feb.-Apr. 2009), at 28 *et seq.*

case should provide a forum to consider the pros and cons of using written witness statements.

Third, as noted above, arbitrators should explore with counsel measures to create efficiencies and cost-savings in arbitration, and they may even use their power of persuasion to urge counsel to agree upon appropriate cost-effective techniques. However, arbitrators must approach the use of written witness statements guardedly and should never *require* the use of witness statements where counsel elect---based on witness credibility, complexity of facts, or any other reason---to present a witness' direct testimony live. Arbitration still is a creature of party agreement, and whatever the practice may be in the context of international arbitration, there is no warrant for arbitrators *to compel* the use of witness statements in U.S. domestic arbitration in the absence of party agreement.

Indeed, experienced observers have noted that party agreement in this context is the preferred approach:

> The tribunal's power to order the witness statement procedure is derived from the parties' agreement to arbitrate, the rules the parties select to govern the arbitration, and acceptance of the panel. Accordingly, the parties' views and suggestions regarding the manner and use of witness statements should be given due regard by the tribunal. Thus, seeking the parties' agreement to the use of written statements is recommended as opposed to imposing the procedure on the parties in an order.[51]

The CCA Best Practices also advise: "[w]ith respect to critical lay witnesses, the use of written testimony probably should be approached with caution and ordered or permitted only if all parties consent and the arbitrators determine that the probative value of the testimony will not be unduly impaired."[52]

Fourth, the tribunal should condition the use of written statements on the witness' appearance at hearing for cross-examination by the other parties and questioning by the arbitrators, unless all parties and arbitrators agree that the witness need not appear. To put all parties on notice, this condition should appear in the scheduling order issued

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[51] Wolf and Preteroti, *supra* note 3, at 6.

[52] CCA Best Practices, *supra* note 21, at 190. *See also* Wilkinson, *supra* note 43, at 4 ("[using written statements] can save significant amounts of time, but arbitrators should exercise some restraint in imposing such a requirement.").

after the preliminary conference outlining the various procedures to govern the conduct of the arbitration.[53]

Fifth, upon request, arbitrators should permit sponsoring counsel to question a witness briefly on direct (*e.g.*, for 15 to 30 minutes) to provide a summary or overview of the testimony before the witness is turned over for cross-examination by opposing counsel. This procedure will permit the witness to become comfortable testifying before being subjected to potentially hostile cross-examination. It also will afford the arbitrators an opportunity to observe witness credibility during direct testimony, even if only briefly.

Sixth, the scheduling order issued by the tribunal following the preliminary conference should include the terms under which written witness statements will be used. Specifically, in addition to the condition that sponsoring witnesses must appear at the hearing for cross examination (and arbitrator questions), the order should identify any format requirements (*e.g.*, that the facts be stated in narrative, rather than question and answer form); provide that each statement shall be signed by the witness or submitted under affidavit; and note that upon taking the stand each witness will be expected to adopt the statement under oath as true and correct. The scheduling order also should set a date for witness statements to be exchanged and furnished to the arbitrators. Witness statements normally are prepared once discovery is complete—to facilitate reference by the witnesses to documentary or other evidence—and, depending on the complexity of the case, usually are exchanged from one to several weeks prior to the hearing.

Finally, arbitrators should fully embrace written witness statements and prepare to take every advantage presented by their use. Specifically, arbitrators should always review witness statements in advance of the hearing; be attentive during the cross–examination of each witness; and pursue arbitrator questioning independently where challenging facts or issues require greater understanding or clarification.

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[53] As noted earlier, the right of cross-examination has become engrained in U.S. jurisprudence as a fundamental due process right. For arbitrators in U.S. domestic arbitration to accept a written statement where a requested witness fails to appear at hearing for cross-examination---even assuming a valid reason is offered---would be somewhat unusual (at least in this arbitrator's experience). In any event, should that issue arise, arbitrators have the power to address unusual or unique circumstances and rule accordingly.

By taking the foregoing measures, U.S. arbitrators will signal to parties and counsel that they regard the use of written witness statements as a core feature of U.S. domestic arbitration in the same way international arbitrators value them in international arbitration. This kind of encouragement hopefully will inspire parties and counsel in U.S. arbitration to evaluate routinely the pros and cons of written witness statements; to consider in earnest (and with an open mind) the use of witness statements in each case; and to let go of old practices (*e.g.*, insisting on live testimony unnecessarily) which, while familiar and comfortable, may not be compatible with achieving efficiency and cost savings in arbitration.

VII. CONCLUSIONS

Written testimony by fact witnesses in international arbitration affords meaningful advantages for the process and the parties. Because written statements redirect the focus of an arbitration hearing from direct testimony to cross-examination, they reduce hearing time significantly and thereby promote arbitration's core values of efficiency and cost-savings. Witness statements also assist arbitration participants in preparing for hearing—witnesses can present relevant facts clearly and cogently in narrative form without fear of rhetorical shortcomings; surprise at the hearing is avoided and opposing counsel is better able to prepare for cross-examination; and arbitrators are able to focus on the key issues in dispute and manage the hearing more effectively and efficiently.

Perceived drawbacks associated with written witness statements can be surmounted or mitigated in most cases. The fact that lawyers often draft witness statements should not be a major concern. This form of lawyer assistance is not unlike the process of preparing a witness for live testimony. Witnesses also sign their written statements and/or attest to the truth and accuracy of their testimony, and witnesses risk not being taken seriously if they approach the process carelessly or cavalierly. As for witness credibility, arbitrators generally are able to assess witness credibility in most cases during cross-examination and on re-direct, as well as during any abbreviated direct examination that may be permitted. A witness' first appearance at a hearing should not be via hostile questioning on cross-examination. Accordingly, counsel should request the tribunal to permit each witness to offer limited direct testimony (*e.g.*, a high-

level summary of the key points) to "warm to the seat" before being turned over for cross-examination.

U.S. arbitrators should implement practical steps to encourage U.S. counsel to consider using written witness statements in all or most domestic arbitrations. Listing witness statements on the preliminary hearing agenda and highlighting their benefits (and possible drawbacks) could result in an enhanced appreciation by counsel for this evidentiary tool. Arbitrators also should adopt appropriate procedural protections whenever witness statements are used—requiring each witness to appear at hearing for cross-examination and arbitrator inquiries, unless the parties and arbitrators agree otherwise; permitting an abbreviated direct examination before the witness is turned over for cross-examination; and specifying any precise arrangements regarding format, signatures, exchange dates, and other key requirements.

Ultimately, the decision in U.S. arbitration to present the direct testimony of fact witnesses either in writing or live should remain with the parties and their counsel, and arbitrators should never *require* counsel to use one method or the other. While written witness statements can offer decided advantages, notably significant efficiencies and cost-savings, there will be circumstances where the live testimony of some witnesses would be preferable. It is hoped, however, that elevating the discourse concerning witness statements might lead to a greater appreciation of their use by arbitrators and counsel alike. Indeed, it is not fanciful to suggest that, as they continue to gain favor in the U.S., written witness statements might well become the norm in domestic arbitration as they are in international arbitration.

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Report of the Colloquium on Possible Future Work on Dispute Settlement held during the seventy-fifth session of Working Group II (New York, 28 March–1 April 2022)

Note by the Secretariat

Contents

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I. Introduction

1. The Commission, at its fifty-fourth session in 2021, requested the secretariat to organize a colloquium to explore legal issues related to dispute resolution in the digital economy (DRDE) and to identify the scope and nature of possible legislative work.[1] The Commission also decided that the desirability and feasibility of work on adjudication should be discussed at the colloquium.[2]

2. Accordingly, the secretariat organized the Colloquium on Possible Future Work on Dispute Settlement (the "Colloquium") during the seventy-fifth session of Working Group II, which was held in New York from 28 March to 1 April 2022.

3. The session was organized in accordance with the decision by the Commission to extend the arrangements for the sessions of UNCITRAL working groups during the COVID-19 pandemic as contained in documents A/CN.9/1078 and A/CN.9/1038 (annex I) until its fifty-fifth session.[3] Arrangements were made to allow delegations to participate in person at the United Nations Headquarters as well as remotely. Further arrangements were made to allow public participation.

4. The session was attended by 48 member States, 27 observer States and 57 invited international organizations. Over 40 speakers with expertise in international dispute settlement were invited to make presentations during the Colloquium. Overall, approximately 700 people registered for the Colloquium.

5. According to the decision by the Commission (see para. 3 above), the following persons continued their offices:

Chair: Mr. Andrés Jana (Chile)

Rapporteur: Mr. Takashi Takashima (Japan)

6. The Working Group had before it the following documents: (a) annotated provisional agenda (A/CN.9/WG.II/WP.221); (b) Stocktaking of Developments in Dispute Resolution in the Digital Economy submitted by the Government of Japan (A/CN.9/WG.II/WP.222); (c) Access to Justice and the Role of Online Dispute Resolution submitted by the Inclusive Global Legal Innovation Platform on Online Dispute Resolution (A/CN.9/WG.II/WP.223); (d) Draft Provisions for Technology-related Dispute Resolution submitted by a group of experts (A/CN.9/WG.II/WP.224); and (e) a note on adjudication, including a proposal for future work submitted by the Government of Switzerland (A/CN.9/WG.II/WP.225).

7. The Working Group adopted the following agenda:

1. Opening of the session.
2. Adoption of the agenda.
3. UNCITRAL Colloquium on Possible Future Work on Dispute Settlement.

8. The Colloquium was structured around four main topics: (a) developments in DRDE; (b) online platforms for dispute resolution; (c) adjudication; and (d) technology-related dispute resolution.

9. This note provides a summary of the discussions held during the Colloquium. Additional information about the Colloquium, including the programme, speaker's biography, presentations, and other material as well as video recordings, is available on a dedicated web page.

[1] *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 17* (A/76/17), para. 233.
[2] Ibid., para. 243.
[3] Ibid., para. 248.

II. Summary of the Colloquium

A. Developments in DRDE

10. Sessions 1 to 3 of the Colloquium, held on 28 and 29 March 2022, dealt with the topic of DRDE, particularly the scope of the stocktaking project to be carried out by the secretariat.[4]

11. Discussions began with a brief presentation on the background of the stocktaking project, which was proposed by the Government of Japan in 2020 to monitor the changing landscape, the evolving practices and the development of new forms of dispute resolution. It was noted that the Commission, at its fifty-fourth session in 2021, had requested the secretariat to compile, analyse and share relevant information with regard to developments in DRDE, taking into account the disruptive aspects of digitization, in particular with respect to due process and fairness.[5] A summary of the Tokyo Forum on Dispute Resolution, which was held as part of the stocktaking project in December 2021, was presented.[6]

12. Similar work undertaken by other international organizations was presented and it was generally felt that the stocktaking project should build on such existing resources. One was the ICC Commission Report on Leveraging Technology for Fair, Effective and Efficient International Arbitration Proceedings,[7] which identified prevalent technology being used in support of international arbitration, described features and functionality that might enhance the arbitration process, and discussed useful procedural practices and pitfalls to be avoided. Another was the IBA Technology Resources for Arbitration Practitioners providing information on applications and software commonly used in arbitral proceedings for video conferencing, document production, management and transfer of data, analytical tools, interpretation, cybersecurity and others.[8] Reference was also made to a study on how a number of jurisdictions responded to the challenges caused by the COVID-19 pandemic in the field of commercial dispute resolution.[9] It was said that the responses, some temporary and some permanent, illustrated a contrast in the jurisdictions' openness to innovation and in their capacity to adapt to the circumstances. Lastly, the findings of a research project conducted in collaboration with ICCA on the right to a physical hearing were shared.[10] The research, which was based on a comparative survey of more than seventy jurisdictions, found that none of the jurisdictions had legislation providing an explicit right to a physical hearing and that unless requested by a party, arbitral tribunals generally had the discretion to hold hearings remotely subject to due process considerations. It was, however, mentioned that the issue was not entirely settled in a few jurisdictions, including where the technical infrastructure to hold online hearings was limited.

13. While the speakers for the three sessions touched upon a wide range of issues relating to DRDE, it was generally felt that there had been a significant increase in the use of technology in dispute resolution, which was further accelerated by the pandemic and which would likely continue. It was also shared that the use of

[4] Speakers included Takashi Takashima, Stephanie Cohen, Sarah McEachern, Lise Alm, Toby Landau, Kim Rooney, Andrés Jana, James Castello, Jaemin Lee, Giuditta Codero-Moss, Kevin Nash, Yulia Mullina, Dirk Pulkowski, Rekha Rangachari, Yasmine Lahlou, Seokchun Yun, Yoshimi Ohara, Ijeoma Ononogbu, Mingchao Fan, James Claxton, Anne-Karin Grill, George Lim, Camilla Macpherson, Federico Ast and Charles T. Kotuby Jr.

