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Online dispute resolution for cross-border electronic commerce transactions: overview of private enforcement mechanisms

Note by the Secretariat

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I. Introduction

1. At its twenty-sixth session, the Working Group agreed to proceed with its development of draft procedural rules for online dispute resolution (ODR) on the basis of a two-track system, one track of which would end in binding arbitration, and one that would not.¹ In relation to the latter track (Track II), one of two options presented for the consideration of the Working Group, under a proposed draft article 8(bis), was for that track to end in a non-binding “recommendation” by the neutral, on which basis the Working Group agreed to proceed.²

2. At its twenty-seventh session, the Working Group requested the Secretariat, in relation to a possible recommendation to be made by the neutral under article 8(bis) of Track II, to provide a document setting out an overview of private enforcement mechanisms.³

3. The Working Group may also wish to recall that at its twenty-second session, albeit in the context of arbitral awards arising out of ODR procedures, it considered that a need existed to address mechanisms that were simpler than the enforcement mechanism provided by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), given the need for a practical and expeditious mechanism in the context of low-value, high-volume transactions.⁴ The Working Group in that context suggested the use of trustmarks, and the possibility of requiring the certification of merchants, who would undertake to comply with ODR decisions rendered against them. The use of statistics indicating compliance with awards was also said at that session to be a mechanism that could contribute to compliance.⁵

Meaning of private enforcement mechanisms

4. The precise nature and meaning of “private enforcement mechanisms” has not been discussed by the Working Group and, in the absence of such guidance, this note thus considers that term to mean an alternative to a court-enforced arbitration award or settlement agreement, and which can either (i) create incentives to perform or (ii) provide for the automatic execution of the outcome of proceedings. These two broad categories are further elaborated below.

5. Moreover, the Working Group may wish to note that the word “enforcement”, which implies that a decision of some kind has been issued and that a mechanism exists to provide enforcement thereof, might not be appropriate in the context of these two categories. Rather, private mechanisms of the nature set out in this note tend to seek to encourage compliance with decisions, or to provide an execution mechanism for a decision that may itself be subject to enforcement in national courts (for example in the case of a settlement agreement, non-binding decision or arbitral award).

¹ A/CN.9/762, para. 18.

² A/CN.9/769, paras.56 and 58.

³ A/CN.9/769, para. 57.

⁴ A/CN.9/716, paras.43 and 98; see also A/CN.9/WG.II/WP.110, para.48.

⁵ A/CN.9/716, para.98.

6. Finally this note does not intend to provide an exhaustive list of private enforcement mechanisms, but rather to highlight some of the most prominent, based inter alia on seminal research works in the field,⁶ and consultations with academics and practitioners. It does not address, for example, mechanisms such as clearinghouses or judgment funds.

Means by which private enforcement mechanisms might be utilized

7. The specific request of the Working Group at its twenty-seventh session was for the Secretariat to provide a document setting out an overview of private enforcement mechanisms. That request was made in the context of a non-binding recommendation to be made by the neutral under draft article 8(bis) of Track II of the Rules.⁷

8. However, and recalling its discussions at its twenty-second session, the Working Group may wish to consider the broader context in which private enforcement mechanisms could be employed as ancillary mechanisms, or as part of, the ODR Rules under preparation by the Working Group: that is, whether in addition to recommendations made by a neutral under draft article 8(bis) of Track II, private enforcement mechanisms could also be used to encourage compliance with settlement agreements arising out of a mediation or facilitated settlement stage, and with arbitral awards. This note also sets out certain examples of where the Working Group may wish to consider whether the ODR Rules themselves might be modified to adapt to existing enforcement mechanisms.

9. The Rules do not currently provide for private mechanisms to be incorporated into the Rules as part of the ODR proceedings. Rather, paragraph (2)(d) of the draft preamble to the Rules foresees a separate Appendix in relation to cross-border enforcement mechanisms. There are, as this note sets out, a number of different such mechanisms, the utility or appropriateness of which may differ according to circumstance and region. Largely these mechanisms are dependent on third parties (for example, credit card companies, in the case of chargebacks) or on the marketplace, ODR provider or payment intermediary that has control over the payment flows of a transaction. The Working Group may wish to consider how the ODR system it is devising can or ought to work alongside such systems, and the intended contents of an Appendix in this regard.

