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Online dispute resolution for cross-border electronic commerce transactions: issues for consideration in the conception of a global ODR framework

Note by the Secretariat

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I. Introduction

1. At its forty-third session (New York, 21 June-9 July 2010), the Commission agreed that a Working Group should be established to undertake work in the field of online dispute resolution (ODR) relating to cross-border electronic commerce transactions, including business-to-business (B2B) and business-to-consumer (B2C) transactions. It was also agreed that the form of the legal standard to be prepared should be decided after further discussion of the topic.[1] At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission reaffirmed the mandate of the Working Group on ODR relating to cross-border electronic transactions, including B2B and B2C transactions.

2. At its twenty-second (Vienna, 13-17 December 2010) and twenty-third sessions (New York, 23-27 May 2011), the Working Group considered the subject of ODR and requested the Secretariat, subject to availability of resources, to undertake research and prepare various documents relating to an ODR framework (A/CN.9/716, para. 115 and A/CN.9/721, para. 140).

3. This note contains general remarks on the ODR framework as a whole and addresses a series of issues relevant to components of the framework including ODR proceedings, ODR provider, ODR platform, neutrals, questions of applicable law and cross-border enforcement.

II. Online dispute resolution for cross-border electronic transactions: issues for consideration in the conception of a global ODR framework

A. Global ODR framework

1. Design of global ODR

4. There are several factors in the conception of an ODR framework that may affect the formulation of procedural rules and complementary documents:

(a) The main actors in a global ODR framework identified so far are the ODR providers, the ODR platform, users of ODR, neutrals and possibly implementers of ODR decisions. The Working Group may wish to consider whether any other actor should be added and also consider the relationship between them and the other actors;

(b) It should be considered whether the ODR framework would function at a global level, a regional level, a domestic level or some combination of the three;

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[1] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 257.

(c) It should be determined whether there would be one single global ODR provider, or several operating at an international, regional or domestic level? Once that matter is determined, the following questions should be considered:

(i) In the case of a single global provider, would that provider manage one or more ODR platforms?

(ii) If several ODR providers are envisaged, would each manage its own ODR platform, or could a provider use the services of a platform managed by another provider? In the latter case, how can interoperability be ensured?

(iii) Again, in the case of several ODR providers, will users be able to choose which one they use? If so, on what basis? And how are uniform standards of operation among ODR providers to be maintained?

(d) Will the global ODR framework operate in relation to a single, centralized ODR platform, or will there be several?

2. Components of ODR framework

5. In accordance with the decisions of the Working Group at its twenty-second and twenty-third sessions, the ODR framework is envisaged to consist of procedural rules ("Rules") as well as a separate document that complements the Rules. The Rules regulate how ODR proceedings are commenced, conducted and terminated. The separate document may be in the form of guidelines for ODR providers and other actors. This document may deal with various aspects not included in the Rules and that may require different treatment for each ODR provider such as costs, definition of calendar days, responses to challenges to neutrals as well as a code of conduct and minimum requirements for neutrals.

6. Other key documents, separate from the Rules and necessary to the ODR framework, deal with rendering and implementing decisions. Substantive legal principles for resolving disputes may refer to general principles on which neutrals could base their decisions. A cross-border enforcement mechanism would address the problem of ensuring implementation of any decision or settlement.

7. Other relevant documents, such as those dealing with accreditation of ODR providers, operational standards for ODR providers, functional requirements for an ODR platform, technical specifications for an ODR platform, interoperability standards of ODR platforms and other related matters may be better dealt with at the domestic or regional level where the ODR framework is established.

8. Some questions arise:

(a) Which of these documents should the Working Group be preparing in the fulfilment of its mandate?

(b) Should the separate documents be attached to the Rules as Annexes or be set out separately elsewhere (A/CN.9/721, para. 53)? If the former, by what means will it be ensured that ODR users are adequately informed of the separate documents when they agree to use the Rules?

B. ODR proceedings

9. The Working Group may wish to note that the Rules provide for different phases in the resolution of a dispute: negotiation and facilitated settlement, which form part of the consensual stage; followed by arbitration, in which the neutral issues a binding decision.

