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Legal issues related to the digital economy – dispute resolution in the digital economy

Note by the Secretariat

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I. Introduction

1. One of the virtual panels held during the fifty-third session of the Commission, in 2020, addressed the impact of the pandemic on international dispute resolution in two round-table discussions.[1] During the first round table, representatives of five arbitral institutions addressed the short-term consequences and shared measures they took to respond to the COVID-19 pandemic, ranging from measures to ensure the safe operation of the institutions to those aimed at the effective administration of arbitral proceedings. Other measures taken included the use of digital technology to facilitate the different stages of the proceedings, such as remote hearings, and the issuance of guidelines to assist parties and the arbitral tribunal. The second round table examined the long-term consequences of the pandemic and how international dispute resolution could evolve as a result. Increased digitalization and further use of technology, expedited procedures, the use of artificial intelligence (AI), asynchronous hearings, online platforms and other innovative measures were outlined, all of which were likely to change how disputes would be resolved. However, the need to preserve the fundamental principles of international arbitration, including party autonomy and the discretion provided to the arbitral tribunals in the conduct of the proceedings, was also highlighted. Overall, it was observed that UNCITRAL texts on dispute resolution (including on mediation) were flexible enough to accommodate these changing circumstances, but that further examination of those texts could be made in the context of the evolving environment.

2. At the same session, the Commission requested the Secretariat to proceed to organize colloquiums to refine the scope of the topics identified in its ongoing exploratory work on legal issues in the digital economy (including dispute resolution and platforms) and to present proposals for concrete legislative work for consideration by the Commission.[2] With respect to the proposal for stocktaking of dispute resolution in the modern context (A/CN.9/1037, see para. 37 below), the Commission requested the Secretariat to commence research on the topic noting their relevance to the digital economy and COVID-19-related developments in the area of dispute resolution, and to report back to the Commission on possible future work in that area. The Secretariat was given flexibility as regards the resources, means and ways to undertake that work.[3]

3. Accordingly, the Secretariat hosted or participated in the following activities in relation to dispute resolution in the digital economy (DRDE):

- An expert group meeting on technology-related dispute resolution held virtually on 25 January and 15–16 March 2021 hosted jointly with the Ministry of Justice of Israel;
- The first meeting of the Inclusive Global Legal Innovation Platform on Online Dispute Resolution (“iGLIP on ODR”) held virtually on 18 March 2021 by the Department of Justice of the Government of the Hong Kong Special Administrative Region of the People’s Republic of China; and
- Two workshops on DRDE held virtually on 5 February and 30–31 March 2021 hosted jointly with the Ministry of Justice of Japan and the Japan International Dispute Resolution Centre (JIDRC).

4. This note provides a summary of the issues discussed at the above-mentioned events and each section contains a suggested way forward for consideration by the Commission.

[1] Additional details and links to recordings of the panels are available at https://uncitral.un.org/en/COVID-19-panels.

[2] *Official Records of the General Assembly, Seventy-fifth Session, Supplement No. 17* (A/75/17), part two, para. 76.

[3] Ibid., para. 16(h).

II. Technology-related dispute resolution

A. Background

5. At its fifty-second session, in 2019, the Commission 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). At that session, the Commission agreed that work on disputes arising out of transactions in the digital economy should be combined with other exploratory work on legal issues related to the digital economy (A/74/17, para. 215).[4]

6. At its fifty-third session, in 2020, the Commission considered a proposal for a colloquium on resolution of international disputes arising from high-tech transactions. It was felt that the topic would benefit from further analysis and focus so as to avoid developing sector-specific rules and to address broader challenges presented by the use of AI and other emerging technologies in dispute resolution, including through the use of platforms to settle disputes. It was pointed out that while sector-specific rules for dispute resolution had been proposed in the past, sector participants tended to revert to generic rules over time.[5]

B. Summary of the discussion

7. The Secretariat, together with the Ministry of Justice of Israel, held an online meeting with 22 experts on legal issues relating to technology-related dispute resolution on 15 and 16 March 2021. The meeting focused on the following topics: (i) the needs of the tech industry; (ii) possible scope of work; (iii) specific aspects of technology-related disputes that required a deviation from the generic rules; (iv) feasibility of work; and (v) forms of possible work. In preparations for that meeting, a preliminary briefing was held on 25 January 2021 to structure the discussions in March.

