THE ACTIVITY OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL) IN THE FIELD OF ONLINE DISPUTE RESOLUTION (ODR)

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Abstract: *One may no longer question* **if** *ODR will impose as a means of dispute resolution, but only* **when** *and* **how** *it will happen. The present study aims to present the evolution of UNCITRAL's activity in the field of ODR, where significant progress has been made in the last three years (2010-2013). It is based on the content analysis of the reference materials published by UNCITRAL on its website, mainly the reports of Working Group III (Online Dispute Resolution).*

Keywords*: Online Dispute Resolution, UNCITRAL, UNCITRAL Working Groups, UNCITRAL Model Law in E-Commerce, ODR.*

I. INTRODUCTION

The United Nations Commission on International Trade Law (UNCITRAL) was created by Resolution no. 2205 (XXI) of the General Assembly of the United Nations (UN), entitled "Establishment of the United Nations Commission on International Trade Law", adopted on 17 December 1966, at the 1497th plenary session, and it is one of its subsidiary bodies (UN 1966, 99-100).

According to the above-mentioned document, UNCITRAL was created in order to "[promote] the progressive harmonization and unification of the law of international trade" (*idem* Sec. I), among other things, by supporting participation of all states to the existing international conventions and

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by preparing the adequate organizational environment for the establishment of new international regulations. Member States with various legal and economic systems were encouraged to participate and to adhere in large numbers to these international conventions (for details, see UNCITRAL 1986 and Sitaru 2008, 126-129).

UNCITRAL reconvenes once a year, alternatively, in New York and Vienna, and its main activity consists in drafting conventions, model laws, guides for writing various commercial documents and other instruments dealing with the substantive law that governs commercial transactions or other aspects of commercial law having an impact on international trade (for details about the establishment, the mandate, the scope, the membership and the work of the Commission, see UNCITRAL 2013, 1-30).

The present study aims to present the evolution of UNCITRAL's activity in the field of online dispute resolution (ODR), where significant progress has been made in the last few years. A designated working group has also been created, having as main task to elaborate ODR cross-border procedural rules, mainly in the field of electronic commerce.

Following a period of almost two decades in which no distinct improvements have been made, the technological evolution in the last decade and the unprecedented development of online commerce transactions, as well as of the extrajudicial proceedings (ADR) as a viable and desirable solution for solving internal and cross-border disputes have determined UNCITRAL to initiate the development of adequate instruments and guidelines intended to reflect both the needs of traders and consumers in developed countries and those of traders and consumers in developing countries.

Our goal is to present the current state of affairs and the progress made following the regulatory effort put in the field. This is not an isolated effort and it did not appear out of thin air. It integrates the legislative efforts of the European Commission, the achievements of the Organization for Economic Co-operation and Development (OECD), the contributions of the private sector, that is developing its own instruments, as well as the scientific efforts of prestigious universities and research institutions. In this context, we point out the publication of several papers written by students enrolled in the "Crisis and Conflict Management" master program, developed by the Faculty of Political, Administrative and Communication Sciences from the Babeş-Bolyai University in Cluj-Napoca, on the website of the 11th edition of the International Online Dispute Resolution Forum, which took place in Prague, on 27-29 June 2012. The publication of such papers stands for a well deserved recognition of the quality of this MA program and encourages the pursuing of further research in the field.

In terms of methodology, the present study is based on the content analysis of the reference materials published by UNCITRAL on its website, mainly the reports of Working Group III (Online Dispute Resolution) from the last two years (2010-2012). The activity of this group is not yet accomplished, the next meeting being scheduled to

take place in New-York in May 2013, but some significant evolutions have been achieved regarding the standardization of the procedural rules, the clarification of certain terms and the creation of a new standard of communication, which is necessary in order to facilitate dispute resolution when the parties have different cultural and linguistic backgrounds, benefit from different technological competences or encounter challenges in written communication (i.e. the ECRI standard).

Furthermore, documents presented by national delegations participating at the debates (such as Canada's proposal on best practices rules of service providers of ODR), documentation of the UNCITRAL Secretariat on the guidelines for neutral third parties, the minimum standards for ODR providers, the principles of substantive law on dispute resolution and the mechanism of cross-border enforcement of rulings are analyzed in the study.

We have deemed appropriate to present the lists of participants to each session of the working group, in order to emphasize the very significant interest raised by ODR among a wide variety of actors, such as developed states or developing countries, supranational organizations, multinational companies, national or international associations of professionals, nongovernmental organizations and the academic forum.

II. HOW THE INTEREST IN ODR IS REFLECTED IN THE ACTIVITY OF UNCITRAL (2000-2009)

The first exchange of views on the proposals to include ODR on the agenda of UNCITRAL took place in 2000, at its 33rd session, held in New York between June 12 and July 7, 2000 (UN 2000, para. 385). The conclusion reached there was that further research was necessary in order to establish whether specific rules were needed in order to facilitate the use of online mechanisms of dispute resolution, that was in constant growth at the time. The main aspects discussed in this context were focusing on the ways in which dispute resolution techniques, such as arbitration and conciliation, could be made available for traders and consumers, considering that in some countries the use of arbitration for the settlement of disputes between traders and consumers is restricted because of public policy reasons.

During the next two sessions of UNCITRAL (the 34th session, held in Vienna between June 25 and July 13, 2001; the 35th session, held in New York between June 17 and June 28, 2002), it was decided that its future activity on electronic commerce would include research and studies on ODR and that Working Group II (Arbitration and Conciliation) would cooperate with Working Group IV (Electronic Commerce) for a possible development of UNCITRAL's activity in this field (for details, see UN 2001, paras. 287 and 311; UN 2002, paras. 180 and 205).

This topic was discussed again at the 39th session of UNCITRAL (held in New York between June 19 and July 7, 2006; for details, see UN 2006, paras. 183, 186 and 187) and at its next sessions, in the following two years (the 40th session, held in Vienna between June 25 and July 12, 2007 and the 41st session, held in New York between June 17 and June 28, 2008). However, no important progress was made. On the occasion of each of the aforementioned sessions, UNCITRAL has only took note of the suggestions made by its members regarding the keeping of ODR on the working agenda and observed that the topic required further research, concluding in the sense that it had to become the object of future activities in the context of the UNCITRAL Arbitration Rules' revision (UNCITRAL 2011. For details, see UN 2007, para. 177 and UN 2008, para. 316).

At its 42nd session (held in Vienna between June 29 and July 17, 2009), UNCITRAL came to the conclusion that some studies were necessary in order to identify the various groups interested in prospective common standards in the field of ODR. The discussions that took place during this session and the proposals regarding ODR presented on this occasion were focused, for the first time, on more practical aspects, the most important being the following:

1. identification of those types of disputes having as object operations conducted by means of electronic commerce which are likely to be settled by using ODR systems;
2. the opportunity of developing consistent procedural rules at the global level for the implementation of ODR techniques;
3. the possibility and/or the opportunity of creating and using one single database comprising the authorized ODR service providers;
4. the implementation of the final agreements following the ODR proceedings in the light of the relevant international conventions in force.

In this context, UNCITRAL has pointed out the importance of the proposals made by Member States and by representatives of some prestigious academic and research institutions related to the possibilities of developing UNCITRAL's future activities on ODR in order to facilitate electronic commerce and it has requested the Secretariat (UNCITRAL's Secretariat; for details about its work programme, see UNCITRAL 2013, 9-10) to conduct a study based on the proposals included in document A/CN.9/681/Add.2 (UN 2009) and to organize a colloquium on this topic (UN 2009a, paras. 338, 342 and 343).

