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Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules

Proposal by the Governments of Colombia, Honduras, Kenya and the United States

Note by the Secretariat

Contents

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I. Introduction

1. Following the forty-sixth session of the United Nations Commission on International Trade Law, the Governments of Colombia, Honduras, Kenya and the United States submitted to the Secretariat the following text, which is reproduced below in the form in which it was received by the Secretariat.

II. Proposal by the Governments of Colombia, Honduras, Kenya and the United States of America

The following paper was prepared by the delegations of Columbia, Kenya, Honduras and the United States for the forty-sixth session of the UNCITRAL Commission. Because the Commission did not address substantive subject matter issues, it was agreed that the substance of the proposal would be addressed at the next session of the Working Group.

Online Dispute Resolution
Submission by the Delegations of Colombia, Honduras, Kenya and the United States

I. Summary

In 2010, the Commission created a new ODR Working Group with a mandate "to undertake work in the field of online dispute resolution relating to cross-border electronic commerce transactions, including business-to-business and business-to-consumer transactions."[1] It was pointed out "that the goal of any work undertaken by UNCITRAL in that 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."[2]

At the 2012 Commission Session, both developing and developed countries expressed the view that the rules needed to provide for final and binding arbitration awards. The Commission specifically directed Working Group III to consider and report back "on how the rules respond to the needs of developing countries and those facing post-conflict situations, in particular with regard to the need for an arbitration phase to be part of the process."[3] Working Group III met twice during the period between Commission sessions, but it did not consider and report back on these issues.

Instead, the Working Group decided to continue discussions on the basis of a proposal from one regional group that would provide for the extraterritorial application of their domestic laws in a way that restricts the freedom of merchants to enter into online arbitration agreements in cross-border e-commerce

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[1] Report of the Forty-third Session of the United Nations Commission on International Trade Law (June 21-July 9, 2010), UN Doc. A/65/17, para. 257.

[2] *Id*. at para. 253.

[3] Report of the Forty-fifth Session of the United Nations Commission on International Trade Law (25 June 21-6 July 2012), UN Doc. A/67/17, para. 79(a).

transactions.[4] The proposal raises serious questions about how online merchants would be able to comply with the Rules, and in what court the parties would be expected to resolve their disputes.

The revisions to the Rules proposed at the last session of the Working Group will not create an enabling legal environment for micro and small businesses to reach international markets through electronic commerce, given the tension between different conceptions about judicial jurisdiction and the practical impossibility of resolving high-volume, low-value cross-border disputes in court. The Rules should not simply reflect the views of countries from a particular region where judicial remedies may be available for parties from that region but not to parties from outside that region.

We request that the Commission again direct that the Working Group report back on the need for the Rules to include final and binding arbitration, particularly for parties in under-developed and developing countries and countries in post-conflict situations where basic legal frameworks are absent or ineffectual. We also request that the Commission direct that the following considerations be addressed:

1. The Rules should enable micro and small businesses to effectively reach international markets through electronic and mobile commerce;

2. The Rules should recognize that traditional judicial mechanisms are not an option for resolving cross-border e-commerce disputes;

3. The Rules should provide a clear and simple process that includes online arbitration of disputes so that sellers cannot avoid their responsibilities to dissatisfied buyers;

4. Online awards can and should be recognizable and enforceable under the Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), but reliance on that mechanism alone is not sufficient;

5. The Rules should not give extraterritorial effect to domestic laws of some countries that require court resolution of disputes and thus prohibit the effective operation of the ODR system for parties in other countries.

We also request that the fall 2013 meeting on Online Dispute Resolution (ODR) be scheduled to follow the meeting on arbitration in order to facilitate assigning a portion of the ODR meeting to the question of consistency of the proposed Rules for ODR with international arbitration law and practice.[5] States might be invited to

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[4] Proposal by the European Union observer delegation, UN Doc. A/CN.9/WG.III/WP.121 (May, 2013). The Chairman determined that "all components of the proposal would be put in square brackets for further consideration and that the concerns raised in relation to the proposal would need to be further addressed." Report of Working Group III (Online Dispute Resolution, (New York, 20-24 May 2013), UN Doc. A/CN.9/769, para. 43. The regional group proposal is discussed in more detail in Section VI.

[5] The arbitration session is tentatively scheduled for 16-20 September in Vienna. This would mean changing the tentative dates for the ODR session from 18-22 November to 23-27 September. A working group session is tentatively set for 23-27 September in Vienna, but no specific project has been assigned.

include their arbitration experts as delegation members, along with their ODR experts to facilitate the discussion.[6]

II. The Rules Should Enable Micro and Small Businesses to Effectively Reach International Markets through Electronic and Mobile Commerce

We have separately stressed the crucial importance of establishing an enabling legal environment for micro and small businesses to effectively reach international markets through electronic and mobile commerce.[7] As numerous studies have shown, future economic growth and commercial development is inextricably linked to the Internet and electronic commerce. UNCITRAL has found that "[o]ne of the main drivers underlying e-commerce growth is the number of individuals connected to the Internet."[8] As the 2013 Microfinance Colloquium report concludes, "Internet usage has exploded over the last 10 years":

> in Africa Internet usage increased by nearly 3000 per cent over the last 10 years, in the Middle East by nearly 2250 per cent, in Latin America, by over 1200 per cent (for instance Brazil ranks fifth, Mexico twelfth and Colombia eighteenth in the world in number of individuals connected to the Internet), and in Asia by nearly 800 per cent. Globally, Internet usage has increased by 528 per cent over the last decade: approximately one third of the world's population is now connected to the Internet. That number is expected to increase to forty-seven per cent by 2016.[9]

Micro and small businesses are the key drivers of economic growth and job creation in both developing and developed economies. Micro and small businesses stand to be among the chief beneficiaries in any digital economy expansion since the Internet has the potential to facilitate faster entry and participation for these businesses in the global economy.

