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Access to Justice and the Role of Online Dispute Resolution

Submission from Inclusive Global Legal Innovation Platform on Online Dispute Resolution

At the 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, legal standards that would apply to online platforms with in-built dispute resolution mechanisms and those dedicated mainly to dispute resolution.

In that context, a summary of the second meeting of the Inclusive Global Legal Innovation Platform on Online Dispute Resolution was submitted on 21 January 2022. The text received by the secretariat is reproduced as an annex to this note in the form in which it was received.



Annex

Possible International Legal Instrument on “Access to Justice and the Role of Online Dispute Resolution”

A. Background

1. In November 2020, the Department of Justice of the Hong Kong Special Administrative Region of the People’s Republic of China (the “HKSAR”) established a Project Office for Collaboration with UNCITRAL (the “HK Project Office”) in the HKSAR.¹

2. The first initiative of the HK Project Office was to establish the Inclusive Global Legal Innovation Platform on Online Dispute Resolution (“iGLIP on ODR”) with the purpose of keeping track of recent developments with regard to online dispute resolution (ODR) and to identify possible future work in the relevant area. iGLIP on ODR is composed of 26 experts from around the world² with different legal traditions, including academics, practitioners, and other professionals in dispute resolution with a wide range of experience and expertise.

3. The first meeting of iGLIP on ODR was hosted by the HK Project Office on 18 March 2021 in collaboration with the UNCITRAL secretariat to take stock of the latest international developments on ODR. Two round tables were held at the first meeting, one generally on platforms for international trade and their linkage to dispute resolution, and another specifically on online platforms dedicated to dispute resolution.³ It was widely felt that further work on ODR at an international level was necessary.

4. The Commission, at its fifty-fourth session in July 2021, endorsed the continued collaboration between its secretariat and the Department of Justice of the HKSAR.⁴ It is expected that the secretariat will continue to take part in iGLIP on ODR, so as to utilize the expertise, resources and connections for promoting, raising awareness and capacity-building with regard to ODR.

5. On 24 November 2021, the second meeting of iGLIP on ODR was hosted by the HK Project Office in collaboration with the UNCITRAL secretariat. The objective of the second meeting was to review the latest developments in ODR and discuss a possible international legal instrument on “Access to Justice and the Role of ODR”.

B. Need for an international legal instrument on access to justice and the role of ODR

6. There have been fast-paced developments in the technological world and digital economy. With the increased interconnectedness and substantial cross-border trade and transactions, coupled with unprecedented disruptions to the functioning of judicial systems and other face-to-face alternative dispute resolution as a result of the outbreak of a global pandemic, there has been a pressing need for consumers and businesses, especially individuals and micro, small and medium-sized enterprises, to have their disputes resolved through other means in a time-efficient and cost-effective manner. Global efforts have therefore turned to the innovative uses of technology in

¹ See Note by the Secretariat (Legal Issues related to the digital economy – dispute resolution in the digital economy”), A/CN.9/1064/Add.4, Section III.

² Jurisdictions represented in alphabetical order: Australia; People’s Republic of China (Mainland China and Hong Kong SAR); Czech Republic; Chile; Colombia; Egypt; France; Japan; Republic of Korea; New Zealand; Russia; Thailand; United Kingdom; United States of America; Spain; and Sweden.

³ For a summary of the discussions at the first meeting, see *supra* note 1.

⁴ See *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/76/17)*, para. 230.

dispute resolution. ODR has now become an important means for parties to resolve disputes and there is a pressing need to deal with relevant issues. This is also evidenced by the recent discussions in relation to ODR at UNCITRAL, the International Organization for Standardization (ISO), and the Asia-Pacific Economic Cooperation (APEC).

7. Although ODR is already being utilized, issues on sufficient means or capacity, such as in developing countries and groups with special needs, as well as a general understanding and application both nationally and internationally of minimum core standards will need to be addressed, so as not to create a serious impediment to the use of ODR at both domestic and international level. Access to appropriate and adequate technology for ODR has become a vital element to ensure equal access to justice for all. As such, there is a need to explore the development of an international legal instrument that could facilitate access to justice through the cross-border use of ODR and set out minimum core standards that would apply to ODR proceedings, ODR providers, and ODR platforms.