[5] *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 17* (A/76/17), para. 233.

[6] Information about the 2021 Tokyo Forum on Dispute Resolution is available at https://uncitral.un.org/en/2021-tokyo-forum-dispute-resolution.

[7] Available at https://iccwbo.org/publication/icc-arbitration-and-adr-commission-report-on-leveraging-technology-for-fair-effective-and-efficient-international-arbitration-proceedings/.

[8] Available at www.ibanet.org/technology-resources-for-arbitration-practitioners.

[9] Available at www.ibanet.org/global-impact-covid-19-pandemic-dispute-resolution.

[10] Available at www.arbitration-icca.org/right-to-a-physical-hearing-international-arbitration.

technology had generally contributed to enhancing the efficiency of the proceedings. At the same time, the need to preserve due process and fairness and to retain the flexible nature of the dispute resolution process was constantly emphasized. It was further stressed that developments in DRDE should aim to improve access to justice for all involved.

14. It was mentioned that the paradigm for dispute resolution was shifting with the emergence of digitization. It was stated that fundamental changes were being witnessed, which have widened the reach of dispute resolution to various sectors and actors. There had been an emergence of digital applications and increased use of technology leading to more efficiency. With dispute resolution services becoming more accessible, there had also been calls for greater accountability and legitimacy, including with regard to the impact on environment. It was noted that technology was being applied to all stages of the dispute resolution, in preparation of and in managing the proceedings. Innovative solutions to engage different means of dispute settlement through escalation clauses and to predict the outcome of the dispute were being utilized. Such developments had raised certain challenges, which might be inherent in the technology itself and those resulting from uneven access to technology. Consequently, it was generally felt that the benefits of using technology should be maximized while addressing any negative impact of such use.

15. One of the concerns expressed throughout the sessions on DRDE was the potential digital divide, the gap between those that have access to technology and those that do not. It was said that the stocktaking project should take this into account not only from the perspective that the infrastructure might be lacking in some jurisdictions but also from the viewpoint that not all parties had access to the same level of technology. Along the same lines, it was mentioned that the use of technology entailed costs, which could be burdensome for small and medium-sized enterprises and those in less-developed economies. On the other hand, it was argued that the benefits of increased accessibility and cost savings (for example, for travel) would generally outweigh the cost of using technology.

16. From a practical perspective, it was stressed that there existed a need to build the capacity of all those involved with regard to the technology that could be utilized in the dispute resolution process. It was stressed that the parties, the arbitrators and all those involved would need to be trained in order to take full advantage of the recent developments, for example, when predicting the outcome, finding a basis for settlement and ensuring coherent awards.

17. Developments in different parts of the globe as well as regional perspectives were shared illustrating a level of commonality. Despite the concerns expressed about the possible digital divide, all regions had witnessed an increase in the use of technology and accessibility to dispute resolution services. Developments in translation and interpretation services were also referred to. It was mentioned that the number of institutions and services provided by them had grown dramatically. In that context, it was said that the stocktaking project could offer guidance to such institutions by sharing best practices, which could also lead to harmonization. While acknowledging the general trend, it was suggested that the stocktaking project should not make a hasty generalization as the legal environments in which developments were being witnessed were quite different.

18. As mentioned above, developments in DRDE had required arbitral institutions to adapt their services, also responding to the challenges caused by the pandemic. Experiences of arbitral institutions were shared, and they reported that the fundamental principles of arbitration had stayed intact despite the adoption of new technologies for filing, the appointment of arbitrators, case management, hearings, exchange of documents including digital evidence and rendering of the award, just to name a few. Reference was also made to the increased role of appointing authorities in overseeing the use of technological means. It was stated that several arbitral institutions had promulgated guidance material to facilitate the use of technology by

the parties and the arbitral tribunal,[11] which should be taken stock of as they could shed light on possible future work.

19. With regard to developments in arbitration, online hearings drew the attention of many participants. Referred to also as remote or virtual hearings, it was noted that the number of online hearings had increased dramatically in recent years particularly due to the travel restrictions imposed by the pandemic. It was reported that legislation in most jurisdictions did not pose an obstacle to the holding of hearings online and that the parties reacted favorably to such hearings. The advantages of online hearings were mentioned as providing for flexible participation and ensuring cost and time efficiency. On the other hand, the merits of in-person hearings were also outlined, particularly when the proceeding involved complex issues, multiple languages and witness examination. It was thus stressed that the virtual setting required the arbitral tribunal to be more attentive in ensuring a level playing field and to take a more active role in communicating with the parties and examining witnesses. It was mentioned that further developments in technology might mitigate concerns arising from online hearings.

20. Discussions evolved around the legal and practical framework for holding online hearings, whether it should be the default, when to take such a decision and elements to take into account (for example, time zones and duration), mode of participation, whether to keep a recording, transcription services, security measures and others. The need for a checklist on the conduct of hearings or a protocol on online witness examination (due to lack of oversight and risk of external influence) was emphasized. It was noted that it might be easier for institutions with the technical capacity to address the issues arising from online hearings compared to ad hoc arbitration and reference was made to existing guidelines formulated by arbitral institutions.

21. A number of the speakers mentioned the use of artificial intelligence (AI) in the different stages of the arbitration, for example, to assist the parties in the preparation of their case and the arbitral tribunal in analyzing documents and evidence. It was, however, suggested that the notion of artificial intelligence and automation might need further clarification in the context of dispute resolution, as had been done in relation to digital trade and contracting (see document A/CN.9/WG.IV/WP.173). While it was viewed that AI could optimize the efficiency of the dispute resolution process, concerns were expressed about the so-called algorithmic or automated decision making, whereby data and statistics were analyzed to render decisions without human intervention. While it was said that such a process could be useful in handling disputes that were simple and repetitive in nature, it was suggested that ethical standards should be prepared on the use of AI, particularly in relation to decision-making, to ensure accountability.

22. Discussions also evolved around online mediation, which had proven successful during the pandemic, with success rates almost the same as in-person mediation. Similar to arbitration, the cost and time savings derived from the online setting were seen as an advantage. Some examples of cross-border disputes that were settled through online or hybrid forms of mediation were shared. Reference was also made to the European Union's regulation on platform-to-business relations, which set forth the use of mediation to resolve issues between online platform providers (search engines, online marketplaces, social media and app stores) and online platform business users. It was mentioned that the regulation required platform providers to set up an internal complaint handling system and to name at least two mediators, who would eventually make a recommendation on the action to be taken by the platform provider.

23. It was stated that the stocktaking would need to take into account the peculiarities of online mediation, for example, the distinct role of mediators and their appointment process, confidentiality requirements including security measures and

[11] For example, the ICC Checklist for a Protocol on Virtual Hearings and Suggested Clauses for Cyber-Protocols and Procedural Orders Dealing with the Organisation of Virtual Hearings and SIAC Guides – Taking Your Arbitration Remote.

the final stage of the settlement negotiation. It was stated that some guidelines could be provided while not impeding on the flexibility of the process, which was the essence of mediation.

24. Developments with regard to financial dispute resolution were shared providing an industry-specific perspective. It was mentioned that disputes in the financial sector required a quick resolution by those with the expertise and that arbitration was being increasingly used to resolve cross-border disputes, whereas banks and financial institutions had traditionally preferred litigation. Reference was made to rules and guidelines reflecting the industry, which was also changing quickly.

25. Novel forms to resolve disputes relating to services in the digital economy or digital assets were also illustrated. References were made to dispute resolution in the metaverse or blockchain-based dispute resolution. The notion of "decentralized justice" was mentioned referring to a mechanism whereby a group of incentivized persons participate as jurors in the decision-making. It was noted that such forms of dispute resolution had their distinct features, for example, they might involve parties and/or decision-makers that were anonymous, and decisions could be enforced using the smart contract provided as an escrow.

26. The role of courts in handling disputes in the digital economy was also highlighted, particularly with respect to cross-border enforcement of interim measures to preserve assets or evidence, possibly in their digital form. It was suggested that the difficulties in enforcing tribunal-ordered interim measures in different jurisdictions should be assessed and reference was made to the current work of Working Group V on civil asset tracing and recovery in insolvency proceeding. It was suggested that work could be undertaken to prepare guidance to the arbitral tribunal in ordering, and the parties in requesting, such measures. More generally, it was felt that judicial assistance in the context of DRDE should be the subject of the stocktaking activity with the aim to facilitate coordination among different courts. As courts might not be fully conversant of the technological developments, it was suggested that means to diminish that gap should be sought as part of the stocktaking exercise.

Scope of the stocktaking project

27. General support was expressed for the stocktaking project as it would usefully assist the Commission in: (i) keeping abreast of the developments in the area of dispute settlement; (ii) determining the desirability and feasibility of legislative projects; and (iii) developing relevant legal standards to address concrete issues. It was widely felt that the stocktaking exercise could assist in preserving the integrity of the dispute resolution process and promoting the effective use of technology. It was continuously stated that developments in DRDE should embrace technology while being conducive to the fundamental principles of dispute resolution. Accordingly, it was observed that the stocktaking should aim to capture technological developments and identify any legal gaps, particularly regarding the rights of the parties to due process and fair treatment. It was further observed that the outcome of the stocktaking project could allow for better sharing of information and best practices among all those involved.

28. A number of suggestions were made on the areas of possible work and on the possible form, for example, rules, protocols, toolkits, or guidance documents. It was emphasized that any standard to be developed by the Commission should be based on the principle of technological neutrality and should endure future developments. Along the same lines, caution was expressed about taking a regulatory approach to dispute resolution, as party autonomy and flexibility should guide the work.

29. It was felt that the scope of the stocktaking project as outlined in paragraph 17 of document A/CN.9/WG.II/WP.222 was generally acceptable. It was further suggested that the stocktaking project should:

- Begin with an assessment of how UNCITRAL instruments addressed the developments and whether they need to be updated;

- Examine the interaction with UNCITRAL instruments in other areas, including those that provide functional equivalence rules for “writing” and “signature”;

- Be coordinated with projects of other Working Groups, for example, Working Group IV on legal issues related to the digital economy and Working Group V on civil asset recovery and tracing in insolvency;

- Take into account the wide range of dispute resolution means including new forms as well the experience of courts in handling small claims and in supporting arbitration;

- Consider the range of experience in jurisdictions with different legal backgrounds and different levels of economic development; and

- Result in a product that can be shared not only with the Commission but more broadly with the international community.

30. Noting the broad scope of the stocktaking project and the limited resources available to the secretariat, it was mentioned that work could begin with topics that deserved more attention.

B. Online platforms for dispute resolution

31. Session 4 of the Colloquium, held on 29 March 2022, was dedicated to the topic of online platforms for dispute resolution.[12] It was recalled that at its fifty-fourth session in 2021, the Commission requested the secretariat to continue to take part in the Inclusive Global Legal Innovation Platform on Online Dispute Resolution (iGLIP on ODR) and to include on the agenda of the Colloquium “legal standards that would apply to online platforms with in-built dispute resolution mechanisms and those dedicated mainly to dispute resolution.”[13]

32. At the beginning of the session, a summary of the second meeting of iGLIP, during which experts discussed the development of an international legal instrument that could facilitate access to justice through the use of ODR and set out minimum core standards applicable to ODR proceedings, providers and platforms, was presented (see document A/CN.9/WG.II/WP.223).

33. It was noted that online platforms were an essential feature of the digital economy and reference was also made to the notion of the “platform” economy. It was described that online platforms, largely based on contracts, were private legal systems involving their users and the operators, the latter being responsible for oversight. Two different types of platforms were highlighted: (i) platforms with built-in mechanisms to handle disputes between users or between users and the operator; and (ii) platforms dedicated to providing dispute resolution services. Relevant issues for further consideration were pointed out, including internal policies of the platform, valid consent of the users, recognition and enforceability of decisions outside the platform, applicable law, redress and appeal mechanisms.

34. The practical experiences of implementing online platforms dedicated to dispute resolution (ODR platforms) in different jurisdictions were shared illustrating various features and designs. Challenges in the implementation were also shared, which included legal limitations (including with regard to consumers), different regulatory approaches, budget constraints as well as the asymmetry in access both within a jurisdiction and among different jurisdictions. Several innovative aspects were also mentioned, including the use of artificial intelligence or algorithms for automated

[12] Speakers included James Kwok Wing Ding, Teresa Rodriguez De Las Heras Ballell, Colin Rule, Nicolás Lozada-Pimiento, Laura Aguilera Villalobos, Amy J. Schmitz, Mike Dennis and Yoshihisa Hayakawa.