Consumers stand to benefit enormously from the development of international e-commerce through access to competitive products and prices through the online marketplace. Our governments, like those of every country, also want to ensure that consumers are properly protected in their cross-border electronic transactions. As the Working Group has concluded: "consumer protection is not merely a local but a

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[6] At the second Working Group Session, "[i]t was noted that any discussion of the involvement of the New York Convention must take account of the advice and deliberations of Working Group II (Arbitration and Conciliation)." Report of Working Group III (Online Dispute Resolution), (New York, 23-27 May 2011), UN Doc. A/CN.9/721, para. 18. Sessions addressing the overlap of two areas of legal expertise have been held from time to time in UNCITRAL. For example, in 2008 the Commission authorized the Secretariat to organize a joint discussion of the impact of insolvency on a security right in intellectual property when Working Groups V (Insolvency) and VI (Security Interests) met back to back. Report of the Forty-first Session of the United Nations Commission on International Trade Law (16 June-3 July 2008), UN Doc. A/63/17, para. 326.

[7] Proposal by the Government of Colombia, UN Doc. A/CN.9/790, 7-8 (2013); Proposal by the Government of the United States regarding UNCITRAL future work, UN Doc. A/CN.9/789, 7 (2013).

[8] Note by Secretariat, Possible future work on online dispute resolution in cross-border electronic commerce transactions, UN Doc. A/CN.9/706, para. 9 (2010).

[9] Note by the Secretariat, Microfinance: creating an enabling legal environment for micro-business and small and medium-sized enterprises, UN Doc. A/CN.9/780, para. 52 (2013).

regional and international issue, in which ODR can play a positive role by promoting interaction and economic growth within regions, including among post-conflict countries and in developing countries."[10]

The challenges for Internet commerce, however, are still great. For micro and small businesses to effectively reach global electronic commerce markets, it will be necessary to develop an enabling legal environment that fosters trust in cross-border electronic commerce transactions and provides a seamless system for trade. A key component in establishing consumer and vendor confidence, and therefore enhancing the use of cross-border e-commerce, is access to justice. The ODR project has been based on the assumption that mere access to courts in such transactions does not effectively provide access to justice, and that the system must make available an effective, low-cost means of redress of disputes, particularly when the transactions are conducted online with another party located in a different country.

The failure of UNCITRAL to address these concerns would limit the future growth of cross-border e-commerce, and have a particularly negative effect on consumer choice and emerging entrepreneurial ventures.[11]

III. Traditional Judicial Mechanism Are Not an Option for Resolution of Cross-Border E-Commerce Disputes

In creating an ODR working group in 2010, the Commission endorsed the view that "traditional judicial mechanisms for legal recourse did not offer an adequate solution for cross-border e-commerce disputes, and that the solution — providing a quick resolution and enforcement of disputes across borders — might reside in a global online dispute resolution system for small-value, high-volume business-to-business and business-to-consumer disputes."[12]

The pro-arbitration policy in instruments such as the UNCITRAL 2010 Arbitration Rules, the UNCITRAL Model Law on International Commercial Arbitration, and the New York Convention is based on the fact that international arbitration provides greater, not lesser, access for parties engaged in international transactions to a dispute settlement mechanism. Domestic notions of guarantees of access to judicial relief must be seen in the context of competing jurisdictional claims by different national courts, as well as different jurisdictional, choice-of-law, and enforcement difficulties that arise in cross-border disputes.[13]

These barriers to seeking and obtaining a judicial remedy are magnified in high-volume, low-value cross-border consumer transactions where a foreign supplier is involved. As the Working Group has recognized, "there exists no international treaty

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[10] Report of Working Group III (Online Dispute Resolution, (New York 21-25 May 2012), UN Doc. A/CN.9/744, para. 132(c).

[11] According to EU market studies substantial cost savings and increased access to products are theoretically available to EU consumers through cross-border e-commerce. Yet, the EU has found that most cross border e-commerce orders fail (61 per cent) because the trader refused to serve the consumer's country or did not offer cross-border payment. *See* European Commission Market Studies, *available at* http://ec.europa.eu/consumers/consumer_research/market_studies/e_commerce_study_en.htm.

[12] Report of the Forty-third Session of Commission, *supra* note 1 at para. 254.