8. On the needs of the industry, it was noted that enhancing access to justice for all involved in technology-related disputes should be the objective of the project, which would also be in line with Sustainable Development Goal 16 (Peace, Justice and Strong Institutions). It was said that particular attention could be given to businesses with limited knowledge about dispute resolution and capacity to handle disputes, for example, micro, small and medium-sized enterprises (MSMEs). However, it was also noted that businesses of all sizes were experiencing an increase in the number and costs of technology-related disputes, rendering the need all the more pressing. It was further mentioned that the availability of counsel with the expertise to advise the disputing parties was another element to be taken into account to ensure access to justice. In this regard, the importance of continued education and training of the different actors involved in technology-related dispute resolution was highlighted.

9. It was stressed that expediency was one of the key needs of the industry in resolving technology-related disputes, with the tech-industry also fast-moving. In this respect, emphasis was put on further collaboration among arbitrators and industry experts in the decision-making process. At the same time, the need for decision-makers to maintain independence and impartiality and to respect due process were underscored. It was mentioned that access to justice did not only mean expeditious resolution but also fair resolution of disputes. Attention was also drawn to the fact that the Commission was scheduled to adopt the UNCITRAL Expedited

[4] A virtual panel on high-tech dispute settlement was held as part of a parallel programme to the Society Law, Artificial Intelligence and Robotics (SOLAIR) Conference 2020 (Prague, 10–11 September 2020) in cooperation with the Governments of Czechia, Israel and Japan. A takeaway from the panel was the need to discuss tools addressing the expertise of arbitrators, the duration of proceedings, confidentiality, and access to digital evidence.

[5] *Supra note* 2, para. 69.

Arbitration Rules in 2021, which would provide for an expedited process and could be further adapted to meet the needs of parties faced with technology-related disputes.

10. On the question of the possible scope of work, a number of proposals were put forward. It was generally acknowledged that defining technology-related or high-tech disputes would pose practical difficulties and thus work could generally aim to address disputes that involve technological complexity and that require a prompt decision and expertise of the decision maker. In that context, there was support that any future work in this area should be based on the experience of other institutions that provide industry-specific dispute resolution services, for example, the World Intellectual Property Organization (WIPO) Arbitration and Mediation Center and P.R.I.M.E. Finance (Panel of Recognised International Market Experts in Finance).

11. While some experts indicated that the technical expertise should be the key consideration when selecting arbitrators, others expressed the need for the arbitrators to be well-trained in dispute resolution. A suggestion was made that the role of experts with technical background could somehow be merged with that of arbitrators, for instance, in the assessment of evidence involving technology. It was suggested that the composition of the tribunal should be so that arbitrators with technical background would address issues related to technology, while those with legal expertise could focus on the procedural elements.

12. Another suggestion was to focus on availing experimental evidence in technology-related dispute resolution. It was mentioned that certain arbitration rules contained provisions relating to the admissibility of experimental evidence (for example, article 51 of the WIPO Arbitration Rules). On the other hand, it was mentioned that providing for experiments may delay the proceedings, which would be contrary to the objective of providing for an expedited resolution.

13. It was mentioned that the confidentiality requirements may be more vital in technology-related disputes considering the need to protect trade secrets, patents, and other confidential information.

14. Another suggestion was the formulation of a list or a roster of experts to handle technology-related disputes. While it was said that such a roster would expedite the selection process and could function as a quality control mechanism, concerns were expressed about how and by whom such a list would be drawn up and maintained, particularly in light of the transparency that would be required.

15. On the feasibility and form of possible work, views were expressed that the combined use of non-adjudicative and adjudicative processes (for example, med-arb, arb-med, or med-arb-med) would be useful in resolving technology-related disputes, particularly in light of the potential role of experts in the non-adjudicative stages of the process. Views were also expressed that model clauses tailored for technology-related disputes, which parties can refer to in their arbitration agreement, could be prepared. Support was also expressed for a more general guidance document on how to make the best use of the existing UNCITRAL texts, mainly the UNCITRAL Arbitration Rules, considering their flexibility and widespread acceptance. In general, it was emphasized that any material to be prepared should be of practical use to the disputing parties as well as the arbitral tribunal.

