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# Draft UNCITRAL Model Clauses on Specialised Express Dispute Resolution (SPEDR)

## Note by the Secretariat

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## Introduction

1. The Commission, at its fifty-fifth session in 2022, entrusted the Working Group with jointly considering two proposed topics of technology-related dispute resolution and adjudication and with considering ways to further accelerate the resolution of disputes by incorporating elements of both proposals. It was agreed that the work should build on the UNCITRAL Expedited Arbitration Rules and that the model provisions or clauses, or other forms of legislative or non-legislative text could be prepared on matters such as shorter time frames, appointment of experts or neutrals, confidentiality, and the legal nature of the outcome of the proceedings, all of which would allow disputing parties to tailor the proceedings to their needs to further expedite the proceedings. It was stressed that such work should be guided by the need of the users, take into account innovative solutions as well as the use of technology, and further extend the use of the UNCITRAL Expedited Arbitration Rules.[1]

2. Accordingly, the Working Group began its deliberations at the seventy-sixth session (Vienna, 10–14 October 2022, A/CN.9/1123) and concluded its work by finalizing model clauses on technology-related dispute resolution and adjudication during the seventy-ninth session (New York, 12–16 February 2024, A/CN.9/1166).

3. At its seventy-ninth session, the Working Group agreed to provisionally name the instrument “Specialised Express Dispute Resolution (SPEDR)”, subject to the provision of a more suitable and harmonized name in the six United Nations languages (A/CN.9/1166, para. 116).

4. Initially, the Working Group also focused on developing guidance texts on confidentiality and evidence. Acknowledging the need for explanatory notes accompanying the model clauses (A/CN.9/1159, para. 14), the Working Group decided that the guidance text on confidentiality be condensed and integrated into the explanatory notes to the model clause on confidentiality (A/CN.9/1166, para. 114). However, concerning the guidance text on evidence as contained in A/CN.9/WG.II/WP.236, paragraph 17, and reproduced in the appendix of this document, the Working Group did not come to a firm conclusion on its inclusion (A/CN.9/1166, para. 115) and it is for the Commission to decide whether it should be included as part of this instrument.

5. At the seventy-ninth session, the Working Group requested the Secretariat to prepare a revised version of the explanatory notes accompanying the model clauses based on the decisions and deliberations of the Working Group. Accordingly, this note presents the draft model clauses as prepared by the Working Group as well as a revised version of the accompanying explanatory notes, in the annex to this document, for finalization and adoption by the Commission (A/CN.9/1166, para. 119).

6. Additionally, the Commission may wish to determine the optimal approach for promoting the model clauses and their accompanying explanatory notes, whether as a comprehensive package or individually (A/CN.9/1166, para. 117).

7. Should the Commission not be able to finalize and adopt the explanatory notes, it may consider mandating the Working Group to finalize those notes at its session in the second half of 2024.

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

# Annex

## Draft UNCITRAL Model Clauses on Specialised Express Dispute Resolution (SPEDR)

## I. Introduction

1. The UNCITRAL Model Clauses on Specialised Express Dispute Resolution (SPEDR) (2024) (the "Model Clauses") have been developed and adopted by the United Nations Commission on International Trade Law (UNCITRAL or the "Commission"). The Model Clauses, accompanied by explanatory notes, offer customized solutions designed to be adapted and adjusted to suit the particular circumstances and preferences of the parties, building on the UNCITRAL Expedited Arbitration Rules ("Expedited Rules" or "EARs"). Designed as a resource for businesses and practitioners engaging in international dispute resolution, especially when speed and technical expertise are crucial factors, the Model Clauses provide parties with tailored means to settle disputes in an expeditious manner, ensuring the integrity and effectiveness of their dispute resolution processes, while catering for their unique needs (A/CN.9/1166, para. 118).

2. In 2022, the Commission entrusted Working Group II with considering the topics of technology-related dispute resolution and adjudication jointly and with considering ways to further accelerate the resolution of disputes, building on the EARs.[2] This decision by the Commission was based on the recognition that the two topics aimed to achieve three common objectives: expeditious dispute resolution, comprehension of technical matters, and maintaining confidentiality. The Commission also acknowledged that the preparation of model clauses would allow disputing parties to further tailor the proceedings to their needs. The Model Clauses are a result of extensive consultations and expert input[3] (A/CN.9/1166, para. 118).

3. Four Model Clauses are presented:

- The Model Clause on Highly Expedited Arbitration;
- The Model Clause on Adjudication;
- The Model Clause on Technical Advisors; and
- The Model Clause on Confidentiality.

The first two Model Clauses provide tailored proceedings for parties with unique needs, such as those that may arise in the technology and construction sectors, as well as other sectors where a complex and long-term commercial relationship demands speed and expertise in resolving disputes to minimize project delays and financial losses. As disputes suitable for settlement through such proceedings often require expertise on technical matters and treatment of sensitive information, the other two Model Clauses may be used to complement the proceedings in the first two Model Clauses, but they are also appropriate for use in arbitration more generally.

4. To promote their best possible use, the Model Clauses are accompanied by explanatory notes which provide a detailed description on the objectives of the specific Model Clause as well as their associated risks, if any, and alternative approaches, where applicable. Parties are of course free to change the terms of the

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[2] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 17* (A/77/17), paras. 224–225; ibid., *Seventy-eighth Session, Supplement No.17 (*A/78/17), paras. 143–145.

[3] Additional background information and the discussion of the Working Group reflected in Working Group Reports: A/CN.9/1123; A/CN.9/1129; A/CN.9/1159 and A/CN.9/1166 are available on the dedicated web page of UNCITRAL Working Group II: Dispute Settlement, https://uncitral.un.org/working_groups/2/arbitration.

Model Clauses at any time and adjust them to suit the requirements of a particular contractual arrangement or procedural context.

*The Model Clause on Highly Expedited Arbitration*

5. This Model Clause provides an option for a highly expedited arbitration, further shortening the time frames and simplifying certain procedural steps provided in the EARs where further expediency may be sought. This Model Clause is suitable for projects or contractual relationships where the possibility of disputes arising during their development could potentially lead to their complete breakdown if not promptly resolved. The annotation to the Model Clause underscores, however, the importance of parties considering the possible consequences of committing to a shortened time frame and avoiding undermining the basic principles of dispute resolution, while at the same time highlighting the benefits of establishing a shortened time frame for dispute resolution.

*The Model Clause on Adjudication*

6. This Model Clause provides for adjudication, which is a process embedded within a broader dispute resolution process. It allows parties to get a very fast determination from an adjudicator, which is contractually binding and may be enforced. The parties to an adjudication, nonetheless, retain the right to refer the dispute to arbitration (either under the UNCITRAL Arbitration Rules ("UAR") or the EARs) to obtain a final award on the same issues that were the subject of the adjudication. While the parties are expected to comply with the orders in the determination, an arbitral proceeding based on the Model Clause on Highly Expedited Arbitration is provided as a method for easily enforcing the orders in the determination. Adjudication is appropriate for parties in need of a mechanism to quickly produce a binding and enforceable result with a view to addressing situations, for example, where parties have a long-term contract and may encounter differences on specific issues while implementing the contract, warranting fast decisions to facilitate their ability to move forward with the contract without serious disruptions.

