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Possible future work in the area of online dispute resolution

Proposal by Colombia, Honduras and the United States of America

Note by the Secretariat

In preparation for the forty-eighth session of the Commission, the Governments of Colombia, Honduras and the United States of America submitted to the Secretariat a proposal in support of future work in the area of online dispute resolution. The proposal was submitted to the Secretariat on 19 June 2015. The text received by the Secretariat is reproduced as an annex to this note in the form in which it was received.

* Reissued for technical reasons on 24 June 2015.



Annex

After five years of meetings, Working Group III of the United Nations Commission on International Trade Law (UNCITRAL) remains at an impasse arising out of fundamental differences in approach among States regarding protection of consumers in cross-border electronic commerce transactions. We consider it very important, however, that the Working Group produce a tangible work product that (a) supports in general the use of online dispute resolution and (b) provides useful information on good practices in online dispute resolution in a factual and balanced manner. Accordingly, we propose that the Commission direct Working Group III on Online Dispute Resolution (ODR) to prepare Notes on Organizing ODR Proceedings. Such Notes would be similar in nature to the Notes on Organization of Arbitration Proceedings that will be reviewed at the current session of the Commission.¹ In short, we are proposing a shift in the focus of Working Group III in order to try to achieve a tangible and useful conclusion within a reasonable period of time.

Over the years, the Working Group has worked diligently to understand the different perspectives regarding online dispute resolution and to pursue agreement on model procedural rules. The status of the negotiations in Working Group III is described in the Annotations to the Provisional Agenda as follows:

The Commission may wish to note in particular that at those sessions, the Working Group worked towards a single set of rules for the resolution of online disputes, on the basis of various proposals made during the sessions themselves. However, no consensus was reached on resolving fundamental differences remaining between States that allowed binding pre-dispute agreements to arbitrate and those that did not, despite the Working Group's strenuous efforts to this end. Accordingly, it was said that the Commission should terminate the mandate of the Working Group, also bearing in mind the Commission's earlier decisions on the allocation of UNCITRAL's resources (see under provisional agenda item 18 below). Other delegations expressed the view that the Working Group should continue to seek consensus on both existing approaches and new elements. The Working Group was also invited to engage in informal consultations before the forty-eighth Commission session to seek progress on these issues (A/CN.9/827, para. 15, and A/CN.9/833, paras. 16 and 17).²

We agree with the assessment that it will not be possible to reach a consensus on a single set of procedural rules for online dispute resolution in a reasonable period of time, in particular, in light of the significant disagreements among nations regarding laws or policies relating to consumers.

As the Commission noted in establishing the ODR Working Group, "issues relating to consumer protection were difficult to harmonize, since consumer protection laws

¹ Revision of UNCITRAL Notes on Organizing Arbitral Proceedings, United Nations Doc. A/CN.9/WG.II/WP. 187.

² Provisional agenda, annotations thereto and scheduling of meetings of the 48th Session, United Nations Doc. A/CN.9/824, para. 26 (emphasis supplied). See also Report of Working Group III on its February 2015 Session, United Nations Doc. A/CN.9/833, paras. 16-17.

and policies varied significantly from State to State.”³ Historically, UNCITRAL and the other private international law bodies have been unable to agree on the application to consumers of a wide variety of private international law instruments, including on instruments concerning international contract law, choice of law, the recognition and enforcement of judgments, and jurisdiction. In these private international law negotiations, disagreements over consumer law issues have been dealt with in one of two ways: (1) providing in the instrument that nothing can override any provision of law from which the parties cannot derogate,⁴ or (2) excluding business to consumer transactions from the scope of the instrument.⁵ For example, the newly adopted Hague Principles on Choice of Law in International Contracts (2015) provides that “[t]hese Principles apply to choice of law in international contracts where each party is acting in the exercise of its trade or profession. They do not apply to consumer ... contracts.”⁶ The Official Commentary explains that “[t]he scope of application of the Principles is confined to commercial contracts because in these contracts party autonomy is widely accepted.” The Commission will consider whether to endorse the Hague Principles at its upcoming session.

