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Report of the Colloquium on Possible Future Work on Dispute Settlement held during the seventy-fifth session of Working Group II (New York, 28 March-1 April 2022)

Note by the Secretariat

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I. Introduction

1. The Commission, at its fifty-fourth session in 2021, requested the secretariat to organize a colloquium to explore legal issues related to dispute resolution in the digital economy (DRDE) and to identify the scope and nature of possible legislative work.[1] The Commission also decided that the desirability and feasibility of work on adjudication should be discussed at the colloquium.[2]

2. Accordingly, the secretariat organized the Colloquium on Possible Future Work on Dispute Settlement (the "Colloquium") during the seventy-fifth session of Working Group II, which was held in New York from 28 March to 1 April 2022.

3. The session was organized in accordance with the decision by the Commission to extend the arrangements for the sessions of UNCITRAL working groups during the COVID-19 pandemic as contained in documents A/CN.9/1078 and A/CN.9/1038 (annex I) until its fifty-fifth session.[3] Arrangements were made to allow delegations to participate in person at the United Nations Headquarters as well as remotely. Further arrangements were made to allow public participation.

4. The session was attended by 48 member States, 27 observer States, and 57 invited international organizations. Over 40 speakers with expertise in international dispute settlement were invited to make presentations during the Colloquium. Overall, approximately 700 people registered for the Colloquium.

5. According to the decision by the Commission (see para. 3 above), the following persons continued their offices:

Chair: Mr. Andrés Jana (Chile)

Rapporteur: Mr. Takashi Takashima (Japan)

6. The Working Group had before it the following documents: (a) annotated provisional agenda (A/CN.9/WG.II/WP.221); (b) Stocktaking of Developments in Dispute Resolution in the Digital Economy submitted by the Government of Japan (A/CN.9/WG.II/WP.222); (c) Access to Justice and the Role of Online Dispute Resolution submitted by the Inclusive Global Legal Innovation Platform on Online Dispute Resolution (A/CN.9/WG.II/WP.223); (d) Draft Provisions for Technology-related Dispute Resolution submitted by a group of experts (A/CN.9/WG.II/WP.224); and (e) a note on adjudication, including a proposal for future work submitted by the Government of Switzerland (A/CN.9/WG.II/WP.225).

7. The Working Group adopted the following agenda:

1. Opening of the session.
2. Adoption of the agenda.
3. UNCITRAL Colloquium on Possible Future Work on Dispute Settlement.

8. The Colloquium was structured around four main topics: (a) developments in DRDE; (b) online platforms for dispute resolution; (c) adjudication; and (d) technology-related dispute resolution.

9. This note provides a summary of the discussions held during the Colloquium. Additional information about the Colloquium, including the programme, speaker's biography, presentations, and other material as well as video recordings, is available on a dedicated web page.

[1] *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 17* (A/76/17), para. 233.
[2] *Ibid.*, para. 243.
[3] *Ibid.*, para. 248.

II. Summary of the Colloquium

A. Developments in DRDE

10. Sessions 1 to 3 of the Colloquium, held on 28 and 29 March 2022, dealt with the topic of DRDE, particularly the scope of the stocktaking project to be carried out by the secretariat.[4]

11. Discussions began with a brief presentation on the background of the stocktaking project, which was proposed by the Government of Japan in 2020 to monitor the changing landscape, the evolving practices and the development of new forms of dispute resolution. It was noted that the Commission, at its fifty-fourth session in 2021, had requested the secretariat to compile, analyse and share relevant information with regard to developments in DRDE, taking into account the disruptive aspects of digitization, in particular with respect to due process and fairness.[5] A summary of the Tokyo Forum on Dispute Resolution, which was held as part of the stocktaking project in December 2021, was presented.[6]

12. Similar work undertaken by other international organizations was presented and it was generally felt that the stocktaking project should build on such existing resources. One was the ICC Commission Report on Leveraging Technology for Fair, Effective and Efficient International Arbitration Proceedings,[7] which identified prevalent technology being used in support of international arbitration, described features and functionality that might enhance the arbitration process, and discussed useful procedural practices and pitfalls to be avoided. Another was the IBA Technology Resources for Arbitration Practitioners providing information on applications and software commonly used in arbitral proceedings for video conferencing, document production, management and transfer of data, analytical tools, interpretation, cybersecurity and others.[8] Reference was also made to a study on how a number of jurisdictions responded to the challenges caused by the COVID-19 pandemic in the field of commercial dispute resolution.[9] It was said that the responses, some temporary and some permanent, illustrated a contrast in the jurisdictions' openness to innovation and in their capacity to adapt to the circumstances. Lastly, the findings of a research project conducted in collaboration with ICCA on the right to a physical hearing were shared.[10] The research, which was based on a comparative survey of more than seventy jurisdictions, found that none of the jurisdictions had legislation providing an explicit right to a physical hearing and that unless requested by a party, arbitral tribunals generally had the discretion to hold hearings remotely subject to due process considerations. It was, however, mentioned that the issue was not entirely settled in a few jurisdictions, including where the technical infrastructure to hold online hearings was limited.