C. Suggested way forward

16. Based on the above, the Commission may wish to request the Secretariat to continue to engage with the experts and prepare an outline of a text that would address the issues arising from technology-related disputes, which can be presented to the Commission for its consideration. Complementing existing UNCITRAL instruments, such a text could function as a tool box for use by businesses, arbitrators, mediators and technical experts faced with technology-related disputes, explaining the benefits of alternative dispute resolution and where appropriate, suggest model clauses or arrangements, which parties can refer to for the conduct of proceedings to resolve

technology-related disputes. For example, the toolbox could include a set of protocols on confidentiality of information, taking of digital evidence, those on the involvement of experts at different stages of the decision-making as well as those to safeguard due process. It would be eventually left to parties to refer to those clauses or arrangements in their entirety or of their choice in their agreement.

III. Online platforms for dispute resolution

A. Background

17. In November 2020, the Department of Justice of the Government of the Hong Kong Special Administrative Region of the People's Republic of China established a Project Office for Collaboration with UNCITRAL (the "HK Project Office")[6] in Hong Kong, China to: (i) keep track of new developments and challenges arising from the use of emerging technologies in international trade; (ii) support and facilitate the establishment of networks or platforms to ensure continued discussion, collaborative knowledge-sharing and creative problem solving with respect to these developments; and (iii) enhance cooperation in exploring the use of innovative solutions to provide answers to existing legal problems, and to promote such solutions globally through different avenues.

18. The first initiative of the HK Project Office was to establish iGLIP on ODR with the purpose of taking stock of recent developments with regard to online dispute resolution[7] and to identify topics and scope of possible future work in that area. This was against the backdrop of increasing global interconnectedness, growth of cross-border trade and the dynamic advancement of technology, also taking note of the UNCITRAL Technical Notes on Online Dispute Resolution (the "ODR Technical Notes") adopted in 2016.

19. The first meeting of iGLIP on ODR was hosted by the HK Project Office on 18 March 2021. The Secretariat contributed to the event, which was comprised of two round tables, one generally on platforms for international trade and their linkage to dispute resolution, and another specifically on online platforms dedicated to dispute resolution (hereinafter referred to as "ODR platforms"[8]). Around 20 legal experts with dispute resolution practice, representing dispute resolution institutions, and from academia, took part. During the opening, it was highlighted that technology was developing at a rapid pace impacting all sectors including the legal industry. It was further noted that the global pandemic had disrupted the international supply chain and rendered face-to-face dispute resolution impossible in some cases. In that context, the shared view was that there was an increasing need to examine how existing UNCITRAL instruments can be used and adapted in light of these new

[6] The HK Project Office was established under the Agreement concluded between the Government of the People's Republic of China and the United Nations constituted by the Exchange of Notes dated 25 October 2019 and the Memorandum of Understanding Between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the United Nations for the Administrative Arrangements for Collaboration Relating to International Trade Law dated 4 November 2019.

[7] See section V, paragraph 24 of the UNCITRAL Technical Notes on Online Dispute Resolution – *Online dispute resolution, or "ODR", is a "mechanism for resolving disputes through the use of electronic communications and other information and communication technology". The process may be implemented differently by different administrators of the process, and may evolve over time.*

[8] See section V, paragraph 26 of the UNCITRAL Technical Notes on Online Dispute Resolution – *ODR requires a technology-based intermediary. In other words, unlike offline alternative dispute resolution, an ODR proceeding cannot be conducted on an ad hoc basis involving only the parties to a dispute and a neutral (that is, without an administrator). Instead, to permit the use of technology to enable a dispute resolution process, an ODR process requires a system for generating, sending, receiving, storing, exchanging or otherwise processing communications in a manner that ensures data security. Such a system is referred to herein as an "ODR platform".*

developments and to consider whether new legal instruments needed to be prepared to ensure a harmonized approach.

B. Summary of the discussion

20. Online platforms (referred to also as “digital”, “electronic” or “e-commerce” platforms) are increasingly being used for trade. They enable the sale of goods and supply of services, connect global supply chain participants, and create online spaces for collaboration among them. Employing a range of systems and technologies, online platforms afford new ways of trading and new business models, thus creating new opportunities for cross-border trade. The benefits of online platforms are particularly acute for MSMEs (for a draft taxonomy of online platforms, see A/CN.9/1064/Add.3).

