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**United Nations Commission on  
International Trade Law**  
**Resumed fifty-third session**  
Vienna (online), 14–18 September 2020**Submission by Israel****Possible future work in the field of dispute resolution in  
international high-tech related transactions – update on recent  
developments**

In the course of the 2019 UNCITRAL Commission, Japan and Israel submitted a proposal entitled: “Possible future work in the field of dispute resolution in international high-tech related transactions”.<sup>1</sup>

After deliberations, it was agreed at the Commission that “the Secretariat should be requested to conduct exploratory work on issues relating to disputes that arise out of transactions in the digital economy. Such exploratory work should include a feasibility study on possible future work by the Commission on the topic.” In addition, it was also agreed that “the concerns and questions expressed during the current session should be taken into account in conducting exploratory work, which should be combined with the Secretariat’s ongoing exploratory work on the legal issues arising in the digital economy.”<sup>2</sup>

In furtherance of this goal, in addition to the exploratory work carried on by the UNCITRAL Secretariat (A/CN.9/1012), three expert panels have been organized by Israel and Japan, with the cooperation of the Secretariat. The following is a description of the various events which took place (as the last two events took place on September 10, the paper only briefly describes them. Further update will be provided by the organizers during the Commission session).

**1. Global Roundtable Discussion – Is there a need to Develop Specific Tools for  
Resolving Cross-Border Disputes in the High-Tech Sector (27 August, 2020)**

Israel hosted a virtual round table discussion, which took place on 27 August 2020. The round table was attended by approximately 30 experts from Japan, Israel, Europe, the United Kingdom, China (Hong Kong SAR), Korea and the United States. The discussion focused on the question of whether there is a need to develop specific tools, or instruments, dedicated to cross-border disputes in the high-tech sector. It was intended to frame the discussions at the panels on dispute resolution in the digital economy which took place in the annual SOLAIR conference in Prague, on

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<sup>1</sup> A/CN.9/997.

<sup>2</sup> A/74/17, para. 215



10 September 2020. The panels were co-organized by UNCITRAL, Czechia, Japan and Israel (see details below).

For the benefit of the 2020 Commission, the discussions at the round table are summarized below, followed by some preliminary observations.

### **Defining high tech disputes**

There is no single definition of high tech disputes. During the round table, various examples were provided: disputes involving faulty deployment of IT software, defective software or hardware, technical misrepresentations in the context of an investment, joint venture or partnership. (Disputes regarding IP as well as B2C disputes are excluded from the scope of the Japan-Israel proposal and hence were not discussed at the round table.<sup>3</sup>)

### **Main features of high tech dispute resolution**

While high tech disputes are not necessarily fundamentally different from disputes in other specialized sectors, such as energy and construction, they present, in certain respects, distinctive features. Notably, for start-up companies, which make up many of the companies involved in high-tech disputes, the length of proceedings (whether court litigation, arbitration or mediation) is critical. A drawn out dispute resolution process, even taking six to nine months (as envisioned by the expedited arbitration rules currently discussed by Working Group II) can have potentially devastating effects on a company's life-cycle and capacity. For investors as well, the risk of lengthy litigation has a chilling effect. The time element has repercussions on the overall cost of the proceedings.

Another issue that came up frequently during the discussion was that of timing of the proceedings. Typically, the dispute arises at an early stage of implementation of a project, requiring a timely resolution, before it balloons into a much larger dispute.

Similarly to the Japan-Israel proposal, the neutral's potential lack of expertise was also flagged by participants as a significant hurdle. Participants also raised the question of whether the neutral has enough guidance and authority to navigate the discovery process, when many of the documents are available digitally only, complex and numerous.

### **Proposals and ideas**

It was observed that there was a fundamental tension between different values and imperatives at play. On the one hand, participants to high-tech disputes wish to see a quick and efficient resolution to the dispute. This is reflected in the desire for drastically shorter timelines, limited discovery procedures and limitations on the scope and length of filings. On the other hand, some disputes are so technically complex that they cannot be adequately resolved in an overly expedited manner.

Thus, some proposals called for a dispute resolution process with timelines markedly shorter than current practices, possibly immediately when the dispute arises in the course of a project. Others called for a fuller mediation or arbitration process (or combination thereof) with multiple experts. The experience of the Society for Computers and Law's adjudicative panel highlighted the advantages and drawbacks of expert adjudication, in which the outcome is contractually binding on the parties but can be overturned by an arbitral award or court ruling. Another idea was a layered form of dispute resolution, with arbitration and expert determination coming in successive stages dependent on the needs of the specific case. Some experts suggested that, rather than focus on prescribing a process, it might be useful to create a guidance document for mediators and arbitrators tailored to high tech disputes.

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## **Conclusion**

While there emerged no consensus or clear direction with respect to the optimal way of defining and resolving high-tech disputes, the discussion revealed a latent lack of satisfaction with the status quo among technical and legal experts in the high tech sector. It also highlighted some distinctions that were not initially made in the Japan-Israel proposal and that should be explored further, e.g. technical disputes that must be resolved quickly so that implementation of a project may resume vs. those that arise after the contractual relationship is terminated; disputes among large high tech companies vs. those involving SMSEs.

As mentioned, the questions of what kinds of tools could best address the procedural issues discussed, and what type of instrument is most suitable to incorporate or support these tools, were left open for discussion at the SOLAIR panel and the UNCITRAL Commission.

### **2. Legal Issues Pertaining to Artificial Intelligence and Data Expert Panel (10 September, 2020)**

Organized by Japan, this expert panel, a part of the SOLAIR Conference, consisted of experts from various Japanese institutions and law firms, including the Japan International Dispute Resolution Center.

The panel, moderated by a representative from the UNCITRAL Secretariat, with attendance of a global audience, focused on issues pertaining to artificial intelligence and data.

The panel featured best practices and innovative ideas from Japan, including in respect of the Contract Guidelines on Utilization of AI and Data issued by the Japanese Ministry of Economy, Trade and Industry (also discussed in [A/CN.9/1012](#)). The discourse and expert presentations raised various issues in respect of the digital economy, including for resolution of cross-border disputes in the High-Tech sector.

### **3. High-Tech Dispute Settlements – Exploring Potential Universal Tools Expert Discussion (10 September, 2020)**

Organized by Israel, this expert panel, a part of the SOLAIR Conference, consisted of presenters and commentators from the United Kingdom, Romania, Italy, the United States, Germany, Czechia, Japan and Israel.

The panel, with attendance from around the world, focused on the questions of what substantive changes, if any, should be made to existing texts to better address needs of high-tech dispute settlement? And what are the potential formats of texts that could address these issues?

The discussion first highlighted issues which are highly relevant to dispute resolution in cross-border disputes in the high-tech sector, ranging from the need for business trade secret confidentiality to the need for very rapid proceedings and expertise of arbitrators. Also discussed was the need for a flexible approach, which would allow parties to select for available tools. Responses to address these issues offered various solutions, including, inter-alia, a universal, model instrument or tool for resolution of cross-border high-tech disputes which can include a multi-tiered process (with different types of adjudicators or arbitrators for different kinds of disputes between the same parties concerning the same transaction); guidance for addressing confidentiality or access to digital evidence issues; and model procedural orders highlighting suggested timeframes. Some of the experts noted that these tools could preferably be developed by UNCITRAL.