13. While the speakers for the three sessions touched upon a wide range of issues relating to DRDE, it was generally felt that there had been a significant increase in the use of technology in dispute resolution, which was further accelerated by the pandemic and which would likely continue. It was also shared that the use of

[4] Speakers included Takashi Takashima, Stephanie Cohen, Sarah McEachern, Lise Alm, Toby Landau, Kim Rooney, Andrés Jana, James Castello, Jaemin Lee, Giuditta Codero-Moss, Kevin Nash, Yulia Mullina, Dirk Pulkowski, Rekha Rangachari, Yasmine Lahlou, Seokchun Yun, Yoshimi Ohara, Ijeoma Ononogbu, Mingchao Fan, James Claxton, Anne-Karin Grill, George Lim, Camilla Macpherson, Federico Ast and Charles T. Kotuby Jr.

[5] *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 17* (A/76/17), para. 233.

[6] Information about the 2021 Tokyo Forum on Dispute Resolution is available at https://uncitral.un.org/en/2021-tokyo-forum-dispute-resolution.

[7] Available at https://iccwbo.org/publication/icc-arbitration-and-adr-commission-report-on-leveraging-technology-for-fair-effective-and-efficient-international-arbitration-proceedings/.

[8] Available at https://www.ibanet.org/technology-resources-for-arbitration-practitioners.

[9] Available at https://www.ibanet.org/global-impact-covid-19-pandemic-dispute-resolution

[10] Available at https://www.arbitration-icca.org/right-to-a-physical-hearing-international-arbitration.

technology had generally contributed to enhancing the efficiency of the proceedings. At the same time, the need to preserve due process and fairness and to retain the flexible nature of the dispute resolution process was constantly emphasized. It was further stressed that developments in DRDE should aim to improve access to justice for all involved.

14. It was mentioned that the paradigm for dispute resolution was shifting with the emergence of digitization. It was stated that fundamental changes were being witnessed, which have widened the reach of dispute resolution to various sectors and actors. There had been an emergence of digital applications and increased use of technology leading to more efficiency. With dispute resolution services becoming more accessible, there had also been calls for greater accountability and legitimacy, including with regard to the impact on environment. It was noted that technology was being applied to all stages of the dispute resolution, in preparation of and in managing the proceedings. Innovative solutions to engage different means of dispute settlement through escalation clauses and to predict the outcome of the dispute were being utilized. Such developments had raised certain challenges, which might be inherent in the technology itself and those resulting from uneven access to technology. Consequently, it was generally felt that the benefits of using technology should be maximized while addressing any negative impact of such use.

15. One of the concerns expressed throughout the sessions on DRDE was the potential digital divide, the gap between those that have access to technology and those that do not. It was said that the stocktaking project should take this into account not only from the perspective that the infrastructure might be lacking in some jurisdictions but also from the viewpoint that not all parties had access to the same level of technology. Along the same lines, it was mentioned that the use of technology entailed costs, which could be burdensome for small and medium-sized enterprises and those in less-developed economies. On the other hand, it was argued that the benefits of increased accessibility and cost savings (for example, for travel) would generally outweigh the cost of using technology.

16. From a practical perspective, it was stressed that there existed a need to build the capacity of all those involved with regard to the technology that could be utilized in the dispute resolution process. It was stressed that the parties, the arbitrators and all those involved would need to be trained in order to take full advantage of the recent developments, for example, when predicting the outcome, finding a basis for settlement and ensuring coherent awards.

17. Developments in different parts of the globe as well as regional perspectives were shared illustrating a level of commonality. Despite the concerns expressed about the possible digital divide, all regions had witnessed an increase in the use of technology and accessibility to dispute resolution services. Developments in translation and interpretation services were also referred to. It was mentioned that the number of institutions and services provided by them had grown dramatically. In that context, it was said that the stocktaking project could offer guidance to such institutions by sharing best practices, which could also lead to harmonization. While acknowledging the general trend, it was suggested that the stocktaking project should not make a hasty generalization as the legal environments in which developments were being witnessed were quite different.

18. As mentioned above, developments in DRDE had required arbitral institutions to adapt their services, also responding to the challenges caused by the pandemic. Experiences of arbitral institutions were shared, and they reported that the fundamental principles of arbitration had stayed intact despite the adoption of new technologies for filing, the appointment of arbitrators, case management, hearings, exchange of documents including digital evidence and rendering of the award, just to name a few. Reference was also made to the increased role of appointing authorities in overseeing the use of technological means. It was stated that several arbitral institutions had promulgated guidance material to facilitate the use of technology by

the parties and the arbitral tribunal,[11] which should be taken stock of as they could shed light on possible future work.

19. With regard to developments in arbitration, online hearings drew the attention of many participants. Referred to also as remote or virtual hearings, it was noted that the number of online hearings had increased dramatically in recent years particularly due to the travel restrictions imposed by the pandemic. It was reported that legislation in most jurisdictions did not pose an obstacle to the holding of hearings online and that the parties reacted favorably to such hearings. The advantages of online hearings were mentioned as providing for flexible participation and ensuring cost and time efficiency. On the other hand, the merits of in-person hearings were also outlined, particularly when the proceeding involved complex issues, multiple languages and witness examination. It was thus stressed that the virtual setting required the arbitral tribunal to be more attentive in ensuring a level playing field and to take a more active role in communicating with the parties and examining witnesses. It was mentioned that further developments in technology might mitigate concerns arising from online hearings.

20. Discussions evolved around the legal and practical framework for holding online hearings, whether it should be the default, when to take such a decision and elements to take into account (for example, time zones and duration), mode of participation, whether to keep a recording, transcription services, security measures and others. The need for a checklist on the conduct of hearings or a protocol on online witness examination (due to lack of oversight and risk of external influence) was emphasized. It was noted that it might be easier for institutions with the technical capacity to address the issues arising from online hearings compared to ad hoc arbitration and reference was made to existing guidelines formulated by arbitral institutions.