21. Discussions began focusing on platform-based models of international trade. It was observed that online platforms have created a private legal system of their own to facilitate international trade, in the sense that: (i) platforms, based largely on contracts, were comprised of a community of users bound by the internal rules; and (ii) platform operators assumed a number of functions, including enforcing compliance with those rules. It was stated that online platforms had become an unprecedented enabler of international trade and reference was made to the notions of the “platform” economy and the “platform” effect (businesses creating innovative means to match supply and demand using technology embodied on the platforms). In that context, it was noted that a clear understanding of the term “platform” was necessary to define the scope of any work in this area.

22. It was said that while online platforms generally provide for the sale of goods and supply of services, they employ a range of technologies (including interactive applications allowing for communication between platform users) and offer a number of additional services. It was added that some of the e-commerce platforms have in-built systems for handling complaints and settling disputes arising from activity on the platform, while ODR platforms offer dispute resolution as their main service. While both posed some common legal issues, there were issues that were specific to each.

23. For example, with regard to platforms that have an in-built dispute resolution mechanism, the following issues were identified: (i) how to incorporate the procedural rules in the terms of use, including how to obtain valid consent of the users; (ii) whether the mechanism should resolve disputes between the operator and the users or also between users; (iii) the law applicable to the dispute, including the possible application of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG); (iv) the anticipated role of the platform to protect consumers and the applicable law for such protection; (v) how to ensure an impartial and fair procedure; and (vi) the possibility of appealing the outcome of the process.

24. Discussions also evolved around the degree of involvement of the platform operator in resolving disputes, including whether it should have an adjudicative role in addressing complaints. It was further noted that considering the information that platform operators had with regard to the platform users and the transactions thereon, they should be able to put in place mechanisms to prevent disputes from arising and to mediate disputes for an amicable settlement. In that context, it was said that it might not be so easy to identify the users of the platforms (who are, in some cases, anonymous), which posed some practical concerns, particularly in the cross-border context.

25. From a regulatory perspective, it was noted that some States have recently imposed obligations on platform operators to provide dispute resolution mechanisms (for example, in China and the European Union, which are explored in A/CN.9/1064/Add.3). In that context, questions were raised on: (i) the laws applicable to the platforms (noting that platforms were made up of multiple layers of agreements involving the operator and the users, as well as between the users); (ii) whether such

obligations should apply to all platform operators regardless of their size; and (iii) whether it would be possible for platform operators to outsource the provision of such services. Views were expressed that it could be useful to develop a harmonized legal standard for regulating platform operators to ensure a minimum quality of service, particularly considering that online platforms were engaged in various cross-border activities involving users from across the globe.

26. Another aspect discussed was the difficulty in drawing a clear distinction between businesses and consumers on transactions undertaken on online platforms as the users vary in type and form, which could also change as transactions are conducted. For example, a platform user could be a business or an individual selling products to another user, which may or may not be a consumer, whereas all platform users could be considered consumers in the sense that they are utilizing the services provided by the platform operator. With the prevalence of the platform economy, a party to a transaction may show some traits of a business while also presenting some characteristics of a consumer. With such shifts in the role and engagement of the various actors, the line between consumers and business has become blurred.

27. With regard to ODR platforms, it was mentioned that there have been increased efforts to utilize ODR to resolve cross-border disputes, particularly with technological developments making it more convenient, cost-effective and efficient. It was stated that the global pandemic has further demonstrated the effectiveness of ODR in the absence or severe restriction of in-person participation in dispute resolution.

28. Reference was made to efforts by the Commission in adopting the ODR Technical Notes in 2016 and by other international organizations to formulate legal standards on ODR. In August 2019, the Asia-Pacific Economic Cooperation (APEC) endorsed the Collaborative Framework for ODR of Cross-Border Business to Business Disputes,[9] a framework to provide technology-assisted dispute resolution through negotiation, mediation, and arbitration for business-to-business claims. APEC also prepared model procedural rules on ODR, which were based largely on the UNCITRAL Arbitration Rules and the ODR Technical Notes. Reference was additionally made to the ongoing work of the International Organization for Standardization (ISO) in preparing the "ISO/TC 321 Transaction assurance in E-commerce", which aims to achieve standardization in the field of transaction assurance in e-commerce related upstream/downstream processes, including: (i) assurance of transaction process in e-commerce; (ii) protection of online consumer rights; (iii) interoperability and admissibility of inspection result data on commodity quality in cross-border e-commerce; and (iv) assurance of e-commerce delivery to the final consumer.

