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Possible future work on online dispute resolution in cross-border electronic commerce transactions

**Note supporting the possible future work on online dispute
resolution by UNCITRAL, submitted by the Institute of
International Commercial Law**

Note by the Secretariat

I. Introduction

1. In preparation for the forty-third session of the Commission, the Institute of International Commercial Law submitted to the Secretariat a note in support of future work on online dispute resolution in cross-border electronic commerce transactions. The English version of that note was submitted to the Secretariat on 24 May 2010. The text received by the Secretariat is reproduced as an annex to this note in the form in which it was received.

* Submission of this note was delayed because of its late receipt.



Annex

Paper supporting the possible future work on online dispute resolution by UNCITRAL

Note submitted by the Institute of International Commercial Law (Pace Law School) and the following organizations and institutions:

American National Standards Institute; Cairo Regional Centre for International Commercial Arbitration, Egypt; Center for Transnational Law (CENTRAL), Cologne University, Germany; Center for International Legal Education, University of Pittsburgh; Chartered Institute of Arbitrators (Singapore) Limited; Committee on International Contract and Commercial Law, International Section of New York State Bar Association; Czech Arbitration Court; China Society of Private International Law; Construction Industry Arbitration Council (CIAC), India; Dispute Resolution Division, Council of Better Business Bureaus, Inc.; Egyptian ADR Association; European Legal Studies Institute, University of Osnabruck, Germany; Faculty of Law, Potchefstroom Campus, Northwest University, Potchefstroom, South Africa; Geneva Master in International Dispute Settlement, University of Geneva Law Faculty and Graduate Institute of International and Development Studies; Global Business Dialogue on e-Society; Hong Kong Internet Forum; Hong Kong Institute of Arbitrators (HKI Arb); Institute of Commercial Law, Penn State Dickinson School of Law; Institute of Computer and Communications Law, Centre for Commercial Law Studies, Queen Mary College, University of London; Institute of Law and Technology, Faculty of Law, Masaryk University, Czech Republic; Institute of International Law, Wuhan University, P.R.China; International Association for Commercial and Contract Management (IACCM); International Chamber of Commerce; International Institute for Conflict Prevention & Resolution (CPR); International Law Department of China Foreign Affairs University; Internet Bar Organization; İstanbul Bilgi University Institute of ICT and Law, Turkey; Latin American E-commerce Institute; Law Department of the European University Institute; Mediators Beyond Borders; National Institute for Dispute Resolution and Technology; OECD — Committee on Consumer Policy Secretariat; ODR LatinoAmerica; School of International Arbitration, Centre for Commercial Law Studies, Queen Mary College, University of London; School of Law, City University of Hong Kong; and The Mediation Room.

I. Executive summary

The increase and indispensability of information and communications technology (ICT) in the developed and developing world represents significant opportunities for access to justice by buyers and sellers concluding cross-border commercial transactions via Internet and mobile platforms. In tandem with the sharp increase over the last two decades of commercial transactions concluded via the Internet (electronic commerce B2B, B2C, and C2C), there has been extensive discussion regarding the use of systems — either judicial or extrajudicial — to resolve the domestic and cross-border disputes which inevitably arise as part of the

management of this type of commercial transaction. Online dispute resolution (ODR)¹ has emerged as a desirable option for the resolution of such disputes. In fact, for small-value, high-volume contracts concluded electronically it is acknowledged by industry and consumer groups that extra-judicial (ADR) procedures — particularly ODR — are desired for the fair and expeditious settlement of these disputes.²

The ODR discussion is not limited to small-value, high volume transactions, however, as government-sponsored and private-sector ODR systems have been established over the last decade for B2B, B2C and C2C disputes of different shapes and sizes.³ Indeed, ODR has spawned its own culture and distinctiveness from normal ADR and litigation proceedings given the particularities and opportunities stemming from its online platform. Yet, even with these developments, it is clear that the efforts have remained disjointed, i.e., applying different standards of due process to participants, largely addressing only domestic online disputes, failing to offer effective enforcement mechanisms, and are often not readily apparent options to buyers compared to mainstream litigation and ADR. These shortcomings reflect some of the reasons why many buyers largely refrain from engaging in cross-border electronic and mobile commerce and why it is crucial that a global harmonizing instrument or set of principles be created in the near future to support online dispute resolution systems that can handle cross-border disputes across the commercial spectrum, including the potential millions of small-value B2B, B2C and C2C disputes that occur annually.

UNCITRAL is uniquely positioned to establish instruments or guidelines particularly suited for redress in the online commercial environment, reflecting the needs of the developed and developing world. This Note reflects on the consensus

¹ “ODR is a collective noun for dispute resolution techniques outside the courts using [information and communications technology], and, in particular, Internet applications.” J. Hornle, *Cross-Border Internet Dispute Resolution*, p. 75 (2009).