10. At its twenty-third session, the Working Group noted that there could be two approaches to the organization of ODR proceedings.

11. Under the first approach, the phases can be seen as parts of a single mandatory procedure, requiring the parties to go through each one in the prescribed order. Under a second approach, parties could have the option to begin the process at a particular stage, for example to go straight to arbitration and a final and binding decision by a neutral (A/CN.9/721, para. 23).

12. Several questions arise with respect to the design of ODR proceedings:

(a) Should they be cast as a three-phase proceeding (as is currently the case) or, alternatively, as a two-phase proceeding, consisting of a consensual and a mandatory phase?

(b) Should a claimant have the option to enter the ODR process at a phase of his choosing and, if so, at what point should a claimant make that choice?

(c) Should an ODR provider be allowed to offer services for only certain phases of the proceedings ("cherry-picking")? (A/CN.9/721, para. 90)

(d) Should the negotiation phase include more specific types of negotiation, such as automated negotiation and assisted negotiation?

(e) Should the Rules contemplate the possibility of filing counter-claims? Would this affect the efficiency of proceedings?

(f) If one party refuses to take part in negotiation, at what point can the other party force a move to the facilitated settlement stage?

(g) How is the move from negotiation to the facilitated settlement phase triggered?

C. ODR provider and ODR platform

1. ODR provider

13. The design of a global ODR framework is closely related to the definition and function of ODR provider and ODR platform. Many issues arise including the role, function, selection, accreditation and funding of an ODR provider and its relationship to the ODR platform as well as to (possibly) any national consumer protection authority:

(a) How would ODR providers operate and be funded?

(b) Would location of the ODR provider be relevant?

(c) How would ODR providers be approved and licensed, and how would they receive or be assigned cases?

(d) Would claimants select an ODR provider when filing their claims or would this be done through a third entity, such as a national consumer protection authority? If the latter, what would be the role and the status of that third entity?

(e) What, if any, charges will ODR providers levy for their services? (see A/CN.9/716, paras. 109-111)

14. Some issues arise in relation to the authority, responsibility and obligation of an ODR provider in the ODR proceedings:

(a) How much authority will be given to the ODR provider? Certain issues such as determining lateness of submissions, extensions of time and challenges to neutrals, contemplate intervention by the provider. How will the ODR framework provide for monitoring of such intervention?

(b) In the event the ODR procedural rules allow for extension of time for filing response and where the ODR provider rejects such request for extension, the ODR provider should be instructed to provide valid reason for the rejection;

(c) Should the ODR provider have the responsibility to oversee the implementation of the settlement or decision? If so, how?

2. Flow of communications between ODR provider and ODR platform

15. The main question to be addressed is the relationship between the ODR provider and the ODR platform, which depends on how these entities are defined and what their tasks are. It should be noted that however the flow of communications into and between provider and platform is ultimately decided, that flow must be taken into account in the Rules to ensure that they provide for a fast and efficient process. Once the definitions and tasks are settled, various issues relating to the flow of communications could be considered.

D. ODR neutrals

16. ODR neutrals are important actors in the ODR framework as their role is to decide disputes; several issues relating to neutrals are relevant to due process within the ODR framework.

17. Several questions arise as to the selection of neutrals:

(a) How will neutrals be selected?

(b) How will neutrals be accredited, and indeed re-accredited? Should there be a limit on their period of service, or the renewal thereof?

(c) Who will be tasked with the accreditation process?

(d) Can the parties challenge the appointment of a neutral? On what basis could such challenges be rejected?

(e) Will the list of neutrals be a global one maintained by a single ODR provider, or would there be several lists maintained by various providers?

(f) If a global list, who will have the authority to amend, add, or disqualify neutrals on the list?

18. Questions related to the authority of neutrals:

(a) Could a neutral preside over a case at both the facilitated settlement and arbitration stages?

(b) If the language of the proceedings is to be decided by the neutral, what guidelines from the provider might regulate such a decision?

(c) If extension of time is allowed for the neutral to make a decision, is there any rule to ensure neutrals will render decisions in a timely manner?