⁶ The descriptions of private enforcement mechanisms in this note are partly based on the following books and articles: Kaufmann-Kohler and Schultz, "Online Dispute Resolution: Challenges for Contemporary Justice", 2004 Kluwer Law International; Schultz, "Online Dispute Resolution: an Overview and Selected Issues", United Nations Economic Commission for Europe, Forum on Online Dispute Resolution, 6-7 June 2002; Rule, "Online Dispute Resolution for Business", Jossey-Bass 2002; Rogers, "Knitting the Security Blanket for New Market Opportunities: Establishing a Global Online Dispute Resolution System for Cross-Border Online Transactions for the Sale of Goods", in Wahab, Katsh & Rainey (Eds.), "Online Dispute Resolution Theory and Practice," Eleven International Publishing, 2012; Del Duca, Rule and Loebl, "Facilitating Expansion of Cross-Border E-Commerce — Developing a Global Online Dispute Resolution System (Lessons Derived From Existing ODR Systems — Work of the United Nations Commission on International Trade Law)", Penn State Law Legal Studies Research Paper No. 25-2011; Katsh and Rifkin, "Online Dispute Resolution: Resolving Disputes in Cyberspace", Jossey-Bass 2001.

⁷ A/CN.9/769, para. 57: As a general matter relating to the content of draft article 8(bis), the Secretariat was requested to provide a document at a future session setting out an overview of existing private enforcement mechanisms. That request received support.

10. Moreover, there is a clear value to having an in-built enforcement mechanism in a dispute resolution process, not only to users of the system but also to ODR providers, in order that that provider's system of dispute resolution provides a "one-stop shop" for parties seeking to resolve a dispute. The Working Group may wish to consider issues that may arise should ODR providers seek to control financial flows as well as serve a dispute resolution function (for example, should an ODR provider also decide to provide an escrow or delayed payment function as part of its dispute resolution function).

Use of ODR Rules as confidence-building or promotional measure

11. The use of private enforcement mechanisms, including trustmarks, begs the question of the foreseeable means by which merchants might utilize the Rules as a promotional measure. The Working Group may wish to consider the limitations of such promotion.

12. In particular, a merchant's advertising its use of the "UNCITRAL ODR Rules" might be problematic in the absence of any oversight mechanism to ensure that the Rules — which are in any event contractual and thus modifiable — were in fact being used by that merchant in whole or in part. In particular, there is a general prohibition on the use of the United Nations logo or emblem for commercial or non-official purposes without the permission of the Secretary-General (General Assembly Resolution 92(I) of 7 December 1946),⁸ based on a concern for the legal and reputational implications of the logo's potential misuse or unauthorized appropriation by commercial entities. Likewise, the UNCITRAL logo cannot be used outside of compliance with that body's intended mandate.

13. A merchant could, however, advertise its resolution of disputes via a certain ODR provider on its website, and that ODR provider could be accredited or trustmarked (potentially by a State or non-governmental body) by reference *inter alia* to its use of the UNCITRAL ODR Rules. The Working Group may wish to consider, in that respect:

(i) Whether providers would be sufficiently well-recognized by purchasers to create a valued incentive to enter into a transaction, and/or whether the granting of accreditation (by a well-recognized entity such as a State or consumer protection agency) to providers could sufficiently create that recognition in transactions across national borders;

(ii) The consequential implication that the guardian of the ODR Rules would thus not necessarily be the merchant and purchaser, but rather, the ODR provider. The autonomy of the parties to a transaction to modify the contractual Rules as between themselves might thus be subject to the willingness of the ODR provider to so modify them (see also para. 6 of document A/CN.9/WG.III/WP.123).

⁸ A/RES/92(I). See also Interoffice Memorandum to the Senior Legal Advisor, Office of the Secretary-General, World Meteorological Organization, on guidelines on the use of the United Nations emblem, *United Nations Juridical Yearbook 2004* at 366-368.