29. In that context, it was suggested that iGLIP on ODR could examine a number of aspects relating to ODR. It was generally felt that the work should begin by examining the current legal and regulatory framework and considering whether the development of any new international standards would be desirable.

30. One aspect related to preserving the integrity of the ODR platforms as well as due process and procedural fairness of the proceedings thereon. On the former, it was mentioned that a harmonized regulatory framework could be developed to ensure quality control and to address other relevant issues like the protection of data and confidentiality.

31. Another aspect related to the scope of services to be provided by ODR platforms, which would have an impact on the legal framework. Reiterating the views above (see para. 26), it was said that making a distinction between ODR platforms for business-to-business disputes and for business-to-consumer disputes could be difficult. It was also mentioned that disputes could be resolved entirely on an ODR platform or some parts thereof. In that context, it was anticipated that ODR platforms would not be limited to dispute resolution in the more conventional sense, but also

[9] The text of the Collaborative Framework is available at http://mddb.apec.org/Documents/2019/EC/EC2/19_ec2_022.pdf.

actively utilized in dispute prevention and avoidance. Similarly, the potential of ODR platforms in assisting parties to reach an amicable settlement, possibly by providing them with an analysis of similar disputes and further guidance through sample templates, was noted.

32. Discussions also evolved around the use of AI on ODR platforms in the different stages of the dispute (see also A/CN.9/1064/Add.1). It was felt that AI was more useful in the earlier stages of the dispute (for example, to support negotiations and to suggest solutions), while caution was warranted when AI was involved in rendering decisions based on a set algorithm. In that context, the need to ensure impartiality, possibly through review of the algorithms by a third party or of the decision by humans, was underscored.

33. Yet another aspect related to the enforcement of the outcome of ODR, as questions were raised whether the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) ("New York Convention") and the United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) ("Singapore Convention on Mediation") could provide the basis for cross-border enforcement. References were also made to domain name dispute resolution systems where there was a built-in mechanism to enforce decisions. Some viewed that involvement of courts or other competent authorities in the respective jurisdictions would be necessary. On the contrary, it was mentioned that the increased use of automated solutions through so-called "smart contracts" deployed on distributed ledger systems, could facilitate the enforcement of decisions rendered on an ODR platform.

34. It was further suggested that iGLIP on ODR should be involved in promoting the use of ODR. In that context, concerns about the different levels of access to technology were raised, particularly in less-developed States, which impacted the parties' access to ODR and to justice more generally. Reference was made to "access to digital justice" and the need to ensure access to adequate technology, especially for MSMEs.

C. Suggested way forward

35. As outlined above, developments in the digital economy have generated an explosion of online platforms for trade and for dispute resolution, which the pandemic has further accelerated. A number of legal issues have been identified but the landscape is also constantly changing. Therefore, work in this area might begin with a narrow scope, while the results of such work could have a broader application. Exploratory work may be focused on identifying the gaps that call for preparation of legal standards in light of existing UNCITRAL instruments. The wide range and different degrees of technology embodied in these platforms should also be taken into account. At the same time, as reiterated by the Commission, any legal standard to be developed should be based on the principle of technology neutrality to ensure further innovations.[10] Lastly, due account should be taken of the so-called digital divide not only among States but also among businesses in utilizing technology to access online platforms.

36. In light of the above, the Commission may wish to request the Secretariat to continue to collaborate with the HK Project Office and to take part in iGLIP on ODR. This would allow the Secretariat to utilize the expertise, resources, and connections available at iGLIP on ODR and to cooperate in promoting, raising awareness and capacity-building. The Commission may also wish to request the Secretariat to report on the work by iGLIP on ODR annually so as to make an informed decision on any future work to be undertaken. An example of such work could be the development of

[10] *Official Records of the General Assembly, Seventy-fifth Session, Supplement No. 17* (A/75/17), part two, para. 74.

core standards that should apply generally to online platforms and more specifically to ODR platforms.