[13] *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 17* (A/76/17), paras. 230 and 233.

decision-making. Reference was also made to dispute resolution in the metaverse and services to be provided therein.

35. It was stressed that due process and fairness needed to be guaranteed on ODR platforms to maximize their advantages. Concerns were expressed about automated decision-making on platforms as they might not be reasoned and might not be the subject of judicial review, especially if self-enforced. In the same sense, the use of algorithms in the decision-making process was cautioned and calls were made to develop ethical standards or to provide best practices.

36. Discussions also touched upon the standards applicable to ODR platforms. It was recalled that the Commission had adopted the UNCITRAL Technical Notes on Online Dispute Resolution ("Technical Notes") in 2016, which highlighted the principles underpinning the ODR process as fairness, transparency, due process and accountability. Some of the shortcomings of the Technical Notes were mentioned, mainly that it was a non-binding descriptive instrument and that it did not define the third and final stage of the ODR proceeding. It was explained that both were due to the fact that the Technical Notes aimed to cover business-to-consumer disputes, which made it difficult to reach a compromise in the Working Group in light of the different approaches to consumer protection in different jurisdictions (for example, pre-dispute arbitration clauses were invalid in some jurisdictions).

37. It was observed that there had been a significant expansion in the use of ODR since the adoption of the Technical Notes and domestic courts were also increasingly relying on online platforms to handle cases. Work by other international organizations in developing relevant standards was outlined. This included the Collaborative Framework for ODR of Cross-Border Business-to-Business Disputes endorsed by Asia-Pacific Economic Cooperation (APEC) in 2019, which included Model Procedural Rules drafted on the basis of the UNCITRAL Arbitration Rules as well as the Technical Notes. It was explained that the Collaborative Framework limited its scope to business-to-business disputes and included arbitration as the third and final stage of the ODR proceedings. References were also made to the ongoing project by the International Organization for Standardization (ISO) in preparing the "ISO/TC 321 Transaction assurance in E-commerce" as well as International Council for Online Dispute Resolution (ICODR), the American Bar Association (ABA) Task Force on ODR and the National Institute for Standards and Technology (NIST).

38. It was generally felt that there was a need to carefully assess the developments that had taken place since the adoption of the Technical Notes both in practice and standard making. It was noted that the meetings of iGLIP on ODR had built a bridge from the current practice of ODR platforms to a potential legal instrument. In that context, support was expressed for the secretariat to continue to participate in iGLIP on ODR to gather more information. It was suggested that the meaning of ODR or online platforms might need to be revisited as well as the notions of consumers, businesses and users, which had become somewhat blurry on platforms. Calls were also made to examine how courts were utilizing online platforms, particularly to address small claims. Issues relating to the cross-border enforcement of decisions on ODR platforms including self-enforced remedies also gained attention. Lastly, calls were made to provide capacity building for developing States and MSMEs regarding the use of ODR platforms.

39. While suggestions were made to embark on the preparation of an international instrument on online platforms for dispute resolution with minimum core standards, it was cautioned that the circumstances that had delayed the negotiations on the Technical Notes persisted and that it was not yet ripe for any binding instrument to be prepared also in light of the evolving technological developments. It was highlighted that any ethical standard and guidance on best practice should aim to ensure that online platforms for dispute resolution expanded access to justice and not result in limiting access.

C. Adjudication

40. Session 5 of the Colloquium, held on 30 March 2022, was dedicated to the topic of adjudication.[14] It was recalled that at its fifty-fourth session in 2021, the Commission had heard a proposal for adjudication procedure to be examined with an aim to prepare rules on international adjudication and had decided that the desirability and feasibility of the work on adjudication would be discussed at the Colloquium.[15]

41. The session began with a presentation of the proposal by the Government of Switzerland as contained in the annex to document A/CN.9/WG.II/WP.225. It was stated that adjudication could respond to the criticism that arbitration had become too time-consuming and costly, which was caused by the complexity of disputes on the one hand and the desire to achieve a perfect dispute resolution procedure sometimes resulting in due process paranoia on the other hand. Adjudication was presented as a method by which a rapid solution in a summary procedure was provided to the dispute resulting in a solution that must be complied with immediately and before a full-fledged arbitration could be initiated. It was explained that the possibility of resorting to arbitration would provide a safety net and reassure the parties against serious errors by the adjudicators.

42. It was noted that legislation on adjudication provided for domestic enforceability of decisions, while questions remained on the means to ensure immediate and cross-border enforcement. The same applied to adjudication on a contractual basis. It was explained that the proposal by Switzerland aimed to ensure cross-border compliance with the outcome of adjudication through a contractual mechanism and reliance on the New York Convention.

43. Experience of adjudication in different jurisdictions that had adopted relevant legislation was shared with participants. It was reported that adjudication was successful in many jurisdictions (both civil and common law) while mainly in the domestic context and in the context of the construction industry. It was stated that adjudication had been successful in resolving disputes arising out of construction contracts allowing for rapid decisions and ensuring due process and fairness at the same time. It was explained that legislations in those jurisdictions had been prepared based on requests from, and needs of, the businesses and that once introduced, the practice had developed quite rapidly and beyond expectations. It was further highlighted that the number of arbitration or litigation cases in those fields diminished with the introduction of the adjudication legislation. It was also mentioned that legislation providing similar tools to secure expeditious payment of claims existed in some jurisdictions.

44. It was stated that adjudication had great potential for resolving disputes involving long-term contracts with recurring payments (for example, license agreements and long-term delivery contracts), where cash flow was key and speedy solutions might be preferred over accurate solutions. It was said that in existing legislation, the decision by the adjudicator could only be challenged on very limited grounds, namely where the adjudicator acted in contravention of the duty to act fairly and where he or she exceeded the jurisdiction. It was said that a party dissatisfied with the decision also had the possibility of raising its claims in arbitral or court proceedings, while that party must nevertheless immediately comply with the decision. It was reported that in the vast majority of the cases, the parties accepted the decision and did not initiate arbitral or court proceedings.

45. It was mentioned that it would be possible for parties to agree on adjudication in jurisdictions without any relevant legislation. It was, however, noted that the

[14] Speakers included Michael Schneider, Lindy Patterson, Allan Stitt, Pierre D. Grenier and Jesusito G. Morallos.

[15] *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 17* (A/76/17), para. 243.

absence of legislation which would make the decision enforceable might discourage parties from using adjudication as they would need to rely on voluntary compliance.

46. Some doubts were expressed about pursuing work on adjudication as the practice of adjudication was limited to certain jurisdictions and certain industries. It was also noted that adjudication was often regulated in the domestic context and reservations were expressed about the level of harmonization that could be achieved. Accordingly, calls were made that the exploratory work should focus on assessing the feasibility of harmonizing different approaches in legislation.

47. It was suggested that the work on adjudication should be based on the needs of the users and the business community. There was some support for undertaking exploratory work on rules applicable to adjudication or a similar procedure to resolve disputes arising from long-term contracts and on ways to ensure provisional enforcement of decisions. It was suggested that the following aspects might need further consideration: (i) scope of application including the need for parties' consent; (ii) applicability of adjudication to various types of and cross-border disputes; and (iii) preservation of due process and fairness requirements. It was said that such work could result in different forms, for example, a guidance document, model clauses for contracts, a model law or a convention.

D. Technology-related dispute resolution

48. Sessions 6 to 8 of the Colloquium, held on 30 and 31 March 2021, focused on technology-related dispute resolution and the draft provisions prepared by a group of experts.[16] It was noted that the Commission at its fifty-fourth session in 2021 had requested the secretariat to continue to engage with experts with a view to preparing an outline of provisions to assist in the operation of such dispute resolution.[17] It was clarified that the draft provisions in document A/CN.9/WG.II/WP.224 were prepared to stimulate the discussions at the Colloquium and the sessions would be structured as a brainstorming exercise. The participants expressed their appreciation to the experts that prepared the draft provisions, which provided a good basis for the discussion.

49. It was mentioned that technology companies in the United States had a tendency to rely on court litigation due to their familiarity with the court process. However, it was also noted that arbitration was increasingly being utilized due to the flexibility of the process, the possibility to introduce confidentiality measures, the decisions being rendered by arbitrators with technical expertise and the cross-border enforcement mechanism provided by the New York Convention.

50. It was widely felt that disputes that involved issues of technology were increasing in number and that there was a need to examine how the existing legal frameworks for dispute resolution could be used and possibly adapted to resolve such disputes. Disputes that could result in start-up companies losing seed capital or competitive advantage and thus requiring a quick resolution were provided as examples. It was suggested that the advantages of arbitration should be further ascertained. At the same time, calls were made to carefully examine the reasons for the underutilization of arbitration and the needs of the disputing parties.

[16] Speakers for the sessions included Cedric Yehuda Sabbah, Elliot Friedman, Patricia Shaughnessy, Crenguta Leaua, Lawrence Akka, Shai Sharvit, Andrés Jana, Christian Aschauer, Elizabeth Stong, Takashi Takashima, Tilman Niedermaier, Chris Clements, Monika Feigerlova, Manuel Gomez, Gilad Wekselman and Racheli Pry-Reichman.

[17] *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 17* (A/76/17), para. 229.

51. Work undertaken in this field by organizations, such as the Silicon Valley Arbitration & Mediation Center (SVAMC)[18] and the UK Jurisdiction Taskforce (UKJT) were shared.[19]

Draft provisions for technology-related dispute resolution

52. With regard to draft provision 1 (definition), it was mentioned that paragraph 1 provided an open-ended definition to encompass the wide range of technology-related disputes and that paragraph 2 listed the common types of such disputes in a non-exhaustive manner. It was explained that the definition was not intended to be a normative one but rather aimed to capture the background against which the draft provisions were prepared.

53. Concerns were raised that the definition was too broad. For example, it was mentioned that since technology was a key component in many transactions, it would be difficult to identify a dispute that would clearly fall outside the scope of that definition. It was also noted that as defined, technology disputes would involve start-up companies as well as States or government entities, which might need different rules. It was also said that disputes involving intellectual property should not be included, as they were usually subject to different dispute resolution mechanisms.

54. In response, it was clarified that the definition in draft provision 1 was prepared mainly to provide the context in which the draft provisions had been prepared rather than to determine their application, which should generally be left to the parties. It was also mentioned that the definition would need to be sufficiently flexible to embrace developments in technology, which was constantly evolving.

55. It was generally felt that if the application of the draft provisions were to be left to the parties, there would not be much merit in defining technology-related disputes. On the other hand, suggestions were made that concrete examples of cases should be provided to highlight the characteristics of disputes for which the parties might consider utilizing the draft provisions.

56. With regard to draft provision 2 (number of arbitrators), some support was expressed for the default rule being a sole arbitrator with the understanding that the arbitrator would have the expertise required to resolve the dispute or would be supported by experts or neutrals with the technical expertise. At the same time, it was noted that the parties should have the flexibility to agree on more than one arbitrator, particularly in a dispute which addressed complex technology-related issues.

57. It was considered that draft provision 3 provided useful guidance on when and how to conduct case management conferences and issues to be discussed. It was mentioned that issues dealt with in other draft provisions (appointment of experts, confidentiality requirements, treatment of digital evidence and shorter time frames) would also need to be discussed during such consultations. Some doubts were expressed about the need for a rule and preference was expressed for providing the contents of draft provision 3 as guidance. In that context, reference was made to article 9 of the UNCITRAL Expedited Arbitration Rules as providing a concise rule on consultation. In response to a question raised about the word “secretary” in

[18] The work being undertaken by the SVAMC Task Force on Tech Disputes, Tech Companies & International Arbitration and the SVAMC Initiative on International Arbitration, Mediation and Blockchain-based Transactions was presented.

[19] The UKJT Digital Dispute Resolution Rules had been developed to facilitate the rapid and cost-effective resolution of commercial disputes, particularly those involving novel digital technology such as crypto assets, cryptocurrency, smart contracts, distributed ledger technology and fintech applications (available at https://technation.io/lawtech-uk-resources/#rules). It was mentioned that those Rules were particularly innovative in that it was possible to conduct the arbitration anonymously or pseudonymously and that the arbitral tribunal was expressly authorized to operate, modify, sign or cancel any digital asset relevant to the dispute, meaning that the arbitral tribunal might be able to effectively enforce its award using distributed ledger technology.

subparagraph 2(h), it was said that the subparagraph aimed to express the idea that all those involved in the proceeding would need to possess the necessary technical expertise in order to ensure efficiency.

