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Résumé/Abstract :

This document takes stock of discussions surrounding the draft procedural rules for online dispute resolution. It focuses on two issues that are presently topics of discussion in Working Group III, namely, cost sharing with respect to arbitration procedures and the exclusive jurisdiction of the arbitral forum, and offers a critical analysis of the options now being considered.

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INTRODUCTION

The purpose of the draft procedural rules for online dispute resolution, developed by Working Group III (Online Dispute Resolution) of the United Nations Commission on International Trade Law (UNCITRAL), is "to provide a practical avenue [...] for the quick, simple and inexpensive resolution of low-value cross-border disputes."¹ In fact, it has been broadly accepted that it is not generally realistic to institute legal proceedings when such disputes arise since present means of recourse most often prove inefficient.

This work, which flows from the *Model Law on Electronic Commerce*,² should lead to the adoption of a framework conducive to online negotiation, mediation and arbitration. The Rules would thus provide that parties to a transaction performed using electronic communications would be able to agree, at the time of the transaction, to resolve possible disputes using such mechanisms.

OBJECTIVES

Despite achieving major advances, the discussions have shed light on certain areas of strong disagreement within Working Group III. They mainly concern two issues that are crucial to the efficiency of extra-judicial mechanisms: distribution of the costs of arbitration proceedings³ and the exclusive jurisdiction of the arbitral forum.⁴

In light of the concerns expressed in the work by Working Group III, we suggest a few alternative avenues for establishing an accessible, transparent, efficient online dispute resolution procedure.

¹ *Report of Working Group III (Online Dispute Resolution) on the work of its twenty-fifth session* (New York, 21-25 May 2012) A/CN.9/744, par. 15.

² *UNCITRAL Model Law on Electronic Commerce* (30 January 1997), A/RES/51/162.

³ *Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules* A/CN.9/WG.III/WP.117/Add.1, art. 13.

⁴ *Ibid.*, art. 8.

ISSUE NO. 1: DISTRIBUTION OF ARBITRATION COSTS

Stakes

No consensus has yet been established concerning the financial burden associated with arbitration proceedings. This issue is all the more fundamental because the disputes concerned by the Rules most often involve small sums of money.⁵

Options considered

Two proposals were made during the discussions: (1) distribute arbitration costs among all users of the online dispute resolution system or (2) place the entire financial burden on the shoulders of merchants using such a system.⁶

Analysis

The first option was generally rejected by the members of Working Group III because it would inevitably discourage consumers, especially when the value of the dispute is low.⁷

In contrast, while it recognizes the asymmetry of the parties' financial means, the second option can also be challenged since it could cast doubt on the impartiality and independence of the service providers.⁸ Making merchants pay all of the costs and thus rendering mediators and arbitrators economically dependent on them could only

5 Report of Working Group III (Online Dispute Resolution) on the work of its twenty-second session (Vienna, 13-17 December 2010) A/CN.9/716, par. 42.

6 Ibid., par. 110.

7 Ibid., par. 108.

8 Ibid., par. 112.

undermine consumer trust and consequently create obstacles to achieving Working Group III's objectives. Indeed, this situation could also open the way to abusive claims.⁹

Consequently, we consider that only an online dispute resolution mechanism based exclusively on public funding would make it possible to dispel concerns about possible bias - real or perceived - on the part of dispute resolution service providers and ensure the integrity of the process, as well as greater access to justice.

Recommendation

- That the draft procedural rules for online dispute resolution provide for public funding of online dispute resolution mechanisms.

ISSUE NO. 2: THE EXCLUSIVE JURISDICTION OF THE ARBITRAL TRIBUNAL

Stakes

There is disagreement concerning the obligatory or voluntary nature of recourse to arbitration as a form of online dispute resolution, in particular owing to possible conflicts with the legislation in effect in various states.

Options considered

Three suggestions were made during discussions: (1) impose online arbitration on parties, (2) leave parties the discretion to decide whether or not to use online arbitration, or (3) set up a "two-track" online dispute resolution system applicable in accordance with the laws in effect in the consumer's jurisdiction. This third system would provide for two possibilities: one that would include negotiation, mediation and arbitration phases, and another in which arbitration would be optional and subject to the parties' ulterior agreement.¹⁰

⁹ *Ibid.*, par. 110.

¹⁰ *Report of Working Group III (Online Dispute Resolution) on the work of its twenty-sixth session* (Vienna, 5-9 November 2012), A/CN.9/762, par. 15-16.

Analysis

It has been argued that recognition of the exclusive nature of arbitral jurisdiction would make it easier for merchants to predict the costs associated with online dispute resolution, which would presumably translate into lower market prices¹¹ – a hypothesis that remains to be proven.

In any case, such an avenue – abandoning consumers' rights to be heard before the courts – would by corollary have the consequence of creating an obstacle to instituting class actions before the courts, even though that is an efficient mechanism. It thus seems incompatible with the legislation in effect in a number of states, such as the Canadian provinces of Alberta, Québec and Ontario, as well as the countries that belong to the European Union, in particular, where the legislation does not acknowledge the binding nature of arbitration clauses in consumer contracts when they are signed before a dispute arises.¹² Moreover, it has been recognized that the Rules should not interfere with states' existing legislation and that they may not take precedence over peremptory norms at the domestic level.¹³

Finally, the third avenue suggested, while judicious, can be considered only if we presume that the consumer has sufficient legal knowledge to determine whether he or she can, in compliance with the laws of his or her state, consent to or reject arbitration. If this is not the case, the consumer could mistakenly consider arbitration as the only possible avenue, or find himself or herself forced to seek outside help – which is often costly – to grasp the scope of excessively complex contractual clauses. To that end, it

11 Ronald A. Brand, "Party Autonomy and Access to Justice in the UNCITRAL Online Dispute Resolution Project," *Loyola University Chicago International Law Review*, forthcoming.

12 See *Fair Trading Act*, R.S.A. 2000, C. F 2, Section 16; *Consumer Protection Act*, R.S.Q., c. P-40.1, Section 11.1; *Consumer Protection Act 2002*, S.O. 2002, C. 30 (Schedule A), Section 7(2); *Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts*, 5 April 1993, 93/13/CEE.

13 *Report of Working Group III (Online Dispute Resolution) on the work of its twenty-fifth session*, (New York, 21-25 May 2012), *supra* note 1, par. 15.

was pointed out in an earlier session of Working Group III that, in all agreements, "[c]lear and adequate notice of any dispute resolution agreement should be given to make it plain to the consumer what obligations he/she will be taking on and the implications of any choice of law being made."¹⁴ Putting this suggestion into practice could thus prove problematic.

Finally, two scenarios seem to us to be preferable to the options proposed. The first would be to permit arbitration clauses that oblige only the merchant to take that path, in the knowledge that consumers employ the courts only in exceptional circumstances. The second would be to ensure that online arbitration and the institution of a class action are not mutually exclusive, thus giving consumers the freedom to opt for the second possibility when there are provisions for it in the laws of their jurisdiction. We consider that such a compromise would be an efficient way to reconcile the concerns expressed by all sides in the discussion.

Recommendation

- That the draft procedural rules for online dispute resolution maintain consumers' rights to be heard before the courts in cases of disputes, and especially to institute class actions where domestic law so permits.

¹⁴ *Online dispute resolution for cross-border electronic commerce transactions: further issues for consideration in the conception of a global ODR framework* (New York, 21-25 May 2012), A/CN.9/WG.III/WP.113, par. 16.