IV. Stocktaking of developments in dispute resolution

A. Background

37. During the fifty-third session, in 2020, the Commission considered a proposal put forward by the Government of Japan that the Secretariat should conduct activities (including research and the hosting of expert group meetings, webinars and online consultations) to collect and compile information on the latest trends regarding international dispute resolution (A/CN.9/1037). The proposal noted that the COVID-19 pandemic had highlighted the need to improve resilience towards such global crises and to achieve modernization, in particular in that area. It was suggested that there was a need to monitor the changing landscape of dispute resolution, the evolving practices and the development of new forms of dispute resolution. General support was expressed for the Secretariat to conduct research and take stock of the wide range of relevant developments.

38. Accordingly, the Secretariat organized a series of online workshops on DRDE in collaboration with the Ministry of Justice of Japan and JIDRC. The series comprised two workshops: (i) a kick-off workshop held on 5 February 2021; and (ii) an interactive workshop on 30–31 March 2021 (the "DRDE workshop").[11]

B. Summary of the discussion

39. The kick-off workshop on 5 February provided an opportunity to: (i) further examine the proposal by the Government of Japan; (ii) be updated on the work being undertaken by Working Group II on expedited arbitration; (iii) examine how the conduct of mediation has evolved with the use of technology; (iv) present possible future work in technology-related dispute resolution; and (v) review the current practice of arbitral institutions in handling online and hybrid hearings.

40. The kick-off workshop concluded with a round table on issues that could be the subject of stocktaking. References were made to: (i) developments in ODR; (ii) means to ensure effective communication between the parties and the arbitral tribunal; (iii) the utility of case management conferences; (iv) possible improvements in document production using electronic documents; and (v) measures to ensure effective online mediation.

41. The first part of the DRDE workshop comprised of updates on current exploratory work on technology-related dispute resolution (see paras. 7–15 above) and on online platforms for dispute resolution (see paras. 20–34 above), the impact of the COVID-19 pandemic on dispute resolution and relevant legislation as well as the use of technology in international mediation. The second part focused on the use of technology in international arbitration and means to ensure due process and fairness in arbitral proceedings.

42. With regard to the impact of the pandemic on dispute resolution and response thereto, key findings in 23 jurisdictions were shared. It was generally observed that the pandemic has led to the development and accelerated use of technology for case filing, submissions of documents, exchange and storage of evidence, modes of hearings as well as rendering of the award. Responses by jurisdictions have varied exhibiting a range of regulatory flexibility. In addition, it was reported that a number of institutions have issued guidelines on fairness, efficiency, logistics and cybersecurity. It was stated that such efforts geared towards: (i) ensuring a more

[11] Additional information and the event recordings are available at https://uncitral.un.org/en/disputeresolutiondigitaleconomy.

efficient process based on the flexibility of arbitration and inherent powers of the tribunal; (ii) enhancing the role of arbitral institutions to ensure the integrity of the process; and (iii) pursuing collaboration among the institutions. It was also noted that this exemplified the willingness of the institutions to respond to the users' needs.

43. With regard to the use of technology in international mediation, it was reported that online mediation has resulted in a similar and, in some cases, a higher settlement rate than that conducted offline. Benefits of online mediation particularly for MSMEs were also emphasized. It was pointed out that efforts could be made to address problems that arise in online mediation, mostly due to technical difficulties and environment distractions. Examples of ways to overcome such difficulties were outlined, requiring parties to join from a private space with a stable and secure Internet connection, scheduling pre-mediation test runs, making use of asynchronous sessions to better engage with the parties and in an informal setting, and making a comfortable environment for the parties. It was stressed that preserving procedural fairness was key in online mediation and calls were made to: (i) ensure equal treatment of the parties taking into account any imbalance in technological competency; (ii) maintain the neutrality of the mediator so as to build trust; (iii) provide for a consistent and predictable proceeding; and (iv) impose ethical standards. In that context, reference was made to the standards and guidelines of the International Council for Online Dispute Resolution (ICODR).