58. It was explained that draft provision 4 provided shorter time frames for the parties to make supplements to its notice and replies to such supplements. While it was felt that shorter time periods would need to be imposed on parties for the arbitral tribunal to render an award within the time period specified in draft provision 9, some doubts were expressed about imposing such short time frames considering the wide range of cases. It was considered that the arbitral tribunal should have the flexibility to fix such time frames upon consultation with the parties and that the time frames provided for in the Expedited Arbitration Rules were short and flexible enough to apply to technology-related disputes.

59. Considering the significant role that experts had in technology-related disputes, it was felt that rules on their appointment and their role in the proceedings as found in draft provision 5 would be helpful. It was also observed that their interaction with the arbitral tribunal and how their findings/determination were to be treated in the proceedings might need to be regulated.

60. It was stated that draft provision 5 focused too much on tribunal-appointed experts and that equal attention should be given to party-appointed experts as well as the parties themselves, particularly the latter on matters relating to emerging technologies where the parties would have the most expertise. It was also stated that the difference between an expert and a neutral would need to be clarified in relation to the legal effect of their respective findings.

61. It was noted that technology-related disputes often involved technical and commercially sensitive information, which needed to be kept confidential. It was noted that the UNCITRAL Arbitration Rules did not contain a specific provision on confidentiality, leaving it to the parties to agree on such arrangements. On the other hand, rules on transparency had been developed in the context of treaty-based investor-State arbitration.

62. It was explained that draft provision 6 would prohibit the disclosure of information regarding the arbitration and generated therein to parties not involved in the proceeding (outbound confidentiality). Some questions were raised on the meaning and scope of non-public information referred to in paragraph 1, whether disclosures to insurers and other financiers of the proceedings should be permitted and the sanctions that could be imposed on the parties in case of non-compliance.

63. With regard to draft provision 7, it was explained that the provision aimed to protect sensitive information within the proceedings (inbound confidentiality), largely based on the WIPO Arbitration Rules. It was noted that technology-related disputes often involved competitors in the market and the need to protect trade secrets and know-how was greater. As to the scope and definition of “confidential” information in paragraph 1, it was suggested that reference could be made to the same in article 7 of the UNCITRAL Rules on Transparency although prepared in a slightly different context. Consideration was also given to a different approach than that provided in paragraph 2 whereby the default rule would be that all information exchanged between the parties and the arbitral tribunal should be confidential without a party needing to invoke confidentiality. It was also suggested that the phrase “cause serious harm” in paragraph 3 would need to be clarified. Interest was expressed for further considering the paragraphs on third-party advisors who would address questions regarding confidentiality and related requirements as well as neutral experts who would be tasked with preparing reports based on the confidential information provided to them. Suggestions were made that provisions on “attorney’s eye only” could also be developed.

64. It was explained that draft provision 8 would supplement article 27 of the UNCITRAL Arbitration Rules considering that technology-related disputes would likely involve digital evidence as well as their presentation using various means. It

was noted that the clarification in paragraph 1 that data and technical information also fell under the notion of "evidence" and in paragraph 2 that there could be different modes of taking evidence was useful. However, concerns were expressed about *a contrario* interpretation that would limit the scope of article 27. With regard to paragraph 3, which required parties to disclose the use of technology for the collection and presentation of evidence, views were expressed that it might be too prescriptive though the issues ought to be discussed during a case management conference. Concerns were expressed with regard to the reference to "artificial intelligence" in that paragraph in light of possible further development in its use.

65. As a general comment, it was noted that the detailed procedures provided for in draft provisions 6 to 8 might run contrary to the objective of achieving swift resolution of technology-related disputes.

66. Lastly regarding the period of making an award, it was generally felt that a swift resolution of the disputes would be ideal, for example in the context of technology-related disputes concerning software development and financing of start-up companies. Some concrete examples were shared, which could usefully guide the work. Accordingly, some support was expressed for providing default time frames of very short periods as outlined in draft provision 9. On the other hand, some doubts were expressed about the usefulness of imposing such a short time period for the broad range of disputes currently covered, particularly not knowing the complexity of the dispute, the experts to be engaged and the measures to be put in place for confidentiality and so forth. It was noted that shorter time frames could result in systemic extensions. It was also mentioned that imposing such short time frames in an ad hoc context may be difficult. Furthermore, while reduction of fees and other sanctions may incentivise the arbitral tribunal to manage the proceedings more effectively, doubts were expressed on the regulatory nature of such sanctions also noting that such a provision may limit the pool of arbitrators that could adequately address the case.

67. It was felt that the framework in which the draft provisions would operate needed to be clarified, for example, whether it would complement or replace the UNCITRAL Arbitration Rules or the recently adopted UNCITRAL Expedited Arbitration Rules. With regard to the need to have a simplified and quick process, some support was expressed for relying on the UNCITRAL Expedited Arbitration Rules to provide the framework with shorter time frames including for the rendering of the award and at the same time providing the flexibility for the arbitral tribunal and the parties to further tailor them to the case.

68. While the form of the final product was yet to be determined, doubts were expressed about preparing a separate set of rules for technology-related dispute resolution. Rather, preference was expressed for preparing model clauses for use by parties or a guidance document on how the UNCITRAL Expedited Arbitration Rules could be tailored to technology-related dispute resolution. In particular, there was some interest to develop model clauses on the appointment and role of experts/neutrals, confidentiality, and a shorter time for the rendering of the award.

E. Roundtable discussion on the way forward

69. A roundtable discussion took place on 1 April 2022 with the aim to provide the Commission with input on possible future work on dispute settlement.

Early dismissal and preliminary determination

70. It was recalled that upon the request by the Working Group at its seventy-fourth session (A/CN.9/1085, paras. 66 and 67), the secretariat had prepared a note presenting different legislative approaches on the topic of early dismissal and preliminary determination for consideration by the Commission (document A/CN.9/1114).

Developments in DRDE and online platforms for dispute resolution

71. With regard to the topics of DRDE and online platforms for dispute resolution, support was expressed for the secretariat to continue to take stock of the developments and report to the Commission on possible legislative work to be undertaken, identifying the relevant issues and the scope of such work. It was said that the work on the two topics would need to be closely coordinated considering their relevance. The secretariat was requested to continue to engage with a wide range of experts from different jurisdictions, including by taking part in and supporting iGLIP on ODR. Support was expressed for including the issues of interim measure and judicial coordination within the scope of the DRDE stocktaking exercise (see para. 26 above).

72. It was widely felt that the stocktaking should examine whether there was a paradigm shift as alternative dispute resolution increasingly embraced technology. It was said that while there was a need to compile information about the technological developments and their application to dispute settlement, the focus of the stocktaking should be on legal issues addressing any negative impact of the use of technology and on how technology can improve the efficiency of the dispute settlement process while preserving its integrity. In that context, it was suggested that the principles of due process and fairness should guide the stocktaking project, which should also be based on technological neutrality, one of the underlying principles of UNCITRAL texts on electronic commerce. It was suggested that the approach taken by the secretariat with regard to legal issues related to the digital economy, whereby a legal taxonomy of emerging technologies and their application was developed, could be followed (see document A/CN.9/1064 and addenda). It was said that by taking such an approach, it would be possible to examine whether and how the recent technological developments could be addressed by existing UNCITRAL texts and to identify any gaps, which might require the development of legal standards. It was mentioned that through such an exercise, the scope of the stocktaking project could be more fine-tuned to provide the Commission with concrete information on the desirability and feasibility of any work. It was suggested that the secretariat should take a holistic approach to include the different means of alternative dispute resolution (including on online platforms) and the wide range of technology utilized in dispute resolution.

73. In light of the above, the Commission may wish to consider requesting the secretariat to continue to implement the DRDE stocktaking project using the resources provided by the Government of Japan[20] and to report back on its preliminary findings at the fifty-sixth session in 2023. Similarly, the Commission may wish to consider requesting the secretariat to continue to support and take part in iGLIP on ODR as its experts continue to develop an international legal instrument on access to justice and the role of online platforms for dispute resolution.

Adjudication and technology-related dispute resolution

74. With regard to the topics of adjudication and technology-related dispute resolution, some support was expressed for the Working Group to pursue legislative work, while doubts were also expressed on the desirability, feasibility and scope of such work.

75. With regard to adjudication, it was pointed out that the practice was still developing with a number of jurisdictions having no such practice nor legislation to provide the legal framework. It was also mentioned that the existing practice was mostly limited to domestic disputes mainly in the construction industry and whether the practice could apply to cross-border disputes and disputes in other industries would need to be carefully assessed. Accordingly, some viewed the issues as not being ripe for harmonization. In that context, it was mentioned that if work were to be undertaken, it would aim to achieve progressive harmonization rather than harmonization of existing legal standards, and therefore, it should take a flexible

[20] *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 17* (A/76/17), paras. 231 and 232.

rather than a prescriptive approach to allow the relevant practice to develop. It was also said that adjudication could provide a suitable solution for resolving technology-related disputes, where developments were fast and parties, such as start-ups, did not have the resources to conduct full-fledged international arbitration.

76. With regard to technology-related dispute resolution, it was suggested that the work should not aim to develop a new set of rules but rather to prepare model clauses, which disputing parties can easily refer to or include in their dispute resolution clause. It was stated that the development of such model clauses would respond to the needs of the industry, whereby the current frameworks for alternative dispute resolution were being underutilized and might be perceived as not providing an ample solution. On the other hand, it was questioned whether the peculiarities of technology-related disputes were such that they would justify the development of separate model clauses because aspects like the technological savviness of arbitrators, the role of experts and confidentiality applied to other types of disputes, particularly with the recent developments in technology.

77. It was stated that both projects had a common objective: to provide a legal framework for a simplified mechanism to resolve disputes in a very short time frame involving a third party with the relevant expertise, not necessarily resulting in a final award but the outcome still being enforceable across borders. It was felt that the UNCITRAL Expedited Arbitration Rules, with their shorter time frames, could provide the underlying framework, which would allow the parties to resort to expedited arbitration when necessary. It was stated that such a mechanism could address the needs of all types of industry and need not be limited to the construction or technology industry. Calls were made that the discretion of the arbitral tribunal and of the parties to tailor the proceedings to their needs would need to be emphasized in that mechanism.

78. While different suggestions were made on the form of possible work (for example, model law, model clauses, guidelines and toolboxes), it was generally felt that the appropriate form should be determined once the scope and substance of the legal standard were identified. In relation, it was pointed out that future work should be in an area where the negotiations at a working group could add value and respond to the four tests as agreed by the Commission.[21]

79. After discussion, it was widely felt that there might be merit in tackling the two topics jointly as the underlying objective was similar. In that context, it was suggested that such work should build on an analysis of whether it would be desirable to utilize adjudication in a cross-border context and in other industries (including the technology industry) and an assessment of whether it would be feasible to harmonize the applicable legal instruments, including for the purpose of enforcement. It was also suggested that the work could involve the preparation of model clauses on the appointment and role of experts/neutrals, short time frames and confidentiality, which parties could use for disputes that require a swift resolution. Lastly, it was stressed that such work should be based on existing UNCITRAL texts and address how their use could be amplified without the need to revise those texts.

[21] The Commission may wish to recall that, at its forty-sixth session, in 2013, it agreed to use four tests to assess whether legislative work on a topic should be referred to a working group: (i) whether it was clear that the topic was likely to be amenable to international harmonization and the consensual development of a legislative text; (ii) whether the scope of a future text and the policy issues for deliberation were sufficiently clear; (iii) whether there existed a sufficient likelihood that a legislative text on the topic would enhance modernization, harmonization or unification of the international trade law; and (iv) whether duplication might arise with work being undertaken by other international organizations. *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 303–304.

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Draft Provisions for Technology-related Dispute Resolution

At the fifty-fourth session, the Commission requested its secretariat to organize a colloquium during the seventy-fifth session of Working Group II to further explore the legal issues with regard to dispute resolution in the digital economy and to identify the scope and nature of possible legislative work. It was agreed that the agenda for the colloquium should include, among others, model provisions that could be utilized in the context of technology-related disputes or provisions to be incorporated by reference in dispute resolution clauses.

In 2019, the Commission had considered a proposal by the Governments of Israel and Japan on possible future work in the field of dispute resolution in international high-tech related transactions (A/CN.9/997). And at its fifty-fourth session in 2021, the Commission requested the secretariat to continue to engage with experts with a view to preparing an outline of provisions to assist in the operation of such dispute resolution (A/76/17, para. 229).

The text in the annex is a first draft prepared by experts to facilitate further exploration of the relevant issues with regard to technology-related dispute resolution.

