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Joint Group on Trade and Competition

ROUNDTABLE ON PUBLIC AND PRIVATE DISPUTE RESOLUTION MECHANISMS

-- Note by the United States --

This note is submitted by the US Delegation to the Joint Group on Trade and Competition FOR DISCUSSION at its forthcoming meeting on 26 October 2000.

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Roundtable on Public and Private Dispute Resolution Mechanisms

Submission of the U.S. Delegation

1. Dispute resolution mechanisms, which broadly are non-judicial alternatives to litigation, address different types of disputes. The potential benefits of such mechanisms in achieving early and effective resolution of controversies are recognized in government and the private sector. Some dispute resolution mechanisms deal with government enforcement actions against private firms, while others concern disputes between private firms or among consumers and private firms. This paper describes some existing and proposed mechanisms for resolving public and private antitrust claims. In addition, it explores current resolution mechanisms for disputes arising in international transactions in the electronic marketplace.

A. Existing and Proposed Dispute Resolution Mechanisms in the Antitrust Area

1. Commonly Used Forms of Dispute Resolution

2. There is a wide range of dispute resolution techniques available to parties to meet their specific goals. A few of the most commonly used forms of dispute resolution include the following:

3. In *arbitration*, the parties present their dispute privately to an agreed-upon impartial third party, either a neutral individual arbitrator or an arbitration panel, who in turn issues a decision. Typically arbitrators are individuals with some subject matter expertise in the case. Unlike other forms of dispute resolution, arbitration decisions most frequently have a binding effect on the parties and are not usually reviewable by the courts. However, the parties to the dispute may agree beforehand to participate in non-binding arbitration in which case the arbitrator's decision will be only advisory in nature. Although less formal and often more abbreviated than court proceedings, the arbitration process nonetheless remains a relatively formal dispute resolution procedure in which the arbitrator may permit discovery and rule on discovery requests and disputes, determine whether and to what degree to apply rules of evidence, hear witnesses, including experts, and review briefs and other documents and exhibits, before issuing a decision.

4. *Mediation* is an informal process that involves the use of a third party neutral to assist the parties in reaching settlement. Such a neutral, unlike a typical arbitrator, has no decision making authority and there is no resulting ruling or award issued by the neutral at the end of the process. The purpose of mediation is to assist the parties in voluntarily reaching an acceptable resolution of disputes and it can take place at any stage of the dispute. Mediation is a flexible dispute resolution process that can be used in many different types of controversies including those in which the parties have been unable to initiate a productive dialogue or where the parties have talked but have reached an impasse. Mediators utilize a number of specific tools to help achieve resolution, but many follow the process of meeting with the parties jointly to allow them to present their case and then working with the parties individually to explore resolution options and develop proposals before bringing the parties together.

5. *Early Neutral Evaluation* is another informal dispute resolution process in which the parties obtain an assessment of the controversy from a neutral who is experienced in the type of matter at issue. The neutral evaluation process is useful in resolving disputes involving complex scientific or technical issues where the presentation of proof in court would be difficult, expensive or time consuming, and where the parties may disagree substantially on the value of the case. The evaluator typically hears presentations by both sides in a conflict and offers the parties a non-binding evaluation of their cases' strengths and

weaknesses. The benefits of early neutral evaluation are that even if the evaluation fails to resolve the case entirely, the opinion of the evaluator as to the likely outcome of the case may help to clarify the issues in the case and narrow areas of disagreement, thereby enhancing the subsequent chances of settlement. Evaluators may operate under a number of different procedures, but typically follow the flexible approach used in mediation involving joint and separate meetings with the parties.

6. *Minitrials* enable the parties to present an abbreviated version of their case to a third party neutral and representatives of the parties with legal authority to settle the dispute. The neutral helps with procedure for the minitrial and gives advisory rulings on issues which arise during the course of the proceeding regarding case presentation, settlement range, etc. Following the minitrial, the neutral and the decision making party representatives meet to discuss settlement in a mediation type format. The purpose of the minitrial is to focus the decision makers on the case and provide an opportunity for the parties to have a "sneak preview" so that they may be better prepared to engage in settlement discussions. The format is voluntary and non-binding.

7. Finally, *summary jury trials* involve a summary presentation to a mock jury. The degree of formality of the proceeding may vary, but can involve strict adherence to rules of evidence or procedure. Jurors render an inadmissible, advisory opinion that can then be used to assist the parties in settlement. Summary jury trials are usually non-binding.

