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UNCITRAL Working Group II 78th Session: Seeking the Balance Between Innovation and Due Process

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The 78th session of the UNCITRAL Working Group II (the “WG II”) took place in Vienna, Austria from 18 to 22 September 2023. The WG II is currently considering proposals for future work on technology-related dispute resolution and adjudication. In this post, we report on the key discussions from this session, in particular on the model contractual clauses (“model clauses”) which the WG II is looking to finalise next year (*see previous discussion on the 77th session*). As attendees of the 78th session, the authors observed that the discussions at the session were substantive, collaborative and productive, focused upon both issues of policy as well as the technical drafting of the model clauses.

As discussed below a recurring theme was the need to find a balance between having model clauses that were, on the one hand, innovative and likely to lead to faster and more efficient resolution of disputes in practice, while, on the other hand, containing sufficient quality and due process safeguards. The tension between these two worthy goals and the search for the golden middle between them will likely continue to lie at the heart of the WG II’s further efforts, and warrant consideration by the arbitration community at large.

The WG II’s Proposed Model Clauses

At its 55th session (2022), the United Nations Commission on International Trade Law (the “Commission”) tasked the WG II to combine proposals for future work on technology-related dispute resolution and adjudication and consider ways to accelerate the resolution of disputes. Currently, there are four proposed model clauses on (a) highly expedited arbitration, (b) expert determination, (c) experts accompanying the tribunal, and (d) confidentiality.

Different from the previous UNCITRAL instruments (such as the [1985 Model Law](#) (amended in 2006) or [2021 Expedited Arbitration Rules](#)), these model clauses are for direct use in contracts, and therefore require parties to deliberately “opt in”. Moreover, sophisticated business parties are welcomed to tailor these model clauses to suit the strategies and needs of their disputes.

The model clauses on highly expedited arbitration and confidentiality seem to be particularly useful for certain players, such as start-ups or the high-tech sector (*see discussion at the [2023 Tel-Aviv Arbitration Week](#)*), where there may be a need to resolve disputes in a highly efficient and

confidential manner. On the other hand, the model clauses on expert determination and experts accompanying tribunal may lend themselves to more general application across different industries.

Highly Expedited Arbitration or “Super Sonic Arbitration”?

In 2021, the UNCITRAL WG II issued the UNCITRAL Expedited Arbitration Rules (“EAR”) (*see post*). The model clause on highly expedited arbitration references the EAR, with additional features including very short procedural timelines, naming an arbitrator in the clause, and equipping the arbitral tribunal to issue an award ‘without reasons.’

Crunching Procedural Timelines

The draft text proposed to crunch procedural timelines even more than under the EAR. For instance, it proposed that the arbitral tribunal (a) shall consult with the parties within 5/7 days of its constitution (compared to 15 days under Article 9 of the EAR), and (b) shall render an award within 60-90 days (compared to the default six months under Article 16 of the EAR). Given the highly truncated time frames, some delegations referred to this model clause as “super sonic arbitration”.

However, there were different views on whether the proposed timelines were too fast or slow and whether they should be reduced or accelerated accordingly. Certain states also considered that these timelines were too prescriptive, and it should not be left to the WG II to endorse certain timelines to the parties.

Naming an Arbitrator

The proposed approach to name an arbitrator in the model clause had already been discussed at the 77th session where concerns were expressed over its desirability. The amended proposal now reflected the position as an optional paragraph. Nonetheless, there were similar concerns that arbitrators may not be willing and able to act in various circumstances (*e.g.*, for reasons of unavailability, or conflict of interests) which would render the clause inoperable or impractical.

Award Issued “Without Reasons”

While not reflected in the draft text, the WG II also considered the proposal of issuing an award “without reasons”. This proposal drew inspiration from [Article 31\(2\) of the Model Law](#), which permits the parties to agree to have an unreasoned award.

The proposal drew stark views. Proponents observed that parties were already permitted to have an arbitral award “without reasons” under the Model Law. Opponents, including Belgium, France, Israel, Russia and Norway, expressed concerns with due process and noted that an award issued “without reasons” may be unenforceable in some jurisdictions as it could contravene public policy.

It was also noted that without being privy to the reasoning of an arbitrator, local courts could face difficulties in reviewing and exercising judicial control over the arbitral award. As a middle ground, some delegations suggested that an award could be issued in the form of a summary judgment given time constraints, with a reasoned award to follow to mitigate due process concerns.

Expert Determination

The model clause on expert determination was discussed during the *77th session*. This is a multi-tiered clause and draws inspiration from the *FIDIC suite of contracts* common in construction disputes. Proponents of this approach, such as Germany, Italy, the United States, Switzerland, and Vietnam, noted that the multi-tiered system could help parties embroiled in technology disputes to avoid disruptions to their projects, given its proven success in construction disputes.

The multi-tiered clause is structured as follows:

- First, the parties proceed to expert determination, which leads to a binding decision. This is in contrast to the current varying practices in arbitration in which expert decisions may not always be automatically binding on parties (*e.g.*, [Art 23.2 of the DIS Rules on Expert Determination](#)). Notably, some suggested that the scope of disputes open to expert determination should be limited to certain obligations (*e.g.*, those involving monetary obligations and not specific performance).
- Second, the parties could enforce the expert determination in an arbitration that is confined to an examination of a party's compliance with the expert determination ("Phase 1 arbitration"). This further innovative aspect would lead to an arbitral award which benefits from wide recognition and enforcement under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Award ("New York Convention").
- Third, parties have the possibility to raise broader issues, including the issue encompassed under the Phase 1 arbitration in a subsequent *de novo* arbitration ("Phase 2 arbitration").