*The Model Clause on Technical Advisors*

7. This Model Clause provides for independent technical advisors accompanying arbitral tribunals in disputes involving complex technical matters. It ensures that the arbitral tribunal benefits from specialized knowledge to make informed decisions while maintaining the principles of transparency, impartiality, fairness and due process.

*The Model Clause on Confidentiality*

8. Maintaining the confidentiality of arbitral proceedings may be an important feature of international arbitration. It is not, however, regulated in the UNCITRAL Model Law on International Commercial Arbitration ("MAL"), or the UNCITRAL Arbitration Rules ("UARs"). The Model Clause on Confidentiality intends to help parties establish clear and robust confidentiality safeguards, ensuring the privacy of the arbitration process.

# II. Model Clause on Highly Expedited Arbitration

## A. Model Clause (A/CN.9/1166, paras. 25–29)

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

(a) The period of time for the parties to reach an agreement on the appointment of a sole arbitrator in article 8(2) of the Expedited Rules shall be [7] days after a proposal has been received by all other parties;

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

(c) The period of time within which the arbitral tribunal shall consult the parties on the manner in which it will conduct the arbitration pursuant to article 9 of the Expedited Rules shall be [7] days;

(d) The period of time within which the award shall be made pursuant to article 16(1) of the Expedited Rules shall be [45] days;

(e)

*Option I*: The extended period of time in article 16(2) of the Expedited Rules shall not exceed a total of [90] days;

OR

*Option II*: The extended period of time in article 16(2) of the Expedited Rules shall not exceed a total of [90] days. The period of time within which the award shall be made may not be further extended, and article 16(3) and (4) of the Expedited Rules shall not apply;

(f) The power of the arbitral tribunal pursuant to article 2(2) of the Expedited Rules to determine that the Expedited Rules shall no longer apply to the arbitration also extends to the power to determine that the modifications to the Expedited Rules contained herein shall no longer apply.

**For consideration by the Commission**: Compared to the model clause finalized by the Working Group, a few editorial changes have been implemented by the secretariat, such as the deletion of the phrase “referred to” in paragraph (e). Furthermore, the former paragraph (a) has been moved to paragraph (f) at the end of the Model Clause, as it addresses the non-application of modifications in exceptional circumstances. The current paragraph (a) has been simplified by stating only the modification to article 8(2) of the EARs. In the current paragraph (c), the phrase “on the manner in which it will conduct the arbitration” has been added to clarify the matter on which the arbitral tribunal should consult with the parties.

## B. Explanatory notes

*Introduction*

1. The EARs provide a set of rules for expedited arbitration[4] and parties are free to modify the EARs to address their specific needs, preferences and any unique requirements that the EARs do not accommodate (article 1 of the EARs). The Model Clause on Highly Expedited Arbitration is for parties that pursue a quicker procedure than that offered by the EARs (“highly expedited arbitration”) by modifying some of its provisions for inclusion into contracts (A/CN.9/1129, paras. 43–44; A/CN.9/1159, para. 15, A/CN.9/1166, para. 31).

2. Highly expedited arbitration procedures can be particularly useful in resolving disputes that arise from technology, construction, financial or other projects where failure to resolve disputes quickly may put parties’ business at serious risk of collapsing. Shorter time frames will ensure expeditious resolution of disputes and reduce the time of long and costly arbitral proceedings, while still preserving procedural rights. Consequently, the risks of project delays or disruptions to business operations due to uncertainties are mitigated.

[4] Parties may find further explanations on the EARs in the Explanatory Note. See UNCITRAL Arbitration Rules (with article 1, paragraph 4, as adopted in 2013, and article 1, paragraph 5, as adopted in 2021) (United Nations publication 2021), pp. 47–71.

3. Highly expedited arbitration, however, might not be suitable for cases with complex legal or technical issues requiring extensive evidence, or where those issues may require more time for presentation and resolution (A/CN.9/1129, para. 45; A/CN.9/1159, para. 17). Furthermore, parties may have difficulties predicting the nature and complexity of their potential disputes when a contract is formed. Therefore, parties may want to preserve some flexibility in the time frames or in the applicable arbitration rules (A/CN.9/1166, para. 32).

4. When parties opt for highly expedited arbitration, the arbitral tribunal needs to ensure that the proceedings are conducted with the level of speed and efficiency that the parties have agreed upon and exercise its discretionary powers under article 3 of the EARs and article 17 of the UARs to meet those expectation (A/CN.9/1159, para. 18). Both the parties and the arbitral tribunal should be committed to acting expeditiously during the arbitral proceedings. The parties should be fully aware of the consequences involved in further shortening the proceedings beyond the period established in the EARs, which will substantially curtail the time available for the parties to present the disputed issue(s) and for the arbitral tribunal to resolve such issue(s), notwithstanding the possibility that the dispute may turn out involving more complex or unanticipated novel facts or legal issues. It is recommended to implement the Model Clause in its entirety, as its elements are interconnected. This ensures the effectiveness and integrity of the entire Model Clause.

*Selection of an arbitrator – paragraph (a)*

5. Parties may jointly agree on a sole arbitrator before (possibly in the arbitration agreement) or after the dispute arises. If the parties have not agreed on a sole arbitrator [7] days after a proposal for the appointment of an arbitrator has been received by all other parties, the appointing authority as agreed by the parties in paragraph (b) will, at the request of a party, appoint a sole arbitrator. Paragraph (a) modifies the 15-day period of time in article 8(2) of the EARs (A/CN.9/1159, para. 23, A/CN.9/1166, para. 33).

6. Parties are encouraged to consider the time-saving benefits of selecting an arbitrator before any dispute arises. If parties decide to agree on an arbitrator in advance of a dispute, they should carefully research their choice to confirm that he or she is qualified and capable of resolving the dispute. Moreover, parties should be aware that agreeing on an arbitrator before the dispute arises creates a risk that the agreed arbitrator may need to be replaced. For example, at the time the dispute arises, the pre-agreed arbitrator may have developed a conflict of interest, may no longer be willing to serve as arbitrator, or be unavailable due to other commitments, illness or even death. It is necessary to ensure that parties have an arbitrator who is committed to the swift resolution of disputes to conduct highly expedited arbitration, also because the process of replacing an arbitrator can be time-consuming (A/CN.9/1129, paras. 46–48; A/CN.9/1159, paras. 21–22; A/CN.9/1166, para. 34).

*Selection of an appointing authority – paragraph (b)*

7. To streamline the constitution of the arbitral tribunal, it is recommended that parties agree on an appointing authority. Otherwise, they could rely on the default appointing authority under article 6 of the EARs, that is the Secretary-General of the Permanent Court of Arbitration at the Hague (PCA) (A/CN.9/1129, paras. 47–48; A/CN.9/1159, para. 21; A/CN.9/1166, para. 35). Hence, parties could use the Model Clause even without agreeing on an appointing authority.

*Consultation – paragraph (c)*

8. Under article 9 of the EARs, the period of time within which the arbitral tribunal should consult the parties on the conduct of the arbitration is 15 days after the constitution of the arbitral tribunal. Paragraph (c) reduces the number of days to 7 to ensure that consultations take place promptly and still provides parties with sufficient

 

time to adequately prepare for a meaningful consultation (A/CN.9/1129, para. 49; A/CN.9/1159, para. 24).

