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Stocktaking of Developments in Dispute Resolution in the Digital Economy

Submission by the Government of Japan

At its fifty-fourth session, the Commission requested the secretariat to organize a colloquium during the seventy-fifth session of Working Group II to further explore the legal issues with regard to dispute resolution in the digital economy and to identify the scope and nature of possible legislative work. It was agreed that the agenda for the colloquium should include among others, developments in dispute resolution in the digital economy. There was general support for the proposal that the secretariat should compile, analyse and share relevant information.

In that context, the Government of Japan submitted a paper summarizing the discussions at the 2021 Tokyo Forum on Dispute Resolution and outlining the possible scope of the stocktaking project on 18 January 2022. The text received by the secretariat is reproduced as an annex to this note in the form in which it was received.

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Annex

1. The Ministry of Justice of Japan is pleased to provide a summary of the discussions at the 2021 Tokyo Forum on Dispute Resolution (7–8 December 2021). The Forum was co-organized by the Ministry of Justice of Japan with the secretariats of UNCITRAL and International Centre for Settlement of Investment Disputes (ICSID). One of the primary objectives of the Forum was to hold discussions following the approval by the Commission of the stocktaking project at its fifty-fourth session in July 2021.[1] Two of the three sessions of the Forum were dedicated specifically to discussing that project.

2. Drawing from those discussions, the following provides the possible scope of activities to be implemented by the secretariat in taking stock of developments in dispute resolution in the digital economy.

Summary of the discussions

3. It was recalled that the recent approval of the stocktaking project by the Commission vested the secretariat with the mandate to compile, analyse and share relevant information so as to monitor the changing landscape of international dispute resolution in the digital economy. It was mentioned that the project had been proposed by Japan because: (1) prior to the onset of the pandemic, digitalization had already been a long and gradual trend in various aspects of international trade, including dispute resolution; (2) the pandemic prompted further thinking about digitalization and the need to improve resilience to global crises and to achieve further modernization; and (3) dispute resolution deserved special attention due to its essential role as the cornerstone for access to justice.

4. It was noted that, in approving the stocktaking project, the Commission stressed the need to take into account the disruptive aspects of digitalization, in particular with respect to due process and fairness. Accordingly, it was underscored that ensuing discussions should explore what standards, rules and guidance needed to be developed to improve the quality of dispute resolution in the digital economy, bearing in mind the principles of dispute resolution, such as due process and fairness, and what needed to be stock taken to achieve that objective.

5. With regard to arbitration, reference was made to the activities carried out by the ICC Working Group on Information Technology in International Arbitration in 2021, which will be published in a report titled “Leveraging Technology for Fair, Effective and Efficient International Arbitration Proceedings” in early 2022. The Working Group had conducted a survey and requested ICC’s National Committees for responses to relevant questions on the use of technology. According to the responses, 93 per cent stated that technology increased cost-effectiveness and efficiency, and 83 per cent stated that technology was underutilized prior to the pandemic. Noteworthy was the fact that, while 74 per cent stated that there were no barriers to access to technology, 26 per cent stated that there was a barrier to technology. Similarly, 26 per cent noted that there were issues with respect to fairness and equal treatment. It was highlighted that such issues deserved special attention going forward and that such issues arose typically when an arbitral tribunal ordered a remote or hybrid hearing notwithstanding one of the parties’ preference to have an in-person hearing.

6. With respect to digital technology used in arbitration, IBA’s compilation of information on “Technology Resources for Arbitration Practitioners” was presented. Reference was also made to the results of the international arbitration survey (Adapting Arbitration to a Changing World) issued by Queen Mary University of London in 2021. It was unequivocally stated that digital technology was increasingly being used in arbitration and that there were various types of technological means

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

being used. The use of some technological means, such as videoconferencing/hearing platforms, cloud-based case management platforms and graphic presentation, were ingrained in practice, but the use of other technological means, such as virtual reality and augmented reality, was still new to the market. It was said that virtual reality allowed the creation of immersive virtual and interactive environments (computer-created scenes combining high-resolution projections and 3D graphics), which gave users the experience of being present in such environments (for example, construction sites).

