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Possible future work on online dispute resolution in cross-border electronic commerce transactions

Note by the Secretariat

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*This document is submitted later than the required ten weeks prior to the start of the meeting because of the need to complete consultations.

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I. Introduction

1. At its thirty-third session (New York, 12 June - 7 July 2000), the Commission held a preliminary exchange of views on proposals to include online dispute resolution in its future work programme.¹ At that session, it was generally agreed that further work could be undertaken to determine whether specific rules were needed to facilitate the increased use of online dispute settlement mechanisms. In that context, it was suggested that special attention might be given to the ways in which dispute settlement techniques such as arbitration and conciliation might be made available to both commercial parties and consumers. It was widely felt that the use of electronic commerce tended to blur the distinction between consumers and commercial parties. It was also recalled that in a number of countries, the use of arbitration for the settlement of consumer disputes was restricted for reasons involving public policy considerations and might not easily lend itself to harmonization by international organizations. At its thirty-fourth² (Vienna, 25 June - 13 July 2001) and thirty-fifth³ (New York, 17 - 28 June 2002) sessions, the Commission decided that future work on electronic commerce would include further research and studies on the question of online dispute resolution and that Working Group II (Arbitration and Conciliation) would cooperate with Working Group IV (Electronic Commerce) with respect to possible future work in that area.

2. At its thirty-eighth session (New York, 12 - 23 March 2001), Working Group IV (Electronic commerce) discussed the possibility of pursuing further work to determine whether specific rules were needed to respond to the increased need for online dispute settlements.⁴ At its fortieth (Vienna, 14 - 18 October 2002) to forty-second (Vienna, 17 - 21 November 2003) sessions, the Working Group recommended to the Commission that the Secretariat be entrusted with the preparation of the necessary studies concerning the UNCITRAL Model Law on International Commercial Arbitration as well as the UNCITRAL Arbitration Rules to assess their appropriateness for meeting the specific needs of online arbitration.⁵

3. At its thirty-second session (Vienna, 20 - 31 March 2000), Working Group II (Arbitration and Conciliation) took note of the suggestion that it would be useful to review the implications of online arbitrations (i.e. arbitrations in which significant parts or even all of arbitral proceedings were conducted by using electronic means of communication).⁶ In addition, at its forty-first (Vienna, 13 - 17 September 2004) to its fiftieth (New York, 9 - 13 February 2009) sessions, the Working Group noted the possible inclusion of issues raised by online dispute resolution in its future work programme.⁷

¹ *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 (A/55/17)*, para. 385.

² *Ibid.*, *Fifty-sixth Session, Supplement No. 17 (A/56/17)*, paras. 287 and 311.

³ *Ibid.*, *Fifty-seventh Session, Supplement No. 17 (A/57/17)*, paras. 180 and 205.

⁴ A/CN.9/484, para. 9.

⁵ A/CN.9/484, para. 134; A/CN.9/527, para. 3; and A/CN.9/546, para. 3.

⁶ A/CN.9/468, para. 113.

⁷ A/CN.9/569, para. 80; A/CN.9/573 para. 100; A/CN.9/592, para. 90; A/CN.9/614, para. 5; A/CN.9/641, para. 5; A/CN.9/665, para. 5; and A/CN.9/669, para. 5.

4. At its thirty-ninth (New York, 19 June - 7 July 2006) to forty-first (New York, 16 June-3 July 2008) sessions, the Commission took note of suggestions that the issue of online dispute resolution should be maintained as an item for future work.⁸

5. At its forty-second session (Vienna, 29 June - 17 July 2009), the Commission considered future work in the field of electronic commerce. At that session, the Commission had before it a proposal by the United States of America on online dispute resolution entitled "Possible future work on electronic commerce" (A/CN.9/681/Add.2). In that proposal, it was recommended that a study be prepared on possible future work on the subject of online dispute resolution in cross-border electronic commerce transactions.⁹ The proposal further recommended that the study should address the types of e-commerce disputes that may be solved by online dispute resolution systems, the appropriateness of drafting procedural rules for online dispute resolution, the possibility or desirability to maintain a single database of certified online dispute resolution providers, and the issue of enforcement of awards made through the online dispute resolution process under the relevant international conventions.¹⁰ The Commission agreed on the importance of the proposals relating to future work in the field of online dispute resolution to promote electronic commerce, for the reasons expressed in the proposal submitted to the Commission.¹¹ It was suggested that further studies should be undertaken to identify the different groups interested in possible future standards, including consumers. It was noted in that respect that the variety of rules on consumer protection made it particularly difficult to achieve harmonization in that field. Divergent views were expressed on the desirability of a discussion of the issue of enforcement of awards rendered in online arbitral proceedings. It was explained that practical difficulties arose from the fact that the disputes settled by such awards generally involved small monetary amounts, especially in consumer-related disputes, and from the costs of cross-border enforcement under existing instruments.¹² After discussion, the Commission requested the Secretariat to prepare studies on the basis of the proposal contained in the document mentioned above with a view to reconsidering the matter at a future session. It further requested the Secretariat to hold a colloquium on that issue, resources permitting.¹³

6. Pursuant to that request, the Secretariat organized a colloquium in cooperation with the Pace Law School Institute of International Commercial Law and the Penn State Dickinson School of Law.¹⁴ The speakers and panellists at the Colloquium consisted of a selection of experts from each of the practice areas examined and the Colloquium was attended by leading experts from government, private sector, academia and the non-profit sector from all parts of the world.