9. Parties may wish to refer to the Explanatory Notes to the EARs in paragraphs 60 to 65 (Part G) which outlines how consultations could be conducted between the parties and the arbitral tribunal (A/CN.9/1129, para. 50; A/CN.9/1159, paras. 24–25). During the consultation, a number of issues could be discussed to expedite the proceedings, for instance: (i) limiting written submissions to one round; (ii) limiting the length of written submissions; (iii) setting the time frame for written submission; (iv) determining whether to hold documents-only proceedings or hold hearings, and if so, whether they will be conducted in person or remotely; and (v) agreeing that the arbitral tribunal does not need to provide reasons in the award (A/CN.9/1166, para. 36).

*Period of time for making the award – paragraphs (d) and (e)*

10. Paragraph (d) modifies the period of time in article 16(1) of the EARs to make the award (six months) to [45] days from the date of the constitution of the arbitral tribunal, aligning with the goal of expeditious dispute resolution. Parties can choose the appropriate time period for their particular needs, although in light of the proceedings to be "highly expedited", it is expected that the parties would choose a period less than the six months provided in the EARs.

11. Under paragraph (e), parties are presented with two options.

12. Option I provides for a possible extension by the arbitral tribunal according to article 16(2) of the EARs, which should not exceed for example 90 days from the date of the constitution of the arbitral tribunal, but continues to give the arbitral tribunal the authority, in exceptional circumstances, to request additional time after inviting the parties to express their views, in accordance with article 16(3) and (4) of the EARs. If parties opt for a different timeline under paragraph (d), they should ensure that the extension in paragraph (e) remains reasonable. If parties agreed to 45 days in paragraph (d), they could specify in paragraph (e) that an extension shall not exceed a total of 90 days.

13. Alternatively, Option II also permits an extended period of time referred to in article 16(2) of the EARs not exceeding a total of [90] days, but foresees that the period of time within which the arbitral award should be made cannot be further extended, which means that article 16(3) and (4) of the EARs do not apply (A/CN.9/1166, para. 37).

14. Parties should note that a fixed time frame for making the award, without the safeguards provided for in article 16(3) and (4) of the EARs, may result in an award being issued after the lapse of the agreed time frame, contrary to the agreement of the parties, which may render the arbitral award unenforceable in some jurisdictions under article V1.*(d)*. of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards or may lead to the award being set aside at the seat of arbitration in accordance with the domestic legislation[5] (A/CN.9/1159, paras. 28–29). However, parties should also be aware that the single extension permitted under article 16(3) carries no specific time limit, except as agreed upon by the parties. There is a risk that, in certain circumstances, the parties may find it difficult to object to an extension proposal made by the arbitral tribunal, even if unreasonable. As for article 16(4), which allows the arbitral tribunal to revert to the regular procedure under the UARs, this would result in the parties not receiving the highly expedited arbitration they originally agreed upon.

[5] For instance, under the UNCITRAL Model Law on International Commercial Arbitration, adopted in many jurisdictions, as shown on the status page: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status.

*Revert to EARs or UARs – paragraph (f)*

15. The power of the arbitral tribunal provided in paragraph (f) is of the same nature as that in article 2(2) of the EARs, and allows, in exceptional circumstances and at the request of a party, the arbitral tribunal to reconsider and potentially revert to the default rules under the EARs if it finds that the modifications in the Model Clause, in whole or in part, were not appropriate for the case. The arbitral tribunal retains the power to revert to the UARs in accordance with article 2(2) of the EARs. Obviously, the parties may agree to revert to the UARs (article 2(1) of the EAR), should they consider that EARs are no longer appropriate. The parties may also agree to revert to the EARs to remove the "hard-stop" limitation on the period of time for granting the award provided for in Option II in paragraph (e), ensuring that there will be appropriate time for the arbitrator to render the arbitral award.

16. Paragraph (f) foresees that circumstances could change or that the nature of the dispute would be more complex than initially anticipated by the parties, despite their initial desire for expediency. It provides a degree of flexibility so that a fair and just resolution may still be achieved and the risks that an arbitral tribunal may not render an enforceable award within the agreed deadline may be minimized (A/CN.9/1166, paras. 22–24).

*Reasoning of the arbitral award*

17. Article 34(3) of the UARs requires the arbitral tribunal to state reasons in the arbitral award unless the parties agree otherwise. If permissible under the applicable law, parties may agree that no reasons be given in the arbitral award, by including the following additional clause: "The parties agree that the award be made without reasons." (A/CN.9/1159, para. 38). This is based on the principle of party autonomy in arbitration and reflects their will for a streamlined procedure. There are circumstances in which reasons may not be needed, for example, in final offer arbitration, where the arbitrator is entrusted to simply choose between two competing offers as provided by the parties. Reducing the time for making the award may enhance the efficiency of the arbitral process.

18. When considering whether to agree that no reasons need to be provided in the award, parties should consider that in certain jurisdictions, arbitral awards without a certain level of reasoning may not be enforceable and may be set aside. A non-reasoned award may make it difficult for parties to comprehend or accept the decision. Additionally, if a court is requested to set aside an award, it may not be able to make such an assessment without the reasons provided in the award. The court may decline to set aside the award due to verification being practically impossible. Also, requiring an arbitrator to give reasons for an award may lead to a deeper understanding of the dispute. Providing reasons is not always a cause of undue delays in making the award, as the arbitrator can also provide succinct and focused reasoning for the award (A/CN.9/1166, paras. 38–40).

19. If the applicable law permits non-reasoned awards, the parties' preference on whether reasons should be required could be discussed with the arbitral tribunal when it organizes the proceedings, which would allow parties to consider the implications for the completeness and enforceability of the award if reasons are not provided (A/CN.9/1159, paras. 39–40). If the parties initially agreed to a non-reasoned award, they could, in consultation with the arbitral tribunal, reconsider their initial agreement and engage in discussions to request reasons for the award.

# III. Model Clause on Adjudication

## A. Model Clause (A/CN.9/1166, para. 80)

*Note: Parties entering into a contractual relationship may wish to adopt the following procedure whereby disputes, as and when they arise, can be resolved in an expedited*

*and binding manner by an adjudicator, subject to any party's right to have the same dispute finally resolved in an arbitration.*

*Arbitration*

1. Any dispute, controversy or claim arising out of or relating to this contract, or breach, termination or invalidity thereof ("Dispute"), shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules with the following additions:

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

(b) The number of arbitrators shall be… [one or three];

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

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

*Adjudication*

| *Option I* | | *Option II* |
|---|---|---|
| 2. Any Dispute may be determined by adjudication in accordance with the following subparagraphs. | OR | 2. Any Dispute relating to [clauses [xx (to specify clauses)][performance obligations under clauses xx][monetary claims][technical issues] under this contract [excluding its termination and invalidity] may be determined by adjudication in accordance with the following subparagraphs. |

(a) A party initiating adjudication shall communicate a request for adjudication containing a description of the dispute, including its basis and an indication of the determination being requested to all other parties and, once there is an agreement on his or her appointment, to the adjudicator;