C. Discussion on a possible international legal instrument

Purpose of the Instrument

8. iGLIP experts noted that the possible instrument could aim to facilitate access to justice through the cross-border use of ODR, including the provision of appropriate and adequate access to technology and other basic infrastructure or support for ODR. It was said that the instrument should also cover essential features of dispute resolution, such as fairness, impartiality and neutrality.

Scope of the Instrument

9. iGLIP experts also noted that the possible instrument may cover or apply to a wide range of civil and commercial disputes (subject to any exclusion to be decided by the State concerned), for example, disputes arising from cross-border civil and commercial disputes involving business-to-business as well as business-to-consumer transactions for the sale of both goods and services. With regard to the meaning of “civil” and “commercial”, reference could be made to UNCITRAL⁵ and other international instruments.⁶

10. The UNCITRAL Technical Notes on Online Dispute Resolution (the “Technical Notes”) states that an ODR process may be particularly useful for disputes arising out of both business-to-business as well as business-to-consumer transactions, and disputes arising out of both sales and service contracts (paras. 22 and 23). As for the APEC Collaborative Framework for ODR of Cross-Border Business to Business Disputes (“APEC Collaborative Framework for ODR”), article 1 of the Model Procedural Rules only applies to business-to-business disputes where the parties to a sales or service contract have agreed that disputes relating to that transaction shall be resolved under the rules, and do not apply to consumer transactions.

⁵ See, for example, footnote 2 of the UNCITRAL Model Law on International Commercial Arbitration, which reads as follows: The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

⁶ For example, HCCH’s Convention of 2 July 2019 on the Recognition and Foreign Judgments in Civil and Commercial Matters applies to civil and commercial matters generally, but sets out the exclusion of certain matters from the scope of the instrument, e.g. family law matters, wills and succession, etc.

11. It was considered that the effectiveness of the instrument might be enhanced if the scope of the instrument was able to encompass a broad and vast range of civil and commercial disputes without drawing unnecessary distinctions and exclusions. In particular, since “consumers” and “businesses” have now become increasingly difficult to distinguish, it may not be necessary or realistic to draw a distinction between the two in defining the scope of the instrument.

12. iGLIP experts also discussed whether a definition of “ODR” should be provided in the instrument, which should however not limit the potential and possibilities of ODR and technologies. If a definition of “ODR” were to be included, it should be broad to encompass a bigger and wider target. In this connection, reference was made to the definition of ODR in the Technical Notes,⁷ and a question was raised whether the concept of artificial intelligence (“AI”) had already been built into that definition. It was noted that the issues relating to AI was being considered by the secretariat, which could guide future work on the instrument.

13. There were also discussions on whether the scope of the instrument should only include outcomes administered by private ODR service providers or be extended to also apply to outcomes rendered by courts through ODR.

Establishing an Exchange Platform

14. iGLIP experts discussed the usefulness for States to establish a platform for the sharing of ODR experience and offering advice or assistance related to ODR. States were also encouraged to work together to encourage and facilitate the use of ODR internationally. It was said that such a platform would facilitate better communication, further cooperation among States as well as among ODR providers, and provide any policy support required.

15. It was stressed that such a platform should not create a closed shop market, but rather encourage multiple competent ODR providers to share their experience, in particular to States which are still in the early stages of developing their own competent ODR providers. For the purposes of exchange and sharing of experience, competent ODR providers may be identified in the instrument.

16. iGLIP experts also discussed whether the platform should provide information on government measures or regulations that focus on ODR providers. It was noted that the regulatory approaches in other ongoing or current projects may shed light on these issues.⁸

Level of Appropriate and Adequate Support and Assistance

17. iGLIP experts agreed that ODR processes should be conducted in a way that treats all parties with equal respect.

⁷ See para. 24 of the Technical Notes: 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 Reference may be made to the approaches adopted under the APEC Collaborative Framework for ODR and discussed under the ongoing project of ISO in preparing the “ISO/TC 321 Transaction assurance in E-commerce” (the “ISO Project on E-Commerce”). For the APEC Collaborative Framework, participating APEC ODR providers operating under the APEC ODR Framework agree to use the Model Procedural Rules for the APEC Collaborative Framework for ODR (“APEC Model Procedural Rules”). The APEC Secretariat also maintains a list on the Economic Committee’s website, of ODR providers from participating APEC economies that have agreed to process claims using ODR, as provided in the APEC Model Procedural Rules. On the other hand, the ISO Project on E-Commerce under discussion seeks to include a quality assurance system where specialists or experts check whether the ISO standard has been satisfied by the ODR provider or not in the implementation of arbitral awards issued in the scheme of ODR. It is understood that the ISO Project on E-Commerce under discussions would include basic principles of ODR, technical conditions such as privacy and security conditions, as well as a set of operational manuals to check the quality of services of the ODR providers.