7. This note contains a summary of the Colloquium proceedings and of the key issues that were identified. The first part contains a presentation of the evolution of

⁸ *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17 (A/61/17)*, paras. 183 and 186-187; *Sixty-second Session, Supplement No. 17 (A/62/17 (Part I))*, para. 177; and *Sixty-third Session, Supplement No. 17 (A/63/17)*, para. 316.

⁹ *Ibid.*, *Sixty-fourth Session, Supplement No. 17 (A/64/17)*, para. 338.

¹⁰ A/CN.9/681/Add.2.

¹¹ *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17 (A/64/17)*, para. 341.

¹² *Ibid.*, para. 342.

¹³ *Ibid.*, para. 343.

¹⁴ The Colloquium, entitled "A Fresh Look at Online Dispute Resolution and Global E-Commerce: Toward a Practical and Fair Redress System for the 21st Century Trader (Consumer and Merchant)" was held in Vienna, on 29 and 30 March 2010.

electronic commerce over the last decade, and of some international, regional and domestic initiatives developed to deal with resolution of disputes originating in business-to-business and business-to-consumer transactions. The second part outlines questions and issues raised regarding features of online dispute settlement mechanisms and the prospect of formulating a set of rules to support the creation of a viable global online dispute resolution system to handle small value, large volume claims.

II. Electronic commerce and initiatives undertaken with respect to online dispute resolution

A. Technology and its impact on business-to-business and business-to-consumer transactions

8. Business-to-business and business-to-consumer electronic commerce has rapidly developed over the past decade, based largely on the exponential diffusion of the internet, increased broadband access and the rise of mobile commerce throughout the world.

9. One of the main drivers underlying e-commerce growth is the rising number of individuals connected to the internet. A little over one fifth of the world's population used the internet in 2008, compared to 2 to 5% in the late 1990s.¹⁵ Studies also revealed that acceptance of the internet as a trading platform is growing.¹⁶ Data on the magnitude of e-commerce trade are unfortunately not available for many countries and where data do exist, they are often not comparable. Available information from national authorities suggests that business-to-consumer electronic commerce is expanding rapidly but that its role remains relatively low, in particular when compared to traditional retail and business-to-business electronic commerce.¹⁷

10. The United Nations Commission on Trade and Development (UNCTAD) provided an assessment of the diffusion of key information and communication technologies (ICT) applications between 2003 and 2008, based on the Information Economy Report 2009.¹⁸ That report noted some very positive developments, which underscored the considerable opportunities that ICT use represented.¹⁹ UNCTAD analysis also showed that the narrowing of the gap between people with effective access to digital and information technology and those with very limited or no access at all ("digital divide") remained a key development challenge, in particular "the broadband gap".

11. Regarding global ICT development between 1997 and 2008, UNCTAD reported that the development of the use of mobile phones had been far more

¹⁵ OECD, "Empowering e-consumers, strengthening consumer protection in the internet economy", 8-12 December 2009, DSTI/CP(2009)20/FINAL, para. 13.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ UNCTAD, "Information Economy Report 2009: Trends and Outlook in Turbulent Times" October 2009, United Nations publication, Sales No. E.09.II.D.18.

¹⁹ There were an estimated 1.4 billion internet users around the world at the end of 2008 and of 1.6 billion people in 2009. China hosted the largest number of users with 298 million, followed by the United States with 191 million and Japan with 88 million. Africa counts 53 million users. While more than half of the population in developed countries has access to the internet, the corresponding share is on average 15-17 per cent in developing countries.

significant than that of any other technologies. In the past couple of years, mobile telephony emerged as the most important ICT for low-income countries, and as the principal gateway to increased ICT access and use. This growth appeared to be continuing.²⁰ Mobile phones were being used in novel ways, with important implications for doing business in developing countries. For instance, they were used to make banking transactions, or to obtain market information. African countries were pioneering mobile banking and other electronic transaction services involving the use of mobile phones. In Kenya, South Africa, Tanzania and Zambia, for example, cell phones enabled companies and individuals to make payments, transfers and pre-paid purchases without a bank account. For small companies in low-income countries, the mobile phone has overtaken computers as the most important ICT tool.

12. The growth of traditional computer networks globally as well as the development of mobile commerce has also enabled consumers to purchase goods and services from foreign businesses.²¹ Participants to the Colloquium shared the view that consumers were becoming a major part of international commercial transactions.

13. The view was expressed at the Colloquium that future expansion of business-to-business and business-to-consumer electronic commerce would depend in large part on the level of confidence of users when making online transactions.²² Participants to the Colloquium shared the view that an online redress system for high volume low value claims was essential to the continued success and growth of both business-to-business and business-to-consumer electronic commerce.