(b) If the parties have not reached an agreement on an impartial and independent adjudicator [7] days after a proposal made by a party has been received by all other parties, the adjudicator shall, at the request of any party, be appointed promptly by the appointing authority;

(c) The appointing authority for the adjudicator shall be… [name of institution or person];

(d) The adjudicator shall consult with the parties on matters related to the dispute and the procedure promptly and within 3 days from his or her acceptance of appointment for the dispute. The adjudicator may hold additional consultations with the parties on matters related to the dispute or request additional information from the parties as he or she deems necessary;

(e) Within [14] days from the acceptance of appointment for the dispute by the adjudicator, the other party or parties shall communicate a response to the request;

(f) Subject to subparagraph (h), the adjudicator may conduct the proceedings as he or she considers appropriate, including abridging or extending any period of time, provided that the parties are treated with equality and that each party is given a reasonable opportunity to present its case;

(g) The adjudicator may determine that the dispute is, in whole or in part, not suitable for adjudication;

(h) The adjudicator shall make the determination within [30] days from the acceptance of appointment for the dispute by the adjudicator stating the reasons. In exceptional circumstances and after having consulted the parties, the adjudicator may extend the period of time for making the determination, which shall not exceed a total of [60] days;

(i) The determination of the adjudicator shall be binding on the parties and the parties shall comply with the determination without delay.

*Compliance Arbitration*

3. Any dispute as to the compliance by any of the parties with the determination of the adjudicator under subparagraph 2(i) may be referred to arbitration by either party, in accordance with the UNCITRAL Expedited Arbitration Rules ("Expedited Rules"), with the following modifications:

(a) The period of time for the parties to reach an agreement on the appointment of a sole arbitrator in article 8(2) of the Expedited Rules shall be [7] days after a proposal has been received by all other parties;

(b) The period of time within which the arbitral tribunal shall consult the parties on the manner in which it will conduct the arbitration pursuant to article 9 of the Expedited Rules shall be [7] days;

(c) The period of time within which the award shall be made pursuant to article 16(1) of the Expedited Rules shall be [30] days;

(d) The extended period of time referred to in article 16(2) of the Expedited Rules shall not exceed a total of [60] days. The period of time within which the award shall be made may not be further extended, and article 16(3) and (4) of the Expedited Rules shall not apply;

(e) The arbitral tribunal shall limit the proceedings to deciding whether a party has breached its undertaking in paragraph 2(i) and, if so, to ordering compliance with the determination of the adjudicator, unless it finds that the adjudicator failed to comply with paragraph 2(f). The arbitral tribunal shall not review the merits of the determination of the adjudicator.

*Arbitration under paragraph 1 in relation to adjudication*

4. In any arbitration initiated by the parties under paragraph 1:

(a) A party may submit disputes considered in the adjudication under paragraph 2 without being limited by any of its claims, arguments, evidence or other submissions in the adjudication; and

(b) The arbitral tribunal shall not be bound by any determination made by the adjudicator.

5. The initiation of adjudication and arbitration under paragraphs 2 and 3 shall not preclude the initiation or continuation of arbitration under paragraph 1 with respect to any dispute. Similarly, the initiation of arbitration under paragraph 1 shall not preclude the initiation or continuation of adjudication and arbitration under paragraphs 2 and 3 of any dispute.

*Note: To address concerns regarding concurrent initiation and conduct of adjudication or arbitration under paragraphs 2 and 3 and arbitration under paragraph 1, parties may consider adding the following text to paragraph 5.*

Optional addition to paragraph 5: Once adjudication has been initiated and is continuing, arbitration under paragraph 1 on issues before the adjudicator may be commenced only once the adjudicator has made his or her determination. If adjudication is initiated while arbitral proceedings are continuing, the arbitral proceedings on issues before the adjudicator, at the request of a party, shall be suspended until the adjudicator has made his or her determination.

**For consideration by the Commission**: Compared to the finalized version by the Working Group, a few changes have been implemented by the secretariat: Some editorial changes have been made, such as the inclusion of the qualification of the party in paragraph 2(a) (a party initiating adjudication), the placement of the word "promptly" has been adjusted in paragraph 2(b), and regarding the decision by the arbitral tribunal, in paragraph 3(e), the term "determine" has been replaced by "decide" to avoid confusion with the determination issued by the adjudicator. Furthermore, the phrase "consult on the dispute and the organisation of the procedure" has been replaced by "consult with the parties on matters related to the dispute and the procedure". Options I and II in paragraph 2 have been placed side by side to clarify

that the subsequent subparagraphs apply to both Options. The word "particular" in front of the word "dispute" has been deleted, as "dispute" with a small "d" is used in the sense of a case at hand. In paragraph 2(g), "submitted to him/her" was deleted as redundant. Paragraph 3 (a),(b) and (d) has been aligned with the corresponding paragraphs in the Model Clause on Highly Expedited Arbitration. In paragraph 5, the title "Optional addition to paragraph 5" has been added for more clarity, and reference to arbitration under paragraph 1 was made.

## B. Explanatory notes

*Introduction*

1. This Model Clause facilitates prompt dispute resolution through adjudication, a mechanism resulting in a binding determination (referred to in the Model Clause as "determination"), which is distinct from a court judgment or an arbitral award. Parties agree to abide by this determination unless a different decision is rendered on all or part of the same issues by an arbitral tribunal conducting regular arbitral proceedings, which either party may initiate. In the absence of any such conflicting award from an arbitral tribunal, the parties must adhere to the adjudicator's determination, and the Model Clause provides separately for expedited arbitration solely to resolve any dispute about a party's compliance with that determination.

2. Adjudication is a process that involves an impartial and independent third party making a binding determination on a specific disputed issue, with the goal of providing its timely and efficient resolution so that execution of the overall contract can move forward. It is a well-established procedure particularly in certain jurisdictions for construction contracts. The Model Clause aims to facilitate the use of adjudication for long-term contracts or projects beyond those in the construction industry, such as financial or other commercial relationships, including supply chain contracts and to provide a mechanism for cross-border enforcement of determinations made by the adjudicator (A/CN.9/1129, para. 56; A/CN.9/1159, paras. 45–47, A/CN.9/1166, para. 84).

3. The adjudication procedure is a rapid process, with a determination expected to be rendered within [30] days. The parties contractually commit to abide by the determination made by the adjudicator (paragraph 2(i)). Paragraph 3 sets forth a mechanism to ensure compliance with that determination through highly expedited arbitration based on the EARs, strictly limited to any dispute as to whether a party has complied with the determination. However, parties retain the right to submit the disputed issues in adjudication as well as other disputes to arbitration under paragraph 1. In other words, adjudication and arbitration may run concurrently. Parties wishing to limit such an occurrence of concurrent proceedings may consider paragraph 5 (A/CN.9/1129, paras. 74–77; A/CN.9/1159, para. 53). Submitting the dispute to arbitration does not exempt a party from its obligation to comply with the adjudicator's determination. Where adjudication is available, experience indicates that the majority of parties accept the adjudicator's determination and do not pursue regular arbitration.