18. As such, the instrument may provide for States to work together to ensure that parties receive equal access to appropriate technology and basic infrastructure. The instrument may also set out the level of appropriate and adequate support and assistance, for example, that parties to ODR proceedings should be provided with: (i) access to stable online connection at all stages of the ODR proceedings; (ii) sufficient and effective equipment and other relevant support to conduct the ODR proceeding; (iii) capacity-building activities, especially for micro-, small- and medium-sized enterprises, and consumers. Further, for local parties who have insufficient means or understanding of the operation of ODR, the support and assistance to be provided could include, for example, (i) publicly accessible technical facilities and equipment for conducting ODR;⁹ and (ii) necessary training and support for the potential neutrals and local users.¹⁰

Assistance and support provided by States may also be particularly important for local parties.

19. In addition to access to essential infrastructure and hardware, reference may also be made in the instrument to the fair operation of the ODR system as a fundamental element in the support of access to justice for parties to ODR.

Minimum Core Standards for the ODR Process

20. iGLIP experts discussed a set of internationally applicable minimum core standards to provide a benchmark for ODR proceedings, ODR providers, and ODR platforms to ensure access to justice in ODR. The standards may also guide and foster the development of ODR systems in different jurisdictions.

21. It was suggested that the instrument should include some minimum core standards which should be complied with. The evolving nature of the standards may be indicated in the instrument so that the standards may be further expanded and/or revised to respond to new developments, technologies and needs in conducting ODR.

22. Possible minimum core standards included the provision of full spectrum of ODR services,¹¹ accessibility and effectiveness,¹² efficiency,¹³ competence,¹⁴ impartiality,¹⁵ security,¹⁶ confidentiality¹⁷ and enforceability.¹⁸ Issues such as whether a full spectrum requirement would place too high a requirement on ODR providers, the concepts of impartiality and independence, the enforceability of ODR outcomes will need further deliberation.

23. iGLIP experts also saw the need to take into account issues of different legal systems as well as the principles of party autonomy, technology neutrality, fairness

⁹ This may be in the form of providing computers with videoconferencing function, microphones and speakers, stable Internet connection, scanners and other necessary equipment which may be set up in a place freely accessible to the public.

¹⁰ This may include capacity-building activities and guidelines in their own language.

¹¹ ODR proceedings to, subject to party autonomy, consist of different stages, including:

(1) negotiation; (2) settlement/mediation; (3) arbitration.

¹² ODR platforms to provide for user-friendly interface and digital accessibility for parties (including parties with special needs) to conduct ODR proceedings and processes that effectively facilitate ODR proceedings.

¹³ ODR providers to provide an around-the-clock platform throughout the year to ensure efficiency in conducting ODR proceedings.

¹⁴ ODR providers to be competent in providing technological and other relevant support required for effective implementation of ODR proceedings.

¹⁵ ODR providers and ODR platforms to operate with independence, neutrality, and impartiality.

¹⁶ ODR providers and platforms to ensure data protection and security, including proper retention, sharing and removal of data.

¹⁷ ODR platforms to treat all information submitted by parties as confidential and the design and implementation of ODR platforms to ensure all information in the ODR proceedings can only be accessible by the parties, any neutrals engaged and necessary personnel of the ODR platform.

¹⁸ The outcome of the ODR process to be final and enforceable under domestic law and applicable international agreement or convention, such as the United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention on Mediation) or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

and integrity when developing these core standards. Additionally, it was considered important to further consider which minimum core standards are specific to ODR, as opposed to alternative dispute resolution generally.

Form of the Instrument

24. With respect to the form of the possible instrument, it may take the form of a convention, model law, principles or a practice guide, some of which may be open for adoption by a State. Taking into account the evolving nature of technology as well as the needs of ODR, the instrument may encourage States to meet regularly to discuss the implementation of the instrument. States may propose amendments or develop protocols or other supplementary instruments to further improve the instrument.

D. Conclusion

25. It may be worthwhile to continue the discussion on developing an international instrument on “Access to Justice and the Role of ODR” during the colloquium, which can provide guidance to the work of iGLIP experts in collaboration with the UNCITRAL secretariat.