E. ODR users

19. In the current electronic commerce market, it is often difficult to discern whether buyers and sellers are consumers or businesses, and therefore the users of ODR may be both consumers and businesses. At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission reaffirmed the mandate of the Working Group on ODR relating to cross-border electronic transactions, including B2B and B2C transactions. The Commission decided that, while the Working Group should be free to interpret that mandate as covering C2C transactions and to elaborate possible rules governing C2C relationships where necessary, it should be particularly mindful of the need not to displace consumer protection legislation.[2] In line with the direction of the Commission, the Working Group may wish to note that the Rules have been prepared in a generic manner, so as to apply to B2B and B2C transactions, provided that those transactions have the common feature of being low-value. This is in line with the Commission's direction that work should focus on ODR relating to cross-border e-commerce transactions, including B2B and B2C transactions.[3]

F. Cross-border enforcement

20. Enforcement in the context of ODR concerns two matters: enforcement of settlement agreements reached by the parties through online negotiation or mediation, and enforcement under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) ("New York Convention") of ODR arbitral decisions. As one of the benefits of ODR is to avoid lengthy and expensive procedures in a State court of a foreign jurisdiction, it may prove useful to avoid court enforcement by exploring other mechanisms to encourage self-compliance. What follows is a very preliminary analysis on enforcement issues, a matter on which more detailed notes will be presented at a later stage to the Working Group for its consideration.

1. Enforcement of ODR settlement agreements under the New York Convention

21. The question of enforcement of settlement agreements was discussed by UNCITRAL when adopting the UNCITRAL Model Law on International

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[2] Ibid.

[3] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 257.

Commercial Conciliation ("Model Law on Conciliation"). In the preparation of the Model Law on Conciliation, the Commission was generally in agreement with the policy that fast and easy enforcement of settlement agreements should be promoted. However, it was realized that methods for achieving such expedited enforcement varied greatly between legal systems and were dependent upon the technicalities of domestic procedural law, which do not easily lend themselves to harmonization by way of uniform legislation.

22. Article 14 of the Model Law on Conciliation thus leaves issues of enforcement, defences to enforcement and designation of courts (or other authorities from whom enforcement of a settlement agreement might be sought) to applicable domestic law or to provisions to be formulated in the legislation enacting the Model Law on Conciliation. Many practitioners have put forward the view that the attractiveness of conciliation would be increased if a settlement reached during a conciliation would enjoy a regime of expedited enforcement or would, for the purposes of enforcement, be treated as or similarly to an arbitral award. The Guide to Enactment and Use of the Model Law on Conciliation ("the Guide to Enactment") provides examples of varying treatments by jurisdictions of settlement agreements. As highlighted in the Guide to enactment, there are no harmonized solutions for the enforcement of settlement agreements, whether concluded offline or online.

23. The Working Group may wish to consider whether the fact that a settlement agreement is concluded online may raise specific issues with regard to its enforcement.

2. Enforcement of ODR arbitral decisions

24. At the twenty-second session of the Working Group, it was generally agreed that ODR arbitral 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 (A/CN.9/716, para. 99). At its twenty-third session, the Working Group engaged in an initial discussion of the appropriateness and applicability of the New York Convention to ODR arbitral decisions (A/CN.9/721, paras. 18 and 19).

(a) General remarks on the New York Convention and the Electronic Communications Convention

25. The New York Convention provides common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards. The New York Convention does not define the notion of an award. The form of an award is also not defined under the New York Convention.

26. The United Nations Convention on the Use of Electronic Communications in International Contracts ("Electronic Communications Convention" or "ECC") adopts the functional equivalence principle by laying out criteria under which electronic communications may be considered equivalent to paper-based communications. In particular, it sets out the specific requirements that electronic communications need to meet in order to fulfil the same purposes and functions that certain notions in the traditional paper-based system — for example, "writing", "original", "signed" and "record"— seek to achieve.