B. Current legal initiatives regarding online dispute resolution

1. Instruments adopted by the Organization for Economic Co-operation and Development (OECD)

14. The work of the OECD Committee on Consumer Policy (“CCP”) over the past ten years addressed the issues of consumer disputes through the development of the 1999 E-commerce Guidelines,²³ a roundtable and report (2002)²⁴ on payment cardholder protections, the Cross-border Fraud Guidelines (2003)²⁵ and a workshop and report in 2005 on alternative dispute resolution,²⁶ leading to the development of a Recommendation on Consumer Dispute Resolution and Redress in 2007.²⁷ The Recommendation covers mechanisms for (i) resolving consumer disputes and (ii)

²⁰ Between 2003 and 2008, according to the International Communication Union (ITU) estimates, there were some 4.6 billion mobile subscriptions at the end of 2009, up from only 1.4 billion in 2003.

²¹ OECD Conference Report, Empowering e-commerce consumers, December 8-10, 2009, DSTI/CP(2009)20/FINAL, paras. 6-17.

²² Ibid., para. 20.

²³ Guidelines for Consumer Protection in the Context of Electronic Commerce (approved by the OECD Council on 9 December 1999).

²⁴ Report on Consumer Protections for Payment Cardholders, OECD Digital Economy Papers, No. 64, OECD Directorate for Science, Technology and Industry (2002).

²⁵ The OECD Guidelines for protecting Consumers from Fraudulent and Deceptive Commercial Practices across Borders: Recommendation adopted by the OECD Council on 11 June 2003.

²⁶ The OECD Workshop on Consumer Dispute Resolution and Redress in the Global Marketplace held in Washington D.C. on 19-20 April 2005. Report published in 2006.

²⁷ OECD Recommendation on Consumer Dispute Resolution and Redress adopted by the OECD Council on 12 July 2007. Recommendation developed by the OECD Committee on Consumer Policy (CCP).

facilitating redress for economic harm resulting from business-to-consumer transactions (online and offline) for goods and services. It identifies the different categories of mechanisms which should be made available to consumers at domestic and cross-border levels such as individual actions (alternative dispute resolution, small claims court procedures); collective actions (private collective actions, actions by a consumer organisation on behalf of a group of consumers, actions by a government agency on behalf of a group of consumers); and government obtained monetary redress. In 2009, the CCP launched a review of the 1999 E-commerce Guidelines with the intent to commence work to update the Guidelines, which may entail the review of related instruments.

2. Initiatives undertaken by regional inter-governmental organizations

European Union

15. Participants to the Colloquium mentioned that, despite the improved legal framework resulting from the adoption of a number of directives in the field of consumer protection and electronic commerce,²⁸ the remaining differences in the European Union (EU) between the various national regulatory frameworks, in particular consumer protection rules, required that e-shops, irrespective of their location, whether inside or outside the EU, comply with varying national sets of consumer protection rules of the EU member States. It was also mentioned that the European Commission maintained a central database of alternative dispute resolution bodies for consumer complaints, which were considered to be in conformity with the European Commission's Recommendations on Dispute Resolution.²⁹ According to a study prepared by the European Consumer Centres Network (ECC-Net),³⁰ published in December 2009, approximately 12,000 cross-border complaints have been filed each year for the past three years within ECC-NET structure, out of which less than 500 resulted in alternative dispute settlement.

16. Some regulatory options for furthering development of European consumer and contract laws, including online dispute resolution, were mentioned. One of the most feasible, it was said, would be an optional instrument for resolution of business-to-consumer transactions (referred to as the "Blue Button"). The proposed blue button online dispute resolution system would not be applicable automatically. Adoption of this procedure would be made by party agreement. For instance, a seller could display on the e-shop website an icon indicating that the client (whether consumer or otherwise) could agree by clicking on the "Blue Button" to make the substantive and procedural legal principles contained in the optional instrument applicable to the transaction concluded between the parties. Participants to the Colloquium explained that adoption of this online procedure would facilitate expeditious and economical resolution of disputes based on the agreement of the

²⁸ This includes, *inter alia*, Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ("Directive on electronic commerce") (OJ L 178, 17.7.2000, p. 1–16); Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 on unfair business-to-consumer commercial practices in the internal market (OJ L 149, 11.6.2005, p. 22–39); and Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ L 144, 4.6.1997, p. 19–27).

²⁹ Available at http://ec.europa.eu/consumers/redress_cons/adr_en.htm.

³⁰ ECC-Net is an EU-wide network co-sponsored by the European Commission and the Member States. It is made up of 29 centres, one in each of the 27 EU Member States and also in Iceland and Norway.

parties and thereby eliminate the need to resolve difficult problems such as those pertaining to jurisdiction and applicable law.

17. Another option, which was proposed as an alternative to online dispute resolution, would be the adoption of a simplified fast-track procedure, similar to that captured in Regulation (EC) No. 861/2007 establishing a European Small Claims Procedure.