III. THE CREATION OF A WORKING GROUP FOR ODR WITHIN UNCITRAL (2010)

At its 43rd session (held in New York between June 21 and July 9, 2010; see UN 2010), the Secretariat presented UNCITRAL with a summary (UNCITRAL 2010) of the discussions that took place during the ODR colloquium organized by the UNCITRAL Secretariat together with The Pace Institute of International Commercial Law and The Penn State

Dickinson School of Law [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, at the UN Vienna International Centre, on 29-30 March 2010. Its agenda is available online at www.uncitral.org/pdf/english/news/IICL_Bro_2010_v8.pdf]. World renowned experts and practitioners from all relevant fields, experts from private and government sector, as well as researchers from the non-profit sector and the academic environment, from various parts of the world, took place in this colloquium. The document presented by the Secretariat has four major parts and includes essentially the following information:

1. a concise record of the evolution of ODR approach within UNCITRAL in the previous decade and a brief description of the context in which the colloquium was organized (UNCITRAL 2010, paras. 1-7);
2. the existing initiatives regarding ODR in the field of electronic commerce (UNCITRAL 2010, paras. 8-30), including the presentation of the instruments adopted by OECD[1], of certain initiatives belonging to some intergovernmental organizations (EU, OAS, CARICOM etc.), of examples of national initiatives (Chile, China, France and Mexico) and of initiatives belonging to non-governmental organizations[2] and to entities from the private sector (eBay);

1 The most important instruments adopted by OECD in this field between 1999 and 2010, following the work of the "Committee on Consumer Policy" are as follows: *Guidelines for Consumer Protection in the Context of Electronic Commerce* (approved by the OECD Council on 9 December 1999), available at http://www.oecd.org/sti/consumerpolicy/34023811.pdf; "Report on Consumer Protections for Payment Cardholders", in *OECD Digital Economy Papers*, no. 64, OECD Directorate for Science, Technology and Industry, 2002, published at http://dx.doi.org/10.1787/233364634144; *The OECD Guidelines for protecting Consumers from Fraudulent and Deceptive Commercial Practices across Borders* (adopted as a Recommendation of the OECD Council on 11 June 2003), available at http://www.oecd.org/sti/consumerpolicy/2956464.pdf; *Consumer Dispute Resolution and Redress in the Global Marketplace* (report following the OECD Workshop on Dispute Resolution and Redress held in Washington, DC on 19-20 April 2005), published at http://www.oecd.org/internet/consumerpolicy/36456184.pdf; *OECD Recommendation on Consumer Dispute Resolution and Redress* (adopted by the OECD Council on 12 July 2007), published at http://www.oecd.org/sti/interneteconomy/38960101.pdf.

2 The most relevant such examples are the following: *Alternative Dispute Resolution Guidelines – Agreement reached between Consumers International and the Global Business Dialogue on Electronic Commerce*, November 2003, published at http://www.gbd-e.org/pubs/ADR_Guideline.pdf; The European Extra-Judicial Network (for details see *Commission Working Document on the creation of a European Extra-Judicial Network (EEJ-NET)*, published at http://ec.europa.eu/consumers/policy/developments/acce_just/acce_just07_workdoc_en.pdf; The Better Business Bureaus ("BBBs") / Eurochambers Trustmark Alliance – http://www.bbb.org;

3. practical aspects regarding the creation of an ODR global system (UNCITRAL 2010, paras. 31-49);
4. the main conclusions formulated as a result of the debates (UNCITRAL 2010, paras. 50-52).

Within the same session, the Secretariat presented UNCITRAL with a document signed by the Institute of International Commercial Law (Pace Law School) and by a number of other organizations and institutions from around the world, entitled "Paper supporting the possible future work on online dispute resolution by UNCITRAL" (UNCITRAL 2010a, Annex), submitted on 24 May 2010. This document is structured in three parts and it is equally a manifestation of the signatories' support to the efforts undertaken by UNCITRAL in the field of ODR and an encouragement towards the continuation of these efforts. Since it is the first document supporting and encouraging the activity of UNCITRAL regarding ODR that was signed by numerous organizations and institutions from around the world and since it has constituted the basis for further discussions on this topic within UNCITRAL, finally leading to the designation of Working Group III as the body responsible for the creation of common standards in this field, we will briefly present the content of the aforementioned document.

In the first part of the document, entitled "Executive summary", the existing situation in 2010 is presented, with an underline of the fact that, in the context of the technological evolution in the last two decades, the ODR techniques have distinguished themselves among the ADR extra-judicial procedures as a viable and desirable option to settle internal and cross-border disputes which occur in the context of electronically concluded commercial transactions, in particular through the Internet (UNCITRAL 2010a, 2-3). The authors of the document underline, among other things, the unique status of UNCITRAL, considering its capability and legitimacy to elaborate adequate instruments and guidelines in the field of dispute resolution from the so called electronic commercial environment, which could reflect at the same time the needs of traders and consumers in developed countries, as well as those of traders and consumers in developing countries.

In the second part of the document, entitled "A collaborative effort to create an integrated ODR system", the authors underline the necessity of a globally joint effort in order to create and implement an integrated ODR system worldwide, which could represent a practical alternative to the existing judicial procedures for both the consumers and the traders, with the purpose of quickly and effectively settle commercial disputes concerning small value commercial transactions conducted by electronic means.

econsumer.gov – an initiative of International Consumer Protection and Enforcement Network (ICPEN) – https://icpen.org.

Considering the consensus of the international community of providers and beneficiaries of ODR systems and techniques on this matter, confirmed, among other things, by the high number and by the variety of the signatories of the document concerned, its authors enumerate in Part III, entitled "The Guiding Principles for the Establishment of Rules and/or Principles to Support a Global Online Dispute Resolution Mechanism for Electronic and Mobile Transactions", a series of general principles and guidelines which they consider essential for the establishment of rules and norms intended to regulate or at least foreshadow a global mechanism of online resolution of disputes related to electronic transactions, including those concluded through mobile phones and other similar types of instruments. It is mentioned that the suggested principles and guidelines are the result of the evolution process of ODR mechanisms that took place in the last two decades in various parts of the world and at different levels. Therefore, these principles and guidelines represent a synthesis of the conclusions reached by experts and practitioners following the implementation and functioning of several ODR systems and of the model rules created, in the electronic commerce, at a local, regional or national level (UNCITRAL 2010a, 5-7). Many of the principles mentioned in the present document are also to be found in different other documents[3] comprising sets of norms, principles or rules related to ODR, applicable to various ODR mechanisms and systems worldwide.

Based on the aforementioned documents presented to UNCITRAL by the Secretariat at the 43rd session, the Commission deemed important the following aspects:

1. the existence of several regional systems of dispute resolution through ODR, which were currently being implemented or functional at the beginning of 2010, was an important indicator of the need to approach this issue at an international, global level. The main goal of such a step would be avoiding the development of parallel ODR mechanisms which are incompatible or even contradictory;
2. considering the global nature of the electronic international commerce phenomenon, the goal of any UNCITRAL activity in the field of ODR should be to focus on general rules and norms – compatible and coherent with the approach of the

3 *Background Report of the OECD Conference on Empowering E-Consumers: Strengthening Consumer Protection in the Internet Economy*, Washington D.C., 8-10 December 2009, published at http://www.oecd.org/ict/econsumerconference/44047583.pdf; *ISO 10003:2007, Quality management – Customer satisfaction – Guidelines for dispute resolution external to organizations*, available at http://www.iso.org/iso/catalogue_detail?csnumber=38449; *Alternative Dispute Resolution Guidelines – Agreement reached between Consumers International and the Global Business Dialogue on Electronic Commerce*, November 2003, published at http://www.gbd-e.org/pubs/ADR_Guideline.pdf.

subject in other relevant documents already adopted by UNCITRAL[4] – which could be applicable both in *business-to-business* (B2B) and in *business-to-consumer* (B2C) commercial transactions;

3. the opinions expressed by the participants to the colloquium converge towards signalling the fact that traditional judicial mechanisms do not represent an adequate option for settling cross-border electronic commerce disputes and that the solution to this problem could be a global system able to offer quick and effective ways of solving disputes and implementing agreements, that is an online functioning system applicable to large numbers of disputes arising from small-value B2B and B2C commercial transactions (for details, see UNCITRAL 2010, paras. 50-52);
4. disputes related to electronic commerce require the implementation of personalized resolution mechanisms which do not imply costs, deadlines and proceedings that are disproportionate in relation to the value of the transactions themselves;
5. the topics discussed at the colloquium organized by the UNCITRAL Secretariat require more attention from the Commission, since the time is right for identifying the courses of action that should be followed by the Commission in the near future. These should take into account the differences between states and between various categories of population at the global level concerning the use of ICT and, in particular, the opinions of the developing states on this issue (*idem*);
6. given the arguments presented both in favour and against the limitation of the UNCITRAL works on disputes related to B2B transactions – at least in an initial phase – it is possible and appropriate to envision the creation of a set of common rules applicable to both B2B and B2C transactions, given that, in practice, it is often difficult to make not only a distinction between the two types of transactions, but also a distinction between traders and consumers.

Following the debates within its 43rd session, UNCITRAL has concluded that it was necessary to create a working group able to continue the activity conducted so far in the ODR field, mainly concerning disputes related to cross-border transactions concluded through electronic commerce, including B2B and B2C ones. Furthermore, on that same occasion, UNCITRAL decided that the final form of the standardized procedural rules

4 *UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996 with additional article 5 bis as adopted in 1998*, United Nations, New York, 1999, published at http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf, and *UNCITRAL Model Law on Electronic Signatures with Guide to Enactment 2001*, United Nations, New York, 1999, published at http://www.uncitral.org/pdf/english/texts/electcom/ml-elecsig-e.pdf.

to be elaborated by the working group was to be established by the latter at a further stage of the process (UN 2010, para. 257).

Thus, following the 43rd working session of UNCITRAL, Working Group III (Online Dispute Resolution) was designated to elaborate common procedural rules generally applicable in the field of ODR and which would not affect the consumers' rights, considering that policies and legislations of member states related to consumer protection are very different from one state to another. UNCITRAL also established that, in case the elaboration of common rules applicable to both types of transactions (B2B and B2C) should prove to be unfeasible, the working group should suggest different approaches where necessary (UN 2010, paras. 255-256).