[13] *See* Born, International Commercial Arbitration, 577-579 (2009).

providing for cross-border enforcement of court awards, underlining the importance of binding decisions under ODR."[14] In the 2005 Hague Convention on Choice of Court Agreements, not yet in force, States did ultimately reach agreement on cross-border enforcement of judicial judgments in B2B transactions (involving choice of court agreements), but B2C transactions were carved out because of concerns about which court (i.e. the vendor or the consumer) should have competent jurisdiction over the parties in e-commerce transactions. The Permanent Bureau of the Hague Conference identified that disputes over online transactions differ in some ways from other disputes:

> [B]usiness interests and other Internet users ... are concerned that they will be forced to defend themselves against actions in a multitude of jurisdictions with no ability to narrow the scope of such expansive jurisdictional claims since a website is globally transmitted and it is virtually impossible to determine where a customer is located with certainty. Closely connected is that each jurisdiction will apply its own choice of law rules, ... thereby subjecting e-commerce businesses and Internet users to a considerable number of potentially conflicting legal frameworks ... [I]t is particularly burdensome for users to remain apprised of all of these new [legal] developments in numerous jurisdictions ... Many countries are still deciding which approach is preferable [i.e. court of vendor or buyer] and some of their deliberations are contingent upon the growth of, for example, online dispute resolution techniques, which may provide a valid alternative by which a consumer can obtain an effective remedy. In addition, the Internet may require lawmakers to re-evaluate the traditional legal doctrines as applied to consumers and businesses, which are based on an assumed bargaining power differential. Because Internet businesses may be quite small and Internet consumers have instant access to enormous amounts of information, highly sophisticated analytical tools and substantial choice online, the relative strength of the two parties is not always obvious. The ability of consumers to make enforceable choices of law and fora might be reconsidered.[15]

As the Working Group has also acknowledged, it is unlikely that a foreign e-commerce supplier will be amenable to suit in the jurisdiction of the consumer, will have assets in that jurisdiction that can be used to provide the consumer an effective remedy, or will come from a state that would recognize and enforce a judicial judgment issuing from the consumer's home jurisdiction (and, even if so, at a cost that is not prohibitive to the consumer in high-volume low-value cases).[16]

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[14] Report of May 2012 WG, *supra* note 10 at para. 119.

[15] Permanent Bureau of the Hague Conference, The Impact of the Internet on the Judgment Project: Thoughts for the Future, Preliminary Document No. 17 of February 2002 at 8-11, *available at* http://www.hcch.net/upload/wop/gen_pd17e.pdf (footnotes omitted).

[16] *See e.g.*, Report of Working Group III (Online Dispute Resolution, (Vienna, 13-17 December 2010), UN Doc. A/CN.9/716, para. 16. In many jurisdictions, including Colombia, Kenya, Honduras, and the United States, choice of forum clauses in B2C transactions are generally enforceable provided they are adequately disclosed and are not unjust and unreasonable. *See* United States Response to Proposals for a Convention and Model Law on Jurisdiction and Applicable Law at 3 (2011), *available at* http://www.oas.org/dil/CIDIP-VII_consumer_protection_brazil_joint_proposal_Comments_United_States.pdf. In other jurisdictions there may be an absolute rule against choice of forum clauses in consumer e-commerce transactions. See Council Regulation (EC) No 44/2001 of 22 December 2000 on

Moreover, if the foreign supplier agreed (or was required) to litigate disputes in the courts of the buyer, it would create a substantial competitive advantage for domestic or regional producers who would be able to litigate disputes in their domestic courts (or in some jurisdictions through regional small claims tribunals) at a much lower cost. In all events, as pointed out in the 2012 Commission session, 4 billion persons lack access to judicial remedies, let alone in cross-border e-commerce transactions for which the ODR Rules are intended.[17]

IV. The Rules Should Provide a Clear and Simple Process that Includes Online Arbitration of Disputes

Global trade relies on existing UNCITRAL instruments such as the UNCITRAL arbitration rules, the UNCITRAL Model Law on Commercial Arbitration, and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), to enable transactions both large and relatively small, including B2B and B2C. What has been envisioned from the outset is that UNCITRAL should develop a set of simple generic rules that are similar to these existing UNCITRAL instruments, but adapted to the ODR context for low-value, high volume e-commerce disputes.[18] At the very first session "[i]t was agreed that arbitration was a necessary component of ODR (since without it there could be no final resolution of those cases which were not settled in earlier stages) but several delegations urged that in any ODR most disputes would need to settle prior to the arbitration phase so that arbitration would occur in only a small percentage of cases that could not be resolved otherwise."[19]

At the November 2012 Session of the Working Group the prevailing view was again that the Rules should provide for final and binding awards, consistent with the UNCITRAL 2010 Arbitration Rules and the New York Convention.[20] Nonetheless, one regional group continues to argue "the easiest way forward for designing a global standard for ODR could be to envisage ... an ODR process not modelled on arbitration."[21] To the contrary, as was explained at the 2012 session of the Commission:

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jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I), *available at* http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l33054_en.htm. Consumers engaging in transactions with vendors within the European Union might be able to enforce judgments cross-border under Brussels I.