27. Taking into consideration national legislation providing for functional equivalence between paper documents and electronic communications and between handwritten and electronic signatures, or on the basis of a liberal interpretation of the provisions of the New York Convention, an electronic award should be held to meet the form requirements. Therefore, online arbitral awards may be enforceable in court either in the form of a printed version, hand-signed by the arbitrators, and notified to the parties in paper form, or in the form of an electronic document signed and notified to the parties electronically.

(b) General remarks on arbitration agreement

28. The arbitration agreement is an important aspect of the ODR framework, since the place of arbitration — as well as how and when the arbitration agreement is concluded — influence the enforcement of ODR decisions and the determination of applicability of the New York Convention for ODR cases. Determining the place of arbitration may also have an impact on the question of applicable law (see A/CN.9/716, paras. 89-96 for discussion on place of arbitration).

(c) Arbitration agreement concluded online involving businesses (UNCITRAL Recommendation)

29. Article II(2) of the New York Convention, while it deals with the form requirement for an arbitration agreement, refers to the means of communication but does not specifically include any reference to electronic documents. The Electronic Communications Convention article 20(1) clarifies that the provisions of that Convention apply to the use of electronic communications in connection with the formation or performance of a contract to which the New York Convention applies. The ECC prescribes that an electronic document is functionally equivalent to a paper document and thus satisfies the need for writing, and shall not be denied validity or enforceability (article 8(1)), provided it remains accessible for further reference (article 9(2)).

30. The Electronic Communications Convention makes electronically concluded arbitration agreements and clauses valid under the New York Convention and therefore, arbitration clauses in online B2B contracts would be recognized as valid in States party to the New York Convention and ECC.

31. In addition, the Commission adopted, at its thirty-ninth session in 2006, a Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the New York Convention ("the Recommendation").[4] The Recommendation was drafted in recognition of the widening use of electronic commerce and enactments of domestic legislation as well as case law, which are more favourable than the New York Convention in respect of the form requirement governing arbitration agreements, arbitration proceedings, and the enforcement of arbitral awards. The Recommendation encourages States to apply article II(2) of the New York Convention "recognizing that the circumstances described therein are not exhaustive". The Recommendation encourages States to adopt the revised article 7 of the UNCITRAL Model Law on International Commercial Arbitration (1985) as

[4] *Official records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17), annex 2.

amended in 2006 (“Model Law on Arbitration”). Both options of the revised article 7 establish a more favourable regime for the recognition and enforcement of arbitral awards than that provided under the New York Convention.

32. In this sense an arbitration clause included in B2C click-wrap agreement (i.e. “OK-box”) in electronic form may be considered as satisfying the writing requirement under national laws that have adopted article 7(2) of the Model Law on Arbitration, since electronic forms are capable of producing records.

(d) Arbitration agreements concluded online involving consumers

33. The scope of application of the Electronic Communications Convention does not extend to consumer contracts as article 2(1)(a) excludes application to “contracts concluded for personal, family or household purposes.” Therefore, it is still questionable whether electronically concluded arbitration agreements involving consumers are valid under the New York Convention.

34. Conditions for the validity of B2C agreements may be more stringent than for B2B agreements. Therefore, the question whether online B2C arbitration clauses satisfy the writing requirement under article II(2) of the New York Convention still constitutes a source of legal uncertainty for both consumers and businesses. So far, no case law involving a consumer in an enforcement proceeding under the New York Convention has been found.

3. Applicability of the New York Convention

(a) Article VII of the New York Convention

35. By virtue of the “more favourable law provision” contained in article VII(1) of the New York Convention, “any interested party” should be allowed “to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement”.

36. At the twenty-second session of the Working Group, it was noted that, should any ODR standard be developed under which a party with an arbitral award would be provided with a specific enforcement mechanism, then article VII(1) of the New York Convention might permit resort to such an enforcement mechanism and thus problems with enforcement through other provisions of the New York Convention might be avoided (A/CN.9/716, para. 100).

37. Courts, in many States, have established a clear position as to the circumstances in which article VII(1) might be applied to uphold arbitration agreements where the form requirement set out in article II(2) would otherwise not be met. The advantage of applying article VII(1) would be to avoid the application of article II(2) and, as States enacted more favourable provisions on the form requirement for arbitration agreements, article VII(1) would allow the development of rules favouring the validity of arbitration agreements in a wider variety of situations.