IV. THE ACTIVITY OF UNCITRAL'S WORKING GROUP III – ONLINE DISPUTE RESOLUTION

IV.1. *The works of the 22nd session of Working Group III (first session on ODR)*

The 22nd session of UNCITRAL's Working Group III was held in Vienna between December 13 and December 17, 2010 and it was the first session on ODR, following the change of the name and attributions of the group based on the decisions adopted by UNCITRAL at its 43rd session (UNCITRAL 2010b).

IV.1.1. *Participants*

UNCITRAL's Working Group III, consisting of all states that were members of the Commission, held its works within the 22nd session, in the presence of representatives of the following 29 member states: Argentina, Austria, Belarus, Bolivia (Plurinational State of), Canada, China, Columbia, Czech Republic, Egypt, El Salvador, France, Germany, Honduras, India, Iran (Islamic Republic of), Israel, Italy, Japan, Mexico, Nigeria, Philippines, Republic of Korea, Russian Federation, Spain, Thailand, Turkey, Ukraine, United States of America and Venezuela (Bolivarian Republic of).

Other participants:

- Observers from 7 other states – Ecuador, Indonesia, Panama, Slovakia, Slovenia, Sudan and Yemen;
- Observers from an intergovernmental organization – European Commission;
- Observers from the following nongovernmental organizations: American Bar Association (ABA), American National Standards Institute (ANSI), Asian Domain Name Dispute Resolution Centre (ADNDRC), Asociación Americana De Derecho Internacional Privado (ASADIP), Business Software Alliance (BSA), Center for International Legal Education (CILE), Centre de Recherche en Droit Public (CRDP), Council of Bars and Law Societies of Europe (CCBE), European Legal Studies Institute,

Institute of Commercial Law (Penn State Dickinson School of Law), Institute of Law and Technology (Masaryk University), Internet Bar Association (IBO), Madrid Court of Arbitration, Pace Institute of International Commercial Law and Swiss Arbitration Association (ASA) (*idem* paras. 6-8).

IV.1.2. ***General observations***

In order to actually draft a document that would consist of rules governing the ODR field, globally applicable in disputes related to B2B and B2C transactions, UNCITRAL's Working Group III started its activity with a session of proposals and debates on the main aspects that, according to the members of the group, required clarifications, in depth analysis and decisions.

Therefore, the first aspect clarified at the 22nd session concerned the mandate of Working Group III and the possible interference of its activity with that of Working Group II (Arbitration and Conciliation). In this context, it was mentioned that the mandate given by UNCITRAL to Working Group III was to develop a set of standard rules on ODR, considering the cross-border transactions concluded through electronic commerce, including B2B and B2C transactions, and that its activity should not overlap in any way with the activity of Working Group II, the latter dealing with the in depth analysis of the issue of transparency in arbitration proceedings opposing an investor to a state, with the future perspective of analyzing in detail the aspects falling within the scope of the international commercial arbitration (*idem* para. 15).

The aspects on which all the members of the group or most of them have totally or mostly agreed upon during the debates were the following (*idem* paras. 16-17):

1. the fact that, prior to the meeting, there was no standard regarding ODR accepted at the international level;
2. the need to identify a practical, fast, effective and inexpensive way to settle disputes related to small value (B2B and B2C) transactions that are constantly multiplying worldwide;
3. the traditional dispute resolution mechanisms – including those belonging to ordinary justice – are inadequate in the case of the aforementioned disputes, because they are too expensive and require too much time considering the value of the transaction, while the cross-border enforcement of rulings is difficult, sometimes even impossible in the absence of treaties providing their recognition and enforcement in the case of B2C transactions;
4. any standard in the field of ODR considered by Working Group III has to be coherent with the existing standards of UNCITRAL in the field of arbitration, conciliation and electronic commerce.

Other aspects deemed important by some members of the working group and consequently submitted to debate were the following (*idem* paras. 18-23):

1. regardless of the form they will take, the recommendations of the working group related to ODR should be flexible, in order to be easily adaptable to the various situations of the states as far as the knowledge and the experience in electronic commerce and ODR, the cultural differences and the level of economic development are concerned;
2. since national laws on consumer protection are largely different from one state to another, special attention should be paid to the compatibility between the group's recommendations on ODR and these legislations, so the rights of the consumers at the national level are not affected;
3. although the group had decided that the final form of the outcome of its activity in the field of ODR (model law, set of norms or rules, guidelines or any other form) would be established later on, after the clarification of the fundamental issues related to ODR, some of the members have proposed the elaboration of the following four different instruments in this respect:
    3.1. simplified procedural rules, according to the requirements imposed by the proceedings concerned;
    3.2. accreditation standards for ODR service providers;
    3.3. basic principles for cross-border disputes' resolution;
    3.4. a cross-border enforcement mechanism.
4. a few challenges related to the creation and the implementation of a single ODR system at the global level, some of the most important being the following:
    4.1. linguistic differences, provided that the users of a single ODR system need to effectively communicate in their own language throughout the proceedings – as a possible solution, ECRI (E-Commerce Claims Redress Interchange) was proposed as a new standard of communication; at the time it was under construction and it was meant to facilitate filling out forms by consumers and subsequent dialogue between parties in a multilingual environment;
    4.2. means of financing a global system of ODR and the willingness of states to finance such a system;
    4.3. the applicability of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (signed in New York on 10 June 1958, entered into force on 7 June 1959; for details, see http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) to those ODR cases that lead to an arbitration award concerning consumers; in this context has

also been raised the issue of regulating, under the new globally standardised rules that were to be developed by the working group, a new mechanism of recognition and enforcement of the arbitral awards, less complex than the mechanism provided by the above mentioned Convention, given the low value of the B2C transactions and the need to resolve any disputes related to such transactions as swiftly as possible (UNCITRAL 2010b para. 43).

IV.1.3. ***Examples of current ODR models and systems***

During the same session, UNCITRAL's Working Group III analyzed the examples of existing ODR models and systems – either functional or under implementation – that it deemed to be the most relevant among those presented in the document "Online dispute resolution for cross-border electronic commerce transactions" (UNCITRAL 2010c), document that was drafted and made available to the working group by the Secretariat. Consequently, a few major aspects were noted:

1. the experience of several states in allowing judges to act as conciliators in small value claims proved to be a success, leading to the swift resolution of such disputes outside the courtrooms (UNCITRAL 2010b para. 24);
2. an ODR procedure could be seen as having three possible phases: (1) negotiation, (2) conciliation and (3) arbitration (*idem* para. 28);
3. it is important that the first two of the three above mentioned phases – negotiation and conciliation (for another example of online conciliation – MédiateurDuNet.fr – see UNCITRAL 2010c para. 6) – be the most encouraged and used within an ODR system, since they have proved to be effective in most cases; the relevant examples (UNCITRAL 2010b para. 30) noted in this respect were the following: (a) the complaints resolution mechanism implemented by eBay – within which millions of cases are handled every year, with only a small percentage of them remaining unsolved – and ECODIR (UNCITRAL 2010c para. 7) – a system designed to facilitate negotiation between a seller and a buyer, with a success rate of 70 % without an intervention of a mediator and of 95 % after the intervention of a mediator; only a small percentage of the cases are settled by means of arbitration;
4. although arbitration is a necessary element of ODR, given the fact that without it there would be no resolution for the cases remained unsolved in the previous stages (negotiation, conciliation, mediation), it is desirable to make use of it as rarely as possible and only in those cases in which none of the other dispute resolution mechanisms resulted in a positive outcome (UNCITRAL 2010b para. 30); among the examples of online arbitration systems mentioned in the working paper drafted by the Secretariat there is the joint project of the International Centre for Dispute Resolution (ICDR) and General Electric for the online resolution of

disputes between producers and providers (for details related to the functioning of this system, see UNCITRAL 2010 section II para. 29).

IV.1.4. ***Standards regarding ODR***

Based on working documents and research previously conducted by the Secretariat and by institutions and organizations from different member states of Working Group III, the latter has concluded that there were no acknowledged common standards or rules in the field of ODR. Nevertheless, it was considered that for the creation of such standards or rules Working Group III should take into account several documents reflecting the basic principles of an ODR system, such as:

1. *Recommended best practices for online dispute resolution service providers* (American Bar Association Task Force on E-commerce and ADR, published at www.abanet.org/dispute/documents/BestPracticesFinal102802.pdf);
2. *Addressing Disputes in Electronic Commerce – Final Report and Recommendations of the American Bar Association's Task Force on Electronic Commerce and Alternative Dispute Resolution* (published at www.abanet.org/dispute/documents/FinalReport102802.pdf);
3. *Alternative Dispute Resolution Guidelines Agreement* between Consumers International and Global Business Dialogue on Electronic Commerce (GBDe-Consumers International Agreement, published at http://www.gbd-e.org/pubs/ADR_Guideline.pdf);
4. *Resolving disputes online – Best practices for Online Dispute Resolution (ODR) in B2C and C2C transactions* (International Chamber of Commerce, published at http://www.nacpec.org/docs/DISPUTES-rev.pdf);
5. *European Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes* (EC 1998);
6. *European Commission Recommendation of 4th of April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes not covered by Recommendation 98/257/EC* (EC 2001).