2. The Administrative Dispute Resolution Acts of 1990 and 1996

8. In accordance with the Administrative Dispute Resolution Act (ADRA) of 1990, 5 U.S.C. §§ 571 -584, the Attorney General has sought to promote greater use of alternative dispute resolution (ADR) techniques in civil litigation. ADR techniques in this context were defined to include "arbitration, mediation, early neutral evaluation, neutral expert evaluation, mini-trials, and summary jury trials." In 1995 the Antitrust Division announced a policy "to encourage the use of ADR techniques in those civil cases where time permits and there is a reasonable likelihood that ADR would shorten the time necessary to resolve a dispute or otherwise improve the outcome for the United States." The policy recognizes that ADR will not be suitable for merger cases because of time constraints. ADR, which involves use of a neutral third party, is not intended to replace traditional direct negotiations among the parties, but rather to provide an additional tool.

9. Further, pursuant to the ADRA of 1996, which renewed the ADRA of 1990, each U.S. federal agency is required to promote the use of ADR techniques as an alternative to litigation in various program areas, including federal civil enforcement actions. On May 1, 1998, President Clinton established an interagency ADR working group, headed by the Attorney General, to encourage and coordinate the development of government agencies' ADR programs. This working group in turn created a subgroup whose goal is to develop civil enforcement dispute resolution programs by federal agencies in appropriate cases.

10. With respect to arbitration, it is important to note that the ADRA of 1996 permits the federal government to use arbitration, including binding arbitration, in appropriate cases, but contains certain limitations on that use. For example, the Act gives parties discretion to invoke binding arbitration provided that there is a prior, knowing agreement of responsible agency officials and provided that the parties agree in advance to a maximum amount the arbitrator may award.

3. The Status of Contractual Provisions for Arbitration Between Private Firms under U.S. Law

11. Until 1985, contractual provisions for arbitration of antitrust issues were not enforceable. Antitrust issues were considered too complex for arbitration, and the antitrust laws were said to involve more than mere private behavior and to protect a public interest in competitive markets. In the *Mitsubishi* case[1], the Supreme Court in 1985 upheld the enforceability of arbitration clauses in international commercial contracts, noting special concerns for international comity and predictability of outcomes in such cases. The Court rejected arguments that foreign arbitrators would fail to consider applicable national antitrust rules, and noted that U.S. courts at the enforcement stage could determine whether the antitrust claims had been properly addressed. The *Mitsubishi* holding has been extended to arbitration provisions in purely domestic contracts as well.

12. In *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716 (9th Cir. 1999), Simula, the U.S. inventor of an air bag system, had entered into agreements with Autoliv, a foreign car parts manufacturer, covering joint development, cooperation, and licensing. The agreements contained a clause stating that "all disputes arising in connection with this Agreement shall be finally settled" by the Swiss Arbitral Tribunal. Simula sued Autoliv alleging various causes of action, including Sherman Act claims of "anti-competitive conduct, creating a monopoly by illicit means, and unreasonably restraining trade." The Ninth Circuit upheld a trial court order compelling arbitration and dismissing the complaint, holding that resolution of the antitrust claims would require interpreting the agreements to see whether they suppress competition as alleged, and that this was a job for the arbitrator, not the courts. Noting that "the emphatic federal policy in favor of arbitral dispute resolution applies with special force in the field of international commerce," the court rejected Simula's arguments that the Swiss Arbitral Tribunal would not apply U.S. antitrust law and deprive it of remedies supplied solely by U.S. law, to the detriment of U.S. automotive safety and a "national interest in open and competitive markets."

4. Recommendations of the Report of the International Competition Policy Advisory Committee

13. The International Competition Policy Advisory Committee's February 2000 report recommended consideration of international mediation of competition policy disputes -- a "mediation mechanism in which neutral parties can help the parties reach a settlement and where no party to a dispute enjoys any home-court advantage:"

> The Advisory Committee recommends that the U.S. government and other interested governments and international organizations consider developing a new mediation mechanism as well as some general principles that might govern how international disputes, at least sovereign competition policy disputes, might be evaluated under such a mechanism. This mechanism could be developed under the auspices of the proposed Global Competition Initiative or elsewhere. One possible format that might facilitate the use of such a mechanism is as follows: either party to a dispute could invoke an international panel of competition experts that would issue a report but would not require a co-equal examination of the petitioner's practices. The members of the panel would be drawn from a roster of internationally respected antitrust and competition experts.
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> Clearly such a mechanism would face many challenges. For example there would have to be agreement on the underlying problems that are reasonably before the expert panel

1. 473 U.S. 614 (1985).