21. A number of the speakers mentioned the use of artificial intelligence (AI) in the different stages of the arbitration, for example, to assist the parties in the preparation of their case and the arbitral tribunal in analyzing documents and evidence. It was, however, suggested that the notion of artificial intelligence and automation might need further clarification in the context of dispute resolution, as had been done in relation to digital trade and contracting (see document A/CN.9/WG.IV/WP.173). While it was viewed that AI could optimize the efficiency of the dispute resolution process, concerns were expressed about the so-called algorithmic or automated decision making, whereby data and statistics were analyzed to render decisions without human intervention. While it was said that such a process could be useful in handling disputes that were simple and repetitive in nature, it was suggested that ethical standards should be prepared on the use of AI, particularly in relation to decision-making, to ensure accountability.

22. Discussions also evolved around online mediation, which had proven successful during the pandemic, with success rates almost the same as in-person mediation. Similar to arbitration, the cost and time savings derived from the online setting were seen as an advantage. Some examples of cross-border disputes that were settled through online or hybrid forms of mediation were shared. Reference was also made to the European Union's regulation on platform-to-business relations, which set forth the use of mediation to resolve issues between online platform providers (search engines, online marketplaces, social media and app stores) and online platform business users. It was mentioned that the regulation required platform providers to set up an internal complaint handling system and to name at least two mediators, who would eventually make a recommendation on the action to be taken by the platform provider.

23. It was stated that the stocktaking would need to take into account the peculiarities of online mediation, for example, the distinct role of mediators and their

[11] For example, the ICC Checklist for a Protocol on Virtual Hearings and Suggested Clauses for Cyber-Protocols and Procedural Orders Dealing with the Organisation of Virtual Hearings and SIAC Guides – Taking Your Arbitration Remote.

appointment process, confidentiality requirements including security measures and the final stage of the settlement negotiation. It was stated that some guidelines could be provided while not impeding on the flexibility of the process, which was the essence of mediation.

24. Developments with regard to financial dispute resolution were shared providing an industry-specific perspective. It was mentioned that disputes in the financial sector required a quick resolution by those with the expertise and that arbitration was being increasingly used to resolve cross-border disputes, whereas banks and financial institutions had traditionally preferred litigation. Reference was made to rules and guidelines reflecting the industry, which was also changing quickly.

25. Novel forms to resolve disputes relating to services in the digital economy or digital assets were also illustrated. References were made to dispute resolution in the metaverse or blockchain-based dispute resolution. The notion of "decentralized justice" was mentioned referring to a mechanism whereby a group of incentivized persons participate as jurors in the decision-making. It was noted that such forms of dispute resolution had their distinct features, for example, they might involve parties and/or decision-makers that were anonymous, and decisions could be enforced using the smart contract provided as an escrow.

26. The role of courts in handling disputes in the digital economy was also highlighted, particularly with respect to cross-border enforcement of interim measures to preserve assets or evidence, possibly in their digital form. It was suggested that the difficulties in enforcing tribunal-ordered interim measures in different jurisdictions should be assessed and reference was made to the current work of Working Group V on civil asset tracing and recovery in insolvency proceeding. It was suggested that work could be undertaken to prepare guidance to the arbitral tribunal in ordering, and the parties in requesting, such measures. More generally, it was felt that judicial assistance in the context of DRDE should be the subject of the stocktaking activity with the aim to facilitate coordination among different courts. As courts might not be fully conversant of the technological developments, it was suggested that means to diminish that gap should be sought as part of the stocktaking exercise.

Scope of the stocktaking project

27. General support was expressed for the stocktaking project as it would usefully assist the Commission in: (i) keeping abreast of the developments in the area of dispute settlement; (ii) determining the desirability and feasibility of legislative projects; and (iii) developing relevant legal standards to address concrete issues. It was widely felt that the stocktaking exercise could assist in preserving the integrity of the dispute resolution process and promoting the effective use of technology. It was continuously stated that developments in DRDE should embrace technology while being conducive to the fundamental principles of dispute resolution. Accordingly, it was observed that the stocktaking should aim to capture technological developments and identify any legal gaps, particularly regarding the rights of the parties to due process and fair treatment. It was further observed that the outcome of the stocktaking project could allow for better sharing of information and best practices among all those involved.

28. A number of suggestions were made on the areas of possible work and on the possible form, for example, rules, protocols, toolkits, or guidance documents. It was emphasized that any standard to be developed by the Commission should be based on the principle of technological neutrality and should endure future developments. Along the same lines, caution was expressed about taking a regulatory approach to dispute resolution, as party autonomy and flexibility should guide the work.

29. It was felt that the scope of the stocktaking project as outlined in paragraph 17 of document A/CN.9/WG.II/WP.222 was generally acceptable. It was further suggested that the stocktaking project should:

- Begin with an assessment of how UNCITRAL instruments addressed the developments and whether they need to be updated;
- Examine the interaction with UNCITRAL instruments in other areas, including those that provide functional equivalence rules for "writing" and "signature";
- Be coordinated with projects of other Working Groups, for example, Working Group IV on legal issues related to the digital economy and Working Group V on civil asset recovery and tracing in insolvency;
- Take into account the wide range of dispute resolution means including new forms as well the experience of courts in handling small claims and in supporting arbitration;
- Consider the range of experience in jurisdictions with different legal backgrounds and different levels of economic development; and
- Result in a product that can be shared not only with the Commission but more broadly with the international community.