38. Therefore, reliance on article VII(1) can, to some extent, be an effective solution to overcome the uncertainty regarding the enforceability of online arbitration clauses under article II(2) of the New York Convention. Article VII(1)

can also be used if a specific framework for enforcement of online awards is designed.

(b) Formal requirement: authentication and certification of an award under article IV of the New York Convention

39. Article IV(1) of the New York Convention requires either the original or certified copies of the award and of the arbitration agreement. The Electronic Communications Convention defines in article 9(4) an original of an electronic document.

40. In relation to signatures, when the law requires that a communication or a contract should be signed by a party, the ECC determines in article 9(3) the situations in which this requirement is met.

41. Article IV of the New York Convention provides for the production of certified copies to ensure that the documents produced were drafted by their alleged authors (authenticity) and that the contents are those originally drafted by the authors (integrity of content).

42. The non-fulfilment of the condition set forth in article IV can be cured after the request for enforcement is filed. If the enforcement court requires paper copies, the party seeking enforcement should be able to obtain copies from the arbitrators.

(c) Recognition and enforcement of arbitral awards in light of article V of the New York Convention

43. Article V(1)(a) — arbitration agreement not valid. 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.

44. Article V(1)(e) — arbitral award not yet binding. A question for consideration is whether the losing party may oppose enforcement on the grounds that the award is not yet binding because of its communication via electronic means (i.e., because the losing party has not been informed of the award in the manner required by the Convention). Even though the New York Convention does not require a notification of the award, one could consider that the autonomous concept of a binding award requires notification. Similarly, applicable national laws governing awards may well require notification for the award to acquire binding force. The question is therefore to find solutions for ensuring and proving that the parties are notified of awards made online.

45. Article V(2)(a) — arbitrability. A question arises as to the arbitrability of consumer disputes in the context of ODR. That question has received different

solutions depending on the jurisdictions, and there is no harmonized approach to the matter.

46. Article V(2)(b) — public policy. Enforcement of arbitral awards may also be refused on the ground that the recognition and enforcement of the award would be contrary to the public policy of the country where enforcement is sought. In cases where, for instance, arbitration is prohibited when a consumer is a party to the arbitration agreement, an award may be refused enforcement on the ground of violation of public policy.

4. Means to encourage self-compliance

47. At the twenty-second session of the Working Group, there was a broad view that traditional dispute resolution mechanisms, including litigation through the courts, were inappropriate for addressing these online disputes, being too costly and time-consuming in relation to the value of the transaction. A need existed to address in a practical way disputes arising from the many low-value transactions, both B2B and B2C, which were occurring in very high volumes worldwide and required a dispute resolution response which was rapid, effective and low-cost.

48. The question was asked whether the Working Group could devise a simpler enforcement mechanism than that provided by the New York Convention, given the low value of the transactions involved and the need for a speedy resolution (A/CN.9/716, para. 43). Discussion centred on options other than enforcement through the New York Convention 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 (A/CN.9/716, para. 98).

49. Mechanisms aimed at self-compliance may still be the most effective means of ensuring enforcement for online arbitration. In parallel to legal procedures, the Working Group may wish to consider the development of other types of procedures. Built-in enforcement mechanisms, such as trustmarks, reputation management systems, exclusion of a party from the marketplace, penalties for delay in performance, escrow systems, and credit card chargebacks are possible solutions meriting further exploration.

G. Applicable law

50. At its twenty-second session, the Working Group engaged in an initial discussion on the issue of applicable law for ODR. One suggested approach was to use equitable principles, codes of conduct, uniform generic rules or sets of substantive provisions as the basis for deciding cases, thus avoiding complex problems that may arise in the interpretation of rules as to applicable law (A/CN.9/716, para. 101). The Working Group will have before it at a future meeting a paper examining the issues relating to applicable law, taking account of previous discussions on this matter in the Working Group (A/CN.9/715, para. 103).