> or at least on an understood frame of reference. Other issues to be resolved include whether the mediation would encompass only governmental practices or some mix of governmental and private practices; how the panelists would obtain necessary evidence; and how timing issues might be addressed if disputes regarding mergers were involved. Despite these obvious complexities and there are doubtless others, the Advisory Committee believes that a report from an expert panel considering the facts of a dispute between nations might add a useful expert opinion for the affected parties and the global community. Much, of course, would hinge on the credibility of the expert panel and the availability of information sufficient to provide an informed basis for expert analysis.
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> Chapter 6, "Preparing for the Future."

14. The Department of Justice is still reviewing the recommendations in the ICPAC Report.

5. The UN Convention on Recognition and Enforcement of Foreign Arbitral Awards

15. One advantage of cross-border arbitration of antitrust disputes, as opposed to litigation, or other forms of ADR, is that there is a mechanism for recognition and enforcement of foreign arbitration awards. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[2] more commonly referred to as the "New York Convention" has been ratified by 112 nations. This Convention enables relatively swift recognition and enforcement of foreign arbitration awards by signatory countries. The Convention applies to both business-to-business and business-to-consumer commercial transactions, though the costs of arbitration may be prohibitive in the case of many cross-boarder consumer disputes.

B. Existing Online Dispute Resolution Mechanisms

1. Generally

16. Several online dispute resolution mechanisms have emerged in the last year that can address problems arising from international transactions both online and offline. For example, online dispute resolution companies like SquareTrade, WebAssured, Mediation and Arbitration Referral Service, and Online Mediators are mediating cross-border disputes entirely online. Companies like Resolution are conducting cross-border arbitrations entirely online. Several of these companies offer services in different languages. Other online dispute resolution companies are entering into international partnerships for conducting ADR. For example, BBBOnline has entered into an agreement with a major privacy program in Japan, under which BBB and the Japanese program plan to roll out a joint ADR program.

17. In the last year, dozens of ADR providers have taken advantage of various technologies to provide new options to businesses and consumers. For example, several companies are offering assisted negotiation programs, where, for purely monetary disputes, parties enter blind offers and demands into their computers, and the computer can split the difference if the parties are within a certain range. Some companies allow consumers and businesses to provide evidence electronically through secure case pages.

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2. The Convention was incorporated into U.S. law. See 9 U.S.C. §§ 201-08.

2. Business-to-Consumer Disputes

18. In online disputes between businesses and consumers, several additional considerations apply. For example, governments have traditionally not interfered with contractual terms providing for binding arbitration that have been freely negotiated by businesses. However, concerns have been expressed about the enforcement of pre-dispute binding arbitration clauses in international consumer contracts because parties may have unequal bargaining power.[3] Consumer groups have expressed other concerns about ADR, including, for example, whether ADR could impose prohibitively high costs for consumers and whether certain ADR providers funded by businesses could have conflicts of interest. Accordingly, several groups are working to develop codes of conduct to ensure fairness and effectiveness in the resolution of consumer disputes. These groups include the American Arbitration Association, the European Commission, the American Bar Association, the CPR Institute for Dispute Resolution and the Better Business Bureau.

3. Arbitration of Domain Name Disputes

19. The Internet Corporation for Assigned Names and Numbers ("ICANN") has implemented a system for resolution of domain name disputes. All domain name registrants with .org, .net or .com top-level domains are required to abide by ICANN's Uniform Dispute Resolution Policy, under which domain name registrants must submit to arbitration of domain name disputes, where a trademark holder wishes to arbitrate, rather than litigate the dispute. Arbitration of domain name disputes must be conducted by one of the four dispute resolution providers accredited by ICANN - National Arbitration Forum, Resolution, CPR Institute for Dispute Resolution, and the World Intellectual Property Organization. If the trademark holder wins, the domain name registrar will revoke the registrant's domain name within a certain amount of time unless the registrant appeals the decision to a court. Advantages of the system include that it is a truly cross-border system that relies on international common law principles of copyright and trademark, is cheaper than court, does not require physical travel, and can be easily enforced through revocation of domain names.

4. Conclusion

20. As the foregoing demonstrates, there are numerous dispute resolution mechanisms available, and it is important to select the mechanism that best fits the controversy. For some controversies, mediation may be the most valuable approach, while others may require more formal dispute resolution mechanisms such as arbitration. It is vital in international transactions to adopt an approach to private and public dispute resolution that considers the appropriateness of dispute resolution techniques for the particular type of dispute.

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3. Current U.S. law allows the use of pre-dispute binding arbitration clauses in consumer contracts in many circumstances. However, consumer groups are opposed to such clauses, and several bills are pending in Congress that would prohibit them in consumer contracts. Many other countries prohibit their use.