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Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules (Track I)

Addendum

Note by the Secretariat

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III. Addressing differences between the views underlying the proposals for Tracks I and II of the Rules and streaming purchasers onto one or other Track

A. General remarks

1. At its thirtieth session, the Working Group considered four main proposals that would address, inter alia, the manner in which purchasers under the Rules would be directed to the applicable Track of the Rules for resolution of any claim thereunder (“streaming”). Document A/CN.9/WG.III/WP.133 sets out the proposals themselves, as they would be reflected in a draft of Track I of the Rules.
2. The Working Group may consider that a proposal can be complete — and so can be the basis for the Rules — only insofar as it is clear when streaming will occur, which person or system designates the relevant track, and upon what basis that designation is made.
3. In the light of the fundamental differences between States that allow binding pre-dispute agreements to arbitrate and those that do not, and the difficulty in assessing four proposals for streaming simultaneously, this Note seeks, therefore, to clarify the extent to which, and how, each proposal addresses streaming. This Note then addresses certain issues of implementation.¹
4. All four proposals envisage an Annex to the Rules or a similar listing to identify jurisdictions that do not permit consumers to agree to binding arbitration before a dispute arises. Although only the first proposal envisages a formal Annex to the Rules, the jurisdictions concerned are referred to in the remainder of this Note using the shorthand term “Annex jurisdictions”. This term is not, however, intended to imply any particular form of listing or Annex and is used for convenience only.
5. This Note summarizes the Secretariat’s understanding of how each proposal addresses streaming at the following stages of a transaction and/or dispute:
 - (a) At the time of, and as part of, the transaction;
 - (b) At the time a dispute arises and/or at the final adjudication stage.
6. The Secretariat’s understanding of the four proposals is based on the Working Group’s deliberations at its thirtieth session. Those deliberations address streaming through a mechanism indicating whether and when Track I might apply to any dispute, based on proposed language for Article 1, paragraph (1)(b), and certain other provisions of the Rules as set out in A/CN.9/WG.III/WP.133. The Working Group may wish to consider as an initial step whether the Secretariat’s understanding of the proposals is correct.

¹ Other issues are denominated using square brackets in, and footnotes to, the proposals themselves in A/CN.9/WG.III/WP.133. Issues of implementation not addressed in this Note, and to be discussed by the Working Group at a future time, include the enforcement of final awards.

B. Streaming: determination of the applicable Track of the Rules

1. At the time of, and as part of, the transaction

(a) The first proposal

7. The first proposal provides that the merchant's online purchase system automatically generates a dispute resolution clause, to the effect that any dispute will be settled under the Rules, and more particularly under which Track of the Rules. If a purchaser is a consumer and provides a billing and/or shipping address from an Annex jurisdiction, the system generates a dispute resolution clause mandating Track II of the Rules. For all other purchasers, the system generates a dispute resolution clause mandating Track I of the Rules.

8. Thus the first proposal determines the applicable Track of the Rules at the transaction stage, assuming that an Annex is in place and that there is a mechanism for identifying whether a purchaser is a "consumer". However, the following questions are outstanding:

(a) How are States to categorize their national consumer protection law and to advise businesses on the implications of the Annex (see, further, para. 61 of A/CN.9/827)?

(b) Who is responsible for the determination of the status of a purchaser, i.e. whether or not he or she is a "consumer", and how are errors in ascribing status to be addressed?

(c) Which address or addresses will be treated as determinative of jurisdiction? and

(d) Is the designation of Track II binding — that is, can a consumer from an Annex jurisdiction elect, at the time of the dispute or later, that the final adjudication be under Track I of the Rules? How might a transfer between Tracks be effected, if so?²

(b) The second proposal

9. The second proposal contemplates that the merchant issues a dispute resolution clause to the effect that any dispute will be settled under Track I of the Rules. However, the dispute clause is accompanied by a footnote that notes that such a clause and any arbitral award thereunder may not be enforceable against consumers located in Annex jurisdictions.

10. Thus the second proposal does not finally designate the applicable Track for all purchasers at the transaction stage.

(c) The third proposal

11. The third proposal contemplates that the merchant issues a dispute resolution clause to the effect that any dispute will be settled under the Rules, but whether or not it will designate the applicable Track is left in square brackets.

² See, further, paragraph 17 of A/CN.9/WG.III/WP.123.

12. It is therefore unclear whether this proposal does or does not determine the applicable Track of the Rules at this stage.

(d) The fourth proposal

13. The fourth proposal contemplates that the merchant issues a dispute resolution clause that identifies whether any dispute will be settled under Track I or Track II of the Rules. However, the dispute clause is accompanied by a footnote that notes that any designation of Track I of the Rules, and any arbitral award thereunder, may not be enforceable against consumers located in certain jurisdictions to be identified on a website listing.

14. Thus the fourth proposal (similarly to the second proposal) does not finally designate the applicable Track at this stage for all purchasers.

2. At the time the dispute arises and/or at the final adjudication stage

(a) The first proposal

15. The applicable track having been determined at the transaction stage, the first proposal does not need to answer this question. However, the questions set out in paragraph 8 above remain outstanding, in that they allow for the possibility that a purchaser may need or may wish to be transferred onto another Track, in the case of error in ascribing address or the status of a consumer, or if a consumer from an Annex jurisdiction agrees to binding arbitration when the dispute arises.

(b) The second proposal

16. The second proposal contemplates that the final designation will be based on an agreement by a consumer in an Annex jurisdiction to binding arbitration made at the time of dispute if necessary. In other words, whether an earlier designation of Track I is to stand under this approach requires an assessment of whether the purchaser is or is not a consumer from an Annex jurisdiction.