The Organisation of American States (OAS)

18. Several private international law initiatives relating to consumer protection are currently being considered by the OAS through the Inter-American Specialized Conference on Private International Law. Those initiatives include a proposal for an Inter-American convention on the law applicable to certain contracts and consumer relations as well as a proposal for a model law on jurisdiction and conflict of laws rules in consumer contracts. Both proposals provide that e-commerce disputes should be litigated in the forum of the consumer.³¹ A third proposal has been submitted for a state-sponsored initiative to resolve cross-border electronic commerce consumer contract disputes for the sale of goods and services (referred to below as the “initiative”). That initiative was described and discussed in detail during the Colloquium. The initiative would create a multi-state electronic system to provide negotiation, facilitated settlement, and arbitration for certain cross-border consumer contract claims on the basis of a cooperative framework agreement and model rules. Under this initiative, a consumer/buyer would be able to file a cross-border complaint online against a registered vendor in another participating State. During the negotiation phase, the buyer and vendor would be allowed to exchange information and proposals, and negotiate a binding settlement, through electronic means. If an amicable settlement was not reached by this means, the case could then be brought to the arbitration phase and a qualified online arbitrator would be appointed by a government-approved authority where the vendor is located to evaluate the case and either conduct a facilitated settlement or issue a binding award. The decision would be rendered by the online arbitrator based on the parties’ submissions and the decision is final and binding.³²

The African Union and African regional organizations

19. The African Union held a summit in 2010 on information technology, and participants to the Colloquium mentioned that a Convention on digital transactions was in the process of being drafted and should be adopted before 2012.

³¹ Proposals by the Member States for the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII) - Topic I – Consumer Protection (CP/CAJP – 2652/08 and CP/CAJP – 2652/08 add.1 to add.4).

³² The initiative is composed of several actors including the national consumer authorities of the buyer and the vendor, national authorities and the central clearinghouse. The national authorities and the central clearinghouse maintain a single database of certified online dispute resolution (ODR) providers that are used to arbitrate a case in order to ensure independence and impartiality. All communication among the actors is in electronic form and is centralized by the central clearinghouse. The central clearinghouse manages the process and acts as the central focal point for communication among the parties. The national consumer authorities, national authorities and the central clearinghouse oversee the communication of parties, examine the effectiveness of the system and deal with communications in real time. The initiative attempts to simplify enforcement issues by providing for ODR where the vendor is located. The vendor opts-in to the system with their national administrators where they do business. Each national consumer authority or national authority where the vendor is located selects the online ODR provider, and the seat of arbitration for the process is the vendor’s State. In the event of non-compliance, the award may be enforced by the national consumer authority or national administrator in the vendor’s home country by taking direct enforcement action, requesting assistance from payment networks, or referring the case to collection agencies.

20. As an illustration of the growing importance of online dispute resolution, it was mentioned that the Economic Community of West African States (ECOWAS) collaborated with partner institutions such as the West African Economic and Monetary Union (UEMOA) and the International Telecommunication Union (ITU) to develop regional guidelines for the ICT sector, which led to six Supplementary Acts being adopted by Heads of States in January 2007, in Ouagadougou.³³ Three additional texts were developed with the assistance of the United Nations Economic Commission for Africa (ECA) on cyber-crime, electronic commerce, and personal data protection. Two of those texts - cybercrime and personal data protection - were adopted by ICT ministers of ECOWAS in Praia, Cape Verde in 2008.³⁴

21. It was mentioned during the Colloquium that the Council of Ministers of the Organisation for the Harmonization of Business Law in Africa (OHADA) had decided during its meeting held on 17-20 December 2009 in N'Djamena (Chad), to, *inter alia*, create a central database of the Commerce and Movable Credit Register and adopt information technology standards for the exchange of data electronically. It was also mentioned during the Colloquium that a project would be considered by OHADA to prepare a draft Uniform Act on digital transactions.

Countries in the Middle East region

22. It was noted that the Arab League Model Laws,³⁵ inspired by the UNCITRAL Model Laws on Electronic Commerce and Electronic Signatures were proposed as a guideline for countries in the region, as they contained provisions on electronic payments, electronic contracts (including consumer protection) and matters relating to applicable laws and jurisdiction. It was mentioned that States in that region had also adopted legislation inspired by the UNCITRAL Model Laws on Electronic Commerce and Electronic Signatures, and that that existing harmonized legal framework on electronic commerce constituted a sound basis for the development of electronic commerce transactions, but that there was a lack of a global system for solving online disputes.

The Caribbean Community (CARICOM)

23. The current initiatives undertaken by the Caribbean Community (CARICOM) include the CARICOM ICT 4 Development, the draft Model Law on Consumer Protection (2008) and the development of Model Consumer Policies in three critical areas which are electronic commerce, safety and sustainable consumption.³⁶ The purpose of those model policies is to protect consumers buying through electronic commerce.