4. As the paragraphs in the Model Clause are interdependent, it is advisable that parties make use of the entirety of the Model Clause to maintain its integrity.

*Arbitration – paragraph 1*

5. Paragraph 1 replicates the model arbitration clause for contracts, annexed to the UARs, and captures the agreement by which the parties resolve their Disputes by arbitration. Parties should be mindful of the distinction between "Dispute" with a capital "D", as defined in paragraph 1 of the Model Clause as "dispute, controversy or claim arising out of or relating to this contract, or breach, termination or invalidity thereof", and "dispute" with a small "d", which refers to the subject matter or the case at hand.

*Adjudication – paragraph 2*

*Scope – chapeau*

6. Parties may wish to agree on the scope of issues that would be suitable for determination by an adjudicator, as per two options provided.

7. Option I is broad and inclusive, suggesting that any dispute arising under the contract can be subject to adjudication without specifying particular types of disputes or excluding any categories. Conversely, Option II offers parties the choice to restrict the scope of disputes that can be resolved through adjudication, as per the various possibilities in the bracketed text.

8. For parties taking a more flexible and inclusive approach to adjudication, Option I may be appropriate, which also avoids potential jurisdictional issues and disagreement over scope. If a dispute is not suitable for adjudication, the adjudicator would decide accordingly (see paragraph 2(g)). Alternatively, if parties prefer a more detailed and specific scope for adjudication to address concerns regarding the broad range of disputes which may potentially be settled through adjudication, Option II may be chosen.

*Request for adjudication and selection of the adjudicator – subparagraph (a)*

9. The selection of an impartial and independent adjudicator is of paramount importance. Ensuring the adjudicator's commitment to impartiality and independence is crucial, and parties should explicitly request a formal statement affirming these ethical obligations. The adjudicator should also have the right qualifications for the case at hand possessing the necessary knowledge, expertise, and competence to resolve the dispute effectively and fairly (A/CN.9/1129, para. 70; A/CN.9/1159, para. 59; A/CN.9/1166, para. 86).

10. Parties may agree on the adjudicator before the Dispute arises to streamline the proceedings and save time and cost. If parties decide to pre-agree on an adjudicator (in advance of a Dispute arising), they should carefully research their choice to confirm that he or she is qualified and capable of resolving the full range of disputes that may be submitted to adjudication. Moreover, parties should be aware that the pre-agreed adjudicator may not always be able to perform his or her role when requested. For instance, at the time the dispute arises, the pre-agreed adjudicator may have developed a conflict of interest, may no longer be willing to serve as an adjudicator, or may be unavailable, due to other commitments, illness or even death. Furthermore, at the time of contract formation, the expertise required for resolving a potential dispute arising therefrom might be uncertain, and the pre-agreed adjudicator's expertise may not align with that required to decide on the dispute at hand (A/CN.9/1129, para. 70). To address the possible unavailability of the pre-agreed adjudicator, parties may incorporate additional clauses. For instance, they can establish that the designated appointing authority could step in and replace the pre-agreed adjudicator (A/CN.9/1166, para. 87). Alternatively, parties may consider whether to designate an "accompanying adjudicator" or to use a "dispute board" if they wish to ensure a particular adjudicator is available throughout the term of the contract. Such an approach, however, will entail additional costs and parties should weigh the costs with the benefits of a preselected available adjudicator.

*Appointment of an adjudicator – subparagraph (b)*

11. If parties fail to reach an agreement on the selection of the adjudicator, the appointing authority will, upon a request of a party, promptly appoint the adjudicator.

*Appointing authority for adjudication – subparagraph (c)*

12. The appointing authority for adjudication may differ from that for arbitration under paragraphs 3 and 4. This distinction acknowledges the distinct nature of these processes and recognizes that the appointing authority may need a different set of specialized expertise, which needs to be assessed by the parties. (A/CN.9/1166,

 

para. 88). The appointing authority may be requested to set the terms of appointment, including the fees to be paid to the adjudicator, if so agreed by the parties. This is to define on what terms the adjudicator is expected to provide its services, as a party not willing to agree on the appointment may otherwise refuse to agree on the terms or fees of that adjudicator after the appointment is made by the appointing authority if such matters are left to the parties. Parties should be aware that, unlike in arbitration, there is no default appointing authority for adjudication. The absence of such an authority could potentially pose challenges and render the model clause pathological if parties fail to reach an agreement on appointing an adjudicator. Therefore, it is essential for parties to designate an appointing authority for adjudication when agreeing to the clause.

*Consultation – subparagraph (d)*

13. According to subparagraph (d), the adjudicator is required "to consult with the parties on matters related to the dispute and the procedure" within three days of the adjudicator's acceptance of appointment. This consultation should involve engaging in discussions or seeking input from the parties regarding the resolution or management of the dispute. The purpose is to understand their perspectives, gather relevant information, and possibly facilitate negotiations or procedural arrangements to address the dispute effectively. The first consultation should occur within three days of the adjudicator's acceptance of the appointment, which may precede the submission of the response by the other parties. This allows the respondent to focus their response on the issues raised during the consultation. However, it is important to note that additional consultations are possible, even after the respondent has submitted their response, to ensure ongoing engagement and the opportunity for further input from all parties involved.

*Communication of acceptance of appointment – subparagraph (e)*

14. Subparagraph (e) outlines a procedural timeline for the responding party or parties following the acceptance of appointment of an adjudicator for a dispute. The submission of the response to the request is scheduled to take place only after the consultations to ensure that the respondent(s) clearly understands the matters under contention and that the response is tailored to address the specific issues identified in the dispute. The submission deadline is set for 10 days following the adjudicator's acceptance of appointment, of which the respondent will be notified at the latest when approached by the adjudicator for consultations, mandated to take place within 3 days after the appointment.

*Conduct of the proceedings – subparagraph (f)*

15. As provided under subparagraph (f), the adjudicator may conduct the proceedings as he or she considers appropriate for the dispute, including abridging or extending any period of time, provided that the parties are treated with equality and that each party is given a reasonable opportunity to present its case. Given the absence of widely acknowledged procedural rules for adjudication proceedings, the adjudicator and the parties can mutually agree on procedures or address matters that would facilitate the adjudication process. For instance, issues such as whether the adjudication process would involve a hearing, or whether it would be a documents-only process, can be discussed during consultations (A/CN.9/1129, para. 71; A/CN.9/1159, para. 59).

*Suitability – subparagraph (g)*

16. Subparagraph (g) grants authority to the adjudicator to assess whether the dispute, either in its entirety or partially, is suitable for adjudication. The determination should be made as promptly as possible. This is because not all matters can be resolved through adjudication. For instance, an adjudicator may determine that certain disputes are too complex to make a determination in the limited amount of time. An adjudicator with expertise on technical matters may find that the dispute focuses predominantly on legal issues, which would not be suitable for his or her

determination. When the relief sought is irreversible once performed or enforced, and cannot be compensated by monetary payments, an adjudicator may determine that the matter is equally not suitable for adjudication. In such cases, parties may rely on arbitration under paragraph 1.