17. The proponents note that this step would require guidance to ODR administrators regarding how to assess a purchaser's location and whether or not he or she is a consumer, relying on the billing and/or shipping address and other information provided by that purchaser.

18. It has also been observed that, in practice, the ODR administrator would need to consult a listing of jurisdictions to assess whether the purchaser concerned could have agreed to binding arbitration before a dispute has arisen. The proposal does not contemplate an Annex per se. If the purchaser is from an Annex jurisdiction, and is a consumer, an offer of binding arbitration at this stage would need to be made and accepted for binding arbitration to be a reliable final adjudication mechanism and if any award is to be capable of enforcement against the purchaser.³ In default of an agreement between the parties as to the final adjudication mechanism, the ODR administrator would need to advise the merchant that any award is not reliable in this sense, and/or select Track II if a purchaser is a consumer and from an Annex jurisdiction.

³ This Note does not address the requirements for such an award in fact to be enforceable against a consumer, nor what form enforcement might take.

19. Thus the ODR administrator takes over the function of an Annex and is required to assess whether purchasers are consumers from Annex jurisdictions. That assessment both requires an Annex or similar listing, and leaves uncertainty regarding which Track will in fact apply, and is also open to challenge should the ODR Administrator err in its assessment.

20. Thus the second proposal relies on information provided by the purchaser and the use of an Annex or similar listing, and to that extent does not designate with certainty the applicable Track for all purchasers at the time the dispute arises.

(c) The third proposal

21. The third proposal contemplates a streaming mechanism whereby the final designation is undertaken at the beginning of the final adjudication stage (using the mechanism proposed in draft article 6 of the Rules). In other respects, the practical steps involved are as the second proposal (and there is also an option for the determination to be made earlier in the process — i.e. at the time a dispute arises). Again, the proposal does not contemplate an Annex per se.

22. As in the second proposal, the ODR administrator takes over the function of an Annex and is required to assess whether purchasers are consumers from Annex jurisdictions, and make appropriate recommendations.

23. Accordingly, the third proposal, as the second proposal, relies on information provided by the purchaser and the use of an Annex or similar listing, and to that extent does not designate with certainty the applicable Track for all purchasers at the time of final adjudication.

(d) The fourth proposal

24. The fourth proposal involves practical steps that are essentially the same as the second proposal, though the notion of an Annex is replaced by an informational listing on a designated website.

25. As for the third proposal, therefore, under the fourth proposal the ODR administrator takes over the function of an Annex and is required to assess whether purchasers are consumers from Annex jurisdictions, and make appropriate recommendations.

26. Accordingly, the fourth proposal, as the second and third proposals, relies on information provided by the purchaser and the use of an Annex or similar listing, and to that extent does not designate with certainty the applicable Track for all purchasers at the time the dispute arises. Indeed, the fourth proposal envisages that the list of jurisdictions that would be informational, non-exhaustive and non-binding in nature, and therefore the uncertainties and risk of challenge referred to above may be greater under this proposal.

C. Issues for deliberation by the Working Group

27. As all the proposals rely on an Annex or similar listing, the first issue that the Working Group may wish to consider is the potential requirements for such an Annex or equivalent listing.

28. The Working Group may recall that its deliberations on the notion of an Annex at the thirtieth session contemplated that the UNCITRAL Secretariat or other United Nations body such as the General Assembly would invite Member States to opt in or out of being listed in the Annex, and would repeat the invitation annually such that the Annex would remain reasonably current. As there is no secretariat to the General Assembly available to perform such a function, the alternative suggestion by the Working Group — that the UNCITRAL Secretariat take over this function — has been considered.

29. In order for the UNCITRAL Secretariat to consider discharging the function, (a) an explicit mandate would be needed from the Commission; (b) a consideration of possible liabilities and how they might be mitigated through privileges and immunities applying to the United Nations Secretariat would be necessary and (c) specific additional resources for the UNCITRAL Secretariat would need to be provided. For a discussion of similar issues regarding points (a) and (c) arising in Working Group II and regarding the establishment of a Transparency Registry, see the Reports of the Commission's forty-sixth and forty-seventh sessions (A/68/17, paras. 79-98 and A/69/17, paras. 107-110 respectively).⁴ For a list of some of the issues that the Working Group or Commission might wish to consider in the context of a mandate and possible liabilities, some of which are also referred to above, see A/CN.9/WG.III/WP.123, paragraph 17.

30. Similar questions of resources and liabilities might arise if any body other than the Secretariat were to host an Annex (or similar listing, such as on a website), and as regards the ODR administrators' determinations based on them and information provided by purchasers.

31. Further issues for consideration relate to the designation of the status of the consumer, and how consumers might be prevented from being streamed onto the wrong Track of the Rules (see, further, subparas. 8(b) and 8(c) above and para. 17 of A/CN.9/WG.III/WP.123).

32. The proposals contemplate that ODR systems based on the Rules would operate in a clearly-defined way, but that the Rules are a non-binding set of recommendations. The Working Group may also wish to consider, therefore, how certain consumer protection mechanisms envisaged can be ensured through the use of the Rules.

33. Finally, and given the uncertainties noted above as to the applicable Track of the Rules in each of the proposals, the Working Group may wish to consider the provision of additional guidance to merchants regarding the mitigation of these uncertainties.

⁴ Available at www.uncitral.org/uncitral/en/commission/sessions/46th.html and www.uncitral.org/uncitral/en/commission/sessions/47th.html.