II. Brief overview of private enforcement mechanisms creating incentives to perform

A. General

14. Private enforcement mechanisms that exist with an aim to incentivise compliance with decisions or with certain standards include ratings systems, and trustmarks. These mechanisms are discussed further below. Like various other private enforcement mechanisms, there is also an element of commonality between these two mechanisms: both ratings and trustmarks are indicators of trust, the difference being that the former is user-generated and the latter, institutionally-generated.

15. Commentators have suggested that the utility of both ratings and trustmarks might be compromised by fraudulent actors, which can mask their identities and provide false ratings or create fake trustmarks. The Working Group may wish to consider the potential for such fraud and the implications for the use of ratings and trustmarks in the context of the ODR Rules, and whether such a risk can be mitigated.

16. The Working Group may also wish to consider more holistic alternatives to a trustmark or ratings-only mechanism. Possible alternatives are set out in subparagraph D below.

B. Ratings

17. One way in which to build trust as part of the overall transaction, of which dispute resolution is one component, is to invite purchasers to provide ratings. This is currently common practice in certain online marketplaces in relation to the transaction as a whole, and relies on voluntary feedback from individual purchasers.

18. The Working Group might consider whether ratings could also be utilized specifically in relation to a dispute resolution mechanism: for example, whether purchasers could be invited to provide ratings in relation to the compliance of a merchant with the terms of a settlement agreement, a recommendation by a neutral, or an arbitral award.

19. In this respect, the Working Group may wish to consider the following questions:

(i) On what basis would ratings be given, and by whom (by parties to a transaction? By an ODR provider?) Would ratings systems be sufficiently consistent in relation to different merchants to be useful?

(ii) Where would those ratings be made public? For example, would they be published on the website of the merchant, or only on that of the ODR provider?

a. If the latter, would they be brought sufficiently to the notice of the public to be useful?

b. If the former, what would prevent a merchant from publishing false or fraudulent ratings (about itself or its competitors)? Would a merchant be inclined to indicate on its website that it had a good record of compliance with dispute resolution outcomes, if the implication was that transactions with that merchant tended to give rise to disputes ?

(iii) Would factors such as the subjective nature of ratings, low response rates, or “incorrect” negative ratings reflecting disagreement with the outcome rather than compliance with the outcome, be factors that would have a substantial impact on whether ratings would serve as an effective private enforcement mechanism?

C. Trustmarks

20. “Trustmarks” in the context of business-to-consumer (B2C) ODR can be described as quality labels that typically take the form of seals or logos sold or otherwise granted (i) by ADR and ODR providers to online merchants, in order that merchants can put such seals on their sites to let buyers know that they are certified by a third party as a trustworthy transaction partner; or (ii) by independent third parties to ODR providers by way of accreditation.

21. The Working Group may wish to consider the likelihood or viability of a government or respected non-profit issuing trustmarks to ODR providers on the basis of their use of the UNCITRAL ODR Rules and/or adherence to guidelines for those providers (envisaged under the draft preamble to the Rules).

(i) *Trustmarks sold or otherwise granted to online merchants*

22. Where a merchant is certified by an ODR provider, the trustmark can inform the customer that the trader has committed to complying with certain standards or best practices, including utilizing dispute resolution mechanisms. A trustmark may incentivise online merchants to comply with the decisions or recommendations reached in ODR proceedings, where non-compliance is a ground for removal of the trustmark.

23. The ODR provider granting trustmarks may generate revenue pursuant to this practice, as trustmark holders typically pay the grantor for the right to display the trustmark. Alternatively, or in addition, an ODR provider might only agree to serve in a provider function for those merchants that adhere to its trustmark standards.

24. In the context of the UNCITRAL ODR Rules, the Working Group may wish to consider:

(i) Which third party entity would sell or otherwise grant trustmarks, and by consequence have a quality-control function in relation to merchants?

(ii) Does, or might, a conflict of interest issue arise insofar as a transactional component exists in the granting of trustmarks to merchants? For example, might it result in forum shopping by merchants to select ODR providers perceived to be favourable to them, or might it result in lack of neutrality of ODR providers who wish to be selected by merchants?