[17] Note by the Secretariat, Selected legal issues impacting microfinance, UN Doc. A/CN.9/756, para. 24 (2012). At the Working Group sessions, "emphasis was also placed on the importance of ensuring that the procedural rules were relevant to the situation in developing countries, where small and medium enterprises lacking financial literacy might be claimants, and where in the absence of effective judicial remedies, ODR might be the only option available to such claimants. Report of May 2011 WG, *supra* note 6, para. 93.

[18] Report of December 2010 WG, *supra* note 16, para. 17.

[19] *Id*. at para. 30. Additionally, "[i]t was agreed that decisions should be final and binding, with no appeals on the substance of the dispute, and carried out within a short time period after being rendered." *Id*. at para. 99.

[20] Report of Working Group III (Online Dispute Resolution), (Vienna, 5-9 November 2012), UN Doc. A/CN.9/762, paras. 26-30, 34-35.

[21] Proposal by the European Union observer delegation, *supra* note 4, at 7.

a global system for online dispute resolution must provide for final and binding decisions by way of arbitration and that such a system could be of great benefit in developing countries and countries in post-conflict situations for the following reasons:

(a) It would improve access to justice by providing an efficient, low-cost and reliable method of dispute resolution where, in many cases, trusted and functioning judicial mechanisms did not exist to deal with disputes arising from cross-border electronic commerce transactions;

(b) That in turn would contribute to economic growth and the expansion of cross-border commerce, instilling confidence in parties to such transactions that their disputes could be handled in a fair and timely manner;

(c) It would enable greater access to foreign markets for small and medium-sized enterprises in developing countries and, in the event of a dispute, mitigate their disadvantage when dealing with more commercially sophisticated parties in other countries that had access to greater legal and judicial resources. [22]

In short, given that adequate court remedies are not available cross border, an ODR platform, with binding arbitration as a "backstop," serves as a strong incentive to move the parties to voluntary resolution. Under UNCITRAL ODR, most cases will be resolved amicably through negotiation or facilitated settlement. If not resolved amicably, the parties need the option of arbitration. Binding arbitration will protect consumers by ensuring that their claims against vendors are properly respected. At the same time, binding arbitration will also protect developing country vendors by preventing fraud by sophisticated Internet scam artists who, as purchasers, are ostensibly "consumers."[23]

V. Online Awards Should Be Recognizable and Enforceable Under the New York Convention But Reliance on That Mechanism Alone Is Not Sufficient

At the outset of the negotiations, "there was a general consensus that it could be assumed the New York Convention would be applicable to enforcement of arbitral awards under ODR cases in B2B and B2C cross-border disputes, but that reliance on that mechanism alone was insufficient ..."[24] The regional group now asserts "[i]t is doubtful if arbitral awards rendered under such a process would be capable of being enforced under the 1958 New York Convention."[25]

To the contrary, the process does provide for the requisites for recognition and enforcement by way of the New York Convention. In this regard, UNCITRAL in 2006 adopted a recommendation on the interpretation of the requisites for enforcement under the New York Convention in recognition of the widening use of

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[22] Report of the Forty-fifth Session, *supra* note 3, para. 76.

[23] If mediation only were offered, respondents (including vendors or consumers, depending on the case) would have an incentive to make a low-value, "take it or leave it" offer to claimants, knowing that the injured party would have no meaningful alternative but to accept the offer, since court remedies are not available. Arbitration would provide an alternative that would prevent this lopsided bargaining situation.

[24] Report of December 2010 WG, *supra* note 16 at para. 98.

[25] Proposal by the European Union observer delegation, *supra* note 4 at 3.

electronic commerce.[26] Specifically, UNCITRAL recommended that Article II, paragraph 2, of the New York Convention, which defines "agreement in writing," be applied flexibly, "recognizing that the circumstances described therein are not exhaustive" in light of arbitration agreements that are concluded entirely online. In addition, UNCITRAL recommended that States adopt article 7 of the UNCITRAL Model Law on International Commercial Arbitration as revised, which specifically recognizes that the writing requirement of an arbitration agreement may be met by an electronic communication including, but not limited to, electronic data interchange, electronic mail, telegram, telex, or telecopy.[27] The ODR Working Group has requested that definitions of "writing", "signature", and "electronic signature" be added to the draft Rules, based on existing UNCITRAL standards as set forth in the Model Law on Electronic Commerce.[28] The requirement that an award be in writing and signed by the neutral is based on article 31(1) of the UNCITRAL Model Law on International Commercial Arbitration.[29]

Once these requirements are satisfied, we believe that ODR awards can and should be enforceable under the New York Convention. Of course, as the Secretariat has pointed out, the application of the Convention (as well as the UNCITRAL Model Law on Electronic Commerce and the UNCITRAL Model Law on International Commercial Arbitration) to any specific e-commerce dispute will depend on the law of the seat of arbitration. Yet it would be anomalous and would indirectly undermine the New York Convention if UNCITRAL were to develop an arbitral regime that produced arbitral awards that would not be so enforceable. It would also undermine the principal purpose of the ODR system to be created by UNCITRAL — to create an effective and efficient set of procedural rules for the settlement of disputes in all high-volume, low-value online transactions.