3. Examples of domestic initiatives

³³ West African Common Market Project: Harmonization of Policies Governing the ICT Market in the UEMOA-ECOWAS Space. (Final Guideline) accessed at: http://www.itu.int/ITU-D/treg/projects/itu-ec/Ghana/modules/Compil-Guidelines_final.pdf and Supplementary Act A/SA.1/01/07 on the Harmonization of Policies and of the Regulatory Framework for the Information and Communication Technology (ICT) Sector adopted in the Thirty-First session of the Authority of Heads of State and Government, ECOWAS, Ouagadougou, 19 January 2007 accessed at http://www.ecowas.int/publications/en/actes_add_telecoms/ICT_Policy_ECOWAS_Engl.pdf.

³⁴ ECOWAS Press release N°: 100/2008 “ECOWAS Telecommunications ministers adopt texts on cyber crime, personal data protection”.

³⁵ Model Law for Electronic Transactions and Model Law for Electronic Commerce prepared by the Arab League.

³⁶ Information on CARICOM ICT 4 Development is available at see <http://caricomict4d.org/>

24. Examples of domestic initiatives were provided during the Colloquium. In certain countries, organizations have been set up to administer domain names and provide online arbitration to resolve disputes arising in that field. For instance, in Chile, the Network Information Center (“NIC Chile”) was described as an organization responsible for administering domain names as designated by the Internet Assigned Numbers Authority (IANA). NIC Chile provides an electronic platform to arbitrators offering a support technological service for the administration of arbitration cases. The responsibility for the management and administration of the website lies with the arbitrators. The arbitral procedure includes the access of the parties to the file and their keys with various tools to interact with the arbitrators and to participate in the conduct of the arbitral proceedings. If an arbitrator is not appointed through party agreement, NIC Chile would appoint an arbitrator from a list established for that purpose. The arbitration is confidential, including all evidence and all communications between the participants to the arbitral proceedings. Participants to the Colloquium also mentioned that in Mexico, Concilianet, a government run online dispute resolution platform has been established.³⁷

25. In China, where electronic commerce has been one of the fastest growing industries, the online dispute resolution system was described as divided into four categories: (1) the Online Dispute Resolution Centre of China International Economic and Trade Arbitration Commission (CIETAC), which mainly settles domain name disputes, common address disputes and electronic business disputes;³⁸ on 1st May 2009, the Online Arbitration Rules of CIETAC took effect and they are applied to larger volume business-to-business electronic commerce disputes; (2) the Online Dispute Resolution Centre, set-up by China’s E-commerce Laws Nets and Beijing Deofar Consulting Ltd, which offers information exchange platform and solving disputes related to electronic commerce; (3) the Internal Complaint Mechanism, which refers to the system established by the provider of the network transaction platform and used to accept consumer complaints and settle disputes through consultation; and (4) the Online petitions, which are adopted by many non-profit organizations such as China’s Electronic chamber, electronic Commerce Association of Beijing and e-commerce Industry Association of Shanghai.

26. Under another approach, in some countries, parties are offered by State courts the possibility to solve, through mediation, their disputes arising in the context of internet transactions. In France, for instance, the “*forum des droits sur Internet*”, an entity set-up with the assistance of the French public authorities, signed a protocol with the Court of Appeal of Paris in 2009 for the settlement of disputes arising in the context of internet transactions. That Protocol applies to consumer disputes, and provides for mediation. Parties may at any time refer the matter back to the competent court of first instance.

4. Examples of initiatives undertaken by non-governmental organizations and the private sector

27. Over the past ten years, non-governmental organizations (NGOs) and the private sector have collectively developed many different types of systems and

³⁷ <http://concilianet.profeco.gob.mx/concilianet/faces/inicio.jsp>

³⁸ By the end of 2009, the online dispute resolution centre had closed nearly 1,500 cases by online mode. In 2009 alone, the online dispute resolution centre had accepted 299 cases and closed 308 cases.

guidelines that have contributed to resolving domestic and cross-border disputes arising from online transactions. It was mentioned that those mechanisms provided good results when based on a framework of best practice standards, model codes of conduct, and standards from international organizations such as the OECD and the Global Business Dialogue on e-Society (GBDe).³⁹

28. A few important initiatives were mentioned at the Colloquium, such as the dispute resolution agreement between Consumers International and GBDe,⁴⁰ the launch of the European Extrajudicial Network⁴¹, the Better Business Bureaus (BBB)⁴²/Eurochambres Trustmark alliance and e.Consumer.gov, which is a project of members of the International Consumer Protection Enforcement Network (ICPEN) and a portal for consumers to report complaints about online and other cross-border transactions with foreign sellers.