30. Noting the broad scope of the stocktaking project and the limited resources available to the secretariat, it was mentioned that work could begin with topics that deserved more attention.

B. Online platforms for dispute resolution

31. Session 4 of the Colloquium, held on 29 March 2022, was dedicated to the topic of online platforms for dispute resolution.[12] It was recalled that at its fifty-fourth session in 2021, the Commission requested the secretariat to continue to take part in the Inclusive Global Legal Innovation Platform on Online Dispute Resolution (iGLIP on ODR) and to include on the agenda of the Colloquium "legal standards that would apply to online platforms with in-built dispute resolution mechanisms and those dedicated mainly to dispute resolution."[13]

32. At the beginning of the session, a summary of the second meeting of iGLIP, during which experts discussed the development of an international legal instrument that could facilitate access to justice through the use of ODR and set out minimum core standards applicable to ODR proceedings, providers and platforms, was presented (see document A/CN.9/WG.II/WP.223).

33. It was noted that online platforms were an essential feature of the digital economy and reference was also made to the notion of the "platform" economy. It was described that online platforms, largely based on contracts, were private legal systems involving their users and the operators, the latter being responsible for oversight. Two different types of platforms were highlighted: (i) platforms with built-in mechanisms to handle disputes between users or between users and the operator; and (ii) platforms dedicated to providing dispute resolution services. Relevant issues for further consideration were pointed out, including internal policies of the platform, valid consent of the users, recognition and enforceability of decisions outside the platform, applicable law, redress and appeal mechanisms.

34. The practical experiences of implementing online platforms dedicated to dispute resolution (ODR platforms) in different jurisdictions were shared illustrating various features and designs. Challenges in the implementation were also shared, which included legal limitations (including with regard to consumers), different regulatory approaches, budget constraints as well as the asymmetry in access both within a jurisdiction and among different jurisdictions. Several innovative aspects were also

[12] Speakers included James Kwok Wing Ding, Teresa Rodriguez De Las Heras Ballell, Colin Rule, Nicolás Lozada-Pimiento, Laura Aguilera Villalobos, Amy J. Schmitz, Mike Dennis, and Yoshihisa Hayakawa.

[13] *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 17* (A/76/17), paras. 230 and 233.

mentioned, including the use of artificial intelligence or algorithms for automated decision-making. Reference was also made to dispute resolution in the metaverse and services to be provided therein.

35. It was stressed that due process and fairness needed to be guaranteed on ODR platforms to maximize their advantages. Concerns were expressed about automated decision-making on platforms as they might not be reasoned and might not be the subject of judicial review, especially if self-enforced. In the same sense, the use of algorithms in the decision-making process was cautioned and calls were made to develop ethical standards or to provide best practices.

36. Discussions also touched upon the standards applicable to ODR platforms. It was recalled that the Commission had adopted the UNCITRAL Technical Notes on Online Dispute Resolution ("Technical Notes") in 2016, which highlighted the principles underpinning the ODR process as fairness, transparency, due process and accountability. Some of the shortcomings of the Technical Notes were mentioned, mainly that it was a non-binding descriptive instrument and that it did not define the third and final stage of the ODR proceeding. It was explained that both were due to the fact that the Technical Notes aimed to cover business-to-consumer disputes, which made it difficult to reach a compromise in the Working Group in light of the different approaches to consumer protection in different jurisdictions (for example, pre-dispute arbitration clauses were invalid in some jurisdictions).

37. It was observed that there had been a significant expansion in the use of ODR since the adoption of the Technical Notes and domestic courts were also increasingly relying on online platforms to handle cases. Work by other international organizations in developing relevant standards was outlined. This included the Collaborative Framework for ODR of Cross-Border Business-to-Business Disputes endorsed by Asia-Pacific Economic Cooperation (APEC) in 2019, which included Model Procedural Rules drafted on the basis of the UNCITRAL Arbitration Rules as well as the Technical Notes. It was explained that the Collaborative Framework limited its scope to business-to-business disputes and included arbitration as the third and final stage of the ODR proceedings. References were also made to the ongoing project by the International Organization for Standardization (ISO) in preparing the "ISO/TC 321 Transaction assurance in E-commerce" as well as International Council for Online Dispute Resolution (ICODR), the American Bar Association (ABA) Task Force on ODR and the National Institute for Standards and Technology (NIST).

38. It was generally felt that there was a need to carefully assess the developments that had taken place since the adoption of the Technical Notes both in practice and standard making. It was noted that the meetings of iGLIP on ODR had built a bridge from the current practice of ODR platforms to a potential legal instrument. In that context, support was expressed for the secretariat to continue to participate in iGLIP on ODR to gather more information. It was suggested that the meaning of ODR or online platforms might need to be revisited as well as the notions of consumers, businesses and users, which had become somewhat blurry on platforms. Calls were also made to examine how courts were utilizing online platforms, particularly to address small claims. Issues relating to the cross-border enforcement of decisions on ODR platforms including self-enforced remedies also gained attention. Lastly, calls were made to provide capacity building for developing States and MSMEs regarding the use of ODR platforms.

