



June 8, 2012

Via email: manon.dostie@justice.gc.ca

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284 Wellington
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Dear Ms. Dostie

Re: UNCITRAL ODR Consultation

The National Section on International Law of the Canadian Bar Association (CBA Section) thanks the Department of Justice Canada for the opportunity to provide comment on the United Nations Commission on International Trade Law (UNCITRAL)'s work in preparing a framework for a global system of online dispute resolution (ODR).

The CBA is a national association of over 37,000 lawyers, notaries, students and law teachers. It has a mandate to promote improvements in the law and the administration of justice. The CBA's National Section on International Law (the CBA Section) comprises lawyers whose practices embrace all aspects of international law.

Generally, the CBA Section supports UNCITRAL's intention to provide ODR. This will help avoid the development of inconsistent on-line dispute resolution systems on cross-border commercial transactions. The CBA Section further supports the preparation of Procedural Rules and accompanying Annexes, such as the guidelines for ODR neutrals, to facilitate the fair and consistent provision of on-line dispute resolution for low-cost, high- volume commercial transactions at the international level.

The CBA Section would like to offer the following specific constructive comments on the documents:

1. Annotated provisional agenda

- Concerns have been expressed in Canada and elsewhere about consumer rights and protections and the potential implications of ODR proceedings on domestic consumer protection legislation. The CBA Section welcomes the Commission's direction to the

Working Group to further consider and deliberate on how this On-line Dispute Resolution process would impact on consumer protection.

2. ODR for cross-border electronic commerce transactions: draft procedural rules

- Draft preamble: We suggest that "low-value" and "cross-border" be expressly defined. Transparency and agreement on these terms as they inform the applicability of the proposed on-line dispute process will encourage participation in, and response to, decisions under on-line dispute resolution processes at the international level. Confidence in, and compliance with, decision-making at the international level is generally proportional to the overall certainty and predictability of procedures and outcomes based on the process. Definitions such as "low-value" and "cross-border" are fundamental and will provide some of this certainty.
- Draft Article 1: There should be opportunities for parties to engage in the on-line dispute resolution project both pre- and post- dispute. A clear written agreement by the parties, enforceable in the chosen legal jurisdiction, should be a prerequisite. For consumers who come in after a pre-dispute agreement has been signed, other avenues of redress should be allowed. Written agreement to participate should provide that the final decision of the neutral in the process should be binding. Other future and alternative recourse should be precluded.
- Draft Article 3: For electronic communications and "receipt" of communications, best practices used in other successful on-line dispute resolution organizations and companies throughout the world should be researched. Extensive consultation should be undertaken with experts to ensure the best technology and procedures for UNCITRAL's ODR process.

3. ODR for cross-border electronic commerce transactions: draft procedural rules – Addendum

- Draft Article 6: More information should be provided as to how the "list of qualified neutrals" will be determined by the ODR providers. Will the Guidelines and minimum requirements for neutrals now being prepared by the Working Group be the only input by UNCITRAL? Will laws and regulations of the jurisdiction in which the ODR provider is located be the only other governing factor?

4. ODR for cross-border electronic commerce transactions: further issues for consideration in the conception of a global ODR framework (Note by the Secretariat)

- The document says on "the Guidelines and minimum requirements for neutrals" that:

The document may specify a system of accreditation and re-accreditation for neutrals, possibly with two phases: an initial phase focusing on relevant experience of the neutral and a second involving periodic review taking account of feedback from ODR users.

The CBA Section recommends that the UNCITRAL accreditation process not be mandatory. It is not clear from the documents whether this accreditation process will be compulsory for all countries that sign on to be part of this ODR process. If a country that signs on to use the UNCITRAL ODR process has its own accreditation processes in place for neutrals and UNCITRAL finds this accreditation process to comply with the basic principles and requirements provided in its guidelines, that country should be allowed to opt out.

- The CBA Section welcomes extensive protection of consumers throughout UNCITRAL's ODR process. However, we have concerns about what "core principles" of consumer protection law would include. We look forward to the opportunity to review consumer protection principles or guidelines that UNCITRAL proposes to produce for its ODR process.
5. Analysis and Proposal for Incorporation of Substantive Principles for ODR Claims and Relief into Article 4 of the Draft Procedural Rules [Note submitted by the Center for International Legal Education (CILE)]
- We generally agree with the list of core principles which will underlie the Global ODR System.

The CBA Section looks forward to the opportunity to comment on the Annex to be produced by the Working Group on "Cross-border enforcement mechanism".

In sum, the CBA Section has concerns about the enforceability of decisions that would arise from UNCITRAL's ODR process, in particular for consumers. Thank you again for keeping the CBA Section apprised of the developments in the creation of UNCITRAL's ODR process and for the opportunity to provide feedback.

Yours truly,

(original signed by Rebecca Bromwich for Charlotte Janssen)

Charlotte Janssen
Chair, National Section on International Law