Some delegates questioned whether the multi-tiered clause could lead to more delays and be counterproductive for parties. The French delegation opined that the multi-tiered mechanism could lead to an expert decision that was widely enforceable, but without being subject to the rigours of the due process protections built into the New York Convention.

The Secretariat also invited the WG II to explore whether the expert determination should be complemented with mediation, in light of the [Singapore Convention on Mediation](#). While the idea gained general support, there were concerns that the inclusion of mediation should not prolong the dispute resolution process, and that it was necessary to elucidate the relationship among expert determination, mediation, and arbitration in the next proposal.

Experts Accompanying the Tribunal

Given concerns with the proposal at the *77th session* on party-appointed joint experts, the Secretariat's revised model clause now focused on tribunal-appointed experts. In substance, the proposed model clause would empower the arbitral tribunal to appoint an expert that is on standby during the proceedings, and to benefit from the expert's explanations on technical aspects of the

dispute. Of note, the proposal suggested that the tribunal's consultation could take place "*casually*" and "*orally*".

There were due process concerns expressed around any potential delegation of the tribunal's decision-making authority to the expert, and the lack of transparency of communications between the two. It was also suggested that a tribunal could have an unconscious bias towards a tribunal-appointed expert versus a party-appointed expert. Moreover, the proposal could also lead to additional financial costs for the parties.

To address some of the above concerns, it was suggested that the model clause clarify that the expert's role would be limited to assisting the tribunal in understanding the parties' submissions, and that communications between the tribunal and expert be made available to the parties.

The WG II also discussed that in some jurisdictions, national judges commonly relied on expert assistance, for example, in the Tokyo District Court and Australia's Admiralty Court (which would use assessors). It was suggested that the Secretariat, together with the help of the WG II, could conduct a further study of the use of experts in different jurisdictions, including issues concerning safeguards on due process and the roles of the experts, to further improve the current proposal.

Confidentiality

The WG II agreed that it was desirable to have a model clause on confidentiality, given its importance in arbitration (especially those involving tech disputes where commercially sensitive information is implicated) and the current lack of a uniform body of rules on confidentiality.

Confidential Information

Different views were expressed regarding whether confidentiality could attach to information that already existed in the public domain and was disclosed via unlawful means. It was also suggested that an arbitral tribunal should not be required to examine whether there was prior lawful or unlawful disclosure in order to decide whether confidentiality exists. It was further proposed that differences could be reconciled by allowing the parties to decide on the right approach for their needs, accompanied by a guidance note explaining the risks of choosing different approaches.

Guidance Text on Confidentiality

It was noted that a guidance note on confidentiality could help to (a) explain the above-mentioned risks, (b) elaborate on the measures that an arbitral tribunal may take to ensure compliance with the confidentiality obligations and address breaches of confidentiality, and (c) suggest scenarios where lawful disclosure could be permitted by parties.

Additional Guidance Text on Evidence

Delegations also supported having a guidance text aimed at assisting tribunals in managing new technologies and electronic evidence. It was noted that arbitral tribunals should be able to seek explanations from parties on their collection and review of evidence in order to preserve its integrity and mitigate any risks of manipulation. It was discussed that there could also be greater alignment with other relevant guidelines, such as the [Silicon Valley Mediation and Arbitration Centre's Guidelines on the Use of Artificial Intelligence in Arbitration](#) (under public consultation) and the [UNCITRAL Notes on Organizing Arbitral Proceedings](#), with respect to doubts over the authenticity of evidence.

Conclusion – Innovation and Contractual Freedom Versus Due Process

The WG II has in mind to issue a set of innovative model clauses that can be tailored by contractual parties to address their different needs. However, there is a degree of inherent tension between innovation/parties' contractual freedom and due process safeguards. As seen with highly expedited arbitrations, there is a need to ensure that parties are treated with equality and given a full opportunity to present their cases (*cf.*, Article 18 of the UNCITRAL Model Law) while ensuring that an enforceable award is rendered in an accelerated time frame that is practical for certain industry demands. Similarly, there are concerns that an expert decision should be subject to the same level of scrutiny and review as an arbitral award rendered under the New York Convention, and that appropriate safeguards should be established for the use of experts accompanying tribunals.

In subsequent discussions to come, we can expect further refinements to the model clauses to ensure that the right balance is sought between innovation/contractual freedom and due process. The WG II would be invested in ensuring that the model clauses respect due process or public policy and thus withstand the scrutiny of national courts in various jurisdictions.

The authors attended the 78th UNCITRAL WG II meeting as representatives of the [Institute for Transnational Arbitration](#). The above is a summary of the authors' observations at the WG II.

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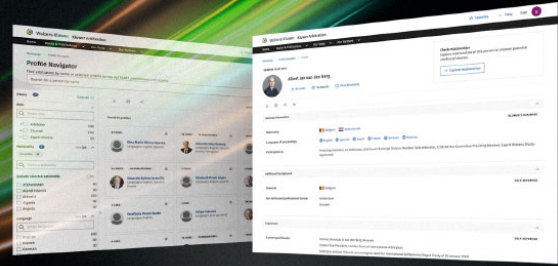
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