The regional group further maintains that, even assuming that awards would be capable of being enforced, "it is unrealistic to believe that arbitral awards rendered in the context of low-value, high-volume transactions could be enforced across borders under the 1958 New York Convention ... in cases where the judicial system at the place where the respondent resides or otherwise has his assets does not

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[26] 2006 — Recommendation regarding the interpretation of article II (2) and article VII (1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), available at http://www.uncitral.org/uncitral/uncitral_texts/arbitration/2006recommendation.html.

[27] *Id*. Additionally, of relevance is the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts (entered into force January 3, 2013, three States Parties). The Convention includes in article 20 a provision intended to clarify that electronic communications may also be used in connection with the formation or performance of contracts that are subject to certain Conventions, including the New York Convention. While the overall application of the Electronic Communication Convention does not expressly apply to B2C transactions, the intent of States with regard to Article 20 is clearly to underscore the functional equivalence of electronic communications for international agreements and online awards under the New York Convention, including in a B2B and B2C context. Focusing on B2B in the Convention was not done to create or imply different standards for B2C but to narrow the scope of the treaty for other reasons. *See id*. at para. 72.

[28] Report of May 2012 WG, *supra* note 10 at para. 59; Report of November 2012 WG, *supra* note 20 at para. 44. *See also* A/CN.9/WG.III/WP.119/Add.1 at paras. 60-61.

[29] A/CN.9/WG.III/WP.119/Add.1 at para. 59.

perform well."[30] Obviously, the Working Group recognized this point when it concluded that the New York Convention would be applicable to enforcement of arbitral awards under ODR cases in B2B and B2C cross-border disputes, "but that reliance on that mechanism alone was insufficient ..."[31] The Working Group Report states that "[d]iscussion then centered on other options that might be used to enforce awards in a more practicable and expedited fashion":

> One option was to emphasize the use of trustmarks and reliance on merchants to comply with their obligations thereunder. Another was to require certification of merchants, who would undertake to comply with ODR decisions rendered against them. In that regard, it was said to be helpful to gather statistics to show the extent of compliance with awards. Finally, it was stressed that an effective and timely ODR process would contribute to compliance by the parties.[32]

While these private enforcement mechanisms should be quicker, easier, less expensive, and therefore much more used in practice, nevertheless, the enforceability of issued awards under the New York Convention may as a practical matter be a prerequisite for such private enforcement systems or methods. Domestic private enforcement mechanisms operate effectively because of the potential recourse to binding domestic arbitration or litigation in the absence of voluntary compliance. Significantly, in most international arbitration cases, parties voluntarily comply with arbitral awards because of the unlikelihood that they can evade enforcement under the New York Convention.[33]

VI. The Rules Should Not Give Extraterritorial Effect To the Domestic Laws of Countries Prohibiting Party Choice of Forum for Dispute Settlement

A. Proper Treatment of Mandatory Domestic Law under International Arbitration Rules

It has been agreed that the ODR Rules, like the UNCITRAL Arbitration Rules, "shall govern the arbitration except where any of these rules is in conflict with a provision of law applicable to the arbitration, from which the parties cannot derogate."[34] As the Working Group report explains:

> It was agreed that the Rules being drafted were of a contractual nature, applied by agreement of the parties. The Rules were thus binding on the parties to the extent that domestic law allowed, and could not override mandatory law at the domestic level ...
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> ... [T]he intent of the Rules was not to effect a change in domestic laws on a global scale, but to provide a practical avenue — which in practice did not

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[30] Proposal by the European Union observer delegation, *supra* note 4 at 3-4. The EU observer also states that "in the context of cross-border low-value, high-volume transactions — it is very likely that the cost of enforcing an arbitral award is much higher than the sum awarded." *Id*. at 4.

[31] Report of December 2010 WG, *supra* note 16 at para. 98.

[32] *Id*.

[33] *See* Born, International Commercial Arbitration, *supra* note 13 at 2327 ("empirical studies and anecdotal evidence indicates that the percentage of voluntary compliance with arbitral awards exceeds 90 per cent of international cases").

[34] Article 1(3) of the UNCITRAL 2010 Arbitration Rules.

> exist at present — for the quick, simple and inexpensive resolution of low-value cross-border disputes, matters for which it was not generally practicable to bring an action in the courts. This in itself was said to be in general a benefit to consumers who, if the ODR system was fair and effective, would likely not use domestic courts for such cases.[35]

Domestic laws may be relevant at the award enforcement stage:

> If a dispute resolution clause specifies that disputes arising under the transaction will be conducted under Track I of the Rules (ending in arbitration), all parties would be bound by the final award where the applicable domestic law so permitted. Consumers in jurisdictions where pre-dispute arbitration agreements are not considered binding on them would engage in the same ODR process but would not be bound by the award under their national legislation (failing a post-dispute agreement to arbitrate).[36]

In this regard, Article 36(1)(b) of the UNCITRAL Model Law on International Commercial Arbitration and Article V(2)(b) of the New York Convention both provide that the country in which recognition or enforcement is sought need not recognize or enforce an arbitral award if the award would be contrary to its own public policy.[37]