*The determination – subparagraph (h)*

17. Subparagraph (h) outlines the time frame within which the adjudicator must reach a decision after accepting the appointment for a specific dispute, along with provisions for possible extensions under exceptional circumstances. This subparagraph aims to ensure that the adjudication process is conducted in a timely manner while allowing for flexibility in situations where additional time may be warranted due to exceptional circumstances.

18. Subparagraph (h) mandates that the adjudicator provide reasons to the parties, to allow them to understand and accept the decision. However, unless otherwise required by applicable law, parties possess the flexibility to determine whether the adjudicator is obligated to state reasons in their determination and may choose to include the following in the clause: "The adjudicator is not required to provide reasons in the determination."

19. Opting for a non-reasoned determination contributes to a more streamlined procedure. However, the absence of reasoning may hinder parties from fully comprehending or accepting the adjudicator's determination. Requiring an adjudicator to give reasons for a determination can lead to a deeper understanding of the dispute. Moreover, if a review is necessary, especially within the context of compliance arbitration under paragraph 3, assessing factors such as whether the parties were treated with equality by the adjudicator and had a reasonable opportunity to present their case might be difficult if no reasons are provided. Additionally, providing reasoning may not significantly extend the time required for the adjudicator to render a determination, as the reasons can be succinct and focused.

20. Parties could discuss this issue with the adjudicator when organizing the proceedings in their consultations, expressing their preference regarding the inclusion of reasons. This proactive approach ensures that parties are well-informed about the implications of their decision on the comprehensibility and potential acceptance of the adjudicator's determination (A/CN.9/1166, para. 90).

*Effect of the determination – subparagraph (i)*

21. Subparagraph (i) establishes the legal effect and obligations arising from the determination made by the adjudicator, which is that, as the parties accept the determination as being legally binding, it must be adhered to by the parties.

*Confidentiality – liability*

22. Furthermore, it is advisable for the adjudicator to enter into an undertaking of confidentiality and ensure that confidentiality is respected during the adjudication process. The parties may also consider whether they agree to waive any claim against the adjudicator based on any act or omission in connection with the adjudication procedure, save for intentional wrongdoing, akin to article 16 of the UARs.

*Request of a security in granting relief*

23. In granting relief, the adjudicator may order that the beneficiary of the determination provide security, considering the nature of the relief granted and addressing concerns regarding irreversible remedies. For example, the adjudicator might determine that a matter where one party seeks relief of specific performance is suitable for adjudication. However, recognizing the irreversible nature of such performance, the adjudicator may find it appropriate to require security to ensure fairness, especially in anticipation of a potentially different decision that could be reached subsequently by an arbitral tribunal under paragraph 1. However, in many

situations, adjudication is initiated to ensure cash flow. Therefore, any decision to order security in the context of additional monetary payments may defeat the objective of ensuring cash flow with the adjudicator's determination, and thus should be carefully weighed against the broader objective of maintaining the effectiveness of the adjudicative process in ensuring timely contract performance (A/CN.9/1166, para. 91).

*Compliance Arbitration – paragraph 3*

24. Paragraph 3 establishes arbitration as the method for resolving disputes regarding compliance with the undertaking outlined in paragraph 2(i). This process offers an efficient means of addressing alleged non-compliance with an adjudicator's determination. While it aligns with highly expedited arbitration, it considers the specific focus, reflected in shorter proposed deadlines compared to that Model Clause. Additionally, paragraph 3(d) introduces a "hard stop" provision on the time period for making the award. Paragraph 3(e) ensures that the tribunal retains authority to assess whether the adjudicator has treated parties equally, allowed them to present their cases, and maintained impartiality or independence (A/CN.9/1166, para. 94).

*Arbitration under paragraph 1 in relation to adjudication – paragraph 4*

25. Paragraph 4 addresses two key issues for any arbitral proceedings following the adjudication process described in paragraph 2.

26. First, subparagraph (a) states that a party involved in the arbitral proceeding can submit to that arbitration disputes that were determined in any earlier adjudication under paragraph 2. Importantly, the parties are not constrained or limited by any claims, arguments, evidence, or other submissions it made during the adjudication proceedings. This provision allows for a more comprehensive presentation of the party's case in the subsequent arbitration, without being restrained by its presentation of the case under time pressure in the adjudication.

27. Second, subparagraph (b) emphasizes that an arbitral tribunal that is responsible for deciding any matter in arbitral proceedings under paragraph 1, is not bound by a determination made by the adjudicator. This signifies the independence of the arbitral proceedings from any prior adjudication, ensuring that the arbitral tribunal can conduct its own assessment, reach its conclusions, and make decisions without being influenced or constrained by the findings of the adjudicator.

28. Hence, even if a dispute submitted to the arbitral tribunal includes factual or legal matters on which an adjudicator made a determination, the arbitral tribunal may conduct a full, *de novo* review of those disputed issues of fact and law, pursuant to the EARs or the UARs. Consequently, the parties' statements and evidence provided in the adjudication procedure and the subsequent arbitration pursuant to paragraph 3 do not have any bearing on an arbitration under paragraph 1 and neither have the decisions made by the adjudicator or the arbitral tribunal under paragraph 3 (A/CN.9/1129, paras. 74–77; A/CN.9/1159, para. 53).

*Concurrent proceedings – paragraph 5*

29. Paragraph 5 indicates that parties could institute adjudication (paragraph 2) and arbitration (paragraph 1) either simultaneously or consecutively, partially or even wholly covering the same issues. Hence, adjudication and arbitration may be conducted in parallel.

30. In order to avoid that concurrent proceeding, parties may agree on the additional text in paragraph 5, which establishes a specific procedural sequence and interaction between adjudication and arbitration under paragraph 1. The additional text in paragraph 5 sets forth the conditions under which arbitration can be initiated in relation to ongoing adjudication and vice versa, taking into account the need to follow a specific order or temporarily suspend one process in favour of the other, depending on the circumstances.

31. By requiring parties to await the adjudicator's determination before commencing arbitration or suspending ongoing arbitration, the clauses address concerns about duplicative efforts (i.e. concurrent proceedings).

32. However, including such a clause may carry risks, as disputes over procedural matters may emerge, leading to delays and possibly prompting parties to resort to dilatory tactics. Despite this, given the brief duration of adjudication proceedings, the risk of duplication in concurrent proceedings is limited.

# IV. Model Clause on Technical Advisors

## A. Model Clause (A/CN.9/1166, para. 101)

1. The arbitral tribunal may appoint one or more independent technical advisors to accompany it in the proceedings and, as the need arises, to assist it in the technical understanding of the dispute.

2. In the process of selecting and appointing a technical advisor, the arbitral tribunal shall consult the parties on:

(a) The specific area of technical expertise necessary;

(b) The terms of reference, including the type of assistance to be provided by the technical advisor and the means and manner in which the technical advisor performs his or her role; and

(c) Any additional matters that the arbitral tribunal deems pertinent.

3. Article 29(2) of the UNCITRAL Arbitration Rules shall apply to technical advisors.

4. The arbitral tribunal shall ensure that the parties are given a reasonable opportunity to comment on the explanations provided by the technical advisor.

**For consideration by the Commission**: In comparison to the version finalized by the Working Group, the phrase "to the appointment of a technical advisor" at the end of paragraph 2(c) has been removed by the secretariat due to redundancy in light of the introductory clause (chapeau).