Regarding the ODR standards that are currently being developed or implemented, Working Group III has noted the project of the *Convention on consumer protection and applicable law* presented within OAS and has included it among the reference materials for its activity. In the same context of the standards that are currently being developed or implemented, the working group addressed the issue of the "*Blue button*" concept, which was considered to be not an ODR proposal in itself, but rather a helpful tool, possibly useful for the development of common rules applicable to ODR (for details on how the "*Blue button*" works, see UNCITRAL 2010 para. 16).

Finally, Working Group III also addressed in its discussions the deliberations within the 11th Annual Summit of the Global Business Dialogue on e-Society, held on 5 November 2009 in Munich, Germany (for details, see the summit agenda at http://www.gbd-e.org/events/2009/summit2009/agenda2.html) and the ones within the *ODR and consumers 2010* colloquium, held on 2-3 November 2010 in Vancouver, Canada (for details, see the colloquium website at http://www.odrandconsumers2010.org/about).

IV.1.5. ***Issues put forward for discussion in order to develop a draft of procedural rules related to ODR***

After identifying the existing ODR models and systems relevant for its activity, UNCITRAL's Working Group III set the themes, the issues and the aspects that required studying, debating and defining in order to outline several common standards in the field of ODR, summarized below.

IV.1.5.1. ***Definition of terms (UNCITRAL 2010c paras. 19-23)***

The most important term that required a definition in the context of the activity of Working Group III was, of course, "ODR". The debates on this matter were based on the definition given to ODR in paragraph 20 of the working group's document no. A/CN.9/WG.III/WP.105, which reads as follows:

> *"Online dispute resolution (ODR) usually refers to alternative dispute settlement methods using information and communication technology (ICT) and, in particular, electronic forms of interaction on the Internet. ODR can be conducted in whole or in part online. ODR is a means of settling disputes that incorporates the use of the e-mail communications, streaming media, ODR online platforms such as websites and other information technology as part of the dispute resolution process."*

Following the debates regarding the previously mentioned ODR definition, Working Group III decided as follows:

1.1. any definition of a term used in the context of ODR, including the definition of the term "ODR", shall respect the principle of technological neutrality and has to be flexible enough as not to exclude relevant technological evolutions that could take place in the future;

1.2. in order to clarify the parameters of ODR and the components of this concept, it is necessary to establish the content and/or the definition of the following aspects (UNCITRAL 2010b para. 39):

1.2.1. the types of disputes that can be settled through ODR;

1.2.2. the parties to such disputes;

1.2.3. the internal or cross-border nature of the disputes that can be settled through ODR;

1.2.4. the value of the transactions that may be related to disputes which are likely to be solved through ODR;

1.2.5. the type of neutral – conciliator, mediator, arbitrator – that can intervene to solve a dispute;

1.2.6. whether the access of the parties to the services of the neutral is free of charge or involves paying a fee;

1.2.7. how the contact between the parties and the neutral is established and how the latter acts to settle the dispute;

1.2.8. the final outcome of the proceedings (a consensus agreement or an arbitral award);

1.2.9. the effects of lacking a final outcome of the proceedings.

1.3. a relevant definition of ODR could be drafted after the clarification of the concept's components, in a further stage of the working group's activity.

IV.1.5.2. ***The activity of Working Group III: implications and limits (UNCITRAL 2010c paras. 24-27)***

During the same 22nd session, the members of the UNCITRAL's Working Group III determined that, in the light of the mandate given by the Commission, the activity of the group in charge with developing common standards in ODR would have a series of implications, such as:

2.1. the creation of a global system, independent from the systems already in place, for settling the cross-border disputes related to B2B and B2C transaction;

2.2. the creation of rights – currently non-existent in practice – for the consumers involved in cross-border B2C transactions; it was mentioned in this context that such consumers currently do not benefit from any right they could exercise in a reasonable way on the basis of certain provisions of national or international legislation in the field of consumer protection, because the costs of the mechanisms for exercising such rights are prohibitive in relation to the values of the transactions which constitute the subject of such disputes;

2.3. the protection of consumers' rights acknowledged by different national legislations, following the regulation and harmonization at global level of certain amiable means of dispute resolution, like complaint-handling, negotiation and conciliation, by the use of which the parties reach a consensus regarding a common solution; in this context it was noted that, unlike the above mentioned amiable means, in the case of online arbitration – which still is a judicial procedure

– the law applicable to the arbitration proceedings has to be established, fact that should be taken into account by the standardized rules that are going to be developed by the working group, so that their implementation in this regard does not affect the protection offered to consumers by the national legislations of the various countries of the world.

Among the limits of Working Group III's activities that were mentioned during the debates within its 22nd session, there are the following:

2.4. the activity of the working group must not target the harmonization of the national legislations in the field of consumer protection;

2.5. in the European Union, the possibility of consumers to choose the law applicable to online arbitration stipulated by the rules developed by the working group could contravene to the legislation of the European Union, more specifically to the provisions of Regulation (EC) no. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (EU 2008), which stipulates that the applicable law in the case of contracts concluded with the consumers is "the law of the country where the consumer has his habitual residence" [EU 2008 article 6 (1)].

The conclusion of the debates related to the implications and the limits of Working Group III's activity was that the rules to be developed must not violate the consumers' rights stipulated by the national legislations in the field of consumer protection.

IV.1.5.3. ***Identification and authentication (UNCITRAL 2010c paras. 28-31)***

Taking into consideration the low value of the transactions and the need for a speedy resolution of the above mentioned types of disputes, Working Group III considered that complex provisions would probably not be necessary for identification and authentication.

In this respect, reference was made to Article 7(1)(b) of the UNCITRAL Model Law on Electronic Commerce, which stipulates that the identification and authentication methods must be reliable and appropriate to the purposes for which they are used (UNCITRAL 1999). Working Group III decided that it would pursue the discussions related to this aspect in a future session.

IV.1.5.4. ***Commencement of proceedings (UNCITRAL 2010c paras. 32-36)***

One of the most important aspects highlighted by Working Group III in respect of this subject was the need to provide the consumers with all the elements they need in order to make an informed choice when they choose an ODR mechanism, regardless of the

method and of the moment when their choice is made in relation to the starting date of a dispute connected to a transaction in which they were a party. For this purpose, the following aspects have been highlighted as important:

4.1. any agreement to solve disputes by alternative means, including through an ODR platform, must be clearly signalled to the consumer and the obligations assumed by the consumer under that agreement must be presented in a clear and explicit manner, especially when the law applicable to the ODR proceedings in question is different from the law that protects the consumer in his country of residence;

4.2. the provisions of any agreement like the one mentioned in the previous paragraph should be presented to the consumer separately from the provisions of the contract between the consumer and the seller, so that the attention of the consumer is mainly focused on the agreement in question and on its consequences.

Working Group III has also consulted the work of other organizations and institutions in the field, including the report of the 2007 technical meeting of the Coordination Committee in the Field of Consumer Protection of the Association of Southeast Asian Nations (ASEAN).

IV.1.5.5. ***Submission of complaint, statements and evidence (UNCITRAL 2010c paras. 37-42)***

Concerning the submission of the complaint and the submission of statements and evidence, the members of Working Group III have formulated a series of observations, such as:

5.1. no standard rule in this respect should prohibit or prevent in any way the use of the technologies or of any dispute resolution methods that might appear in the future;

5.2. the time settled for filling out the forms and for the submission of evidence should be short, in order to ensure a speedy deployment of the proceedings;

5.3. a valid option could be the adoption of the model offered by the WIPO Electronic Case Facility (WIPO ECAF), which has been designed for accelerated proceedings and which contains a system of warnings, allowing at the same time the users to send documents and communications through electronic means to an online register that is accessible to all the parties at any time (for details about the WIPO system, see WIPO – ADR Arbitration and Mediation Center webpage at http://www.wipo.int/amc/en/ecaf/index.html).

With regard to the admissibility of the evidence, it was pointed out that in some countries, according to the national legislation, evidence in electronic form was not admissible and that this should be taken into account in the development of the legal standards in this respect (UNCITRAL 2010b para. 59).

Moreover, the possibility of holding the ODR service provider liable for the correct and timely exchange of documents between the parties during the proceedings has also been raised, but no actual suggestion was made in this respect (*idem* para. 60).