39. While suggestions were made to embark on the preparation of an international instrument on online platforms for dispute resolution with minimum core standards, it was cautioned that the circumstances that had delayed the negotiations on the Technical Notes persisted and that it was not yet ripe for any binding instrument to be prepared also in light of the evolving technological developments. It was highlighted that any ethical standard and guidance on best practice should aim to ensure that online platforms for dispute resolution expanded access to justice and not result in limiting access.

C. Adjudication

40. Session 5 of the Colloquium, held on 30 March 2022, was dedicated to the topic of adjudication.[14] It was recalled that at its fifty-fourth session in 2021, the Commission had heard a proposal for adjudication procedure to be examined with an aim to prepare rules on international adjudication and had decided that the desirability and feasibility of the work on adjudication would be discussed at the Colloquium.[15]

41. The session began with a presentation of the proposal by the Government of Switzerland as contained in the annex to document A/CN.9/WG.II/WP.225. It was stated that adjudication could respond to the criticism that arbitration had become too time-consuming and costly, which was caused by the complexity of disputes on the one hand and the desire to achieve a perfect dispute resolution procedure sometimes resulting in due process paranoia on the other hand. Adjudication was presented as a method by which a rapid solution in a summary procedure was provided to the dispute resulting in a solution that must be complied with immediately and before a full-fledged arbitration could be initiated. It was explained that the possibility of resorting to arbitration would provide a safety net and reassure the parties against serious errors by the adjudicators.

42. It was noted that legislation on adjudication provided for domestic enforceability of decisions, while questions remained on the means to ensure immediate and cross-border enforcement. The same applied to adjudication on a contractual basis. It was explained that the proposal by Switzerland aimed to ensure cross-border compliance with the outcome of adjudication through a contractual mechanism and reliance on the New York Convention.

43. Experience of adjudication in different jurisdictions that had adopted relevant legislation was shared with participants. It was reported that adjudication was successful in many jurisdictions (both civil and common law) while mainly in the domestic context and in the context of the construction industry. It was stated that adjudication had been successful in resolving disputes arising out of construction contracts allowing for rapid decisions and ensuring due process and fairness at the same time. It was explained that legislations in those jurisdictions had been prepared based on requests from, and needs of, the businesses and that once introduced, the practice had developed quite rapidly and beyond expectations. It was further highlighted that the number of arbitration or litigation cases in those fields diminished with the introduction of the adjudication legislation. It was also mentioned that legislation providing similar tools to secure expeditious payment of claims existed in some jurisdictions.

44. It was stated that adjudication had great potential for resolving disputes involving long-term contracts with recurring payments (for example, license agreements and long-term delivery contracts), where cash flow was key and speedy solutions might be preferred over accurate solutions. It was said that in existing legislation, the decision by the adjudicator could only be challenged on very limited grounds, namely where the adjudicator acted in contravention of the duty to act fairly and where he or she exceeded the jurisdiction. It was said that a party dissatisfied with the decision also had the possibility of raising its claims in arbitral or court proceedings, while that party must nevertheless immediately comply with the decision. It was reported that in the vast majority of the cases, the parties accepted the decision and did not initiate arbitral or court proceedings.

45. It was mentioned that it would be possible for parties to agree on adjudication in jurisdictions without any relevant legislation. It was, however, noted that the absence of legislation which would make the decision enforceable might discourage parties from using adjudication as they would need to rely on voluntary compliance.

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[14] Speakers included Michael Schneider, Lindy Patterson, Allan Stitt, Pierre D. Grenier and Jesusito G. Morallos.

[15] *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 17* (A/76/17), para. 243.

46. Some doubts were expressed about pursuing work on adjudication as the practice of adjudication was limited to certain jurisdictions and certain industries. It was also noted that adjudication was often regulated in the domestic context and reservations were expressed about the level of harmonization that could be achieved. Accordingly, calls were made that the exploratory work should focus on assessing the feasibility of harmonizing different approaches in legislation.

47. It was suggested that the work on adjudication should be based on the needs of the users and the business community. There was some support for undertaking exploratory work on rules applicable to adjudication or a similar procedure to resolve disputes arising from long-term contracts and on ways to ensure provisional enforcement of decisions. It was suggested that the following aspects might need further consideration: (i) scope of application including the need for parties' consent; (ii) applicability of adjudication to various types of and cross-border disputes; and (iii) preservation of due process and fairness requirements. It was said that such work could result in different forms, for example, a guidance document, model clauses for contracts, a model law or a convention.

D. Technology-related dispute resolution

48. Sessions 6 to 8 of the Colloquium, held on 30 and 31 March 2021, focused on technology-related dispute resolution and the draft provisions prepared by a group of experts.[16] It was noted that the Commission at its fifty-fourth session in 2021 had requested the secretariat to continue to engage with experts with a view to preparing an outline of provisions to assist in the operation of such dispute resolution.[17] It was clarified that the draft provisions in document A/CN.9/WG.II/WP.224 were prepared to stimulate the discussions at the Colloquium and the sessions would be structured as a brainstorming exercise. The participants expressed their appreciation to the experts that prepared the draft provisions, which provided a good basis for the discussion.

49. It was mentioned that technology companies in the United States had a tendency to rely on court litigation due to their familiarity with the court process. However, it was also noted that arbitration was increasingly being utilized due to the flexibility of the process, the possibility to introduce confidentiality measures, the decisions being rendered by arbitrators with technical expertise and the cross-border enforcement mechanism provided by the New York Convention.