(iii) On which basis such trustmarks would be sold or provided? In other words, what criteria would be used? Would criteria be uniform across trustmark providers or could different providers use different criteria? Would a trustmark be issued to an online merchant simply because that merchant used the ODR Rules? Because it abided by decisions rendered by a neutral? Would a trustmark be issued to an ODR provider because it complied with a document, to be drafted, setting out Rules and Guidelines for ODR providers?

(iv) In the absence of a global system of accreditation, how would the third party accreditor itself be regulated, if at all?

(v) How a global system of trustmarks might work alongside existing regional systems of trustmarks.

(ii) *Trustmarks sold or otherwise granted to ODR providers*

25. The primary issue for consideration in relation to trustmarks may in fact relate to their recognition value; in order to be effective, a trustmark must be recognized and valued, thus implying that the third party granting that trustmark must have a recognizable reputation. One option in that respect may be for an ODR provider to develop a reputation as a trusted and valued provider of dispute resolution services, or to, by association with (e.g.) a governmental or standards-giving body, have an inherent recognition value.

26. In that respect, where an ODR provider has, or has developed, a positive recognition value, whether by virtue of its own commercial brand or because of State or other support it receives, a merchant may wish to use the imprimatur of that provider to advertise its use of a viable online dispute resolution procedure.

D. Possible alternative mechanisms

27. In terms of creating incentives for merchants to comply with ODR decisions and/or quality standards, the Working Group may wish to consider whether alternative solutions may exist. The following examples represent a more radical and holistic approach to an online dispute resolution process, including an enforcement stage, than that previously considered by the Working Group. However experts have observed that such an approach may provide more robust incentives to merchants to comply with dispute resolution outcomes than ratings or trustmarks alone. Specifically, the Working Group may wish to consider:

(i) Enforcement mechanisms whereby a non-compliant merchant could be subject to suspension of its domain name;

(ii) How or whether a “merchant black list” might be established and maintained, in order for browsers to be able to mark a merchant as risky (by, for example, turning the URL red);

(iii) Whether it would be possible to work with marketplaces (like eBay and Amazon) or payment providers (like PayPal, or Mastercard/Visa) to suspend accounts of non-compliant merchants;

(iv) Whether a system of fines or potential of loss of membership could be set up through business associations and chambers of commerce in order to penalize merchants for non-compliance.

28. All of these “alternative” mechanisms could work in tandem with ratings or trustmark systems and/or other enforcement mechanisms.

29. However, all of these alternative mechanisms involve a third party to create the requisite incentive for compliance. The Working Group may wish to consider how and whether such third party involvement could be effected.

III. Brief overview of private enforcement mechanisms providing for an “automatic” execution of the case outcome

A. General

30. Private enforcement mechanisms that aim to provide for an automatic or self-executing outcome have several limitations when considered in the context of procedural rules agreed as between parties to a transaction.

31. Specifically, these mechanisms, and in particular chargebacks, tend to be perceived as parallel dispute resolution processes in themselves, within a system managed by a payment intermediary (such as a credit card company or bank) which has actual or de facto control over both the adjudicative process and the financial flows arising out of the transaction, or as mechanisms which in other ways rely on control of the financial resources in dispute. Indeed where such mechanisms exist in practice, they are perceived to serve a useful purpose but one that does not necessarily provide a panacea for the dispute resolution “gap” the Working Group has been mandated to address.

32. Indeed were the use of such mechanisms to be considered as part of a dispute resolution system such as the one the Working Group has been mandated to undertake, the Working Group would need to consider how such mechanisms in fact would or could be integrated into the ODR Rules in their present form, and/or work in the broader online dispute resolution framework it is devising.

33. Separately, and in addition, it is important to note that self-execution mechanisms do not amount to a “final and binding” outcome, insofar as a purchaser would still retain recourse to a court process, however unlikely he or she may be to pursue it.

34. Given the commonalities of the mechanisms by which enforcement of a decision or settlement agreement could be effected when a third party has control of the resources in dispute, this note considers chargebacks only, by way of example.