29. The Protocol for Manufacturer/Supplier Disputes of the International Centre for Dispute Resolution (“ICDR”, the international division of the American Arbitration Association (“AAA”))⁴³ was given as an example of creation of online dispute resolution systems in the context of business-to-business transactions. General Electric (“GE”), a multinational corporation handling a large number of suppliers, had designed, in cooperation with ICDR, a manufacturer/supplier online dispute resolution programme. The challenge was to set-up a process to resolve fairly and quickly a large volume of supplier-manufacturer small claims. In 2009, the system became operational and in 2010, a pilot experience was undertaken. In brief, the system was described to function as follows: the request for resolving a dispute online is initiated via an application called “webFile”, followed by on-line negotiation; in case of failure to settle, online dispute resolution is initiated on the basis of documents already submitted via “webFile”. Engineers serve as adjudicators for online dispute resolution. A brief reasoned award is rendered within 30 days from the appointment of the arbitrator. It may be noted that the ICDR Protocol established for the online resolution of manufacturer/supplier disputes is no longer restricted to online cases related to GE, but is now available as a general protocol to apply to the online resolution of manufacturer/supplier disputes generally.

30. It was also explained during the Colloquium that eBay, a company with experience in business-to-business, business-to-consumer and consumer-to-consumer transactions, has developed an online dispute resolution centre. Launched

³⁹ The GBDe constitutes an international complaint-handling network for cross-border on-line shopping. The concept scheme was proposed at the 2007 GBDe summit in Tokyo. The stakeholders are governments (USA, Japan, Chinese Taipei, Malaysia, Vietnam, Singapore, Thailand), International Organizations (Asia-Pacific Economic Cooperation (APEC), OECD), consumers’ organizations, and alternative dispute resolution providers (from USA, Japan, Chinese Taipei, Singapore, Korea). GBDe has handled various cases, involving domain registration, fake escrow company, and failure of delivery.

⁴⁰ Global Business Dialogue on Electronic Commerce, “Alternative Dispute Resolution Guidelines, Agreement reached between Consumers International and the Global Business Dialogue on Electronic Commerce,” November 2003, available at <http://www.gdb-e.org>.

⁴¹ “Commission Working Document on the creation of a European Extra-Judicial Network (EEJ-NET)”, available at http://ec.europa.eu/consumers/policy/development/acce_just/acce_just_07_workdoc_en.pdf.

⁴² The Better Business Bureaus (“BBBs”) are private, non-governmental agencies. The system is made up of 123 member local Better Business Bureaus throughout the United States of America and Canada. In 2009, the BBB system handled nearly one million consumer disputes. The BBB reported a substantial increase in cross-border complaints in 2009.

⁴³ Available at <http://www.adr.org>

in 1995, eBay has made numerous acquisitions over the years, including the PayPal payment service in 2002. The eBayPayPal platform includes an online dispute resolution centre, where parties can attempt to solve problems which might arise during the transactions. It is based on principles that the system offered to the parties must be fair and predictable, the resolution must be quick and policies clear. Enforcement is essential to success. Refund should come through the same money transfer channel as the original payment.

III. Practicalities of establishing a global online dispute resolution system

1. Cross-border electronic commerce disputes and the administration of justice

31. Disputes arising in the online context are diverse, and include failure to deliver, late delivery, false or deceptive information on price and product.⁴⁴ Participants to the Colloquium underlined that those disputes were difficult for courts to handle for a variety of reasons, which included high volume of small value claims, the contrast between the low value of the transaction and the high cost of litigation, questions of applicable law in both electronic commerce and consumer protection contexts and difficulties of enforcement of foreign judgments.

32. It was also highlighted that a difficult question in cross-border consumer redress related to the determination of the appropriate forum, and the legal consequences attached thereto. One approach, followed in the European Union through the enactment of the Brussels I and Rome I Regulations, had been to provide for jurisdiction in the forum of the consumer. That solution, which may be ideal for consumers, raised a number of practical problems if transposed to the international level, the most obvious being the difficulty for the consumer to utilize enforcement remedies and for the vendor to handle large volumes of claims in many different countries where consumers were located.⁴⁵

2. Commercial and consumer online dispute resolution

Definition of online dispute resolution

33. Online dispute resolution is a means of dispute settlement whether through conciliation or arbitration, which implies the use of online technologies to facilitate

⁴⁴ Figures related to complaints filed with the European Consumer Centre Network (the “ECC-Net”) for 2007 show that half of the cross-border complaints and disputes related to purchases made over the Internet. Delivery problems and dissatisfaction with the products purchased were the leading reasons for the complaints, accounting for 75 per cent of the total. Information collected by econsumer.gov, which is an intergovernmental initiative that provides a means for consumers to file complaints involving cross-border transactions (e-commerce and other forms), reveals a similar pattern. (see OECD, “Empowering e-consumers, strengthening consumer protection in the internet economy”, 8-12 December 2009, para. 20, available at <http://www.oecd.org>).

⁴⁵ The draft Hague Conference Convention on Choice of Court Agreements included a proposal on competent jurisdiction which would have followed Brussels I and effectively voided the parties’ choice of court in business-to-consumer contracts, unless the forum chosen was the country of destination. However, the provision proved to be controversial given concerns about of its potential negative impact on vendors in e-commerce transactions. After prolonged consideration and negotiations, the final text of the convention excluded agreements where a consumer is a party. *See generally* Hague Conference on Private International Law Permanent Bureau, Preliminary Document No 17 of February 2002 at 10, available at http://www.hcch.net/upload/wop/gen_pd17e.pdf.

the resolution of disputes between parties. Online dispute resolution has similarities with offline conciliation and arbitration but the information management and communication tools which are used during the proceedings, and may apply to all or part of the proceedings, also have an impact on the methods by which the disputes are being solved.