50. It was widely felt that disputes that involved issues of technology were increasing in number and that there was a need to examine how the existing legal frameworks for dispute resolution could be used and possibly adapted to resolve such disputes. Disputes that could result in start-up companies losing seed capital or competitive advantage and thus requiring a quick resolution were provided as examples. It was suggested that the advantages of arbitration should be further ascertained. At the same time, calls were made to carefully examine the reasons for the underutilization of arbitration and the needs of the disputing parties.

[16] Speakers for the sessions included Cedric Yehuda Sabbah, Elliot Friedman, Patricia Shaughnessy, Crenguta Leaua, Lawrence Akka, Shai Sharvit, Andrés Jana, Christian Aschauer, Elizabeth Stong, Takashi Takashima, Tilman Niedermaier, Chris Clements, Monika Feigerlova, Manuel Gomez, Gilad Wekselman, and Racheli Pry-Reichman.

[17] *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 17* (A/76/17), para. 229.

51. Work undertaken in this field by organizations, such as the Silicon Valley Arbitration & Mediation Center (SVAMC)[18] and the UK Jurisdiction Taskforce (UKJT) were shared.[19]

Draft provisions for technology-related dispute resolution

52. With regard to draft provision 1 (definition), it was mentioned that paragraph 1 provided an open-ended definition to encompass the wide range of technology-related disputes and that paragraph 2 listed the common types of such disputes in a non-exhaustive manner. It was explained that the definition was not intended to be a normative one but rather aimed to capture the background against which the draft provisions were prepared.

53. Concerns were raised that the definition was too broad. For example, it was mentioned that since technology was a key component in many transactions, it would be difficult to identify a dispute that would clearly fall outside the scope of that definition. It was also noted that as defined, technology disputes would involve start-up companies as well as States or government entities, which might need different rules. It was also said that disputes involving intellectual property should not be included, as they were usually subject to different dispute resolution mechanisms.

54. In response, it was clarified that the definition in draft provision 1 was prepared mainly to provide the context in which the draft provisions had been prepared rather than to determine their application, which should generally be left to the parties. It was also mentioned that the definition would need to be sufficiently flexible to embrace developments in technology, which was constantly evolving.

55. It was generally felt that if the application of the draft provisions were to be left to the parties, there would not be much merit in defining technology-related disputes. On the other hand, suggestions were made that concrete examples of cases should be provided to highlight the characteristics of disputes for which the parties might consider utilizing the draft provisions.

56. With regard to draft provision 2 (number of arbitrators), some support was expressed for the default rule being a sole arbitrator with the understanding that the arbitrator would have the expertise required to resolve the dispute or would be supported by experts or neutrals with the technical expertise. At the same time, it was noted that the parties should have the flexibility to agree on more than one arbitrator, particularly in a dispute which addressed complex technology-related issues.

57. It was considered that draft provision 3 provided useful guidance on when and how to conduct case management conferences and issues to be discussed. It was mentioned that issues dealt with in other draft provisions (appointment of experts, confidentiality requirements, treatment of digital evidence and shorter time frames) would also need to be discussed during such consultations. Some doubts were expressed about the need for a rule and preference was expressed for providing the contents of draft provision 3 as guidance. In that context, reference was made to article 9 of the UNCITRAL Expedited Arbitration Rules as providing a concise rule on consultation. In response to a question raised about the word “secretary” in subparagraph 2(h), it was said that the subparagraph aimed to express the idea that all

[18] The work being undertaken by the SVAMC Task Force on Tech Disputes, Tech Companies & International Arbitration and the SVAMC Initiative on International Arbitration, Mediation, and Blockchain-based Transactions was presented.

[19] The UKJT Digital Dispute Resolution Rules had been developed to facilitate the rapid and cost-effective resolution of commercial disputes, particularly those involving novel digital technology such as crypto assets, cryptocurrency, smart contracts, distributed ledger technology and fintech applications (available at https://technation.io/lawtech-uk-resources/#rules). It was mentioned that those Rules were particularly innovative in that it was possible to conduct the arbitration anonymously or pseudonymously and that the arbitral tribunal was expressly authorized to operate, modify, sign or cancel any digital asset relevant to the dispute, meaning that the arbitral tribunal might be able to effectively enforce its award using distributed ledger technology.

those involved in the proceeding would need to possess the necessary technical expertise in order to ensure efficiency.

58. It was explained that draft provision 4 provided shorter time frames for the parties to make supplements to its notice and replies to such supplements. While it was felt that shorter time periods would need to be imposed on parties for the arbitral tribunal to render an award within the time period specified in draft provision 9, some doubts were expressed about imposing such short time frames considering the wide range of cases. It was considered that the arbitral tribunal should have the flexibility to fix such time frames upon consultation with the parties and that the time frames provided for in the Expedited Arbitration Rules were short and flexible enough to apply to technology-related disputes.

59. Considering the significant role that experts had in technology-related disputes, it was felt that rules on their appointment and their role in the proceedings as found in draft provision 5 would be helpful. It was also observed that their interaction with the arbitral tribunal and how their findings/determination were to be treated in the proceedings might need to be regulated.

60. It was stated that draft provision 5 focused too much on tribunal-appointed experts and that equal attention should be given to party-appointed experts as well as the parties themselves, particularly the latter on matters relating to emerging technologies where the parties would have the most expertise. It was also stated that the difference between an expert and a neutral would need to be clarified in relation to the legal effect of their respective findings.