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Annex

Draft provisions for technology-related dispute resolution

The following provides draft provisions that could be utilized in the context of technology-related disputes, either as part of a set of rules to be agreed upon by the parties or as clauses to be incorporated by reference. They have been prepared to stimulate discussion during the colloquium and therefore do not include mechanisms for parties to opt in to the provisions nor define the role of the appointing authority in determining whether such provisions are appropriate for the dispute at hand.

A. Definition

Draft provision 1

1. Technology dispute means a dispute arising out of or relating to the supply, procurement, research, development, implementation, licensing, commercialization, distribution, financing, as well as to the existence, scope, and validity of legal relationships of or related to the use of emerging and established technologies.

2. Technology disputes may be varied in nature and arise out of ownership (including intellectual property rights in a specific technology), licensing terms, payment or financial issues, non-competition (unfair competition or non-competition), confidentiality (data privacy, non-disclosures), or regulatory issues.

1. Since the draft provisions are aimed at creating a specific mechanism for resolving technology-related disputes, it is imperative to first define the term “technology dispute”. This would also guide the possible scope of work to be undertaken by the Working Group. The definition in draft provision 1 aims to include the standard types of disputes arising in the digital economy, which can generally be described as having two important and sometimes contradictory features: the need for significant technical expertise and the need for a very efficient and speedy resolution. While common, these two features may not exist to their fullest extent in every dispute and may vary in their nature and intensity depending on the case.

2. Concerns have been expressed about the high costs, the lengthy proceedings, and the lack of expertise by decision makers in resolving technology-related disputes. They result from the fact that such disputes are quite complex, and their resolution may require expertise in more than one field. Furthermore, while tech companies need to be agile and innovative in order to remain competitive, such disputes could prevent them (particularly start-ups) from obtaining funding from investors. In summary, technology-related disputes can be described as those that require a speedy and cost-efficient resolution by a person(s) with the appropriate expertise and that require a flexible resolution process to adapt to the evolution of the dispute as well as relevant technology.

3. The two most representative types of technology dispute are as follows. One is a dispute arising out of IT systems development and/or implementation contracts, which typically require a high level of technical understanding. The other is a dispute relating to the ownership of technology in early-stage start-ups, which requires a very speedy and efficient resolution to allow parties to continue their business operations, including software development. True to the old proverb of “justice delayed is justice denied”, full-length proceedings would deny the parties their due process rights and could have a negative impact on their business prospects.

4. Draft provision 1 was prepared with the understanding that parties’ consent would be required for the application of the draft provisions, which would avoid questions on whether the draft provisions shall apply to a certain dispute and if so,

which authority would make that determination. Accordingly, draft provision 1 provides a very wide and open-ended definition for the parties' consideration. In preparing the definition, reference was made to existing work by the OECD, United Nations Statistics Division, the European Council, the UK Jurisdiction and the Society of Computers and Law.

5. The definition focuses on the nature of the underlying transaction and the dispute but not on the identity of the parties, the sector they are operating in, or the type of relevant product or service. While disputes that arise in the high-technology industry (aerospace, pharmaceuticals, computers and office equipment, electronics, communications, and precision instruments) are often technology-related, it can be said that companies in almost every industry face similar disputes, as they also rely heavily on technology in their operations. The definition is also geared towards business-to-business disputes.

6. Paragraph 1 provides an open-ended definition, which can potentially encompass all forms and sizes of technology-related disputes. Paragraph 2 lists in a non-exhaustive manner, the common types of disputes that would fall under the definition in paragraph 1, while leaving a margin of appreciation for the parties, arbitral tribunals and administering institutions to further broaden the scope of disputes. It may be the case that disputes that do not necessarily fall within the definition (such as construction, commodities, and maritime disputes) may also benefit from the application of the draft provisions. Whether certain types of disputes should be excluded depending on the technology utilized (for example, mature technologies that have been operational for over fifty years or design patents) or on the industry (for example, the art or culinary industry) would need further consideration.

7. By way of illustration only, disputes arising in the following industry or sector would likely fall under the definition: aerospace, audio technology, automotive or mobility (including electric, smart, and autonomous vehicles), artificial intelligence, automation, biotechnology, computer engineering, electronic engineering, information technology, legal technology, medical devices, military/defence, nanotechnology, nuclear physics, photonics, robotics, semiconductors, telecommunications and media communications, pharmaceutical and financial technology (FinTech). Similarly, the draft provisions may apply to disputes relating to industrial technology, disruptive/innovation technology, architectural/building technology, creative technology (intersection between technology, arts, and fashion) and open-source technology. Furthermore, the draft provision could apply to disputes arising from or related to e-commerce, data privacy and security, technology insurance, M&A transactions involving tech companies or where technology is a prominent deal feature, technology distribution or resale, digital currency and cryptocurrency, non-fungible tokens (NFTs), blockchain based smart contracts and cloud computing.

B. Number of arbitrators

Draft provision 2
Unless otherwise agreed by the parties, there shall be one arbitrator.

8. If the parties have not agreed on the number of arbitrators, the default should be a sole arbitrator as proceedings involving an arbitral tribunal composed of more than one arbitrator may be less expeditious. This would be in line with article 7 of the UNCITRAL Expedited Arbitration Rules (the "Expedited Rules"). For the appointment of the sole arbitrator, the mechanism provided in article 8 of the Expedited Rules could apply.

C. Case management conferences

Draft provision 3

1. As soon as possible after the constitution of the arbitral tribunal, and before any oral hearing, the arbitral tribunal shall hold an initial case management conference to consult with the parties on the manner in which it will conduct the arbitration to avoid unnecessary delay and expense and to provide a fair and efficient resolution of the dispute. To the extent possible, a case management conference should be attended by the representatives of the parties including, where appropriate, the parties' internal technology experts.

2. At the initial case management conference, the arbitral tribunal should discuss, in particular, the following:

(a) The nature of the technology-related issues presented in the dispute, including the production and management of electronically stored information, and other case-specific technology matters;

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

(c) Confidentiality and disclosures;

(d) The identification of contested and uncontested facts, including those relating to technology;

(e) The structuring and the appropriate phasing of the proceedings;

(f) The management of the technology issues in response to the needs of each phase, including the early exchange of relevant information and the exchange of information necessary to address the prospects of an early resolution or settlement of the dispute;

(g) The taking of expert evidence in the light of the technical issues in the dispute and in particular, the taking of expert evidence through party-appointed expert witnesses, tribunal-appointed experts and/or other forms of expert evidence;

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

(i) Any other issues in relation to the resolution of the dispute, including the prospects of an early resolution or settlement of the dispute.

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

4. In order to understand the dispute, the arbitral tribunal may ask any questions to the parties and the experts throughout the proceedings.

5. The arbitral tribunal may, after inviting the parties to express their views and taking into account the circumstances of the case, utilize any technological means as it considers appropriate to convene a case management conference pursuant to paragraphs 1 and 3.

9. A case management conference (CMC) can help to avoid unnecessary delay and expenses and is the best means to provide a fair and efficient process. Draft provision 3 distinguishes between the initial CMC, which is mandatory, and subsequent CMCs, which can be scheduled at the discretion of the arbitral tribunal.

10. Paragraph 1 does not impose a fixed time limit for the initial CMC. However, it should be as early as possible and, in any case, before any oral hearing. The most appropriate time for the initial CMC will be promptly after the constitution of the arbitral tribunal, and prior to the exchange of further written submissions.

11. Paragraph 2 contains an illustrative list of elements, which might be discussed at any CMC. Where appropriate, the arbitral tribunal should invite the parties to make additional proposals, or to comment on the list of elements ahead of the CMC. For example, whether a hearing will be held or whether the proceedings would be based on documents only could also be discussed.

12. The phrase "other forms of expert evidence" in subparagraph (g) refers to a pre-hearing where the party-appointed experts may be requested to identify technological issues where agreement can be reached upon and those where the views are split, or "experts teaming" procedures where experts selected among those proposed by the parties work under the instruction of the arbitral tribunal in order to produce a joint report. The provision is intended to be open to novel forms of expert evidence that may arise in the future.

13. Paragraph 3 refers to regular and ad hoc CMCs that may follow the initial CMC. Regular CMCs are recommended especially where tribunal-appointed experts have to perform operations over an extended period of time.

14. Paragraph 4 encourages the arbitral tribunal to ask questions to the parties and experts at any time during the proceedings. If the arbitral tribunal puts a question to a party or an expert, this should not, in and of itself, be considered as a lack of independence and impartiality. Where a question is put only to one of the parties, the arbitral tribunal will have to assess if and when the other party or parties should be given an opportunity to comment on the answer.

15. Paragraph 5 refers to the technological means used for the CMCs. While the provision is open to any appropriate means, including a meeting in person, the most cost-effective means will usually be to conduct the CMCs by telephone or videoconference.

D. Time frames

Draft provision 4

1. Any supplement to the notice of arbitration, including all supporting evidence, should be communicated within five days following the initial case management conference. In case, witness evidence is offered, the supplement must include the list of witnesses.

2. A reply to any supplement shall be communicated within five days after the receipt of the supplement. It shall include all supporting evidence, and if witness evidence is offered, the list of witnesses.

E. Appointment of experts and neutrals

Draft provision 5

1. Considering the needs and complexities of the dispute, it may be appropriate and necessary to appoint experts and neutrals to expeditiously assist the arbitral tribunal with matters such as the details and scope of the technology in dispute or the intricacies of damage calculations, and to provide an expert determination on specific issues. A party may request permission to appoint such an expert or neutral or the arbitral tribunal may determine that such assistance is required.

2. When so required, the arbitral tribunal will provide additional or alternative directions, including but not limited to directions for the service of written evidence from the appointed expert or neutral. When providing such directions, consideration shall be given to the following:

(a) Accessibility of the parties to counsel with the appropriate technological and related fields expertise;

(b) The type of a suitable independent expert or neutral, the need for technical and/or damage-based expertise and other qualifications, and geographic locations;

(c) The experience and qualification of the arbitrator(s);

(d) Any time frame including those agreed between the parties;

(e) The structure of the expert determination and timetable of matters subject thereof (including discovery and the scope of discovery); and

(f) Any enhanced confidentiality or data-security requirements.

3. An expert or neutral appointed by the arbitral tribunal shall be independent of the parties and shall submit a signed declaration to that effect in its report.

4. The parties will provide the expert or neutral with all relevant information, documentation, coding, and products, including the organization of site visits if necessary. If a party fails to do so, the arbitral tribunal may order such access as appropriate to the circumstances.

5. Unless otherwise agreed by the parties and subject to any applicable law, the expert or neutral's report shall be admissible in any judicial or arbitral proceedings between the same parties.

6. The expert or neutral's findings are not binding on either party. However, the findings can be used by the parties as a basis for negotiations with a view to reaching a settlement of their dispute or narrowing their differences.

7. If asked by any party, or ordered by the arbitral tribunal, the expert or neutral shall attend any hearing/pre-hearing at which reasonable and relevant question may be put to them about their report.

8. The fees and expenses of any expert or neutral appointed by the arbitral tribunal shall form part of the cost of arbitration.

9. Subject to any applicable law, the parties may agree on, or the arbitral tribunal may direct the use of an early determination or neutral evaluation on one or more aspects of the dispute. In that case, the expert or neutral's findings shall constitute a contractually binding expert determination for the relevant aspects of the dispute. For the avoidance of doubt, such an expert or neutral is not an arbitrator, and their findings are not enforceable as an arbitral award.

F. Confidentiality and protection of confidential information

16. Technology-related disputes often concern technical and scientific information, trade secrets and rights with a high profile in the market that are sensitive to confidentiality and from which tech companies derive significant economic value.

17. However, the UNCITRAL Arbitration Rules do not contain a provision on confidentiality and the 2016 UNCITRAL Notes on Organizing Arbitral Proceedings leave the desired confidentiality regime up to the agreement of the parties, should confidentiality be a concern or priority (Note 6, paras. 50–54). While an agreement between the parties would provide certainty, it may be desirable to provide default rules in the absence of such an agreement. Draft provisions 6 and 7 provide a specific and supplementary set of rules applicable to technology-related disputes, at the heart of which lie technical and commercially sensitive information and where preserving confidentiality is critical. They attempt to obtain a balance between preserving confidentiality and ensuring sufficient disclosure to facilitate the proceedings.

18. The duty to maintain confidentiality has two facets with a potentially different scope of protected information. One relates to "outbound confidentiality" in the sense of non-disclosure to third parties not involved in the arbitration proceedings of information relating to the arbitration (which is to some extent regulated in arbitration rules such as LCIA Arbitration Rules and the Swiss Arbitration Rules). Another

relates to “inbound confidentiality” regarding protection of information before it is produced or disclosed within the proceedings (for example, trade secrets). The latter, which is rarely regulated, relates to situations where certain information is deemed to be confidential to one of the parties.

