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Proposal on principles applicable to Online Dispute Resolution providers and neutrals

Proposal by the Canadian delegation

Note by the Secretariat

In preparation for the twenty-fifth session of Working Group III (Online Dispute Resolution), the Government of Canada on 12 March 2012 submitted to the Secretariat the note attached hereto as an annex concerning a proposal on principles applicable to online dispute resolution providers and neutrals.

The document in the attached annex is reproduced in the form in which it was received by the Secretariat.

I. Background

The UNCITRAL Secretariat prepared draft Procedural Rules (A/CN.9/WG.III/WP.109), which cover the online dispute resolution (ODR) process through three successive stages: (1) negotiation, (2) conciliation and (3) decision by a neutral. The draft Procedural Rules constitute simplified rules of procedure similar to the UNCITRAL Arbitration Rules, but adapted to the ODR context.

ODR providers operate dispute resolution systems online. They may have a place of business in one or more jurisdictions. They offer services — in particular ODR for cross-border transactions — directly to consumers and businesses. An important aspect for ODR providers is the presence of trust marks in relation to their services, such as a reference to the draft Principles below or surveys by users published online.



There is a certain level of overlap between the proposed Principles and the draft Procedural Rules. They reinforce each other but have different objectives: the Procedural Rules are aimed at establishing a procedure for ODR and the Principles are aimed at promoting a best practices model for ODR providers and neutrals. Some of the best practices proposed in the Principles below will be adopted or reflected in agreements between the ODR provider and the parties to the ODR proceedings or third parties.

A proposal concerning Principles Applicable to Online Dispute Resolution Providers and Neutrals was circulated informally by the Canadian delegation during the 24th session of Working Group III in November 2011. The Principles found in this document are based on the informal submission.

Canada submits this document as a starting point for the discussions of the Working Group on issues relating to best practices for ODR providers and neutrals. Canada recognizes that the document will evolve as the Working Group's discussions progress and that the Principles set out in this document will need to be adapted to reflect policy choices made by the Working Group. For example, the Working Group may wish to expand or limit any of the Principles or provide more details with respect to their scope; to elaborate or combine the Principles on competence, neutrality and impartiality of neutrals; or to provide more guidance with respect to the information that is required to be provided such as guidance on the anticipated length of time for a decision to be rendered after a complaint has been filed, on whether a decision is final and binding and on whether communications in the ODR process will be accessible to others. In addition, the Principles need to be considered in light of the law applicable to the various aspects of the transactions, to the decision process and to the enforcement of the resulting decision.

II. Draft Principles applicable to ODR Providers and Neutrals

Principle 1 — Maintaining a Roster of Competent Neutrals

- (1) The ODR provider shall select individuals for the roster of neutrals on the basis of competence, independence and impartiality.
- (2) The ODR provider shall publish and maintain an up-to-date list of neutrals, which shall include information on their experience and expertise.
- (3) The ODR provider shall ensure that the competence of neutrals is maintained through appropriate training including training on subject-matters relating to ODR cases and on the technology used by the ODR system.
- (4) The ODR provider shall put in place processes to deal with complaints concerning the roster of neutrals, such as disqualification of neutrals on the basis of a demonstrated lack of required skills [*or expertise*].¹

¹ The term "expertise" may be considered too broad and leading to disqualification in many situations. Consideration could be given to specifying the type of expertise that is expected from neutrals.

(5) The ODR provider shall ensure, to the extent feasible, that an arm's length body is available to users to hear complaints about rules, practices or administrative decisions by the ODR provider.²

Principle 2 — Independence

(1) [*Neutrals are selected by agreement between the parties.*]

(2) [*The ODR provider may randomly appoint the neutral [where the parties agree to this selection process].*]³

(3) The ODR provider and the neutral shall maintain independence from the parties throughout the ODR process and shall put in place processes to deal with complaints concerning a neutral, such as disqualification on the basis of a demonstrated lack of independence.

(4) The ODR provider or neutral shall promptly disclose to the parties any relation, contractual or other, that may reasonably be perceived as affecting their independence [*in relation to the parties*].

(5) An ODR provider that is captive of a single seller, a limited number of sellers or a single industry is not considered independent.

[*Alternatively: An ODR provider is not required to be independent from the parties, but it shall disclose any circumstances affecting its independence.*]⁴

(6) Funding sources and payment arrangements for the ODR services shall be disclosed to the parties.

Principle 3 — Impartiality

(1) [*The neutral shall be impartial throughout the ODR process.*]

(2) [*The ODR provider shall put in place processes to deal with complaints concerning a neutral, such as disqualification on the basis of a demonstrated lack of impartiality.*]⁵

Principle 4 — Disclosure of Terms of Service and Confidentiality

(1) The ODR provider shall publish, on its website, [*clear, comprehensible, and accurate information, including*] its fees, ODR procedures, potential recourses against decisions, enforcement procedures, complaint handling processes against the ODR provider or neutral and practices regarding the treatment of information. This information is brought expressly to the attention of users prior to their acceptance of the ODR process.

² It is understood that such review body may not currently be available. As ODR expands, such bodies may be created or existing institutions may decide to offer these services.

³ Paragraphs (1) and (2) may appear as belonging to ODR Procedural Rules rather than to these Principles. They are nonetheless suggested as random selection of neutrals may be unusual in some jurisdictions.

⁴ The alternative language might be more appropriate in circumstances for example where ODR providers are set up and funded by associations of sellers.

⁵ The Working Group may wish to consider incorporating the requirement for the ODR providers to put in place processes similar to those found under Principles 1(4) and 2(3) dealing with complaints regarding a neutral's lack of impartiality.