61. It was noted that technology-related disputes often involved technical and commercially sensitive information, which needed to be kept confidential. It was noted that the UNCITRAL Arbitration Rules did not contain a specific provision on confidentiality, leaving it to the parties to agree on such arrangements. On the other hand, rules on transparency had been developed in the context of treaty-based investor-State arbitration.

62. It was explained that draft provision 6 would prohibit the disclosure of information regarding the arbitration and generated therein to parties not involved in the proceeding (outbound confidentiality). Some questions were raised on the meaning and scope of non-public information referred to in paragraph 1, whether disclosures to insurers and other financiers of the proceedings should be permitted and the sanctions that could be imposed on the parties in case of non-compliance.

63. With regard to draft provision 7, it was explained that the provision aimed to protect sensitive information within the proceedings (inbound confidentiality), largely based on the WIPO Arbitration Rules. It was noted that technology-related disputes often involved competitors in the market and the need to protect trade secrets and know-how was greater. As to the scope and definition of “confidential” information in paragraph 1, it was suggested that reference could be made to the same in article 7 of the UNCITRAL Rules on Transparency although prepared in a slightly different context. Consideration was also given to a different approach than that provided in paragraph 2 whereby the default rule would be that all information exchanged between the parties and the arbitral tribunal should be confidential without a party needing to invoke confidentiality. It was also suggested that the phrase “cause serious harm” in paragraph 3 would need to be clarified. Interest was expressed for further considering the paragraphs on third-party advisors who would address questions regarding confidentiality and related requirements as well as neutral experts who would be tasked with preparing reports based on the confidential information provided to them. Suggestions were made that provisions on “attorney’s eye only” could also be developed.

64. It was explained that draft provision 8 would supplement article 27 of the UNCITRAL Arbitration Rules considering that technology-related disputes would likely involve digital evidence as well as their presentation using various means. It was noted that the clarification in paragraph 1 that data and technical information also fell under the notion of “evidence” and in paragraph 2 that there could be different

modes of taking evidence was useful. However, concerns were expressed about *a contrario* interpretation that would limit the scope of article 27. With regard to paragraph 3, which required parties to disclose the use of technology for the collection and presentation of evidence, views were expressed that it might be too prescriptive though the issues ought to be discussed during a case management conference. Concerns were expressed with regard to the reference to "artificial intelligence" in that paragraph in light of possible further development in its use.

65. As a general comment, it was noted that the detailed procedures provided for in draft provisions 6 to 8 might run contrary to the objective of achieving swift resolution of technology-related disputes.

66. Lastly regarding the period of making an award, it was generally felt that a swift resolution of the disputes would be ideal, for example in the context of technology-related disputes concerning software development and financing of start-up companies. Some concrete examples were shared, which could usefully guide the work. Accordingly, some support was expressed for providing default time frames of very short periods as outlined in draft provision 9. On the other hand, some doubts were expressed about the usefulness of imposing such a short time period for the broad range of disputes currently covered, particularly not knowing the complexity of the dispute, the experts to be engaged and the measures to be put in place for confidentiality and so forth. It was noted that shorter time frames could result in systemic extensions. It was also mentioned that imposing such short time frames in an ad hoc context may be difficult. Furthermore, while reduction of fees and other sanctions may incentivise the arbitral tribunal to manage the proceedings more effectively, doubts were expressed on the regulatory nature of such sanctions also noting that such a provision may limit the pool of arbitrators that could adequately address the case.

67. It was felt that the framework in which the draft provisions would operate needed to be clarified, for example, whether it would complement or replace the UNCITRAL Arbitration Rules or the recently adopted UNCITRAL Expedited Arbitration Rules. With regard to the need to have a simplified and quick process, some support was expressed for relying on the UNCITRAL Expedited Arbitration Rules to provide the framework with shorter time frames including for the rendering of the award and at the same time providing the flexibility for the arbitral tribunal and the parties to further tailor them to the case.

68. While the form of the final product was yet to be determined, doubts were expressed about preparing a separate set of rules for technology-related dispute resolution. Rather, preference was expressed for preparing model clauses for use by parties or a guidance document on how the UNCITRAL Expedited Arbitration Rules could be tailored to technology-related dispute resolution. In particular, there was some interest to develop model clauses on the appointment and role of experts/neutrals, confidentiality, and a shorter time for the rendering of the award.

E. Roundtable discussion on the way forward

69. A roundtable discussion took place on 1 April 2022 with the aim to provide the Commission with input on possible future work on dispute settlement.

Early dismissal and preliminary determination

70. It was recalled that upon the request by the Working Group at its seventy-fourth session (A/CN.9/1085, paras. 66 and 67), the secretariat had prepared a note presenting different legislative approaches on the topic of early dismissal and preliminary determination for consideration by the Commission (document A/CN.9/1114).

Developments in DRDE and online platforms for dispute resolution

71. With regard to the topics of DRDE and online platforms for dispute resolution, support was expressed for the secretariat to continue to take stock of the developments

and report to the Commission on possible legislative work to be undertaken, identifying the relevant issues and the scope of such work. It was said that the work on the two topics would need to be closely coordinated considering their relevance. The secretariat was requested to continue to engage with a wide range of experts from different jurisdictions, including by taking part in and supporting iGLIP on ODR. Support was expressed for including the issues of interim measure and judicial coordination within the scope of the DRDE stocktaking exercise (see para. 26 above).