Draft provision 6

1. Unless expressly agreed otherwise, the parties undertake to keep confidential all awards and orders in the arbitration, together with the existence of the arbitration, all materials produced in and/or generated during the proceedings which are not otherwise in public domain, including materials created for the purpose of the arbitration and all other documents or evidence given by a party, witness, or expert, except and to the extent that a disclosure may be required:

(a) To enforce or challenge an award in legal proceedings before a judicial authority or to pursue a legal right;

(b) To comply with the provisions of the laws of any State, which are binding on the party making the disclosure;

(c) To any government body, regulatory body, court or tribunal where the party is obliged by the law to disclose the above-mentioned information; or

(d) To a professional or any other adviser of any of the parties, including any potential witness or expert.

2. The undertaking in paragraph 1 also applies to the arbitrators, and any person appointed by the arbitral tribunal, including any expert, and any administrative secretary to the arbitral tribunal. The parties shall seek the same undertaking of confidentiality from all those that it involves in the arbitration, including but not limited to any authorized representative, witness of fact, expert, or service provider.

3. The deliberations of the arbitral tribunal shall be confidential. The parties shall acknowledge this confidentiality and undertake to protect it.

4. The arbitral tribunal may take appropriate measures and sanction a party through an order or an award if a party breaches the duties in this draft provision.

5. A party intending to make disclosure in accordance with paragraph 1 must within a reasonable time prior to the intended disclosure notify the arbitral tribunal and the other parties (if during the proceeding) or the other parties (if the disclosure is after the conclusion of the proceeding) and furnish details of the disclosure including the reasons for the disclosure.

6. The duties in this draft provision shall survive the termination of the proceedings.

7. The arbitral tribunal may, in consultation with the parties, adopt any measure:

(a) To protect any physical and electronic information shared in the arbitration; and

(b) To ensure any personal data produced or exchanged in the arbitration is processed and/or stored in light of any applicable law.

19. Draft provision 6 provides for outbound confidentiality. Paragraph 1 defines the scope of the confidentiality obligation. Paragraph 1 prohibits disclosure of all information revealing the existence of the arbitration, and all materials in the arbitration proceedings, which are not publicly available. It covers all information and documents created for the purposes of the proceedings as well as information and documents provided by the other party.[1]

[1] See article 3.13 of the IBA Rules on Taking of Evidence (2020) (“IBA Rules”).

20. With regard to awards, draft provision 6 supplements article 34(5) of the UNCITRAL Arbitration Rules, which provides that an award may be made public with the consent of all parties and where and to the extent disclosure is required.[2]

21. Paragraph 1 further outlines circumstances in which disclosure of confidential information is permissible. Subparagraph (d) creates an obligation to endeavour to preserve confidentiality when non-disputing parties become involved in the proceedings. Paragraph 4 makes clear that the confidentiality provision may yield rights and duties, which may be enforced by the arbitral tribunal. Paragraph 5 imposes a duty to inform prior to any disclosure.

Draft provision 7

1. For the purposes of this draft provision, confidential information means any information, regardless of the medium in which it is expressed, which is:

(a) In the possession of a party;

(b) Not accessible to the public;

(c) Of commercial and/or scientific and/or technical sensitivity; and

(d) Treated as confidential by the party possessing it.

2. A party invoking the confidentiality of any information it wishes or is required to submit during the proceeding, including to an expert appointed by the tribunal, shall request the arbitral tribunal to have the information classified as confidential with a copy to the other parties. Without disclosing the substance of the information, the party shall give the reasons for which it considers the information confidential. The other parties shall be given a reasonable opportunity to state its views. Upon receipt of any such request, the arbitral tribunal may invite the relevant parties to consult with each other with regard to the request.

3. If the other parties do not agree with the request, the arbitral tribunal shall determine whether the information is to be classified as confidential and of such a nature that absent special protection measures it would likely cause serious harm to the party making the request. If the arbitral tribunal so determines, it shall decide under which conditions and to whom the confidential information may in part or in whole be disclosed and shall require any person to whom the confidential information is to be disclosed to sign a confidentiality undertaking.

4. In exceptional circumstances, the arbitral tribunal may, at the request of a party or on its own motion and after consultation with the parties, designate an advisor to make the determination in accordance with paragraph 3.

5. The arbitral tribunal may also, at the request of a party or on its own motion and after consultation with the parties, appoint a person as an 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.

22. Draft provision 7 provides for inbound confidentiality of information of intrinsic value (such as trade secrets, know-how, algorithms, etc.) regardless of the medium in which it is expressed.

23. Most arbitration laws and arbitration rules lack rules on protection of confidential information. Such protection could be viewed as falling within the broad discretionary powers of the arbitral tribunal, while some arbitration rules have

[2] In contrast, another approach would be to allow the publication of anonymized awards, provided that the parties do not object. This could allow others involved in technology-disputes to be informed of the development of relevant law and principles. See Digital Dispute Resolution Rules (2021) of the UK Jurisdiction Task force.

included specific provisions (see article 22(3) of the 2021 ICC Arbitration Rules[3]). The WIPO Arbitration Rules, while geared towards IP disputes, contain a very detailed set of rules on protection of trade secrets and other information of commercial or industrial significance. While article 7(2) of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration provides a definition of confidential or protected information, this is in the context of investment arbitration and relates more to whether the information should be made publicly available.

24. The existence and scope of confidential information is normally determined by the applicable law, which requires a choice of law analysis. This exercise could prove difficult if there are several competing applicable laws. To avoid this, paragraph 1, largely based on the WIPO Arbitration Rules, provides a precise description of what would constitute confidential information and limits requests for confidentiality on the ground of commercial, scientific and/or technical sensitivity.

25. While there may be different approaches to deal with requests for confidentiality, one approach may be to provide a default rule that all information exchanged between the parties and the arbitral tribunal shall be deemed confidential, unless determined otherwise by the tribunal upon request by a party. If necessary, the arbitral tribunal should make arrangements to preserve the confidentiality of the information in question.

26. Another approach could be based on the premise that confidentiality is not assumed but must be invoked by a party. According to draft provision 7, upon the request by a party, the tribunal will determine whether the information is to be classified as confidential and whether the absence of special measures of protection in the proceedings would be likely to cause serious harm to the party invoking confidentiality. The requirement of "serious harm" must be considered on a case-by-case basis and will include a balancing by the tribunal of competing interests. The discretion provided to the arbitral tribunal under article 27(3) of the UNCITRAL Arbitration Rules and article 9.2 of the IBA Rules would continue subject to any protective measure under draft provision 7.

27. Paragraph 2 provides that the plea of confidentiality can be invoked both by a party resisting the introduction of the information into the proceedings and by a party seeking to rely on the allegedly confidential information. In other words, the draft provision deals with protection of a party that is requested to produce information as well as with protection of a party that needs to rely on information in its possession. Paragraphs 3, 4 and 5 deal with the procedure of determining whether the information is confidential. If information is deemed confidential, the tribunal will determine under which conditions and to whom information may be disclosed. The second sentence of paragraph 3 envisages the possibility of limiting the disclosure to specific individuals (such as opposing parties' lawyers).

28. Paragraph 4 allows the appointment of a third-party advisor, which is widely recognized in the context of document production. Such an advisor can be better equipped with relevant expertise to determine whether the confidentiality concern is genuine, supervise the redaction process, and monitor the disclosure or inspection of documents. A similar approach can be found in article 3.8 of the IBA Rules.[4]

29. Paragraph 5 envisages the appointment of a neutral expert where such person would collect evidence which may only be drawn from the confidential information and prepare a report answering specific questions put by the parties and the tribunal.

[3] Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.

[4] In exceptional circumstances, if the propriety of an objection can be determined only by review of the Document, the Arbitral Tribunal may determine that it should not review the Document. In that event, the Arbitral Tribunal may, after consultation with the Parties, appoint an independent and impartial expert, bound to confidentiality, to review any such Document and to report on the objection. To the extent that the objection is upheld by the Arbitral Tribunal, the expert shall not disclose to the Arbitral Tribunal and to the other Parties the contents of the Document reviewed.

Whether the advisor in paragraph 4 or the expert in paragraph 5 can report on specific issues arising from confidential information communicated to that person but not disclosed to the tribunal or other parties would need to be further considered.

30. Examples of suitable confidentiality protection arrangements that the tribunal can adopt in order to permit evidence containing highly competitive or sensitive information to be presented or considered subject to such arrangements (e.g. disclosure of information only to counsel or to the experts or to arbitrators; redaction of documents and use of different sets of written submission) can be elaborated in a separate confidentiality protocol/guide rather than in the rules.

G. Evidence

Draft provision 8

1. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits, data, technical information, or other evidence within such a period of time as the arbitral tribunal shall determine.

2. At any time during the arbitral proceedings the arbitral tribunal may order that evidence be taken or that an experiment be performed or repeated in the presence of or by the arbitral tribunal, the parties or an expert appointed by the arbitral tribunal.

3. Each party shall disclose to all parties and the arbitral tribunal the use of technology including artificial intelligence for the purpose of collecting or presenting evidence or complying with an order of the arbitral tribunal. Upon such disclosure, any party may request that the use of such technology be limited, and the arbitral tribunal may refuse or allow it in view of the circumstances of the case.

31. Draft provision 8 supplements article 27 of the UNCITRAL Arbitration Rules (Evidence) to provide tools for technology-related disputes, where evidence may involve significant technology and/or digital processes. In line with article 27, draft provision 8 reaffirms the ability of the arbitral tribunal and the parties to adapt the gathering, presentation, and evaluation of evidence to the circumstances of the case, while protecting due process and ensuring efficiency and effectiveness.

32. Paragraph 1 intends to clarify that “data” and “technical information” fall under the phrase “other evidence” in article 27(3) of the UNCITRAL Arbitration Rules and that the arbitral tribunal may require their production. The inclusion of the two terms would clarify and ensure that flexibility is provided with regard to evidence in technology-related disputes. The term “technical information” includes primers, namely technical background information necessary to understand the issues or expert evidence on technical points. The addition of the two terms should, however, not be understood as limiting the types of evidence to be produced which may change with new developments in technology.

33. Paragraph 2 addresses the taking of evidence in the form of experiments and demonstration of a process.

34. Paragraph 3 requires the parties to disclose the use of technology, including artificial intelligence, in collecting, processing, and presenting evidence, or complying with an order of the tribunal. A party may object to the use of such technology, upon which the arbitral tribunal should make a determination on whether it should be allowed. Paragraph 3 seeks to balance between ensuring transparency and facilitating the evaluation of evidence, while not overregulating the use of technological or digital evidence.

35. With regard to the use of artificial intelligence (AI), it may be necessary to distinguish between two situations. If used by parties to help prepare and analyse their case with no direct impact as to the evidence, documents or information presented to tribunals or the other parties, it should be considered legitimate. As there is a human involved, who understands and takes responsibility for the work done by AI, parties

should remain free to use such technology. However, if AI is used to collate documents or information submitted or disclosed during the proceedings, some regulations may be necessary. In that sense, the discretion provided in article 17(1) should allow arbitral tribunals to regulate the use of AI and similar technology. More generally, it will be necessary to monitor how AI and other technology may be used in arbitral proceedings and to guard against potentially adverse impacts on evidence.

H. Period for making an award

Draft provision 9

1. If the arbitral tribunal determines that an award could be rendered based on written statement only without hearing the witnesses or hearing a limited number of witnesses, the award may be rendered within 20 days of the constitution of the arbitral tribunal.

2. Except as provided in paragraph 1 and unless otherwise agreed by the parties, the award shall be made within 40 days from the date of the constitution of the arbitral tribunal.

3. The arbitral tribunal may, in exceptional circumstances and after inviting the parties to express their views, extend the period of time established in accordance with paragraph 2. The extended period of time shall not exceed a total of 60 days from the date of the constitution of the arbitral tribunal.

4. If the award is not rendered within the established period of time, the fee of the arbitrator will be reduced as follows, unless otherwise agreed by the parties and the arbitral tribunal:

(a) Delay of up to 14 days: 20 per cent

(b) Delay between 15 and 30 days: 50 per cent

(c) Delay between 31 and 60 days: 70 per cent

(d) Delay of more than 60 days: 90 per cent

36. Paragraph 1 proposes a fast-track process whereby the award can be rendered within 20 days of the constitution of the arbitral tribunal, when it is possible for the arbitral tribunal to do so based on written statements only and hearing a limited number of witnesses, if any.