44. With regard to the use of technology in international arbitration, a number of issues were discussed. First, the decision by Working Group II to include a specific provision on the use of technological means in the draft UNCITRAL Expedited Arbitration Rules (and similarly in the draft UNCITRAL Mediation Rules) was highlighted, which aimed to clarify the discretion of the arbitral tribunal with regard to the use of such means. In this regard, it was mentioned that expedited arbitration, which provided a streamlined and efficient process for resolving disputes, would likely be used more often along with the use of technology in arbitration. Discussions also focused on the increased automation in arbitration, which could be employed by the parties and their legal counsel in preparing submissions and evidence, by the institutions in administering cases, and by the arbitral tribunal in conducting the proceedings and rendering the award. It was mentioned that while the benefits of automation could be vast, interoperability of the systems as well as confidentiality requirements could pose some difficulties. Reference was also made to the digitization of documents, which greatly enhanced the efficiency of the proceedings.

45. The use of technology for the selection and appointment of arbitrators was also illustrated as benefiting the parties in the most time-consuming stage of the arbitration. However, it was stated that such a technology required collection of data from a wide range of sources, which posed certain challenges.

46. The increased use of and benefits of e-discovery was also discussed. It was stated that the scope of discovery and proportionality were elements that needed to be taken into account to ensure the efficiency of e-discovery. It was also mentioned that rules on data protection and confidentiality might be prepared in this context.

47. With the prevalent use of online/remote hearings during the pandemic, calls were made for guidance on their conduct based on the wide range of existing guidelines and protocols prepared by arbitral institutions and others. Reference was also made to the Seoul Protocol on Video Conference in International Arbitration, which was introduced during the 7th Asia-Pacific ADR Conference in 2018, one of the annual flagship events of the UNCITRAL Regional Centre for Asia and the Pacific.

48. Finally, the use of technology in supporting practitioners in their case preparations was highlighted. It was noted that technology could assist practitioners in a number of ways, for example, by compiling and translating relevant material, enabling document-sharing platforms, providing sample templates of submissions, and analysing the case law of different jurisdictions, all of which improved the efficiency and quality of the legal services. At the same time, it was also mentioned

that such technology comes at a cost to the parties and could result in some of the services not being available to all.

49. The last panel of the workshop focused on ways to ensure due process and fairness in arbitral proceedings. One of the aspects highlighted was the importance of consultations between the arbitral tribunal and the parties, often referred to as case management conferences. During a case management conference, a number of issues on the conduct of the proceedings are discussed and a procedural timetable is prepared, creating a basis for common understanding among the parties and the arbitral tribunal. This has a positive impact on increasing the efficiency of the proceedings as well as the predictability for the parties, thus enhancing fairness. In that context, reference was made to the draft provision on consultation in the draft UNCITRAL Expedited Arbitration Rules as well as the proposed provisions on case management conference in the ICSID Convention Arbitration Rules. Reference was also made to articles 48 and 56 on dialogue in the Japan Commercial Arbitration Association (JCAA) Interactive Arbitration Rules.

50. It was mentioned that the notions of due process and fairness could differ across jurisdictions. For example, while certain jurisdictions may restrict an arbitrator from taking a proactive role in early resolution (including proposals for settlement), in other jurisdictions such a rule was viewed as contributing to due process as well as efficacy as a whole. In this regard, reference was made to the fact that under the 2018 German Arbitration Institute (DIS) Arbitration Rules, 72 per cent of the cases were terminated without a final award and 58 per cent before a hearing.

51. The panel also touched upon the issue of whether remote hearings posed due process concerns. It was mentioned that the advantages of remote hearings in saving time and costs should be weighed against some of the practical challenges that could arise, for example, the parties being in different time zones, the participation of arbitrators taking different forms, witness coaching, and difficulties in cross-examination. In this regard, reference was made to article 18 of the UNCITRAL Model Law on International Commercial Arbitration (the “Model Law”) providing that the parties should be treated with equality and article V(1)(b) of the New York Convention, which provided that a party not being able to present its case was a ground for refusing recognition and enforcement of the award.