(2) The ODR provider shall take measures to ensure confidential information is protected and stored with restricted access.⁶

(3) Except where required by law, the ODR provider shall not disclose to third parties settlement offers and settlements made during the ODR process.⁷

Principle 5 — Establishing Identity of the Parties

(1) The ODR provider shall take appropriate measures to facilitate identification of the parties and may require confirmation or evidence from the parties to establish their identity.⁸

(2) A party shall not be denied access to information relevant to establish or confirm the identity of another party to the ODR process on the basis that the information is confidential.⁹

Principle 6 — Accessibility, System Reliability and Security

(1) The ODR provider shall put in place measures to ensure reliability and security in the ODR process, such as the use of usernames and passwords.¹⁰

(2) The ODR provider shall use technologies that are accessible and understandable for common users.

(3) The ODR provider shall ensure information is presented prominently and in a comprehensible manner.

(4) [*The ODR provider is encouraged to obtain sufficient insurance and guarantees to cover potential liability for a security breach or from an inadvertent release of personal information.*]

⁶ The ODR process is somewhat different from a traditional court process. It is not anticipated that all documents be available to the general public. Specific rules may be required with respect to “personal information” in particular under Principle 5. Duties and liabilities with respect to personal information under domestic law may impose a higher standard which could be reflected in the Principles.

⁷ This rule is commonly found in common law and civil law jurisdictions with respect to settlement offers made in the course of mediation. It aims at fostering amicable resolution of disputes and encouraging parties to make reasonable proposals.

⁸ In traditional court systems, a party is entitled to know the identity of the opposing party. The rule confirms that a party also has the right to seek confirmation of the identity of the opposing party in an online environment.

⁹ Some could argue there is a conflict or an overlap between the rules on confidentiality and those for establishing identity. This Principle clarifies any expectation by one party that keeping information confidential does not extend to documents or information concerning his or her identity when it is requested by the opposing party. This principle also limits the liability of ODR providers as concerned disclosure of confidential information.

¹⁰ Reliability and security measures adopted by ODR providers will depend on the circumstances and will evolve overtime as technology and risks change. The level of security required for an ODR system will depend on the circumstances such as the sensitivity of information, the applicable law and the parties’ expectations. As such, it was considered unpractical to attempt to define what the measures could be. Usernames and passwords are illustrative and may be considered a strict minimum under which the ODR provider could be exposed to liability.

Principle 7 — Record and Publication of Decisions

(1) The ODR provider shall maintain a record of the ODR proceedings and settlement agreements in a manner that allows subsequent reference by the parties for a period of [three]¹¹ years.

(2) [*The ODR provider [may] publish[es] the decision except where the party is a consumer; in which case, a consent for publication of the consumer's name [shall] first be obtained from the consumer.*]¹²

(3) The ODR provider shall publish statistics on the percentage of complaints decided in favour of and against the complaining party, the average time period for resolving cases and the number of cases that remain unresolved.¹³

(4) [*Alternatively: The ODR provider shall publish [at least once a year] statistics on the number of complaints received and the percentages of these complaints that have been accepted, examined, resolved or decided in favour or against the complaining party, including the detail of those that have been decided wholly in favour of the complaining party, the average length of time for the resolution and the number of requests that are outstanding and the number of decisions for which a party has refused to comply with the award.*]

Principle 8 — Sensitivity to Language and Culture

(1) An ODR provider dealing with individuals of different cultural backgrounds or languages shall ensure its system, rules and neutrals are sensitive to these differences, and shall put in place mechanisms to address client needs in these regards.

(2) An ODR provider shall not actively solicit clients where linguistic or cultural needs cannot be accommodated.

(3) The ODR provider shall divulge the languages in which its services are offered.

Principle 9 — Fees and Costs

(1) The fees for the ODR service shall be reasonable with regards the value of the dispute, to the parties involved and their bargaining position at the time of concluding the contract under dispute.

¹¹ A three-year period is suggested as it is the time limitation period in many jurisdictions for claims in relation to consumer goods. In practice ODR providers may easily exceed this requirement because of the availability at low cost of data storage.

¹² This paragraph is bracketed because publication raises issues of confidentiality and privacy. It also requires the examination of the practicality of collecting ODR decisions for the purposes of legal interpretation of future cases.

¹³ Publication of information relating to the ODR decisions and execution of those decisions is considered important for a well-functioning system as publication encourages compliance to decisions. Paragraph (2) provides a best practice to publish information generally. A special rule is proposed in relation to consumers, which recognizes that consumers may not want their name to be published. Paragraph (2) also limits the liability of the ODR provider. Paragraph (3) sets the minimum publication requirements by ODR providers under the Principles.

(2) All fees of the ODR process must be disclosed to the parties before its commencement.

(3) The neutral shall not award costs to one party or another.

[Principle 10 — Decisions

(1) *Decisions shall state the reasons upon which they are based.*]

Principle 11 — Enforcement

(1) The ODR provider shall take measures to encourage compliance with ODR decisions, which may include: requiring that a security be posted; seeking undertakings to comply from the parties at the outset of the ODR process; or facilitating payment of awards.

Principle 12 — Redress

The ODR provider shall not propose in its offer for service contractual clauses waiving consumer rights or legal recourses afforded by the domestic law of the parties.¹⁴

¹⁴ This provision ensures that agreeing to ODR will not affect the rights of the parties. This best practice for ODR providers ensure that ODR clauses which are agreed to by the parties are not waiving rights recognized by the applicable law. This provision also protects ODR providers by clarifying the extent of the services provided (i.e., they do not guarantee that recourses available under domestic law will not be commenced although the ODR process has been agreed upon).