72. It was widely felt that the stocktaking should examine whether there was a paradigm shift as alternative dispute resolution increasingly embraced technology. It was said that while there was a need to compile information about the technological developments and their application to dispute settlement, the focus of the stocktaking should be on legal issues addressing any negative impact of the use of technology and on how technology can improve the efficiency of the dispute settlement process while preserving its integrity. In that context, it was suggested that the principles of due process and fairness should guide the stocktaking project, which should also be based on technological neutrality, one of the underlying principles of UNCITRAL texts on electronic commerce. It was suggested that the approach taken by the secretariat with regard to legal issues related to the digital economy, whereby a legal taxonomy of emerging technologies and their application was developed, could be followed (see document A/CN.9/1064 and addenda). It was said that by taking such an approach, it would be possible to examine whether and how the recent technological developments could be addressed by existing UNCITRAL texts and to identify any gaps, which might require the development of legal standards. It was mentioned that through such an exercise, the scope of the stocktaking project could be more fine-tuned to provide the Commission with concrete information on the desirability and feasibility of any work. It was suggested that the secretariat should take a holistic approach to include the different means of alternative dispute resolution (including on online platforms) and the wide range of technology utilized in dispute resolution.

73. In light of the above, the Commission may wish to consider requesting the secretariat to continue to implement the DRDE stocktaking project using the resources provided by the Government of Japan[20] and to report back on its preliminary findings at the fifty-sixth session in 2023. Similarly, the Commission may wish to consider requesting the secretariat to continue to support and take part in iGLIP on ODR as its experts continue to develop an international legal instrument on access to justice and the role of online platforms for dispute resolution.

Adjudication and technology-related dispute resolution

74. With regard to the topics of adjudication and technology-related dispute resolution, some support was expressed for the Working Group to pursue legislative work, while doubts were also expressed on the desirability, feasibility and scope of such work.

75. With regard to adjudication, it was pointed out that the practice was still developing with a number of jurisdictions having no such practice nor legislation to provide the legal framework. It was also mentioned that the existing practice was mostly limited to domestic disputes mainly in the construction industry and whether the practice could apply to cross-border disputes and disputes in other industries would need to be carefully assessed. Accordingly, some viewed the issues as not being ripe for harmonization. In that context, it was mentioned that if work were to be undertaken, it would aim to achieve progressive harmonization rather than harmonization of existing legal standards, and therefore, it should take a flexible rather than a prescriptive approach to allow the relevant practice to develop. It was also said that adjudication could provide a suitable solution for resolving technology-related disputes, where developments were fast and parties, such as start-ups, did not have the resources to conduct full-fledged international arbitration.

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

76. With regard to technology-related dispute resolution, it was suggested that the work should not aim to develop a new set of rules but rather to prepare model clauses, which disputing parties can easily refer to or include in their dispute resolution clause. It was stated that the development of such model clauses would respond to the needs of the industry, whereby the current frameworks for alternative dispute resolution were being underutilized and might be perceived as not providing an ample solution. On the other hand, it was questioned whether the peculiarities of technology-related disputes were such that they would justify the development of separate model clauses because aspects like the technological savviness of arbitrators, the role of experts and confidentiality applied to other types of disputes, particularly with the recent developments in technology.

77. It was stated that both projects had a common objective: to provide a legal framework for a simplified mechanism to resolve disputes in a very short time frame involving a third party with the relevant expertise, not necessarily resulting in a final award but the outcome still being enforceable across borders. It was felt that the UNCITRAL Expedited Arbitration Rules, with their shorter time frames, could provide the underlying framework, which would allow the parties to resort to expedited arbitration when necessary. It was stated that such a mechanism could address the needs of all types of industry and need not be limited to the construction or technology industry. Calls were made that the discretion of the arbitral tribunal and of the parties to tailor the proceedings to their needs would need to be emphasized in that mechanism.

78. While different suggestions were made on the form of possible work (for example, model law, model clauses, guidelines and toolboxes), it was generally felt that the appropriate form should be determined once the scope and substance of the legal standard were identified. In relation, it was pointed out that future work should be in an area where the negotiations at a working group could add value and respond to the four tests as agreed by the Commission.[21]

79. After discussion, it was widely felt that there might be merit in tackling the two topics jointly as the underlying objective was similar. In that context, it was suggested that such work should build on an analysis of whether it would be desirable to utilize adjudication in a cross-border context and in other industries (including the technology industry) and an assessment of whether it would be feasible to harmonize the applicable legal instruments, including for the purpose of enforcement. It was also suggested that the work could involve the preparation of model clauses on the appointment and role of experts/neutrals, short time frames and confidentiality, which parties could use for disputes that require a swift resolution. Lastly, it was stressed that such work should be based on existing UNCITRAL texts and address how their use could be amplified without the need to revise those texts.

[21] The Commission may wish to recall that, at its forty-sixth session, in 2013, it agreed to use four tests to assess whether legislative work on a topic should be referred to a working group: (i) whether it was clear that the topic was likely to be amenable to international harmonization and the consensual development of a legislative text; (ii) whether the scope of a future text and the policy issues for deliberation were sufficiently clear; (iii) whether there existed a sufficient likelihood that a legislative text on the topic would enhance modernization, harmonization or unification of the international trade law; and (iv) whether duplication might arise with work being undertaken by other international organizations. *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 303–304.