² “Recourse to courts in disputes resulting from international Internet transactions is often complicated by the difficult questions of which law applies, and which authorities have jurisdiction over such disputes. Furthermore, international court proceedings can be expensive, often exceeding the value of the goods and services in dispute. If this were the only means to settle disputes, it would certainly not enhance consumer confidence in international electronic commerce and would strongly encourage merchants to restrict the geographic scope of their offers. This in turn would limit competition and consumer choice. An important catalyst for consumer confidence in electronic commerce is that Internet merchants offer their customers attractive extra-judicial procedures for settling disputes as an alternative to the cumbersome and expensive resorts to courts.” Agreement reached between Consumers International and the Global Business Dialog on Electronic Commerce, *Alternative Dispute Resolution Guidelines*, Global Business Dialogue on Electronic Commerce, p. 54-55 (GBDe) (November, 2003) (hereinafter “GBDe Agreement”). The GBDe Agreement reflects a ground-breaking consensus document between industry and consumers declaring the need for extra-judicial procedures for the settling of disputes for contracts concluded electronically, and outlining principles regarding the creation of such a system. See also Conference on Empowering E-Consumers: Strengthening Consumer Protection in the Internet Economy, Background Report, p. 35 (Washington D.C., December 8-10, 2009) (hereinafter “OECD Consumer Background Report”) (“Consumers should be provided with meaningful access to fair and timely alternative dispute resolution and redress without undue cost and burden”).

³ See Possible future work on online dispute resolution in cross-border electronic commerce transactions, Note by the Secretariat, A/CN.9/706.

established by experts within the ODR community and enumerates guidelines for the development of harmonized rules and/or guidelines to support such ODR systems.⁴

II. A collaborative effort to create an integrated ODR system

It is essential that the gap in online cross-border redress is filled so that merchants and consumers have a viable option to resolve cross-border electronic commercial disputes. The current channels available — cumbersome and expensive resorts to courts or traditional international arbitration procedures established for more complex disputes — are not useful or necessarily needed for that vast majority of these cross-border disputes. Moreover, as the consumers' position as international traders is more firmly fixed in the global economy, the presence of an effective online dispute resolution system will be a significant factor encouraging consumer confidence in cross-border transactions, which benefits both merchants and consumers. A gateway to a collaborative effort to create an integrated system for ODR is open given the consensus of the experts within the ODR community:⁵

- The existence of a global redress system is essential to the continued success and growth of electronic commerce and mobile commerce in the developed and developing world;
- A global online dispute resolution system (ODR) would be a fair, attractive, and affordable redress system to both sellers and buyers and should inspire confidence in the ability of the system to economically, expeditiously, efficiently, fairly, and transparently resolve claims (both B2B and B2C);
- Intergovernmental organizations, the private sector, and non-profit organizations have acknowledged the need for ODR systems in this context and limited online redress systems have succeeded over the last decade, but no global standard set of rules or system has emerged from these efforts;
- Conservative estimates suggest millions of small value disputes (B2B and B2C) could be resolved via a global ODR system annually;
- General principles for the establishment of a fair and efficient global ODR system have achieved consensus amongst the various interested and impacted groups;

⁴ We also support the recommendation of the Secretariat that “[t]he goal of any work undertaken by UNCITRAL in this field should be to design generic rules which, consistent with the approach adopted in UNCITRAL instruments (such as the Model Law on Electronic Commerce), could apply in both business-to-business and business-to-consumer environments.” Id. para. 51.

⁵ On March 29 and 30, 2010, UNCITRAL, the Pace Law School Institute of International Commercial Law, and Penn State Dickinson School of Law collaborated to present the colloquium, “A Fresh Look at Online Dispute Resolution and Global E-Commerce: Toward a Practical and Fair Redress System for the 21st Century Trader (Consumer and Merchant)” at the Vienna International Centre. Leading experts on ADR/ODR and electronic commerce from the government, private sector, academia, and the non-profit sector, representing all parts of the globe, engaged in a two-day intensive dialog to take this “fresh look” at the subject and came to the same conclusions as outlined in this Note. An oral podcast of the Colloquium and speaker presentations can be found at http://www.pace.edu/page.cfm?doc_id=35560.

- Contrary to the tremendous growth in domestic electronic commerce in the last decade, there is a relative stagnation of growth in cross-border electronic commerce in the developed world due, in part, to a lack of regional and/or global redress system;
- Mobile telephony is experiencing exponential growth in developing countries and will have important and definite implications for doing business in the developing world;
- UNCITRAL could support the creation and functioning of a global ODR system by designing generic rules and/or principles which, consistent with the approach adopted in UNCITRAL instruments (such as the Model Law on Electronic Commerce), could apply in both B2B and B2C environments.⁶

III. The Guiding Principles for the Establishment of Rules and/or Principles to Support a Global Online Dispute Resolution Mechanism for Electronic and Mobile Transactions

Drawing on the lessons learned, systems established, models rules on e-commerce, and guidelines developed in the last two decades, principles have emerged to guide the development of legal instruments to support a global online dispute resolution system. These guidelines are not intended to exclude or trump other rules and/or principles to be incorporated into a B2B, B2C or C2C dispute resolution system.