This course of action concerning the treatment of consumer issues has not proven to be acceptable in Working Group III, in part because of the high percentage of low value cross-border transactions involving consumers.

We nevertheless would like the Working Group to try to achieve a practical and useful product within a reasonable period of time, especially in view of the many years of discussions and learning that has been accumulated with respect to online dispute resolution within this Working Group. We also think that it is important for UNCITRAL to adopt an instrument in some form that will promote the use of ODR in international commerce and promote international good practices. As we have stressed several times, a key component in enhancing the use of cross-border e-commerce for micro, small and medium-sized enterprises, is access to justice through ODR.⁷

In light of the impasse, we believe that the best way forward would be for Working Group III to shift its focus from drafting rules of procedure to drafting Notes on the Organization of ODR Proceedings, similar to Notes on the Organization of Arbitration Proceedings that will be reviewed at the current session of the Commission. The ODR Notes would be for use by ODR platforms, providers and practitioners. Consistent with the Notes on Organizing Arbitral Proceedings, the Notes for ODR proceedings would not reflect any practice as “the best practice” or

³ Report of the United Nations Commission on International Trade Law, 43rd Session (21 June-9 July 2010), United Nations Doc. A/65/17, para. 255.

⁴ See e.g., the UNCITRAL Arbitration Rules (Art. 1(3)); the UNCITRAL Conciliation Rules (Article 1(3)).

⁵ See e.g., the Convention on Contracts for the International Sale of Goods (1980) (Art. 2); the United Nations Convention on the Use of Electronic Communications in International Contracts (Art. 2); the Hague Convention on Choice of Court Agreements (2005) (Art. 2); the Hague Principles on Choice of Law in International Contracts (2015) (Art. 1).

⁶ Hague Principles on Choice of Law in International Commercial Contracts art. 1(1), March 19 2015, www.hcch.net/upload/conventions/txt40en.pdf (emphasis added).

⁷ See Proposal by the Governments of Colombia, Honduras, Kenya and the United States at the last session of the Commission, United Nations Doc. A/CN.9/817 at 2-3.

seek to resolve the fundamental differences among countries on consumer protection.

Drawing from the Notes for Arbitration Proceedings, the ODR Notes could make clear that they do not impose any legal requirement binding on the ODR administrators, providers, neutrals or the parties. An ODR provider or neutral could refer to the ODR Notes at its discretion and to the extent it sees fit, and need not adopt, nor provide reasons for not adopting, any particular element of the Notes. The Notes would not be suitable for use as ODR Rules since they would not establish any obligation on the platform, provider or the parties to act in a particular way. Thus, the ODR Notes would be able to avoid the differences in approach concerning consumer law.

We believe that the ODR Notes would be very helpful in promoting the use of ODR and in providing guidance to ODR administrators, providers, and neutrals. The Notes, like the UNCITRAL arbitration notes, could address important matters for ODR such as:

- Use of stages in ODR (e.g. including a preliminary negotiation state where the buyers and sellers negotiate directly through a messaging platform and a facilitated negotiation stage)
- Discretion in the conduct of proceedings and usefulness of timely decisions on organizing proceedings
- Language of the proceedings
- Confidentiality and transparency of information
- Routing of electronic communications (including among the parties and the neutrals)
- Electronic means of sending documents
- Evidence to be considered
- Use of online hearings
- Fees, costs and deposits in respect of costs

We further note that the proposal would be consistent with the original mandate of the Commission. In establishing the Working Group, the Commission did not specify that any specific form of the legal instrument be developed or that the focus be on low value disputes.⁸

For now, we believe that development of ODR Rules may be best left to regional organizations. We also note that the United Nations Conference for Trade and Development (UNCTAD) is negotiating a resolution on consumer protection for the General Assembly that would revise the United Nations Guidelines on the Protection of Consumers and vest oversight over these issues in a body under UNCTAD. The new Guidelines encourage the development of fair, effective and transparent mechanisms to address consumer complaints, including for cross border transactions, through alternate dispute resolution.

⁸ Report of the United Nations Commission on International Trade Law, 43rd Session (21 June-9 July 2010), UN Doc. A/65/17, para. 257.