52. References were made to recent case law and a research project by the International Council for Commercial Arbitration (ICCA) regarding the right to a physical hearing in international arbitration. The ICCA research, which was based on a survey of 86 jurisdictions, found that in most jurisdictions, remote hearings were compatible with domestic arbitration laws. However, considering the difference in the approaches in some jurisdictions, particularly in those that have adopted the Model Law, calls were made for a more in-depth analysis of the practices.

53. An aspect that obtained great attention was the conduct of witness examinations in online/remote hearings. For example, it was mentioned that there was still scepticism about the creditworthiness of the testimony and the lack of immediate contact between the tribunal and witnesses. In that light, suggestions were made for the increased use of written witness statements, with hearings allowing arbitral tribunals to actively engage the witnesses and providing for cross-examination. In that context, suggestions were made for work on providing guidance on witness examinations in remote hearings taking into account the different approaches in jurisdictions.

54. Building on the inputs from experts, the round-table discussions that followed focused on identifying areas where stocktaking would be beneficial. As to the scope of the stocktaking, the following were mentioned:

- Compilation of technology (including AI and automation) that has been utilized to maximize the efficiency of the dispute resolution as well as of related statistics;

- Comparative analysis of legislative responses and case law with regard to the use of technology in dispute resolution;
- The extent to which a harmonized legal approach would be useful taking into account the possible divergence in approaches between common and civil law jurisdictions, among different regions, as well as among different industries;
- Possible impact of the use of technology on due process and fair conduct of the proceedings and ways to preserve the core principles of party autonomy and flexibility; and
- Obstacles to remote arbitration and mediation proceedings and means to overcome them.

55. It was also mentioned that such stocktaking would need to be supplemented by analysis of:

- Existing tools, guidelines and protocols prepared by arbitral institutions and other bodies to address issues pertaining to DRDE and also in response to the pandemic;
- Disparity in access to technology among the parties and ways to ensure access to digital justice; and
- Other issues that might require the preparation of international legal standards, for example, the determination of the place of arbitration when the proceedings are conducted fully online and the enforceability of awards rendered remotely and in electronic form.

C. Suggested way forward

56. At the fifty-third session of the Commission, the Secretariat was given flexibility in carrying out the activities mentioned above. Furthermore, the Secretariat was requested to explore possible means to implement such activities and report back to the Commission.

57. Stocktaking of recent developments in DRDE would involve information gathering and hosting a number of informal meetings for the same purposes, all of which could contribute to future legislative projects to be undertaken by the Commission and its working groups. Such stocktaking could also touch upon aspects of technology-related dispute resolution and online platforms for dispute resolution as mentioned in chapters II and III considering that there are some common aspects. Despite the benefits of such stocktaking, it is not possible to carry out the task with existing resources.

58. The Commission may wish to note that the team servicing Working Group II includes one secretary of the Working Group, two regular staff members, and one administrative staff. The same team also services Working Group III and further supports other areas of work of the Commission. It is foreseen that the stocktaking would need to be conducted by the same team to ensure synergy between the stocktaking and possible legislative work.

59. Therefore, the Commission may wish to request the Secretariat to seek extrabudgetary contributions to undertake the work and call on Member States interested in the project to indicate their willingness to contribute. Subject to obtaining such contributions, the Commission may wish to request the Secretariat to implement the project and report back on any progress at its next session in 2022.

VI. Concluding remarks

60. Considering the broad range of DRDE topics mentioned in this note, the Commission may wish to organize a colloquium during a session of Working

Group II to further explore the relevant legal issues and to identify the scope and nature of possible legislative work. The organization of a colloquium would also provide the opportunity to obtain inputs from a wider range of practitioners and institutions involved in dispute resolution. The proposed colloquium could consider the following: (i) the elements of a toolbox for technology-related disputes (see para. 16 above); (ii) the development of legal standards that would apply generally to online platforms with in-built dispute resolution mechanisms and those dedicated mainly to dispute resolution (see para. 35 above); (iii) the impact of the use of technology in dispute resolution and the need for new standards; and (iv) means to preserve the core principles of international dispute resolution in light of all the developments. The outcome of the colloquium would allow for the identification of topics to be included the stocktaking exercise to be conducted by the Secretariat (see para. 57 above), but more importantly, would allow the Commission to make an informed decision at its next session on the desirability and feasibility of any future legislative work in the area of dispute settlement.