7. Despite the benefits brought by the use of technology, it was mentioned that technology also gave rise to issues regarding equal treatment and procedural fairness. It was generally understood that parties were free to use whatever technological means they saw fit to the extent that they were limited for their internal use. Issues arose, however, when certain technological means were used for the parties' presentation of the case, particularly when the use resulted in inequality on costs or in uneven distribution of technology between the parties. Arbitral tribunals might hesitate to order the use of a certain technological solution if it made proceedings more costly and if it imposed an uneven financial burden on one of the parties. If arbitral tribunals allowed the parties to use any technological means of their choosing, this could conversely create concerns with respect to equal treatment in their presentation of the case. In light of such challenges that tribunals may face in adopting digital technology to its proceeding, it was stated that new overarching standards to treat parties equally with fairness and efficiency were necessary. It was also pointed out that there was a need to build awareness and familiarity with certain IT solutions. In terms of developing new standards in this respect, the need to take stock of orders by tribunals, protocols and guidelines was stressed.

8. Discussions converged on ways to ensure substantive fairness and proper decision-making in arbitration. Digital technology radically changed the way of communication, which brought alongside its benefits serious problems. The transition from paper-based to electronic documents may have resolved the physical storage problem but exacerbated the flood of information problem. The imbalance between the parties using sophisticated technology and the arbitrators using not as advanced technology made this problem even more serious. Alongside levelling the playing field in terms of the digital technology available to the parties and the tribunal, possible solutions to address the flood of information problem included regulatory approaches, such as imposing page limits to parties' submissions, and exhortatory approaches, such as inviting parties to summarize documents and to identify key documents, which required discipline on the part of counsels representing the parties. The interaction between the arbitral tribunals and the parties was underscored as an effective solution, which enabled tribunals to obtain transparent ownership of the case. The exercise of tribunals' control of the case or case management power was stressed as being essential to focus the proceedings on important issues and eliminating minor issues, thereby enabling tribunals to properly understand the case and render a fair decision. It was noted that the core in addressing the flood of information problem was about practice, advice and exchange of experience, which should be taken stock of.

9. Rule 31 of ICSID's proposed new Arbitration Rules on case management conferences was discussed as a positive development. The rule provides that tribunals shall convene one or more case management conferences with the parties to: (i) identify uncontested facts; (ii) clarify and narrow the issues in dispute; or (iii) address any other procedural or substantive issue related to the resolution of the dispute. It was mentioned that lacking proper case management, the same standard procedural framework was often rubber stamped and resources were wasted on issues that were insignificant at the very end. Tribunals were compelled to reach a decision against a vast record with irrelevant information, which created the phenomenon referred to also as "the ships passing in the night" and had a detrimental impact on the resolution of the dispute. It was stressed that case management enabled tribunals to tailor the procedure to the nature of the dispute, identify what was uncontroversial

and focus on what was indeed needed to resolve the dispute efficiently and effectively. Reference was also made to practice in courts, in particular commercial courts, regarding the conduct of case management meetings. It was mentioned that courts had shifted to active case management over the years and noticeable was the practice at the Singapore International Commercial Court, which required lead counsels to be well prepared as they attended such meetings.

10. There were ensuing discussions on new forms of dispute resolution catered for specific needs. It was mentioned that, for the resolution of fintech disputes or more broadly disputes arising in the finance sector, speed, expertise, and confidentiality were key aspects. Reference was made to the UK Jurisdiction Taskforce Digital Dispute Resolution Rules, which were a set of arbitration rules specifically formulated to resolve disputes between parties in on-chain digital relationships such as smart contracts in the fintech world. Those Rules included a novel feature which authorized arbitral tribunals to enforce decisions by vesting it with control over digital assets. It was stated, however, that such new features gave rise to novel issues. While appeals were rare in fintech disputes, in the event a successful appeal, the irreversibility of what had already been done to the blockchain would raise a practical problem.

