



February 24, 2012

Via email: ddallair@justice.gc.ca

Dominique D'Allaire
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Justice Canada
284 Wellington St.
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Dear Mr. D'Allaire:

Re: UNCITRAL Online Dispute Resolution Project

I am writing on behalf of the National Alternative Dispute Resolution Section of the Canadian Bar Association (CBA Section) in response to your letter dated February 6, 2012 inviting comments about online dispute resolution for cross-border transactions. In particular, your office has requested input on *Principles for Online Dispute Resolution Providers and Neutrals*, which the Canadian government wishes to submit to the United Nations Commission on International Trade Law (UNCITRAL) Working Group III on Online Dispute Resolution (ODR).

The ADR Section consists of dispute resolution practitioners from across Canada, including counsel and neutrals. We comment on the 10 specific principles set out in the *Principles for Online Dispute Resolution Providers and Neutrals* attached to your letter.

An ongoing concern of the CBA is the need for better access to justice services for all Canadians. The CBA has produced several studies and reports, notably the 1996 *Systems of Civil Justice Task Force Report*, that identify the need to cut cost, delay and complexity in the justice system. That report highlighted the importance of multiple dispute resolution options in the justice system. ODR is one option for enhancing justice services and we anticipate that it could particularly benefit Canadians who live in rural and remote areas.

Principle 1 – Maintaining a roster of competent neutrals

The CBA Section agrees that maintaining a roster of competent neutrals is essential for the effective operation of ODR, particularly in the cross-border context. Consumers of ODR must have confidence that the neutrals are competent, independent and impartial and are also seen to be so. Carefully developed criteria for establishing this roster will be critical.

Principle 1(4), requiring the ODR provider to put processes in place to deal with complaints concerning neutrals, such as disqualification of neutrals on the basis of a demonstrated lack of

required skills or expertise, engages particularly complex and difficult considerations. Unless the ODR provider establishes clear rules, including the necessary jurisdictional framework for doing so, it may be difficult for the ODR provider to administer the complaints process. The hallmark of international dispute resolution is the confluence of different, sometimes conflicting cultural legal backgrounds. What may be acceptable in one jurisdiction may not be in another. Care must be taken to ensure that the complaints process is transparent and fair. Indeed, footnote one of the consultation document, explaining that an arms length review body is currently not available, is illustrative of the issue.

Principle 2 – Independence

Party autonomy should permit the selection of a neutral by mutual agreement among the parties. Alternatively, where no agreement exists, the ODR provider should have the authority to appoint the neutral, chosen at random from a list of neutrals.¹

Principle 2(5) as drafted appropriately reflects our view of independence. In contrast, we believe the suggested alternative language may result in institutional bias that could undermine the integrity of the ODR process.

Principle 3 – Disclosure of terms of service and confidentiality

We agree with the proposed principles. However, the principles should also clarify that the parties indicate that the ODR provider and the neutrals are not compellable as witnesses in any subsequent legal proceedings, in any jurisdiction, and any information exchanged during or in connection with the ODR process is also not compellable.

Principle 4 – Establishing identity of the parties

It is essential to the proper functioning of the ODR process that each party know the other party's identity.

Principle 5 – System reliability and security

While we generally agree with this principle, its implementation could give rise to potential liability on the part of the ODR provider. Accordingly, it would be appropriate for ODR providers to be permitted to insulate themselves from liability in the event of system reliability or security breaches beyond the control of the ODR provider.

Principle 6 – Record and publication of decisions

Among the hallmarks of commercial arbitration are privacy and confidentiality. In our experience, maintaining confidentiality and privacy will result in greater use of ODR procedures. For this reason we question why decisions and names of parties should be published, except where the party is a consumer. On the other hand, the publication of statistical information would be useful. The publication of redacted forms of decisions (i.e. with names and other proprietary information not made public) would also be helpful from a precedential point of view.

Principle 7 – Sensitivity to language and culture

Sensitivity to language and culture is important. We agree with principle 7(2), that an “ODR provider shall not actively solicit clients where the clients’ linguistic or cultural needs cannot be accommodated.” Further, the alternative proposal on the languages in which the ODR provider offers its services should be expressly incorporated as a third sub-principle.

¹ We question whether there is a typographical error in the second sentence of footnote 2: the word “which” may have been included in error.

Principle 8 – Fees and costs

In keeping with most international commercial arbitrations, the CBA Section believes that there should be more flexibility on the issue of fees and costs. Specifically, with arbitrations, the neutrals should, subject to the parties’ agreement to the contrary, have the jurisdiction to make awards with respect to reasonable costs.

Principle 9 – Enforcement

We have no comments.

Principle 10 – Redress

We agree with the proposition that an ODR provider not be permitted to propose waiving consumer rights or legal resources afforded by the domestic law of the party.

Conclusion

We thank you for the opportunity to participate in this process and appreciate the work that has been undertaken in connection with this project to date. We trust that our comments will be helpful. The CBA Section would be pleased to be consulted again in future and to respond to any questions or concerns about the suggestions in our letter.

Yours truly,

(original signed by Gaylene Schellenberg for Ellen C. Desmond)

Ellen C. Desmond
Chair, National Alternative Dispute Resolution Section