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Possible future work in the field of dispute resolution in international high-tech related transactions

Proposal by the Governments of Israel and Japan

Note by the Secretariat

In preparation for the fifty-second session of the Commission, the Governments of Israel and Japan submitted to the Secretariat a joint proposal in support of future work in the area of dispute resolution. The English version of that proposal was submitted to the Secretariat on 24 May 2019. The text received by the Secretariat is reproduced as an annex to this note in the form in which it was received.



Annex

Possible future work in the field of dispute resolution in international high-tech related transactions

Background

1. The growth of digital economy in the last few decades has brought an increase in disputes involving questions unique to the field of high-tech. For example, in recent years, telecommunications and information technology disputes amount to around 10 per cent of all International Chamber of Commerce (ICC) filings.¹ This trend is likely to continue, as businesses increasingly rely on digital services and products.² Disputes arise in a wide range of cases, for example where one party alleges a violation of the terms of a software license, misrepresentations of an acquired company's information technology, or liability due to faulty code.

2. In the Commission's fifty-first session and in the Congress held in 2017, UNCITRAL considered potential future work in various legal aspects of the digital economy. The Commission decided that in regards to certain matters concerning the digital economy, the Secretariat should conduct exploratory and preparatory work, including by organizing, within existing resources and in cooperation with other organizations, symposiums, colloquiums and other expert meetings.³

3. In light of these developments, and as a complementary element building upon UNCITRAL's significant contributions to the successful development of international dispute resolution frameworks, it is proposed that the Commission mandate the Secretariat to examine the need and feasibility of developing specialized tools for resolving disputes in international high-tech related transactions.

The unique features of disputes in international high-tech related transactions

4. Consultations with in-house counsel and arbitration lawyers in the high-tech sector revealed a need for dispute resolution processes to better address certain topics that are unique to disputes involving high-tech issues, for example:

- Disputes involving high-tech issues tend to be technically complex, mainly due to the fact that high-tech products and services are grounded in applied sciences, engineering, and the like (e.g. aerospace, biotechnology, software as a service, Internet of Things). The complexity of issues that arise will only increase as artificial intelligence algorithms become ubiquitous in products and services. Therefore, in some cases it may be necessary to select, by default, one or more arbitrators or experts with a technical background, including in some cases with familiarity with coding. For particularly complex disputes, there may be a need for expertise in more than one technical field.⁴
- There could arise a need for particular arrangements with respect to access to digital evidence – for example, by providing the arbitrator, mediator or technical expert with remote access to a computer, wherever located, containing relevant information, or by enabling him or her to take such measures as may be needed in order to preserve digital evidence. Additionally, there may be a need to

¹ Based on the ICC's published statistics between 2009 and 2014. See: Davis Mellwaine, *International arbitration and technology disputes, with a specific look at the UK Government's Model Services Contract and NEC3* (2015).

² David Mellwaine and Stuart Davey, *Experts identify 'growing appetite' for international arbitration in the technology sector* (2015); Gary L. Benton, *Technology Dispute Resolution Survey Highlights US and International Arbitration Perceptions, Misperceptions and Opportunities* (2017).

³ United Nations, Commission on International Trade Law, *Report of the United Nations Commission on International Trade Law Fifty-first session, A/73/17* (31 July 2018), para. 253.

⁴ Raymond G. Bender, JR., *Arbitration, an ideal way to resolve high-tech industry disputes* (2010), p. 4.

condition the arbitrator, mediator or expert's access to digital information to particular security measures, in order to preserve confidentiality.⁵ While this is not unique to high-tech disputes, there is a high likelihood that much of the evidence in high-tech disputes will be in digital format.

- Although a quick and efficient arbitration process is important in any commercial dispute, it is particularly essential in the field of high-tech. High-tech companies need to be agile and innovative in order to remain technologically competitive. Short product life cycles, fast changing consumer preferences and rapidly changing technologies make speed-to-market imperative. In the fast-paced and competitive world of high-tech, it may be worth exploring ways to empower arbitrators and mediators to further shorten timelines, perhaps beyond that which is contemplated in the future UNCITRAL expedited arbitration instrument.

5. While UNCITRAL's existing set of dispute resolution texts, together with the future text on expedited arbitration, provide flexibility to address the above issues on an ad hoc basis, there might be added value to addressing them more explicitly and developing uniquely tailored tools accordingly.

Proposed scope of Secretariat's work

6. The UNCITRAL Secretariat could undertake a preliminary review of the current state of affairs, the current and expected needs of the high-tech industry in resolving such disputes, and the availability or lack of adequate legal frameworks to address these needs. These could include, for instance, technical guidance tools, recommendations, standards, on-line tool boxes, quality assurance means, and rules, to assist arbitrators, mediators, experts and the parties in resolving disputes in international high-tech related transactions. To that effect, it should be noted that the World Intellectual Property Organization (WIPO) proposes dispute resolution services and tools tailored to information and communications technology disputes⁶ – this may constitute a useful reference point for the Secretariat's study.

7. If the exploratory work indicates a concrete need for such an instrument, the Commission can consider this in its agenda for future work, subject to the current work programme and existing resources. In addition, a colloquium bringing together experts in the field of high-tech dispute resolution could be organized, possibly in conjunction with other events organized by the Secretariat as part of its exploratory work regarding the digital economy, in order to further consider these issues. The present proposal concerns specifically the field of high-tech, due to the challenges it presents, but the Secretariat would be invited to consider it as part of UNCITRAL's broader digital economy agenda.

8. It is important to emphasize that this suggested field of work is not intended to cover consumer transactions, intellectual property or personal data protection matters, each of which are governed by specific legal frameworks. Furthermore, it is not intended to address procedural aspects of online dispute resolution, which have been addressed in the previous iteration of Working Group III.

9. As UNCITRAL considers its future work and seeks to tackle cutting-edge issues, the topic of international dispute resolution in respect to high-tech related disputes has the potential to provide a fertile ground for increasing the visibility and prominence of UNCITRAL's work in the development of international trade law in the global digital arena.

⁵ Ibid., pp. 5–6.

⁶ WIPO ADR for ICT, <https://www.wipo.int/amc/en/center/specific-sectors/ict/>.