Guiding Principles Impacting the Creation of a Global Online Dispute Resolution Mechanism Common to Electronic and Mobile Commerce B2B, B2C and C2C Disputes:

Electronic commerce

- “[A]n increasing number of transactions in international trade are carried out by means of electronic data interchange and other means of communication, commonly referred to as “electronic commerce”, which involve the use of alternatives to paper-based methods of communication and storage of information”.⁷
- “[T]he increased use of electronic communications improves the efficiency of commercial activities, enhances trade connections and allows new access opportunities for previously remote parties and markets, thus playing a fundamental role in promoting trade and economic development, both domestically and internationally”.⁸

⁶ The UNCITRAL Secretariat has also published a Note on online dispute resolution and the Colloquium. Note by the Secretariat, A/CN.9/706, Possible future work on online dispute resolution in cross-border electronic commerce transactions.

⁷ Model Law on Electronic Commerce with Guide to Enactment, Preamble (1996). Available at http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf.

⁸ United Nations Convention on the Use of Electronic Communications in International Contracts, Preamble (2005). Available at http://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf.

Rules of procedure

- Sellers should provide access to buyers, so that they may choose to attempt resolution of the dispute directly with seller before resorting to any formal redress systems (e.g., “customer satisfaction systems”).⁹
- “[T]he adoption of uniform rules to remove obstacles to the use of electronic communications in international contracts, including obstacles that might result from the operation of existing international trade law instruments, would enhance legal certainty and commercial predictability for international contracts and help States gain access to modern trade routes.”¹⁰
- “[U]niform rules should respect the freedom of parties to choose appropriate media and technologies, taking account of the principles of technological neutrality and functional equivalence, to the extent that the means chosen by the parties comply with the purpose of the relevant rules of law.”¹¹
- ODR personnel and decision makers should be impartial, and should possess sufficient skills and training. Decision makers must disclose any potential conflicts and parties must have the opportunity to object to a decision maker within a reasonable time after the appointment of the decision maker.¹²
- The ODR system should offer dispute resolution methods and remedies that are suitable to the nature of disputes that the system will accept.¹³
- ODR systems should be easily accessible, user-friendly, efficient, timely, transparent and low-cost to the consumer in case of B2C or C2C disputes.¹⁴
- With regard to B2C disputes, ADR dispute resolution officers may decide in equity and/or on the basis of codes of conduct, also taking into account the general principles common to the laws of the member state of the United Nations and usages which are widely known to, and regularly observed by, parties to contracts of the type involved in the particular transaction concerned. This flexibility as regards the grounds for ADR decisions provides an opportunity for the development of high standards of consumer protection worldwide.¹⁵
- Rules or general principles created to support a global ODR system should not create obstacles for the innovative use of technology.¹⁶
- “ADR providers should refer disputes to the relevant law enforcement authorities, with the [buyer’s] permission, when they have reason to believe that there may be fraud, deceit or patterns of abuse on the part of the Internet

⁹ See GBDe Agreement, p. 56.

¹⁰ Id.

¹¹ Id.

¹² See GBDe Agreement, p. 57; see also ICDR Online Dispute Resolution Program for Manufacturer/Supplier Disputes.

¹³ ISO 10003:2007, Quality management — Customer satisfaction — Guidelines for dispute resolution external to organizations, Annex E.

¹⁴ See GBDe Agreement, p. 57-58; see also OECD Consumer Background Report, p. 35.

¹⁵ See generally GBDe Agreement, p. 59.

¹⁶ Id.; OECD Consumer Background Report, p. 36.

merchant. In such cases, the merchant should be informed that such action has been taken.”¹⁷

Information to be provided

- Potential buyers should be fully informed about the conditions of access to the ODR system at the time the transaction is concluded (including, costs, type of ODR, i.e., negotiation, mediation, arbitration or other).¹⁸
- Sellers should provide buyers with information regarding ODR providers to which a claim can be filed (e.g., via reference to a code of conduct, trustmark or in the general sales conditions).

ODR providers

- ODR providers should be accredited by third-party accreditation associations or national consumer agencies applying a universal set of criteria.
- There should be close cooperation between the public and private sector to achieve a satisfactory global ODR system, particularly regarding enforcement of decisions rendered by the ODR providers.¹⁹
- ODR providers should provide sellers and buyers with sufficient information to allow an informed choice about participating in ODR, including the methods of dispute resolution used; the scope of the provider’s authority; any fees the parties will have to pay; available remedies; the criteria against which the dispute will be evaluated (e.g., codes of conduct, legal principles, equity); significant differences from court procedures; a statement of the precise dispute or type(s) of dispute to which the consent to participate applies; how to access the process and how to obtain a copy of the applicable dispute resolution procedures; expected time frames for the completion of each different method; and whether the complainant will be giving up the right to go to court if not satisfied with the resolution.²⁰

¹⁷ See GBDE Agreement, p. 59.

¹⁸ Id., p. 57.

¹⁹ Id., p. 61; OECD Consumer Background Report, p. 35-36.

²⁰ ISO 10003:2007, Quality management — Customer satisfaction — Guidelines for dispute resolution external to organizations, Annex C.