37. Unlike the Expedited Rules where the award shall generally be made within six months from the date of the constitution of the arbitral tribunal, paragraph 2 provides a fast-track process whereby the award shall be made in 40 days. This period can be extended by the arbitral tribunal, after hearing the views of the parties, for up to 60 days (in comparison with nine months as provided in the Expedited Rules). An alternative approach would be to subject the extension to the agreement of the parties.

38. By providing sanctions on arbitrator’s fees, paragraph 4 encourages the arbitral tribunal to manage the proceeding efficiently and in accordance with the established timetable. Even when the fees are reduced, the right of the parties to request damages under the applicable law should remain unaffected.

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Technology-related dispute resolution and adjudication

Note by the Secretariat

Contents

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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 (see A/CN.9/WG.II/WP.226, paras. 9–12).[1]

2. There was general support in the Commission to pursue legislative work building on the common elements, mainly that both aimed to provide a legal framework for a simplified mechanism to resolve disputes in a very short time frame involving a third party with the relevant expertise, not necessarily resulting in a final award but the outcome still being enforceable across borders. It was pointed out that the outcome of adjudication, which could be the subject of review in a subsequent arbitration proceeding, was of particularly relevance. It was suggested that such legislative work should build on existing UNCITRAL texts, notably the UNCITRAL Expedited Arbitration Rules (the "Expedited Rules"), which would provide the underlying framework for an expedited procedure.[2]

3. After discussion, the Commission agreed that the work should build on the Expedited Rules and that model provisions, clauses, or other forms of legislative or non-legislative text could be prepared on matters such as shorter time frames, appointment of experts/neutrals, confidentiality and the legal nature of the outcome of the proceedings, all of which would allow disputing parties to tailor the proceeding to their needs to further accelerate the proceedings. It was stressed that such work should be guided by the needs of the users, take into account innovative solutions as well as the use of technology, and further extend the use of the Expedited Rules.[3]

4. The aforementioned decisions by the Commission were based on the discussions at the UNCITRAL Colloquium on Possible Future Work on Dispute Settlement held during the seventy-fifth session of the Working Group.[4] At the Colloquium, the Working Group considered the draft provisions for technology-related dispute resolution submitted by a group of experts (A/CN.9/WG.II/WP.224) and a note by the Secretariat on adjudication, which included a proposal for future work submitted by the Government of Switzerland (A/CN.9/WG.II/WP.225).[5] The round-table discussions held on the last day of the Colloquium may provide guidance as the Working Group makes progress on the topics.[6]

5. At the Colloquium, with regard to technology-related dispute resolution, it was suggested that the work should not aim to develop a new set of rules but rather to prepare model clauses, which disputing parties can easily refer to or include in their dispute resolution clause. It was stated that the development of such model clauses would respond to the needs of the industry, whereby the current frameworks for alternative dispute resolution were being underutilized and might be perceived as not providing an ample solution. On the other hand, it was questioned whether the peculiarities of technology-related disputes were such that they would justify the development of separate model clauses because aspects like the technological

[1] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 17* (A/77/17), para. 225.
[2] Ibid., para. 223.
[3] Ibid., para. 225.
[4] See the Report of the Working Group Report of the Colloquium on Possible Future Work on Dispute Settlement held during the seventy-fifth session of Working Group II (A/CN.9/1091). Additional information about the Colloquium is available at: https://uncitral.un.org/en/disputesettelementcolloquium2022.
[5] For the summary of the discussions on technology-related dispute resolution, see A/CN.9/1091, paras. 48–68. For a summary on adjudication, see A/CN.9/1091, paras. 40–47.
[6] For the summary of the round-table discussions, see A/CN.9/1091, paras. 69–79.

savviness of arbitrators, the role of experts and confidentiality applied to other types of disputes, particularly with the recent developments in technology.[7]

6. With regard to adjudication, it was pointed out that the practice was still developing with a number of jurisdictions having no such practice nor legislation to provide the legal framework. It was also mentioned that the existing practice was mostly limited to domestic disputes mainly in the construction industry and whether the practice could apply to cross-border disputes and disputes in other industries would need to be carefully assessed. Accordingly, some viewed the issues as not being ripe for harmonization. In that context, it was mentioned that work should aim to achieve progressive harmonization rather than harmonization of existing legal standards, and therefore, should take a flexible rather than a prescriptive approach to allow the relevant practice to develop. It was also said that adjudication could provide a suitable solution for resolving technology-related disputes, where developments were fast and parties, such as start-ups, did not have the resources to conduct full-fledged international arbitration.[8]

7. In light of the above, this Note presents ways to further accelerate the resolution of disputes by incorporating elements of both proposals on technology-related dispute resolution and adjudication. Upon review of the elements, the Working Group may wish to consider how to conceptualize and refer to the project

8. While they are presented in the form of model clauses and guidance notes building on the Expedited Rules and the UNCITRAL Notes on Organizing Arbitral Proceedings (the "UNCITRAL Notes"),[9] this is without prejudice to decision on the final form of work, which may take the form of model provisions, clauses, or other forms of legislative or non-legislative text (see para. 55 below).

II. Possible model clauses

9. This section provides possible model clauses for use by parties to further accelerate and tailor to their needs a proceeding governed by the Expedited Rules. As requested by the Commission, they address: (i) shorter time frames linked with the legal nature of the outcome of the proceeding; (ii) appointment and the role of experts and neutrals; and (iii) confidentiality. The model clauses have been prepared to operate independent of each other, allowing parties to choose the rules they deem necessary. The Working Group may wish to consider whether and how the model clauses would operate in a proceeding other than one governed by the Expedited Rules.

1. Timeframes and outcome of the proceedings

10. The Expedited Rules provides a streamlined and simplified procedure with a shortened time frame, making it possible for the parties to reach a final resolution of the dispute in a cost- and time-effective manner. Article 16 of the Expedited Rules provides for a six-month time frame for rendering the award and a mechanism for extending that time frame in certain circumstances. Parties are free to agree on a shorter time frame,[10] which may be the case particularly for technology-related disputes.

11. Unlike arbitration, adjudication does not necessarily result in a final award and its outcome could be the subject of review. It was mentioned that such a characteristic should be of particularly relevance and that the outcome should still be enforceable across borders.

[7] See A/CN.9/1091, para. 76.
[8] Ibid., para. 75.
[9] Available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-notes-2016-e.pdf.
[10] Explanatory Note to the UNCITRAL Expedited Arbitration Rules, paras. 84–85.

12. In light of the above, the Working Group may wish to consider the following model clause.

> *Model clause 1*
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> *1. A preliminary award shall be rendered within [a short period of time to be specified by the parties, for example, 60 days] of the constitution of the arbitral tribunal.*
>
> *2. The preliminary award shall become final and binding on the parties unless a party objects within [a short period of time to be specified by the parties, for example, 30 days] after receipt of the preliminary award.*
>
> *3. A party may object to the preliminary award only after carrying out that award or committing to carry out the award within [a period of time to be specified by the parties].*

13. Paragraph 1 aims to capture the agreement of the parties that the accelerated procedure should result in an outcome within a period of time shorter than six months as provided for in article 16(1) of the Expedited Rules.[11] As it builds on the Expedited Rules, the outcome is characterized as an "award" made by an "arbitral tribunal" and the time frame commences from the "constitution" of the arbitral tribunal. The mechanism in article 16(2) to (4) of the Expedited Rules for extending the time frame would continue to apply.

14. The Working Group may wish to consider other possibilities, for example, where the outcome is rendered not by the arbitral tribunal but by a third-party neutral appointed by the arbitral tribunal or by the parties themselves. If such an approach is taken, the procedure for appointing the third-party neutral as well as the tasks to be performed by the neutral would need to be agreed by the parties, particularly as the outcome could eventually become binding on the parties. The time frame should also commence upon the appointment of the neutral.

15. The Working Group may wish to also consider whether the term "preliminary" award, which refers to the outcome of the accelerated procedure and aims to distinguish it from the "final" award, is appropriate. It may also be possible that the accelerated procedure leads to an interim judgment which is not necessarily an "award", while that judgment could be challenged in an arbitration resulting in an award. This may, however, require the preparation of an entire set of rules to govern the accelerated procedure.[12]

16. Paragraph 2 aims to capture the understanding of the parties that the preliminary award will become a "final" award binding on the parties in accordance with article 34(2) of the UNCITRAL Arbitration Rules, unless a party raises an objection within short period of time after receiving the preliminary award. This ensures two aspects: (a) a preliminary award can be challenged and become the subject of review; and (b) a preliminary award can eventually become enforceable under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") after lapse of a short period of time.

17. With regard to the first aspect, the Working Group may wish to consider whether the review mechanism would need to be specified. Alternatively, it could be understood that the Expedited Rules would continue to apply to the proceeding and that the review of the preliminary award will form part of such proceeding, all of which would eventually result in a final award. It may also be possible that an objection by a party would make the Expedited Rules no longer appropriate for the

[11] See A/CN.9/WG.II/WP.224, Section H.

[12] See for example, the ICSID Fact-Finding Rules available at https://icsid.worldbank.org/sites/default/files/ICSID_Fact-Finding_Rules.pdf and the draft provisions proposed by Switzerland in document A/CN.9/WG.II/WP.225.

dispute, and thus not being applied in accordance with article 2 of the Expedited Rules.

18. Paragraph 3 sets out the condition to be met in order for a party to raise an objection and is based on an agreement by the parties to comply with the outcome of the accelerated procedure. This is in addition to the requirement in paragraph 2 that an objection shall be made within a short period of time after receipt of the preliminary award. Paragraph 3 requires the party to either carry out the preliminary award (including any decision or order contained therein) or commit to carrying out the award within a fixed period of time. By including paragraph 3 in their arbitration agreement, parties would be agreeing to comply with the preliminary award even though it is not yet a final award. By raising the threshold for raising objections, it aims to ensure the efficiency of the proceedings and avoid possible delays caused by parties' systemic objections. The Working Group may wish to confirm that it would be up to the arbitral tribunal to determine whether the conditions in paragraph 3 are met by the parties prior to reviewing the preliminary award and continuing the arbitration proceeding.

2. Appointment and the role of experts and neutrals

19. Considering the needs and complexities of the dispute, it may be necessary and useful for experts to be appointed to assist the arbitral tribunal on certain matters, as provided for in articles 27(2) and 29 of the UNCITRAL Arbitration Rules. Note 15 of the UNCITRAL Notes touches upon the types of experts and their selection as well as party- and tribunal-appointed experts.

20. Article 29 provides for the appointment by an arbitral tribunal, after consultation with the parties, of one or more independent experts to report on specific issues to be determined by the arbitral tribunal. It may also be possible that one or more individuals are appointed by the arbitral tribunal to make decisions on specific issues on behalf of the tribunal or to provide an impartial view as to the strength of the parties' evidence (referred to as "neutral" below).

21. It may, therefore, be useful for the parties to agree in advance on the means of appointing experts and neutrals and the role to be undertaken by them. In that context, the Working Group may wish to consider the following model clause.

Model clause 2

1. Expert witnesses will be presented jointly by the parties.

2. An independent expert or neutral appointed by the arbitral tribunal in accordance with article 29 of the UNCITRAL Arbitration Rules shall perform the following duties:

(a) ...

3. The arbitral tribunal shall take due account of statements by an expert witness presented jointly by the parties in accordance with paragraph 1 or reports by an expert or neutral appointed in accordance with paragraph 2.

22. Paragraph 1 aims to reduce the cost and time of each party appointing its own expert witnesses (see para. 98 of the UNCITRAL Notes). It captures the understanding of the parties that they will make efforts to appoint expert witnesses jointly, while not depriving themselves of doing so individually in accordance with article 27(2) of the UNCITRAL Arbitration Rules. A joint appointment would avoid the situation whereby statements by the experts appointed by each of the parties diverge and could facilitate a quicker resolution of the dispute by the arbitral tribunal.

23. In a situation where parties have appointed their respective experts, it should be possible for the arbitral tribunal to order the party-appointed experts who have submitted statements on the same or related issue to meet and confer on such issues,

with the aim of reaching a shared understanding and to narrow down the differences.[13] It may be possible for party-appointed experts to work under the instruction of the arbitral tribunal in order to produce a joint report. The Working Group may wish to consider whether such guidance should be provided (see para. 97 of the UNCITRAL Notes).

24. There may be instances where the parties have the most expertise, particularly on matters relating to emerging technologies. The Working Group may wish to consider whether such instances would need to be elaborated further as that possibility is already envisaged in articles 27(2) of the UNCITRAL Arbitration Rules.