B. Chargebacks

35. Self-execution can in some instances be implemented via a “chargeback”, a process whereby a purchaser disputes a charge and consequently requests reimbursement from a payment intermediary (such as a credit card company), with that intermediary (where it has already passed on the purchased funds to the

merchant) in turn attempting reimbursement from the merchant. Under some national legislation, the purchaser must have been defrauded by the merchant in order to obtain a chargeback. In other jurisdictions, either under national law or where no legislation exists in relation to chargebacks, a cardholder may be able to dispute and cancel payment or to be credited the payment amount in instances including non-performance or defective performance by the merchant.

36. In either context (fraud or non-performance), the payment intermediary, essentially (or actually, as is the case with some card issuers, which have an arbitration committee for the purpose) serves an adjudicative role by requesting information from the purchaser regarding the reason for disputing the charge and determining whether to grant that charge. In effect, such a process binds the merchant to the dispute resolution process without binding the purchaser. Some payment intermediaries, such as Visa and Mastercard, have detailed processes for undertaking such an adjudicative function, although commentators note that much more frequent is the passing of the disputed amount back and forth between the disputing parties until one party decides no longer to pursue the reimbursement. Commentators have also noted that the credit card issuer or bank may have conflicts of interest with one or more parties to a transaction.

37. The chargeback process is governed in some countries by national legislation, a fact which may not in itself be a bar to creating a global system of chargebacks (as legislation typically tends to encourage chargebacks and provide a framework for pursuing a chargeback), but which the Working Group may wish to consider in determining how a cross-border chargeback system might be made to function.

38. Moreover, the protection offered by chargebacks is also limited to purchasers making purchases using credit cards; other forms of payment (debit cards, online banking-based Internet payments, mobile phone payments etc.) are not subject to redress via such a mechanism. This has the concurrent disadvantage, also set out above, of only permitting financial recourse within the enforcement of a dispute resolution outcome.

39. In brief, the chargeback process as it traditionally works, that is, undertaken within the framework of the credit card networks or other payment intermediaries, consists of adjudicative processes specific to those intermediaries. The payment intermediary determines whether a purchaser has a right to a chargeback. The Working Group would need to consider whether and how the roles and liabilities of a third party such as a payment intermediary could be integrated into the procedural framework it is devising.

C. Escrow accounts

40. Another system of enforcement that is prevalent in certain regions, and may provide broader scope of application than chargebacks (because it applies more broadly than just to credit card transactions) is that of escrow accounts. Under an escrow system, payment is made by the purchaser into a third party account, and after a certain time period, barring any complaints or conversely upon verification that the goods have been received as expected, money is disbursed to the merchant. The merchant also receives comfort in an escrow system that the transaction funds will be paid.

41. In the event there is a complaint, the escrow agent withholds payment until the dispute is resolved via an online dispute resolution process. The escrow agent may be a third party (referred to in an additional clause in the contract), or the ODR provider itself. An escrow agent typically is subject to national legislation and licensing rules.

42. On the one hand, a legitimate escrow service may protect a purchaser from suffering financial implications should it engage in a transaction with a fraudulent merchant. There is, as with other mechanisms set out in this note, also a certain potential for fraud in online escrow systems themselves, insofar as rogue merchants may set up false accounts that resemble legitimate escrow services. Various online auction sites and consumer bodies have set up guidelines to help consumers identify potentially fraudulent escrow services.

IV. Conclusion

43. In relation to mechanisms intended to create incentives for merchants to comply with decisions or settlement agreements, the Working Group may wish to consider more radical and/or holistic approaches in respect of the financial or other incentives that might be required to prevent non-compliance.

44. In relation to mechanisms intended to provide for an automatic enforcement functions, chargebacks, while a useful model, may be limited in their utility given that they apply only to payments made by credit card, and moreover are generally perceived as a parallel process within the context of credit card purchases, rather than necessarily a mechanism that could be appended to the end of a discrete resolution process. The Working Group may wish to consider whether the ODR framework the subject of its work could or ought to be modified to accommodate or work alongside such mechanisms.

45. In relation to all possible mechanisms set out above, the Working Group may wish to consider how the framework for online dispute resolution might best engage with internet intermediaries, payment companies and banks — in other words, entities with the market power to create incentives for merchants — in order to formulate a system of incentivisation or enforcement that could work alongside the ODR Rules it is devising.