34. Online dispute resolution may be applied to a range of disputes. While the application of online dispute resolution is not limited to disputes arising out of business-to-business and business-to-consumer online transactions, it developed in that context as it is logical to use the same medium (the internet) for the resolution of e-commerce disputes. Online arbitration raises specific legal issues stemming from the formal requirements contained in national and international arbitration laws and conventions.

General remarks on conciliation

35. Conciliation or mediation refers to proceedings in which a person or a panel of persons assists the parties in their attempt to reach an amicable settlement of their dispute. In the context of commercial and consumer disputes, mediation is an important filter. The main advantages of conciliation or mediation in the context of online dispute resolution are its flexibility, its rapidity and its minimal cost. It was underlined during the Colloquium that using mediation to solve online disputes implied clear rules, compliance with general principles of accessibility, low cost, confidentiality, impartiality and independence of conciliators. It also implied efficient enforcement procedures at the international level.

General remarks on arbitration

36. A question that would deserve further study is the extent to which online arbitration would be recognized by existing legislation on arbitration and which aspects in online arbitration would require specific regulation. For instance, many arbitration laws require the arbitration agreement to be written or recorded in writing. It still remains uncertain in many jurisdictions whether this formal requirement would be fulfilled by electronic communications. At the stage of recognition and enforcement of an award, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) imposes a duty on contracting States to recognise an agreement in writing. Courts of some jurisdictions may refuse to recognise and enforce an award under the New York Convention where the award is based on an arbitration agreement concluded by electronic means. The New York Convention also requires that originals or certified copies of the arbitration agreement and the award be produced by the parties.

37. Some formal legal requirements may be in conflict with electronic forms but the approach to that matter is evolving. In that respect, it may be noted that UNCITRAL adopted at its thirty-ninth session, in 2006, a revision to article 7 on “definition and form of arbitration agreement” of the UNCITRAL Model Law on International Commercial Arbitration (“Model Law on Arbitration”) whereby it offers to States wishing to enact legislation based on the Model Law on Arbitration two options. The first option follows the New York Convention in requiring the written form of the arbitration agreement but recognizes a record of the “contents”

of the agreement “in any form” as equivalent to traditional “writing”. The agreement to arbitrate may be entered into in any form (e.g. including orally) as long as the content of the agreement is recorded. This new rule also modernizes the language referring to the use of electronic commerce by adopting wording inspired by the 1996 UNCITRAL Model Law on Electronic Commerce and the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts. It may be noted that the instruments adopted by UNCITRAL in the field of electronic commerce contain generic rules, designed to be applicable to both business-to-business and business-to-consumer environments. The second approach defines the arbitration agreement in a manner that omits any form requirement. The Commission also adopted, at its thirty-ninth session, in 2006, a “Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958”⁴⁶. The Recommendation was drafted in recognition of the widening use of electronic commerce and enactments of domestic legislation as well as case law, which are more favourable than the New York Convention in respect of the form requirement governing arbitration agreements, arbitration proceedings, and the enforcement of arbitral awards. The Recommendation encourages States to apply article II (2) of the New York Convention “recognizing that the circumstances described therein are not exhaustive”.

38. Another matter that would require further analyses is the evidentiary weight accorded to an electronic document and whether an electronic communication has the same evidentiary weight as a paper record.

General remarks on business-to-consumer dispute settlement

39. Business-to-consumer disputes, when they are simple and factually straightforward, may be easily solved through automated and informal systems. Complex or high value disputes should comply with due process standards that might be more stringent than those applied in the context of international commercial arbitration. Due process in the context of online dispute resolution may entail proportionate fair hearing, reasons for decisions and transparency of the process. It remains uncertain whether there should be any form of judicial review. A balance therefore needs to be found between efficiency and fairness. In the context of online dispute resolution, arbitrators and institutions hosting such procedures should satisfy the requirements of independence and impartiality.

40. The question of the validity of an arbitration agreement would need to be carefully considered. In that regard, a variety of approaches have been adopted by jurisdictions when a consumer is a party to the agreement. In addition, the manner in which parties are brought to arbitrate a dispute may have an impact on the validity of an arbitration agreement, whether under national laws or, for instance, the New York Convention.

41. The commencement of arbitration would require specific rules, as under most online dispute resolution models there is an asymmetrical obligation and consumers retain the right to choose between arbitration and litigation.

⁴⁶ *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17 (A/61/17), Annex 2.*

42. The question of the determination of the place of arbitration, with all the legal consequences attached thereto, would require careful consideration and tailored solutions.