IV.1.5.6. ***The number of neutrals (conciliators, mediators, arbitrators) and their appointment (UNCITRAL 2010c paras. 43-45)***

The working group initiated the discussions regarding these aspects because of the necessity to ensure the impartiality and the professionalism of the neutral third party, regardless of his/her quality (conciliator, mediator or arbitrator).

In this context, within Working Group III there was a generally accepted rule, according to which, in the absence of an opposite agreement between the parties, the neutral should be a single person, the main arguments in favour of this choice being (1) the low value of the transactions connected to the type of disputes in question and (2) the need for a speedy process (UNCITRAL 2010b para. 62).

With regard to the appointment of the neutrals, it was found that the issue arises especially in situations of deadlock, when parties cannot agree on a neutral third party and, therefore, the intervention of another third party is required for the appointment of the neutral. The possible answers to this issue were mainly three (*idem* paras. 61 and 64):

- appointment of the neutral by the competent authority in the field of consumer protection;
- choosing the neutral from a list drawn and updated by care of the ODR service provider;
- appointment of the neutral by the ODR service provider under the conditions of transparency and impartiality.

Another aspect discussed in this context on which the members of Working Group III have reached consensus is related to the experience of the neutral third parties, who do not necessarily have to be lawyers, although they should be required to have relevant professional experience, as well as dispute resolution skills to enable them to successfully fulfil the role of the neutral (*idem* para. 63). Following this idea, the issue of an accreditation system of the neutrals was raised, for which two stages have been suggested:

- the stage of the initial accreditation, in which the technical experience of the neutral third party and his/her experience in dispute resolution would be taken into account;
- a second stage, consisting of the regular (re)evaluation of the neutral third party, also on the basis of the reactions received from the users of the ODR system.

A possible model of accreditation system mentioned during the discussions and noted by Working Group III was the one established by the Independent Standards Commission of the International Mediation Institute – an international certification scheme for the neutral third parties (*idem* para. 65).

IV.1.5.7. ***Impartiality and independence of the neutrals (UNCITRAL 2010c paras. 46-47)***

The main aspects discussed by Working Group III with regard to these subjects were the following:

7.1. the independence, the neutrality and the impartiality of the neutrals are essential for winning and maintaining the trust of the users in the ODR systems, the more so as they are parties to a conflict who never meet in person (UNCITRAL 2010b para. 66);

7.2. the necessity of a statement of impartiality given by the neutrals, which must be included as an annex to any set of rules (*idem* para. 71);

7.3. the necessity of a statement of availability given by the neutrals, with a clear indication of the fact that they are able to fulfil their role in a timely manner throughout the procedure, until its completion (*idem* para. 66);

7.4. the adoption of codes of conduct for neutrals (*idem* para. 67) by using some of the existing models, like "Recommended best practices for online dispute resolution service providers" (American Bar Association Task Force on E-commerce and ADR, published at www.abanet.org/dispute/documents/BestPracticesFinal102802.pdf) and the European Code of Conduct for Mediators (at http://ec.europa.eu/civiljustice/ adr/adr_ec_code_conduct_ro.pdf);

7.5. the impartiality of the ODR service providers is also important, taking into account the fact that they could suggest or appoint neutrals and they could supervise the development of the procedure; an aspect considered to be very important in this respect was the transparency of the financing sources of the ADR service providers, so that they could not be suspected of favouring one party or the other (UNCITRAL 2010b para. 69);

7.6. in the same logic of transparency and impartiality, the parties should have the possibility to refuse the appointment of a certain person as a neutral, as it happens in the case of the ODR mechanisms implemented by ICDR and OAS, and the ODR service providers should have the authority to replace the neutrals who do not meet the obligations imposed to them by the status in question (*idem* paras. 70-71).

IV.1.5.8. *Confidentiality and security of communications (UNCITRAL 2010c paras. 48-50)*

Working Group III agreed that the appointment of the parties and any other information that could lead to their identification must remain confidential and should only be revealed to third parties under exceptional circumstances (UNCITRAL 2010b para. 77). On the other hand, however, several arguments were presented in favour of the regulation of some exceptions to the procedural rules providing confidentiality for the entire ADR process – especially in the case of arbitration – like the following:

8.1. the full or partial publication of the arbitration awards or of their abstracts has become an increasingly common practice in the last few years (*idem* para. 72);

8.2. the publication of the decisions resulted from ODR cases could contribute to the creation of a public collection of precedents which could serve as a guide for the parties wanting to resort to ODR mechanisms and for the neutrals; several examples of databases containing abstracts of ODR decisions have been mentioned in this context: Case Law on UNCITRAL Texts ("CLOUT", accessible at http://www.uncitral.org/uncitral/en/case_law.html), the database of the Court of Arbitration for Sport (accessible at http://www.tas-cas.org/jurisprudence-archives) and the ICANN UDRP database of WIPO Arbitration and Mediation Centre (accessible at http://www.icann.org);

8.3. since "many of the neutrals might be non-lawyers", another advantage resulted from the publication of the decisions adopted within ODR proceedings would be the free access to precedents, which would encourage the uniform and consistent application of the rules in the field of ODR (UNCITRAL 2010b para. 73);

8.4. moreover, the publication of such decisions could help warning the public about certain doubtful or fraudulent commercial practices, as well as about sellers who do not comply with the decisions adopted against them as a result of ODR proceedings, while the sellers in question could be stimulated to implement such decisions (*idem* para. 74);

8.5. the publication of statistics regarding the ODR mechanisms, that would help monitor the use of such mechanisms and the results obtained as a consequence of their use; in this context, the question has been asked whether an ODR service provider could have the liberty to publish statistics showing that a particular merchant has been a party in several ODR proceedings without violating the principle of neutrality (*idem* para. 75).

With regard to conciliation, all participants to the discussions have agreed that its results should remain confidential, because they essentially represent the agreement

between the parties. In addition, confidentiality could act as a stimulus for the parties to choose conciliation as a means to solve their dispute.

Regarding the security standards that the ODR service providers should guarantee for the communication between the parties involved in ODR proceedings, Working Group III has concluded that these should be high, in order to prevent any unauthorized access to information and documents that are communicated, regardless of the purpose of such access. In this respect, ISO 27001 and ISO 27002 were mentioned as possible standards (*idem* para. 82).

IV.1.5.9. ***Communication between the neutrals and the parties (UNCITRAL 2010c paras. 51-58)***

Working Group III has considered that the aspects related to the communication between the neutrals and the parties are more of a technical nature, therefore they are not approached within the working group's activity, predominantly dealing with the legal aspects.

Thus, it was only specified that each ODR service provider should set its own rules and the platforms through which these types of services are accessed should make available for the parties, in due time, all the relevant information in this respect.

Moreover, the respect of the autonomy of the parties was also considered to be an important issue, while recalling that the principles provided by the UNCITRAL Model Law of Electronic Commerce (MLEC) and by the UNCITRAL Model Law of Electronic Signatures (MLES) are to be applied only when the parties do not agree otherwise (UNCITRAL 2010b para. 83).

Finally, the working group concluded that a common protocol regarding the technical aspects could be useful and that, in order to avoid possible confusions generated by the use of different interfaces, it would be desirable that the access of consumers and merchants to the ODR platform was made through a unique interface (*idem* para. 84).

IV.1.5.10. ***Hearings (UNCITRAL 2010c paras. 59-62)***

With regard to the hearings, the discussions of Working Group III were mainly concentrated on the following aspects:

10.1. records should be kept only in an electronic format;

10.2. any procedural rules should be flexible and open with respect to the hearings;

10.3. in the case of some ODR success models, like ICANN UDRP, hearings are provided only in a small number of exceptional cases (UNCITRAL 2010b para. 84).

IV.1.5.11. ***Representation of the parties and the assistance available to them (UNCITRAL 2010c para. 36)***

In principle, Working Group III has concluded that in ODR proceedings the parties should have the right to be represented or assisted by third parties – national organizations or institutions acting in the field of consumer protection, national ODR service providers, lawyers – able to help them overcome any difficulties encountered in accessing or using an ODR platform, including language difficulties.

Nonetheless, it would be desirable for the ODR platforms to be sufficiently user-friendly and easy to use, so that the users would not have to resort to assistance or representation by a third party, because such services are in most cases too expensive compared to the value of the transaction that makes the object of the dispute.

IV.1.5.12. ***Place of the ODR proceedings (UNCITRAL 2010c paras. 64-65)***

With regard to the place of the ODR proceedings, Working Group III has found that this issue is particularly relevant in the case of online arbitration, from the point of view of the enforcement of foreign arbitration awards on the national territories of the states. However, in the case of conciliation or mediation the issue of implementing the agreement concluded between the parties or the decision resulted from the dispute resolution proceedings subsists, therefore the place of the ODR proceedings is not irrelevant in these cases either.