25. Paragraph 2 reiterates the discretion of the arbitral tribunal to appoint experts in accordance with the procedure set out in article 29 of the UNCITRAL Arbitration Rules. It would also reflect the understanding of the parties that the same procedure would apply to neutrals to be appointed by the arbitral tribunal. If the parties foresee the role of experts or neutral being expanded beyond that provided for in article 29 or specified, such roles could be listed in paragraph 2 (for example, binding expert determination or neutral assessment).

26. Paragraph 3 further elaborates on how the arbitral tribunal should treat statements by experts jointly appointed by the parties as well as reports of experts or neutrals appointed by the arbitral tribunal. It could be further elaborated, for example, that reports by an expert or a neutral could be binding on the parties and the arbitral tribunal on specific issues (A/CN.9/1091, para. 59). In this context, the difference between an expert and a neutral may be clarified in relation to the legal effect of their respective findings (A/CN.9/1091, para. 60).

3. Confidentiality

27. Apart from article 28(3) which provides that hearings shall be held in camera, the UNCITRAL Arbitration Rules do not contain provisions on confidentiality. Note 6 of the UNCITRAL Notes leave the desired confidentiality regime up to the agreement of the parties, should confidentiality be a concern or priority and lists the issues that are to be addressed therein. While article 7 of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration provides a definition of confidential or protected information,[14] that definition functions in the context of investor-State arbitration and as an exception to the principle of transparency.

28. Many of the current disputes involve technical and scientific information, trade secrets and rights with a high profile in the market that are sensitive to confidentiality and from which a disputing party can derive significant economic value. In such circumstances, parties may wish to agree on different aspects of confidentiality that would apply to the proceeding. In doing so, they should aim to obtain a balance between preserving confidentiality and ensuring sufficient disclosure to facilitate the proceedings.

29. Confidentiality has to facets. One relates to ‘outbound confidentiality’ in the sense of non-disclosure by all those involved in the arbitration of any information relating to the arbitration to anyone not involved in the arbitration proceedings (see paras. 31–32 below). Another relates to ‘inbound confidentiality’ regarding protection of information against opposing parties (see paras. 32–37 below).[15]

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[13] See IBA Rules on Taking of Evidence International Evidence (“IBA Rules”), Article 5(4); and the Swiss Arbitration Rules, Article 27.

[14] Article 7(2) reads: “Confidential or protected information consists of: (a) Confidential business information; (b) Information that is protected against being made available to the public under the treaty; (c) Information that is protected against being made available to the public, in the case of the information of the respondent State, under the law of the respondent State, and in the case of other information, under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information; or (d) Information the disclosure of which would impede law enforcement.”

[15] See A/CN.9/WG.II/WP.224, Section F.

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

Model clause 3

1. All aspects of the arbitration shall be 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. A party invoking the confidentiality of any information it wishes or is required to submit during the proceeding shall request the arbitral tribunal to have the information classified as confidential. Upon receipt of such a request and after inviting the parties to express their views, the arbitral tribunal shall determine whether the information is to be classified as confidential and of such a nature that in the absence of a special protection measure, it would likely cause serious harm to the party making the request.

31. Paragraph 1 addresses outbound confidentiality and defines the scope of the confidentiality obligation. It prohibits disclosure of all awards and orders in the arbitration, together with the existence of the arbitration, all materials produced in and/or generated during the proceedings which are not publicly available, including materials created for the purpose of the arbitration and all other documents or evidence given by a party, witness, or expert.[16] The obligation in paragraph 1 lies not only with the parties but also with their legal representatives, arbitrators, expert witnesses and any person appointed by the arbitral tribunal, including any expert, and any administrative secretary to the arbitral tribunal. The Working Group may wish to consider how to ensure that all those involved in the proceedings are bound by the confidentiality obligations, for example, by requiring a confidentiality undertaking.

32. Paragraph 1 further outlines the circumstances in which the confidentiality obligations can be waived - where disclosure of the relevant information is required by legal duty, necessary to protect or pursue a legal right, or in relation to legal proceedings before a court or other competent authority. The wording is based on that found in article 34(5) of the UNCITRAL Arbitration Rules with regard to awards. The Working Group may wish to consider whether the detailed procedure for disclosure would need to be outlined (for example, who should be informed of the disclosure and whether the details of the disclosure including the reasons thereof should be included in such notification).

33. Paragraph 2 addresses inbound confidentiality to respond to a situation where one of the parties is inclined to not disclose information to the opposing party due to its intrinsic value (such as trade secrets, know-how, algorithms, or any other proprietary information). Such information should generally be in the possession of a party, not accessible to the public, and of commercial and/or technical sensitivity.

34. Paragraph 2 also provides the basic procedure to be followed in order for the information to be classified as confidential by the arbitral tribunal. The Working Group may wish to consider whether a more detailed procedure needs to be agreed upon by the parties. For example, the party invoking confidentiality may be required to stipulate the reasons justifying its request. Similarly, the arbitral tribunal may be required to outline the conditions of the confidentiality, including to whom the confidential information may be disclosed for the purpose of the proceedings. This may be an expert or a neutral appointed by the arbitral tribunal to report on the basis of confidential information, widely used in the context of document production.[17] The expert so appointed (sometime referred to as a confidentiality advisor) should be equipped with the relevant expertise to determine whether the confidentiality concern is genuine, supervise the redaction process, if any, and monitor the disclosure.

[16] IBA Rules, Article 3.13.
[17] IBA Rules, Article 3.8.

35. With respect to paragraph 2, the Working Group may wish to consider the possible impact on due process requirements and potential delays. For example, a party would not be in a position to challenge the evidence of the other party if such evidence is classified as confidential. Engaging an expert or a neutral to manage the confidential information may require additional time and cost.

36. More generally, it would be the task of the arbitral tribunal to maintain confidentiality and to sanction any breach of confidentiality. The discretionary power of the arbitral tribunal to take such actions could be provided as guidance to the arbitral tribunal and the parties.

37. After consulting the parties, the arbitral tribunal may adopt measures to protect any physical and electronic information shared in the arbitration and to ensure any personal data produced or exchanged in the arbitration is processed and/or stored in light of any applicable law. Such measures could be adopted at any stage of the proceedings and possibly in the form of a confidentiality protocol.

38. In case there is a breach of confidentiality, the arbitral tribunal may take appropriate measures and sanction a party through an order or an award. For example, the arbitral tribunal may be able to restrict any further disclosure or award damages for the breach, if the disclosure resulted in serious harm to a party. It should, however, be noted that establishing whether there has been a breach of confidentiality is a difficult one, as it would require the arbitral tribunal to determine that the confidential information was disclosed to an unauthorized person and that the disclosure resulted in harm to the party.

39. Concerns of confidentiality is usually an ongoing consideration and therefore the duty of confidentiality usually survives the termination of the proceedings. The Working Group may wish to consider whether guidance should be provided on how to ensure this continued duty of confidentiality and whether there shall be any exceptions (for example, lapse of a certain time period or changes in circumstances).

III. Possible guidance material

40. Some of the common elements of technology-related dispute resolution and adjudication could be addressed in the form of a guidance document rather than a rule or model clause. The following provides some examples of guidance material for consideration by the Working Group.

41. Considering that the Commission also requested the Working Group to finalize the guidance text on early dismissal and preliminary determination[18], the Working Group may wish to consider how such guidance material should be presented and in what form, as this would impact the content.

42. One option would be to incorporate the guidance material into or as an additional note to the UNCITRAL Notes. The UNCITRAL Notes list and briefly discuss matters relevant to the organization of arbitral proceedings with a focus on international arbitration. However, they are intended to be used in a general and universal manner and not specifically in the context of the UNCITRAL Arbitration Rules. If the purpose of the guidance material is to assist parties and the arbitral tribunal in the application of the Expedited Rules, a different approach may need to be taken, possibly as a supplement to the Explanatory Note to the Expedited Rules. In any case, the guidance material should be easily accessible for potential readers.

1. Case management conference

43. Article 9 of the Expedited Rules puts emphasis on consultations with the parties and mentions a case management conference (CMC) as a possible method of conducting such consultations. Note 1 of the UNCITRAL Notes also highlights the

[18] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 17* (A/77/17), paras. 194 and 224.

need for consultation and advises the arbitral tribunal to consider holding, at the outset of the proceedings, a meeting or a CMC at which it would determine the organization of the arbitral proceedings and a procedural timetable.[19] Note 1 also addresses the modification of decisions taken at a CMC, the recording of the outcome of a procedural meeting as well as the attendance of the parties. In general, CMCs may aid in avoiding unnecessary delay and expenses, and provide a fair and efficient resolution of the dispute.

44. The Working Group may wish to consider providing additional guidance on how to organize CMCs in complex disputes, including those involving technology, as found below in paragraphs 45 to 48.[20]

Guidance material

45. As soon as possible after the constitution of the arbitral tribunal, and before a hearing, the arbitral tribunal shall consider holding an initial CMC to consult with the parties on the manner in which it will conduct the arbitration. To the extent possible, a CMC should be attended by the parties, their representatives and where appropriate, the parties' internal experts.

46. At the initial CMC, the arbitral tribunal should consider discussing, in particular, the following: (a) the nature of the issues in the dispute; (b) the protection of data integrity and data security; (c) confidentiality and disclosures; (d) the identification of contested and uncontested facts; (e) the structuring and the appropriate phasing of the proceedings; (g) the taking of expert evidence as well as the appointment of experts or neutrals; (h) the appointment of a secretary of the tribunal with expertise; (i) the holding of a hearing or whether the proceedings would be based on documents; (j) any other issues in relation to the resolution of the dispute, including the prospects of an early resolution or settlement of the dispute. Where appropriate, the arbitral tribunal should invite the parties to make additional proposals, or to comment on the list of elements ahead of the CMC.

47. The arbitral tribunal may consider holding additional CMC at regular intervals and at any appropriate time to discuss the issues mentioned above as well as others. Regular CMCs are recommended especially where tribunal-appointed experts have to perform operations over an extended period of time.

48. In accordance with article 3(3) of the Expedited Rules, the arbitral tribunal may, after inviting the parties to express their views and taking into account the circumstances of the case, utilize any technological means as it considers appropriate to convene the CMC.

2. Evidence

49. Article 15 of the Expedited Rules address issues relating to evidence, mainly that the arbitral tribunal may decide which documents, exhibits or other evidence the parties should produce. It further provides that statements by witnesses including expert witnesses, shall be in writing and that the arbitral tribunal may decide which witnesses shall testify in a hearing.

50. Note 13 of the UNCITRAL Notes address issues relating to documentary evidence, which should be read in conjunction with Notes 7 (Means of communication) and 10 (Practical details regarding the form and method of submission).

51. With the increased use of technology for producing and presenting evidence and the evidence being in forms other than documents, the Working Group may wish to consider providing additional guidance on evidence, as found below in paragraphs 52 to 54.

[19] UNCITRAL Notes, para. 12.

[20] For reference, see Appendix IV of the 2021 ICC Arbitration Rules (Case Management Techniques).

Guidance material

52. Evidence 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. Accordingly, article 15 of the Expedited Rules as well as article 27(3) of the UNCITRAL Arbitration Rules should be understood so that "data" and "technical information" also fall under the phrase "documents, exhibits or other evidence". This is to clarify and ensure that flexibility is provided with regard to evidence in disputes relating to technology.

53. The arbitral tribunal may wish to consider taking of evidence in the form of experiments and demonstration of a process. In other words, 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.

54. 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 allowed. The arbitral tribunal should also take into account the possible use of artificial intelligence in taking evidence and guard against potentially adverse impacts.

IV. Way forward

55. In pursuing its work, the Working Group may wish to identify other common elements which could accelerate the resolution of disputes. The Working Group may wish to also consider whether these common elements could be presented as a single legislative project and if so, how they should be characterized (for example, elements of "fast-track" or "accelerated" procedure under the Expedited Rules). In considering the way forward, the Working Group should be mindful that work should add value and respond to the four tests as agreed by the Commission.[21]

[21] The Commission, at its forty-sixth session in 2013, agreed to use four tests to assess whether legislative work on a topic should be referred to a working group: (i) whether it was clear that the topic was likely to be amenable to international harmonization and the consensual development of a legislative text; (ii) whether the scope of a future text and the policy issues for deliberation were sufficiently clear; (iii) whether there existed a sufficient likelihood that a legislative text on the topic would enhance modernization, harmonization or unification of the international trade law; and (iv) whether duplication might arise with work being undertaken by other international organizations. See Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17), paras. 303–304.