43. Awards in commercial arbitration are usually enforced under the New York Convention, which presupposes that the award is based on an enforceable arbitration agreement under the New York Convention. Legal enforcement under that regime might be costly and inappropriate for consumer disputes. This raises the question whether there would be a need for a specific instrument to deal with the issue of enforcement. It was also highlighted that the successful and sustained online dispute resolution programmes of the last decade have been those able to automatically enforce their outcomes; for instance, the Internet Corporation for Assigned Names and Numbers (ICANN) can unilaterally change domain name registries and PayPal can freeze funds and move them unilaterally to enforce claim decisions. The procedure of credit card charge back was also presented during the Colloquium. Credit card charge back is not a dispute resolution mechanism but in the consumer context, it tends to fulfil that function in an effective manner. Under that procedure, the credit card issuer allows consumer to cancel the payment of a purchase price made using a credit card and acts as an adjudicator between the parties.

3. Challenges surrounding the creation of a global online dispute resolution system

44. Some of the challenges faced in designing a global online dispute resolution system are of a technical nature and relate to the ability to create (a) a system which is able to continue functioning effectively as the number of cases increases, and (b) a central structure for data communication protocols that ensures that all the various endpoints of the network can communicate in real time with each other, despite existing differences in language and culture. Another key challenge for development of online dispute resolution is the absence of the online environment and infrastructure in certain countries.

45. Some of the challenges are of a legal nature, and relate to the difficulty of capturing a global definition of “consumer”, and of designing a global conciliation and arbitration system to deal specifically with online disputes, which would be fully compliant with due process requirements and able to provide fair results to all parties involved. A global online dispute resolution system should be developed based on general principles and generic rules of fairness and commercial practices that can be adapted to local needs. The regulatory frameworks for e-commerce vary among countries. In addition to differences in substantive law, countries have different approaches toward regulation.⁴⁷ This can have implications not only for businesses, but also for consumers – particularly those engaging in cross-border trade. Consumer rights and obligations, for example, vary considerably from one jurisdiction to another. Some countries use generic regulation, developed in other consumer protection contexts, to address e-commerce issues, while others have adopted regulation dealing specifically with e-commerce and consumers.

46. Other challenges are of a cultural and linguistic nature. Participants at the Colloquium said that locally culturally appropriate systems for solving disputes arising in the context of cross-border consumer transactions may be more

⁴⁷ OECD Conference Report, Empowering e-commerce consumers, December 8-10, 2009, DSTI/CP(2009)20/FINAL, para. 38.

appropriate than global solutions. Cultural and language barriers should be taken into account. Technology and online dispute resolution systems should be adapted to local conditions and cultures, and the nature and types of disputes prevailing in a given society should be given consideration. In that context, it was said that global solutions must develop incrementally, be supported by science and technology, and by an international legal framework.

47. To tackle these challenges, it was recommended that policy development for promoting online dispute resolution should take into account the following: treat as a priority education and awareness raising among merchants and consumers regarding the impact and increasing importance of online dispute resolution in resolving commercial disputes; ensure that national legislation recognizes the validity and enforceability of electronic transactions and facilitates the use of out-of-court dispute settlement schemes; enhance cooperation and exchange among ODR providers; promote voluntary adherence by e-business to reliability programs; and give sufficient attention to cultural and linguistic differences.

48. Further, it was emphasized that government regulation alone is not sufficient. It was recommended that business groups and civil society as well as governments come together to establish a consensual procedure. It was also recommended that the consensus-based system should be friendly to consumers, cost-effective to business and fair to consumers, and be consistent with local consumer protection mandates.

49. The view was expressed that the flow of trade results in synergies between technologies, the stream of goods and services and payment channels being created, and that these developments justify the need for the kinds of rules necessary to support development of a global online dispute resolution system.

IV. Concluding remarks

50. The commonly shared view expressed during the Colloquium was that traditional judicial mechanisms for legal recourse do not offer an adequate solution for cross-border electronic commerce disputes, and that the solution - providing a quick resolution and enforcement of disputes across borders - lies in a global online dispute resolution system for small value, high volume business-to-business and business-to-consumer disputes. It was also underlined that electronic commerce cross-border disputes, which will form a significant proportion of complaints in the coming years, require tailored mechanisms that do not impose costs, delays and burdens that are disproportionate to the economic value at stake. It was acknowledged that many challenges face the creation of a system that would meet the needs of all parties involved, and take account of cultural, jurisdictional and linguistic differences.

51. Participants also noted that proposals for regional online dispute resolution systems were in the process of being developed, and it may therefore be timely to deal with the matter internationally from the outset in order to avoid development of inconsistent mechanisms. Many participants to the Colloquium expressed the view that an international phenomenon such as electronic commerce needs more than similar national frameworks; it calls for an international umbrella that can accommodate international electronic commerce. The goal of any work undertaken

by UNCITRAL in this field should be to design generic rules which, consistent with the approach adopted in UNCITRAL instruments (such as the Model Law on Electronic Commerce), could apply in both business-to-business and business-to-consumer environments.

52. In view of the above recommendations, the Commission may wish to consider whether it would be timely for it to undertake work in the field of online dispute resolution relating to cross-border electronic commerce transactions, including business-to-business and business-to-consumer transactions.