Thus, starting from the observation that the main principle is that the place of the ODR proceedings is the one set by the parties in their agreement, the following proposals have also been discussed within Working Group III:

12.1. if the procedural rules applicable to an ODR platform specify a certain place for the proceedings and if the parties choose to use that ODR platform, it would mean they have accepted that place voluntarily by "opting in" to the platform (UNCITRAL 2010b para. 89);

12.2. failing an agreement of the parties, the place of the proceedings would be the place of the consumer's residence, so that he/she may benefit from the protection offered by the national legislation on consumer protection in his/her state of residence;

12.3. failing an agreement of the parties, the place of the proceedings would be the headquarters of the merchant, so that the consumer is not forced to request, for example, the enforcement of an arbitration decision awarded as a result of an online arbitration that took place in another state than the one in which he/she resides (*idem* para. 90);

12.4. designation of a single place for all the ODR proceedings in the world, chosen from the jurisdictions in which the legislation related to the ADR systems in general and to the ODR systems in particular is adequate to their functioning and in which the legal framework and the judicial system are favourable to a speedy resolution of the aspects related to the ODR proceedings – an example cited in this respect was the Court of Arbitration for Sports in Lausanne (Switzerland) (*idem* para. 92);

12.5. the place of the ODR proceedings could be the place where the contract was executed (*idem* para. 93);

12.6. taking into consideration the global nature of the ODR proceedings, the multitude of jurisdictions and the need to implement a simple and speedy procedure, suitable for the low value of the transactions, giving up the concept of "place of arbitration" (*idem* para. 94), according to the model adopted by the International Centre for Settlement of Investment Disputes [ICSID's Rules of Procedure for Arbitration Proceedings (Arbitration Rules) are available at https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/main-eng.htm].

Finally, the members of Working Group III decided that they will return to this complex aspect during the following sessions.

IV.1.5.13. ***Settlement agreement and termination of the proceedings (UNCITRAL 2010c paras. 66-67)***

The discussion within Working Group III related to this topic was brief, the only notable aspect being the fact that the group decided to focus its attention on regulating through rules those types of agreements that can be most easily and rapidly implemented at a national level (UNCITRAL 2010b para. 97).

IV.1.5.14. ***Enforcement of agreements and arbitral awards (UNCITRAL 2010c para. 68-75)***

The issue of enforcing the agreements concluded between the parties as a result of ODR proceedings arises less in the case of disputes settled through conciliation – the majority in B2B and B2C transactions – because in these cases the agreement in question is in its entirety the will of the parties, which are therefore motivated and willing to proceed with its implementation.

However, this issue has a particular relevance for the arbitral awards following ODR proceedings, related to which Working Group III has concluded that they fall under the New York Convention as far as their enforcement is concerned (UNCITRAL 2010b para. 98). Nevertheless, it was considered that the mechanism provided by this convention was not sufficient to ensure an efficient and speedy enforcement of arbitral

awards adopted within ODR proceedings related to disputes concerning B2B and B2C transactions. Therefore, other possible solutions were discussed, in order to find those which would lead to a more accelerated and efficient enforcement procedure for these arbitral awards, out of which we mention two:

14.1. the use of "trustmarks" (signs, logos) that induce confidence and could indirectly compel the merchants to fulfil their obligations resulted from such an arbitral award, for reasons related to their image and commercial reputation;

14.2. certification of merchants, who would thus commit to respect and enforce the arbitral awards rendered against them; in this respect, gathering and publication of statistics illustrating to what extent the certified merchants enforce such awards was considered to be useful (*idem*).

With regard to the effects of the arbitral awards adopted as a consequence of online arbitrations similar to the ones mentioned above, Working Group III has considered that these should be (1) final and binding, (2) not submitted to appeal as far as the merits of the dispute are concerned and (3) carried out within a short period of time after being rendered (UNCITRAL 2010b para. 99).

Finally, the Secretariat specified that, in the case of creation of ODR rules according to which the parties have at their disposal a special mechanism to enforce the arbitral awards, article VII(1) of the New York Convention might allow the resort to such an enforcement mechanism and thus the issues related to the enforcement through other provisions of the New York Convention might be avoided (UNCITRAL 2010b para. 100).

IV.1.5.15. ***Applicable law***
(UNCITRAL 2010c paras. 76-81)

Many of the delegations present at the working group's debates have supported the use of principles founded on equity, of codes of conduct, of uniform rules with general application or of substantive provisions as a basis for solving disputes related to B2B and B2C transactions, in order to avoid the complex issues that might arise from the interpretation of various rules related to the applicable law in such cases.

Moreover, given the fact that the majority of such disputes can be solved in practice exclusively based on the provisions of the contract concluded between the parties, it was considered that any rules regulating ODR proceedings applicable in these cases must be simple, expeditious and flexible (UNCITRAL 2010b para. 101). The example cited in this sense, which will be considered by Working Group III in its future debates, is the joint proposal put forward by Brazil, Argentina and Paraguay at the OAS Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII), according to which the applicable law is the one most favourable to the consumer (UNCITRAL 2010b para. 102).

It was as well established that, within the next sessions of Working Group III, the Secretariat would be able to present also other proposals regarding the applicable law, based on the debates and suggestions received from the members of the group.

IV.1.5.16. ***Language of proceedings (UNCITRAL 2010c paras. 82-87)***

Regarding the language of the ODR proceedings, most of the members of Working Group III have shared the opinion that the language of proceedings is a very important aspect within an ODR procedure, because it is closely linked to ensuring the protection of the consumer. Thus, it was highlighted that the level of knowledge and understanding of a language needed for the conclusion of a contract is different than the one needed for an active participation in ODR proceedings (UNCITRAL 2010b para. 104). As a consequence, several proposals regarding the modality of choosing the language of proceedings were discussed, including the following:

16.1. the language in which the contract was signed in electronic form should be presumed to be the language of the ODR proceedings;

16.2. the language of proceedings should be chosen by the parties by mutual agreement;

16.3. if the parties fail to agree with regard to the language of proceedings, it should be chosen by the neutral third party (*idem* para. 105).

A very important aspect related to the language of the ODR proceedings discussed within Working Group III was that, regardless of the chosen language of proceedings and of the modality to determine it, the interface of the ODR platform must be as simple and intuitive as possible, so that all its users, and especially the consumers, can easily follow and understand the ODR procedure. In this context was mentioned the new standard in the field of communication, known under the name of ECRI (E-Commerce Claims Redress Interchange), currently in the process of being developed, which aims to facilitate the filling out of the forms by the users of the ODR platform and the subsequent dialogue between the parties in a multilingual environment [for more details about how ECRI works, see *ECRI (preliminary working draft)*. According to the description, *ECRI introduces new approaches to customer redress. In addition to textual information localized by language, the ECRI also addresses the inclusion of graphic and audio communications as appropriate. The ECRI is applicable across a wide variety of communication types, including computers, telephones, and mobile devices. It also enables full participation in redress systems by persons who may have difficulty communicating effectively with textual communication. The use of ECRI will greatly facilitate participation through the reduction of barriers for certain populations* (ODR Exchange 2012 2)].

IV.1.5.17. ***Costs and speed of the ODR proceedings (UNCITRAL 2010c paras. 88-90)***

Starting with the 22nd session, the UNCITRAL's Working Group III meetings have been focused on reducing the costs and duration of the ODR proceedings. Therefore, the arguments and the solutions presented for most of the debated issues have been related to these two aspects. Here is a list of the most relevant arguments discussed, as well as a series of suggestions aimed at reducing the costs and the duration of the ODR proceedings:

17.1. The enforcement of agreements between parties and of arbitral awards adopted within ODR proceedings must be quick, efficient and inexpensive. If the enforcement is difficult, too costly or impossible, these proceedings are useless (UNCITRAL 2010b para. 109);

17.2. If users are requested to pay a reasonable application fee, in order to deter the submission of abusive claims, such fee should be proportional to the value of the transaction the dispute is related to (whether it represents a percentage of the value of the transaction or a set amount that can vary from a minimum to a maximum value or a combination of the two) (*idem* para. 110);

17.3. The users of the ODR platforms must be given in advance clear and transparent information on the costs deriving from the access to and from the use of the respective ODR system since the beginning until the end of the proceedings and, if necessary, until the full enforcement of the agreement or of the arbitral award adopted;

17.4. ODR providers and neutrals must be independent, especially in cases when providers are in charge of keeping updated lists of neutrals who they may call upon if the parties do not themselves reach an agreement concerning the appointment of a neutral; it was suggested that the flow of money between providers and neutrals should be transparent – in other words, the fees received by the neutrals from the ODR providers and the financial sources of such payments must be made public – thus making clear the fact that neither the neutral nor the ODR provider have any financial interest to have cases decided in a certain way;

17.5. Other suggestions related to the funding referred to (1) government financial support, (2) funding by consumer organizations or (3) self-financing (*idem* paras. 112-114).