## B. Explanatory notes

*Role of the technical advisor – paragraph 1*

1. Arbitral tribunals may be composed of individuals with legal background, while the cases before them may involve complex technical issues. In highly specialized, technical or other types of disputes, arbitral tribunals may benefit from support provided on the technical aspects so as to better understand and evaluate the case. Paragraph 1 vests the arbitral tribunal with the power to appoint technical advisors to accompany it in the proceedings. This may be done online or in person. The role performed by technical advisors is different from that performed by experts appointed pursuant to article 29 of the UARs (experts appointed by the arbitral tribunal). A technical advisor assists the arbitral tribunal in the technical understanding of the dispute as the need arises. Whereas experts appointed by the arbitral tribunal prepare written reports which include opinions on issues to be determined by the arbitral tribunal, the role of technical advisors is limited to providing assistance to the arbitral tribunal, primarily in the form of explanations, so as to facilitate the understanding of the technical matters that appear in the submissions and evidence submitted by the parties, based on generally accepted standards in the area of technical expertise (A/CN.9/1129, para. 82; A/CN.9/1159, para. 70).

2. A technical advisor may perform his or her function at any time after appointment and during the proceedings, including in case management conferences

and hearings (A/CN.9/1129, para. 83). Having understood the technical aspects of the case with the assistance of the technical advisor, the arbitral tribunal may wish, in some instances, to seek further views on the disputed issues from tribunal-appointed experts. An arbitral tribunal that has appointed a technical advisor is not precluded from appointing one or more experts in accordance with article 29 of the UARs only because it had been assisted by a technical advisor (A/CN.9/1159, para. 71).

*Consultation with the parties – paragraph 2*

3. The arbitral tribunal should consult the parties on certain issues relating to the appointment of the technical advisor. Paragraph 2 of this model clause lists two key issues, namely the area of technical expertise required and the terms of reference.

4. The parties, especially when they are specialists in the field, may be better placed to identify a relevant individual to be appointed as a technical advisor. If so, the arbitral tribunal may request the parties to provide a list of candidates to be considered by the other party and the arbitral tribunal (A/CN.9/1159, para. 72).

5. The establishment of the terms of reference is essential to safeguard the rights of the parties to be heard by providing a process by which the parties may make comments, raise objections or pose questions to any technical advisor, in a transparent manner. Ensuring transparency and the rights of the parties to be heard is essential for building confidence in the functioning of the technical advisor. The cost of retaining the technical advisor should be considered costs under article 40(2)(c) of the UARs and may also be stipulated in the terms of reference.

*The rights of the parties – paragraphs 3 and 4*

6. There is a need to ensure that the parties have the opportunity to exercise their procedural right to raise an objection regarding the technical advisor's qualification, impartiality and independence prior to and after the appointment. Hence, the same process as provided for in article 29(2) of the UARs is followed (A/CN.9/1159, para. 73).

7. There is also a need to ensure that the parties have the opportunity to exercise their right to be heard. In accordance with paragraph 4 of this Model Clause, the arbitral tribunal should ensure that the parties are given a reasonable opportunity to comment on explanations provided by the technical advisor, especially if these explanations introduce considerations that have not been raised by the parties or their experts. The specifics as to how the parties may comment on the explanation should be defined in the terms of reference, which is to be established by the arbitral tribunal in consultation with the parties. The arbitral tribunal may decide that the parties may be present when the technical advisor performs its role orally. When the technical advisor performs its role in writing, the parties should be kept equally informed. The arbitral tribunal may also decide that, in the interest of efficiency, it will seek explanations by the technical advisor without the presence of the parties but later provide a summary of the explanations to the parties and seek their comments.

# V. Model Clause on Confidentiality

## A. Model Clause (A/CN.9/1166, paras. 108 and 110)

1. Each party shall maintain confidentiality of all aspects of the proceedings, including the existence of the proceedings, all non-public information disclosed by another party in the proceedings, all non-public decisions or awards, [and any decisions or awards that have been proven to have become public unlawfully] with the following exceptions: to the extent that such disclosure is required by legal duty, to protect or pursue a legal right or interest, or in relation to enforcing or challenging awards in legal proceedings before a court or other competent authority, or for the purposes of having, or seeking, legal, accounting or other professional services.

2. The arbitral tribunal and the parties shall seek the same undertaking of confidentiality in writing from all those that they involve in the proceedings.

3. The arbitral tribunal may, upon the request of a party, make orders concerning the confidentiality of the arbitral proceedings and take measures for protecting confidential information.

* Footnote to the Model Clause: In some jurisdictions, a valid confidentiality agreement can only be concluded once a dispute has arisen. In such cases, parties may add a first paragraph to the model clause: Upon commencement of a dispute, parties may consider agreeing on the following: (and then have the Model Clause as it currently stands).

## B. Explanatory notes

1. Parties wishing to ensure confidentiality in arbitral proceedings and choosing to conduct their arbitration under the UARs are encouraged to address confidentiality explicitly in their arbitration agreements or consider entering into additional confidentiality agreements, as permitted by applicable law. Unlike many institutional rules or national legislations, the UARs do not specifically cover provisions regarding confidentiality. (A/CN.9/1166, para. 111).

*Obligation to maintain confidentiality – paragraph 1*

2. This paragraph establishes an obligation of each party involved in the arbitral proceedings to maintain confidentiality regarding all aspects of the proceedings, including the existence of the proceedings, all non-public information shared by other parties and all non-public decisions or awards. It also outlines specific exceptions to the duty of confidentiality allowing disclosure to the extent necessary, when legally obligated, required to protect or pursue legal rights or interests, when enforcing or challenging awards in legal proceedings, or when obtaining legal, accounting, or other professional services. Normally, consulting with a third-party funder would fall within these exceptions (A/CN.9/1166, para. 107).

3. Parties may wish to consider including the text within square brackets, “and any decisions or awards that have been proven to have become public unlawfully” according to their specific needs and concerns. Inclusion of the text would provide the parties the flexibility to address situations where decisions or awards have been unlawfully disclosed to the public. In addition, parties may agree to uphold the confidentiality of any information revealed during the proceeding that has been unlawfully made public, and incorporate such provisions into the clause.

*Written undertaking of confidentiality – paragraph 2*

4. Paragraph 2 establishes a requirement for the arbitral tribunal and the parties involved in the proceedings to obtain a written undertaking of confidentiality from all individuals/entities they involve in the arbitration process. This undertaking is aimed at ensuring that everyone participating in the proceedings including witnesses, and experts (A/CN.9/1166, para. 112), agrees in writing to maintain the confidentiality of various aspects, including the existence of the proceedings, non-public information, and decisions or awards (A/CN.9/1159, para. 78).

5. In some circumstances, it is for the parties themselves to enter into a confidentiality agreement with the participants whose involvement they seek. In other circumstances, for example where the tribunal invites experts to become involved in the proceedings, it is more appropriate to have the duty rest with the arbitral tribunal (A/CN.9/1129, paras. 91–92; A/CN.9/1159, para. 78).