B. Regional Group Proposal For Extraterritorial Application of Domestic Laws

Nonetheless, at the last session of the Working Group, one regional group argued that "saying that the Rules are intended to be only contractual in nature ... and that they therefore are incapable of setting aside consumer protection legislation ... is not enough."[38] Instead, they asserted that Rules should place an affirmative obligation on "merchants, at the time of the transaction [to] generate two different online dispute resolution clauses, depending on the jurisdiction and status (business or consumer) of the purchaser ... ensuring that consumers from certain jurisdictions would not be subject to an arbitration track of the Rules, but rather only to ... a non-arbitral stage of proceedings."[39] Additionally, an Annex would be added to the Rules "comprising a list of jurisdictions, which would opt in to inclusion on that list in order to exclude the application of Track I [arbitration] of the Rules to consumers in those jurisdictions ..."[40] Further, a provision would be added to the Rules stating: "These Rules shall not apply where one party to the transaction is a consumer from

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[35] Report of May 2012 WG, *supra* note 10 at paras. 15-16.

[36] Note by the Secretariat, Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules, UN Doc. A/CN.9/WG.III/WP.119, para. 17 (March, 2013).

[37] The U.S. Court of Appeals for the Second Circuit concluded that the public policy exception should be construed narrowly, and recognition or enforcement should be refused only where it would "violate the forum state's most basic notions of morality and justice." Parsons v. Whittemore Overseas Co., Inc., v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969, 974 (2d Cir. 1974). *See also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 472 U.S. 614, 639 (1985); *See* Born, International Commercial Arbitration, *supra* note 13 at 2837-39 (2009) (providing brief history of the public policy provision of the New York Convention).

[38] Proposal by the European Union observer delegation, *supra* note 4, at 6.

[39] Report of May 2013 WG, *supra* note 4 at paras. 21, 31.

[40] *Id*. at para. 34. The proposal further provided that "States would notify the UNCITRAL secretariat, prior to adoption of the ODR Rules, if they intend to be listed in Annex I ... ". Proposal by the European Union observer delegation, *supra* note 4 at 8.

a state listed in Annex X, unless the Rules are agreed after the dispute has arisen."[41] These changes would, in fact, "effect a change in domestic laws on a global scale,"[42] and would do so by imposing the law of one set of states on the residents of all other states.[43]

C. The Regional Proposal Is Inconsistent With the Nature of Procedural Rules

Such an imposition of the national laws of one group of countries on all other countries in a multilateral instrument is contrary to the purposes of UNCITRAL. Proper harmonization of law is not achieved merely by extending the national laws of one group of states to apply to the citizens of other states. Neither is it appropriate to use an UNCITRAL instrument to achieve such a goal.

At a minimum, the Working Group's mandate requires that its Rules be consistent with the framework that governs international arbitration through other existing UNCITRAL instruments. In this regard, Article 1(1) of the UNCITRAL Arbitration Rules specifically recognizes that the Rules apply where the parties have agreed that disputes between them shall be settled in accordance with the Rules "subject to such modifications as the parties may agree." Article 1(3) of the Arbitration Rules further provides that "These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail."

Given the contractual nature of procedural rules and the fact that the parties may adopt them in whole or in part, it would be beyond the mandate of the Working Group to attempt to impose obligations on merchants to determine the type of purchaser and its jurisdiction(s). This was recognized at the last session of the Working Group:

> Ideally a business vendor's webpage or even an internal link within a dispute resolution clause should set out the implications of its dispute resolution procedures including the implications for consumers in certain jurisdictions of, for example, the non-binding nature of a pre-dispute resolution clause. *However, as imposing obligations on businesses is not within the scope of the Rules*, the Working Group may wish to consider whether the guidelines for ODR providers should require that the implications of Track I or Track II of

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[41] Report of May 2013 WG, *supra* note 47 at para. 32.

[42] *See* note 35 *supra* and accompanying text.

[43] Delegations opposed the proposal on a range of grounds including that: (1) "such a proposal would require the Working Group to revisit one of the fundamental areas on which it has achieved consensus, namely the inadvisability of defining 'consumer' in an international text;" (2) "devising an Annex purporting to decide for States which rules would apply to that State's consumers was not for the Working Group to decide, and nor was it for States to provide that kind of submission or to update it"; (3) UNCITRAL should not as a matter of policy and could not "legally adopt Rules that self-proclaim they are inapplicable to certain States or parties as such"; and (4) "the proposal would be inconsistent with the structure and proper interpretation of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, therefore undermining existing international arbitration practice." Report of May 2013 WG, *supra* note 3 at paras. 24, 29, 37. We do not discuss herein all the grounds for opposing the proposal.

> the Rules (as applicable) should be stated clearly and simply for both parties when a claim is filed.[44]

Nor would it be it consistent with the mandate of the Working Group for the Rules to direct the UNCITRAL Secretariat to maintain a list of states that have indicated that they wish to be listed in an annex. It is also not clear on what basis States would inform the Secretariat of their intent to be added to the list, as States may have very different rules that defy clear inclusion in a single list. The Working Group has not been charged with drafting a treaty or model law that would bind private parties; instead it has been requested to draft a set of generic contractual rules that may be modified by the parties to a dispute.