11. From a similar standpoint, it was mentioned that international arbitration might not necessarily be the best way to resolve all disputes in the digital economy. The monetary amount involved in cross-border consumer-to-business disputes, such as disputes concerning delivery of products and provision of online services, was said to be too small to justify a fully-fledged arbitration. It was stated that the resolution of such disputes warranted more attention and that innovative solutions were required. It was pointed out that peer-led dispute resolution was a burgeoning form of dispute resolution for high-volume and small-scale disputes (not limited to consumer-to-business disputes), which deserved attention. For example, it was stated that a platform kept 700 jurors who were not necessarily lawyers on the roster to hear disputes and handled around 1,000 cases. Only minimal digital rewards were offered to the jurors involved in the case to ensure coherence.

12. On online dispute resolution (ODR), it was mentioned that they had obvious benefits, such as speed and efficiency, but that there was a need to understand its dangers. For instance, whether the consent of the parties was an informed one was a point of concern, which also related to how the platform was designed and what services were provided through the platform. It was stressed that there should be guardrails on ODR to ensure its healthy use and that there were movements towards that direction. In this regard, reference was made to the work being carried out by institutions, including the National Center for Technology and Dispute Resolution and the International Council for Online Dispute Resolution. It was pointed out that there were further considerations to be had when data analytics and artificial intelligence (AI) came into play. In some cases, the decision-making on an ODR platform could be done through an algorithm or without standards in place, which posed questions on the fairness of proceedings and of the outcome as well.

13. Online hearings and witness examination were discussed in detail as there was already abundant information on their conduct owing much to the need to respond to the pandemic. An overview of ICCA's project "Does a Right to a Physical Hearing Exist in International Arbitration?" was provided and its usefulness for the stocktaking project was discussed. It was mentioned that the title of the project practically translated into the question of whether there was a risk that an award will be set aside or not enforced if a hearing had been held remotely over the objection of one or both parties. By May 2021, 78 reports prepared by national reporters tasked to respond to a questionnaire were posted on the ICCA website. The survey yielded mainly three responses to the question. In a minority of the jurisdictions, there was a right to a physical hearing. In a majority of the jurisdictions, such a right did not exist. In other jurisdictions, the situation was uncertain. It was mentioned that the reports could be used to map the jurisdictions in which there was a potential barrier to the use of technology and to decide whether new legislative instruments or amendments

to existing instruments, including the UNCITRAL Model Law on International Commercial Arbitration, would be warranted. It was also mentioned that it would be important to find out what steps had been taken to ensure due process in a remote hearing because the finding that a majority of jurisdictions did not recognize a right to a physical hearing seemed to be founded on the assessment that due process was duly accorded. In an online setting, various problems, for example, access issues (particularly for people with disabilities) gave rise to concerns about parties' equal treatment and their opportunity to present the case. Hence, stocktaking the rich data around practical responses in arbitration and court proceedings was suggested.

14. Online witness examination was also discussed. In this regard, the Seoul Protocol on Video Conferencing in International Arbitration and work carried out by a study group of the Japan International Dispute Resolution Center (JIDRC) were introduced. The importance of ensuring the integrity of witness examination was highlighted. To avoid witness coaching or other misconduct, the physical presence of observers who could be appointed by both or either parties, or a neutral was referred to as a possible solution. Placing a 360-degree camera in the venue was also mentioned. Technical assurances were also mentioned as essential components of online witness examination. For example, high audio and visual quality and stable Internet connection were considered essential for a proper examination of witnesses in an online setting. It was pointed out that, while standards were generally useful to ensure the proper conduct, the risk that detailed binding rules may be invoked to challenge awards should be borne in mind and, for that reason, the form of such standards should be carefully considered.