IV.2. ***Agenda of the following session of UNCITRAL's Working Group III***

Before concluding its 22nd session, Working Group III requested the Secretariat to prepare, for its 23rd session, that was going to take place in New York between May

23 and May 27, 2011 (*idem* para. 116), based on the conclusions reached and on the suggestions made during its 22nd session and on the possible further suggestions made by member states, the following documents:

1. **A draft project of general procedural rules for ODR comprising, among other aspects, the following:**
   1.1. Types of claims with which ODR would deal – B2B and B2C cross-border low-value high-volume transactions;
   1.2. Initiation of the online procedure;
   1.3. Warning of the parties concerning any agreement to resort to ODR they enter automatically or they have the option to enter at the time of conclusion of the contract in electronic form;
   1.4. Stages of the ODR procedure – negotiation, conciliation and arbitration;
   1.5. Description of the most important legal principles, including those based on equity, on which the decision making process and the adoption of the arbitral awards in ODR proceedings would rely;
   1.6. Presentation of some procedural aspects, such as representation of the parties and language of proceedings;
   1.7. Application of the New York Convention, as previously discussed within the working group;
   1.8. References to other ODR systems;
   1.9. Presentation of several options, where appropriate.
2. **A draft document setting out the principles and issues involved in the design of an ODR system;**
3. **All documents or other references to ODR known to the Secretariat, with indication of the websites or other sources where they may be found.**

Working Group III has also suggested that, for the preparation of the documents for the next session, the Secretariat should consult with NGOs and experts that have a relevant activity in the field of ODR and should take into account, if possible, the outcomes of the 10th annual meeting of the Online Dispute Resolution Conference that was to be held in Chennai (India) on 7-9 February 2011 (http://www.odr2011.org).

IV.3. ***The 23rd session of Working Group III (the 2nd ODR session)***

The 23rd session of Working Group III (Online Dispute Resolution) was held in New York between May 23 and May 27, 2011. The following member states have participated: Benin, Brazil, Cameroon, Canada, Chile, Czech Republic, Egypt, France, Germany, Greece,

Honduras, Iran (Islamic Republic of), Israel, Japan, Kenya, Malaysia, Mexico, Nigeria, Pakistan, Philippines, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, Turkey, Ukraine, United States of America and Venezuela (Bolivarian Republic of).

Other participants to the session:

- Observers from 11 states – Croatia, Ecuador, Indonesia, Iraq, Kuwait, Lebanon, Madagascar, Myanmar, Netherlands, Panama and Peru;
- Observers from two organizations of the UN system – United Nations Economic Commission for Africa (UNECA) and World Intellectual Property Organization (WIPO);
- An observer from an international intergovernmental organization – European Union;
- Observers from the following NGOs: ABA, Asian-African Legal Consultative Organization (AALCO), Association for the Promotion of Arbitration in Africa (APAA), Association of the Bar of the City of New York (NYCBAR), CILE, CRDP, Chartered Institute of Arbitrators (CIARB), Construction Industry Arbitration Council (CIAC), CCBE, Electronic Consumer Dispute Resolution (ECODIR), Forum for International Commercial Arbitration C.I.C. (FICACIC), Institute of International Commercial Law (Penn State Dickinson School of Law), Inter-American Commercial Arbitration Commission (IACAC), IBO, International Institute for Conflict Prevention and Resolution (CPR), International Technology Law Association (ITECHLAW), Latin American E-Commerce Institute (ILCE), Madrid Court of Arbitration, National Center for Technology and Dispute Resolution (NCTDR) and Pace Institute of International Commercial Law (UNCITRAL 2011a, 3).

This session focused on the continuation of the debates concerning the ODR procedural rules initiated during the previous session (UNCITRAL 2011b). Among the issues debated upon at the beginning of the 23rd session there were (1) the applicability of the provisions of the New York Convention to the ODR cases leading to an arbitral award, (2) the definition of terms such as "low-value", (3) the issue of the "digital divide" (referring to the existing technological gap between the developing countries that do not have extensive Internet access and therefore are not able to partake fully in an ODR system), (4) the issue of the technological neutrality of the rules of procedure (anticipating the progress that would be made in the field of videoconferences) and (5) the issue of the final form of the document to be produced by Working Group III.

After the preliminary part of the session, the group proceeded to the debate on the paragraphs of the draft procedural rules.

Thus, remarks were made concerning the field of application, especially with regard to the definition of the term "cross-border" – reference was made to two documents

pertaining to the international law: the United Nations Convention on the Use of Electronic Communications in International Contracts (*Electronic Communications Convention*) (UNCITRAL 2007) and the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (EU 2008a). It was even suggested that the term "cross-border" should be eliminated from the rules of procedure. Other terminology related clarifications referred to the phrases "electronic means of communication", "neutral third party" and "ODR platform".

As far as the commencement of ODR is concerned (draft article 4), it was decided that, in order to create an ODR system, the following principles must be respected:

- Arbitral decisions should be binding on the parties, in order to ensure their effective enforcement;
- When being offered a choice to accept the procedural rules, whether before the start of the dispute or afterwards, the buyers should be given a separate, clear and adequate notice about ODR;
- Online sellers should be under the obligation to implement the decisions and should have the right to bring claims against non-paying buyers;
- Rules or guidelines should highlight the best practices for providing online notices to the parties and adequate measures should be set in order to ensure that claims would be brought to the attention of the other party (UNCITRAL 2011a, 14).

During the debates on draft article 5 (Negotiation), a series of issues were raised as to the appropriate moment for a party to determine the initiation of a facilitated settlement stage when the other party refuses to take part in the negotiation, to the manner in which a negotiated agreement can be carried out and to the passing from the negotiation to the facilitated settlement phase (UNCITRAL 2011a, 18). The issue of automated software that allows speedy handling of a large number of cases was also raised in this context, thus introducing a forth party in the process – the technology. It was stated that such software has proved to be very efficient (*idem*).

In conclusion, Working Group III requested the Secretariat to prepare for its next session, to the extent that resources were available, documents addressing the following issues:

- Guidelines for the neutrals,
- Minimum standards for the ODR providers,
- Substantive legal principles for resolving disputes; and
- A cross-border enforcement mechanism (UNCITRAL 2011a, 20).

IV.4. *The 24th session of Working Group III (the 3rd ODR session)*

The 24th session of the UNCITRAL's Working Group III was held in Vienna between November 14 and November 18, 2011 and it was attended by representatives of 30 member states: Austria, Bolivia, Canada, China, Colombia, Czech Republic, Egypt, El Salvador, France, Germany, India, Israel, Italy, Japan, Jordan, Kenya, Malaysia, Mexico, Nigeria, Philippines, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, Turkey, Ukraine, United States of America and Venezuela (Bolivarian Republic of).

The session was also attended by:

- Observers from 12 other states – Angola, Croatia, Denmark, Dominican Republic, Finland, Hungary, Indonesia, Netherlands, **Romania**, Slovakia, Sudan and Syrian Arab Republic;
- Observers from the European Union;
- Observers from the following intergovernmental organizations: Islamic Development Bank (IDB) and Secretaría de Integración Económica Centroamericana (SIECA)
- Observers from the following non-governmental organizations: CILE, CRDP, CIARB, CIAC, ECODIR, European Law Students' Association (ELSA), Institute of Commercial Law (Penn State Dickinson School of Law), Institute of Law and Technology (Masaryk University), IBO, ILCE, International Arbitral Centre of the Austrian Federal Economic Chamber (VIAC), Moot Alumni Association (MAA) and New York State Bar Association (NYSBA) (UNCITRAL 2011c, 3).

In support of the debate regarding the ODR procedural rules and as a result of the request addressed at the end of its previous session, the working group was presented by the Commission Secretariat with a summary (UNCITRAL 2011d). The document pointed out the aspects that need to be considered in the endeavour to draft a global framework for ODR and the main issues that could hinder it, such as:

- activity of the working group,
- identification of the main actors involved in the ODR procedure,
- implementation of the ODR procedural rules at a global, regional and national level,
- listing of the procedures that are actually related to ODR,
- aspects regarding the location and functioning of the ODR provider, as well as its certification and accreditation,
- assignment of cases,
- communication between the ODR provider and the ODR platform,
- ODR neutrals,

- ODR users,
- cross-border enforcement of decisions, including those falling within the scope of the New York Convention,
- enforcement of ODR arbitral awards,
- applicability of the New York Convention, including aspects related to the recognition and enforcement of arbitration decisions under article V of the Convention and
- applicable law.

The working group discussed the procedural rules article by article, as it came back to the issues that remained unresolved from previous sessions. Therefore, the debate regarding the definition of certain terms was resumed (especially "low value" – upon which it was agreed that it was a subjective notion, its interpretation being linked to factors such as inflation, exchange rates, regional economic and commercial differences; the request was not to include a preset monetary value since it could lead to the revision of the document based on its becoming obsolete – and "cross-border": the working group gave up on the definition of this term as a result of the discussion). The terms cited in draft article 2 (Definitions) – "claimant" (para. 1), "communication" (para. 2), "electronic communication" (para. 3), "neutral" (para. 4), "respondent" (para. 5), "ODR" (para. 6), "ODR platform" (para. 7), and "ODR provider" (para. 8) – were also discussed.