*Orders and measures on confidentiality – paragraph 3*

6. Paragraph 3 gives the arbitral tribunal the authority to address confidentiality issues in the arbitral proceedings, providing a mechanism for parties to request intervention and for the tribunal to address such concerns. In the event of a breach of confidentiality, parties may have the right to seek remedies from the party that breaches confidentiality in accordance with the applicable law. Moreover, under the Model Clause, a party may request that the arbitral tribunal issue orders and adopt appropriate measures to address and restore the confidentiality of the arbitral proceedings (A/CN.9/1159, para. 76; A/CN.9/1166, para. 113).

*Confidentiality within the proceedings*

7. Paragraph 3 also covers scenarios where a party has sensitive information of intrinsic value, like highly valuable trade secrets, know-how, algorithms or proprietary data, that it wishes to use in arbitration but wants to keep confidential from the opposing party. In such situations, measures can be discussed during a case management conference. The arbitral tribunal may classify such information as "confidential" and implement protective measures. For instance, information in the party's possession treated as confidential, inaccessible to the public or the opposing parties, and of commercial, scientific, or technical sensitivity may be classified as confidential. A party can submit a request to classify information as confidential by providing justifiable reasons. The arbitral tribunal decides on the classification and adopts protective measures if needed after hearing both parties and, considering potential harm to the requesting party if confidentiality is not safeguarded. For example, by limiting access to specific information to counsel's eyes only or experts' eyes only, controlling the distribution of specified information, permitting the submission of specified information in redacted form only as documentary evidence, and requesting witnesses and experts to sign an undertaking of confidentiality. (A/CN.9/1166, para. 115; A/CN.9/WG.II/WP.236 para. 16).

# Appendix: Guidance text on evidence

Reproduced without any change from A/CN.9/WG.II/WP.236

1. Article 27 of the UNCITRAL Arbitration Rules and article 15 of the Expedited Arbitration Rules refer to "witnesses", "statements by witnesses", and "evidence", which is further specified as "documents, exhibits or other evidence", as the means by which each party discharges its burden of proof. As medium neutral terms, these terms encompass information in electronic form that a party may wish to rely on to support its claim or defence.[6] Commonly referred to as "electronic evidence" or "digital evidence", such information may be generated and processed by a variety of different technologies, and subsists as "data messages" that form "electronic communications" and "electronic records" as defined, notably the Model Law on Electronic Commerce and Model Law on Electronic Transferable Records.[7] Electronic evidence plays an increasingly critical role in arbitral proceedings. While witness testimony given by videoconference ordinarily constitutes "electronic evidence", the focus of this guidance is on other forms of electronic evidence, including electronic equivalents of physical or paper-based "documents" and "exhibits".

2. Existing UNCITRAL legislative instruments on electronic commerce have been enacted in over 100 jurisdictions worldwide. When they apply, these texts give legal recognition to contracts concluded in electronic form, as well as communications in connection with the formation and performance of contracts, on which parties may seek to rely in presenting their case in arbitral proceedings. While these texts do not apply on their terms to arbitral proceedings, the principles on which they are based and the provisions that give expression to these principles can nevertheless provide useful guidance to arbitral tribunals in applying the UNCITRAL Arbitration Rules to the assessment of electronic evidence. These texts apply a "functional equivalence" approach, which recognizes that an electronic communication or record can serve an equivalent function to a paper-based document for the purpose of meeting certain legal requirements, even though the electronic communication or record, in and of itself, it cannot be regarded as an equivalent of a paper-based document.[8] After all, a paper-based document is a tangible thing containing information that is readable by the human eye. It is thus capable, without anything more, of being accessed and assessed by an arbitral tribunal. Conversely, an electronic communication or record is not so; it relies on information systems – comprising software (e.g., applications) and hardware (e.g., screens or other devices) – to be accessible and the information that it contains to be interpretable to a human.[9] Accordingly, the functional equivalence rules in these texts usually require some form of "method" to be used in order for the electronic communication or record to fulfil the functions of its paper-based equivalent.

3. Accordingly, when requiring the production or the presentation of electronic evidence, the arbitral tribunal may prescribe that the evidence be submitted in a form that is compatible with a particular information system that allows the arbitral tribunal to access and assess the electronic evidence, and to require the party presenting the electronic evidence to take measures to ensure that the information contained therein is in a form (e.g., file format) that can be stored and displayed by the software and hardware components of the system prescribed.

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

[7] Article 2 of the UNCITRAL Model Law on Electronic Transferable Records defines "electronic records" as information generated, communicated, received or stored by electronic means, including, where appropriate, all information logically associated with or otherwise linked together so as to become part of the record, whether generated contemporaneously or not.

[8] MLEC Guide to Enactment, para. 17; United Nations Convention on the Use of Electronic Communications in International Contracts (ECC), Explanatory Note, para. 50.

[9] Article 6(1) and 8(1) of the MLEC; MLEC Guide to Enactment, para. 17; ECC, Explanatory Note, para. 50.

4. Issues such as data protection, security, interoperability, portability and localization, as well as associated costs, will likely be relevant factors in determining which information system to prescribe.[10] At the same time, arbitral tribunals should be aware that the evidential weight of the information contained in electronic evidence may be affected if the relevant data needs to be migrated from the format in which it was generated, sent or received (i.e. its "native format") in order to comply with the requirements of the prescribed system. This is because migration may result in the data losing some of the qualities afforded by its native format, which may in turn give rise to questions as to its authenticity and integrity. If a party still wishes to present data in its native format, that party may bring to the attention of the arbitral tribunal the need to submit the relevant electronic evidence accordingly. The arbitral tribunal may, if it accepts the need to do so, require the party submitting the electronic evidence to provide the necessary means to enable it to access and assess the evidence.

5. In accordance with article 27(4) of the UNCITRAL Arbitration Rules, it is for the arbitral tribunal to determine the admissibility, relevance, materiality and weight of the evidence offered. Article 9(2) of the Model Law on Electronic Commerce specifies certain factors that might be relevant in determining the *weight* of electronic evidence. It provides that, in assessing the weight of electronic evidence, "regard shall be had to the reliability of the manner in which the data message was generated, stored or communicated, to the reliability of the manner in which the integrity of the information was maintained, to the manner in which its originator was identified, and to any other relevant factor". These factors essentially go to the authenticity and integrity of the electronic evidence. As with paper-based documents, a party may raise a question regarding the quality of electronic evidence, and the arbitral tribunal may request the party relying on the evidence to provide additional evidence as to this matter.

6. The use of electronic evidence allows the arbitral tribunal, in assessing the evidence and in managing the case, to deploy a range of digital technologies and technology-enabled services, including artificial intelligence, distributed ledger technology systems and solutions offered by online platforms, to process the information, which can in turn enhance the efficiency of the proceedings. Digital technologies also provide parties with new ways to exhibit and display the information. It should be noted however that there are certain risks associated with their use and that measures to safeguard against those risks need to be taken, such as by providing the parties with the opportunity to exercise their due process rights. Furthermore, there may be cases in which the imbalance between the parties' access to the technologies are significant as such that it undermines the fairness of the proceedings and appropriate measures for counterbalancing are required.

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[10] Third-party systems may be offered as cloud computing service, in which case additional guidance is provided in the UNCITRAL Notes on the Main Issues of Cloud Computing Contracts.