15. With respect to online hearings conducted on ODR platforms, reference was made to the UNCITRAL Technical Notes on Online Dispute Resolution. The Technical Notes provided, inter alia, that it was desirable that ODR proceedings be subject to the same confidentiality and due process standards that apply to dispute resolution proceedings in an offline context. Accordingly, it was for ODR providers to set forth guidelines for the proper conduct of online hearings. As an example, an ODR provider secured confidentiality on its platform by protecting information using passwords, adopting cyber security measures, and assigning hearing managers to verify the participants. With regard to ensuring fairness and equal treatment, the ODR provider conducted test sessions to familiarize participants with the system and also tasked hearing managers with the role to address any technical problems which arose.

16. Finally, online mediation was discussed. It was mentioned that online mediation had been successful from the onset of the pandemic and that it was here to stay. As an example, the Singapore International Mediation Centre (SIMC) had administered approximately 200 mediation cases, of which 60 per cent were conducted online or in hybrid form. The success rate of those conducted online or hybrid was 76 per cent, compared to 80 per cent for in-person mediation, which demonstrated that online mediation could be equally as effective and useful as in-person mediation. Emphasis was given to the need for guidelines to ensure fairness in online mediation, while bearing in mind the need to preserve flexibility, as mediation was generally an area where overregulation was not much appreciated. It was stated that prearranged guidelines on online mediation may address issues such as those pertaining to accessibility of technology being used in the conduct of the proceeding, methodology in which information sharing and communication would take place and means to ensure data security. Guidelines may also address issues pertaining to the conduct of mediators such as their responsibility to nurture trust with the parties. Furthermore, it was mentioned that parties were hesitant to accept standards to be applied to the proceedings proposed by the other party, as this gives the impression that the other party has the initiative. Therefore, prearranged guidelines may greatly contribute to alleviating such concerns.

The scope of the stocktaking project

17. In light of the above, it is suggested that the stocktaking project consists of activities to collect, compile and analyse relevant information which address the

following questions. Given the breadth of the issues enlisted below, relevant information should be obtained through a comprehensive study of various dispute resolution means, not limited to arbitration and mediation, and in different jurisdictions and legal systems.

A. Equality and fairness issues arising from the use of technology in arbitration

- What are the technological means used?
- Does the use of such technological means give rise to concerns on equality and fairness? If so, under what circumstances does that occur?
- Is there a need for standards, rules or guidelines (legal standards) to address those issues?
- If so, what kind of legal standards should be developed?

B. Addressing the flood of information problem

- What exactly is the problem and its magnitude?
- What are the existing rules on case management which may be utilized to address the problem?
- What are the practical steps and the procedural approaches to address the problem?
- Is there a need for legal standards and if so, what kind of legal standards should be developed?

C. Appropriate use of dispute resolution on online platforms

- What are the characteristics of ODR platforms?
- What new forms of dispute resolution other than arbitration and mediation exist on ODR platforms?
- What types of disputes are best resolved on ODR platforms?
- Does dispute resolution on online platforms give rise to concerns regarding due process, fairness, and accountability?
- Is there a need for legal standards and if so, what kind of legal standards should be developed to safeguard the principles of due process, fairness, and accountability on the use of dispute resolution on such platforms?

D. Online hearings and witness examination

- What standards, protocols or guidelines exist and are being used in practice for the conduct of online hearings in arbitration?
- Are standards or guidelines on online hearings on ODR platforms different from those for arbitration?
- Is there a need for a common set of protocols or guidelines on the organization and conduct of online hearings and/or online witness examination, and if so, what should they address?

E. Online mediation

- What standards, protocols or guidelines are being used in practice for the conduct of online mediation?
- Is there a need for a common set of standards, protocols or guidelines on the organization and conduct of online mediation and if so, what should they address?