Further, placing an obligation on businesses to determine the jurisdiction and status (consumer or business) of counterparties would be inconsistent with the goal of promoting cross-border e-commerce. As the Secretariat stated:

> requiring vendors to determine whether their counterparty is a business or consumer, and the relevant jurisdiction and law applicable to that counterparty, and to tailor their dispute resolution clause accordingly, would possibly thwart a presumptive objective of the Rules, namely to remove investigatory burden and risk from merchants to encourage them to sell cross-border. The Working Group has previously identified the difficulties inherent in categorizing consumers and businesses in the context of online transactions ...[45]

Additionally, providing for the parties to agree to arbitration post-dispute raises both legal and practical problems:

> [T]he validity of the initial dispute resolution clause might be compromised if such a clause were to be superseded by a second "acknowledgement" or agreement. In any event, such a second click by consumers post-dispute could not resolve any concern relating to consumer respondents. Nor would a post-dispute agreement to arbitrate by both parties appear to be practical in either B2B transactions, or in the vast majority of B2C transactions, where the respondent is likely to be a business, thus substantially reducing the ability of claimants to achieve relief under the Rules in instances where a business respondent declines to arbitrate post-dispute.[46]

D. The Regional Proposal Is Inconsistent with the New York Convention Framework.

The regional proposal would also cause confusion with the mandate of UNCITRAL as it may operate inconsistently with the provisions of the New York Convention regarding which jurisdiction's law applies to the substantive validity or nonarbitrability of arbitration agreements. Specifically, the proposal that the Rules "shall not apply where one party to the transaction is a consumer from a state listed

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[44] UN Doc. A/CN.9/WG.III/WP.119, *supra* note 36 at para. 18 (emphasis added).

[45] *Id.* at para. 9.

[46] *Id*. at para. 12.

in Annex X, unless the Rules are agreed after the dispute" may be inconsistent with the obligations of State Parties under Article II of the Convention.[47]

Article II(1) of the New York Convention sets forth a mandatory obligation that states "shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration." Article II(3) goes on to provide a mandatory enforcement mechanism for agreements to arbitrate requiring specific performance of those agreements to arbitrate, subject to only generally-applicable contract law defenses: "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."[48]

The Working Group understands "that the vast majority of national consumer protection laws allowed consumers to enter into arbitration agreements before a dispute arose."[49] Even for consumers from minority states that disallow such pre-dispute agreements, the substantive validity of such arbitration agreements under Articles II(3) and V(1) of the Convention may remain unaffected. As the Secretariat has pointed out:

> The requirements of substantive validity of arbitration agreements are governed by "the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made" (article V(1)(a)). One of the main questions for consideration is whether there was a consent to arbitration by the parties. That question is left to be dealt with by applicable domestic law, and online arbitration agreements may not necessarily raise specific issues. Regarding B2C agreements, *the question is whether those arbitration agreements or pre-dispute arbitration agreements are recognized as valid under the applicable national laws*. That question has received different responses depending on the particular jurisdiction, and there is no harmonized approach to the matter.[50]

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[47] It is unclear how the provision would operate in practice. The regional group stated that it was not seeking a determination during the dispute of the type of purchaser and of its jurisdiction. *See also id*. and accompanying text.

[48] *See* Born, International Commercial Arbitration, *supra* note 13, at 569 (the New York Convention is "best interpreted as authorizing only the application of generally-applicable contract law defenses"). The U.S. Courts of Appeals have interpreted this clause narrowly, stating that "the clause must be interpreted to encompass only standard contract defense situations — such as fraud, mistake, duress, and waiver — that can be applied neutrally on an international scale." *See, e.g.*, DiMercurio v. Sphere Drake., PLC, 202 F.3d 71, 79-80 (1st Cir., 2000). U.S. courts have also rejected the argument that a conflicting state law rendered an arbitration agreement "null and void, inoperative or incapable of being performed," under Article II(3) noting that "by acceding to the treaty, the federal government has insisted that not even the parochial interests of the nation may be the measure of interpretation." *See, e.g.*, Ledee v. Ceramiche Ragno, 684 F.2d 184, 187 (1st Cir., 1982).

[49] Report of December 2010 WG, *supra* note 16 at para. 52.

[50] Note by the Secretariat, Online dispute resolution for cross-border electronic commerce transactions: issues for consideration in the conception of a global ODR framework, UN Doc. A/CN.9/WG.III/WP.110, para. 43 (2011) (emphasis added). *See also, e.g.*, A. van den Berg,

Accordingly, under the New York Convention, absent an express choice-of-law provision designating the law of the consumer's home jurisdiction, the law where the consumer is located is only relevant and applicable to an assessment of arbitral agreements and awards when such agreements or awards are sought to be recognized or enforced and, in the case of awards, annulled, in that jurisdiction.