The other articles under debate were article 3 (Communications), article 4 (Commencement) accompanied by its annex regarding information about ODR, article 5 (Negotiation), article 6 (Appointment of neutral), article 7 (Power of the neutral), article 8 (Facilitated Settlement), article 9 (concerning the arbitral award – the title of this article is yet to be decided), article 10 (Language of proceedings), article 11 (Representation), article 12 (Exclusion of liability) and article 13 (Costs).

IV.5. ***The 25th session of Working Group III (the 4th session on ODR)***

UNCITRAL's Working Group III held its 25th session in New York between May 21 and May 25, 2012. The meeting was attended by the representatives of 27 member states: Austria, Benin, Brazil, Cameroon, Canada, Chile, China, Colombia, Czech Republic, Egypt, El Salvador, Germany, India, Israel, Japan, Kenya, Mexico, Nigeria, Republic of Korea, Philippines, Russian Federation, Senegal, Singapore, Spain, Thailand, United States of America and Venezuela (Bolivarian Republic of).

The session was also attended by:

- Observers from 7 other states – Croatia, Cuba, Finland, Indonesia, Iraq, Kuwait and Panama;
- Observers from the Holy See;

- Observers from the European Union;
- Observers from a United Nations organization – the United Nations Economic Commission for Africa (UNECA);
- Observers from the following non-governmental organizations: ABA, Arab Association for International Arbitration (AAIA), CILE, CRDP, CIARB, ELSA, FICACIC, Institute of Commercial Law (Penn State Dickinson School of Law), Institute of International Commercial Law (IICL), ILCE, IACAC, IBO, NCTDR, NYSBA, Regional Centre for International Commercial Arbitration – Lagos (RCICA), and Willem C. Vis International Commercial Arbitration Moot (MAA) (UNCITRAL 2012, 3).

The working group tackled the project of procedural rules and the document prepared by the Secretariat for the previous session (UNCITRAL 2011d), as well as a couple of additional documents: the Proposal submitted by the delegation of Canada (UNCITRAL 2012a) regarding the preparation of principles applicable to ODR providers and neutrals and a note submitted by the Center for International Legal Education (UNCITRAL 2012b) on changes suggested to the procedural rules.

As a starting point for the discussions of the working group, the document submitted by the delegation of Canada includes 12 basic principles meant to promote a model of best practices for the ODR providers and neutrals.

The principles are the following:

1. **Creating and Maintaining a Roster of Competent Neutrals.** ODR providers should select individuals for the roster of neutrals on the basis of competence, independence and impartiality; they should publish an up-to-date list of neutrals including information about their experience and expertise; they should ensure that the competence of the neutrals is maintained through appropriate training programs on subject-matters related to ODR cases and technology used by the ODR system. Furthermore, ODR providers should put in place procedures to deal with complaints concerning the roster of neutrals, such as disqualification of neutrals on the basis of a demonstrated lack of required skills (UNCITRAL 2012a, 2).
2. **Independence**. ODR providers should put in place procedures to deal with complaints concerning a neutral, such as disqualification on the basis of a demonstrated lack of independence. Any relation, contractual or other, that may reasonably be perceived as affecting their independence should be promptly disclosed to the parties. If an ODR provider is captive of a single seller, a limited number of sellers or a single industry, that ODR provider is not to be considered independent. Funding sources and payment arrangements for the ODR services should be disclosed to the parties (*idem*, 3).

3. **Impartiality.** ODR providers should put in place procedures to deal with complaints concerning a neutral, such as disqualification on the basis of a demonstrated lack of impartiality (*idem*).

4. **Disclosure of Terms of Service and Confidentiality.** ODR providers should publish on their websites, in a clear, comprehensible and accurate manner, the information regarding their fees, ODR procedures, potential recourses against the decisions, enforcement procedures, complaint handling procedures against the ODR provider or neutral and practices regarding the treatment of information. This information should be brought expressly to the attention of the users prior to their acceptance of the ODR procedure (*idem*).

5. **Establishing Identity of the Parties.** ODR providers should take appropriate measures to facilitate identification of the parties and may require confirmation or evidence from the parties to establish their identity. A party should not be denied access to information relevant to establish or confirm the identity of another party to the ODR proceedings based on the information confidentiality (*idem*, 4).

6. **Accessibility, System Reliability and Security.** ODR providers should put in place measures to ensure reliability and security in the ODR proceedings, such as the use of usernames and passwords. Moreover, they shall use technologies that are accessible and understandable for common users. They should ensure information is presented prominently and in a comprehensible manner (*idem*).

7. **Record and Publication of Decisions**. ODR providers should maintain a record of the ODR proceedings and settlement agreements in a manner that allows subsequent reference by the parties for a period of at least three years. Also, they should 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 (*idem*, 5).

8. **Sensitivity to Language and Culture.** ODR providers dealing with individuals of different cultural backgrounds or languages should ensure their systems, rules and neutrals are sensitive to these differences and should put in place mechanisms to address clients' needs in these regards. They should not actively solicit clients where linguistic or cultural needs cannot be accommodated and they should divulge the languages in which their services are offered (*idem*).

9. **Fees and Costs.** The fees for the ODR service should be reasonable with regard to the value of the dispute for the parties involved and their bargaining position at the time of concluding the contract under dispute. All fees related to the ODR proceedings must be disclosed to the parties before its commencement. The neutral should not award costs to one party or another (*idem*, 6).

10. **Decisions** should state the reasons upon which they are based (*idem*).
11. **Enforcement.** ODR providers should 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 (*idem*).
12. **Redress.** ODR providers should not propose in their offers for service contractual clauses waiving consumer rights or legal recourses afforded by the domestic law of the parties (*idem*).

The note submitted by the Center for International Legal Education is based on the assumption that any instrument created by the working group should be based on a common understanding of what can and what cannot be achieved through an ODR system, designed as a simple, efficient, effective, transparent and fair system. This note suggests that, instead of a separate document on substantive legal principles, the same goals could be accomplished by providing clear and transparent methods for submitting specific fact-based claims and requesting specific relief in the forms now included as annexes to Article 4 in the Draft Procedural Rules. They would include templates of standard forms to be filled in as required, by the buyer or the seller (as plaintiffs or respondents, depending on the case).

The working group then reviewed the conclusions to the previous debates on procedural rules, article by article, and discussed several proposals submitted by the attending delegations as to the **scope of application** (with an emphasis on consumer protection in national judicial systems), **definitions** (terms such as "claimant", "communication", "electronic communication", "neutral", "respondent", "ODR", "ODR platform", "ODR provider"), **communications within ODR procedures** (to be done exclusively through the ODR platform), **commencement of proceedings, negotiation** (reformulation of Article 5 with a view to better clarify the negotiation stage), **appointment of the neutral** (stressing that independence and impartiality are permanent requirements), **power of the neutral, facilitated settlement and arbitration**.

It was decided that the next meeting of the working group would be held in Vienna between December 10 and December 14, 2012. That meeting, as well as the session that is going to be held in New York in May 2013 will be analyzed in a future paper.

V. CONCLUSIONS

One may no longer question **if** ODR will impose as a means of dispute resolution, but only **when** and **how** it will happen. Based on what we have presented above, there are a few preliminary conclusions that we may infer.

First, the codification and standardization of a global ODR system is a very complex process, considering the multitude of legislative constraints. It should be in conformity

with the provisions of the international conventions regulating commercial transactions (including electronic commercial transactions), with those regulating the settlement of commercial disputes through conciliation and arbitration (primarily with the New York Convention), with regional rules (including at the European Union level – the Rome I Regulation and others), as well as with national laws, especially in countries where arbitration is not used for reasons of public policy.

Second, this procedure must not be only economically affordable (expenses must be in proportion with both the nature of the dispute and the negotiating power of the parties), but also culturally and linguistically accessible. It is desirable that whoever turns to online dispute resolution may do so in a language they understand (preferably their mother tongue).

Third, technology and technical education of users must not become barriers in the way of procedural rules' application. Creators are envisioning a neutral instrument that could be used by a large number of people (including challenged persons in written communication), regardless of their level of computer literacy, and that would be flexible enough to face the continuous evolution of information technology and communication.

Forth, we deem necessary that Romania participate more actively to this effort, since so far one may count a single official presence of our country at the works of Working Group III (at its 24th session). Like in all the other countries, Romania's economy will experience the impact of these instruments and that will be completed by the impact of the rules currently under debate at the EU level – the Directive on Alternative Dispute Resolution (the ADR Directive) and the Regulation regarding Online Dispute Resolution (the ODR Regulation).

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