The regional proposal appears to require states to decline to recognize otherwise valid arbitration agreements involving consumers from certain states, without regard to differing state views on the law governing the substantive validity of the arbitration agreement. As such, the regional proposal would result in either conflicting interpretations of the New York Convention or an inappropriate effort to have some states' national law exceptions applied by other states.[51] If a State does require domestic litigation of disputes notwithstanding an agreement to arbitrate, based on a view that such disputes are non-arbitrable that State's application of the non-arbitrability doctrine under Article II or V(2) is not binding on other States.[52] No matter their domestic operation, those domestic laws should not govern whether the Rules apply in the first instance in an international transaction.[53]

The New York Arbitration Convention of 1958, 126 (1981) ("A systematic interpretation of the Convention, in principle, permits the application by analogy of the conflict rules of article V(1)(a) to the enforcement of the agreement. It would appear inconsistent at the time of the enforcement of the award to apply the Convention's uniform conflict rules and at the time of enforcement of the agreement to apply possibly different conflict rules of the forum."); J. Lew, L. Mistelis and S. Kröll, *Comparative International Commercial Arbitration*, paras. 6-54, 6-55 (2003) ("Though these provisions [i.e., New York Convention, Article (V)(1) and UNCITRAL Model Law, Article 36(1)(a)(i)] address the issue only from the perspective of the annulment or enforcement judge, there is a strong argument in favor of applying the same criteria at the pre-award stage.").

[51] *See* Born, International Commercial Arbitration, *supra* note 13 at 827 ("there is a compelling argument that the invalidation of all pre-dispute consumer arbitration agreements ... is contrary to Article II's requirement of neutrality for Rules of contractural validity.").

[52] *See* Born, International Commercial Arbitration, *supra* note 28, at 840-841 ("The non-arbitrability doctrine is an exception, contrary to the uniform choice of law regime established by Article V(1)(a) and contrary to the Convention's objectives, which should be applied with restraint, in a narrowly-tailored and non-idiosyncratic fashion, and generally not on an interlocutory basis (e.g., prior to the final award). Moreover, consistent with an appropriate choice-of-law analysis, national courts should not apply foreign non-arbitrability rules (save in unusual cases), and should instead give effect to Article V(1)(a)'s choice of law regime. Even if a State is permitted to adopt local non-arbitrability rules as an escape devise, other Contracting States in general should not give such rules effect.") (footnotes omitted); *See also* Working Group III (Online Dispute Resolution, (Vienna, 14-18 November 2011), UN Doc. A/CN.9/739, para. 28).

[53] In Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., *supra*, the U.S. Supreme Court specifically concluded (473 U.S. at 629) "that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context." The Court noted that it had in an earlier decision "paid heed to the Convention delegates 'frequent[ly voiced] concern that courts of signatory countries in which an agreement to arbitrate is sought to be enforced should not be permitted to decline enforcement of such agreements on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of the agreements.' ..., citing G. Haight, Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Summary Analysis of Record of United Nations Conference, May/June 1958, pp. 24-28 (1958)."

Regardless, there has been no suggestion in the regional proposal, that consumer agreements constitute a "subject matter" not capable of arbitration under Article II(1). Indeed, even under the regional proposal, consumers would be permitted to arbitrate disputes after those disputes have arisen.

For these reasons, in our view, the regional proposal would cause confusion with the mandate of UNCITRAL as it may operate inconsistently with the provisions of the New York Convention regarding which jurisdiction's law applies to the substantive validity or nonarbitrability of arbitration agreements. Moreover, if an UNCITRAL initiative were to append to the Rules a list of states that assert broad party incapacity to enter into binding arbitration agreements, that effort would implicitly endorse those states' interpretation of substantive validity or nonarbitrability, particularly since the list itself would be maintained by UNCITRAL. If there are differing interpretations of the New York Convention and differing national standards regarding the substantive validity or nonarbitrability of arbitral agreements, it would be inappropriate for an UNCITRAL soft law instrument that creates contractual rules for private parties to purport to resolve those differences by effectively endorsing the position of only one group of states.

In short, the regional proposal would not contribute to the establishment of a harmonized legal framework for the fair and efficient settlement of international cross-border high-volume low-value e-commercial disputes. Instead, it could open a gateway into an inconsistent and arguably improper interpretation and application of the New York Convention. The proper treatment of mandatory domestic law is in Article 1(3) of the UNCITRAL 2010 Arbitration Rules, which while ultimately giving proper effect to the laws of those countries whose laws limit consumers' capacity to enter into agreements to arbitrate, would not give rise to such New York Convention problems.

VII. Conclusion

The revisions to the Rules proposed at the last session of the Working Group will not create an enabling legal environment for micro and small businesses to reach international markets through electronic commerce, given the tension between different conceptions about judicial jurisdiction and the practical impossibility of resolving high-volume, low-value cross-border disputes in court. The Rules should not simply reflect the views of countries from a particular region where judicial remedies may be available for parties from that region but not to parties from outside that region.

The Working Group should again be directed to address the need for the Rules to include final and binding arbitration, particularly for parties in under-developed and developing countries and countries in post-conflict situations where basic legal frameworks are absent or ineffectual. Additionally, the Commission should approve a fall 2013 meeting on Online Dispute Resolution (ODR) immediately following the meeting on arbitration in order to facilitate assigning a portion of the ODR meeting to the question of consistency of the proposed Rules for ODR with international arbitration law and practice.